

Hot Topics and the Latest and Greatest: Case Law Update

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Case Law Update

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I. Hot off the Press

Bullock v. BankChampaign, 133 S. Ct. 1754 (2013) - Defalcation under Section 523(a)(4) requires element of intent or scienter on part of debtor who allegedly committed defalcation. Defalcation requires culpable state of mind involving knowledge or, or gross recklessness in respect to, the improper nature of the fiduciary behavior. While conduct may have been "objectively reckless", that is not sufficient for purposes of defalcation under Section 523(a)(4). Record was insufficient for court to determine whether trustee's conduct met "scienter" standard where evidence indicated that trustee engaged in self-dealing by taking loans from trust assets but then repaying those loans with interest at market rate. Case remanded for further proceedings.

U.S. v. Windsor, ____ US ____, 133 S.Ct. 2675, 2013 WL 3196928 (2013) – Federal Defense of Marriage Act is unconstitutional. Federal Government cannot deny benefits to same sex couples where couple is lawfully married as a matter of state law where the ceremony was performed.

II. Cases to Watch

In re Bellingham Insurance Agency, Inc., 702 F.3d 553 (9th Cir. 2012), *cert granted*, ____ U.S. ____ (2013) – Can the parties consent to litigation by Bankruptcy Court of matter otherwise within constitutional jurisdiction solely of article III Court. Ninth Circuit held that fraudulent transfer claims brought against non-creditor defendants cannot be adjudicated in Bankruptcy court. However, Ninth Circuit also held that jurisdictional issue can be waived by consent of parties, including failure to assert jurisdictional defect during litigation. Supreme Court accepted jurisdiction to resolve split between Ninth Circuit and Sixth Circuit holding in *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2013)(constitutional limits of subject matter jurisdiction cannot be waived and can be raised for first time on appeal).

Law v. Siegel, 435 Fed. Appx. 67 (9th Cir. 2011), *cert granted*, ____ S. Ct. ____ (2013) – Can Chapter 7 Trustee surcharge debtor's exemptions to cover administrative costs of estate where costs were incurred in litigating validity of second mortgage. Record indicated that Bankruptcy Court allowed surcharge, which exceeded any possible exempt value of property and deprived debtor of any otherwise available exemption, based on Debtor's vexatious conduct and bad faith litigation that constituted fraud on the court and caused the estate to incur substantial litigation expense that estate would not otherwise have incurred. Interestingly, the Court granted certiorari even though the Solicitor General suggested that the Court not hear the case contending that there was no split of authority at the Circuit Court level on the issue presented.

III. Automatic Stay

A. Actions Stayed

3.1 Generally

Vulpina, LLC v. Dzierzawski, 2013 WL 5651430 (E.D. Mi. 2013) – Pre-petition action brought by creditor to avoid allegedly fraudulent transfer by debtor under state law becomes property of estate upon commencement of bankruptcy case. Action by creditor against third party stayed.

CH Holding Co. v. Miller Parking Co., 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor's related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor suits against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.

In re Benchmark Capital, Inc., 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Automatic stay is automatic and mandatory with the filing of the petition. Stay remains in effect throughout case to provide debtor breathing room from collection efforts and

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.

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

Fadel v. DCB United, LLC, Case no. 12-1061 (9th Cir. BAP 2013) – Debtor’s Chapter 13 filing did not stop foreclosure sale against home that was owned solely by debtor’s non-filing spouse. Purchaser at sale could proceed with unlawful detainer action in effort to obtain possession of property.

Beacon Navigation GmbH v. Suzuki Motor Corp., 2013 WL 2193902 (E.D. Mi. 2013) – Automatic stay protects only debtor and not related third party. Bankruptcy stay that resulted when debtor filed bankruptcy does not protect corporate parent or related corporation.

Al-Shara v. Wal-Mart Stores, Inc., 2012 WL 1119339 (E.D. Mi. 2012) – Extension of stay to non-debtor co-defendant is rare exception to

rule that non-debtor entities are not covered by stay. Court will extend stay to non-debtor if (1) there is such identity between the third party defendant and 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

Fadel v. DCB United, LLC, Case no. 12-1061 (9th Cir. BAP 2013) – Co-debtor stay does not apply to party who is not co-debtor. Debtor did not have any interest in residence or any liability on note where property was solely name of non-filing spouse and only non-filing spouse was on note. As debtor was neither owner of residence nor obligated on note, debtor was not “co-debtor” in connection with mortgage on home and spouse was not protected by co-debtor stay.

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

3.4 Property of Estate

In re Lady Bug Corp., 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Automatic stay does not prevent actions against property that is not property of estate. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Judgment creditor who obtained judgment liens against property prior to acquisition of property by trust could pursue foreclosure of judgment liens as action was not against property of estate and was not attempt to collect debt against debtor as debtor had no liability on the underlying obligation or the judgment itself.

3.5 Abandoned Property

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

3.6 Utilities

In re Grisham, 2103 WL 427935 (Bankr. D. Hawaii 2013) – Condominium association is not “utility” for purposes of Section 366. Utility billed association for all electrical usage and association recovered costs through assessments. Debtor's failure to pay condo assessments did not allow association, under Section 366, to disconnect electrical service. Association violated automatic stay.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Section 366 precludes utility from terminating or reusing to provide service to debtor solely based on debt that was owed prior to commencement of case. Utility can alter or discontinue service

unless debtor or trustee, within 20 days of petition, furnished adequate assurance of future payment in the form of a deposit or other security. Debtor does not have private right of action against Utility for terminating utility service allegedly in violation of Section 366. Further, Section 366 did not prevent termination of service post-discharge where debtor failed to provide adequate assurances of future payment at any time during bankruptcy proceeding.

3.7 Evictions – Section 362(l)

In re Jackson, 2013 WL 3956994 (Bankr. D. Colo. 2013) – Section 362(l) stays any attempt to evict a tenant from a residential leasehold only where state law allows tenant to cure default after issuance of state court judgment for possession. Stay under Section 362(l) did not apply to protect debtor from post-petition eviction where creditor obtained judgment of possession pre-petition and state law did not allow for tenant to cure default post-judgment.

3.8 Actions by Debtor

Downey v. FNMA, 2013 WL 3456984 (E.D. Mi. 2013) – Action brought by debtor against mortgage company is not stayed by Section 362. Automatic stay does not apply to affirmative claims brought by debtor-plaintiff. Action was not brought by lender against debtor and action was not one by lender to obtain property of estate where foreclosure sale occurred and debtor failed to redeem, vesting FNMA with full title to the property free and clear of any claims of estate. Case would proceed in District Court to consider FNMA's Motion to Dismiss.

Wolgast v. Richards, 463 BR 445 (E.D. Mi. 2012) – Debtor's Motion in non-bankruptcy forum for sanctions against opposing party pursuant to Rule 11 stayed by debtor's subsequent bankruptcy filing. Rule 11 Motion was response to opposing party's Motion for Attorney Fees and Costs. Stay prevented opposing party from prosecuting Motion for Fees, requiring stay of Debtor's responsive Rule 11 Motion. Deferring a decision on the Rule 11 motion until the automatic stay had been lifted was particularly appropriate, as the motion was, substantively, simply a means to challenge the merits of officer's motion for costs.

3.9 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.

3.10 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

3.11 Police Power

Dunn v. Advantage Windows, Inc., 2013 WL 1091737 (Bankr. E.D. Tn. 2013) – Section 362(b)(1) excludes from the automatic stay enforcement of criminal statutes. Section 362(b)(1) does not contain exception based on alleged motivation of creditor in filing criminal complaint. Although court was troubled by risk of abuse, where creditor did not pursue a criminal complaint for almost a year after filing a civil action and did so only after action against debtor's wife was dismissed based on her early discharge in her own Chapter , suggesting that the creditor launched his criminal action after its civil efforts were stayed in effort to obtain payment.

U.S. v. Osborne, 2012 WL 5385863 (N.D. Ohio 2012) – Bankruptcy court does not have exclusive jurisdiction to determine whether governmental action falls within police power exception to automatic stay. Debtor filed for bankruptcy in Pennsylvania. United States filed suit in Ohio to enforce provisions of Clean Water Act. Ohio District Court had concurrent jurisdiction to determine whether Clean Water Act was within scope of police power exception. District Court not required to abstain from determining scope of police power exception in favor of Bankruptcy Court.

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

activities, and unfair trade practices are directed at addressing public harm. Although remedies included restitution, civil penalties and disgorgement in addition to injunctive relief, those remedies did not undercut conclusion that actions by state were intended to protect safety and welfare of state and protect citizens from unlawful activities, sufficient to bring action within scope of police powers.

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

U.S. v. Erpenbeck, 682 F.3d 472 (6th Cir. 2012) – Section 362(b)(1) excludes from the stay the commencement or continuation of a criminal action or proceeding against 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 adaption of affirmative action plan in Title VII case coupled with claim for back pay constitutes exercise of EEOC's police or regulatory power which is not subject to the automatic stay until monetary claims are reduced to judgment.

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

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.

3.12 Police Power – Bad Checks

Nash v. Clark County, 464 BR 874 (9th Cir. BAP 2012) – Criminal prosecution arising out of “bad markers” for gambling debt did not violate discharge injunction or automatic stay. Although underlying debts themselves had been discharged, that did not preclude state from pursuing criminal proceedings based on debtor's presentment of bad checks. Creditor's contact with prosecutor post-discharge did not violate injunction where contact was initiated by prosecutor in connection with investigation of possible criminal charges.

Bankruptcy courts should not invalidate results of state criminal proceedings. Fact that state criminal proceedings may result in restitution does not alter fact that state's decision to enforce criminal statutes must be respected by bankruptcy courts. Criminal prosecution is, by definition, on behalf of all citizens of the state and discretion to bring charges lies solely with the government, not to any complaining witness. Strong public policy advised against any interference by the bankruptcy court in the decisions of the state prosecutors to pursue criminal charges, and those proceedings will not be sanctionable as alleged violation of either automatic stay or discharge injunction.

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

In re Fidler, 442 BR 763 (Bankr. D. No. 2010) – Bankruptcy court cannot enjoin prosecution of action for writing bad checks where debts themselves were discharged in bankruptcy. However, court can sanction complaining witnesses to extent that they are attempting "end run" around discharge by attempting to collect debts as restitution. Bankruptcy Court will not disrupt sovereign determination by state Prosecutor to bring charges simply because the Bankruptcy Court believes that there is economic motive behind statute or prosecution.

3.13 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.

3.14 Criminal Restitution

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

3.15 Setoff

Lewis v. United Joint Venture, 691 F.3d 835 (6th Cir. 2012) – Setoff exists between two parties, each of whom under an independent contract owes a definite amount to the other, to setoff their respective debts by way of mutual deduction. Requirement of "mutuality of obligation" means debts must be to and from the same persons and in the same capacity. Although debts may have arisen from same scheme, judgment against debtor was for individual and judgment held by debtor was against other co-conspirators. Lack of mutuality prohibits effort to set off.

In re Scales, 476 BR 512 (Bankr. N.D. Ohio 2012) – Filing of bankruptcy has no effect on mechanical intercept process for tax refunds to offset prior tax liabilities. Debtor's right to receive refund is contingent on IRS determination of amount of tax refund, if any, that is due. Once IRS applies the netting provision of 26 USC Section 6402(d), any contingent interest that the debtor had in the refund was terminated to the extent of the prior tax liabilities. Fact that refund is attributable to earned income credit rather than true "overpayment" did not alter IRS right to intercept refunds to offset prior liabilities.

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

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

US Department of Agriculture v. Riley, 485 BR 361 (W.D. Ky. 2012) – Post-petition setoff by governmental agency against debtor's tax refund did not violate stay. To establish a valid right of setoff in bankruptcy, creditor must establish four conditions: (1) creditor's claim must arise before the commencement of the case, (2) creditor must have a debt to debtor that arose before the commencement of the case, (3) the claim and debt must be mutual, and (4) the claim must be valid and enforceable. Governmental agencies have statutory right to setoff against tax refunds and direct the Secretary of Treasury to reduce a debtor's "tax overpayment" by past-due amounts owed to other

agencies before determining whether taxpayer is entitled to refund. Taxpayer “overpayment” of taxes does not create entitlement to refund. An overpayment of taxes is any payment made by taxpayer that is over and above tax liability, whereas a refund is amount that Internal Revenue Service is obligated to pay taxpayer after IRS has exercised its statutory right to offset. Debtor's interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer's estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers' obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors' overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.

Lake Trust Credit Union v. Houston, 2012 WL 4490890 (E.D. Mi. 2012) – Reversing lower court ruling, Court concluded that joint account in credit union, bearing name of debtor and debtor's mother, is a “multi-party account” under Michigan Credit Union Act on which credit union holds perfected lien and rights of setoff regardless of identity of party making deposits. MCUA imposes lien on any deposit account from which a member may withdraw funds without the consent of another person and for any obligation owed to the credit union by that member. Credit Union that holds claim against one of the parties is not required to establish that the obligor is the owner of some or all of the funds in the account. Non-debtor third party cannot avoid credit union right to setoff or enforce lien against entire account by presenting evidence that non-debtor made all deposits and withdrawals from account. While presumptions of ownership may be relevant in disputes between members or between members and creditors, these presumptions do not apply to credit union which is not a “creditor” within meaning of statute creating presumption.

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

In re Hess, 2011 WL 3701798 (Bankr. E.D. Mi. 2011) – The right to set off is preserved where (1) there are mutual, pre-petition obligations owing between 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.

3.16 Injunctive Relief

In re Trish Enterprises, LLC, Case No. 12-21729 (Bankr. E.D. Mi. 2012) – Court would lift automatic stay to allow state court injunctive proceedings to continue. Actions of non-debtor were clear violations of covenants not to compete. Although debtor was not the alleged tortfeasor, the non-debtor was a principal of the debtor and used the debtor-corporate entity to conduct business which was the basis of the alleged violation. Debtor's alleged tortious use of property warrants relief from stay to allow state court to adjudicate possible injunction or other equitable relief.

Dominic's Restaurant of Dayton, Inc. v. Mantia, 2012 WL 2580741 (6th Cir. 2012) – The automatic stay protects interests in a debtor's property, not tortious uses of that property by 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.

3.17 Possessory Security Interests

Okke v. Okke, Case no. 13-80061 (Bankr. W.D. Mi. 2013) – Creditor holding property pursuant to possessory security interest does not violate stay by retaining possession. Court can order creditor to turnover property subject to appropriate protections of creditor's interest, but absent a turnover order, creditor cannot be held to have violated stay.

In re Vega, 2013 WL 3158516 (Bankr. E.D. Mi. 2013) – Creditor holding property pursuant to possessory security interest does not violate stay by retaining property post-petition. Creditor, an auto repair facility, has a statutory possessory security interest in any vehicle in its possession until the costs of the repairs are paid in full. If creditor releases possession of the vehicle, creditor loses that security interest and becomes an unsecured creditor. Section 362(b)(3) allows a creditor to take any action necessary to perfect or maintain perfection of any interest in property to the extent a trustee's avoiding powers under Section 546 are subject to that perfection. Trustee's avoiding powers are subject to any security interest that was properly perfected as of petition date, which would include possessory security interests. As such, creditor has full right to take steps to maintain that perfection. For possessory security interests, perfection is maintained solely by possession. Creditor did not violate stay where creditor retained possession to continue perfection of properly perfected security interest as of date of commencement of case.

3.18 Post-Petition Perfection of Lien

Johnson v. Williams, 490 BR 236 (Bankr. W.D. Ky. 2013) – Discharge in Chapter 7 discharges only in personam liability and does not affect validity of lien. Creditor did not violate injunction by perfecting previously unperfected mortgage after entry of discharge in Chapter 7 case. Lien was valid and unavoidable in subsequent Chapter 7 proceeding where there was no basis to avoid as preferential or fraudulent.

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

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

Soto-Rios v. Banco Popular de Puerto Rico, Case No. 10-2270 (1st Cir. 2011) - Mortgagee and purported secured creditor held an "interest in property" as that term is used in both 11 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.

3.19 Domestic Support Obligations

In re DeSouza, Case No. 12-091 (1st Cir. BAP 2013) – State Court orders awarding alimony did not violate automatic stay. However, contempt order entered by state court when debtor failed to pay did violate stay. State court contemplated that ongoing alimony payments would come from debtor's future rental income and future earnings, all of which are property of estate. Section 362 specifically allows for the use of a judicial or administrative order directing payment from property of the estate. However, order that awarded alimony did not constitute a garnishment or other order that directed payment by a third party source. As such, collection efforts through the contempt process constituted actions to obtain possession of property of estate in violation of Section 362.

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

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

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

3.20 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.

3.21 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.

3.22 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.

3.23 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

In re Porter, 2013 WL 3992444 (Bankr. E.D. Ky. 2013) – Cause existed for relief from stay to allow state court fraud action against debtor to continue to trial. In the context of a request to continue a non-bankruptcy judicial action, courts have identified a variety of factors to be balanced to determine “cause”: (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; (5) the cost of the defense or other potential burden to the bankruptcy estate; and (6) the impact of the litigation on other creditors. State court action had been pending for two years and was ready for trial. Judicial economy and trial readiness favor stay relief as Fraud Action was to proceed to trial the next business day after the bankruptcy filing. There are third party defendants, not currently subject to bankruptcy Court's jurisdiction, who allegedly were involved in connection with the transaction which is the subject of the litigation. There were no preliminary bankruptcy issues to be determined and the potential cost of the defense, given the trial readiness of the state court, clearly favored the state court forum. Significant prejudice could result to other creditors of the estate if litigation begins anew in bankruptcy court. The outcome of the litigation could significantly affect the Debtor's Chapter 13 plan as debt ranged from \$0 to \$10 million. State court, while not a “specialized tribunal” clearly has more expertise than this Court in interpreting state law which controls outcome. Stay lifted for purposes of trial but no appeal or enforcement action could be undertaken absent further relief from the Bankruptcy Court.

In re Bazzi, Case No. 12-60627 (Bankr. E.D. Mi. 2012) – Court has authority to annul stay for cause, such as where debtor is attempting to use stay as sword rather than shield. Court would annul stay retroactively to petition date. Debtor was incarcerated for violating state court probation order for alleged failure to pay restitution. Restitution Order, entered more than 2 years prior to commencement, required debtor to pay to the court a restitution award based on conviction for seven counts of fraud and false pretenses and uttering a bad check with intent to defraud. No dispute that restitution, as paid, would pass through court to the injured party for its ultimate benefit. Criminal restitution judgment based on fraud would be non-dischargeable under Section 523(a)(2)(A) and it is “inevitable” that the debt will be held non-dischargeable at which point the automatic stay would not preclude incarceration of debtor. Under circumstances, there was no legitimate bankruptcy related reason to invoke stay to “spring” debtor from jail, where any release would be only temporary and would delay the inevitable. Stay would remain in place only to extent of property of the estate.

In re Michigan Biodiesel, LLC, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Action taken in violation of stay is voidable and not void ab initio. After debtor filed bankruptcy, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a “correction statement” indicating that the termination statement was error. Court would retroactively annul stay for purposes of ratifying correction statement where correction did not adversely affect any creditor or the trustee, as the status of a claim as secured is determined as of the petition date and the lien was indisputably perfected as of the petition date. Further, automatic stay does not prevent action to continue perfection by filing a continuation statement which relates back to the original perfection date as long as the secured claim has continuously been perfected. Correction statement was not intended to affect the estate but was intended to 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 Greektown Holdings, LLC, Case No. 08-53104 (Bankr. E.D. Mi. 2009) – Court granted partial relief from stay to allow City of Detroit to serve Notices of Default under Development Agreement. Court balanced the adverse impact that serving the Notices could have by causing negative publicity at a critical stage of the Chapter 11 proceeding and the triggering of cure periods that could be inimical to the confirmation process; with the possible benefit to the Debtor to find out specifically aware of any claimed defects with sufficient time to address those issues even with the running of the contractual cure period. Court ordered stay to be modified effective 60 days after the date of the order unless the Debtor voluntarily agrees to accept notice at an earlier date.

3.25 Failure to Conduct or Conclude Hearing

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

3.26 Cause - Section 362(d)(1)

In re Gardstein, 2013 WL 3306095 (Bankr. E.D. Ky. 2013) - Court would lift stay for cause based on debtor's failure to make all post-petition mortgage payments after confirmation of Chapter 13 Plan. Debtor's Plan as confirmed provided for payment of the arrearage through the Trustee, but provided for direct payments of the ongoing mortgage by the debtor. Although the parties did not agree on the amount of the post-confirmation missed payments, the evidence indicated that there was at least some delinquency. However, Court would delay effect of stay relief to provide debtor with opportunity to cure arrearage through a plan modification.

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

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

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

In re McKenzie, 2012 WL 4742708 (E.D. Tn. 2012) – To prove lack of equity, creditor must prove validity of security interest and amount of debt. Stipulation between parties that “to the extent the court determines [creditor] has a valid security interest in any property of the debtor, the parties stipulate that the debtor does not have any equity in such property” did not establish lack of equity where creditor did not present evidence that it held valid security interest.

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

In re Barnes, Case No. 11-3072 (Bankr. W.D. Mi. 2011) – State Equalized Value is not reliable evidence of value. Debtor’s schedules, which indicated that debtors lacked equity in the property, constituted admissions of debtors. Debtors could not counter those admissions by offering evidence that SEV times 2 resulted in a value that exceeded the amount of the secured claims.

Mentag v. GMAC Mortgage, LLC, 430 BR 439 (Bankr. E.D. Mi. 2009) – State Equalized Value is not reliable or credible evidence of value. Debtor’s Schedule A is admissible on issuer 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.

3.28 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 to finance the administration of this case or to reorganize an estate.

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

3.29 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.

3.30 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.

3.31 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.

3.32 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.

3.33 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.

3.34 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.

3.35 Mootness

In re Caffey, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Stay terminated automatically where debtor did not file statement of intentions indicating that debtor intended to reaffirm or redeem vehicle. Upon termination of stay, Motion for Stay Relief became moot.

In re Ulrich, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Once a debtor's discharge 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.

3.36 Standing to Obtain Relief From Stay

Steinberg v. Bank of America, Case no. 12-082 (10th Cir. BAP 2013) – Bank seeking relief from stay to proceed with foreclosure must demonstrate that it has a right to enforce the note. Court erred in granting stay relief without requiring lender to prove that it has possession of original note or that it was otherwise a "holder" of the note.

In re Grason, 2013 WL 412916 (Bankr. C.D. Il. 2013) – Individual who bought property at sale conducted minutes after debtor filed for bankruptcy protection lacked standing to request Court to annul stay and validate sale. Purchaser was not a creditor of the estate or the debtor. Foreclosure sale that occurred after filing of case was void. As such purchaser did not acquire either any interest in the property or any claim against debtor.

Mentag v. GMAC Mortgage, LLC, 2013 WL 489181 (E.D. Mi. 2013) – Debtor lacks standing to contest validity of alleged assignment of mortgage or to raise alleged defect in assignment in response to request for relief from stay. A litigant who is not a party to an assignment lacks standing to challenge the validity of the assignment. Creditor constituted "holder" of note for purposes of standing to seek relief from stay. Under Michigan law, a "holder" is one in possession of an unsigned note that is made out to it; or one in possession of a signed note. Creditor was the holder when the motion was filed and creditor was in physical possession of note.

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

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

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

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

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

In re Rice, Case No. 11-8032 (6th Cir. BAP 2011) – "Party in interest" for purposes of requesting relief from stay is expandable concept based on factual context. Party in interest is generally held to be one who has an actual pecuniary interest in the case, anyone who has a practical stake in the outcome, and anyone who would be significantly impacted by the outcome. Party who has right to enforce obligation is party in interest. Secured creditor has standing to seek stay relief as long as the creditor shows it has an interest in the note and that it has been injured by 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.

3.37 Retroactive Relief

Gasprom, Inc. v. Fateh, Case No. 12-1567 (9th Cir. BAP 2013) – Bankruptcy court erred in *sua sponte* annulling stay where no party had requested that relief either in pleadings or in arguments in court. Only matter before court was debtor’s motion for contempt against creditor for violation of automatic stay. Court can annul stay retroactively based on balancing of equities, but parties must be provided notice and opportunity to develop record so that court can properly evaluate multiple factors for annulment.

In re Benchmark Capital, Inc., 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Automatic Stay comes into effect immediately upon commencement of case without requirement for notice. Section 362 allows court to annul stay for cause. Creditor failed to demonstrate any basis for retroactive relief to annul stay where creditor conducted foreclosure sale of assets post-petition but without knowledge of petition. Stay can be annulled only in presence of extraordinary circumstances which include debtor’s bad faith, creditor’s lack of knowledge of pendency of stay, and unfair prejudice to creditor. Creditor’s lack of notice alone is not basis to retroactively annul stay. There is no indication that debtor intentionally withheld notice or that debtor was attempting to use stay in unfair manner. Record also did not indicate any unfair prejudice to creditor. Creditor retains its status as lien holder and can seek court permission to reinstitute foreclosure proceedings. There was no evidence that creditor had incurred improvement costs or that he was forced to forego improvements

to property.

3.38 Procedural Requirements

In re TMT, Inc., 2013 WL 1154532 (Bankr. N.D. Ohio 2013) – To extent creditor alleged in stay relief motion that possessory lien was invalid or contested amount owed, action to contest validity, priority or extent of lien must be brought as adversary proceeding.

In re Cisne, Case No. 09-11491 (Bankr. W.D. Mi. 2010) – Court denied approval of Stipulation for Stay Relief signed only by Debtor and Secured Creditor. Rule 4001 requires any request for stay relief to be served on twenty largest creditors with notice and opportunity to object. Rule 4001(d)(4) allows relief by stipulation only if parties are served with notice of the proposed agreement and provided an opportunity to object. Stipulation between Secured Creditor and Debtor had not been sent to 20 largest creditors and creditors had no notice of proposed terms. Although it was unlikely that any creditor would object, Court would not circumvent notice and opportunity to object provided in Rule 4001.

3.39 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.

3.40 Termination – Failure to Reaffirm or Redeem

In re Caffey, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Automatic stay lifts automatically if fails to file statement of intentions to either redeem or reaffirm before earlier of 341 meeting or 30 days after petition date. Fact that debtor schedule debt as unsecured or that debtor may not have realized that debt was secured did not change result. Section 521(a)(2) does not require that debt be scheduled as secured, only that the debt be scheduled and be secured. Allowing debtor to schedule secured debts on Schedule F and avoid Section 521 would enable debtors to manipulate schedules contrary to both letter and spirit of code. Failure to schedule debt, or listing debt on incorrect schedule, does not change the character of the debt itself.

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

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

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

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

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

3.41 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.

3.42 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.

3.43 Setoff

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

3.44 GMAC Bankruptcy

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

D. Violations of Automatic Stay

3.45 Notice of Filing

In re Stewart, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – To recover damages for violation of stay, debtor must prove that creditor had knowledge of bankruptcy case and acted deliberately which resulted in violation. Creditor has notice of case if creditor had some actual knowledge or had sufficient facts that would cause reasonably prudent person to make inquiry. Formal notice is not required. Communications between debtor’s counsel and creditor’s counsel were more than sufficient to establish actual notice.

Bankers Healthcare Group, Inc. v. Bilfield, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor had actual notice of bankruptcy filing. Debtor called creditor to inform creditor of filing and advised of case number. Creditor also received notice of commencement from court. Notice from court addressed to creditor’s Florida address was sufficient where creditor acknowledged that Florida address was correct address for service of process. Fact that processing of notice was delayed because creditor’s Florida office had to forward it to creditor’s New York office for processing did not defeat or limit effectiveness of stay.

In re Purdy, 2013 WL 2355542 (Bankr. W.D. Ky. 2013) – Creditor did not willfully violate stay when Creditor repossessed collateral day after filing of case where creditor did not have notice of case. However, creditor violated stay when creditor refused to return collateral for at least three weeks after creditor became aware of the filing.

In re Wentworth, Case No. 12-20779 (Bankr. E.D. Mi. 2012) – Creditor cannot be sanctioned for violation of stay unless creditor has received notice pursuant to Section 342(g)(2). Section 342 provides that notice shall not be effective unless notice is brought to the attention of the creditor. If the creditor has designated a person or subdivision to be responsible for receiving notices and establishes reasonable procedures so that notices received by the creditor are delivered to the designated person or subdivision, then a notice provided to the creditor other than in accordance with this section shall not be considered “received” until the notice is received by the designated person. Under Section 342(c)(2)(A), if the creditor within 90 days pre-petition supplies debtor with at least 2 communications with an address at which the creditor requests to receive correspondence, then any notice required shall be sent to that address and shall include the account number. Debtors failed to provide account statements that may have disclosed another address for creditor. Debtor obtained the

creditor's address from a credit report, but address did not match address used by creditor on its webpage or any address designated by creditor for receipt of notice. Debtor used an address that was not the correct address as designated in Section 342. Therefore, although creditor's actions may have violated stay, debtor could not recover sanctions as creditor had not been given "effective" notice.

3.46 Effect of Violation

In re Grason, 2013 WL 412916 (Bankr. C.D. Il. 2013) – Foreclosure sale conducted minutes after petition was filed was void and did not convey to purchaser any interest in property.

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.

3.47 Violations – Continued Collection Efforts

Iskric v. Commonwealth Financial Systems, Inc., 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor's arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor's actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.

In re Stewart, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Creditor violates stay when creditor takes action to collect a pre-petition debt. Creditor violated stay when creditor seized personal property left in leased premises and repeatedly stated that creditor intended to retain equipment in lieu of bank rent.

Bankers Healthcare Group, Inc. v. Bilfield, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor violates stay by filing collection action against debtors 6 days after commencement of case, and by continuing efforts even after bankruptcy counsel contacted creditor to request that action cease. Creditor failed to take steps to stop process server from serving summons and complaint and process server showed up at debtor's place of business and became disruptive, throwing papers at debtor in front of clients.

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

In re Brown, 2012 WL 3908029 (Bankr. E.D. Pa. 2012) – Creditor willfully violated stay by failing to halt collection efforts that began pre-petition. Creditor obtained judgment and commenced execution and garnishment. Debtors filed bankruptcy and advised creditor, but creditor did not cause cessation of collection efforts by sheriff and garnishment. Courts have placed upon the creditor, rather than the debtor, the duty to take affirmative action to prevent post-petition collection efforts by notifying relevant third parties that the bankruptcy stay is in place and that the prepetition status quo must remain.

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

In re Thorpe, 2011 WL 5909403 (Bankr. E.D.N.C. 2011) – Lender willfully violates stay by sending contractor to change locks at debtor's home before stay relief hearing.

Grine v. Chambers, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Creditor violated stay by sending account statement with full knowledge of bankruptcy filing. Creditor intentionally sent statement, although did so in inadvertent violation of the stay.

Heers v. Gibson Realty, Inc., 2010 WL 3491169 (Bankr. W.D. Ky. 2010) – Employer violated stay by retaining portion of real estate commission earned post-petition to pay pre-petition obligation for rent and other office expenses. Commission was not earned until sale actually closed, which occurred post-petition, even though contract for sale was signed pre-petition.

3.48 Violations – Commencement or Continuation of Foreclosure Proceedings

In re Gallo, 2012 WL 3930320 (Bankr. M.D.N.C. 2012) – Creditor willfully violated stay by commencing foreclosure proceedings notwithstanding notice of bankruptcy case. Foreclosure was halted when debtor's attorney advised Deed Trustee of bankruptcy. Several months later, creditor began sending demand letters to debtor and stating that the matter had been referred to an attorney for initiation of foreclosure proceedings. Although creditor stopped collection efforts for a second time, 6 months later creditor resumed collection efforts and stated that debtor was "at risk" of losing his home in foreclosure. Even after being advised by Chapter 13 Trustee of pendency of case, 6 months later creditor again notified debtor that a foreclosure sale was set. Debtor filed Motion for Sanctions and creditor responded with yet another Notice of Foreclosure Sale. Creditor did not dispute that it took actions, but blamed actions on "spelling error" as creditor's computer listed Debtor's first name as "Jeffrey" while Debtor's name was actually "Jeffery". Even though creditor had misspelled debtor's name, creditor had multiple instances of actual notice of filing, including communication from Chapter 13 Trustee, yet failed to correct the misspelling. Creditor's own internal error does not save them from willful violate of stay.

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

Tyson v. Hunt, 450 B.R. 754 (Bankr. W.D. Tn. 2011) – Post-petition foreclosure sale violates automatic stay and is void, even if at time sale occurred seller and buyer lacked notice of the bankruptcy petition. Section 549(c) safe-harbor does not protect the buyer as Section 549(c) protects only against actions to avoid transfers. Post-petition foreclosure sale is not attempt to recover property under Section 549 but is an entirely void transfer in violation of Section 362.

In re Makdisi, Case No. 10-44413 (Bankr. E.D. Mi. 2010) – Lender violated stay by conducting foreclosure sale after commencement of case and further violated stay by refusing to set aside the foreclosure sale. Subsequent dismissal of case prior to confirmation of Chapter 13 Plan does not obviate violations that occurred while case was pending. Debtor's reinstatement of the case following dismissal vested jurisdiction in Bankruptcy Court to enter sanctions against creditor for actions taken before dismissal.

3.49 Violations – Commencement of Continuation of Other Actions

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

Borders v. King, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Automatic stay prohibits creditors from asserting fraudulent transfer actions under Section 544 and 548. Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

Clay v. Credit Acceptance Corp., 2011 WL 1808828 (Bankr. E.D. Ky. 2011) – Although creditor cannot violate stay based on pre-petition conduct, creditor can violate stay by failing to stop actions that were begun prior to petition. Conduct will subject creditor to sanctions if (1) actions were taken in violation of stay; (2) violation was willful; and (3) violation causes actual damages. Creditor filed state court complaint and sent paperwork to process server for service. One day later, before service had been effectuated, debtor filed bankruptcy and immediately advised creditor of the filing. Creditor did not attempt to withdraw summons or to advise process server to refrain from serving complaint, and process server subsequently did serve papers on debtor. Creditor violated stay by failing to make efforts to prevent service of the complaint after receiving notice of the filing.

