

alleged were “inseparable from the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.

In re Mayer, Case No. 09-60536 (Bankr. E.D. Mi. 2010) – Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court’s docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any other significant factors. Court would not abstain from dispute over whether State Court Divorce judgment created constructive trust in specific assets for payment of Debtor’s attorney fees. Bankruptcy Court could adjudicate related state law claims; issues involved necessarily impacted on administration of estate including possible preference litigation; resolution in State Court would necessarily result in further proceedings in Bankruptcy Court, resulting in duplication of judicial effort and expense; Bankruptcy Court can efficiently handle the issues presented; the only non-debtor parties in the State Court are the creditors who have actively participated in the Bankruptcy proceeding; no party demanded a jury trial and there would be no right to a jury trial if the matter were returned to State Court; and there are no unusual or significant factors that would indicate that abstention would produce better or more efficient result.

LaBankoff v. GMAC Mortgage, LLC., Case No. 09-1294 (9th Cir. BAP. 2010) – A bankruptcy court may abstain from hearing an adversary in the interests of justice or in the interest of comity with State courts or respect for State law. Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court’s docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. Court properly abstained where all allegations in the complaint were “non-core” and arose entirely from pre-bankruptcy conduct and claims were principally state law claims that could have been pursued in state court and three of four plaintiffs and at least two defendants were neither debtors nor creditors in the bankruptcy case.

In re Porrello, Case No. 07-10053 (Bankr. N.D. Ohio 2009) – Bankruptcy courts have the authority to abstain from hearing matters that may be heard in state court within sound discretion of the bankruptcy judge and can be raised sua sponte. A Court will consider (1) the effect on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court’s] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. Court would abstain from ruling on Debtor’s objection to Claim Debtor will not receive a general discharge in bankruptcy and the outcome of the objection would have no effect on the efficient administration of the Debtor’s estate; the lack of other pending bankruptcy matters combined with the presence of a related fraud claim proceeding pending in state court; Debtor’s estate has been fully administered by the case trustee; and the relief sought herein is truly a matter rooted in state law. Court remanded the Debtor’s Objection to Claim to the appropriate state court for its consideration and determination.

Lone Star Fund V (U.S.), L.P. v. Barclays Bank Plc, 594 F.3d 383 (5th Cir. 2010) – Court can remove non-bankruptcy case to federal court pursuant to 28 USC Sections 1334(b) and 1452(a) where the underlying action is “related to” a pending bankruptcy proceeding. “Related to” jurisdiction includes any litigation where the outcome could alter, positively or negatively, the debtor’s rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. An indemnification provision in which the bankrupt debtor agrees to indemnify one party to a transaction is a sufficient nexus to allow removal of action between other party to transaction and unrelated third party. Mortgage company originated loans and sold loans to buyer, with agreement to indemnify buyer from any losses on mortgages that defaulted. Buyer in turn sold the mortgages to third party with similar indemnification provision. When mortgages defaulted, third party sued buyer on indemnification provision. Buyer removed action to Federal Court where the underlying bankruptcy case was pending. To the extent Buyer was liable to third party on its indemnification provision, Buyer would have corresponding claim against debtor. Therefore, claims of third party against Buyer were sufficiently “related to” bankruptcy to support removal.

MR Crescent City, LLC., v. Draper, 588 F.3d 822 (4th Cir. 2009) – 28 USC Section 1447(c) permits imposition of legal fees against a party who removed a case from state court to federal court if the federal court later remands the case to the state court. Section 1447(c) authorizes recovery of fees only from party who caused case to be removed, and does not create personal liability of attorney for party who filed removal petition. Section 1447 does not repeal “American Rule” presumption that each party to litigation bears its own fees and costs or that only parties to proceeds can be held responsible for payment of legal fees. Fee shifting statutes must be construed

narrowly and will not be construed to include awarding fees against counsel for a represented party absent clear indication that Congress intended that result.

Collins & Aikman Litigation Trust v. Detkowski, 2009 WL 1469630 (E.D. Mi. 2009) - Action for personal injury or death – 28 USC Section 157(b)(5) requires that the action be tried either in the District Court where the bankruptcy case is pending or in the District Court where the claim arose, as determined by the District Court where the bankruptcy case is pending. Section 157 does not prohibit the District Court from abstaining entirely in favor of pending State Court suit as provided in 28 USC Section 1334(c)(1). Factors to determine whether abstention is appropriate include (i) whether the District Court's exercise of jurisdiction will result in piecemeal litigation, with the pending personal injury suit going forward as to other non-Debtor parties who cannot be transferred out of the jurisdiction they are now in, (ii) whether issues of state law are predominant, (iii) considerations of judicial economy, (iv) effect of abstention on the efficient administration of the bankruptcy estate, and (v) the degree of relatedness of the personal injury suit to the bankruptcy case. Abstention is appropriate where State Court personal injury action includes claims against non-Debtor defendants that could not be transferred and which would require personal injury suit to be tried twice in different Courts; state issues predominate in personal injury action with federal law playing no role whatsoever; State Court suit has progressed through the pre-trial phase and is now ready for trial; and there is no reason to believe that the claims against Debtor could not be tried in a similarly expeditious manner. Alleged increased cost to Debtor of litigating in State Court not sufficient to overcome factors that support abstention where State Court is still proximate to and is actually located in same District as bankruptcy case and Debtor failed to produce any evidence that litigating in State Court would actually be significantly more expensive than doing so in District Court.

Commonwealth of Kentucky v. Young Oil Corp., 2009 WL 1475512 (E.D. Ky. 2009) – Action by governmental unit to enforce police or regulatory power is not subject to removal to either Bankruptcy Court or District Court after the defendant files for bankruptcy protection. Action by governmental unit to enforce State Securities Act is not adjudication of private right but is effectuation of public policy precluding removal to Federal Court. Action must be remanded to Kentucky Court.

12.28 Timeliness of Notice of Removal

Church Joint Venture v. Graphic Enhancement Technologies Corp., 2013 WL 3929725 (W.D. Tn. 2013) – State Court action pending at commencement of bankruptcy case can be removed to Federal Court upon timely filed notice of removal. Notice must be filed no later than the longer of (1) 90 days after the order for relief; or (2) 30 days after entry of an order terminating a stay; or (3) 30 days after a trustee qualifies in a Chapter 11 Case. Petition constitutes order for relief triggering running of 90 day limit. Court's Order denying debtor a discharge constitutes an order terminating the stay. Notice of Removal filed more than 90 days after commencement of case and more than 30 days after order denying discharge was untimely. Case must be remanded back to state court.

Lunan v. Jones, 489 WL 711 (Bankr. E.D. Tn. 2012) – Chapter 7 Trustee's 30 day window to request removal did not run until trustee was formally served with summons and complaint. Mere "receipt" of summons and complaint is not sufficient – technical requirements for service must be fulfilled before time period commences.

Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc., Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1446 requires notice of removal of a civil action or proceeding to be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. If civil action was initiated before commencement of the bankruptcy case, a party has 90 days after the bankruptcy petition is filed to seek removal if the State court proceeding is "related to" the bankruptcy proceeding. A civil proceeding is "related to" the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the debtor's rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate debtor's president based on president's personal guarantee is "related to" the bankruptcy estate. Corporate president is listed as co-debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor's claim against assets of the bankruptcy estate. Thus, corporate president had 90 days from commencement of the bankruptcy case to seek removal under section 1452 and Federal Rule 9027.

12.29 Procedure

In re T.S.P. Co., Inc., 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – A party removes a case under 28 U.S.C. § 1441 by taking three procedural steps: (1) filing a notice of removal in the federal court; (2) filing a copy of this notice in the state court; and (3) giving prompt written notice to all adverse parties. Once these steps are taken, removal is effective and the state court "shall proceed no further unless and until" the federal court remands the matter. Although underlying action was not properly removable under 28 USC Sections 1441 or 1442, the notice of removal nonetheless divested state tribunal of jurisdiction and action should not have proceeded.

McKibben v. Fair Finance Company, Case No. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Section 1441 requires the joinder or consent of all co-defendants to a Notice of Removal. Failure to obtain consent mandates that court deny removal of action to Bankruptcy Court. However, Section 1452(a) provides a separate basis to remove action that is "related to" a bankruptcy case without the consent of all co-defendants.

Mills v. Ellis, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the

same as serving a copy of the Notice of Removal itself. Service of the notice of removal alerts parties in the removed case to the change of court, as well as starts the clock for filing a motion to remand or to respond to the complaint if time remains to do so. Further, the Notice of Removal was not accompanied by any pleading which would have placed issue of non-dischargeability before the Bankruptcy Court. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

12.30 Removal – Consent of All Defendants

Crockett v. Mutual of Omaha Bank, 2013 WL 2384388 (M.D. Tn. 2013), *report and recommendations adopted*, 2013 WL 3335113 (M.D. Tn. 2013) – Defendant has a right to remove action from State Court to District Court if the district court has basis for original jurisdiction. However, as removal encroaches on state court jurisdiction, statutes regarding removal are to be strictly construed. If an action lists multiple defendants, all defendants who have been properly joined and served must join in or consent to removal. Request for removal signed by only 2 of 4 listed and served defendants violates rule of unanimity and must be remanded to state court.

12.31 Burden of Proof

RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc., Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Party seeking abstention bears burden of proof on every element of abstention. Failure to satisfy even one factor will be fatal to request.

G. Remand

12.32 Grounds

Anthony Marano Company v. Sherman, 925 F.Supp.2d 864 (E.D. Mi. 2013) – District Court has authority to sua sponte order remand for lack of subject matter jurisdiction. Although Notice of Removal asserted diversity jurisdiction, Notice did not allege any facts showing plaintiff's citizenship and Defendant did not respond to order to show cause why the case should not be remanded. Failure to allege sufficient jurisdictional facts results in the absence of jurisdiction. Once District Court remanded action, Court lacked jurisdiction to reconsider or reopen the case.

Church Joint Venture v. Graphic Enhancement Technologies Corp., 2013 WL 3929725 (W.D. Tn. 2013) – State Court litigation would be remanded where notice of removal was not timely filed.