Church Mutual Insurance Co. v. American Home Assurance Co., 2011 WL 1838720 (2d Cir. 2011) – Final Judgment against debtor rendered after filing for relief under Chapter 11 was void as violation of automatic stay. Debtor's insurance company, as the party that would have to pay the claim, had standing to contest validity of judgment entered in violation of stay.

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

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

3.50 Violations – Seizure of or Failure to Return Property

In re Stewart, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Section 362(a)(3) makes it a violation to exercise control over property of estate. While merely holding property that the creditor was legally able to seize pre-petition may not be guilty of deliberate violation, creditor who had no pre-petition right to possession or control of property could not retain property and claim “merely passive retention”. Creditor’s retention of property of estate and refusal to return property on demand of debtor constituted exercise of control over property of estate. Creditor’s good faith belief that it had right to possess property is not defense to damages.

In re Purdy, 2013 WL 2355542 (Bankr. W.D. Ky. 2013) – Creditor did not willfully violate stay when Creditor repossessed collateral day after filing of case where creditor did not have notice of case. However, creditor violated stay when creditor refused to return collateral for at least three weeks after creditor became aware of the filing.

Weber v. SEFCU, 2013 WL 1891371 (2d Cir. 2013) – Secured creditor violates stay when creditor fails to promptly turn over to debtor motor vehicle repossessed pre-petition. Vehicle had not been sold and title had not transferred, and vehicle remained property of estate as debtor had continuing equitable interest in vehicle. Creditor’s actions were willful and unlawful exercise of dominion and control over property of estate. Creditor cannot hold property until debtor offers what creditor deems to be adequate protection. Creditor must turnover vehicle and if creditor wants adequate protection, it must take affirmative steps to request Court to determine nature and amount.

In re Pearl Management Corp., Case No. 11-47422 (Bankr. E.D. Mi. 2011) – State Court Receiver appointed to take control of corporate property would be stayed by bankruptcy filing. Receiver is stayed from taking or attempting to take any action to exercise dominion or control over property of estate. 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.

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.

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

In re Markins, Case No. 10-30820 (Bankr. N.D. Ohio 2010) – Creditor’s refusal to remove electronic device that would enable Creditor to remotely disable Debtor’s automobile and refusal to return Debtor’s vehicle title constituted “well-established” violations of the automatic stay. Creditor’s actions were effort to coerce payment of dischargeable pre-petition unsecured debt.

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

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

3.51 Violations – Domestic Relations Actions

In re Murphy, 473 BR 197 (Bankr. E.D. Mi. 2011) – Provision of final divorce judgment that required debtor to pay \$2,500 of ex-wife’s attorney fees directly to ex-wife’s attorney was not domestic support obligation. Obligation was not payable to spouse, former spouse, or child of debtor, and ex-wife, having herself been discharged of any obligation to attorney in her own prior Chapter 7 case, could not held

liable, or otherwise adversely affected, if debtor failed to pay attorney. Obligation payable to third parties, such as fee to professional who provided services to benefit the spouse or child, may constitute DSO only if former spouse is also obligated for such fees. Post-petition conduct of attorney in seeking to enforce debtor's obligation for fees was not excepted from automatic stay as action to collect domestic support obligation from property not included in bankruptcy estate.

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

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

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

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

3.52 Violations – Taxing Authorities

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

3.53 Violations – Administrative 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.

3.54 Violations – Appeals

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

3.55 Violations – Contempt Proceedings

Iskric v. Commonwealth Financial Systems, Inc., 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor's arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor's actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.

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

3.56 Violations – Perfecting or Recording Liens

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

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

3.57 Violations - Other Actions

In re Grisham, 2013 WL 427935 (Bankr. D. Hawaii 2013) – Condo association violated stay by cutting off utility service to debtor’s unit. Utilities were billed to association as a whole, and association passed along pro-rata costs to unit owners through assessments. Association was not “utility” under Section 366 and association’s actions were expressly intended to force debtor to pay pre-petition and post-petition assessments.

3.58 Violations – Refusal to Comply With Contract

Lewis v. Negri Bossi USA, Inc. 423 BR 643 (E.D. Mi. 2010) – Automatic stay prohibits actions by creditor to obtain payment of pre-petition obligations. Creditor’s refusal to honor pre-petition contract to provide post-petition services to maintain machines constituted violation of stay where creditor’s actions would result in diminution of value of property of estate. Automatic stay designed to protect both Debtor from loss of assets and also creditors from diminution of value of estate. Creditor’s refusal to honor pre-petition maintenance contract would cause assets to decline in value, to the harm and detriment of other creditors. Act will be violation of stay if it (1) could reasonably be expected to have a significant impact on debtor’s ability to pay; and (2) if a reasonable person would consider the conduct to be unfair under the circumstances. Court found that Creditor’s refusal to provide services was solely effort to force payment of pre-petition obligations, even though Creditor never said it was refusing to provide services because of prior non-payment or that Creditor would provide services if it was paid for prior obligations.

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

3.59 Violations – Post-dated Checks

In re Waldo, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney who accepted post-dated checks prior to commencement of Chapter 7 case violated stay when Attorney attempted to cash check post-petition. Check constituted payment of otherwise dischargeable debt for unpaid attorney fees in Chapter 7 case. Attorney further violated the stay when Attorney wrote repeated letters to client advising that check had bounced and demanding additional \$50 for “returned check fees”. Attorney’s actions constituted “willful” violation of stay as attorney acted with full knowledge of debtor’s bankruptcy case.

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

3.60 Violations – Loan Modifications

Crow v. Ocwen Loan Servicing, LLC, 2013 WL 4668558 (Bankr. N.D. Ohio 2013) – Mortgage servicing company willfully violated stay by sending account statements that were inconsistent with Court approved loan modification. Mortgage servicer continued to send erroneous statements even after being advised by debtors and by debtors’ counsel of the errors. Servicer’s actions were willful within the scope of Section 362(k). Debtors alleged damages for emotional distress are not compensable under Section 362. However, willfulness of creditor’s actions supported recovery of attorney fees. Punitive damages were also warranted where servicer continued to send account statements that were totally inconsistent with court's loan modification approval order including statements showing a post-petition

deficiency in excess of \$25,000.00 when the loan modification brought the loan current. Despite repeated efforts of debtors and their attorney to rectify the matter, servicer continued to send such account statements for a period of approximately one year and, despite receiving adequate notice, disregarded adversary proceeding. Court awarded attorney fees of \$3,642.40, plus punitive damages of \$11,000.00. Court also ordered servicer to adjust records to reflect loan modification with proper credits for all payments made by debtors under the loan as modified; and to issue a new escrow statement to properly calculate the escrow balance on a going forward basis.

3.61 Actions by Debtor

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

E. Particular Actions Not Violations

3.62 Inadvertent or Good Faith Actions

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

Mitchell v. Home Echo Club, Inc., 2009 WL 1597901 (S.D. Ohio 2009) – Actions taken in violation of automatic stay are generally voidable and not void. Debtor unreasonably withheld notice of the Bankruptcy Petition and resulting Automatic Stay and the creditor would be prejudiced if 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.

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

3.63 Satisfaction of Judgments or Claims

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

3.64 Setoff

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

3.65 Actions Against Property Not Property of Estate

In re Lady Bug Corp., 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Automatic stay does not prevent actions against property that is not property of estate. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Judgment creditor who obtained judgment liens against property prior to acquisition of property by trust could pursue foreclosure of judgment liens as action was not against property of estate and was not attempt to collect debt against debtor as debtor had no liability on the underlying obligation or the judgment itself.

In re Grady, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Property owned by Debtor’s wholly owned corporate entity does not constitute property of Debtor’s estate. Corporate Creditor’s actions in seizing those assets after Debtor personally filed for bankruptcy protection does not constitute violation of stay, as stay prevents only actions against property of the estate, not property owned by related but non-debtor entities.

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

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

3.66 Adjournment or Continuation of Foreclosure Sale

Henson v. Bank of America, 2012 WL 3987633 (Bankr. D. Co. 2012) – Bank did not violate automatic stay by failing to take steps to prevent automatic continuation, from week to week, of foreclosure sale. Bank did not take any action to collect debt or to cause foreclosure sale to proceed notwithstanding bankruptcy case and foreclosure sale did not occur. While a creditor who set a course of action in motion may be required to take steps to stop the proceeding where continuation would result in collection of a pre-petition obligation such as a writ of garnishment, creditor was not required to do anything more than advise party who would have conducted sale of filing of bankruptcy. Continuing a foreclosure sale date in the manner provided by state law does not violate the automatic stay where continuing sale does nothing more than preserve the status quo. Lender did not attempt to press forward with foreclosure sale or to institute new foreclosure proceedings.

3.67 Refusal to Extend Additional Credit

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

3.68 Criminal Proceedings

In re Ward, 2013 WL 4051351 (Bankr. D. Mont. 2013) – Automatic stay does not prohibit filing of criminal complaint even where alleged motive for filing complaint was to collect debt. Debtor provided home renovation services to creditor. After project was completed, creditor accused debtor of theft and pursued collection of damages. Debtor filed for Chapter 7 and creditor attended the first meeting of creditors. A few days later, creditor filed criminal complaint against debtor for theft. Code expresses strong policy against any interference by bankruptcy court in decisions of state prosecutors to pursue criminal charges. Creditor did nothing more than make report to proper authorities, and reporting possible crime is not violation of stay.

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

3.69 Furnishing Information

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

Kowall v. GMAC Mortgage, LLC, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Creditor’s conduct will be violation of Section 362(a)(6) if the conduct could reasonably be expected to have a significant impact on debtor’s decision to repay obligation and is contrary to what a reasonable person would consider fair under the circumstances. Creditor’s reporting of delinquent loan to credit reporting agency prior to commencement of case is not violation of automatic stay. Creditor’s reporting of information to credit reporting agency post-petition does not suggest course of conduct designed to induce debtor to pay, where debtor had no contact with creditor or agency until years after alleged reporting occurred. Information reported was accurate as to status of loan and pendency of bankruptcy.

Messick v. Ascend Fed. Credit Union, 424 B.R. 344 (E.D. Tenn. 2010) - Informational letters which credit union mailed to Chapter 13 debtors, advising them that, pursuant to credit union’s generally applicable policy of denying services to any member who had caused financial loss to credit union, debtors’ accounts would be converted into “share loss” accounts, with certain restrictions on withdrawals and suspension of all credit union services to accounts, unless debtor-wife’s name was removed from accounts, did not violate automatic stay as commencement or continuation of proceeding to recover, or as act to collect, assess or recover, on claim that arose prior to commencement of bankruptcy case. Bank employee’s truthful response to question posed by debtor-husband that Debtor could reaffirm debt did not establish either coercive action to encourage repayment or any willful intent on credit union’s part to collect debt.

3.70 Filing Proof of Claim

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Creditor’s filing of a proof of claim is not a violation of the automatic stay.

Poteet v. eCast Settlement Corp., 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Filing a proof of claim in the debtor's bankruptcy case does not violate the automatic stay. Alleged inaccuracy in claim or incompleteness of claim does not convert proof of claim into stay violation. Proper remedy is for debtor to object to claim.

3.71 Internal Recordkeeping

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

3.72 Litigation – Debtor as Plaintiff

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.

3.73 Post-Petition Perfection of Lien – Safe Harbor

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.

3.74 Surrendered Collateral

Canning v. Beneficial Maine, Inc., 462 BR 258 (1st Cir. BAP 2011), *aff'd* Case No. 12-9002 (1st Cir 2013) – Creditor does not violate stay or discharge injunction by refusing to release lien or foreclose against property. Surrender under Section 521 requires that debtor make collateral available to secured creditor but does not obligate secured creditor to accept possession of collateral unless refusal to accept collateral is subterfuge to coerce payment by the debtor of the discharged debt. Lender was not demanding that debtors pay debt in full to obtain release of lien and offered to release lien through settlement or short sale, which provided ability of debtor to sell property and indicated intent by creditor to recover no more than value of collateral.

Brown v. Branch Banking & Trust Co., 477 BR 915 (Bankr. S.D. Ga. 2012) – Surrender of collateral does not obligate creditor to take affirmative action to transfer title or to foreclose. Creditor does not violate stay by failing to take any action to either foreclose or transfer title after confirmation of Plan.

In re Waltower, 2012 WL 4758043 (Bankr. S.D. Ga. 2012) – Surrender of property in confirmed chapter 13 plan terminates automatic stay as to property. However, surrender does not convey title or remove property from estate.

3.75 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.

3.76 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.

3.77 Sanctions – Standing to Request

Bankers Healthcare Group, Inc. v. Bilfield, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Debtor-wife has standing to seek damages for emotional distress even where wife was not liable to creditor who allegedly violated stay. To extent that wife experienced emotional distress that was beyond stress that normally attaches to someone whose family business is failing and who is filing for bankruptcy, and that resulted from creditor's willful violation of stay, wife suffered sufficient injury in fact to support prudential standing even if creditor's conduct was aimed solely at debtor-husband.

Cook v. Wells Fargo Bank, NA, Case no. 12-2100 (10th Cir. 2013) – Failure to follow procedural requirements of Section 554 and Rule 6007 renders abandonment ineffective. Debtor did not reacquire title to pre-conversion actions for alleged violate of Automatic Stay while case was in Chapter 11 and prior to conversion to Chapter 7, where Chapter 7 Trustee did not provide notice and an opportunity for hearing on potential abandonment. Neither Trustee's Notice of Abandonment nor Report of No Distribution provided any opportunity for an objection to the abandonment, where the Notice merely stated that the Trustee "gives notice that he abandons all remaining property of the estate". There were no provisions for objecting to abandonment, no indication that either the notice or report of no distribution were sent to interested parties, and no hearing to entertain objections. Intent to abandon, without proper notice to creditors, is insufficient to establish abandonment. Debtor had no interest in alleged claim for violation of stay and could not allege any injury that was concrete, particularized, and actual or imminent; or that was fairly traceable to the actions of the creditor; or that were redressable by favorable ruling; as necessary to establish Article III standing.

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

3.78 Sanctions Generally

Bankers Healthcare Group, Inc. v. Bilfield, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor violates stay by filing collection action against debtors 6 days after commencement of case, and by continuing efforts even after bankruptcy counsel contacted creditor to request that action cease. Creditor failed to take steps to stop process server from serving summons and complaint and process server showed up at debtor's place of business and became disruptive, throwing papers at debtor in front of clients. Actions were willful violations of stay where creditor had actual notice of bankruptcy filing for at least one week and in many instances as much as a month yet continued activities. Damages include actual damages that are reasonably incurred as a proximate cause of stay violation, plus costs and attorney fees. Economic damages included lost income that resulted from debtor's reduction in patient scheduling for one month following process server's contact at office, and lost revenue from two patients who witnessed altercation and never came back to the debtor for future services. Debtor also entitled to costs incurred in attending hearings and in copy costs that were necessary for hearings on contempt. Damages for emotional distress are damages that can be recovered where debtor proves independent economic damages. However, while creditor's conduct may have aggravated debtor's pre-existing medical condition, evidence was insufficient to establish that debtor's health issues were caused by process server rather than some independent health condition.

In re Grisham, 2013 WL 427935 (Bankr. D. Hawaii 2013) – Condo association violated stay by cutting off utility services after commencement of case. Sanctions awarded of \$8,940 including loss of rental income, attorney fees and emotional distress.

In re Galutan, Case No. 12-31837 (Bankr. E.D. Ill. 2012) – Creditor violated stay by telephoning debtor once or twice every day, although debtor and debtor's counsel repeatedly advised creditor of bankruptcy filing. Creditor acknowledged bankruptcy filing but contended that filing did not prohibit actions to collect debt and that "petition" was merely an "application" for bankruptcy that did not prevent collection

efforts. Creditor also sent repeated written demand letters after petition date. Creditor was served with Motion for sanctions but did not respond and did not appear for the hearing on the Motion. Creditor's conduct amounted to knowing and intentional violation of stay. Sanctions included actual damages for attorney fees in enforcing the stay, plus punitive damages of \$15,000, plus an additional \$500 per day for each day on which creditor continued harassment after entry of the Order.

In re Brown, 2012 WL 3908029 (Bankr. E.D. Pa. 2012) – Willful violation does not require that creditor intend to violate stay. Action is willful violation when creditor violates stay with knowledge that petition has been filed. Willful merely requires intentional acts that violate stay. Evidence was undisputed that creditor, with full knowledge of stay, failed to halt to pre-petition collection efforts, resulting in post-petition levy and garnishment. That creditor and counsel believed that action did not violate stay, actions were nonetheless intentional and taken with knowledge of filing. Debtor proved that when debtor's tenant was served with the garnishment, tenant vacated premises, causing actual damages equal to lost rent less amount of security deposit; plus attorney fees incurred in connection with preparation, filing and service of Motion and attendance at the hearing and post-hearing submission. However, court would not impose punitive damages as actions, while willful, did not evidence egregious conduct in failing to prevent post-petition continuation of collection efforts based on good faith, but erroneous, belief that actions did not violate stay.

In re Gallo, 2012 WL 3930320 (Bankr. M.D.N.C. 2012) – Creditor willfully violated stay by commencing foreclosure proceedings notwithstanding notice of bankruptcy case and by repeatedly commencing or continuing collection efforts after having actual notice of filing including letter from Chapter 13 Trustee. Section 362(k) provides for award of actual damages including costs and attorney fees incurred as a result of willful violation of stay. While award is mandatory upon finding of willfulness, Debtor must support amount of any actual damages. Debtor demonstrated attorney fees in excess of \$5,000 as a result of creditor's conduct. Section 362(k) also allows award of punitive damages where creditor has demonstrated egregious, vindictive or intentional misconduct. Creditor's repeated acts in violation of stay, when creditor had actual knowledge of pendency of case, warranted punitive damages in the amount of \$10,000.00.

In re Webb, 2012 WL 3638005 (Bankr. N.D. Ohio 2012) – Secured creditor and counsel violated stay by scheduling foreclosure sale at time when bankruptcy case was open and discharge had not entered. Creditor had previously scheduled sale and been sanctioned, yet inexplicably re-set the sale yet again, also in 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 Wcislak, 446 BR 827 (Bankr. N.D. Ohio 2011) – Motion for damages for alleged violation of automatic stay dismissed following dismissal of underlying Chapter 13 case. Section 349 does not deprive Court of ability to proceed with motion after dismissal where there remains a basis for the court to adjudicate matter. Whether court retains jurisdiction is entirely discretionary with Court and is not mandatory regardless of basis of underlying action. Damages for stay violations are of the type of action for which retention of jurisdiction may be particularly appropriate. Court declined to retain jurisdiction where alleged stay violation was minor and technical, involving sending of only one letter; and debtor's case was dismissed for willful failure to abide by orders of the Court including inability to formulate a plan, failure to make plan payments, and non-disclosure of large tax refunds.

Tyson v. Hunt, 2011 WL 2222193 (Bankr. W.D. Tn. 2011) – Once Court determines that creditor has willfully violated stay, debtor has a

fundamental right to present evidence on damages. Section 362(h) provides that damages shall be awarded for any willful stay violation. Bankruptcy Court erred in concluding that willful violation occurred but then denied damages to debtor.

In re Livingston, 2011 WL 2694557 (Bankr. W.D. Mi. 2011) – Actions taken during prior, now dismissed bankruptcy case could not form basis for sanctions for alleged violation of automatic stay in subsequent case. Further, debtor would lack standing to pursue any claim for stay violation in prior case as that claim would constitute property of the estate in the subsequent case and only the Trustee would have standing to pursue that claim.

Tyson v. Hunt, 2011 WL 2222193 (Bankr. W.D. Tn. 2011) – Post-petition foreclosure sale, recording of deed resulting from foreclosure sale, and refusal to set aside deed upon being apprised of bankruptcy filing constitute separate violations of automatic stay. A specific intent to violate the stay is not required, or even an awareness by the creditor that conduct violates the stay. Where there is actual notice of bankruptcy, Court will presume that the violation was deliberate or intentional creating strict liability. If defendant acted in bad faith or with malice, court can also award punitive damages. Party's deliberate refusal to cooperate in voiding the sale and reconveying property to the Debtor at any time after this date were willful and constitute a violation of the automatic stay warranting award of actual damages. Violation was not egregious, vindictive or intentionally malicious or motivated by reckless disregard of the federal bankruptcy laws, but were instead the result of a very mistaken understanding of how those laws work. As a result, the Court finds that an award of punitive damages is not appropriate in this case.

Clay v. Credit Acceptance Corp., 2011 WL 2312334 (Bankr. E.D. Ky. 2011) – Once a willful violation is established, an award of damages is mandatory under § 362(k)(1), so long as there is a resulting injury. Sanctions can include reasonable attorney fees in an amount that bears a reasonable relationship to the amount in controversy. Debtor must also mitigate, and attorney fees incurred after a reasonable offer of settlement has been made by the party to be sanctioned will not be included and must be borne by debtor. Request for attorney fees which are double the amount in controversy is far outside the bounds of reasonableness. Debtor failed to mitigate damages. Initial telephone contact between debtor's attorney and creditor's attorney did not occur until more than one month after service of the state court complaint. Matter would have been easily resolvable with a phone call, without the need to engage in lengthy and expensive litigation.

Henderson v. Auto Barn Atlanta, Inc. 2011 WL 1838777 (Bankr. E.D. Ky. 2011) – Court previously determined that lender's actions in threatening and intimidating debtors; thwarting any efforts by the Debtors to title the Vehicle in Kentucky, despite knowledge of the Debtors' bankruptcy; repossessing vehicle; threatening other repossessions; sending letters threatening debtors with criminal prosecution; and hiring repossession company; all with full knowledge of bankruptcy filing, violated automatic stay. Sanctions require finding both of violation of stay and that violation was willful. Creditor did not willfully violate stay where creditor neither requested nor authorized repossession company to repossess vehicle. Remaining creditor actions were willful and warranted award of actual damages plus costs and attorney fees. Attorney fees are to be determined using "lodestar" method which requires multiplication of the reasonable number of hours billed by a reasonable billing rate. The court then considers other factors that may be relevant to adjust the award up or down to achieve a reasonable result such as (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Court awarded actual damages, fees and costs totaling \$40,047.50. Repeated violations also warranted imposition of punitive damages of \$25,000, taking into account (1) the nature of the creditor's conduct; (2) the nature and extent of harm to the debtor; (3) the creditor's ability to pay; (4) the level of sophistication of the creditor; (5) the creditor's motives; and (6) the lack of any provocation by the debtor.

Vining v. Comerica Bank, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – Sanctions for alleged violation of stay are limited to any "individual" injured by a willful violation of Section 362. Sanctions not available where third party refused to surrender original documents belonging to corporate debtor in Chapter 7 proceeding. Even assuming refusal to surrender documents was technical violation of stay, Corporate Chapter 7 debtor is not an "individual". Any entity allegedly harmed by violation of stay may seek sanctions under Section 105, but sanctions are discretionary. Court would not exercise discretion to award sanctions where Trustee failed to demonstrate any harm or prejudice from delay in turning over documents to Trustee.

In re Makdisi, Case No. 10-44413 (Bankr. E.D. Mi. 2010) – Lender violated stay by conducting foreclosure sale after commencement of case and further violated stay by refusing to set aside the foreclosure sale. Sanctions included compensation for Debtor's lost wages for days spent attempting to resolve issues with lender plus attorney fees for services of counsel in attempting to resolve issues.

Grine v. Chambers, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Creditor violated stay by sending account statement with full knowledge of bankruptcy filing. Creditor who purportedly settled damage claim but wrote on check "extortion money" did not have valid accord and satisfaction where creditor did not believe that debtor had any valid claim, preventing a meeting of the minds on issue of settlement. To extent parties may have had settlement, creditor failed to perform where creditor wrote on check "extortion money" rendering check unacceptable tender of payment, as negotiation of check would constitute implicit admission that money was product of extortion rather than settlement of legitimate claim. Debtor-wife would not be entitled to sanctions where billing statement was issued only for Debtor-husband. Sanctions would not include alleged loss of work or travel expenses for Debtor-wife in preparing for and attending the hearing on the Motion for Sanctions. Attorney's fees for prosecuting a damages action under Section 362(k) may be compensable as actual damages under the statute under certain circumstances: the attorney's fees and costs claimed as damages, whether pre-litigation or post-litigation, must have been proximately caused by and reasonably incurred as a result of the violation of the

automatic stay; and must be proven with reasonable certainty and may not be speculative – rejecting 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.

3.79 Sanctions – Punitive Damages

Iskric v. Commonwealth Financial Systems, Inc., 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor's arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor's actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.

Bankers Healthcare Group, Inc. v. Bilfield, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Party injured by violation of stay can recover punitive damages if creditor's conduct was egregious, vindictive or intentionally malicious. Overt wrongful intent is not required, but debtor must show that creditor acted in bad faith or otherwise undertook actions in reckless disregard of law. Creditor had no effective bankruptcy procedure in place to stop filing of lawsuits or to instruct process server to cease efforts to serve papers that had been filed. Creditor's only “bankruptcy procedure” was to move debtor's name from one computer to another, and to re-locate the paper file from one cabinet to another. Creditor's procedures were “woefully inadequate” to ensure that creditor ceased collection efforts. Even after receiving

actual notice, creditor's general counsel took no steps to stop filing of lawsuits or efforts by process server. Creditor contended that it did not affirmatively do anything to violate stay, it merely did not tell process server to stop. Creditor had affirmative duty to call off the process server, not to merely stand by and allow process that creditor started to unfold in violation of stay. Court awarded punitive damages totaling \$10,500 for three separate actions that violated stay.

3.80 Sanctions - Parties Liable

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

3.81 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.

F. Extension of Automatic Stay

3.82 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 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.

3.83 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 court 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.

3.84 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.

3.85 Grounds for Extension

3.86 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.

3.87 “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.

G. Imposition of Automatic Stay

3.88 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.

3.89 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.

3.90 Grounds for Denial

3.91 Grounds for Imposition

3.92 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.

3.93 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.

3.94 Re-imposing Stay After Grant of Stay Relief

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

H. Serial Filing – Small Business

3.95 Non-Applicability of Stay

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

I. Reinstatement of Automatic Stay

3.96 Generally

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

4.3 Duties of Attorney as DRA

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 Sinta, 2013 WL 1946185 (E.D. Mi. 2013) – Appeal challenging court’s order lifting stay became moot when underlying bankruptcy case was dismissed. Even if Court erred in lifting stay, there was no active bankruptcy case in which court could impose stay.

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

4.6 Partnerships

4.7 Conservatorship

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

4.8 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

4.9 Parties Entitled to Appointment

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

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

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

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

4.10 Limitations on Appointment

4.11 Termination of Pro Bono Appointment

D. Attorney Fees

4.12 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 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.

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.

4.13 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.

4.14 Fee Agreement

In re Ortiz, 2013 WL 447890 (Bankr. S.D.N.Y. 2013) – Attorney for consumer debtor must act as debtor’s attorney for all normal, ordinary and fundamental aspects of case. Retainer agreement that purported to limit counsel’s obligations to attend only one 341 meeting, even if not conclude, and limited post-petition services to no more than one hour, violated ethical obligations.

In re Slabbinick, 2012 WL 5386677 (Bankr. E.D. Mi. 2012) – Unbundling services into pre- and post-petition services does not per se violate Michigan ethical limitations or result in post-petition fee agreement being avoidable under Section 329. Section 329 does not apply to post-petition fee agreements. Attorney had a fee agreement for pre-petition services that specified exactly what services would be provided and the fee for those services, and specified that attorney would not perform any services post-petition without a new fee agreement. Pre-petition fee agreement made it clear that debtors were not required to hire attorneys for post-petition services and that attorney’s agreement to perform pre-petition services was not conditional on agreement to perform post-petition services. Michigan Ethical Rules allow fee agreement to limit services to be performed as long as client consents with adequate consultation. Unbundling must not undermine attorney’s ability to provide competent representation, defined as the ability to assist debtor in obtaining discharge and retention of exempt property. Some requirements can be performed prior to commencement of case, such as preparation of documents. However, Section 523(a)(4) also requires debtor to cooperate with the trustee and to surrender property of the estate to the trustee, both of which are necessarily post-petition requirements. Section 343 requires debtor to testify at meeting pursuant to Section 341, Section 727 imposes multiple requirements relating to debtor’s conduct and duties in order to obtain discharge, again which are by definition post-petition services. Alternative to split representation may be hiring of petition preparer or *pro se* filing, either of which provides worse representation that debtors will have even if services are unbundled. While ethical rules require competent representation, rules to not require that attorney represent debtor in all matters necessary to obtain objectives, and debtor will be better service to have at least some assistance prior to petition than if debtor is entirely unrepresented. Debtors states that they believed Attorney adequately advised and counseled debtors concerning limitations of representation and potential consequences if debtors choose to proceed without an attorney and that they understood that they would be required to obtain counsel subsequent to filing and that attorneys adequately advised them of legal options as it relates to bankruptcy case. However, debtors belief that consultation was adequate is not sufficient. Attorneys must also prove that the consultation was, in fact adequate to constitute “informed consent” on such items as consequences of failing to file documents; consequences of dismissal and serial filings; consequences of failure to attend 341 meeting; that failure to cooperate with trustee could result in loss of discharge. Court afforded attorney opportunity to provide additional affidavits concerning consultation to allow court to determine whether debtors acted with “informed consent”.

In re Gourlay, 2012 WL 4791034 (Bankr. E.D. Mi. 2012) – Attorney in Chapter 7 proceeding cannot require debtor to pay balance of fees post-petition. To extent fee agreement purported to required debtor to make payments post-petition, fee agreement is void. even though the fee arrangement is described as a “flat fee,” the Debtor’s promise to pay \$900.00 of the flat fee post-petition is a pre-petition debt that is dischargeable. The United States Court of Appeals for the Sixth Circuit previously held that a debtor’s pre-petition agreement to pay attorney fees is a dischargeable debt. Although Section 329 requires attorney to file statement of compensation paid or to be paid for services rendered in contemplation of or in connection with the bankruptcy case, that provision does not create some exception to the discharge provisions of Section 727. Rule 1006 which allows for payment of filing fees in installments does not, by implication, except debt from discharge. Debtor’s pre-petition promise to pay fees post-petition is a prepetition debt. Attorney was stayed by the filing of the Debtor’s petition from taking any steps to collect this debt from the Debtor under Section 362(a). Any act to collect this prepetition debt—even just asking the Debtor to pay it—violates the automatic stay that went into effect when the Debtor filed for relief under Chapter 7. As the Debtor has already received his discharge, any act to collect the debt is prohibited by the discharge injunction of Section 524(a). Although debtor is not prohibited from making voluntary payments, retainer agreement creates a false impression that debtor is required to make payments, raising issue of whether payments would be truly “voluntary”.

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.

4.15 Rule 2016 Disclosure

In re Carter, Case no. 12-5200 (Bankr. W.D. Mi. 2013) – Attorney must file supplemental statement for any fees received directly from a debtor. Counsel’s initial 2016b statement listed \$3,000 in fees to be paid by Chapter 13 trustee and did not reference any payments directly by debtor. Nonetheless, attorney received 4 separate payments directly from debtor totaling \$1,100.00. Attorney could retain fees paid up to amount disclosed in 2016b because those fees were properly disclosed in 2016b statement, but must disgorge all fees received directly from debtor and would be denied any request for additional compensation in Chapter 13 case.

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

4.16 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.

4.17 Disinterestedness

Auday v. Wet Seal Retail, Inc., 2013 WL 2457717 (E.D. Tn. 2013) – Trustee’s retention of debtor’s pre-petition litigation counsel to prosecute action following substitution of Trustee as real party in interest was not ethically prohibited. While Model Rule 1.7 precludes representation of multiple clients who may have inconsistent objectives, Rule 1.7 allows the conflict to be waived and representation to continue. Concurrent representation does raise significant concerns about potential conflicts as attorney will be required to receive and evaluate settlement offers that could produce inconsistent results for the two clients. Dual representation was also complicated as there

may, at some point, be claims between debtor and trustee arising out of or in connection with litigation, and trustee will have different rights and obligations regarding confidentiality. Counsel would not be permitted to represent Trustee in light of actual and potential conflicts that could not be waived or, to extent waiver was possible, evidence did not indicate that debtor knowingly and fully waived any conflict.

4.18 Notice

In re Duronio, Case No. 08-55409 (Bankr. E.D. Mi. 2010) – Fee Application failed to attach required 21 day Notice of Opportunity to Object as required by Bankruptcy 2002 and Local Bankruptcy Rule 2016-1 and 9014-1.

In re Weddle, Case No. 08-58255 (Bankr. E.D. Mi. 2010) – Fee Application failed to attach required 21 day Notice of Opportunity to Object. Applicant attempted to file “Corrected” Notice but did so under the incorrect ECF event code and Court entered Order striking the Corrected Notice. Applicant failed to take any other steps to try to correct the notice problem, resulting in denial of application without prejudice.

4.19 Content of Application

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

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

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

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

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

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

In re Russell, 2009 WL 2849085 (E.D. Mi. 2009) – Bankruptcy Court properly reduced counsel’s application by \$500 where counsel’s application failed to comply with Local Bankruptcy Rule 2016-2 and the relevant Federal Rules of Bankruptcy Procedure.

4.20 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.

4.21 Lodestar

B.O.C. Law Group, P.C., v. Carroll, 2013 WL 5182395 (E.D. Mi. 2013) – In awarding fees, court must determine reasonable hourly rate and reasonable number of hours expended. Court can consider factors including but not limited to those specified in Section 330; and court must not allow compensation for services that were unnecessary, duplicative, those that were not reasonably likely to benefit the debtor, or those not necessary to administration of case. Court can take into account the standard "no look" fee and take into account normal and customary services. If court intends to reduce fees in award, court must specifically explain which objections are sustained and how those objections impact the fee award. Court must discuss reasonable hours and reasonably hourly rate and must provide calculation as part of the record for compliance with lodestar. Court's failure to articulate reasons for fee reduction mandated reversal and remand of case for further proceedings.