Lunan v. Jones, 489 BR 711 (Bankr. E.D. Tn. 2013) – Court can remand action to state court where there is no independent basis for federal jurisdiction. Although state court action included count for violation of federal civil rights under 42 USC Section 1983 over which the District Court would have federal jurisdiction, there is no statutory authority to refer an action under Section 1983 to the Bankruptcy Court. Removal was otherwise proper where state court litigation involved action against Chapter 7 trustee by non-debtor for allegedly wrongfully selling assets that did not belong to the debtor. Action is "related to" bankruptcy case where it could conceivably have an effect on administration of estate. Every claim pertains to the Trustee's conduct while administering the assets of the bankruptcy estate under authority of, and pursuant to orders of bankruptcy court. Plaintiff sought disgorgement of funds Trustee received in official capacity as the chapter 7 trustee and court-appointed auctioneer, and damages for the conduct that the bankruptcy court ordered. To extent that a reviewing court would determine that bankruptcy court's orders were improper, that the Trustee utilized the wrong bankruptcy procedure and/or committed a fraud on the bankruptcy court, or that Trustee is required to disgorge funds received in official capacity, Plaintiff's claims will have an impact on the bankruptcy estate. Further, action brought in state court was core proceeding as directly involving the liquidation of assets of the estate which is core proceeding under 28 USC Section 157.

CPC Livestock, LLC v. Fifth Third Bank, Inc., 2013 WL 1411222 (W.D. Ky. 2013) – In considering whether Federal court has jurisdiction over State court action removed to federal court, Court must use complaint in place at time of removal. Where Plaintiff had filed an initial complaint plus two amended complaints before request for removal was filed, Court would base federal jurisdiction on allegations contained in Second Amended complaint. Removal is appropriate where Second Amended Complaint states diversity of citizenship between all plaintiffs and all defendants. However, non-diversity will not prevent removal if joinder of non-diverse defendants is done for fraudulent purpose of defeating Federal Court jurisdiction. Joinder will be fraudulent where Plaintiff could not have maintained action against non-diverse defendants as a matter of state law. If there is colorable or reasonable basis for predicting that state law might impose liability on facts alleged, then joinder is not fraudulent. Record did not conclusively establish that actions against non-diverse defendants would have been barred by statute of limitations. Federal Jurisdiction sufficient for removal can also be based on federal question, if action is created by federal law; or state law claim necessarily raises disputed federal issue that is substantial, and exercise of jurisdiction would not disburse balance of state and federal judicial responsibilities.

CH Holding Company v. Miller Parking Co., 2012 WL 5463128 (E.D. Mi. 2012) – District Court can remand case to state court where action was pending in state court prior to commencement of bankruptcy case and was removed based on commencement of bankruptcy case. Complaint sought to pierce corporate veil of debtor to impose liability on shareholders. Action related to bankruptcy case as action to pierce corporate veil is one that belongs first to the corporation, and recovery would affect estate, even if cause of action is entirely state law based. Further, Chapter 7 Trustee of debtor had commenced separate action in bankruptcy court seeking same relief. Court not required to remand case where case "related to" pending bankruptcy.

Anderson v. Banks, 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – 28 USC Section 1452 allows Bankruptcy Court to remand any action that

was removed to Bankruptcy Court as a result of the bankruptcy filing. Bankruptcy Court could not remand action that was filed in the first instance in the Bankruptcy Court. Remand means “send back”, not “sent elsewhere”. Remand is contemplated only to allow action to be sent back to state court from which it was removed.

Brown v. Metropolitan Life Insurance Company, 2011 WL 6826638 (W.D. Ky. 2011) – When considering request for remand, court must examine whether case was properly removed to federal court in the first instance. Where action was removed based on alleged federal subject matter jurisdiction, cause of action must arise under Constitution, laws or treaties of United States or if Congress has completely pre-empted particular area of law. ERISA claim is pre-empted if the state law claim could also have been brought pursuant to ERISA enforcement provision. Plan falls within ERISA if plan covers participants because of their employee status and the employer maintains the plan. Open membership organization that operates welfare benefit plan is not ERISA plan. State court lawsuit alleging violation of state regulations for operation of welfare benefit program not pre-empted by ERISA. Action should not have been removed as action was not based on Federal law and state law claims were not pre-empted, such that no independent basis for federal jurisdiction existed.

Mills v. Ellis, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc., Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) - Courts have discretion to remand state law causes of action whenever doing so presents appropriate equitable grounds. The factors to be taken into account include: 1) duplicative and uneconomical use of judicial resources in two forums; 2) prejudice to the involuntarily removed parties; 3) forum non conveniens; 4) the state court's ability to handle a suit involving questions of state law; 5) comity considerations; 6) lessened possibility of an inconsistent result; and 7) the expertise of the court in which the matter was originally pending. Court would not remand action against corporate president on personal guarantee where we men would result in duplicate dividend uneconomical use of judicial resources and would produce a substantial possibility of inconsistent results. Burden of litigating in bankruptcy court was not prejudicial to creditor given that creditor is already a party to the bankruptcy case and will be litigating corporate debtor's liability. Although claims were based in state law, claims did not raise unique issues of state law that would see the adjudicative abilities of the bankruptcy court. Creditor's motion for remand denied.

12.33 Equitable Remand

RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc., Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Even if grounds do not support abstention, court can equitably remand case to state court where leaving case in bankruptcy court would be duplicative and uneconomical use of judicial resources in two forums. Substantial overlap of facts and background of litigation involving core and non-core proceedings so overlap that to retain the core claims would produce entirely duplicative and uneconomical use if resources.

12.34 Appellate Review

Timco, LLC v. T and M Sales Agency, Inc., 2013 WL 150105 (6th Cir. 2013) - Mandatory abstention provision of 28 USC Section 1334 precludes appellate review of Order remanding case to State Court. Action was based on state law, action was non-core proceeding, no basis existed for federal jurisdiction other than pending bankruptcy case, and action could be timely adjudicated in State court of competent jurisdiction.

Auto Owners Insurance v. Rossi, 444 BR 170 (6th Cir. BAP 2011) – Order remanding case to state court from which it was removed is not appealable order pursuant to 28 USC Section 1447(d). Whether Bankruptcy Court correctly stated that it lacked subject matter jurisdiction as basis for remand, Order of Remand was not reviewable to determine whether Bankruptcy Court's conclusion of jurisdiction was correct.

H. Standing to Prosecute

12.35 Generally

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. Debtor lacked standing to pursue recovery.

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.

Northedge v. Beckett, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Debtor has at least colorable standing in Chapter 13 to pursue action

based on avoiding powers under Section 544. To extent debtor seeks relief under Section 522(h) to preserve exemption rights, debtor has standing as Section 522(h) specifically authorizes debtor to pursue avoidance to extent necessary to preserve exemptions.

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. Owner is also precluded from challenging foreclosure once redemption has expired. Upon expiration of redemption, title vests absolutely in the purchaser at the sale and there is no basis for a court to alter that outcome. To extent owner has any remedy, that is limited to either contesting sale before redemption expires, or holding over after redemption and contesting foreclosure sale as part of summary proceedings for possession. Only exception is where mortgagor makes strong showing of fraud or irregularity. Fraud requires false statements by lender. Defect under Section 600.3205 requires proof that failure to comply with statutory foreclosure laws resulted in prejudice to owner, such that owner would have been in better position to preserve interest in property had lender not failed to comply with statute. Allegation that debtor does not recall receiving notice of foreclosure sale does not rise to level of either fraud or prejudice. Debtor did not present any facts that would entitle him to render the foreclosure sale voidable. Debtor admittedly was aware that a foreclosure sale of his home was going to occur and he was not misled into believing that one might not occur and, there is no evidence that he made any effort convert the summary proceedings to a judicial foreclosure or to redeem the property after the foreclosure sale, but prior to expiration of the redemption period. Debtor had the advice of counsel, at least during the summary eviction proceedings, such that there was no basis for the Federal Court to disturb foreclosure process.

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. 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. Plaintiff, allegedly harmed by pre-petition fraudulent transfers, lacked standing to prosecute actions after debtor filed bankruptcy petition. 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.

Kentucky Automotive Center of Grayson, LLC v. Nissan north America Inc., 2013 WL 663574 (E.D. Ky. 2013) – Standing requires that the plaintiff has suffered an injury in fact which is traceable to the acts or omissions of the defendant and which is redressable. If asserting a statutory cause of action, plaintiff must also demonstrate that plaintiff is a member of the group of persons intended to be protected by the statute. Plaintiff must also be asserting own legal rights as opposed to the rights to third persons. Plaintiff lacked standing to contest bankruptcy sale where plaintiff did not make a bid at the sale. Unsuccessful third party's bid did not constitute an injury to plaintiff's bidding rights or sale procedures. Plaintiff also failed to demonstrate standing under Kentucky Motor Vehicle Sales Act as Act applies only to dealerships, new motor vehicle dealers, manufacturers, distributors, factory branches, and factory representatives. Plaintiff did not fit into any statutory category as plaintiff was merely unsuccessful potential purchaser of dealership who claimed that manufacturer unreasonably refused to consent to sale. Although the potential seller would fall within statute, plaintiff could not assert rights held by third party.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 444450 (N.D. Ohio 2013) – Article III standing requires that plaintiff demonstrate that conduct of which plaintiff complains causes an injury in fact that a favorable judgment would redress. The injury must be concrete and particularized, and the harm must be actual or imminent, not conjectural or hypothetical. "Prudential standing" is separate requirement that plaintiff assert only his own legal rights or interests and prohibits actions that are based on legal rights or interests of third parties or that are generalized grievances best resolved in the legislative branch. Debtor lacks standing to contest alleged validity of mortgage assignment. Debtor was not party to mortgage assignment in question and validity or invalidity of assignment did not impact or alter debtor's obligation to pay.

Auday v. Wet Seal Retail, Inc., 2012 WL 5259002 (6th Cir. 2012), *appeal after remand*, 2013 WL 2457717 (E.D. Tn. 2013) – 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. Action remanded to District court to either allow amendment of complaint to substitute trustee as plaintiff or to dismiss without prejudice. On remand, District Court concluded that debtor lacked standing to pursue action for legal or equitable relief, and that actions belonged solely to the Trustee. Court could not permit joinder of trustee, as trustee is sole party in interest, requiring substitution of Trustee for debtor.

Van Sickel v. Fifth Third Bankcorp, 2012 WL 3230430 (E.D. Mi. 2012) – Causes of action that accrued before plaintiff filed for bankruptcy are property of bankruptcy estate. Debtor lacks standing to prosecute actions in his own name. Complaint dismissed pursuant to Rule 17(a)(1) as plaintiff was not real party in interest.

Mitrano v. US, 2011 WL 4459102 (Bankr. E.D. Va. 2011) – Debtor lacks authority to pursue avoidance action under Section 544. Avoidance power is granted only to Trustee. Powers of debtors are enumerated in Section 1303 and trustee's avoidance powers are not included in that list.