Carroll v. Reeds, Reeds, Hammerschmidt & Strickrad, PC, 2013 WL 4084773 (E.D. Mi. 2013) – In awarding fees, bankruptcy court must begin with lodestar, which multiplies reasonable hourly rate times reasonable number of hours expended. While court can then depart from the lodestar, in doing so, court must explain which hours in the fee application are disallowed and why. Court's use of flat reduction in fee application, without designating time expended that was not reasonable, hourly rates that were unreasonable, or any other specific facts on which the court based the adjustment did not comply with Section 327 and Section 330.

In re Moore, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Lodestar calculation, based on reasonable hourly rate and reasonable number of hours, starts calculation. Lodestar can be adjusted by (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hourly rate of \$225 was high for attorney who was "unknown" to court and who did not present any basis for this hourly rate. Time records raised questions about reasonableness. Time records billed to attend hearings on dates on which the court had no record of any hearing being held; and reviewing correspondence from court where record did not indicate that the court sent any correspondence. Time entries reflected too much time devoted to routine tasks such as 12 minutes, \$45, to review the wage order; and 12 minutes to review a notice of appearance filed by attorney for State Department of Taxation. Counsel billed \$700 to review claims, where most of the claims and amounts corresponded to the schedules and not one resulted in any action. Services were of little benefit where plan was substantially underfunded and will not complete within plan term. Case presented no novel or unusual issues which would warrant fee beyond standard "no-look" fee of \$2,000.00.

Berliner v. Pappalardo, Case No. 11-1830 (1st Cir. 2012) - Lodestar requires court to multiply number of hours productively spent by a reasonable hourly rate to calculate a base figure. Court must discount time spent on unnecessary, duplicative or overworked tasks. In evaluating fee application, bankruptcy court is not required to march mechanically through a checklist of the section 330 factors when fashioning a fee award. Court must merely make a fee calculation that takes the section 330 factors fairly into account. The fact that debtors were "above median income" which require preparation of means test, standing alone, does not make case unusually intricate or extraordinary so as to warrant a greater fee. Purported need for extensive communications with the client does not warrant substantial increase in fees. Lawyers have an obligation to keep handholding within reasonable limits in order to control costs. In reducing fees, bankruptcy court is not required to proceed line by line through the fee application or to explain a fee award with excessive precision. Court must provide explanation which is sufficiently detailed to allow a reviewing court to ascertain the lower courts thought process.

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Bankruptcy courts should use the lodestar method in determining reasonable attorney fees. Starting point in the lodestar analysis is to determine a reasonable hourly rate and then to determine the lawyer's reasonable hours. Court has an obligation to ask whether the rate charged for the service is reasonable in light of the complexity and importance of the task. For Applicant's hours to be reasonably expended, time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case. Attorney's request for compensation of \$28,000 for services rendered in adversary proceeding that, at most, could have returned only \$30,000 to estate were not reasonable. Further, adversary actually ended up with Estate paying the adversary defendant \$5,000, thereby depleting, not enhancing, the

estate. Reasonable cost-benefit analysis at some point or points would have indicated that its fees and costs were quickly rising to a level very near the maximum possible recovery. Once it becomes reasonably obvious that the prospective costs of commencing or continuing litigation will exceed any benefit to the estate, the attorney is duty bound to abandon the claim and Applicant should have considered either abandoning the claim or attempting to settle it. In second adversary, Application incurred fees of \$31,000 to recover alleged fraudulent transfer of pickup truck worth, at most, \$4,500.00. Applicant should have exercised critical, independent professional judgment, either initially or at some point during the proceedings, and refrained from pursuing the matter given that a predictable result would realize that, at most, it could recover at most only \$4,500. Applicant cannot justify excessive hours by indicating that Applicant was merely following directions from Debtor or from Creditors. Attorney has independent duty to exercise professional judgment and to not take on actions that are not reasonably likely to benefit parties.

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

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

Orlow v. Carroll, 2011 WL 1102821 (E.D. Mi. 2011) – Bankruptcy Court required to use lodestar method to determine fees for debtor's counsel. Court erred in reducing fees to presumptive "no look" amount without analyzing the hours expended by attorneys and paraprofessionals or the hourly rate of those attorneys and paraprofessionals as set forth in Appellant's fee application. The only rationale provided for reducing the fee award was a mistake in the Means Test which should not have made in the first place, should have been corrected more quickly, delayed the proceedings, and increased the attorney's fees. Remanded to Bankruptcy Court for proceedings consistent with lodestar.

In re Wheeler, 2010 WL 4259941 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Attorney is not allowed to bill time spent reviewing debtor's documents after a paralegal had already reviewed the documents and billed for that time. Court would also reduce time spent on reviewing and preparing documents where time charged was excessive. Court would also deny compensation for clerical services such as scheduling appointments, calendaring dates and reviewing notices of appearance. Charge of 3.8 hours for adversary to strip a second mortgage lien was excessive where adversary was largely a form, fill-in-the-blank practice. Services necessary to correct errors that should not have been made in the first place are not compensable or in the alternative the time spent making the error in the first instance is not compensable. Although time spent in resolving good faith objections and disagreements over plan provisions will be compensable, time spent on a legal question that was resolved in prior cases years ago is not compensable. Court would also consider overall total of fees and would reduce fees for a straightforward chapter 13 case that did not warrant extraordinary fee.

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

In re Lance, 2010 WL 3430492 (Bankr. N.D. Ohio 2010) – Lodestar calculation is based on reasonable hourly rate multiplied by the number of hours reasonably expended. Lodestar is subject to upward or downward adjustment. Court *sua sponte* reduced requested attorneys fees in chapter 7 proceeding from \$1200 to "presumptively reasonable" \$1100 where debtor had no secured claims; have less than \$5000 in personal property; no reaffirmation agreements would be necessary; debtor was single with one dependent; and was "below-median". Attorney's expenditure of 2.5 hours to draft the bankruptcy petition was excessive given the simplicity of the case, the lack of an hour difficult issues, and the absence of any need for special knowledge or skills. Attorney is not entitled to bill for clerical services.

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

In re Kasubowski, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Court can adjust number of hours expended by attorney in

awarding fees. Court would reduce time requested for services that were not expended on matter under consideration or for time that exceeded reasonable amounts. Court reduced research time from 2.8 hours to 1 hour where experienced attorney should not have needed more than one hour to research issues concerning stay violations.

In re Budzinski, 2010 WL 2925088 (Bankr. N.D. Ohio 2010) – 11 U.S.C. Section 329 requires Court to monitor the compensation paid to debtors' attorneys and to reduce that compensation to the extent that it is unreasonable. Lodestar calculation which requires a bankruptcy court to multiply the attorney's reasonable hourly rate by the number of hours reasonably expended. Overall reasonableness of an attorney's fee depends on all relevant considerations, including (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Counsel not entitled to additional compensation where case would have been an ordinary case if not for problems that debtors' attorney created. Debtors' attorney failed to recognize that the second mortgage could be avoided; debtors' attorney should have 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."

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.

4.22 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."

4.23 Hourly Rate

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record. Movant submitted expert testimony of an experienced attorney who practices in the same area as the Movant's counsel averring that the billing rates charged by the Plaintiffs' attorneys are reasonable and are well within the range of rates charged by commercial litigation attorneys of similar experience in the same geographic area. Percentage increases in hourly rates ranging between 3.5% and 5% for the years 2007 through 2011 were reasonable where State Bar publication reported average billing rate increases were 5.1% per year over the same time period.

In re Moore, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Hourly rate of \$225 was high for attorney who was “unknown” to court and who did not present any basis for this hourly rate.

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

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

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

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

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

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

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

4.24 Hours Expended

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – Block billing is not per se improper, as long as the entries are sufficient in detail to allow court to determine substance of work performed and time expended.

In re McKenzie, 2013 WL 3187299 (Bankr. E.D. Tn. 2013) – Court must determine whether fees reflect a reasonable number of hours actually worked and a reasonable hourly rate. Court will consider time and labor expended; and difficulty of the questions raised; skill required to properly perform the legal services rendered; attorney's opportunity costs in pressing the instant litigation; customary fee for like work; attorney's expectations at the outset of the litigation; time limitations imposed by the client or circumstances; amount in controversy and the results obtained; experience, reputation and ability of the attorney; undesirability of the case within the legal community in which the suit arose; nature and length of the professional relationship between attorney and client; and fees awards in similar cases. Counsel did not charge for time “getting up to speed” on matters handled by prior counsel. Representation involved complex issues of real estate, corporate, commercial and bankruptcy law and involved large potentially avoidable transfers, and actions were hotly litigated and mediated.

In re Moore, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Time records raised questions about reasonableness. Time records billed to attend hearings on dates on which the court had no record of any hearing being held; and reviewing correspondence from court where record did not indicate that the court sent any correspondence. Time entries reflected too much time devoted to routine tasks such as 12 minutes, \$45, to review the wage order; and 12 minutes to review a notice of appearance filed by attorney for State Department of Taxation. Counsel billed \$700 to review claims, where most of the claims and amounts corresponded to the schedules and not one resulted in any action. Services were of little benefit where plan was substantially underfunded and will not complete within plan term. Case presented no novel or unusual issues which would warrant fee beyond standard “no-look” fee of \$2,000.00.

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

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

4.25 Clerical Services

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – Purely clerical or secretarial tasks are not compensable regardless of whether performed by an attorney or a paralegal. Paralegal services for time spent assisting with document productions in response to discovery requests and in preparing financial compilations relating to damage computations were not clerical in nature and were appropriately performed by paralegal.

In re Young, Case no. 06-6385 (Bankr. W.D. Mi. 2012) – Attorney time spent on clerical services is to be compensated at staff rate and not attorney rate. Court reduced hourly rate for time spent to review and save notices of claim transfers, calendaring follow up dates, and calendaring date for responding to Trustee's Motion.

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

In re Wheeler, Case No. 10-54111 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Court would also deny compensation for clerical services such as scheduling appointments, calendaring dates and reviewing notices of appearance.

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

4.26 Excessive Number of Professionals

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – Attorneys are not entitled to recover for duplicate services performed by two separate professionals. However, fact that two attorneys worked together on matter is not per se unreasonable or prohibited where

movant can satisfactorily explain why two attorneys worked on same or similar matters.

In re Clark, Case No. 08-53620 (Bankr. E.D. Mi. 2009) – Objection based on alleged excessive number of professionals would be overruled where Application indicated that four attorneys and 9 paraprofessionals worked on file, but that most of time was expended by one counsel and record did not suggest any inefficiency of services.

4.27 Benefit to Debtors or Estate

In re McKenzie, 2013 WL 3187299 (Bankr. E.D. Tn. 2013) – Professionals retained by estate are to receive reasonable compensation for actual, necessary services, but not for services that are unnecessarily duplicative, that were not reasonably likely to benefit estate, or were not necessary to administration of estate. Although court must consider results of professional's activities, the professional is entitled to compensation for services that appeared to be reasonably necessary when performed even if those efforts later turned out to be largely unproductive. Trustee's attorney entitled to compensation for efforts to avoid fraudulent transfers where, if successful, efforts would have added substantially to estate. Trustee also pursued other avenues that, if successful, would have produced recovery for estate. Although services ultimately produced no benefit as Trustee did not prevail in litigation, that did not change fact that services were reasonably necessary in pursuing possible recovery.

In re Young, Case no. 06-6385 (Bankr. W.D. Mi. 2012) – Attorney not entitled to compensation for services that were “doomed from the start”. Attorney sought compensation for services in attempting to shorten plan below applicable commitment period and to obtain a premature discharge of debtor. Attorney's efforts were “farfetched, self-serving, not supported by authority, and ultimately burdensome to the Trustee and the estate he represents.” Court would not require creditors or the debtor to bear cost of attorney's “quixotic efforts to obtain a discharge prematurely”. Court denied both compensation for time attendant to preparing, filing and prosecuting Discharge Motion and costs to attend hearing on Discharge Motion.

James C. Warr & Assoc. v. Ruskin, 2012 WL 4855180 (E.D. Mi. 2012) – Attorney not entitled to compensation for services that were not reasonably calculated to lead to the benefit of debtor or the estate. Attorney not entitled to compensation for time spent in attending hearing on plan modification where proposed modification failed to advance any legitimate reason for modifying plan. Modification asked only that plan be modified but failed to state any reason why the plan needed to be modified or why relief was warranted. Proposed modification was so woefully lacking in any factual basis that counsel knew or should have known that modification was doomed to fail for lack of any detail, such that any services rendered in connection with the modification were clearly unnecessary. Extremely brief modification that did not explain why a modification was necessary other than to note that modification “is necessary for the Plan to calculate timely” is insufficient to justify relief sought, and contained no information that would be probative on issue of good faith which was fatal to the modification.

In re Moore, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Services were of little benefit where plan was substantially underfunded and will not complete within plan term. Case presented no novel or unusual issues which would warrant fee beyond standard “no-look” fee of \$2,000.00.

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

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

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

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

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

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

4.28 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.

4.29 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.

4.30 “Fees on Fees”

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – In civil contempt action, prevailing party is entitled to attorney fees incurred in bringing the motion. However, absent statutory fee provisions, party is not entitled to fees for preparing and prosecuting the fee application itself.

Carroll v. Goldstein, Bershad & Fried, Case no. 12-13503 (E.D. Mi. 2013) – Counsel can receive additional attorney fees for time expended in defending prior fee application. Amount awarded was reasonable where counsel contacted the objecting party in efforts to resolve objections; and counsel traveled to the courthouse for status conference that ultimately led to a settlement. Fact that counsel settled the underlying objection by agreeing to reduce fees does not mean that counsel was not successful in defending application or that counsel ultimately agreed with merits of objections themselves; rather, record indicated that counsel settled for economic reasons and in effort to avoid further litigation.

In re Makris, Case No. 11-1666, 2012 US App. Lexis 10359 (3d Cir. 2012) – Creditor is not entitled to recover attorney fees incurred in litigating amount of attorney fees. Bank pursued debtor for payment on a personal guarantee including fees associated with the guarantor litigation. Bank sought to recover fees incurred by the bank in determining whether 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.

4.31 Disgorgement

In re Dyer, Case No. 12-08030 (6th Cir. BAP 2013) – Court erroneously ordered disgorgement of fees where disgorgement was predicated on Order denying confirmation of plan that itself was reversed on appeal. Bankruptcy Court’s mistaken conclusion that debtor’s plan could not be confirmed could not support denial of fees and disgorgement.

In re Graves, 2012 WL 4026811 (Bankr. M.D.N.C. 2012) – Attorney required to disgorge fees received as payment for prior services rendered where payment occurred within preference period. Debtor owed attorney money for prior services rendered in non-bankruptcy matters. Within 90 days of filing case, debtor paid that invoice, which allowed attorney to receive full payment while creditors in Chapter 7 estate will receive no distributions. “Subsequent new value” defense to preference-avoidance claim: (1) creditor must have received a transfer that is otherwise voidable as preference; (2) creditor, after receiving this preferential transfer, must have advanced new value to debtor on an unsecured basis; and (3) debtor must not have fully compensated creditor for this new value as of date that bankruptcy petition is filed. Attorney failed to demonstrate new value exception based on services rendered post-petition and where attorney elected to receive “no look” fee in Chapter 13 case, which included payment for all services. Creditor cannot rely on new value defense where creditor later receives full payment for the later extension of credit in a transaction that is not, itself, avoidable.

In re Kim, 2012 WL 3907490 (Bankr. E.D.N.Y. 2012) – Court has authority to review fees received by counsel for services rendered or to be rendered in connection with the case and to order disgorgement of fees determined to be excessive or unreasonable. Counsel's 2016 statement indicated that counsel received a total fee of \$3,000, and counsel repeated that asserting in "Affidavit of Compliance" filed with court. However, evidence indicated that counsel received total fees of \$4300. Counsel's explanation that \$4300 was fee for Chapter 13 which debtor initially sought to file did not make fee reasonable where case was ultimately filed as Chapter 7. Failure to accurately disclose fees, constitutes independent basis to deny or reduce fees without regard to consideration of reasonableness. Reasonableness of fee depends on time spent, rates charged, whether the services were necessary to administration of or beneficial to the case at the time the services were rendered, whether the services were performed within a reasonable amount of time commensurate with the complexity, importance and nature of the problem, and whether compensation is reasonable when compared to rates and fees charged by comparable practitioners. Counsel's failure to accurately disclose all relevant information regarding fees, and failure to correct error notwithstanding multiple opportunities to amend 2016 disclosure warranted reduction and disgorgement of partial fees. Based on time records, Court concluded that \$3000 was reasonable fee and ordered counsel to disgorge excess \$1300.

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

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

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

In re Stetler Cross Ministries, Inc., 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff'd sub nom Stetler Cross Ministries, Inc. v. McDermott*, 2011 WL 1434615 (W.D. Ky. 2011) – Section 330(a)(2) and Court's broad and inherent authority permits bankruptcy court to order disgorgement of previously paid attorney fees where an attorney fails to satisfy the requirements of the Code and Rules. Debtor's Counsel received a \$2000 fee although counsel never filed an application to have himself or his firm retained as counsel and never filed an application for approval of compensation as required by sections 327, 330 and 331. Debtor's counsel in a Chapter 11 proceeding cannot be paid without seeking and obtaining prior court approval. There are few omissions more serious in a Chapter 11 case than the failure of a debtor's attorney to obtain court approval prior to securing payment for services rendered from a debtor's estate. Bankruptcy Code Rules strictly regulate the compensation of professionals for the purpose of preventing over-reaching. Failure to follow these rules, regardless of how *de minimis* the fee, cannot be overlooked by the Court. Further, Counsel did not place the unawarded fees in his trust account, but rather drew upon the funds, and spent them, all without Court approval. Although failure may have been inadvertent or negligent failure to disclose, the failure to seek Court approval by Debtor's counsel prior to accepting the fee and having his employment approved by the Court requires disgorgement.

In re Henkel, 408 B.R. 699 (Bankr. N.D. Ohio 2009). Attorney's errors warranted partial disgorgement of fees, where Chapter 7 debtor's attorney listed income and expenses of non-filing spouse instead of debtor.

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

4.32 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.

4.33 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.

4.34 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.

4.35 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.

4.36 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.

4.37 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.

4.38 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.

4.39 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.

4.40 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.

4.41 Attorney for Chapter 7 Trustee

In re Martin Designs, Inc., 2013 WL 1195706 (Bankr. N.D. Ohio 2013) – Chapter 7 Trustee has wide latitude in selecting attorneys to represent trustee. Trustee's retention of new counsel to contest fee application filed by prior, now terminated counsel, was within scope of trustee duties for which employment was appropriate under Section 327. Counsel to be retained was also representing Trustee in other, limited capacities, and new application sought to expand scope of those responsibilities. Prior and ongoing representation of Trustee in certain aspects did not result in counsel having any adverse interest that would disqualify retention for additional matters.

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

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.

4.42 Disqualification – Attorneys for Non-Debtor Parties

In re Ralph Roberts Realty, Inc., Case No. 12-53023 (Bankr. E.D. Mi. 2013) – Creditor counsel disqualified from adversary proceeding where counsel represented the debtor prior to bankruptcy proceeding. Michigan Rule of Professional Conduct 1.9 prohibits an attorney from representing an interest adverse to a former client in the same or substantially related matter. However, counsel would not be disqualified where matters in which counsel previously represented debtor were unrelated to, and neither the same as nor substantially related to, the adversary in question. Further, Rule 1.9 prohibits disclosure or use of confidential information gleaned in the course of the prior representation, but fact that attorney has such information does not preclude the representation of another party, only the use of confidential information in the course of that representation. Debtor did not present any evidence that attorneys had, or were likely to in the future, disclose any confidential information. However, Rule 1.7 prevents an attorney from taking on an interest that is adverse to the interest of another current client. At the time counsel agreed to represent creditors in adversary proceedings against corporate debtor, counsel also represented the principal of the corporate debtor. Any representation of parties adverse to the corporate debtor would be a representation contrary to the interests of the then-client and neither the client nor the debtor agreed to waive the conflict. Later cessation of the attorney-client relationship between counsel and the principal of the corporate debtor did not absolve counsel of the conflict that

necessarily resulted from simultaneous representation of creditors of the debtor and the principal of the debtor. Under Rule 1.10, this conflict with a current client required disqualification not only of the specific attorneys representing the individual client, but all members of the firm.

4.43 Effect of Order Awarding Compensation

In re Trombley, 2013 WL 4417425 (E.D. Mi. 2013) – Order awarding compensation is not the equivalent of a judgment against debtor for payment of fees and does not, standing alone, allow for execution or garnishment. Party holding fee award needs to institute separate collection proceeding to convert award into executable final judgment.

E. *Pro Hac Vice*

4.44 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

4.45 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's Motion for Summary Judgment. Unless and until Court grants Motion to withdraw, counsel remains counsel of record in case.

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

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

In re Digital Gas, Inc., Case No. 08-54958 (Bankr. E.D. Mi. 2008) – Motion to Withdraw denied without prejudice where Notice of Motion did not comply with form on Court website and where Motion misstated deadline to respond by failing to allow 3 days for mailing on those creditors not receiving notice by ECF. Motion filed October 2 with 15 days notice incorrectly stated that last day to object was October 17. Notice deadline should have been October 20 pursuant to Federal Rule of Bankruptcy Procedure 9006(f).

4.46 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.

4.47 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.

4.48 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.

4.49 Death or Incapacity of Counsel

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

G. Professional Fees

4.50 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".

4.51 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 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.

4.52 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.

4.53 Retention of Professionals – *Nunc Pro Tunc* Approval

In re McKenzie, 2013 WL 3335168 (Bankr. E.D. Tn. 2013) – Approval of retention *nunc pro tunc* is within discretion of bankruptcy court upon showing of exceptional circumstances. Accountant had been retained by debtor with court approval. After debtor-in-possession was removed and trustee appointed, accountant did not seek approval to act as accountant for trustee. Court found extraordinary circumstances warranted *nunc pro tunc* approval where trustee expressly contracted with accountant; trustee and creditor's committee approved of the *nunc pro tunc* relief; all parties received notice of the application and no party objected or offered any reasonable objection to the application; accountant satisfied all criteria for employment under Section 327; work was performed accurately and to high standards of

quality; no party was prejudiced by delay in retention; the failure to seek approval was adequately explained based on earlier order allowing debtor to retain accountant; and the accountant was not inattentive or negligent in failing to obtain approval at an earlier date.

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

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

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

4.54 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.

4.55 Retention of Professionals –Ethical Limitations

4.56 Retention of Professionals – Disinterestedness

In re LPN Healthcare Facility, Inc., 2013 WL 5312374 (Bankr. S.D. Ohio 2013) – Order approving retention of accountant for debtor would be set aside where application for retention failed to disclose that accountant was also performing services for individuals and entities related to debtor. Other entities and individuals were closely connected and operated as single enterprise providing multiple levels of care to the elderly, with complex financial transactions within the enterprise that resulted in debtor/creditor relationships. Accountant failed to timely or completely disclose relationships while serving as accountant for debtor including preparation of monthly operating reports. Some services may be compensable as administrative expenses, and accountant would be permitted to file separate application, but would be denied compensation for services as professional for estate based on non-disclosures.

In re Stamp Farms, LLC, Case No. 12-10410 (Bankr. W.D. Mi. 2013) – Law firm’s pre-petition relationship with debtor’s current management does not necessarily constitute interest for purposes of disqualification. Firm was not a creditor notwithstanding pre-petition representation. Pre-petition relationship with management was unusual – firm became aware for what it deemed irregularities and questionable accounting, and resigned as counsel. Management persuaded counsel to resume representation and agreed to divorce itself from operations and hire professional manager recommended by counsel. Although law firm and management company had “cozy” relationship and had dealings in matters unrelated to this estate, those issues did not give rise to any adverse interest or conflict of interest with debtor. UST asserted that debtor’s prior management may have claims against firm but mere possibility of claim against counsel is not sufficient to deny debtors’ choice of counsel. If future events demonstrate actual conflict or lack of disinterestedness, parties can raise issue at that time.

In re Graves, 2012 WL 4026811 (Bankr. M.D.N.C. 2012) – Attorney who received avoidable preference was not “disinterested” as

bankruptcy estate held claim against attorney. Attorney not disqualified but Court ordered that attorney would not be entitled to receipt of any fees for services in chapter 13 unless and until attorney repaid estate the amount of the preferential transfer.

In re Sattler, Case No. 10-76383 (Bankr. E.D. Mi. 2011) – Party seeking to retain real estate broker must demonstrate that broker is disinterested and does not have any adverse interest and did not hold a position as director, officer or employee of 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

4.57 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.

4.58 Allowable Services

In re Hutchinson, 2013 WL 639051 (Bankr. E.D. Mi. 2013) – BPP is allowed to place information on forms and to put forms in condition for filing. However, BPP is prohibited from virtually all conduct falling into the category of guidance or advice, effectively restricting “petition preparers” to scrivener and typing services. Suggesting bankruptcy as an available remedy for a debtor's financial problems or providing information on exemptions or other legal issues will invariably violate state laws proscribing unauthorized practice of law and more specific provisions of Code.

In re Richards, 2012 WL 3870446 (Bankr. N.D. Ohio 2012) – BPP is allowed to type information on the official forms that has been provided by and at the direction of 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 drafted Motion to Set Aside Judgment in connection with Order Lifting Automatic Stay. BPP required to disgorge all his fees to the UST for refund to the Debtor

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.

4.59 Compensation

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

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

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

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

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

In re Denison, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Court issued Order to Show to address petition preparer charging fees in excess of amount permitted by local court order.

In re Rice, Case No. 10-54792 (Bankr. E.D. Mi. 2010) – Court’s Administrative Order 10-21 sets maximum allowable fee for a non-attorney petition preparer at \$100.00. Any Petition Preparer who seeks compensation of more than \$100 must file a motion with an affidavit stating the facts which support fees greater than \$100. Bankruptcy Petition Preparer who failed to file the required motion ordered to refund fees that exceed the \$100 presumptive maximum allowable fee.

In re Scott, Case No. 10-53676 (Bankr. E.D. Mi. 2010) – Court’s Administrative Order 10-21 sets maximum allowable fee for a non-attorney petition preparer at \$100.00. Any Petition Preparer who seeks compensation of more than \$100 must file a motion with an affidavit stating the facts which support fees greater than \$100. Bankruptcy Petition Preparer who failed to file the required motion ordered to refund fees that exceed the \$100 presumptive maximum allowable fee.

In re Payne, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Bankruptcy Petition Preparer entitled to compensation of no more than \$25 per hour and that a routine Petition and supporting documents should take no more than 5 hours to complete.

4.60 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.

4.61 Sanctions

In re McCrary, 2013 WL 2947902 (Bankr. E.D. Mi. 2013) – Section 110 is designed to address abuses perpetrated on debtors by non-attorney petition preparers. Preparers can have only limited role as scrivener and typist. “Referral agency” that does not act as preparer but who refers potential debtors to preparers is liable if the referring agency collects money from the debtor, engages in acts that constitute unauthorized practice of law, plays an integral role in allowing another party to violate rules regarding preparers, acted as “point of contact” or liaison between debtor and preparer, exerts control over, or acts in concert with, preparer. “Referral agency” acted as preparer where it accepted \$600 total from debtor and retained a portion of the funds as “referral fee”, remitting remaining funds to preparer, which produced total fee far in excess of \$100 allowable total; “agency” provided debtor with questionnaire incident to bankruptcy filing; gathered financial documents and acted as sole point of contact between debtor and petition preparer; and prepared petition and other documents. Sanctions included \$150 per violation for three separate identifiable violations by “agency”, trebled to a total of \$1,350, payable to UST; plus additional \$2,000 payable to debtor. Sanctions against the “preparer” to whom agency referred debtor included \$500 per violation for three violations, trebled to a total of \$4500 payable to UST; plus \$2,000 payable to debtor.

In re Hutchinson, 2013 WL 639051 (Bankr. E.D. Mi. 2013) – Court can award sanctions of greater of \$2,000 or twice the amount paid by debtor; plus actual damages including reasonable attorney fees and costs. Evidence did not disclose any actual damages and fees paid totaled \$500, leaving maximum monetary penalty of \$2,000. Court can also issue fines against BPP if \$500 per violation of Section 110.

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

real value as it would have saved Plaintiff \$75,000 in mortgage payments. Court determined that actual value of lost modification to Plaintiff was \$10,000 and awarded damages in that amount.

4.62 Unauthorized Practice of Law

In re Hutchinson, 2013 WL 639051 (Bankr. E.D. Mi. 2013) – Petition preparer engaged in unauthorized practice of law by performing legal services and rendering legal advice. BPP also advised debtors to falsely state that debtor did not have assistance or pay for assistance, both in petition and at 341 meeting. BPP prepared all documents including determination of exemptions, appropriate chapter under which to file, and how to schedule assets.

In re Warfield, Case No. 09-75993 (Bankr. E.D. Mi. 2010) - Petition Preparer engaged in unauthorized practice of law where preparer instructed Debtor to file Chapter 7 petition, preparer completed schedules based on debtor's credit report with minimal input from debtor, debtor did not understand entries on schedules such as "fee simple" used on Schedule A and did not know what an exemption was, and prepared request to defer filing fees although debtor neither requested nor wanted that relief. Preparer advised debtor as to procedure of bankruptcy including obligation to attend 341 meeting and continued to answer questions even after petition had been filed. Section 110 allows court to award sanction in the greater amount of \$2000 or double the amount paid to the preparer.

In re Payne, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Non-attorney is not permitted to perform any service requiring legal knowledge or legal advice relating to the rights, duties, obligations, liabilities or business relationships of the person seeking the services. Petition preparer committed unauthorized practice of law by advising Debtor on whether the debt on her real property was secured or unsecured, incorrectly listing that she had no income and classified the Kentucky statutes on all of the Debtor's claimed exemptions.

I. Ethical Issues

4.63 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.

4.64 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.

4.65 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.

4.66 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.

4.67 “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.

4.68 Suspension and Disbarment

Goldberg v. Goodman, Case No. 12-1643 (9th Cir. BAP 2013) – Bankruptcy court acted within discretion in sanctioning debtor’s counsel including 6 month suspension from filing new bankruptcy cases, and referrals to the United States Attorney, Nevada Secretary of State, Nevada Attorney General, Nevada State Bar and United States Trustee. Attorney knowingly had staff members take pre-petition counseling courses in lieu of debtors and then filed fraudulent certificates stating that debtors had completed the course. Attorney also forged debtor’s signatures on tax returns filed with the IRS as well as the IRS Power of Attorney forms. Attorney failed to appear at Section 341 meeting and sent non-lawyer paralegal to represent debtor; attorney had staff members notarize documents without witnessing the signatures, which themselves were forged; and failed to act with diligence in prosecution of debtor’s Chapter 13 case. Counsel knowingly filed fraudulent and false documents with the Court and the IRS, and not only violated court rules but continued to violate multiple criminal statutes including those relating to filing of tax returns and other documents. Court has authority under Section 105, Rule 9011 and inherent authority to impose sanctions for conduct that frustrates or impedes the proper administration of estate. Sanctions were not excessive where counsel had previously been sanctioned multiple times for same or similar conduct, where prior disciplinary actions had not stemmed unprofessional conduct. Counsel also acknowledged 15-20 grievances filed against him by former clients for similar conduct. Sanctions should be progressive and where prior sanctions were ineffective, court properly elevated sanctions to include suspension and criminal referral. Court also imposed monetary sanctions for attorney fees incurred by debtor’s new counsel in connection with sanctions process.

In re Gleason, Case no. 12-11433 (11th Cir. 2012), *cert denied*, 2013 WL 1285334 (2013) – Bankruptcy Court acted within authority in suspending attorney from practice for 60 days for filing pleadings that are inappropriate or unprofessional. Court has inherent authority to oversee actions of attorneys practicing before it. Attorney is entitled to notice and due process before discipline is handed down. Before court can issue suspension, court must make finding of bad faith or that attorney acted vexatiously, wantonly or for oppressive reasons. Attorney compounded violation when, after disciplinary proceedings had been commenced, attorney had ex-parte communication with complaining Judge that included bottle of wine and a note suggesting that attorney and judge have private meeting to “resolve our issues privately”. Attorney cannot use First Amendment as shield against disciplinary proceedings arising out of tone and tenor of communications. Sanction of 60 days suspension was “minimal sanction” that would preserve integrity and authority of court.

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

In re Thav, 852 F.Supp.2d 857 (E.D. Mi. 2012) – Attorney suspended from practice in Western District is automatically suspended from practice in Eastern District for reciprocal time period. Western District suspension for repeated failure to appear for hearings notwithstanding repeated warnings from court warranted suspension that had not been modified or vacated. Western District suspension procedure did not constitute deprivation of due process and implementing same discipline in Eastern District had not resulted in grave injustice. Court would consider vacating or modifying reciprocal order only on showing of “grave injustice” which focused on original suspension order and whether severity of punishment imposed by first court fit the misconduct.

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

V. Commencing Case

A. Eligibility for Relief

5.1 Section 109 – Generally

In re Kwiatkowski, 486 BR 409 (Bankr. E.D. Mi. 2013) – Bankruptcy Court can consider whether debtor’s total non-contingent, liquidated,

unsecured debt was such as to render debtor ineligible for Chapter 13 relief even in absence of objection by any party.

White v. Lewis, Case No. 04-60231 (E.D. Mi. 2008) – Section 109 limitations on eligibility are not jurisdictional. Failure to assert a Debtor's lack of eligibility prior to entry of the discharge does not void the discharge. Accordingly, even if Debtor would not have been eligible under section 109 had issue been timely raised, creditor was not permitted to collaterally attack or attempt to set aside discharge based on alleged lack of eligibility.