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) - Although debtor's causes of action become estate property upon filing a Chapter 13 bankruptcy petition, Chapter 13 debtors have standing to bring claims in their own name on behalf of the bankruptcy estate. Debtor has more power over estate assets and a better ability to pursue lawsuits than a Chapter 13 trustee.

Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc., Case No. 10-4182 (10th Cir. 2011) – Owner of property allegedly the subject of a wrongful foreclosure action has standing to contest enforceability of mortgage even where owner was not maker of note or signor of mortgage and lacked any privity with lender. Allowing foreclosure action to proceed created risk of direct injury to property owner sufficient for purposes of standing.

US Bank, NA v. Barbee, , 2011 WL 6141648 (6th Cir. BAP 2011) – Debtor has derivative standing to pursue avoidance action where bank allegedly failed to perfect lien on title of mobile home.

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

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Debtor's undisclosed claim of ownership of real property was not disclosed in bankruptcy schedules, became property of estate on filing of case. Absent abandonment, only the Trustee has standing to pursue claims based on failed purchase and sale of real estate where all elements of action arose prior to commencement of case. Adversary proceeding prosecuted by Debtor post-petition properly dismissed as Debtors lacked standing to pursue action.

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

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Borrower has standing to challenge foreclosure as long as action is brought before expiration of redemption period. Complaint contesting foreclosure sale filed 7 days before sale date timely filed. Subsequent expiration of redemption does not render action moot.

In re Ferrette, 2011 WL 940409 (E.D. Mi. 2011) – Adversary proceeding challenging validity of foreclosure sale dismissed where sale occurred prior to commencement of bankruptcy case. After the property had been sold at the sheriff's sale, debtor lost his opportunity to obtain any relief from the bankruptcy court to void the sale or extend the redemption period.

Lessl v. CitiMortgage, Inc., 2011 WL 4351673 (E.D. Mi. 2011) – Owner may hold over after foreclosure sale by advertisement and contest validity of sale in summary proceeding for possession. However, Court will not overturn foreclosure sale absent strong showing of fraud or irregularity.

Nett v. Wells Fargo Home Mortgage, Inc., 2011 WL 1519166 (E.D. Mi. 2011) – Owner retains standing to contest validity of foreclosure sale even after redemption period has run. Owner can challenge foreclosure validity as part of summary eviction proceedings or as part of separate proceeding.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Debtor has standing to bring adversary against IRS to determine amount of tax debt and to recover potential overpayment. Debtor has “clear interest” in issues relating to the scope of the discharge. Tax debts were admittedly non-dischargeable, so amount of tax debt directly impacted the discharge. Fact that any money recovered as overpayments would be property of estate and would be distributed to creditors did not deprive debtor of standing as outcome is “clearly related” to the administration of the estate.

JGR Associates, LLC v. Brown, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – “Standing” for purposes of adversary proceeding requires “Article III” Standing, which requires that the action directly affect a right or the pecuniary interest of the plaintiff. Standing also requires “prudential” standing, which requires that only the “real party in interest” bring the adversary. A person with Article III standing may still lack prudential standing. Defendant's claim that plaintiff was not real party in interest must be timely raised or will be waived. Defendant's assertion that plaintiff was not real party in interest, not made until first day of trial, was untimely.

Morris v. Paine, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Court can dismiss action where complaint fails to assert a private right of action, as complaint fails to state a cause of action pursuant to Rule 12(b)(6).

Harker v. Countrywide Homes, Inc., 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor's note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the debtors' bankruptcy estates and that it is the holder of notes or mortgages on real estate of the debtors on the date of debtors' bankruptcy petitions; (ii) misrepresenting to Bankruptcy

Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

Spradlin v. Baker, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Creditor has standing to pursue recovery under Section 547 where funds that would be recovered would not be exempt and would be available for distribution to creditors.

Moses v. Howard University Hospital, Case No. 08-7087 (D.C. Cir. 2010) – The trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. The commencement of Chapter 7 bankruptcy extinguishes a debtor's legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. Whatever interest passed to the trustee when Debtor filed for Chapter 7 bankruptcy was extinguished when Trustee abandoned the cause of action in this case. At that point, the Debtor re-acquired standing to prosecute the action as if the bankruptcy had never been filed.

Countrywide Home Loans v. Dickson, 427 BR 399 (6th Cir. BAP 2010), *aff'd* 2011 WL 3768684 (6th Cir. 2011) – Debtor has direct and derivative standing to pursue action under Section 522(h) and Sections 544 and 547 where the creditor obtained the judgment lien during the preference period. Court has equitable power to allow Debtor to pursue avoidance actions where the Trustee fails or refuses to do so. Chapter 13 Trustee typically lacks resources to pursue avoidance action and lacks ability to sell assets to fund a war chest for litigation.

Kirschner v. KPMG, LLP., 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporation's interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.

Gilchrist v. Bank of America, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) - Adversary proceeding commenced by Debtor while case pending under Chapter 13 becomes property of estate upon conversion to Chapter 7. Debtors did not claim any exemption in the causes of action and the Chapter 7 trustee has not abandoned the causes of action. Only the Chapter 7 trustee may prosecute the claim(s), and Debtors' continuing prosecution of these claims would violate the automatic stay.