5.2 Standing to Contest Eligibility

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

5.3 Debt Limits

In re Kwiatkowski, 486 BR 409 (Bankr. E.D. Mi. 2013) – Eligibility is generally determined by face of debtor's schedules, as long as schedules are completed in good faith. Debtor's schedules lacked good faith when debtor scheduled unsecured deficiency claims on foreclosed mortgages with amounts as "unknown". Property had been foreclosed in 2009 and by date of bankruptcy filing, debtor knew that deficiency claim was, at a minimum, \$250,000.00. Debtor knew the balance of the mortgage as of the foreclosure date was at least \$575,000 and that property sold for less than \$302,000, as evidenced by debtor's own tax returns and the sheriff's deed. Debtor's assertion that the deficiency balance was "unknown" lacked good faith where debtor knew that the actual balance was at least \$250,000.00. As result, debtor had total unsecured debt in excess of statutory limit for relief under Chapter 13. Under Michigan law, foreclosure satisfies the debt only to extent of foreclosure sale price. If the foreclosure bid is not sufficient to pay the debt in full, the remaining balance is an unsecured deficiency claim for purposes of Chapter 13 eligibility.

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

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

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 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), *affirmed in further proceeding*, *Winters v. IRS*, 485 BR 375 (Bankr. M.D. Tn. 2013) – Debtor's liability on personal guarantee may be "contingent debt" to the extent that the underlying obligation is not yet in default. However, once a default in the underlying obligation arises, liability on personal guarantee is no longer contingent as debtors liability is no longer conditioned upon the occurrence or happening of any extrinsic event. Value of collateral securing loan was substantially less than the amount owed on the obligation, leaving a noncontingent unsecured balance owing substantially in excess of the debt limits under section 109, requiring dismissal of Chapter 13 case.

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.

5.4 Prior Voluntary Dismissal

Rivera v. Matos, Case No. 12-087 (9th Cir. BAP 2013) – Court dismissed second filing where debtor voluntarily dismissed first case after mortgage company filed for relief from stay. Regardless of whether court adopted "mandatory", "discretionary" or "causal connection" approach, debtor's conduct precluded designed to thwart foreclosure would bar second filing which was also for purpose of thwarting foreclosure.

In re Henderson, 2012 WL 4498887 (Bankr. S.D. Ohio 2012) – Debtor ineligible where debtor voluntarily dismissed prior case after

creditor had filed request for relief from stay.

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

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

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

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

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

5.5 Simultaneous Estates

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

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

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

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

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

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

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

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

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

In re Coleman, Case No. 10-50324 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Dismiss first of two simultaneously filed cases denied. Second filed case must be dismissed and first filed case must remain open case. Court denied Motion to Dismiss first case but *sua sponte* dismissed second filed case.

In re Coleman, Case No. 10-50341 (Bankr. E.D. Mi. 2010) – Debtor is not permitted to have two open Chapter 7 cases pending simultaneously. Court dismissed second filed case *sua sponte*.

In re Rogers, Case No. 09-42767 (Bankr. E.D. Mi. 2009) - Debtor's Chapter 7 petition dismissed. Debtor filed petition under Chapter 7 while Debtor had active Chapter 13 proceeding with confirmed plan. Debtor may not have two bankruptcy cases pending at same time.

In re Smith, Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case dismissed where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Further, discharge in second case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

5.6 Petition - Name of Debtor

In re Woods, Case no. 11-72329 (Bankr. E.D. Mi. 2012) – Debtor’s Chapter 13 petition that included reference to limited liability company as “all other names used by debtor” improperly attempted to join LLC as debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.

In re Scarlett, Case No. 09-50320 (Bankr. E.D. Mi. 2012) – Debtor’s Chapter 13 petition that included reference to limited liability company as “all other names used by debtor” improperly attempted to join LLC as debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.

In re Jawad, Case No. 11-49496 (Bankr. E.D. Mi. 2011) – Individual’s petition that listed as “Other Name” the name of a Limited Liability Company improperly attempted to join a corporate entity as debtor. Joint filings are limited under Section 302 to spouses.

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

5.7 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.

5.8 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.

5.9 Trusts

In re Lady Bug Corp., 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Trust whose only assets are those titled in trust name for benefit of third parties is not eligible for relief, as trust has no assets subject to administration. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Section 1112(b) allows the court to dismiss a case for cause including lack of good faith. The lack of any property to be administered constitutes cause for dismissal.

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

B. Joint Cases

5.10 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 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.

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.

5.11 Improper Joinder

In re Jawad, Case No. 11-49496 (Bankr. E.D. Mi. 2011) – Individual’s petition that listed as “Other Name” the name of a Limited Liability Company improperly attempted to join a corporate entity as debtor. Joint filings are limited under Section 302 to spouses.

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

C. Credit Counseling

5.12 Deadline to Obtain

In re John, 2012 WL 1998405 (Bankr. M.D. Pa. 2012) – To determine relevant 180 day period, court starts with date of petition and counts backward 180 days, rather than starting with date of credit counseling and counting forward. Counting forward from date of counseling produced 180 day period that ended on a weekend, such that deadline would be extended to the first business day following. However, counting backward indicated that counseling was received 182 days prepetition. Counseling was not timely under Section 109(h).

In re Lane, 2012 WL 1865448 (Bankr. N.D. Ok. 2012) – Technical Corrections Act which removed “preceding” and added the phrase “ending on” so that statute now reads “during the 180-day period ending on the date of the filing of the petition” clarified that the credit counseling can be completed at any time up to the moment of the filing of the petition. Court noted ambiguity as to whether counseling could be completed after the filing but on the same date but rejected this interpretation in favor of “bright line” that counseling must be completed at any moment up to the filing of the petition.

In re Koo, 2012 WL 692578 (Bankr. D.D.C. 2012) – Technical Corrections Act was not intended to change substance of Section 109(h) but was only intended to clarify that the required prepetition credit counseling can be received up to the moment of filing the bankruptcy petition and need not be received prior to the calendar date on which the petition is filed.

5.13 Failure to Obtain

In re Shamily, Case No. 12-57958 (Bankr. E.D. Mi. 2012) – Case dismissed by court sua sponte where debtor obtained counseling 6 days post-petition.

In re Kang, 467 BR 327 (Bankr. D.N.J. 2012) – Debtor’s non-compliance with credit counseling requirement is not absolute mandate for dismissal nor bar to court’s inquiry into debtor’s motive for seeking dismissal, impact of dismissal on creditors, or estoppel based on debtor’s prior conduct. Debtor’s purported failure to obtain credit counseling did not establish cause for dismissal of her Chapter 7 case. Debtor engaged bankruptcy process by taking advantage of automatic stay, stopping execution and foreclosure on her real and personal property, and implicating trustee’s administration of case. Motive in seeking dismissal stemmed from realization that asset-diversion tactic had failed, was other than pure. Debtor’s filings reflecting preposterous financial picture had developed attributes of involuntary case in which credit counseling would not be required, such that public purpose would be served by investigating debtor’s finances in bankruptcy forum. Judicial estoppel barred debtor from denying compliance with credit counseling requirement where debtor entered bankruptcy through her authorized representative’s filing, which acknowledged that credit counseling had occurred, and debtor appeared either to have actually received credit counseling or could not deny that counseling occurred.

In re Fiorillo, 455 BR 297 (D. Mass. 2011) – Judicial estoppel applied to bar debtor from asserting that he was ineligible to be debtor under Bankruptcy Code, due to his failure to satisfy prepetition credit-counseling requirement, in support of his motion to dismiss his Chapter 7 case, where debtor filed for Bankruptcy to take advantage of automatic stay to avoid foreclosure, but participated in Bankruptcy process only to the extent that he thought it convenient for him, debtor represented his reasons for noncompliance with counseling requirement as exigent in at least two court filings before arguing that asserted circumstances were not exigent, and failed to file certificate of counseling compliance for more than three months, and debtor’s initial representations of compliance and purported desire to cure noncompliance caused court, creditors, and trustee to proceed with case

In re Samuel, Case no. 12-60566 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor received credit briefing 7 days after commencement of case.

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

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

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

In re 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 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 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 Hoke, Case No. 08-66997 (Bankr. E.D. Mi. 2009) - Debtor who received credit counseling after petition was filed is not eligible for relief. Case must be dismissed. Obtaining counseling post-petition does not comply with requirement of Section 109(h)(1) and Debtor is not eligible.

In re Hicks, Case No. 09-41591 (Bankr. E.D. Mi. 2009) - Debtors who initially received credit counseling 237 days prior to filing petition and then did not update credit counseling until after petition filed are not eligible for relief and case must be dismissed. Obtaining counseling more than 180 days pre-petition or post-petition does not comply with requirement of Section 109(h)(1) and Debtors are not eligible.

In re Mack, Case No. 09-58533 (Bankr. E.D. Mi. 2009) - Court *sua sponte* dismissed case where Debtor did not receive credit counseling until after the petition was filed. Section 109(h)(1) requires that counseling be obtained before the petition is filed.

In re Depew, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Case dismissed where Debtor did not obtain credit counseling until after case filed. Debtor failed to demonstrate any basis for a waiver of credit counseling or authority to obtain post-petition counseling as Debtor failed to comply with Section 109(h)(3) and failed to file a Motion for Approval of Certification of Exigent Circumstances as required by Local Rule 1007-6.

In re Garza, Case No. 09-44633 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 4 days after the petition was filed. Case dismissed by Court *sua sponte*.

In re Culbert, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 17 days after petition was filed.

In re Rhodes, Case No. 09-43128 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 17 days after petition was filed.

In re Holland, Case No. 09-55622 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief pursuant to section 109 (h)(1) where Debtor did not receive credit counseling until after bankruptcy petition filed.

5.14 Exemption from Requirement

In re Oliver, 2013 WL 1403336 (Bankr. S.D. Ga. 2013) – Debtor can be excused from counseling only if debtor requested, but was unable

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

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

5.15 Equitable Exception

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

In re Cox, Case No. 10-61052 (Bankr. N.D. Ohio 2010) – Wife dismissed from Joint Filing where documents indicated that only Husband completed pre-petition credit counseling.

5.16 Pay 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.

D. Venue

5.17 Generally

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – When jurisdiction is founded on a question of federal law, venue lies in: (1) A judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) If there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff’d* Case No. 11-8011 (6th Cir. BAP 2011), *aff’d* 2013 WL 425342 (6th Cir. 2012) – Venue is proper in the district in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district. Venue is proper if Debtor meets any one of the four tests (domicile, residence, principal place of business or principal assets). There is a presumption that 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.

5.18 Domicile

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff’d* Case No. 11-8011 (6th Cir. BAP 2011) – Domicile is largely a matter of intention - what is the fixed location to which he intends to return when he is elsewhere? Domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time. An individual consequently may have several residences, but only one domicile. Debtor’s testimony is relevant but not determinative, and court will also consider objective evidence that establishes 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.

5.19 Location of Principal Assets

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Alternative basis for venue is the location of 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.

5.20 Residence

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.

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

5.21 Principal place of business

5.22 Location of Claim or Property

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – 28 USC Section 1391 allows venue in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of the property that is the subject of the action is located. Venue in Tennessee improper where all elements of cause of action occurred in northern District of Mississippi and Plaintiff failed to allege that any action or event occurred in Tennessee.

5.23 Default Venue

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

5.24 Dismissal

Thurman v. Michael W. Boyd Law Firm, 2013 WL 1103645 (W.D. Tn. 2013) – Court has broad discretion in dismissing or transferring case that is filed in improper venue. Party seeking transfer rather than dismissal bears burden of proof that transfer is warranted. Court cannot transfer case if there is no district in which venue would have been proper in first instance. Court then determines whether transfer is consistent with interests of justice. Case would not be transferred where complaint failed to state cause of action with requisite particularity as required by *Twombly*.

5.25 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 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”.

5.26 Transfer - Venue Improper

E. Filing Fee

5.27 Failure to Pay

In re Clark, 2013 WL 3849610 (E.D. Mi. 2013) – Court properly denied Debtor’s Motion to pay filing fee in installments and dismissed case where Debtor previously had filed four bankruptcy actions, three of which were dismissed for failure to pay filing fee, file required documents, or attend required hearings; and Bankruptcy Court was unconvinced that Debtor would do any better in this case.

In re Coleman, Case No. 12-54116 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor failed to pay filing fee as required by Court order directing payment by date certain, failing which the case would be dismissed without further notice or hearing.

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

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

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

5.28 Waiver

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

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

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

In re George, Case No. 11-67210 (Bankr. E.D. Mi. 2011) – Debtor’s motion was not clear as to whether debtor had received and spent tax refund prior to filing case. Debtor’s Motion indicated that debtor had done so but debtor’s schedule B showed tax refund as receivable that had not been received. Debtor’s statement on Schedule B, made under penalty of perjury, was inconsistent with any assertion 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 Daniels, Case No. 09-44335 (Bankr. E.D. Mi. 2009) – Debtor’s Application for Waiver of Chapter 7 Filing Fee denied where Debtors schedules revealed that Debtor had a garnishment of \$407 per month that should have ceased upon the filing of the bankruptcy case which would result in Debtor having average monthly net income in excess of \$1500 per month. Information on Debtor’s Application was inconsistent with information Debtor provided on Schedule I which indicated that Debtor was single with no dependents, and Debtor’s monthly income on Schedule I exceeded 150% of the official poverty line. Therefore, Court lacks authority to waive filing fee under 28 USC Section 1930(f)(1).

In re Walker, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's Motion to waive filing fee denied where schedules indicated that

Debtor had sufficient exempt assets from which to pay the filing fee including tax refunds totaling over \$4000.

F. Means Test

5.29 “Primarily Consumer Debts”

In re Price, 2013 WL 4017149 (Bankr. E.D. Ky. 2013) – Court is not precluded from considering amendments to debtor’s schedules in determining whether debtor’s debts are primarily consumer. Debtor is free to amend schedules as long as amendment is in good faith.

In re Hernandez, 2011 WL 1541691 (Bankr. E.D. Ky. 2011) – Case cannot be dismissed under Section 707(b)(2)(A) where debtor’s debts are not primarily consumer debts. Court will determine amounts of claims based on scheduled amounts. Debtor had total debt of \$373,000.00, including debtor’s scheduled the secured claim for debtor’s commercial property of \$189,000.00. As “business” debt amounted to 50.6% of the total debt, debtor had primarily non-consumer debts for purposes of Section 707.

In re Lapke, 428 BR 839 (8th Cir 2010) – Debtor’s non-recourse obligation on two mortgages on debtor’s home would be considered consumer debts even though Debtor signed only the mortgages and not the notes themselves. Mortgages constituted claims against debtor’s property and constituted claims in bankruptcy case. Debt secured by lien on principal residence is generally consumer debt. Including amounts due on mortgages resulted in Debtor having consumer debt in excess of \$1 million versus non-consumer debt of only \$667,000.00, resulting in debtor having primarily consumer debt for purposes of Section 707.

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

5.30 Calculation of Current Monthly Income – Timing

In re Maura, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Current Monthly Income is statutorily defined based on all income received in the 6 calendar months preceding commencement of case. There is no basis to increase or adjust CMI calculation based solely on fact that as of date of petition, debtor was earning more money that debtor had earned during the relevant 6 month time period.

5.31 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 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”.

5.32 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 online 49 and line 50 of the form B22C must be added back into the disposable income calculated online 59 in order to ensure that the total proceeds available to unsecured creditors is not less than the presumptively disposable income shown on line 59 times 60. Priority creditors are not “unsecured creditors” were paid from projected disposable income. Instead, those payments are deducted before determining projected disposable income which is then allocated to payment of general unsecured creditors.

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

In re Phillips, 2009 WL 3019815 (Bankr. S.D. Ohio 2009) – Chapter 7 Debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing.

In re Goble, 401 BR 261 (Bankr. S.D. Ohio 2009) - Chapter 7 Debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing; additional secured debt payments that Debtor would be required to make in Chapter 13 in order to cure the pre-petition mortgage arrears; and priority claim for real property taxes owed on property to be surrendered.

In re Marchionna, 393 BR 512 (Bankr. N.D. Ohio 2008) – Chapter 13 debtor may not take deductions on Form 22C for future payments

on debt secured by real estate which she plans to surrender.

In re Thomas, 395 BR 914 (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.

5.33 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.

5.34 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.

5.35 Calculation of Disposable Income – Automobile Operating Expense

In re Maura, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Operating expense may be claimed for up to two operating automobiles. Debtors with three automobiles not permitted to multiply single car allowance by three and claim higher amount. Although IRS Collection Guidelines permit taxpayer to claim operating expenses for every vehicle for which operating is reasonable, Section 707 limits operating expense to two vehicles. IRS guidelines cannot overrule express statutory limit.

In re Warden, 2012 WL 1414277 (Bankr. E.D. Wis. 2012) – Single debtor who owned and drove two vehicles entitled to operated expense deduction for both cars. Deduction is not limited to reasonableness of retention of second vehicle. Further, it appeared reasonable for debtor to retain both cars as both were older and debtor retained both cars in the event one became inoperable.

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

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

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

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

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

5.36 Calculation of Disposable Income – Automobile Title Liens

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

5.37 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.

5.38 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.

5.39 Calculation of Disposable Income – Health Savings Account

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

5.40 Calculation of Disposable Income – Education Expenses

In re Maura, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Student loan payments are not special circumstances as those expenses are not beyond the control of the debtor and are not extraordinary or exceptional. Parochial school expense is not special circumstance where debtors failed to prove no alternative. UST presented expert testimony that Dearborn Public Schools presented a reasonable alternative that could meet educational requirements of children and there was no evidence that public schools had levels of safety and security that were lower than the parochial schools involved. Preference for religious education is not special circumstance. Further, Congress specifically allowed school expenses not to exceed \$1775 per year per child, indicating that Congress specifically intended to provide limited amount which debtors could claim for purposes of means test.

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

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.

5.41 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.

5.42 Calculation of Disposable Income – Retirement Loan Repayment

In re Maura, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Debtors cannot deduct on means test payments on retirement loans or voluntary contributions to retirement accounts. Loan payments are not involuntary deductions that are required for employment. While contributions are required to participate in employer’s “matching contribution” program, they are not conditions of employment itself.

In re Weinert, 2013 WL 1694482 (Bankr. E.D. Mi. 2013) – Debtor cannot deduct on means test payments on retirement loan. Repayment of retirement loan is not “other necessary expense” within scope of Section 707. Participation in plan is voluntary and ability to borrow is at employee’s discretion. Means test form expressly excludes from “other necessary expenses” contributions to retirement plans, and there is no reason to distinguish between contributions and loan payments. Continued repayment of loan is not condition of employment, where failure to repay loan would trigger tax consequence but no adverse employment actions.

5.43 Social Security Income

Anderson v. Cranmer, 2012 WL 5235365 (10th Cir. 2012) – Social Security of debtor and non-filing spouse are excluded from calculation of projected disposable income and do not need to be included in calculating plan payment. Exclusion of SSI from calculation of PDI was not lack of good faith that prevents confirmation of the plan.

Beaulieu v. Ragos, 2012 WL 5292949 (5th Cir. 2012) – Social Security benefits are not included in calculation of projected disposable income. Although Code does not define “projected disposable income” the definition of “disposable income” specifically excludes Social Security income; and definition of “current monthly income” similarly excludes Social Security income. In light of Congressional intent to exclude Social Security from CMI and disposable income, “it makes little sense to circumvent that prohibition by allowing social security income to be included in *projected* disposable income.” Conclusion is further bolstered by Social Security Act, 42 USC Section 407(a), enacted in 1935, that prohibits Social Security income from being subject to “any bankruptcy or insolvency law.” Debtors’ refusal to commit 90% of their Social Security income is not “bad faith” that would preclude confirmation where Debtors, as a matter of law, are not required to include SSI in calculating plan payment.

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

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

Mains v. Foley, 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – 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 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.

5.44 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.

5.45 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.

5.46 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. Ill. 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.

5.47 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.

5.48 Self-Employed Debtor

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

In re Romero, 2013 WL 241742 (Bankr. S.D. Fla. 2013) – Self-employed debtor is entitled to deduct business expenses in determining whether debtor is above or below median income. Precluding debtor from deducting expenses produces artificial calculation of income that does not actually exist. Debtor was below median and had 36 month applicable commitment period even though, without deducting expenses, debtor would have been above median.

In re Grabarczyk, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – Debtor not permitted to deduct mortgage obligation on rental property where amount of mortgage payment has already been deducted in determining the net rental income which is been used by debtor's in calculating Current Monthly Income. Allowing 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.

5.49 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.

5.50 Household Size

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

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.

5.51 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.

5.52 Special Circumstances

In re Weinert, 2013 WL 1694482 (Bankr. E.D. Mi. 2013) – Presumption of abuse under Section 707(b)(2) can be rebutted only by showing of “special circumstances” such as serious medical condition or call to active military duty. Special circumstances are limited to events which require debtor to incur additional expenses or adjustments to income. Retirement plan loans are not special and are common events in bankruptcy cases.

In re Barbutes, 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Special circumstances are limited to those that put a strain on debtor’s budget and arise from circumstances normally beyond debtor’s control and that are highly unusual. Debtor’s high monthly home maintenance expense is “special circumstance” on peculiar facts of this case, where Debtor works 2 jobs; debtor’s wife also works full time notwithstanding serious and chronic back pain; debtor’s home was built in the 1970’s and requires serious and well- documented maintenance expenses, and debtor’s daughter and disabled son-in-law live with debtor. Debtor lacked any reasonably alternative to the necessary maintenance where debtor’s house was fully encumbered and debtor lacked any reasonably ability to sell house or to obtain alternative housing. Court would allow IRA contributions to be considered special circumstances where Debtor is 52 years old and has a limited amount of years he is employable in his profession as a pilot. Debtor’s wife suffers from chronic back pain as a result of her work as a hygienist and is also likely limited in her employment life span. Today’s America, which promotes not relying solely on Social Security requires some retirement savings. For these debtors, the court finds the Roth IRA contributions are allowed as a special circumstance for which there is no reasonable alternative.

In re Meyers, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Debtor rebutted presumption by filing affidavit of special circumstances alleging that debtor’s brother, who lived with debtor, received unemployment but did not provide any of those funds for household expenses. With that income excluded, debtor had income below Section 707(b) presumption.

In re Roach, Case No. 09-76184 (Bankr. E.D. Mi. 2010) - Congress did not provide exhaustive list of special circumstances but did provide examples including serious medical condition or call to armed forces, which are events that are beyond debtor's control and put a strain on debtor's budget. 401-k loan payments are not "special circumstances". There is nothing unusual or special for either borrowing money from a retirement plan or loan payments. Loan payments were not taken by deducting from debtor's pay, but were voluntarily paid by deductions from debtor's checking account.

In re Burggraf, Case No. 10-32297 (Bankr. N.D. Ohio) - Bankruptcy Code does not specifically define what constitutes a “special circumstance” as applied to Section 707(b)(2)(B)(i) but does provide two examples: (1) a serious medical condition; or (2) a call to active duty in the Armed Forces. A condition giving rise to a “special circumstance” should be limited to situations which not only put a

strain on a debtor's household budget, but they arise from circumstances normally beyond 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.

5.53 Marital Adjustment – Non-filing spouse

U.S. Trustee v. Holmes, 2013 WL 4446947 (Bankr. M.D. Pa. 2013) – Debtor could exclude money of debtor's same sex partner in calculating current monthly income. Although debtor and partner had significant joint debt, debtor not required to include income of partner not used for payment of joint debts. Debtor and partner had no legal relationship that would warrant combination of assets and liabilities, and personal expenses of partner were not expenses of debtor nor payment of obligations for the support of debtor. Partner was separate individual with separate property rights and liabilities which the court must respect.

In re Persaud, 486 BR 251 (Bankr. E.D.N.Y. 2103) – Debtor cannot deduct as marital adjustment educational expenses paid by non-filing spouse, from separate account of non-filing spouse, for expenses of debtor's and non-filing spouse's children. Section 101(10A)(B) includes in CMI amounts regularly paid for expenses of debtor's dependents. Section 101(10A)(B) does not focus on the source of the funds used to pay those expenses, but on the nature of the expenses paid. Educational expenses for debtor's children constitute expenses regularly paid for the benefit of debtor's dependents.

In re Tosvard, 2013 WL 122508 (Bankr. D. Colo. 2013) – Chapter 13 Debtor permitted to take marital adjustment for mortgage payments made by non-filing spouse on property owned solely by non-filing spouse. Property owned by non-filing spouse before parties were married. Debtor and spouse maintained separate checking accounts and did not co-mingle funds. Payments by non-filing spouse were for his individual debts related to his individual property and could be excluded from CMI calculation.

Bankruptcy Administrator v. Gregory, 471 BR 823 (Bankr. E.D. N.C. 2012) – Income of non-filing spouse used over preceding 6 months to renovate debtor's and spouse's former to prepare for possible sale can be excluded from calculation of Current Monthly Income. Section 101(10A)(B) sweeps in payments made by third parties for expenses of debtor or debtor's dependents. Capital improvements to home in which neither debtor nor dependents resided are not "household expenses" of debtor or dependents.

Sturm v. U.S. Trustee, 2011 WL 2746059 (N.D. Ohio 2011) – Debtor is entitled to marital adjustment for mortgage payment made by non-filing spouse for property owned solely by the non-filing spouse. Debtor can take marital adjustment for non-filing spouse's credit card payments to the extent that the cards were used solely for the benefit of the non-filing spouse's separate expenses. To the extent the credit cards may have been used to purchase goods that benefitted 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.

5.54 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).

5.55 Amendments to Schedules – Continuing Duty to Disclose

Axis Surplus Insurance Company v. Flugence, Case No. 13-30073 (5th Cir. 2013) – Chapter 13 debtor has continuing duty to disclose causes of action that arise post-petition and post-confirmation. Whether a particular asset should be available to satisfy creditors may be contested issue, and disclosure allows that issue to be resolved as part of orderly bankruptcy process. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Debtor judicially estopped from pursuing undisclosed cause of action.

EEOC v. JPMorgan Chase Bank, 2013 WL 944200 (S.D. Ohio 2013) – Debtor has continuing duty to disclosed changes in financial condition and assets during pendency of case. Debtor wrongfully failed to schedule pre-petition tort claim initially and wrongfully failed to amend schedules to disclose that claim at any point during bankruptcy case.

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

5.56 Standing to Seek Dismissal Under for Abuse

In re Gandy, 2013 WL 3712425 (Bankr. E.D. Tn. 2013) – Where debtor’s statement of current monthly income indicates that debtor’s CMI multiplied by 12 is less than the applicable median income, creditors lack standing to request dismissal under Section 707(b). Determination is made on face of form B22. Creditor could not circumvent restrictions on ability to allege abuse by alleging that debtor falsely underreported income. Creditors are not authorized to go behind the figures listed in the Chapter 7 Statement of Current Monthly Income and Means–Test Calculation for the purposes of filing a § 707(b) motion. What is reflected on the face of the filed document is the basis by which a determination under § 707(b)(6) and/or (7) is made. Creditor’s remedy, if at all, was to seek contest discharge under Section 727.

G. Involuntary Petitions

5.57 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.

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

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

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

5.58 Credit Counseling – Section 109(h)

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

5.59 Petitioning Creditors

In re Miller, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Involuntary petition requires three qualified unsecured creditors holding claims in the aggregate of at least \$14,425. Additional unsecured creditors can join the petition after filing for purposes of meeting requirements for number of petitioning creditors and dollar amount of debt.

In re Hicks, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Involuntary petition requires at least three petitioning creditors including any additional creditor who timely joins the petition, who hold claims that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount, and where the non-contingent undisputed claims aggregate at least \$14,425.00 more than the value of any liens on property of 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.

5.60 Debts Subject to Bona Fide Dispute

In re Freedom Filler, LLC, 2013 WL 3379365 (Bankr. N.D. Ohio 2013) – Whether there is a bona fide dispute depends upon “there [being] either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts. Debts were not subject to good faith dispute where terms of contract required delivery of machines that Creditors bought from Debtor but which had not been delivered. Nothing in contract excused delivery of machines where law regarding use of machines by purchasers may have changed, but law had not changed regarding sale or delivery of machines. Contract clause that purports to allow Debtor to refuse to deliver for any reason, or no reason, would render contract illusory but would not provide basis for Debtor to retain funds paid by creditors without delivering machines, and would at least create cause of action for unjust enrichment which is sufficient basis for involuntary petition.

In re Miller, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Debt is subject to bona fide dispute if there is genuine issue of material fact that bears on debtor's liability or a meritorious contention as to the application of law to undisputed facts. Court is not required to resolve any dispute, only to determine whether there is a legitimate legal basis to challenge the claim. Debts were not subject to bona fide dispute where debtor admitted signing promissory notes and admitted that debtor had not made payments. Debtor's assertion that notes were not intended to be cross collateralized with loans to debtor's husband were not supported by documents themselves which unequivocally cross-defaulted and cross collateralized loans, such that Lender properly called a default on Debtor's Notes based on husband's defaults on individual cross-defaulted notes. Evidence also indicated that debtor had failed to pay property taxes on collateral which constituted independent default, and that debtor had stopped paying on her notes because of disputes with the Bank and as a result the loans were in default.

In re Miller, 487 BR 875 (Bankr. E.D. Tn. 2012) – Claim is subject to a bona fide dispute if there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts. bankruptcy court is expected to make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Debtor must have legitimate legal or factual basis to challenge the claim. State court denial of lender's Motion of r Summary Judgment does not conclusively establish that claim is subject to bona fide dispute. Denial of Summary Judgment is not disposition of any aspect of the claim, but is merely pretrial order that case can proceed to trial. Further, Debtor's counsel acknowledged to State Court Judge at Summary Judgment hearing that even if Debtor's defenses were valid, Debtor nonetheless owed lender the principal sum of the note, which was \$2.8 million. Debtor also had a number of other loans owed to the same creditor as to which Debtor had not lodged any defenses, and on which Debtor owed at least \$350,000.00, which is sufficient to support the involuntary petition.

In re Seventh Avenue Properties, 2013 WL 655871 (Bankr. M.D. Tn. 2013) – Involuntary Petition established that bona fide dispute did not exist. Debtor was partnership consisting of four partners. One of the partners borrowed money on behalf of the partnership, apparently without knowledge of the other partners. Each partner was agent of partnership and actions taken on behalf of partnership bound partnership even in absence of knowledge of remaining partners. Further, party who borrowed money was managing general partner and remaining partners previously agreed to allow partner to manage day-to-day affairs of business. Alleged debtor did not present any evidence that partner was not authorized to borrow money on behalf of partnership.

In re Hicks, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Claim is subject to bona fide dispute if there is either a genuine issue of material fact that bears on liability or a meritorious contention as to the application of law to the undisputed facts. Congress intended to disqualify a creditor if there is any legitimate basis for 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.

5.61 Not Generally Paying Debts as They Come Due

In re Miller, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Creditor must show more than a general showing that debtor's financial condition and debt structure results in a few unpaid debts. Court must consider proportion of debt being paid to total debt as well as the number of creditor being paid as a percentage of the total creditor body. However, where the debtor fails to pay just one creditor or one debt that makes up a substantial portion of debtor's liability, debtor will be found to not generally paying debts as they come due. Evidence indicated that debtor was in default on four separate loans from Bank as well as a least obligation to another petitioning creditor and an unsecured obligation owed to a private creditor. Although debtor demonstrated that she was generally paying living expenses and day-to-

day creditors, the large majority of her debt was owed to the petitioning creditors and far outweighed the total debt owed to debtor's day-to-day creditors such as credit cards and utility services.

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

5.62 Secured Versus Unsecured Creditors

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

5.63 Eligible for Relief Under Chapter in Which Involuntary Petition Filed

5.64 Burden of Proof

In re Seventh Avenue Properties, 2013 WL 655871 (Bankr. M.D. Tn. 2013) – Petition granted where alleged debtor failed to file response to Involuntary Petition until night before hearing.

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

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

5.65 Sanctions

Rosenberg v. DVI Receivables, XIV, LLC, 2012 WL 3990725 (Bankr. S.D. Fl. 2012) – An award of fees and costs, pursuant to 11 U.S.C. § 303(i)(1) requires: (1) the court must have dismissed the involuntary petition; (2) the dismissal must be other than a consent by all petitioners and the debtor; and (3) the debtor did not waive its right to recovery under the statute. Once involuntary case is dismissed, burden shifts to petitioning creditors to present evidence to disallow an award of fees, and there is no requirement that petitioner have acted in bad faith in filing the petition. Award of fees should be made unless petitioners demonstrate otherwise based upon the totality of the circumstances. Fees can include fees and costs incurred by the involuntary debtor in defending an appeal from the bankruptcy court's decision to dismiss an involuntary case. Section 303(i) imposes liability on "petitioners." Petitioning creditor refers to those entities commencing an involuntary bankruptcy case—whether or not these entities are qualified or authorized to do so and is not limited to person who actually signed the petition but include creditors who cause the filing of the petition. In determining amount, court must consider (1) the time and labor required, (2) the novelty and difficulty of the legal questions, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

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

In re Creekside Senior Apartments, LP, 477 B.R. 40 (6th Cir. BAP 2012) – “Property of the estate” includes real property and all rights and privileges attached to, and covenants running with, the land. Property consisted of low income apartment complexes, each of which had Low-Income Housing Tax Credits attached to the property. Tax credits provide incentive to develop low-income housing properties in exchange for stream of tax credits, and are conditioned on property maintaining compliance with Tax Credit program requirements. If the property is sold during the term of the tax credits, the purchaser acquires the remaining stream of tax credits as if the prior owner had not sold the property. Tax credits are attached to the property and belong to the owner of the property. Tax credits could not be severed from the property and do not exist separate from ownership of the property, and must be considered in valuing the property itself.

Elswick v. Miller, 2012 WL 2122170 (E.D. Ky. 2012) – Property of the estate is broad and far-reaching concept and includes every conceivable interest of 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.

Mayer v. Giarmarco, Mullins & Horton, PC., 451 BR 702 (E.D. Mi. 2011), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was “recovered” by plaintiff in that she was allowed to retain the funds, such that attorney services produced a “recovery” against which a charging lien could be imposed.

In re Fleming, 424 BR 795 (Bankr. W.D. Mi. 2010) – Debtor would be required to turn over to Trustee property of estate even if debtor had already divested himself of that property. Section 542 requires turnover to the Trustee of all property of the estate. Debtor's schedules did not list a potential tax refund and Debtor did not exempt any potential tax refund. When Debtor filed his tax return, it indicated a refund, which was sent directly to 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 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 Hargis, 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Property that reverts in debtor at confirmation is property that existed as of date of petition. Property that debtor acquires post-petition such as life insurance proceeds and proceeds of inherited 401-k are property of estate that do not revert and remain property of estate.

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

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

In re Hodges, 2013 WL 1755483 (Bankr. E.D. Tn. 2013) – Equity that accrues in converted case between commencement of Chapter 13 and conversion to Chapter 7 is not property of the estate. In determining whether property has value that could benefit estate, court will fix value as of original petition date. As of original petition, property value was substantially less than amount owed. Fact that property appreciated and may now have equity did not give Trustee claim to that equity. Property that would be available to Chapter 7 trustee worth less than debt, such that order to compel abandonment would be entered.

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

6.7 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 entirety even where only one of the owners is liable for the unpaid taxes. Non-liaible owner is entitled to one-half of the net proceeds with taxing authority retaining half of proceeds, up to amount necessary to satisfy tax lien.

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

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

Shapiro v. Sassak, Case No. 09-61221 (Bankr. E.D. Mi. 2010) - Michigan law creates statutory presumption that certain types of personal property owned by spouses are held as tenants by the entirety, including bonds, stocks, mortgages, notes and evidence of indebtedness. Brokerage Account originally titled as “Joint Tenants and not as tenants in common or as tenants by the entirety” not sufficient to rebut presumption of entirety where debtor and wife testified that they really did not have any intent with regard to the manner in which the account was originally held, and that account was later re-titled as “Joint - tenants in entirety”.

Tomasi v. Citizens Bank, Case No. 09-63027 (Bankr. E.D. Mi. 2010) - Bankruptcy estate’s interest in entirety property is in whatever equity is available in the entirety property that can be liquidated for the benefit of the joint creditors of the debtor and the non-filing spouse. A tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons and is intended to protect the marital estate. Each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entirety, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entirety property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. A creditor with a judgment on a joint debt may levy upon the property itself and thus on the interests of both spouses. The debtor’s interest in that portion of entirety property reachable by joint creditors therefore is not exempt. As a result, the trustee is authorized to liquidate entirety property for the benefit of the joint creditors of the individual debtor and that debtor’s non-filing spouse. Where the value of the property at issue is less than the amount due on the first mortgage, there is no equity available to pay joint claims. Therefore, the estate has no interest in the entirety properties of the debtor and the non-filing spouse.

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.

6.8 Corporations and LLCs

In re Breece, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor’s status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor’s homestead, as debtor had no interest in the specific property to claim as exempt.

In re Schmakel, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor’s membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor’s homestead, as debtor had no interest in the property that could be properly claimed as exempt.

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

6.9 Leaseholds

In re Thorpe, 2011 WL 671935 (Bankr. E.D. Ky. 2011) – Debtor’s interest in mobile home that debtor was leasing on lease-purchase was property of estate.

In re KY USA Energy, Inc., 2010 WL 4923644 (Bankr. W.D. Ky. 2010) – An oil and gas lease is not truly a lease but rather a conveyance of an interest in realty.

In re Appalachian Oil Co, Inc., 2009 WL 2843371 (Bankr. E.D. Tn. 2009) – Non-residential Lease that is terminated pre-petition leaves Debtor with no possessory or leasehold interest to become property of the estate and Debtor is not permitted to assume or assign that lease. Whether a lease has been terminated pre-petition is determined by applicable state law where the property is located. A termination notice must clearly and unequivocally terminate the lease and must leave no doubt as to the intention of the party giving notice. Notice delivered by Landlord was not “clear and unequivocal” termination where notice failed to identify any alleged breach of the lease and stated only “I will be compelled” to take action. Further, lease required Landlord to retake possession before attempting to terminate lease. Landlord had not retaken possession nor taken any steps that would operate as a “legal substitute” for re-entry and had no right under the lease to attempt to terminate the lease. Lease remained property of estate subject to assumption and assignment.

6.10 Life Estates

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

6.11 Abandonment by Trustee

Cook v. Wells Fargo Bank, NA, Case No. 12-2100 (10th Cir. 2013) – Failure to follow procedural requirements of Section 554 and Rule 6007 renders abandonment ineffective. Debtor did not reacquire title to pre-conversion actions for alleged violate of Automatic Stay while case was in Chapter 11 and prior to conversion to Chapter 7, where Chapter 7 Trustee did not provide notice and an opportunity for hearing on potential abandonment. Neither Trustee’s Notice of Abandonment nor Report of No Distribution provided any opportunity for an objection to the abandonment, where the Notice merely stated that the Trustee “gives notice that he abandons all remaining property of the estate”. There were no provisions for objecting to abandonment, no indication that either the notice or report of no distribution were sent to interested parties, and no hearing to entertain objections. Intent to abandon, without proper notice to creditors, is insufficient to establish abandonment.

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 reconstitute 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.

6.12 Technical Abandonment

Tyler v. DH Capital Management, Inc., Case No. 13-5021 (6th Cir. 2013) – All pre-petition causes of action become property of estate upon filing, and only the trustee has standing to pursue actions post-petition. Causes of action that are not disclosed in bankruptcy schedules are not abandoned upon closing of case and remain property of estate that may be prosecuted only by the Trustee.

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Upon filing for bankruptcy, all pre-petition causes of action held by debtor become property of estate and may only be prosecuted by the Trustee. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim. Undisclosed assets are not administered and are not deemed abandoned at closing of case, but remain property of the estate even after the case is closed. Chapter 11 case closed without confirmation of plan could be re-opened to administer undisclosed causes of action for alleged pre-petition fraudulent transfers. If Bankruptcy Court concludes that re-opening is not warranted or that, after re-opening, trustee abandons causes of action, then Plaintiff, as party allegedly injured by transfer, would have standing to prosecute fraudulent transfer actions.

In re Rotunda, 2013 WL 486968 (Bankr. D.C. 2013) – Pre-petition cause of action constitutes property of estate. Cause of action that was not disclosed and not administered is not abandoned upon closing of case, and Trustee of the Debtor can move to reopen case to administer.

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.

6.13 Implied Abandonment

Rugiero v. Flagstar Bank, 2013 WL 3849930 (E.D. Mi. 2013) – There is no concept in the bankruptcy code for “implied abandonment”. Abandonment requires notice to creditors, with a hearing if anyone objects. Unscheduled assets cannot be abandoned even if the trustee knows of its existence. Debtor had a dispute with the lender prior to commencement of case, yet failed to disclose that dispute in the schedules. Dispute is property of estate and debtor lacks standing to pursue it independent of Chapter 7 Trustee.

6.14 Motion to Compel Abandonment

In re Hodges, 2013 WL 1755483 (Bankr. E.D. Tn. 2013) – In determining whether to compel abandonment, Court should consider whether there is a reason that the estate’s interest should be preserved or whether the property is so worthless or burdensome that the property should be removed from the estate. If the asset has no equity and the estate is being liquidated, abandonment is almost always appropriate because no unsecured creditor could benefit from administration. Lack of equity creates rebuttable presumption that can be

rebutted by proof that liens can be subordinated to interest of trustee or that some other value or benefit will accrue based on estate's retention of property. Equity that accrues in converted case between commencement of Chapter 13 and conversion to Chapter 7 is not property of the estate. In determining whether property has value that could benefit estate, court will fix value as of original petition date. As of original petition, property value was substantially less than amount owed. Fact that property appreciated and may now have equity did not give Trustee claim to that equity. Property that would be available to Chapter 7 trustee worth less than debt, such that order to compel abandonment would be entered.

In re Williams, Case No. 08-71337 (Bankr. E.D. Mi. 2010) – Debtor has standing to file Motion to Compel Abandonment of property by Trustee. However, Debtor cannot seek to “abandon” debtor's own interest in the property.

6.15 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.

6.16 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.

6.17 Tax Refunds

US Department of Agriculture v. Riley, 485 BR 361 (W.D. Ky. 2012) – Post-petition setoff by governmental agency against debtor's tax refund did not violate stay. To establish a valid right of setoff in bankruptcy, creditor must establish four conditions: (1) creditor's claim must arise before the commencement of the case, (2) creditor must have a debt to debtor that arose before the commencement of the case, (3) the claim and debt must be mutual, and (4) the claim must be valid and enforceable. Governmental agencies have statutory right to setoff against tax refunds and direct the Secretary of Treasury to reduce a debtor's "tax overpayment" by past-due amounts owed to other agencies before determining whether taxpayer is entitled to refund. Taxpayer "overpayment" of taxes does not create entitlement to refund. An overpayment of taxes is any payment made by taxpayer that is over and above tax liability, whereas a refund is amount that Internal Revenue Service is obligated to pay taxpayer after IRS has exercised its statutory right to offset. Debtor's interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer's estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers' obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors' overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.

Winters v. Comm'n of Internal Revenue Service, 2013 WL 364328 (Bankr. M.D. Tn. 2013) – IRS issued erroneous refund to debtor post-petition although debtor had substantial liability owed for prior years taxes. Debtor returned the check to the IRS a few months later. To extent debtor may have been entitled to pre-petition refund, that entitlement would be property of estate. However, refund check was erroneously issued as debtor had no right to that refund. Debtor never acquired legal or equitable interest in the refund and court could not compel IRS to turnover the check or its proceeds to the Trustee.

Santiago v. Rivera, Case No. 11-075 (1st Cir. BAP 2012) – All tax refunds received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306.

Matos v. Rivera, Case no. 11-074 (1st Cir. BAP 2012) – All tax refund received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306.

In re 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.

6.18 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.

6.19 Property Settlements

Mayer v. Giarmarco, Mullins & Horton, PC., 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – State Court can impose constructive trust on marital assets for benefit of third parties, not just one of the spouses. A pre-petition court-granted equitable interest in an asset can be the basis for the imposition of a constructive trust with respect to that asset. Something more than a simple failure to live up to a legal obligation is required to justify the imposition of a constructive trust. There must be some other basis pursuant to which debtor was under an equitable—and not simply a legal—duty to convey IRA proceeds to creditors in order to support the finding that the judgment of divorce impressed those proceeds with a constructive trust. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was “recovered” by plaintiff in that she was allowed to retain the funds, such that attorney services produced a “recovery” against which a charging lien could be imposed.

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

6.20 Causes of Action

Tyler v. DH Capital Management, Inc., Case No. 13-5021 (6th Cir. 2013) – All pre-petition causes of action become property of estate upon filing, and only the trustee has standing to pursue actions post-petition. Cause of action for alleged violation of Fair Debt Collection Practices Act was pre-petition claim where crux of argument was that creditor violated FDCPA by filing suit against debtor. Suit was filed before bankruptcy commenced, although debtor was not served with the complaint until post-petition. All elements of cause of action occurred prior to commencement of bankruptcy, such that claim constituted pre-petition cause of action.

CH Holding Co. v. Miller Parking Co., 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor's related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor suits against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.

Windham v. East Ohio Gas, 2013 WL 5216429 (N.D. Ohio 2013) – Debtor's failure to list action for wrongful termination in bankruptcy schedules resulted in action being dismissed for lack of standing. Debtor had filed challenge with EEOC months before filing bankruptcy, yet debtor did not list claim or pending EEOC investigation in bankruptcy schedules. Based on bankruptcy filing, causes of action became property of bankruptcy estate and only the Trustee had standing to pursue recovery absent evidence that Trustee abandoned claims in course of case administration.

Epps v. United States, 2013 WL 4096001 (W.D. Tn. 2013) – Commencement of bankruptcy case creates an estate which includes all causes of action that debtor had as of the date of commencement. In Chapter 7, Bankruptcy Trustee is sole party with standing to pursue causes of action. In Chapter 13, debtor retains standing to pursue claims that are property of the estate.

Buzulencia v. Ohio Bell Telephone Co., 2013 WL 4049679 (N.D. Ohio 2013) – Bankruptcy trustee becomes real party in interest when bankruptcy petition is filed, and has authority to commence and prosecute any action or proceeding on behalf of the estate. Bankruptcy trustee is not judicially estopped from appearing in and prosecuting action based on debtor's failure to disclose cause of action in schedules, and is not precluded from prosecuting action merely because debtor claimed value of action exempt.

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Owner of property lacks standing to prosecute action for alleged violation of Michigan foreclosure laws regarding mediation where violation, if any, occurred prior to commencement of bankruptcy case. Upon filing of bankruptcy, action became property of estate and only trustee could thereafter maintain action absent abandonment by the trustee.

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Upon filing for bankruptcy, all pre-petition causes of action held by debtor become property of estate and may only be prosecuted by the Trustee. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim.

Staker v. Jubber, Case No. 12-091 (10th Cir. BAP 2013) – Debtor lacked standing to appeal settlement of claims entered into by Chapter 7 trustee. Upon filing of case, Trustee became the sole representative of the estate with power to assert, enforce or settle claims. Any judgments that debtor obtained pre-petition also became property of estate, vesting in the Trustee the full right to administer and, if appropriate, settle and vacate those judgments.

Auday v. Wet Seal Retail, Inc., 2012 WL 5259002 (6th Cir. 2012) – Pre-petition cause of action arising out of alleged pre-petition age discrimination is property of estate that can be prosecuted only by, and in the name of, the Trustee, unless the trustee abandons the cause of action. Debtor failed to schedule cause of action and failed to later amend schedules to disclose cause of action. Although Trustee became aware of cause of action before discharge entered, entry of discharge did not abandon cause of action or allow debtor to pursue action in her own name. Final Judgment entered in favor of debtor must be vacated as debtor lacked standing to pursue action in her own name.

In re Schwartz, 2012 WL 4965284 (Bankr. W.D. Ky. 2012) – Post-petition claim that is rooted in pre-bankruptcy past or relationship will be property or estate. Question is not whether malpractice claim accrued prior to filing, but whether malpractice claim is rooted in pre-bankruptcy conduct. Debtor's action against prior bankruptcy counsel was rooted in pre-bankruptcy past as entire cause of action arose out of attorney's malpractice in filing case in first instance. But for negligent handling of case at the outset, later events that gave rise to actual claim would never have occurred.

In re 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.

6.21 Pre-Petition Alimony and Support Awards

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

6.22 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.

6.23 Titled Assets – Auction Sales

In re Dixon, 2013 WL 1397464 (Bankr. E.D. Mi. 2013) – In auction sales, Michigan Compiled Laws section 440.2328 states that title transfers when the auctioneer announces that the auction is complete. However, under Michigan law, ownership of a titled motor vehicle does not pass to a purchaser until purchaser signs application for title and takes possession of vehicle. Court could not determine ownership of motorcycle without evidentiary hearing. Although auctioneer announced sale as closed prior to bankruptcy petition being filed, record was unclear as to when the buyer at the sale signed the title documents or took possession of the motorcycle.

6.24 Jointly Owned Bank Accounts

Lake Trust Credit Union v. Houston, Case No. 12-10534 (E.D. Mi. 2012) – Reversing lower court ruling, Court concluded that joint account in credit union, bearing name of debtor and debtor's mother, is a "multi-party account" under Michigan Credit Union Act on which credit union holds perfected lien and rights of setoff regardless of identity of party making deposits. MCUA imposes lien on any deposit account from which a member may withdraw funds without the consent of another person and for any obligation owed to the credit union by that member. Credit Union that holds claim against one of the parties is not required to establish that the obligor is the owner of some or all of the funds in the account. Non-debtor third party cannot avoid credit union right to setoff or enforce lien against entire account by presenting evidence that non-debtor made all deposits and withdrawals from account. While presumptions of ownership may be relevant in disputes between members or between members and creditors, these presumptions do not apply to credit union which is not a "creditor" within meaning of statute creating presumption.

6.25 Contract Rights

Barbacci v. Marshall Buck Financial Group, LLC, 2013 WL 1222599 (Bankr. N.D. Ohio 2013) – Property of estate includes all proceeds, product, offspring, rents or profits of or from property or the estate, except as such earnings are for services performed by an individual debtor after commencement of the case. Debtor had pre-petition employment agreement for 2 years at \$2,000 per month, for which debtor was to provide referrals to employer. Although written agreement did not make right to receive payments conditional on continued referrals, evidence indicated that debtor's right to receive post-petition payments were conditioned on debtor's continued provision of services post-petition, making future payments the result of services performed after commencement. As such, future contract payments were not property of estate.

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

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

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

6.26 Contract Deposits

Lawrence v. Commonwealth of Kentucky, 2013 WL 2422669 (Bankr. W.D. Ky. 2013) – Ability of Trustee to pursue turnover action depends on status of property in hands of third party as "property of estate". Prior to commencement of case, debtor paid non-refundable deposit in connection with proposed purchase of real estate. Upon filing, Trustee made demand for the return of the deposit, claiming deposit was property of estate. Trustee's rights were limited to those that the debtor had as of the moment of commencement of case. Debtor had no right to return of money – remedies were limited to either application of the purchase price to the balance due at closing, or forfeiture to seller as liquidated damages. Contract language was clear and unequivocal and did not afford debtor any right to retake possession of deposit. As such, deposit was not property of estate and trustee could not compel turnover.

6.27 Land Contract Interests

Higgason v. Porter, 2013 WL 4715685 (Bankr. E.D. Ky. 2013) – Land Contract Vendee acquires equitable interest in property, while legal title remains in seller. Seller holds security interest in underlying property pursuant to the Land Contract.

6.28 Accounts Receivable

French v. Butler, 2013 WL 4453039 (Bankr. N.D. Ohio 2013) – Debtor's entitlement to unpaid rent from tenant that accrued pre-petition is property of the estate that Trustee is entitled to collect. Judgment entered against tenant in turnover action for balance owed.

6.29 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.

6.30 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.

6.31 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.

6.32 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.

6.33 Trust Property – Generally

The White Family Companies, Inc. v. Slone, 2013 WL 3925820 (6th Cir. 2013) – Property held in trust by a debtor, where debtor holds only bare legal title, is not property of debtor. Bank’s provisional credit of deposit into Debtor’s trust account did not create a trust relationship when the deposited check bounced. Although the money had been deposited into the trust account with intent to create trust relationship, the check that had been entrusted to the debtor bounced, which prevented the creation of any trust relationship between Debtor and remitter with respect to those funds. Instead, the provisional credit amounted to a loan by the Bank to the Debtor when the deposited check bounced, and the funds in the trust account were the proceeds of this “loan” and belonged to the Debtor.

6.34 Express Trusts – Spendthrift Provisions

Meoli v. Thrun, Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Section 541(c)(2) excludes from property of the estate any property that is subject to a restriction on transfer of a beneficial interest in a trust that is enforceable under applicable non-bankruptcy law. Inquiry is three part test: does the debtor have a beneficial interest in a trust; is there a restriction on the transfer of that interest; and is that restriction enforceable under non-bankruptcy law. Debtor had interest in trust that contained clauses preventing mandatory distributions and allowing distributions solely in trustee’s discretion, trust expenses and claims had to be paid before any distributions could be made and those expenses and claims had not been determined, and trust otherwise had a valid spendthrift provision. First two conditions were not restrictions on transfer of interest but were merely limitations on distribution rights which do not prevent interest from becoming property of estate, as conditions may affect value of interest but not transferability of interest. Whether spendthrift clause itself is valid is matter of state law. Spendthrift clause is invalid to extent beneficiary has equivalent of ownership allowing beneficiary to demand distribution. Trust document specified that at age 30, beneficiary could demand full distribution of assets. Spendthrift clause enforceable only to point where beneficiary turns age 30, after which the spendthrift clause is lifted. Debtor had attained age 42 before filing bankruptcy. As such, spendthrift clause no longer controlled and interest became property of estate.

6.35 Resulting Trusts and Estate Planning Devices

Goddard v. Heldt, 2013 WL 1960599 (10th Cir. 2013) – Trustee could not use BFP status to defeat resulting trust held by debtor’s mother in property where mother was in open and notorious possession of property at time case filed. Years before debtor filed bankruptcy, mother transferred property into debtor’s name. Mother purchased the property and made all payments on the property, paid all taxes and insurance, and lived in the property. Transfer was done as estate planning device. Court ruled that property was subject to a resulting trust in favor of mother. Trustee argued that resulting trust was avoidable as an unrecorded interest subject to Trustee’s power as BFP. Mother’s open and unambiguous possession of property was sufficient under State law to give constructive notice of Mother’s interest, thereby defeating Trustee’s status as BFP.

6.36 Constructive Trusts

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh'g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Constructive trust is remedy, not cause of action. Bankruptcy court lacks authority to impose constructive trust unless, prior to commencement of case, constructive trust was imposed under state law. Where debtor's mother never claimed that debtor held title to property under constructive trust for mother's benefit prior to commencement of bankruptcy case, mother could not assert constructive trust as defense to action by Trustee to recover preferential transfer of property by debtor to mother 5 months pre-petition.

Mayer v. Giarmarco, Mullins & Horton, PC., 41 BR 702 (E.D. Mi. 2011), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was "recovered" by plaintiff in that she was allowed to retain the funds, such that attorney services produced a "recovery" against which a charging lien could be imposed.

In re Warns, 2013 WL 2422708 (Bankr. N.D. Ohio 2013) – Property held by debtor in constructive trust determined by state law is not property of estate as debtor holds bare legal title. However, constructive trust is remedy that must have been imposed by state law or state court prior to commencement of case. Remedy is normally limited to extraordinary circumstances to prevent a fraud or other wrongful acquisition or holding of property. Alleged transfer of property by debtor's wholly owned corporation to debtor individually did not impress property with constructive trust, even if transfer was done in violation of state law requirements for winding down business. Property was transferred by corporation to debtor before corporation ceased operations or entered winding down process, and there was no basis to impose a constructive trust on those assets. Bank held valid lien on assets regardless of whether property was vested in debtor individually or in debtor under a constructive trust, such that transfer did not cause any harm or loss to bank and there were no other equitable circumstances that would have impressed property with constructive trust pre-petition under applicable state law.

6.37 Possessory Liens

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

6.38 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.

6.39 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.

6.40 Cash Collateral and Assignment of Rents - Defined

In re Kelley, 2012 WL 5457331 (Bankr. E.D. Ky. 2012) – Proceeds of automobile insurance where automobile is destroyed in accident constitute substitute “cash collateral” in which secured lender retains security interest to extent of balance of allowed secured claim plus interest at rate in confirmed plan. Debtor cannot use those proceeds to acquire a new vehicle without the consent of the secured lender unless debtor provides adequate protection. Lienholder retains lien in remainder of proceeds until discharge or payment in full pursuant to non-bankruptcy law.

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section 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.

6.41 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 he use of the cash collateral decreases the value of the creditor’s security interest. Debtor proposed to use insurance proceeds from automobile accident, which constituted lender’s cash collateral, and to provide lender with lien on newly acquired vehicle. Proposed purchase price for new vehicle was 100% of the amount of lender’s cash collateral, placing lender at serious risk of loss as the automobile will depreciate immediately upon being purchased, leaving lender with collateral that is worth significantly less than the amount of the cash collateral. Proposed replacement lien would be unlikely to protect secured creditor from diminution in value of collateral.

6.42 Bare Possessory Interests

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

6.43 Incomplete Transfers

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

6.44 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.

6.45 Pre-petition Attorney Fee Retainers

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

6.46 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.

6.47 Contingent and Future Interests

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

6.48 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.

6.49 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.

Mayer v. Giarmarco, Mullins & Horton, PC., 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse’s claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was “recovered” by plaintiff in that she was allowed to retain the funds, such that attorney services produced a “recovery” against which a charging lien could be imposed.

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

6.50 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.

6.51 Bonuses

Seaver v. Klein-Swanson, Case no. 12-6054 (8th Cir. BAP 2013) – Debtor's bonus received post-petition was not property of Chapter 7 estate. As of date of commencement of case, employer had not declared or determined any bonuses. Whether to declare bonus and, if so, amount, remained entirely within the discretion of the employer. Debtor's alleged contingent interest in bonus, if employer decided to declare one, was not sufficient to make later received bonus property of estate, even if later-declared bonus was based on pre-petition financial results of company. Before employer decided to declare bonus, debtor had nothing more than hope or expectancy – as of the petition date, debtor had no interest in the bonus pool and so, had a contingent interest in nothing. Further, because later-declared bonus payments were not property of estate, funds received by debtor as bonus were not proceeds or products of property of estate as used in Section 541(a)(6) and were not an interest that the estate acquired an interest after commencement of the case, as there was no basis for the estate to assert any interest in the later-declared bonus.

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

6.52 Encumbered Property

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

6.53 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.

6.54 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.

6.55 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”.

6.56 Equitable Distribution and Marital Interests

Brown v. Brown, 2013 WL 2338233 (E.D. Ky. 2013) – Issues involved were within scope of court jurisdiction as court had jurisdiction over all property of estate including debtor's interest, if any, in the Antenuptial agreement and any property that debtor would be entitled to as a result of marriage. Action to invalidate Antenuptial was core proceeding as action involved administration of estate property, the very definition of “core proceeding”. Action was core proceeding and settlement resolve that core proceeding giving Bankruptcy Court jurisdiction to enter order. Section 542(a)(5) inclusion of property received within 180 days of petition did not exclude debtor's interest in the Antenuptial agreement even if debtor did not receive, and was not entitled to receive, property under that agreement within that 180 day period. Antenuptial agreement existed as of petition date and debtor's initial complaint regarding validity was filed only 11 days after petition, bringing agreement and litigation squarely within Section 541. To extent that debtor sought money judgment, debtor's right, if any, vested when action had begun pre-petition in state court. Although scope of relief was not determined, debtor's legal rights existed as of petition date and became property of estate, regardless of when liquidated. Further, debtor's statutory rights to equitable distribution also became property of estate even if divorce proceedings had not been determined, where divorce proceeding had commenced prior to commencement of case. Right to equitable distribution vested as of commencement divorce subject only to being liquidated at some future date.

6.57 Health Savings Accounts

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

6.58 Inheritance

6.59 Marshalling of Assets

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

6.60 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.

6.61 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.

6.62 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.

6.63 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.

6.64 Conversion From Chapter 13 to Chapter 7

Lentz v. Myers, 486 BR 365 (Bankr. S.D. Miss. 2013) – Bad faith conversion from Chapter 13 to Chapter 7 results in Chapter 7 estate including all property of debtor acquired after commencement of Chapter 13 up through date of conversion. Debtor's conversion was motivated by substantial improvement in financial condition that would have permitted debtor to increase plan payments rather than increase payments, debtor converted case to Chapter 7. Conversion done not because debtors could no longer afford Chapter 13 payments but, instead, to retain substantial post-petition assets and income evidenced bad faith.

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

6.65 Generally

In re Stewart, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Once creditor has notice of bankruptcy filing, Section 542 imposes affirmative obligation on creditor to return to debtor any property of the estate. Creditor wrongfully withheld property that belonged to debtor and constituted property of estate.

Okke v. Okke, Case no. 13-80061 (Bankr. W.D. Mi. 2013) – Creditor holding property subject to a security interest that is perfected by possession can be required to turn over property to debtor, but court can impose conditions and restrictions as necessary to protect creditor's lien rights. Court ordered turnover of property expressly conditioned on finding that creditor does not lose perfected security interest as result of turnover, and prohibiting debtor from selling, disposing of or otherwise transferring property without further order of court.

In re Brown, 2013 WL 5493213 (Bankr. E.D. Ky. 2013) – Debtor's failure to turnover assets to Trustee notwithstanding turnover order constituted contempt of court. Debtor had actual notice of turnover order and admittedly failed to completely comply. Order was specific and definite as to items to be turned over. Court awarded monetary judgment against debtor for \$147,000 representing the value of items not turned over plus attorney fees incurred by Chapter 7 Trustee in attempting to obtain possession of items.

French v. Butler, 2013 WL 4453039 (Bankr. N.D. Ohio 2013) – Debtor's entitlement to unpaid rent from tenant that accrued pre-petition is property of the estate that Trustee is entitled to collect. Judgment entered against tenant in turnover action for balance owed.

Newman v. Schwartzer, 487 BR 193 (9th Cir BAP 2013) – Chapter 7 Trustee could compel debtor to turnover amount of pre-petition tax refund even though Debtor had spent the refund before entry of the turnover order. Although debtor was entitled to refund, he neither scheduled the refund as an asset nor claimed it as exempt. Tax refund constituted property of the estate as "an interest in property" as of commencement of the case and as community property under Nevada law. The fact that the Debtor had spent the refund prior to the Turnover Order did not defeat the Trustee's right to compel turnover, because the refund constituted property in the Debtor's "possession, custody or control" during the case, and, pursuant to Bankruptcy Code Section 542, the Debtor must account to the Trustee for either the property or its value. There is no requirement for the "present possession" of property before turnover can be compelled under Section 542.

Vining v. Comerica Bank, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – To prevail in turnover action, Trustee must prove that the property sought is property of the estate and that the property is of more than inconsequential value. Trustee failed to demonstrate that failure to turnover original documents as of consequence where Trustee had been provided with exact copies of documents and Trustee could not allege or prove any actual harm or prejudice from receiving copies rather than originals.

In re Watkins, 2013 WL 1289157 (Bankr. N.D. Ohio 2013) – Court ordered turnover to Trustee of automobile in debtor's possession and valued at \$2,500, subject to Trustee's agreement to allow debtor to redeem vehicle for \$2,000.00. Vehicle would be turned over, with debtor retaining the right to redeem for \$2,000 up through the date of the auction of the vehicle.

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

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

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

6.66 Excusal – State Court Receiver

In re Denning, Case No. 13-4630 (Bankr. W.D. Mi. 2013) – Court would not order receiver to turnover property seized pre-petition where Chapter 7 Trustee had already filed Notice of No Distribution. Given that the Trustee has concluded that the estate has been fully

administered, there is no point in ordering turnover, and creditors would be better served allowing assets to remain in possession of receiver for appropriate proceedings after entry of discharge when stay lifts.

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

6.67 Defenses

Newman v. Schwartz, 487 BR 193 (9th Cir BAP 2013) – The fact that the Debtor had spent the refund prior to the Turnover Order did not defeat the Trustee's right to compel turnover, because the refund constituted property in the Debtor's "possession, custody or control" during the case, and, pursuant to Bankruptcy Code Section 542, the Debtor must account to the Trustee for either the property or its value. There is no requirement for the "present possession" of property before turnover can be compelled under Section 542.

Winters v. Comm'n of Internal Revenue Service, 2013 WL 364328 (Bankr. M.D. Tn. 2013) – IRS issued erroneous refund to debtor post-petition although debtor had substantial liability owed for prior years taxes. Debtor returned the check to the IRS a few months later. To extent debtor may have been entitled to pre-petition refund, that entitlement would be property of estate. However, refund check was erroneously issued as debtor had no right to that refund. Debtor never acquired legal or equitable interest in the refund and court could not compel IRS to turn over the check or its proceeds to the Trustee.

Shapiro v. Henson, 449 BR 109 (D. Nv. 2011) – Trustee could not compel debtor to turnover balance in debtor's checking account as of the date of the bankruptcy petition where checks written pre-petition were ultimately honored post-petition. Debtor no longer had possession or control over funds that had been in the account as of the petition date. Section 542 allows turnover only of assets that are in the possession of 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.

C. Failure to Disclose Causes of Action

6.68 Future Prosecution Barred

Garrett v. University Hospitals of Cleveland, Inc., 2013 WL 2186116 (N.D. Ohio 2013) – Debtor's complaint dismissed based on judicial estoppel. Although debtor knew of cause of action and knew that complaint had already been filed and litigation was ongoing, debtor failed to disclose cause of action in bankruptcy schedules and failed to advise either the Court or the Trustee of the pending action prior to confirmation of Debtor's Chapter 13 plan. Debtor did not amend pleadings or disclose cause of action until after defendant had brought motion for judgment based on judicial estoppel. Non-disclosure was not inadvertent where debtor knew of action and failed to disclose it, and where debtor was at all times represented by bankruptcy counsel and litigation counsel.

EEOC v. JPMorgan Chase Bank, 2013 WL 944200 (S.D. Ohio 2013) – Debtor's failure to schedule sexual discrimination claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes. EEOC enforcement is to vindicate public interest, not merely personal interests of the debtor.

Catron v. Dr. James S. Hayes Living Home Health Care Agency, Inc., 2013 WL 1729124 (W.D. Tn. 2013) – Debtor's failure to disclose cause of action in Chapter 13 bankruptcy filing estopped debtor from later pursuing cause of action after dismissal of Chapter 13 case. Debtor's failure to schedule cause of action constitutes statement on which court relied in confirming Debtor's plan. Debtor's later pursuit of action would be judicially estopped unless debtor can demonstrate that failure to disclose was inadvertent. Non-disclosure is not inadvertent where debtor was fully aware of all facts on which debtor's claim was based, where claim was predicated on debtor's extensive uncompensated overtime for prior 5 years. Debtor's contention that debtor did not know that she could bring action against employer did not demonstrate inadvertence. Standard is whether debtor knew of factual basis for claim, not that debtor know the exact legal claim that could be asserted. Non-disclosure lacked good faith where debtor made no effort to disclose the action or to amend the schedules even after she filed the complaint to initiate the lawsuit. Debtor filed complaint 40 days prior to dismissal of Chapter 13, allowing debtor ample time to advise the bankruptcy court of the pending claim. Debtor's allegation that she relied on counsel where debtor did not allege that

she told attorney of cause of action and attorney failed to disclose, but only alleged that her attorney did not tell her she had to disclose potential claim.