Hyundai Translead, Inc. v. Johnson Truck & Trailer Repair, Inc., 555 F.3d 231 (6th Cir. 2009) - Bankruptcy Code permits the Court to grant derivative standing to creditors to pursue avoidance claims on behalf of the Estate where the Chapter 7 Trustee declines to do so. Section 544's reference to authorizing the trustee to pursue avoidance actions does not limit the Court's equitable or statutory ability to permit creditors to act in place and stead of the Trustee where that is in the best interests of the estate. Derivative standing is equally available in Chapter 7 and Chapter 11 cases. To support derivative standing, party moving for derivative standing must show that: (1) a demand was made on the trustee (or Debtor-in- possession) to act, (2) the trustee (or Debtor-in-possession) declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's (or Debtor-in-possession's) inaction was an abuse of discretion.

Casden v. Burns, 2009 WL 103620 (6th Cir. 2009) - Shareholder lacked standing to pursue action against former officers and directors of corporation for breach of fiduciary duty where approval of corporation's Chapter 11 plan cancelled corporate stock and extinguished shareholder's right to bring derivative claims. Purported deprivation of shareholder rights does not convert a derivative claim into a direct claim. The incidental loss of shareholder rights does not constitute an injury that is distinct from the harm suffered by all shareholders. Alleged loss of shareholder rights would not give rise to a direct individual action.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Chapter 7 Trustee had standing to pursue fraudulent transfer against transferee where property transferred was subject to a security interest in favor of third party and as part of transfer the secured party released the security interest. Trustee's efforts to recover fraudulently transferred assets was not action taken merely to enforce the rights of one creditor (in which case the Trustee would lack standing) but was effort to preserve rights of estate and of creditors as a whole. If property transferred was over-encumbered such that any recovery would benefit only the secured creditor then the Trustee would lack standing as the recovery, if any, would benefit only the secured creditor. But where the secured creditor voluntarily released the security interest at the time of the transfer, any property recovered would be for benefit of estate and creditors.

Wuliger v. Manufacturers Live Insurance Company, 567 F.3d 787 (6th Cir. 2009) - Constitutional requirements for standing require

plaintiff to show: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. Plaintiff must also satisfy three prudential standing requirements: (1) plaintiff must assert his own legal rights and interests, without resting claim on rights or interests of third parties; (2) claim must not be generalized grievance shared by large class of citizens; and (3) in statutory cases, plaintiff's claim must fall within zone of interests regulated by statute in question.

12.36 Standing to Contest Mortgage Foreclosure

Mullins v. FNMA, 2013 WL 5707798 (E.D. Mi. 2013) – Legal title to foreclosed property vests in the purchaser if the property is not redeemed within allowable time. Court can equitably extend redemption, and accordingly extend the prior owner's right to contest foreclosure sale, on clear showing of fraud or irregularity. Misconduct must relate to foreclosure process itself and not collateral matter. Owner lacked standing to contest foreclosure where owner alleged only that lender stated that loan modification had been approved but did not provide paperwork evidencing any modification.

Carr v. JPMorgan Chase Bank, 2013 WL 5450291 (E.D. Mi. 2013) – Once redemption expires, former owner's rights are terminated and party cannot contest foreclosure sale except by showing fraud or irregularity in sale proceedings themselves, and not simply based on any other conduct of the defendant. Complaint to contest foreclosure was filed after redemption expired and did not allege any irregularity in the foreclosure process. Allegations regarding multiple attempted loan modifications do not address validity or effect of sale and do not form basis to contest sale.

Connolly v. Deutsche Bank National Trust Co., 2013 WL 4084742 (E.D. Mi. 2013) – Under Michigan law, upon expiration of redemption, all right, title and interest in the property vests in the purchaser at the sale. Former owner can maintain action to challenge foreclosure process only if plaintiff makes a clear showing of fraud or irregularity in the process itself, and the action must be brought promptly and without delay, which can be even after expiration of the redemption period.

Mourad v. Homeward Residential, Inc., 2013 WL 870205 (6th Cir. 2013) – Under Michigan law, property owners are generally not permitted to assert claims related to a foreclosed property after redemption expires. However, defense is not lack of standing, as homeowner has both Article III and Statutory standing. Expiration of redemption can affect outcome of case on merits.

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – Homeowner has standing to bring action contesting validity of foreclosure sale where action is brought within statutory redemption period and does not lose that standing upon expiration of redemption. Homeowner is the last legal owner of the property and has a continuing right to lawful ownership and possession based on defects in the foreclosure process.

12.37 Ratification

Automotive Finance Corp. v. Leonard, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – For purposes of Section 523(a)(2), (4) or (6), party with standing is creditor to whom debt is owed. Real party in interest is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit. Legend on promissory note that stated that obligation had been sold to AFC Funding Corp. raised question as to whether American Funding Corp. had standing. However, where plaintiff lacks standing, Court should not dismiss action until real party in interest has opportunity to either join or ratify action. Party can "ratify" action by unequivocal statement authorizing the continued prosecution and stating that the party agrees to be bound by results. Affidavits filed by AFC Funding sufficient to stating that AFC was the servicer and specifically authorized action to be brought by Automotive Finance Corp. and agreed to be bound by result.

12.38 Intervention

Matthews v. Educational Credit Management Corp., 2011 WL 836925 (E.D. Ky. 2011), *aff'd* 2013 WL 791520 (6th Cir. 2013) – Assignee of guarantor of student loan debt had sufficient interest to support intervention in action to determine dischargeability under Section 523. Intervenor demonstrated timely request to intervene; guarantor had substantial legal interest in case; applicant's ability to protect interests would be impaired if intervention was denied; and applicant's interests were not otherwise adequately represented. Primary lender's status as defendant in case did not provide adequate representation of guarantor who held distinct interests, particularly where primary lender defaulted by failing to respond to adversary complaint.

Bailey v. White, 2009 WL 928595 (6th Cir. 2009) – Federal Rule of Civil Procedure 24(a) requires party seeking to intervene to demonstrate (1) application is timely; (2) applicant must have substantial legal interest in the subject matter of the action; (3) applicant's ability to protect that interest must be impaired if intervention is not granted; and (4) parties already present in the action do not adequately represent applicant's interest. District Court properly denied motion to intervene as untimely where action had been pending for 17 months including litigation over preliminary injunction, class certification and discovery. Proposed intervenors knew about their interests in the case before the complaint was filed and had adequate opportunity to participate in fairness hearing and review documents voluntarily produced by the parties. Court will consider 5 factors in determining whether request for intervention is timely: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to

the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

12.39 Joinder and Severance

Auday v. Wet Seal Retail, Inc., 2013 WL 2457717 (E.D. Tn. 2013) – Rule 17 allows substitution of trustee for debtor unless parties fail to substitute trustee for debtor in reasonable time. Once Trustee substitutes in, action proceeds as if it had originally been commenced by real party in interest, where trustee, having been substituted, ratifies the original filing by the debtor. Ratification requires Trustee to authorize continuation of action and agree to be bound by results. Trustee did not ratify action where Trustee did not take any action to prosecute action but directed debtor to pursue the action on her own. Trustee's affidavit stating that trustee was aware of the prosecution did not amount to ratification as affidavit neither asserted control over action nor agreed to be bound by outcome. Rule 25 allows for substitution of party where party, during pendency of action, obtains assignment or transfer of the litigation. Action was transferred by Debtor to Trustee upon filing of bankruptcy case regardless of whether action had been commenced pre-petition. Trustee would be substituted in as if action had been brought by trustee in first instance. Where original action was commenced within statute of limitations, trustee as substituted party can maintain action as if trustee was party in first instance and brought action within statute of limitations period.

Sequatchie Mountain Creditors v. Detweiler, 2012 WL 4120386 (N.D. Ohio 2011) –Amendment of complaint should be permitted where justice requires. Court must consider whether there has been undue delay; lack of notice to opposing party; bad faith by moving party; repeated failure to cure deficiencies in prior amendments; and a futility of amendments; with notice and substantial prejudice being critical factors. Amendment to complaint to add parties as additional plaintiffs is permitted if (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. Opposing party did not demonstrate prejudice merely because case had been pending for 21 months, where opposing party had already conducted discovery into possible causes of action by as-of-then persons who were not plaintiffs. Although confusion regarding proper plaintiffs was result of poor drafting by plaintiff, that alone did not present prejudice. Discovery had not closed and there would be substantial overlapping testimony were all of the plaintiffs purchased lots in the same real estate development. Court's desire to move cases on docket did not warrant denial of amendment, although court could limit discovery to avoid unnecessary delays in light of 21 month delay by plaintiff in naming proper parties.

Smith-Boughan, Inc., v. Sun Bank, 2009 WL 2901521 (Bankr. N.D. Ohio 2009) – Joinder of parties is appropriate where Plaintiff's causes of action arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the Court. Court has discretion to sever properly joined parties for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. Severance is not favored and will not be granted where the risks of prejudice and confusion are outweighed by other factors including the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources. Action by Plaintiff for breach of construction contract against Defendant-Contractor was substantially related to Plaintiff's claims against Bank that was holding retainage to be paid under the contract. If proceeds are severed, Bank could assert Plaintiff's failure to complete construction as a defense to the "retainage" action, thereby requiring Plaintiff to try the contract issues twice. Duplicate trials would be inefficient and expensive as the contract issues will involve fact-intensive, complex construction litigation which the court believes would impose a tremendous burden on both Plaintiff and its witnesses if litigated in two separate forums and would create a meaningful risk of inconsistent adjudications.

12.40 Class Actions

Bent v. ABMD, Ltd., 2010 WL 4780776 (Bankr. S.D. Ohio 2010) – Bankruptcy Court can certify class where proponent establishes (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Proponent must also certify that action complies with Rule 23(b). Key elements to defining a class include: (1) specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way, and (2) facilitating a court's ability to ascertain its membership in some objective manner. Class of plaintiffs defined as those working for Defendant within specific time frame sufficiently definite. 293 total affected class members met the "numerous" requirement. Alleged mass layoffs in violation of WARN act constituted sufficient commonality and resulted in class representatives having claims that are typical of all members of the class. Class representatives qualified to act as none had any interest that was adverse to the interests of the class itself. The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy