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

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

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

Young v. Independent Bank, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) - Michigan Court of Appeals affirmed dismissal of a lawsuit the plaintiff failed to schedule in her Chapter 7 bankruptcy case. Court of Appeals applied bankruptcy law and Sixth Circuit precedent that an unscheduled cause of action is not abandoned to 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 only after the Motion to Dismiss suggests intentional concealment of the instant claims in an attempt to keep any proceeds from this cause of action. Debtor’s amendments continued to misrepresent nature of claim, valuing the claim in Amended Schedule B at \$1,000 while demanding in Title VII pleadings at EEOC and the Rule 26 disclosure that she sought damages will in excess of \$1.7 million.

Moses v. Howard University Hospital – Case No. 08-7087 (D.C. Cir. 2010) – Debtor failed to list pending action in Bankruptcy Schedules and Statement of Financial Affairs and continued to hold himself out before the District Court as a proper plaintiff even though Debtor had already filed and was pursuing claim at the time Debtor filed bankruptcy petition. Debtor obtained a discharge without disclosing the action and succeeded in hiding the inconsistency from the courts creating the perception that either the trial court or the Bankruptcy court (or both) was misled. Debtor set up a situation in which he could gain an advantage over his creditors by keeping any damages for solely himself, to the detriment of his creditors and adversely affected the Trustee, who might have settled this case early or decided not to pursue it. Debtor's actions in the bankruptcy proceedings and before the District Court were related. Debtor represented that he had no legal claims before the bankruptcy court and obtained a discharge based on that representation and now wants to assert the opposite in order to win a second time. Debtor cannot avoid judicial estoppel by claiming that his failure to disclose this lawsuit in the bankruptcy court or his maintenance of the suit in District Court were the result of inadvertence or mistake where Debtor listed other pending lawsuits that, unlike the instant case, reduced the overall value of his assets through wage garnishment. Debtor cannot cure failure to disclose by reopening his Chapter 7 case, amending his Statement of Financial Affairs, and inviting Trustee to intervene in the suit. Allowing a debtor to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them.

In re Blöse, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – A cause of action is an asset that must be scheduled pursuant to Section 521. Debtor's failure to list a cause of action amounts to an affirmative statement that no such action exists. Debtor will be judicially estopped from pursuing an undisclosed cause of action after obtaining a discharge on the basis that no such action exists. Pursuing an undisclosed cause of action creates an inconsistency sufficient to support judicial estoppel. By granting a discharge and closing this "no asset" case, this Court adopted Debtor's statement that she had no potential causes of action. Judicial estoppel does not apply where the prior inconsistent position occurred because of "mistake or inadvertence." Failure to disclose a cause of action may be deemed inadvertent where (1) 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.

6.69 Future Prosecution Not Barred

In re Rotunda, 2013 WL 486968 (Bankr. D.C. 2013) – Chapter 7 Trustee is not judicially estopped from pursuing unscheduled and undisclosed cause of action. Either Debtor or Trustee can seek to reopen case to administer undisclosed cause of action. However, Trustee is estopped from recovering any amount in excess of administrative costs plus amount necessary to pay allowed claims in full, so that debtor does not receive any recovery from undisclosed action.

Stevenson v. Malloy, 2012 WL 5306046 (6th Cir. 2012) – Debtor's alleged wrongdoing cannot be basis for estoppel of Chapter 7 trustee who is real party in interest and who did not participate in the wrongdoing. Trustee's pursuit of state court action that was pending on petition date but not listed in schedules could not be dismissed for judicial estoppel as Trustee had not made any inconsistent representations.

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

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

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

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

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) - Judicial estoppel is an equitable doctrine which bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Doctrine should be applied with caution to avoid impinging on truth seeking function of court. Judicial estoppel applies in bankruptcy to bar a debtor from pursuing a cause of action for his own benefit after 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.

D. Sale of Assets

6.70 Approval Generally

In re Ungar, 2012 WL 5505784 (Bankr. N.D. Ohio 2012) – Debtor could not force trustee to refund proceeds received from sale of household goods by trustee to debtor. Debtor scheduled household goods having a value of \$2,500.00. Trustee conducted an inventory and concluded that the assets were worth at least \$10,600. Trustee entered into sale agreement with debtor where Trustee sold estate’s interest in goods back to debtor for \$11,570.00. Motion to approve sale was properly noticed to debtor and all creditors and no party filed an objection to the sale. After the sale closed and debtor paid the Trustee, debtor sought to compel Trustee to return payment to debtor claiming that the Trustee had coerced debtor into a settlement. Motion denied as it did not appear that Trustee had overreached, particularly as debtor was represented by counsel at all times; and debtor did not object to the proposed sale.

In re Crabtree, 2009 WL 2999165 (Bankr. W.D. Ky. 2009) – Trustee’s Motion to Approve Sale denied. Schedules listed value at \$200,499.00 with mortgages of \$200,499.00 and Debtor claimed exemption of \$10,000.00. Motion failed to support proposed sale price of \$156,000.00 and failed to demonstrate any benefit to the estate.

6.71 Sale Free and Clear of Liens

In re Scott, 2013 WL 4498987 (Bankr. E.D. Ky. 2013) – Section 363(f) allows sale free and clear of liens if the creditor consents; if the price to be received is more than the aggregate value of liens on the property; the lien is in bona fide dispute; or the creditor could be compelled to accept money satisfaction of interest. Creditor’s lien constitutes an “interest” for purposes of Section 363(f)(5). However, sale can occur under Section 363(f)(5) only if the holder of the interest could be compelled to accept less than payment of the full balance owed. Fact that foreclosure of lien could result in creditor receiving less than full balance owed is not the same as a creditor being compelled to accept less, as the lienholder could bid at the foreclosure sale an amount that would be sufficient to pay its liens in full. No matter how broadly “compelled” is construed, there is no legal basis on which a debtor could force the lienholder to accept less than full payment.

Rogan v. Vanderbilt Mortgage & Finance, Inc., 2013 WL 1909497 (Bankr. E.D. Ky. 2013) – Assignee of mortgage who did not also obtain endorsement or transfer of note lacks standing to enforce either note or mortgage under Kentucky law. Assignee is not “holder” of note as defined in Uniform Commercial Code and could not be recognized as transferee absent evidence of proper endorsement or transfer. Assignment of mortgage does not automatically transfer note and note does not automatically file the mortgage upon transfer. Without proper transfer of the note, holder of mortgage is not legally able to enforce the mortgage. Trustee would be able to sell property free and clear of mortgage.

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

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

6.72 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.

6.73 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.

E. Prosecution of Pre-petition Causes of Action

6.74 Role of Trustee and Debtor

CH Holding Co. v. Miller Parking Co., 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor's related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor suits against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.

Wilson v. Dollar General Corporation, Case no. 12-1573 (4th Cir. 2013) – Debtor who files Chapter 13 petition does not lack standing to continue prosecution of pre-petition cause of action. Cause of action is property of estate and under Section 323, the Trustee has capacity to sue and be sued as representative of estate. In a Chapter 7 case, this standing is conferred exclusively on the Chapter 7 Trustee and debtor in Chapter 7 lacks standing unless action is abandoned by Chapter 7 trustee. However, Chapter 13 allows debtor to retain possession of property and affords powers to debtor exclusive of those afforded to the trustee. Power to use and possess property must include ability of debtor to prosecute cause of action in his own name for benefit of estate.

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

VII. Exemptions

A. Exemptible Property

7.1 Time for Determining

In re Depascale, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Extent of homestead exemption for purposes of determining whether judgment lien impaired exemptions is allowable exemption when bankruptcy case is filed, not earlier date when judgment lien attached. Debtor entitled to full Ohio exemption of \$132,900 in effect when bankruptcy case filed rather than \$21,625 exemption that was allowed at time judicial liens attached.

Eleiwa v. Whitmore, Case No. 12-1559 (9th Cir. BAP 2013) – Property cannot be claimed as exempt unless property is property of estate as of petition date. Debtor could not claim exemption in two parcels of property that had been conveyed to third party more than one year prior to commencement of case.

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

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

In re Pellegrini, 2012 WL 129842 (Bankr. W.D. Mi. 2012) – Exemptions are determined on the bankruptcy filing date. Only the facts as they existed on the filing date are relevant to determination as to whether debtor qualifies for claimed exemption, without reference to any subsequent changes in the character or value of the property.

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

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

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

7.2 Equity in Property to be Exempted

Goben v. Corydon State Bank, Case No. 13-6039 (8th Cir. BAP 2013) – Debtor cannot claim exemption in asset in which debtor has no equity. Statute allows debtor to exempt value of debtor's interest in automobile. Where liens exceed value of car, debtor has no "interest" to exempt.

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

7.3 Bankruptcy Only Exemptions

In re Schafer, 2012 WL 3553294 (6th Cir. 2012), *cert denied*, *Richardson v. Schafer*, 133 S.Ct. 1244, 185 L.Ed.2d 179, 81 USLW 3310, 81 USLW 3446, 81 USLW 3452 (2013) – Bankruptcy specific exemption statute MCL 600.5451 is constitutional. State exemption statutes that create special exemptions that apply only in bankruptcy do not violate either the supremacy clause or the Bankruptcy clause on uniform laws. Debtor in Michigan can elect federal exemptions or can elect Michigan exemptions to the extent those exemptions apply in all cases and are not "bankruptcy specific".

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

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

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

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

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

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

7.4 Amended Claim of Exemptions

In re Wiggs, 2013 WL 4460881 (Bankr. S.D. Il. 2013) – Debtor's failure to list interest in principal residence in schedules was bad faith attempt to conceal asset. Debtor did not disclose interest until two years after filing and after the house was sold, at which time debtor sought to claim property as exempt. Although debtor stated that he thought property was in wife's name alone, evidence indicated that property was originally in debtor's name and a few years prior to filing he conveyed property to debtor and wife as joint tenants. Debtor worked for a title company and owned an interest in title company and knew how to read public records. Debtor failed to disclose alleged lack of understanding until forced to under oath in adversary proceeding called into question debtor's credibility, compounded by later sale of property without court permission and check for proceeds of sale was made out to debtor and wife jointly

In re Gilliam, 479 BR 768 (Bankr. E.D. Tn. 2012) – Debtors are permitted to amend exemptions to add previously undisclosed asset where omission of asset was not result of bad faith or intent to conceal. Debtors' failure to schedule a 2007 automobile was not bad faith where debtors thought automobile belonged to daughter. In 2007, debtors purchased a car in their names in order to take advantage of employee discounts available to debtor-husband. At all times since the purchase, the car was driven exclusively by the daughter and the daughter made all of the payments on the car. Shortly after the first meeting of creditors, debtors amended Schedule B to disclose auto and amended Schedule C to exempt auto. Although debtors actions indicated a lack of understanding of the bankruptcy process, actions did not indicate lack of good faith where debtors genuinely thought of the auto as being the "daughter's car".

In re Younoszai, 478 BR 841 (Bankr. W.D. Ky. 2012) – Rule 1009 allows debtor to amend scheduled exemptions at any time while case is pending. Court may reject amendment only where debtor has acted in bad faith or concealed property. Bad faith requires proof of intentional misconduct. Debtor permitted to amend exemptions after case filed to drop homestead exemption on property occupied by debtor as of petition date and to add "wild card" exemption for second property owned by debtor as of petition date.

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

In re Stiltner, 2012 WL 1805423 (Bankr. E.D. 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. Westenhofer, Case No. 11-8048 (6th Cir. BAP 2012) - Debtors will not be barred by doctrine of judicial estoppel from amending schedules and exemptions to increase asset valuation if debtor can establish that differing valuations were due to mistake or inadvertence rather than bad faith. Fire destroyed the house of Cary and Dana Rossi ("Debtor") while their Chapter 7 bankruptcy was pending. On the schedules, household goods, furnishings and wearing apparel were valued at \$2,200. On the insurance claim the same assets plus medical

equipment and living expenses were valued at \$45,924.88. Debtor then amended the schedules, increasing the value of the property in question to \$24,309.88, adding the medical equipment valued at \$13,145.00, and claiming all of these assets as exempt. Bankruptcy court erred in denying debtor's request to modify exemptions without providing debtor an opportunity to explain the substantial discrepancy in values as well as debtors apparent failure to list all assets.

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

In re Clark, 2011 WL 2837478 (Bankr. W.D. Mi. 2011) – Debtor's request to amend Schedule C to add previously undisclosed tax refund denied. Debtors did not list anticipated tax refund in Schedule B or claim as exempt on Schedule C based on advice by Bankruptcy Petition Preparer that "if the tax returns have not been filed, you do not have to list the refunds". Debtors completed the Chapter 7 Trustee's standard questionnaire which also denied that debtors anticipated any tax refund for the current year. Debtors were at least reckless in failing to disclose tax refund in either schedules or questionnaire, such that request to amend to add refunds would be denied.

In re Borbi, Case No. 10-31247 (Bankr. E.D. Mi. 2011) – Rule 1009 authorizes debtor to amend schedules at any time before case is closed unless debtor acts in bad faith or property has been concealed. Debtor did not disclose the retention of \$10,000 representing proceeds of life insurance on debtor's deceased husband and initially failed to disclose that omission under questioning at the first meeting of creditors. Debtor offered incomplete, insufficient and contradictory statements about why these assets were not disclosed, although debtor had ample opportunity to disclose. Debtor's conduct indicated that debtor concealed the assets, precluding amended claim of exemption.

In re John, 2011 WL 143871 (Bankr. E.D. Mi. 2011) – Debtor will not be permitted to amend exemptions if the amendment would prejudice creditors or the estate. Mere delay in filing the amendment does not constitute prejudice, absent proof that parties would have taken different actions or asserted different positions had the exemption been claimed earlier, and the interests of those parties are detrimentally affected by the timing of the amendment; or if the amendment impairs a trustee in the diligent administration of the estate. Debtor's delay in amending the exemption for 4 weeks after issue first raised at Section 341 meeting was not prejudicial delay sufficient to warrant denial of exemption where exemption would have been allowed had it been raised in the first instance.

In re O'Brien, 2011 WL 10077 (Bankr. W.D. Mi. 2011) – Debtors who filed Chapter 7 in January and failed to list possible tax refund for prior year would be permitted to amend schedules and claim exemption where Debtors timely filed tax return and amended schedules to disclose refund and assert exemption shortly after filing return that first indicated existence of refund. Amended exemptions relate back to date of bankruptcy petition. Debtors filed tax returns post-petition and before Section 341 meeting and disclosed anticipated tax refunds at the time of the first meeting of creditors. There was no evidence of any intent by debtors to deceive or defraud trustee by failing to list potential tax refunds in the initial schedules. Debtor's receipt and expenditure of the refund post-petition and before amending Schedules to disclose and exempt does not prevent refund from being claimed as exempt.

In re Lambert, 2010 WL 3604116 (Bankr. N.D. Ohio 2010) – Debtors not permitted to amend exemptions in Chapter 7 on same date that Chapter 7 Trustee filed final report. Debtor does not have unrestricted right to amend where circumstances indicate bad faith or concealed property of the estate. Debtors' amendments evidenced lack of good faith by listing and exempting two assets that were not properly listed in Debtor's original Schedule B and amendments also deleted assets that had been previously disclosed without explanation. Last minute amendment would result in definite prejudice to creditors by reducing estate that will be available for distribution yet debtors failed to provide notice to creditors of proposed amendments. Finally, debtors waited more than three months to amend exemptions after learning that additional assets would be available, doing so only after the Chapter 7 Trustee filed his final report.

In re Bailey, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Debtor who scheduled a cause of action as an asset would not be permitted to amend the exemption to claim the action as exempt where the amendment was not filed until 4 months after the Trustee settled the action with the defendant and recovered \$17,000.00. Trustee not put on notice that he needed to adduce any evidence concerning the composition of the Settlement, and the Court was deprived of jurisdiction to have the parties supplement the record of the evidentiary hearing.

7.5 Recovery of Avoided Transfers

In re McKinnon, 2013 WL 4518714 (Bankr. M.D. Fl. 2013) – Debtor cannot claim exemption in automobile recovered by trustee as either fraudulent transfer or avoidable preference. Section 522(g) applies only to property that is transferred involuntarily. Section 522(g) requires that transfer be both involuntary and not concealed. Debtor's open disclosure of voluntary transfer did not bring property within scope of Section 522(g).

Johnson v. Jones, 2013 WL 3216136 (Bankr. W.D. Ky. 2013) – Section 522(g)(1)(A) allows debtor to exempt property recovered under Section 550, 551 or 552 if the transfer that is being avoided was not a voluntary transfer by the debtor. Granting of a mortgage or security interest is considered a voluntary transfer. Debtor may not exempt equity in property that may result from trustee's successful action to avoid mortgage.

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.

7.6 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.

7.7 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.

7.8 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

7.9 Jurisdiction – Mootness

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

7.10 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.

7.11 Deadline for Objections

Santiago v. Rivera, Case No. 11-075 (1st Cir. BAP 2012) – Trustee waived objection to exemption by failing to object within time permitted. Trustee's objection to Plan based on plan's failure to commit tax refunds as disposable income did not constitute an objection to the claimed exemption. Court rejected Trustee's only basis for objecting to exemption based on assertion that tax refunds were not property of estate. Fact that debtor's plan voluntarily offered to contribute non-exempt portions of tax refunds did not overrule debtor's claimed exemption by implication. Trustee's belated attempt to add "disposable income" as additional basis to overrule claimed exemption was time barred.

Matos v. Rivera, Case no. 11-074 (1st Cir. BAP 2012) – All tax refunds received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306. Debtor could claim exemption in tax refunds in Chapter 13 case. Trustee waived objection to exemption by failing to object within time permitted. Trustee's timely objection to Plan based on plan's failure to commit tax refunds as disposable income did not constitute an objection to the claimed exemption. Court rejected Trustee's only basis for objecting to exemption based on assertion that tax refunds were not property of estate. Fact that debtor's plan voluntarily offered to contribute non-exempt portions of tax refunds did not overrule debtor's claimed exemption by implication. Trustee's belated attempt to add "disposable income" as additional basis to overrule claimed exemption was time barred.

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

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

In re Messina, 2010 WL 2712141 (3d Cir. 2010) *aff'd after remand* Case No. 11-1426 (3d Cir. 2012) - 30 day deadline to object to claimed exemption applies only to (1) the description of the exempted property; (2) the Code provisions governing the claimed exemptions; and (3) the amount "listed in the column titled 'value of claimed exemption." When the objection is based on other elements in that case, 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 o \$36,000 as the exempt portion of the proceeds, and the Trustee filed a Motion to Determine Value of Exemption as \$0 as debtors, on the date of the filing of the case, had no equity in the property and, therefore, nothing to which an exemption could attach. Debtors responded that *Taylor* precluded Trustee's belated objection to exemption. Court held that Trustee's objection was not time barred as possible objection was not discernible from face of schedules and that issue did not arise until after avoidance action had been successful. Court also concluded that Trustee's Motion to Value Exemption at \$0 would be granted because, as of the date of the petition, debtors had no equity in the property. To extent lien is avoided, benefit is preserved for estate and debtors are not entitled to receive the benefit of that voidance 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.

7.12 Valuation of Property Claimed as Exempt

In re Schmakel, 2013 WL 694317 (Bankr. N.D. Ohio 2013) – Where debtor claims property under exemption that allows for specific dollar limit on exempt amount and lists value of property as “unknown”, exemption is limited to the value of the property up to the specific dollar limit. Asset listed with value of “unknown” cannot produce exemption that exceeds amount of statutory limit.

7.13 Conversion of Non-Exempt Into Exempt Property

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

7.14 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.

7.15 “In Kind” and Dollar Limitations on Exemptions

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

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

7.16 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.

7.17 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 dependents. "Reasonably necessary" depends on factors such as (1) debtor's present and anticipated living expenses; (2) debtor's present and anticipated income from all sources; (3) the age of the debtor and his or her dependents; (4) the health of debtor and his or her dependents; (5) debtor's ability to earn a living; (6) debtor's job skills, training and education; (7) debtor's other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtor's ability to save for retirement; (10) the special needs of the debtor and his or her dependents; and (11) debtor's continuing financial obligations, e.g., alimony or support payments. Court declined to reach issue of whether debtor's use of buyout funds to purchase car rendered car non-exempt where value of car was less than amount of exemptions available to debtor under subsections other than (d)(11)(E).

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.

7.18 Undisclosed Assets

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Upon filing for bankruptcy, all pre-petition causes of action held by debtor become property of estate and may only be prosecuted by the Trustee. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim. Undisclosed assets are not administered and remain property of the estate even after the case is closed.

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.

7.19 Homestead

Eleiwa v. Whitmore, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim exemption in home occupied by debtor where property was owned by Trust and not by debtor individually. Debtor's status as trustee of trust that owned property did not convey any equitable interest in property for purposes of claiming property as exempt. Further, debtor did not actually reside in property for which

debtor sought to assert homestead exemption. Debtor's petition indicated that debtor resided at one address, while debtor was attempting to assert homestead exemption in two entirely different parcels of real property. Debtor's statement in petition constituted admission that can be used against debtor in bankruptcy proceedings.

In re Dougan, 2013 WL 85146 (Bankr. D. Mass. 2013) – Debtor's 99-year leasehold, coupled with Debtor's interest in Co-op, sufficient to support homestead exemption. Although debtor did not technically "own" the apartment, the long term lease and co-op stock ownership conveyed a sufficient interest to constitute "ownership" for homestead purposes.

In re Breece, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor's status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor's homestead, as debtor had no interest in the specific property to claim as exempt.

In re Schmakel, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor's membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor's homestead, as debtor had no interest in the property that could be properly claimed as exempt.

In re Lehr, 2012 WL 3763925 (Bankr. N.D. Ca. 2012) – Debtor not entitled to claim homestead exemption in property that debtor did not reside in as of petition date.

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

In re Holland, 474 BR 826 (Bankr. E.D. Mi. 2012) – As of the petition date, debtors were not using cabin in northern Michigan as residence. At the first meeting of creditors, debtors both affirmed that they lived in Garden City. Debtors described the cabin property as a one bedroom cabin and pole barn and stated that nobody lived in the cabin. Cabin was just a shell sitting there, with no plumbing or windows, and the barn contained just building materials, some windows, and a few odds and ends. Debtors testified that they intended to move to cabin property but, as of a month and a half after the petition date, debtors still had not done so. Even then, debtors testified that they intended to live with friends and not in the cabin itself. Debtors had not been to property for at least 6 months prior to first meeting of creditors. Debtors' later affidavit, unsigned and not notarized, was not evidence and would be discounted given direct contradictions between affidavit and testimony at 341 meeting. Cabin property was not residence as of petition date as required for exemption as homestead.

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

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

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

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

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

joint case, Husband and Wife are permitted to aggregate exemptions, allowing exemption of total of \$50,000.00.

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

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

In re Young, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Homestead exemption applies as against real property owned by 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".

7.20 Life Estate

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

7.21 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.

7.22 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.

7.23 Unmatured Life Insurance Contracts

In re DeMarco, 2013 WL 2100521 (Bankr. W.D. Tn. 2013) – Debtor, as non-insured owner of policies issued on lives of daughter, with unfettered rights to surrender policies and receive cash surrender values, could not claim cash surrender values as exempt from claims of insured’s creditors. Debtor purchased policies not for benefit of daughters but for his own benefit, and was seeking to exempt cash surrender values from his own creditors, not from claims of creditors of the insured. Tennessee statute exempting from claims of insured’s creditors life insurance or annuity for, or assigned to, a spouse, child, or dependent relative protects beneficiaries from creditors of the insured, whether or not insured is owner of policy, but does not protect owners from their own creditors.

In re Schoof, Case No. 10-60887 (Bankr. E.D. Mi. 2011) – Section 522(d)(7) allows debtor to exempt unmatured insurance policy, but does not include cash surrender value or any attribute of policy other than the life insurance contract itself.

In re Zerbi, 2011 WL 175923 (Bankr. W.D. Mi. 2011) – Section 522(d)(7) allows a debtor to exempt an unmatured life insurance policy. The exemption is limited to the policy itself and not to other rights such as cash surrender value under whole life policy. Section 522(d)(8) allows for exemption of accrued interest or dividends or loan values of unmatured insurance policies to the extent of the stated dollar limit. Debtor must account for cash value to the extent it exceeds amount allowed under Section 522(d)(8) plus any available “wild card” under Section 522(d)(5). If debtor cannot satisfy this obligation, Court will order surrender of policy and payment of cash surrender value to debtor to the extent of available exemptions with the remainder to the Trustee.

7.24 Personal Injury Claims

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

7.25 Insurance Proceeds

In re Frederick, 2013 WL 3808160 (Bankr. N.D. Ohio 2013) – Debtor entitled to claim as exempt proceeds received under group life insurance policy. Ohio law allows debtor to claim as exempt proceeds of employer sponsored group life insurance that is paid to the employee. To be exempt, (1) the insurance policy must be a “policy of group insurance,” (2) the deceased person must be covered under the policy, and (3) the proceeds must be paid to “any employee thereunder.” Decedent does not need to be dependent of debtor for purposes of exemption. Debtor’s wife was insured person under the policy. Although debtor had previously been terminated as an employee of the employer, policy was initially provided by employer and at termination of employment debtor had option of keeping insurance in place. Debtor did not have to be employee at time of payment of proceeds as long as the proceeds are paid on account of the insured person’s death. Once policy attached while person was employee, later separation from employment would not disqualify the proceeds from exemption.

In re Ladd, 448 BR 207 (Bankr. N.D. Ohio 2011) – Ohio statute that exempted life insurance proceeds from claims of the insured person was limited to debtors who were the insured party. Debtor could not claim as exempt proceeds on now-deceased husband’s life insurance policy as debtor was a beneficiary but was not the “insured person”.

In re Schoof, Case No. 10-60887 (Bankr. E.D. Mi. 2011) – Section 522(d)(8) allows debtor to exempt dividends, interest and cash surrender value of insurance policy.

In re Kudela, 427 B.R. 643 (Bankr. N.D. Ohio 2010). Debtor-beneficiary could not exempt her interest in life insurance proceeds under Ohio law. Ohio law does not create exemption for life insurance paid on death of debtor’s spouse. Ohio law protects proceeds of life insurance policy from creditors of the insured, not creditors of the beneficiary. Debtor’s husband passed away 18 months prior to

commencement of case. Debtor, age 80, still had \$46,000 of life insurance proceeds in savings. Remaining proceeds are not exempt under Ohio law and must be turned over to Trustee.

Menninger v. Schramm, 2010 WL 2489591 (6th Cir. BAP 2010) – Ohio law does not create exemption for life insurance paid on death of debtor's spouse. Ohio law protects proceeds of life insurance policy from creditors of the insured, not creditors of the beneficiary. Debtor's husband died 19 days after couple filed joint petition. Proceeds of husband's life insurance policy became property of Debtor's estate and could be used to pay creditors even though some of those creditors were also creditors of the deceased on joint accounts with Debtor. Ohio law does not allow exemption of proceeds from creditors of beneficiary. Although Federal exemptions protect proceeds from creditors of a 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.

7.26 Health Savings Accounts

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

7.27 Annuities

Neal v. First Alliance Bank, 2013 WL 5739701 (W.D. Tn. 2013) – State law that allowed debtor to exempt amount payable under annuity contract on the life of the debtor for the benefit of dependent relatives did not permit debtor to exempt annuity in which debtor was the beneficiary as well as the annuitant.

In re Jadud, 2012 WL 4757870 (Bankr. N.D. Ohio 2012) – Ohio state law governing exemption of annuity parallels Section 522(d)(10), allows debtor to exempt annuity. Merely calling contract an "annuity" does not necessarily make it the type of annuity that can be exempted. To be exempt, annuity must provide income that is in the nature of a substitute for wages. Court will consider (1) were the periodic payments intended as a substitute for wages, (2) were contributions into the plan or contract made over time and were multiple contributions made, (3) is there a return on investment, (4) how much control can the owner exercise over the investment, and (5) whether the investment a prebankruptcy planning measure. Annuity was originally purchased for debtor's son as part of a structured settlement following auto accident. Debtor inherited beneficial interest when son passed away. Annuity provided for fixed monthly payments for defined term in fashion that would be similar to employer-established retirement fund, indicating substitute for wages. Although annuity was purchased with single premium, that usually indicates an annuity that would not be exempt, origin of annuity was auto accident which left son unable to work and unable to purchase annuity through periodic purchases such that victim would not be prohibited from exempting annuity. Annuity was unclear as to whether annuity payments included return of principal and interest. Debtor had no ownership or control other than right to receive payments as they become due. Annuity was not purchased as part of pre-bankruptcy planning. Annuity does not have to be for retirement income or provided by employer to be exempt. Fact that annuity was not purchased for debtor but was inherited does not change fact that annuity was purchased on account of disability which meets requirement. Amount of payment was reasonably necessary where debtor was double amputee living only on social security income. Trustee's objection to exemption overruled.

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

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

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

7.28 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”.

7.29 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.

7.30 Property Owned by Third Party

Kahn v. Regions Bank, Case No. 12-6567 (6th Cir. 2013) – Debtor cannot claim an exemption in home that is owned by Irrevocable Trust.

Bullard v. IndyMac Bank, 2012 WL 4134839 (E.D. Mi. 2012), *aff’d* 2013 WL 4859785 (6th Cir. 2013) – Husband could not claim exemption in home that is owned solely by wife. Husband had no legal interest that could be claimed as exempt as a matter of law.

In re Breece, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor’s status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor’s homestead, as debtor had no interest in the specific property to claim as exempt.

In re Schmakel, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor’s membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor’s homestead, as debtor had no interest in the property that could be properly claimed as exempt.

Weinstein v. Fox, Case No. 11-1009 (9th Cir. BAP 2013) – Debtor cannot claim exemption on behalf of non-debtor spouse. Although Debtor and spouse owned two cars, State law permitted debtor to exempt only one car. Debtor could not use exemption that would have been available to spouse to exempt second car. Debtor cannot claim exemption that belongs to a third party who is not a debtor in bankruptcy.

Eleiwa v. Whitmore, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim exemption in home occupied by debtor where property was owned by Trust and not by debtor individually. Debtor’s status as trustee of trust that owned property did not convey any

equitable interest in property for purposes of claiming property as exempt.

Elswick v. Miller, 2012 WL 2122170 (E.D. Ky. 2012) – In joint case under Section 302, each debtor is presumed to have a separate estate. The exemptions available to each co-debtor may be claimed only from his or her separate estate. Husband in joint case cannot claim exception in property owned by debtor-wife. Court must determine whether husband has interest in property separate and apart from the interest of debtor-wife in the property to determine whether, and to what extent, husband can claim exemption.

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

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

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

7.31 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.

7.32 Tools of the Trade

In re Nickeas, 2013 WL 4017940 (Bankr. W.D. Wis. 2013) – Liquor license is not "tool of the trade even if essential to operation of business. Tools of the trade are personal property used in business but do not include intangible rights such as liquor licenses.

Maestas v. Old World Construction, Inc., Case no. 12-100 (10th Cir. BAP 2013) – "Tools of the trade" is limited to personal property. Debtor cannot claim real property as exempt as "tool of the trade" even if real property is location out of which debtor conducts business.

Eleiwa v. Whitmore, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim motor vehicles as tools of the trade of debtor's spouse where there was no evidence that spouse actually used vehicles in course and scope of his trade.

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

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

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

7.33 Entireties Property

In re Scioli, 2013 WL 318718 (Bankr. D. Del. 2013) – Debtor's ownership interest in three automobiles not exempt as entireties property under Section 522(b)(3). Vehicles were titled solely in debtor's name, creating presumption that vehicles were owned by debtor individually and not jointly with spouse. Further, vehicles had been purchased by debtor using debtor's individual assets and not funds that were themselves entireties property. Although presumption of individual ownership is rebuttable, debtor failed to present any evidence to overcome title and source of proceeds. Fact that spouse undoubtedly drove one or more of the vehicles, alone, did not give spouse ownership rights sufficient to constitute ownership interest.

7.34 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.

7.35 Salary and Bonuses

In re Schmakel, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Ohio law permits debtor to exempt earnings “owed to” debtor for personal services. Earnings remain exempt even after deposit into checking account, so long as source of exempt funds is known or reasonably traceable. Wages earned can be exempt even where the wages were paid and deposited into a bank account pre-petition.

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

7.36 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.

7.37 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.

7.38 Workers Compensation

In re Stanley, 2013 WL 2154787 (Bankr. E.D. Mi. 2013) – MCL Section 600.5451(1)(j) allows debtor to exempt money or benefits paid by an insurance company, provided or allowed to be paid, because of disability due to injury or sickness of an insured person. Benefits paid by State Workers Compensation Fund constitute payments by “insurance company” within meaning of statute. Michigan Workers Compensation Statute states that the state “insures” covered employees and is acting as functional equivalent of insurance company. Funds received under workers compensation benefits remain exempt even after receipt, and exemption is not limited to entitlement to future benefits, as long as funds remain in cash form. Once benefits are used to purchase asset, funds and the asset purchased cease to be exempt as workers compensation, even if asset purchase can be directly traced to workers compensation funds. Debtor entitled to exempt funds that remained in bank account but could not exempt \$6,000 that had been paid by debtor as deposit on purchase of automobile.

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

In re Dang, Case No. 11-10091 (Bankr. W.D. Mi. 2012) – Lump sum workers compensation benefits can be exempted under Section 522(d)(10)(C) where the funds have not been received at the time 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.

7.39 Retirement Accounts

In re James, 489 BR 731 (Bankr. E.D. Tn. 2013) – IRA is presumptively exempt where IRA disclosure statements indicated that form of IRA was model government form provided by IRS and there was no evidence by either party as to whether actual favorable determination had been requested or obtained with regard to account in question.

Ahmed v. Stevenson, 2012 WL 4513771 (E.D. Mi. 2012) – Share of ex-husband's 401-k account awarded to debtor in divorce constitutes retirement funds that retain exemption as long as funds are deposited in qualified retirement account. However, court also ordered ex-husband to pay debtor her share of equity in marital property and provided that if ex-husband failed to do so, then the payment would be funded from ex-husband's 401-k account. Ex-husband failed to pay, and 401-k plan administrator removed funds from 401-k account and paid debtor. Debtor received funds and 4 weeks later deposited funds into IRA. Once funds were removed from 401-k account, funds lost "tax exempt" status, distinguishing case from those involving inherited IRAs which pass intact. Debtor's deposit of funds into new IRA could not protect all funds as IRS regulations limited debtor to an IRA deposit of no more than \$5,000 per year. Funds in IRA were "qualified" funds to extent of \$5,000 and were not exempt for all sums beyond \$5,000.

In re Lawless, 2012 WL 2974759 (Bankr. E.D. Tn. 2012) – 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

In re Daley, 459 BR 270 (Bankr. E.D. Tn. 2011), *reversed on other grounds*, 2013 WL 2922651 (6th Cir. 2013) – Issuance of favorable determination letter by IRS creates rebuttable presumption that Debtor's IRA was tax exempt but presumption could be rebutted by evidence to contrary.

7.40 Retirement Accounts – Prohibited Transactions

In re James, 489 BR 731 (Bankr. E.D. Tn. 2013) – Debtor did not engage in prohibited transaction that would disallow favorable tax treatment under Internal Revenue Code when debtor signed account agreement to establish IRA that contained standard form provision granting broker/dealer a security interest for any indebtedness that debtor may thereafter incur, where agreement also stated that lien would be unenforceable to extent inconsistent with any provision of ERISA or Internal Revenue Code, and where there was never any actual indebtedness for lien to secure and lien provisions were never enforced.

In re Daley, 2013 WL 2922651 (6th Cir. 2013) – Reversing the District Court, 459 BR 270 (Bankr. E.D. Tn. 2011), Sixth Circuit held that debtor did not engage in prohibited transaction merely by signing account agreement that granted to broker a security interest in the account for any indebtedness that debtor incurred with broker. Debtor never borrowed against IRA, never engaged in margin transactions through broker, and never incurred any actual indebtedness to broker, such that no lien ever actually arose against assets of IRA. Account had received favorable determination from IRS creating presumption that funds are exempt. IRS provision that prohibits any lending of money or extension of credit by the IRA demands an actual lending or extension, neither of which occurred in this case. Mere inclusion of language in account agreement, without actual loan or extension of credit, did not constitute prohibited transaction.

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

7.41 Employee Benefit Plan

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

7.42 Inherited Retirement Accounts

In re Jones, 2013 WL 4084093 (Bankr. D. Neb. 2013) – Debtor's inherited interest in deceased mother's pension is not exempt under Section 522(b)(3) as money lost identity as retirement funds once distributed to debtor. Pension plan did not designate beneficiary, such that proceeds passed through mother's probate estate before being paid to debtor. Once money was paid to estate's personal representative, it lost identity as retirement funds and was nothing more than another asset of the debtor. Funds in plan lost retirement attributes by being liquidated through the probate estate.

In re Clark, 2013 WL 1729600 (7th Cir. 2013) - Non-spousal inherited IRA is not exempt. Retirement funds are those funds in an account maintained by a person for his or her own retirement, and includes a decedent's spouse who inherits the account. However, where beneficiary is a person other than the owner or the spouse, the funds no longer constitute funds set aside by a person for his or her own retirement. Although the inherited account remains sheltered for tax purposes until the money is withdrawn. The new beneficiary cannot make new contributions or roll over the balance or merge the balance with any other account; and distributions must begin within one year of the original owner's death, rather than being deferred until the beneficiary reaches age 59 1/2.

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

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

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

In re Clark, 2011 WL _____ (Bankr. W.D. Wis. 2011) – Inherited Individual Retirement Account was not exempt under Section 522(b)(3) or 522(d)(12). Debtor claiming exemption under State Law must comply with Section 522(b)(3) which requires (1) the amount 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), *aff'd* 674 F.3d 486 (5th Cir. 2012) - Individual retirement account (IRA) that Chapter

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

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).

7.43 Tax Refunds

In re Briley, 2013 WL 3146901 (Bankr. S.D. Ind. 2013) – Tax refund attributable to American Opportunity Tax Credit is not exempt. State statute that allowed for exemption of Earned Income Credit did not extend to AOTC.

In re Stepp, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Ohio law allows debtor to claim as exempt tax refunds to extent that refund results from earned income credit or child tax credit. Refund was clearly attributable to the credits where debtor's W-2 statements reflected no tax withholdings, and returns showed that entire refund was attributable to credits.

US Department of Agriculture v. Riley, 485 BR 361 (W.D. Ky. 2012) – Debtor does not have property interest in potential tax refund until IRS determines amount of tax overpayment and then exercises right of setoff for past-due obligations owed to Governmental agencies. Secretary of Treasury must reduce a debtor's "tax overpayment" by past-due amounts owed to other agencies before determining whether taxpayer is entitled to refund. Debtor's interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer's estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers' obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors' overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.

Cohen v. Borgman, Case No. 11-1369 (10th Cir. 2012) – Amount of federal tax refund equivalent to the "nonrefundable" portion of the child tax credit cannot be claimed as exempt. Colorado Statute exempts only tax refund attributable to the child tax credit. Although the credit may result in a greater refund (as the credit offsets the tax liability), that does not convert the non-refundable portion into a part of the refund itself. State statute limited exemption to refund "attributable to" the child tax credit. As none of the refund was attributable to the non-refundable credit, debtor could not exempt the tax refund.

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

7.44 College Savings Accounts and Student Loan Proceeds

In re Perkins, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – Ohio exemption for State created Tuition Payment Contract is limited to

funds and rights to payment from that account and does not extend to student loans received under Federal Direct Loan program. However, 20 USC Section 1087a, which established the Federal Direct Loan program, provides that no grant, loan, or work assistance awarded or traceable to a Federal Direct Loan is exempt. Debtor can exempt student loan proceeds even after deposit into a bank account if debtor can trace the proceeds to the student loan using a standard accounting method. The Court will use the accounting method that is most beneficial to the debtor. Debtor received \$2,886.22 in student loan funds deposited into debtor's account and debtor's balance never fell below that amount prior to garnishment by creditor. Therefore, that balance would be deemed traceable to the student loans in which debtor properly claimed exemption.

7.45 Spousal Support and Child Support

In re Smith, 2012 WL 7006405 (Bankr. S.D. Ohio 2012) – Ohio law allows debtor to exempt a right to receive spousal support, child support, an allowance or other maintenance to extent reasonably necessary for support of debtor or dependent of debtor. "Right to receive" does not require court order. Entitlement created by statute is sufficient "right to receive" payment. Debtor had "right to receive" federal adoption tax credit under Federal tax law, even if IRS had not made final determination on return or possible offset against taxes owed. Credit is fully refundable, giving debtor a "right to receive" proceeds from IRS. Ohio does not define "allowance" and court would not limit scope of "allowance" to those emanating from divorce decree.

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

7.46 Exemptions – Tracing of Proceeds of Exempt Asset

In re Stepp, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Ohio law allows debtor to claim as exempt tax refunds to extent that refund results from earned income credit or child tax credit. Refund was clearly attributable to the credits where debtor's W-2 statements reflected no tax withholdings, and returns showed that entire refund was attributable to credits. Fact that debtor received proceeds prior to commencement did not preclude debtor from claiming exemption where proceeds were traceable to funds paid as part of divorce proceeding.

Barbacci v. Worrell, 2013 WL 4525227 (Bankr. N.D. Ohio 2013) – Generally, as long as funds can be traced, exempt funds do not lose their exempt nature merely through deposit into bank account. To extent debtors could trace portion of income tax refunds to earned income credit and child tax credit, debtors likely would have been able to exempt those funds.

D. Liens Impairing Exemptions – Avoidance

7.47 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).

7.48 Grounds – Generally

Goben v. Croyden State Bank, Case No. 13-6039 (8th Cir. BAP 2013) – Debtor cannot avoid consensual lien given to bank secured by liens on debtor's automobile. Section 522(f) does not allow avoidance of lien on automobile as automobile is not in the classes of assets listed in Section 522(f) as to which lien avoidance is available.

In re Depascale, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Extent of homestead exemption for purposes of determining whether judgment lien impaired exemptions is allowable exemption when bankruptcy case is filed, not earlier date when judgment lien attached. Debtor entitled to full Ohio exemption of \$132,900 in effect when bankruptcy case filed rather than \$21,625 exemption that was allowed at time judicial liens attached.

In re McGuire, 2013 WL 4029297 (Bankr. N.D. Ohio 2013) – Debtor cannot avoid lien on property where debtor has not claimed property as exempt. Debtors did not claim property as exempt where Debtors' Schedule C listed the value of debtors' interest at \$0.00 and asserted a value of claimed exemption of \$0.00. Debtors could not show that debtors had any property in which exemption is properly claimed.

In re Law, 2013 WL 4078844 (Bankr. N.D. Ohio 2013) – Section 522(f) permits a debtor to avoid a judicial lien that impairs an exemption. A lien impairs an exemption to extent that sum of lien plus all other unavoidable liens plus exempt amount exceeds value of debtor's interest. Debtor cannot avoid a judicial lien on property in which debtor did not claim an exemption, even if the value of the property is

less than the unavoidable liens in the property.

In re Pees, 2013 WL 3808153 (Bankr. N.D. Ohio 2013) – Debtor can avoid judicial lien where value of property is less than value of unavoidable liens plus exemptions. Debtor permitted to avoid lien after claiming asset exempt to extent of \$1.00 using wild card exemption. As amount of unavoidable secured liens plus \$1.00 claimed exemption exceeded value of property, judgment lien was avoidable. Court rejected creditor argument that debtor's claiming of exemption only to extent of \$1.00 was "artificial impairment" done solely to allow avoidance of lien, and not for any good faith basis to actually claim exemption in which debtor had no equity. Court concluded that language of "wild card" exemption allowed debtor to spread that exemption as desired by the debtor and did not either require debtor to use specific amount on any particular asset or limit purposes for which exemption was claimed.

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

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

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

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

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

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

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

7.49 Valuation

In re Younoszai, 478 BR 841 (Bankr. W.D. Ky. 2012) – Judgment lien is avoidable to extent sum of lien plus all other liens on property plus exempt amount exceeds value of property. Value is fair market value for property. Debtor's appraisal appeared to undervalue property as it used condominium units that were somewhat different than debtor's unit and did not take into account that debtor had previously rented unit for as much as \$2400 per month. Court also considered tax assessed value. Court concluded that actual value was mid-point between debtor's appraiser and tax assessed value.

In re Lavine, 2012 WL 4106749 (Bankr. N.D. Ohio 2012) – Valuation of property for purposes of avoiding judicial lien where property is owned as joint tenants but judgment is against only one of the owners is based on one-half of the value of the property. As joint tenant, debtor had the right to use and possess one-half of the property versus tenancy-by-entirety in which each tenant owns the property in full. Property was also subject to first mortgage signed by both debtor and spouse. To determine whether lien impairs exemption, and to what extent, court would divide mortgage by two and charge only half of the mortgage balance plus the judicial lien against the value of debtor's one-half interest in the property.

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

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

7.50 Joint Ownership

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

7.51 Liens Avoidable – Judicial Liens

In re Anderson, 2013 WL 3878973 (Bankr. E.D. La. 2013) – Debtors may avoid judicial liens that impair exemptions even where liens attached to property prior to debtor's acquisition. Debtors suffered judgment and creditor properly recorded judgment in public records, constituting a lien on all real property of the debtor in the county. Debtors thereafter bought a house in the county, at which time the lien attached. Section 522(f) allows avoidance of any judicial lien, and does not distinguish between liens that created prior to or subsequent to the acquisition of the property.

In re Zorns, 2013 WL 5310175 (Bankr. N.D. Ohio 2013) – Debtor's lack of personal liability on the senior mortgage does not exclude balance owed in determining whether judgment lien impairs exemption. Debtor purchased property subject to existing mortgage but did not assume mortgage personally. Mortgage attaches to debtor's interest in property and operates to secured payment of the obligation. Even assuming highest value of property and lowest balance due on mortgage, total of mortgage and exemption far exceeded value of property such that entire judgment lien would be avoided.

In re Depascale, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Judicial lien avoidable where residence had fair market value of \$144,000 subject to mortgage of \$143,862.00 and debtor's exemption of \$132,900, leaving no equity in property to which lien could attach. Even if property was worth \$230,000 as alleged by creditor, prior lien plus exemption still exceeded value of property leaving nothing to which lien could attach.

Northedge v. Beckett, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Ex-spouse cannot use Section 522(f) to defeat lien granted to former spouse where the lien is granted under a divorce decree that extinguishes all interest the parties had in the property and which does not exceed the value of the property.

In re Younoszai, 478 BR 841 (Bankr. W.D. Ky. 2012) – Judgment lien is avoidable to extent sum of lien plus all other liens on property plus exempt amount exceeds value of property. Court determined that property had value of \$456,000.00, subject to a first mortgage of \$331,461; a second mortgage of \$95,000; and a judgment lien sought to be avoided of \$1,229,393.97. Debtor entitled to exemption of \$5,100. Total of all liens plus exemptions was \$1,660,954.97, minus value of property of \$456,000 resulted in lien impairing exemptions in total amount of \$1,204,954.97. Thus, judgment lien avoidable to that extent, with surviving lien of \$24,439.00.

In re Mack, 2012 WL 4882267 (Bankr. N.D. Ohio 2012) – Section 522(f) provides for avoidance of judicial liens to extent liens impair exemptions. A lien is considered to impair an exemption to the extent that the sum of the lien, all other liens on the property, and the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens. Debtor entitled to avoid judicial lien on property worth \$15,000.00. Value of homestead was less than amount of available exemption. Thus, judicial lien would impair exemption to full extent of lien.

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.

7.52 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.

7.53 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.

7.54 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

7.55 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.

7.56 Trustee’s Power to Sell Exempt Assets

Still v. Hopkins, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Tennessee law allows debtor to exempt value of homestead up to \$12,500, but does not guarantee debtor any right of possession or use of specific property. Debtor’s Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt. Trustee could sell property free and clear of life estate, as long as Trustee paid debtor \$12,500 representing the value of the claimed exemption.

7.57 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.

7.58 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 of estate and parties agreed that tax debt was non-dischargeable.

7.59 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.

Still v. Hopkins, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Debtor's Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. To extent property was worth in excess of \$12,500, Trustee was entitled to the excess. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt. Trustee could sell property free and clear of life estate, as long as Trustee paid debtor \$12,500 representing the value of the claimed exemption.

7.60 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 Ohakpo, 2013 WL 794347 (Bankr. E.D. Mi. 2013) – Section 543 governs rights and duties of custodians. Custodian retains secured claim in bankruptcy to extent of equity in property, but custodian is not entitled to administrative claim as the seizure of the property does not provide any benefit to the estate and the custodian has not been hired by the Chapter 7 Trustee.

Wojcik v. Hudson Funding, LLC, 2013 WL 2085959 (N.D. Ohio 2013) – Debt is entitled to administrative status as actual and necessary expense only if action arose from transaction with bankruptcy estate and transaction directly and substantially benefitted estate. Administrative claims are limited to those where the consideration for the claim was received post-petition, and creditor must prove that benefit is more than a speculative or potential one. Fact that right to payment arises post-petition is not sufficient. Corporate debtor's obligation to indemnify officers and directors of company is not administrative where all of debtor's officers and directors resigned approximately one year pre-petition and the agreements containing the indemnification obligation were all executed well before filing of case. There were no transactions with the estate on which those obligations were based and there was no showing that enforcement of indemnification clauses would, in any way produce benefit to estate, particularly where indemnification being sought was for costs of defense of adversary proceeding brought by estate against former directors and officers for misconduct.

In re Halabu, 2013 WL 780757 (Bankr. E.D. Mi. 2013) – Property taxes that come due during pendency of Chapter 13 case are administrative expenses. Section 502(b)(3) does not defeat administrative status as Section 502(b)(3) applies only to pre-petition taxes. Creditor who pays taxes is not entitled to administrative claim as administrative status is limited to taxes owed to taxing authority, not to secured creditor who pays those taxes on behalf of debtor.

In re Marotta, 479 BR 681 (Bankr. M.D.N.C. 2012) – Filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition

loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole. Reimbursement of advances are not recoverable as compensation under Section 330(a)(4) as they funds are not “compensation for services rendered”.

In re Fornes, 2012 WL 4904581 (Bankr. M.D.N.C. 2012) – Adopting holding in *Marotta*, filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.

In re Hollingsworth, 2012 WL 4832328 (Bankr. M.D. N.C. 2012) - Adopting holding in *Marotta*, filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.

In re Energy Conversion Devices, Inc., 2013 WL 501732 (Bankr. E.D. Mi. 2013) – Section 503(b)(9) provides for administrative expense status for goods sold within 20 days prepetition and in the ordinary course of debtor’s business. Trustee objected to administrative status based on other, unrelated allegedly preferential transfers, citing Section 502(d) that requires the court to disallow any claim of any entity that received an avoidable transfer unless the transferee has paid the amount, or turned over the property, representing the avoidable transfer. Acknowledging split of authority on whether Section 502 can defeat an otherwise valid administrative expense claim, court held that Section 502 provides for disallowance of “claims” but that a request for administrative expense status is not a “claim”. Therefore, Section 502 cannot be used to defeat an otherwise proper claim for administrative expenses. Court would not defer payment of administrative expense claim where confirmed plan required payment and trustee had not filed avoidable transfer action and did not demonstrate any likelihood of success if one was filed, given numerous possible defenses to that action, and if trustee does prevail, there was no evidence that the transferee, a large multinational corporation, would be uncollectable.

In re Halabu, Case No. 11-59449 (Bankr. E.D. Mi. 2012) – Under Section 503 as amended by BAPCPA, property taxes for which liability is in rem, in personam, or both, are entitled to administrative expense status. Governmental unit is not required to file request for payment of administrative expense for claim to be allowed as such. Section 503 does not explain how Trustee is to know of administrative taxes if no claim is filed. Once secured creditor filed request for administrative status, however, burden shifted to trustee to investigate and court to determine, whether any taxing authority has an allowed administrative claim for unpaid real estate taxes incurred during pendency of case. Trustee would thereafter be required to hold funds until Motion for Administrative Expense Claim can be heard and decided. To extent claim is to allowed and paid, it must be allowed to and paid to the taxing authority. Secured creditor lacks standing to assert administrative priority claim on behalf of taxing authority. Fact that unpaid taxes would adversely affect secured creditor’s lien is not sufficient to create standing in creditor to seek administrative claim status. However, dismissal of case does not, alone, deprive court of jurisdiction to determine administrative expense status. Court required service of motion and order on taxing authorities to provide opportunity for taxing authority to appear and seek administrative status if it so chose.

In re Michigan Biodiesel, LLC, Case No. 10-5786 (Bankr. W.D. Mi. 2012) – Administrative claimant must prove by preponderance of evidence that claim represents actual, necessary costs and expenses of preserving the estate. Expense is “actual and necessary” only if the expense arose from transaction with bankruptcy estate and directly and substantially benefitted the estate. Claimant served as Chief Executive prior to commencement of case under oral agreement with Board of Directors. Claimant continued to serve in that capacity, although the executory contract for those services was never formally assumed, indicating that continued performance established transaction with estate. Services were also necessary as someone had to be in control of operations of debtor’s business. However, services did not help to preserve estate. Claimant caused certain dubious tax claims to be filed with the IRS resulting in \$13 million tax claim against estate. Claimant then paid substantial portion of tax credits to third party without court permission. Ongoing “misadventures” undercut allegation that claimant was good manager and steward. Debtor suffered serious financial losses post-petition while under control of claimant.

In re Connolly North America, LLC, 2012 WL 4096256 (Bankr. E.D. Mi. 2012), *affd* 2013 WL 5450285 (E.D. Mi. 2013) – 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 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.

8.2 Environmental

In re Appalachian Fuels, LLC, 2013 WL 1694769 (6th Cir. BAP 2013) – Environmental costs may be recoverable as administrative expenses. Debtor can be liable for environmental charges either for direct liability or on a derivative basis where the environmental claims are the result of actions of a related entity. Derivative liability requires independent basis to pierce corporate veil. Parent corporation is not generally liable for acts of subsidiary unless corporate form is being misused to accomplish some unlawful purpose such as fraud on behalf of the shareholder. Direct liability requires operation of the facility. Fact that facility is owned by subsidiary does not insulate parent where pollution is the result of the parent's operations of that facility. Creditor could not prevail against debtor where creditor did not present any proof as to whether funds or property interests were commingled. There is no evidence of inadequate capital structures, failure to follow corporate formalities, siphoning off of funds to the other entities, or total control and dominance of debtor by the other entities. Aside from indicating that same individual served as director or president of all three entities, creditor did not present any evidence that debtor or the related entities had the same directors and officers or that the similar officers shared responsibility for supervision and management of debtor's mining operations. There was also no evidence presented that debtor intended to use its corporate structure as a way to perpetrate a fraud or do grave injustice to a third party.

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

In re Caffey, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Security interest in personal property is enforceable if value has been given; debtor has rights in collateral; and debtor had authenticated a security agreement that provides description of collateral. Value has been given where creditor acquires security interest as security for pre-existing claim. Creditor had valid possessory security interest in debtor's vehicle to secure costs of repairs. Creditor released vehicle to debtor in exchange for a lien on the vehicle title to secure the remaining balance owed. Documents signed when vehicle was returned sufficiently indicated intent to create security interest and contained an adequate description of the vehicle and was signed by both parties.

In re Hall, 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Lien secured by debtor's property passes through Chapter 7 bankruptcy, although underlying personal liability may be discharged. Chapter 7 proceeding valued car at less than amount of debt. Debtor did not reaffirm debt and received discharge. In later Chapter 13, debtor attempted to disallow lender's entire claim under Section 502(b)(1) on theory that as a result of the discharge, the claim was no longer enforceable against the debtor. Court concluded that section 502(b)(1) disallows a claim only where the claim is unenforceable against the debtor *and* property of the debtor. Here, although the claim may have been unenforceable against debtor, the claim passed through the Chapter 7 and remained enforceable against property of the debtor. Further, creditor cannot be compelled to satisfy lien on vehicle for less than full contract value in subsequent Chapter 13. Section 1325(a)(5) allows lien to be stripped only if (a) creditor received full payment of contract balance, or (b) debtor receives discharge. In "Chapter 20" debtor as not entitled to discharge. Therefore, debtor could not require creditor to release lien unless creditor received full contract payment.

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), *aff'd* 2013 WL 4859785 (6th Cir. 2013) – Mortgage that is signed but not recorded is enforceable against mortgagor and any subsequent purchaser with notice. Mortgage is void only as against a good faith purchaser for value. Mortgage signed by debtor and her husband was valid and enforceable secured obligation as against husband even if not recorded. Later amended mortgage that was signed by wife alone also valid where wife acquired property prior to marriage can, after marriage, continue to deal with property as if owner never married. Thus, mortgage signed by wife alone on property owned by wife prior to marriage and still owned in wife's name alone was enforceable and valid.

8.5 Secured – Method of Perfection

Rogan v. Greentree Financial Servicing Corp., 2013 WL 571796 (Bankr. E.D. Ky. 2013) – Method of perfection of security interest is governed by state law. Under Kentucky law, proper method of perfection on manufactured home is by recording lien on certificate of title. However, if manufactured home is converted to real property, then proper method of perfection is recording a lien in the real property records. To convert manufactured home to real property, owner must file affidavit with the county clerk that the home has been permanently affixed; and must surrender the certificate of title. Lender did not record lien on certificate of title and home was never converted to real property using statutory method. Lender's recording of lien with county clerk did not perfect lien as home never became part of real property. Although home was, as a matter of fact, permanently affixed to real property, that alone did not convert home to real property for purposes of perfecting lien. Lender could not avoid result by arguing that home was "fixture" on which lien perfected by recording, because under Kentucky law, only method to convert manufactured home from "title" to real estate was by statutory process for conversion. Thus, home never became part of real estate as matter of law even though it was permanently affixed.

In re Marble Cliff Crossing Apartments, LLC, 484 BR 175 (Bankr. S.D. Ohio 2012) – Under Ohio law, no specific words or formal documents are necessary to create security agreement, but there must be some written documentation of intent to create security interest. Debtor signed purchased agreement and separate service agreement for acquisition and installation of wireless internet access equipment in apartment complex created security agreement. Although purchase agreement did not create security interest, language in servicing agreement that debtor conveyed security interest in equipment installed was sufficient. Equipment was not a fixture that required recording of security interest in real estate records. "Fixture" requires actual attachment to realty, appropriation of personal property to use of real property; and intention that personal property become permanent part of realty. Equipment was not fixture as equipment had "slight" attachment to realty by screws that could easily be removed with little or no harm to property; equipment benefitted rental business conducted on property rather than property itself; and testimony indicated that parties did not intend for the items to become fixtures. Resulting security interest was PMSI that was properly perfected by filing financing statement with secretary of state.

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 Security Deposits

Iwanski v. Federal Home Loan Mortgage Corp., 477 BR 67 (E.D. MI. 2012) – Possession of property, including security deposits for rental property, remains in mortgagor until expiration of state law redemption. Prior to expiration of redemption, landlord/mortgagor can apply security deposits to rent arrearages. Adversary proceeding brought by tenants to compel return of security deposits remanded for proceedings to determine whether any unpaid rent remained outstanding as of date of redemption to which security deposits could be applied. To extent debtor retained security deposits remained in possession of the debtor and security deposits exceeded unpaid rents, deposits would have to be refunded by debtor.

8.8 Secured – Accounts Receivable

Swope v. Commercial Savings Bank, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Whether and to what extent creditor holds security interest and whether that interest is perfected are matters of state law. Uniform Commercial Code provides that security interest is enforceable only when value has been given by the creditor, debtor has rights in the collateral or the power to transfer rights to third party, and debtor has authenticated a security agreement that describes the collateral. The description is sufficient whether or not it specifically identifies any item of collateral if it reasonably identifies the collateral, including a description by category or type of collateral. Security interest is valid against third party such as Bankruptcy Trustee only if interest is perfected, generally by filing a financing statement with the appropriate governmental agency. Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the proceeds and products of the equipment. Accounts receivable did not qualify as “proceeds of collateral”. Proceeds are whatever is acquired at the sale, lease, license, exchange or disposition of the collateral. Although use of equipment generated receivables, those receivables were not proceeds as the debtor never disposed of the equipment, but were rights to receive payment for services. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor’s rights did not supersede the rights of the Trustee.

8.9 Secured – Proceeds of Collateral

Swope v. Commercial Savings Bank, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the proceeds and products of the equipment. Accounts receivable did not qualify as “proceeds of collateral”. Proceeds are whatever is acquired at the sale, lease, license, exchange or disposition of the collateral. Although use of equipment generated receivables, those receivables were not proceeds as the debtor never disposed of the equipment, but were rights to receive payment for services. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were

not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor’s rights did not supersede the rights of the Trustee.

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.

8.10 Secured – Products of Collateral

Swope v. Commercial Savings Bank, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the proceeds and products of the equipment. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor’s rights did not supersede the rights of the Trustee.

8.11 Secured – Priority of Competing Secured Claims

Agri-Max Financial Services, LP v. Springfield State Bank, 2013 WL 4525175 (Bankr. W.D. Ky. 2013) – Priority of security interests is matter of state law. Lender failed to obtain perfected purchase money security interest in livestock where lender failed to provide statutorily required notice to second creditor who held perfected lien on all of debtor’s livestock. As such, the lender holding the blanket lien on all livestock had priority in livestock and in proceeds received upon disposition of livestock.

Peoples National Bank v. Bandera Bank, Case no. 12-3079 (7th Cir. 2013) – Cross collateralization clause in properly recorded first mortgage was sufficient constructive notice to second mortgage holder that actual balance secured by first mortgage may exceed face amount of debt stated in first mortgage and note as long as total amount of all secured indebtednesses did not exceed “Maximum Lien” amount stated in the mortgage. While “Maximum Lien” amount stated was also the initial amount of the promissory note, once the borrower began making payments, the principal balance owed on the note would decrease and the amounts owed on any cross-collateralized obligations would attain secured status to extent of principal reduction on note. Information contained in recorded mortgage provided sufficient notice that any subsequent purchaser or lender would have duty to further inquire as to actual balance secured by mortgage and possible cross-collateralized loans.

In re Purdy, 2013 WL 781630 (Bankr. W.D. Ky. 2013), *aff’d* 2013 WL 5407045 (W.D. Ky. 2013) – Whether a transaction creates a lease or a security interest if the consideration that the lessee is to pay is for a right to use and possess goods for a term that is not subject to termination by lessee, and original term of lease is equal to or greater than economic life of the goods; the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods; he lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement. Alleged lease of dairy cattle was disguised security agreement where lease was not terminable by debtor; term of lease of 50 months was substantially in excess of economic life of the dairy herd, which had a annual turnover rate of 30% rendering it a virtual certainty that the entire herd would be turned over at least once in 50 month term; and parties treated cattle as belonging to debtor including allowing debtor to sell or dispose of cattle without accounting to “lessor” for the value or proceeds. “lessor” did not perfect security interest in cattle prior to date on which another trade creditor perfected a security interest by recording a financing statement that included “livestock” in description. As creditor held superior security interest in cattle, creditor also held superior interest in all proceeds and products including post-petition milk proceeds under Section 522.

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.

8.12 Secured Claims – Purchase Money Security Interests

In re Murphy, 2013 WL 1856337 (Bankr. D. Kn. 2013) – Creditor holds perfected PMSI in goods purchased on Best Buy credit card. Credit application debtor signed when acquiring the car granted Bank a security interest in all goods purchased using the card. Description of goods in security agreement as "goods purchased" was sufficient description to create valid security interest.

8.13 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.

8.14 Secured – Attorney Fees

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.

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”.

8.15 Secured – Interest Rate

Prudential Insurance Company v. SW Boston Hotel Venture, LLC, Case no. 11-079 (1st Cir BAP 2012) – Under Section 506(b), oversecured creditor is unqualifiedly entitled to Post-petition interest on its oversecured claim regardless of whether loan documents provide for interest. Whether loan is oversecured is determined using flexible approach, such that even an originally undersecured loan can become oversecured based on changing events and circumstances. Although parties initially believed loan to be undersecured, and court had entered an order to that effect, property was later sold during course of Chapter 11 case for substantially more than was owed, resulting in creditor being oversecured and entitled to interest on the claim from the petition date. Creditor entitled to compound interest where loan documents provided that interest would compound monthly and Court lacks authority to deny compound interest where loan documents clearly provide for compounding. Bankruptcy code presumes that creditor is entitled to interest at contractual default rate, provided that there are no equitable considerations that would compel different result. In considering whether equitable basis exists to deny default rate, court will focus on whether the creditor is guilty of misconduct; the imposition of default rate would harm unsecured creditors; default rate would impair fresh start; or default rate constitutes a penalty. Loan documents provided for additional 5% on contractual non-default rate in event of default. Plan proposed to pay all creditors in full, such that use of default rate would not harm other creditors, and there was no evidence of creditor misconduct. Rate was not penalty as rate was consistent with rates generally used by lender and used by other lenders. Rate would not impair debtor’s ability to reorganize or impair fresh start. Default rate of 5% higher than non-default rate was not a penalty and was not inequitable.

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.

8.16 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.

8.17 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.

8.18 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.

8.19 Secured – Assignment of Insurance Proceeds

State Farm Insurance Company v. P.M.C., 2013 WL 4009031 (E.D. Mi. 2013) – Assignment of insurance policy as collateral for loan transfers policy to creditor to extent necessary to secured debt and extinguished beneficiary’s interest to the same extent. Lender’s receipt of payments in borrower’s bankruptcy case did not extinguish secured claim to extent that debt remained unpaid after application of proceeds received in bankruptcy case. Although lender was treated in bankruptcy case as unsecured, lender filed unsecured proof of claim, and lender received payments as an unsecured creditor, those payments did not extinguish the secured interest, as discharge eliminates personal liability but does not extinguish the underlying debt itself.

8.20 Secured – Property Acquired Subject to Lien

8.21 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.

8.22 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.

8.23 Secured – Judgment Lien

Northedge v. Beckett, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Judgment of Divorce was sufficient to create judgment lien on former marital home to secure balance owed by debtor to spouse. JOD clearly states that parties intended to divide the value of the property equally, to permit debtor to continue to live there, and for debtor to have up to 5 years to pay spouse for his equity at a specified price. JOD also stated that spouse retained a secured interest and reserved to spouse power to have property sold if Debtor did not make payments as required. Lack of separate note and mortgage did not defeat spouse’s status as holder of a lien where that was clearly spelled out in the JOD.

In re Wittmer, 2013 WL 3808150 (Bankr. N.D. Ohio 2013) – Judgment lien attaches only to property owned by debtor when lien is recorded or property obtained after recording, and located in county in which lien has been perfected. Judgment creditor did not hold lien against property that debtor had transferred prior to creditor’s recording of lien in county records. Although property may have been fraudulently transferred, creditor did not bring fraudulent transfer action prior to commencement bankruptcy case and creditor could not trace any connection between debt underlying the judgment and any property conveyed by debtor.

8.24 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.

8.25 Secured – Attorney Charging Liens

Mayer v. Giarmarco, Mullins & Horton, PC., 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Attorney charging lien arises by operation of law without prior notice to client where attorney’s actions results in judgment in favor of client. Lien extends to any judgment or other recovery in a particular suit, and includes any settlement or other money recovered as a result of attorney’s efforts. In divorce action. “recovery” includes the outcome of the divorce case as a whole, and includes property transferred to or property retained by client. Attorney held charging lien in client’s interest in IRA that debtor retained as a result of divorce proceeding. Although debtor had IRA prior to commencement of divorce action, and judgment did not “recover” anything that client did not already have, client’s retention of that interest was recovery for purposes of charging lien.

8.26 Secured – Attorney Retaining Liens

8.27 Federal and State Tax Liens

Ryan v. U.S., Case No. 12-3398 (7th Cir. 2013) – Chapter 13 debtor cannot use Section 506 to bifurcate federal tax lien. Although lien was for amount far in excess of value of debtor’s equity in assets, under *Dewsnup*, U.S. held valid secured claim that cannot be bifurcated.

8.28 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, 477 B.R. 40 (6th Cir. BAP 2012) – Section 506(a) requires valuation of the collateral for purposes of determining extent of secured claim. In valuing property, court must first determine the extent of the creditor’s interest in debtor’s interest in the collateral; and must then determine how to value the collateral. Where the debtor proposes to retain and use the collateral, valuation is based on amount which willing buyer in debtor’s trade or business would pay to acquire like property from a willing seller. Collateral consisted of low income apartment complexes, each of which had Low-Income Housing Tax Credits attached to the property. Tax credits provide incentive to develop low-income housing properties in exchange for stream of tax credits, and are conditioned on property maintaining compliance with Tax Credit program requirements. If the property is sold during the term of the tax credits, the purchaser acquires the remaining stream of tax credits as if the prior owner had not sold the property. Tax credits are attached to the property and belong to the owner of the property. Tax credits could not be severed from the property and do not exist separate from ownership of the property, and must be considered in valuing the property itself. Bankruptcy Court properly valued property, by reviewing appraisals submitted by each party, reviewing evidence and testimony, and concluding that the creditor’s appraiser more accurately reflected market conditions. Bankruptcy court engaged in thorough review of qualifications of appraiser for debtor and appraiser for creditor and made detailed analysis of why Court gave more weight to creditor’s appraisal. Debtor failed to demonstrate clear error or abuse of discretion in Court’s determination of value of collateral.

8.29 Membership Interests as Collateral

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

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

8.31 Default Interest Rate

Prudential Insurance Company v. SW Boston Hotel Venture, LLC, Case no. 11-079 (1st Cir BAP 2012) – Bankruptcy code presumes that creditor is entitled to interest at contractual default rate, provided that there are no equitable considerations that would compel different result. In considering whether equitable basis exists to deny default rate, court will focus on whether the creditor is guilty of misconduct; the imposition of default rate would harm unsecured creditors; default rate would impair fresh start; or default rate constitutes a penalty. Loan documents provided for additional 5% on contractual non-default rate in event of default. Plan proposed to pay all creditors in full, such that use of default rate would not harm other creditors, and there was no evidence of creditor misconduct. Rate was not penalty as rate was consistent with rates generally used by lender and used by other lenders. Rate would not impair debtor’s ability to reorganize or impair fresh start. Default rate of 5% higher than non-default rate was not a penalty and was not inequitable.

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.

8.32 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.

8.33 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 governed filing of post petition claims were 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 Senczyszyn, 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 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.

8.34 Corporate Tax Liabilities

In re Community Memorial Hospital, 2013 WL 2297042 (Bankr. E.D. Mi. 2013) – State's claim for unpaid Unemployment taxes is not priority claim under Section 507(a)(8).

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.

8.35 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.

8.36 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.

8.37 Domestic Support Obligations

In re Thomas, 2013 WL 5493214 (Bankr. E.D. Ky. 2013) – Section 507(a)(1) creates a first-priority claim for domestic support obligations. Whether debt is DSO is based on parties' intent interpreted under federal law and depends on whether obligation is in the nature of alimony, maintenance or support. Obligation constitutes support only if the state court or parties intended to create a support obligation; obligation must have actual effect of providing necessary support; obligation must not be so excessive as to be unreasonable under traditional concepts of support; and if the amount is unreasonable, the obligation is non-priority general unsecured debt to extent necessary to serve purposes of federal bankruptcy law. Fact that domestic judgment expressly disavowed any continuing support obligation does not preclude finding that payment is in the nature of support. Decree that required debtor to pay one-half of second mortgage was in the nature of support, where payments were essential to protecting former residence which was the residence of the debtor's children. Ex-spouse did not receive any additional support that would support finding that spouse was taking sole responsibility for payment of mortgage. Agreement contemplated that ex-spouse would retain any excess proceeds upon sale of home, but in the event of a shortfall debtor would be responsible for one-half of the shortfall indicating that purpose of agreement was to providing continuing home for children, and without debtor's obligation to pay mortgage there was substantial risk that children would be left without a home. Debtor's obligation to reimburse ex-spouse for judgment lien that spouse satisfied at sale of home was also DSO where it appeared that debtor withheld information that judgment lien existed at time of divorce which effectively eroded the support spouse negotiated at time of divorce.

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.

8.38 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.

8.39 Priority – Tax Claims

U.S. v. Monahan, Case No. 12-084 (1st Cir. BAP 2013) – Chapter 13 Plan that provided for payment of IRS priority non-dischargeable claim but did not propose to pay interest did not discharge interest portion of tax debt. Chapter 13 plan can treat only allowed claims and per Section 502 post-petition interest is not allowed claim on unsecured debt. *Espinosa* did not compel different result where plan was silent on interest, such that IRS did not have notice that plan would discharge unpaid interest at completion of case.

Winters v. Comm’n of Internal Revenue Service, 2013 WL 364328 (Bankr. M.D. Tn. 2013) – Section 507(a)(8)(A) gives priority treatment to tax claims where the return is last due less than 3 years pre-petition, or where the taxes are assessed less than 240 days plus any time during which collection was stayed pre-petition. Income taxes must be assessed within three years of date on which return is due. Upon assessment, taxpayer has 90 days to file an appeal. If an appeal is filed, IRS is precluded from assessing until Tax Court decision becomes final. Thus, filing of tax court appeal tolls running of 240 day period until appeal is determined. Debtor filed bankruptcy before Tax Court issued ruling, which precluded Court from issuing ruling and precluded running of 240 period for assessment. Debtor’s obligation for 2004 tax liability was entitled to priority under Section 507. Further Section 523 precludes discharge to taxes that have not been assessed as of the petition date but which are still assessable as of the petition date. Debtor’s liability for 2004 taxes which were unassessed but still assessable as of the petition date were excepted from the discharge.

In re Paradis, 2012 WL 3938644 (Bankr. D. Me. 2012) – Tax will be priority if the tax is measured by income and if the last date on which the return was due is more than three years prior to commencement of the case, unless Section 507(a)(8)(A)(i) extends the time. Time will be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days. Debtor filed for bankruptcy in June, 2011. Debtor had not obtained extension for filing 2007 return, meaning last date on which return could be filed was April 15, 2008. Thus, three year “lookback” presumably expired on April 15, 2011. Debtor’s request for Offer

in Compromise did not constitute “request by the debtor for a hearing” sufficient to suspend time. OIC process entails no hearing and is an administrative proposal designed to foster evaluation and negotiation. OIC stands apart from more formal proceedings that include a request for hearing and operate to suspend time. Taxes were not assessed within 240 days where taxes were assessed, at the latest, 291 days pre-petition and there was no action that would have tolled running of 240 day period.

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.

8.40 Priority – Unemployment Compensation Reimbursement

In re Community Memorial Hospital, 494 BR 906 (Bankr. E.D. Mi. 2013) – Michigan Unemployment Insurance Agency claim for reimbursement of unemployment benefits paid by agency to former employees of debtor did not seek payment of “taxes” within provisions of Section 507(a)(8) and was not entitled to priority status.

8.41 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.

8.42 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.

8.43 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.

8.44 Guaranty Claims

Key Bank v. Hartmann, 2013 WL 1312013 (E.D. Ky. 2013) – Under Ohio law, lender on secured debt cannot pursue recovery from guarantor unless lender proves that it repossessed and disposed of collateral in a commercially reasonable manner. Lender not entitled to summary judgment on guarantee claim where guarantor disputed that sale was commercially reasonable and lender did not produce any evidence of commercially reasonable nature of sale or disposition.

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.

8.45 “Advancement of Fees”

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

8.46 Executory Contracts and Unexpired Leases – Assumed

8.47 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.

8.48 Condominium and Homeowners Associations

In re Kanohokula, 2013 WL 1346020 (Bankr. D. Hawaii 2013) – Dischargeability is determined by date on which payment of assessment is due. Fact that board announced assessment prior to date on which debtor commenced bankruptcy did not make debt dischargeable where assessment was not due and payable until after commencement of case.

In re Kelson, 2012 WL 3990789 (Bankr. S.D. Fl. 2012) – Under Section 523(a)(16), post-petition fees and assessments are not dischargeable. Special Assessment levied pre-petition is a pre-petition claim, even if assessment cannot be enforced until post-petition. Obligation to pay special assessment arose when Board of Directors adopted assessment at duly noticed meeting, even if payment was not due until later date. fact that the board of directors opted to provide the members a longer period of time to pay the obligation does not change the fact that the obligation was established when the assessment was adopted. Assessment was pre-petition obligation that is discharged in Debtor’s Chapter 13 proceeding.

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.

8.49 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.

8.50 Subordination

8.51 Guaranty Claims

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

8.52 Custodian

Jones v. Goodman, 2013 WL 4084760 (E.D. Mi. 2013) – Under Section 101(11), custodian is a receiver or trustee of property of debtor appointed in a case or proceeding not under Title 11; an assignee under a general assignment for benefit of creditors; or a trustee, receiver or agent under law or contract that is appointed to take charge of property of debtor for purposes of enforcing lien. Section 543 provides that if property is in possession of custodian, court must provide for payment of reasonable compensation for services rendered and costs advanced by the custodian. Claimant was not “custodian” as claimant had not been appointed or authorized by state court to take charge or seize debtor’s property. Seizure order named only a third party as the officer for purposes of seizure. Fact that named court officer may have received assistance from claimant did not transform claimant into court appointed officer. Further, based on State Court’s own requirements, claimant was not eligible to have been named as court officer in first instance.

In re Ohakpo, 2013 WL 794347 (Bankr. E.D. Mi. 2013) – Section 543 governs rights and duties of custodians. Section 101(11) defines custodian as a receiver or trustee; assignee under general assignment for benefit of creditors; or trustee, receiver or agent under law or contract appointed or authorized to take charge of property of debtor for purposes of enforcing line or for administration of property for benefit of creditors. Persons acting as court officers for purposes of seizing property are appointed as court officers as defined in Section 101(11). State Court order authorized named court officer to take possession of debtor’s property as defined in Section 101(11). Named individual took possession of property under writ of execution, issued for purposes of enforcing a charge against the seized property. As such, court officer who took possession of debtor’s property under writ of execution constitutes “custodian” under section 543. Under Section 543, Court can enter orders as necessary to protect entities to which the custodian has become obligated with respect to the property or its proceeds, and may provide for reasonable compensation for services rendered and costs and expenses incurred by the custodian. Michigan state law provides for compensation of \$32 plus mileage plus actual and reasonable expenses for seizing and keeping the property. Custodian entitled to recover actual costs paid to towing company for seizing vehicle plus \$32. Custodian is not entitled to percentage fee as property was neither sold by custodian nor released because debtor paid the underlying judgment. Custodian has lien against seized property for payment of fees and expenses to extent that sale of collateral yields amounts in excess of liens on property. Custodian retains secured claim in bankruptcy to extent of equity in property, but custodian is not entitle to administrative claim as the seizure of the property does not provide any benefit to the estate and the custodian has not been hired by the Chapter 7 Trustee.

8.53 Insider Claims

Spradlin v. Williams, 2010 WL 4736905 (E.D. Ky. 2010) – Claims filed by insiders are subjected to a greater level of scrutiny that 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).

8.54 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.

8.55 Post-petition Interest – Unsecured Claims

Ground Improvement Techniques, Inc. v. Plan Committee, Case No. 11-17447 (9th Cir. 2013) – Section 502(b)(2) prohibits claims for unmatured interest on unsecured claims. However, protection runs only to debtor. To extent that non-debtors are also liable on debt, creditor is entitled to full contract rights against non-debtor including interest that accrued after commencement of Chapter 11 case.

8.56 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.

8.57 Punitive and Treble Damages

Gidelski v. Anton, 2013 WL 1747907 (Bankr. E.D. Mi. 2013) – Where state law permits award of treble damages, Court has discretion to award treble damages or actual damages, but cannot award some intermediate amount such as double damages. Award of attorney fees where allowed by state law is also discretionary with court. Trebling is not automatic, but rather, is left to the exercise of judicial discretion, based on Court's determination of what is fair under the circumstances. Debtor clearly acted wrongfully over the course of years by wrongfully embezzling trust funds that had been entrusted to her. Debtor expressed some remorse for her actions. State court criminal proceeding resulted in incarceration and restitution to victim that will take debtor some years to pay, and the somewhat relevant fact that the beneficiary of the required payments will not be the actual victim, who is deceased, but rather the victim's heir. Totality of circumstances tipped the scale in favor of debtor. Court would not award treble damages or attorney fees against debtor.

R & L Pricecorp, LLC v. Hall, 2013 WL 1739658 (Bankr. E.D. Tn. 2013) – Punitive damage claim was warranted where Debtors willfully and maliciously caused harm and injury to rented premises. Debtors rented house in pristine condition, to be occupied by no more than 6 people. When debtors moved out, premises were substantially damaged and photos of damage were shocking to the court. Damage including extensive damage to the carpets, doors, walls, and windows, untreated mold and mildew growth, and broken appliances. More specifically, the house was filthy, wreaked of urine, and contained animal feces on the carpet, stairs, and a wall, there was writing on one of the walls in what appeared to be permanent ink and there were, among other things, missing and broken Levolor blinds, a broken dishwasher, a damaged stove, a damaged kitchen sink and damaged flooring. As many as 8 people lived in the house plus four dogs and one cat. Court awarded actual damages plus punitive damages as evidence indicated that actions of debtors in damaging property were particularly egregious, and held that entire damage award was non-dischargeable.

In re Hamade, 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Claim for treble damages and attorney fees for conversion under Michigan statutory conversion law is permissive, not mandatory. Court would not impose attorney fees or treble damages where there was good faith dispute over lease of property, condition of property, or whether any property was actually missing or converted.

B. Proof of Claim

8.58 Standing to File Proof of Claim

In re Young, 2013 WL 3299251 (Bankr. E.D. Tn. 2013) – An allegation of lack of documentation is not a valid objection even if the Debtor re-characterizes it as an objection to standing. A valid objection to standing must raise a factual dispute about who is the holder of the claim. The Debtor must allege that, to the best of her knowledge, information, and belief, either (a) she owes someone else or (b) she does not owe the obligation at all.

In re SCBA Liquidation, Inc., 489 BR 666 (Bankr. W.D. Mi. 2013) – State attorney general has standing to file proof of claim based on breach of warranty claims on behalf of individual purchasers and uses in their respective states. Although claims are primarily designed to protect economic interests of individual purchasers, claim is also attempt to protect State quasi-sovereign interests by ensuring general economic welfare of consumers. Claims were filed on behalf of police, firefighters, and first responders who purchased allegedly defective bullet proof vests.

Kreitzer v. Household Realty Corp., 489 WL 698 (Bankr. S.D. Ohio 2013) – Lender's standing to file proof of claim was established by pre-petition judgment of foreclosure of mortgage. State Court judgment was entitled to res judicata and collateral estoppel effect on whether lender had standing to enforce mortgage. Any dispute as to proper party entitled to enforce mortgage based on alleged defective assignment of mortgage to lender or any alleged fraud in connection with that transfer would necessarily have been litigated in state court either as part of main claim or would have been compulsory counterclaims logically connected to main action to foreclosure mortgage. Debtor's failure to assert any defenses or raise any counterclaims in state court as to right of lender to foreclose would be estopped and subject to res judicata. Debtor was not attacking any alleged transfer of the claim after entry of state court order.

In re Reed, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Proof of claim may be filed by "creditor", defined as one holding a claim. A claim is a right to payment regardless of whether the claim is matured, unmatured, contingent, liquidated, disputed, unliquidated; and any right for equitable remedy for breach if the breach gives rise to a right to payment.

Rogan v. Vanderbilt Mortgage & Finance, Inc., 2013 WL 1909497 (Bankr. E.D. Ky. 2013) – Assignee of mortgage who did not also obtain endorsement or transfer of note lacks standing to enforce either note or mortgage under Kentucky law. Assignee is not “holder” of note as defined in Uniform Commercial Code and could not be recognized as transferee absent evidence of proper endorsement or transfer. Assignment of mortgage does not automatically transfer note and note does not automatically file the mortgage upon transfer. Without proper transfer of the note, holder of mortgage is not legally able to enforce the mortgage. Trustee would be able to sell property free and clear of mortgage.

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.), *affd*, 2011 WL 500060 (E.D. Mi. 2010) – Debtor has standing to file a proof of claim on behalf of a governmental agency for pre-petition taxes where the governmental agency fails to file a claim within the time permitted under Rule 3002. Debtor has 30 days after expiration of governmental claims bar date to file that Claim.

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.

8.59 Required – Secured Creditors

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

8.60 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.

8.61 Failure to File - Priority Claims

Municipality of Carolina v. Gonzalez, 2013 WL 1629235 (1st Cir. BAP 2013) – Municipality holding priority claim for unpaid municipal taxes must file proof of claim to participate in Chapter 13 distributions. Where claim is not filed, or claim is untimely filed and disallowed, priority claim will not be paid and will be discharged at successful completion of Chapter 13 plan.

8.62 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.

8.63 Informal Proof of Claim

In re Dumain, 2013 WL 1890256 (Bankr. S.D.N.Y. 2013) – Listing of debt to creditor in schedules or provision for claim in plan is not “informal proof of claim”. Secured creditor who did not timely file proof of claim not entitled to distributions under confirmed chapter 13 plan.

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.

8.64 Effect of Filed Proof of Claim

In re Mace, Case No. 12-8025 (6th Cir. BAP 2013) – Claim is afforded prima facie validity only if the claimant alleges facts sufficient to

support legal liability to the claimant. Facts must support both that debtor had a legal obligation to claimant and that debtor's breach of that obligation caused damages. Alleged oral promise by debtor to creditor to release creditor from guaranty of corporate obligations. Agreement did not rise to level of enforceable contract because contract could not be achieved without consent of third party, the bank to which the guaranty flowed. Neither debtor nor creditor had power to release guaranty and bank had no obligation to do so. An agreement which is contingent on acts which must be performed by a third party is not an enforceable oral agreement. Further, evidence indicated a lack of meeting of minds, where creditor stated that debtor promised to obtain release of creditor while debtor stated that he promised only to try to have creditor released, and debtor thereafter made significant, if unsuccessful, attempts to do so. Even if debtor and creditor had enforceable agreement for debtor to obtain release of creditor, there was no damage that flowed from that breach. Creditor never presented any evidence of any hold harmless or subordination agreement by which debtor agreed to reimburse creditor if creditor was ever called on to answer for guaranty. Absent an indemnification or hold harmless agreement, there was no legal basis on which creditor could collect or obtain reimbursement from debtor.

Wren Alexander Investments, LLC v. Internal Revenue Service, Case no. 12-50376 (5th Cir. 2013) – Proof of claim is entitled to presumption of correctness. Objecting party must offer evidence sufficient to overcome presumption. IRS proof of claim attached Form 4340 Certificate of Assessment which was sufficient to give rise to presumption. Debtor offered no evidence that assessment was incorrect.

Bavelis v. Doukas, 490 BR 258 (Bankr. S.D. Ohio 2013) – Proof of claim executed and filed in accordance with Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of validity and amount of claim. Debtor has initial burden of making a colorable challenge to properly filed proof of claim. Once debtor meets this burden, burden of going forward shifts to creditor, and creditor bears ultimate burden of persuasion. If debtor's objection to claim is based on affirmative defense for which debtor would have burden of proof outside of bankruptcy, debtor must carry same burden of proof in prosecuting objection.

In re Reed, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Proof of claim executed and filed in accordance with Bankruptcy Rules is prima facie evidence of validity and amount of claim absent objection filed by party in interest.

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.

8.65 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.

8.66 Proof of Claim Filed on Behalf of Creditor

Municipality of Carolina v. Gonzalez, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).

8.67 Late Filed Proof of Claim

In re Ketchum, 2013 WL 3479652 (Bankr. N.D. Ohio 2013) – Section 502 requires disallowance of claim that is not timely filed in Chapter 13. Rule 3002 requires unsecured creditors to file a proof of claim within 90 days after the date first set for the meeting of creditors. Claim filed by holder of mortgage stripped in the plan was untimely where the claim was filed 2 days after the bar date. Creditor could not rely on order in adversary that “The lien on mortgage held by PHH Mortgage Corporation will be treated as an unsecured creditor and the lien will be stripped upon successful completion of the pending Chapter 13 Plan.” as a basis for payment of the claim without a proof of claim. Further, Order in adversary did not constitute a judgment that denies or avoids entity’s interest in property for purposes of additional 30 days to file claim after entry of Judgment. Proof of claim disallowed as untimely.

Municipality of Carolina v. Gonzalez, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).

In re Jazayeri, Case No. 11-10107 (Bankr. W.D. Mi. 2012) – There is no provision to allow a late filed claim in Chapter 13. Although creditor did not have notice prior to bar date, resulting in claim being non-dischargeable under Section 523(a)(3), that does not create exception to Section 502(b)(9) requirement that claim be timely filed in Chapter 13.

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

8.68 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.

8.69 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.

8.70 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

8.71 Jurisdiction to Resolve

In re Royal Manor Management, Inc., 2013 WL 1310881 (Bankr. N.D. Ohio 2013) – Court has jurisdiction to enter sanctions under 28 USC Section 1927 based on unreasonable and vexatious litigation arising out of an objection to claim. Federal courts have inherent authority to enter sanctions to protect integrity of the court and to preclude abuse of the litigation process.

Waldman v. Stone, 2012 WL 5275241 (6th Cir. 2012) – Bankruptcy Court had authority to disallow claim where claim resulted from creditor's own fraud perpetrated on the debtor. Although the debtor's claims against creditor did not themselves arise under federal law (all were based on state law fraud), even a state law claim can be asserted and adjudicated by bankruptcy court as a defense to a claim asserted by the creditor, as it relates to the bankruptcy case and is at least related to the bankruptcy case as the outcome “conceivable” has an impact on the outcome of the case. However, Bankruptcy court lacked jurisdiction to enter further judgment in favor of debtor and against creditor awarding damages arising out of that same fraudulent conduct. Article III, Section 1 of the Constitution vests jurisdiction for non-bankruptcy matters exclusively in the District Court. Issue to be adjudicated involved one solely of “private rights” that exist outside of and independent of the bankruptcy code. Affirmative claims required proofs beyond those necessary to resolve objection to claim itself, and included both actual and punitive damage claims. Case remanded for Bankruptcy Court to convert judgment into proposed findings of fact and conclusions of law for review and action by District Court.

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*.

8.72 Standing to Object

In re B & P Baird Holdings, Inc., 2011 WL 5909669 (Bankr. W.D. Mi. 2011), *aff'd* 2012 WL 4501016 (W.D. Mi. 2012) – Debtor's principals lacked standing to oppose Trustee's resolution of objection to creditor's claim. Estate was administratively insolvent, such that principals lacked any pecuniary interest in outcome of objection.

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), *affd*, Case No. 12-6567 (6th Cir. 2013) – Debtor in “no asset” Chapter 7 lacks standing to object to claims. Creditor’s filing of proof of claim does not create standing in favor of debtor to either object to claim or to seek to void lien held by creditor. Filing of proof of claim does not create or enhance rights or positions of creditors. Fact that lien is against property that debtor claimed as exempt and will retain following bankruptcy does not create standing in favor of debtor. Based on debtor’s schedules, debtor’s estate has no possibility of producing surplus as debtor’s assets are clearly insufficient to satisfy creditors.

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.

8.73 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.

8.74 Burden of Proof

In re Calhoun, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Proof of claim is deemed allowed unless a party in interest objects. Proof of Claim executed and filed in accordance with rules constitutes prima facie evidence of validity of claim. Objection based on failure to follow rules is not sufficient to disallow claim, but does affect evidentiary effect of proof of claim. Claim failed to attach any documentation to support claim and, to extent claim was based on revolving charge, claim failed to attach documents required by Rule 3001(c). Claim lacked any evidentiary value and would be disallowed where creditor failed to produce any evidence in support of claim.

Bavelis v. Doukas, 490 BR 258 (Bankr. S.D. Ohio 2013) – Proof of claim executed and filed in accordance with Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of validity and amount of claim. Debtor has initial burden of making a colorable challenge to properly filed proof of claim. Once debtor meets this burden, burden of going forward shifts to creditor, and creditor bears ultimate burden of persuasion. If debtor’s objection to claim is based on affirmative defense for which debtor would have burden of proof outside of bankruptcy, debtor must carry same burden of proof in prosecuting objection. Where debtor admitted signing promissory note on which claim was based, debtor had burden to prove any affirmative defense to the obligation to pay the note.

In re Hamade, 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Creditor had burden to prove amount of claim where claim was based on equipment allegedly on premises leased by debtor from creditor but not in premises after debtor vacated. Creditor was not able to produce accurate inventory of items in premises at commencement of lease and did not take inventory until some time after eviction when property had been left empty and suffered significant damage. However, for items where debtor did not have specific challenge other than to argue, without testimony, that creditor overvalued missing items, debtor failed to rebut prima facie evidence of claim, and claim would be allowed as filed.

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.

8.75 Calculation of Amount of Claim

Casteel v. Cornerstone Community Bank, 2013 WL 4790540 (Bankr. E.D. Tn. 2013) – Claim of lender will be reduced by amounts actually paid to lender by third party, but not by amounts that third party promised to pay but has not yet paid.

In re Mead, 2013 WL 64758 (Bankr. E.D.N.C. 2013) – IRS discriminated against debtor when IRS refused to abide by pre-petition Offer in Compromise. Prior to commencement of bankruptcy, debtor entered into OIC to repay liabilities in the reduced amount of \$4,000, to be paid in four quarterly installments. IRS accepted the offer and debtor made one payment before filing bankruptcy. IRS filed claim in debtor's case for full tax liability and debtor objected. IRS could not disregard OIC merely because debtor filed bankruptcy, as IRS would not revoke OIC under similar circumstances for non-bankrupt taxpayer. Congress prohibited all discriminatory treatment based solely on bankruptcy filing, and that would include any effort by IRS to revoke OIC based on bankruptcy filing.

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 result of Court’s failure to calculate “cost to cover” for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor. Claim which stated amount based on erroneous state court judgment disallowed without prejudice to creditor filing amended claim to correct mathematical errors.

MacDonald v. Gunther, Case No. 08-8108 (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.

8.76 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”.

8.77 Grounds – Failure to Attach Documents Generally

In re Halstead, 2013 WL 5230041 (Bankr. E.D. Mi. 2013) – Where party filing claim is one other than the party to whom the debt was originally owed, claimant must attach to proof of claim documents establishing claimant's title to the debt or authority to file claim. Creditor sold debt to collector and claim was filed by "servicer" for collector, but claim did not attach either documents establishing the sale of the claim to the collector or any authority of the servicer to then file the claim. Claim failed to establish that either servicer or collector had standing to file claim, resulting in disallowance.

In re Young, 3992456 (Bankr. E.D. Tn. 2013) – Proof of claim that does not attach documentation lacks any presumption of validity. Proof of claim failed to attach any documents showing how the party filing the proof of claim allegedly came to be the party holding the claim, where the original debt was owed to another person and there were no documents attached showing assignment or transfer of the underlying obligation.

In re Young, 2013 WL 3299251 (Bankr. E.D. Tn. 2013) – An allegation of lack of documentation is not a valid objection even if the Debtor re-characterizes it as an objection to standing. A valid objection to standing must raise a factual dispute about who is the holder of the claim. The Debtor must allege that, to the best of her knowledge, information, and belief, either (a) she owes someone else or (b) she does not owe the obligation at all. However, Proof of Claim not entitled to prima facie validity as claim was filed by entity other than creditor to whom debt was originally owed and claim did not attach any documents regarding either the underlying debt or how claimant came to be the holder of the debt. Claimant's statement that the debt was for medical services and Health Care Privacy rules (HIPPA) prevented disclosure did not constitute sufficient explanation for failure to attach documents. However, where only objection was based on lack of documentation, and no substantive defense to the underlying claim itself (either that debtor did not owe it or that debtor owed it to someone else), debtor's objection to claim would be disallowed.

In re Gorman, 2013 WL 2284985 (Bankr. E.D. Tn. 2013) – Failure to attach documents showing that claimant is the holder of the debt is not a basis to object to the claim. Debtor must do more than allege failure to attach assignment documents. Debtor must affirmatively allege that, to the best of their information and belief, either (a) the debt is owed to someone else; or (b) they do not owe the obligation at all. Failure to attach a copy of a power of attorney or other evidence of authority to execute claim is not basis to disallow claim. Rule 9010 specifically excuses requirement for power of attorney for filing proof of claim. Debtor cannot avoid this rule merely by raising the objection in the context of a lack of standing to file the claim. Although failure to attach documents may eliminate presumption of validity of claim, Rule 3001 states the exclusive grounds to object to claim, none of which are merely failure to attach documents.

Haines & Krieger, LLC v. National Capital Management, LLC, Case No. 12-1375 (9th Cir. BAP 2013) – Debtor's objection to proof of claim based on alleged failure to attach documents was frivolous and was properly overruled. Debtor scheduled the obligation as liquidated, non-contingent and undisputed, which provides evidentiary basis for validity of claim. Debtor had no good faith reason to believe that debt was not owed or that there was any other substantive objection to either existence or amount of claim. However, Bankruptcy Court erred in awarding sanctions under Rule 9011 where court failed to state the factual basis for conclusion why Court considered objection meritless under standard of Rule 9011 and where there was no evidence of compliance with safe harbor provisions of Rule 9011.

In re Reynolds, 470 BR 138 (Bankr. D. Colo. 2012) – Rule 3001 does not provide authority for court to deny claim based solely on failure to attach documents. Failure to attach documents deprives claim of evidentiary presumption at any subsequent hearing on a substantive objection to claim under section 502(b).

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.

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

In re Lepard, 2013 WL 2404016 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However. Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.

In re Wheeler, 2013 WL 2404003 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However. Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.

In re Rodgers, 2013 WL 2404000 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not

basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However, Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.

In re Calhoun, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Proof of claim is deemed allowed unless a party in interest objects. Proof of Claim executed and filed in accordance with rules constitutes prima facie evidence of validity of claim. Objection based on failure to follow rules is not sufficient to disallow claim, but does affect evidentiary effect of proof of claim. Claim failed to attach any documentation to support claim and, to extent claim was based on revolving charge, claim failed to attach documents required by Rule 3001(c). Claim lacked any evidentiary value and would be disallowed where creditor failed to produce any evidence in support of claim.

In re Gorman, 2013 WL 2284985 (Bankr. E.D. Tn. 2013) – Failure to attach documents showing that claimant is the holder of the debt is not a basis to object to the claim. Debtor must do more than allege failure to attach assignment documents. Debtor must affirmatively allege that, to the best of their information and belief, either (a) the debt is owed to someone else; or (b) they do not owe the obligation at all. Failure to attach a copy of a power of attorney or other evidence of authority to execute claim is not basis to disallow claim. Rule 9010 specifically excuses requirement for power of attorney for filing proof of claim. Debtor cannot avoid this rule merely by raising the objection in the context of a lack of standing to file the claim. Proof of claim filed prior to effective date of Rule 3001(c)(3) is not defective for failure to comply with rule, even if objection to proof of claim is filed after effective date of rule.

8.79 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.

8.80 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.

8.81 Grounds – Technical Defects

In re Young, 3992456 (Bankr. E.D. Tn. 2013) – Claim is not objectionable based merely on supposition that person who executed the claim did not review the claim, absent evidence to the contrary. Failure to attach power of attorney to the claim is not a basis to disallow the claim absent evidence that the person signing the claim lacked actual or apparent authority to do so.

8.82 Late Filed

Municipality of Carolina v. Gonzalez, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).

In re Jazayeri, Case No. 11-10107 (Bankr. W.D. Mi. 2012) – There is no provision to allow a late filed claim in Chapter 13. Although creditor did not have notice prior to bar date, resulting in claim being non-dischargeable under Section 523(a)(3), that does not create exception to Section 502(b)(9) requirement that claim be timely filed in Chapter 13.

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.

8.83 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.

8.84 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.

8.85 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.

8.86 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.

8.87 Grounds – Mortgage Fees and Charges

Kreitzer v. Household Realty Corp., 489 WL 698 (Bankr. S.D. Ohio 2013) – Charges that are included in claim for pre-petition foreclosure fees and costs are not allowed to extent they are not reasonable. Mortgage company should submit an amount certain that is owed by the borrower for principal, interest, and fees to provide debtor with opportunity to object and to permit the court to review the charges and make sure that they are accurate and reasonable. State Court judgment that did not rule on any itemization of charges and contained general exception for "charges prohibited by law" without detailing any charges that would be disallowed or reduced was not collateral estoppel on issue of pre-petition fees as it was not clear what items were actually litigated or whether any charges reflected in proof of claim may have been added after entry of foreclosure judgment.

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.

8.88 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.

8.89 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 facilities 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.

8.90 Grounds – Cancellation of Debt

In re Reed, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Creditor's issuance of Form 1099-C "cancellation of debt" does not alone extinguish the underlying debt. Form 1099-C is issued by lender to comply with IRS reporting requirements and is for informational purposes only whether or not the debt has actually been discharged. IRS regulations also state that issuance of Form 1099-C is not admission that creditor has discharged debt or that creditor cannot legally pursue collection. However, where Form 1099-C has resulted in debtor's inclusion of amount stated in Gross Income on which Debtor then was required to pay taxes, the combination of the Form