Wilborn v. Wells Fargo Bank, N.A., Case No. 09-20415 (5th Cir. 2010) – Bankruptcy Court can certify class action under 28 USC Section 157 and 1334, where class certification otherwise complies with Federal Rule 23. Rule 23(b)(3) requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Court must assess how the matter will be tried on the merits, by identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Court must determine whether proposed classes are sufficiently cohesive to warrant adjudication by representation in light of the relevant claims, defenses, facts, and substantive law presented in the case. Plaintiffs' complaint is based on the claim that for each named plaintiff and each unnamed class member Wells Fargo

impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court, as purportedly required by Title 11 and the Federal Rules of Bankruptcy Procedure failed to demonstrate required predominance or superiority, particularly with respect to damages. Court also concluded that there was a substantial split between the Bankruptcy Courts as to whether a secured creditor is required to obtain approval under Section 506 and Rule 1016 before assessing contractually allowed fees. Although all members of the putative class were debtors in bankruptcy, the cases of the individual named plaintiffs varied from debtor to debtor and illustrated the many underlying circumstances of the charges that would need to be considered. The circumstances surrounding the charging of fees require an individual assessment of the claims. The bankruptcy court cannot require Wells Fargo to simply disgorge all fees that were not previously approved because it is evident that there has been a wide "array of charges tailored" to each individual debtor. The differing circumstances of the debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. The rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo.

I. Commencement

12.41 Filing Fee

Smith v. LeGare, 2013 WL 5417212 (Bankr. N.D. Ohio 2013) – Court lacks authority under 28 USC Section 1930 to waive a filing fee for a creditor to commence an adversary proceeding.

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – 28 USC Section 1915(a) permits court to waive filing fee by person who submits an affidavit that discloses all assets and states that the person is unable to pay the fees or give security for payment of the fees. If a motion to proceed without payment of fees and is accompanied by a facially sufficient affidavit, court should allow complaint to be filed.

12.42 Generally – Time For

In re Stough, 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing debtor to enjoy finality and certainty of relief. Failure to provide creditor notice of proceeding, however, can excuse late filed complaint as failure to provide notice constitutes failure of fundamental due process. Complaint untimely where not filed within 60 days and where creditor did not seek extension of deadline before deadline expired. Minor error in creditor address will not constitute failure of notice or form basis to excuse untimely filing of adversary if it appears likely that creditor received notice notwithstanding error. Creditor received appropriate notice of proceedings where, although matrix contained typographical error in address, where address was off by one digit. Creditor was large Hospital and it appears likely that the Hospital would have received the notice. Evidence indicated that notice had not been returned to noticing center, and it is likely that Post Office would have known and recognized the minor error in the address and delivered the notice.

Alfes v. Educational Credit Management Corp., 2011 WL 3795107 (Bankr. E.D. Mi.) *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Amended complaint dates back to date of initial complaint as long as claim arises out of same transaction, conduct or occurrence. Although amended complaint added new theory of liability, it was premised on the same facts and debtor had full notice of the allegations based on the initial complaint. Debtor was unable to demonstrate any prejudice by allowing amended complaint filed only one day after filing of initial complaint, before debtor took any action in response.

In re Rutherford, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.

Probuild Company, LLC. v. Doria, Case No. 10-11914 (E.D. Mi. 2010) – Rules 4007 and 9006 govern time for filing adversary complaint objecting to dischargeability of debt. Where 60-day deadline to file adversary falls on weekend or legal holiday, deadline to file adversary is extended to first business day thereafter.

12.43 Extension of Time – Granted

In re McKenzie, 2012 WL 4742708 (E.D. Tn. 2012) – Equitable tolling provides that statute of limitations will not bar claim if plaintiff, despite diligent efforts, did not discover injury until after limitations period expired. Courts will consider (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. Court can consider any other factors that court deems appropriate, but must apply doctrine sparingly. Court equitably tolled statute notwithstanding evidence that the Trustee was extremely experienced and could not feign ignorance of notice and filing requirements; and also could have exercised greater diligence. Trustee mistakenly believed creditor's only collateral was real estate despite schedules indicating debtor owned a number of interests and ran a variety of businesses. Trustee failed to act upon email that included several attachments relevant to the matters at hand. Court concluded that notwithstanding Trustee's lack of diligence, alleged transfer at issue was not disclosed in schedules and schedules were not amended to disclose until 2 weeks after statute of limitations expired; and other actions of creditor were misleading and created false

impressions. While creditor may not have had affirmative duty to disclose certain facts, creditor had ample opportunity to correct misimpressions and misunderstandings that led to Trustee's initial decision not to pursue action until after statute had expired.

12.44 Extension of Time – Denied

In re Stough, 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing debtor to enjoy finality and certainty of relief. However, time limit is not jurisdictional and court can extend deadline where debtor's dilatory behavior caused delay in filing adversary. Equitable tolling applies where Plaintiff (1) lacks actual notice of filing requirement; (2) lacks constructive knowledge of filing requirement; (3) has been diligent in pursuing one's rights; (4) demonstrates that late filing did not prejudice the defendant; and (5) demonstrates that conduct in remaining ignorant of the notice requirement was excusable. Court would not equitably toll time where creditor received actual notice of deadlines in Notice of Commencement, even if, because of creditor's internal processes, the notice was not delivered to the proper person. Creditor did act diligently to protect rights after creditor became aware of bankruptcy and debtor would not have been prejudiced if the deadline were extended. However, creditor did not act reasonably in remaining ignorant of deadline. Creditor, plus three of its agents, were all scheduled and all received the Notice of Commencement. There was no reasonable basis for creditor to have remained ignorant for so long a duration.

Cummings v. Ehrhart, Adv. No. 12-3101 (Bankr. E.D. Mi. 2012) – Deadline for filing is not jurisdictional. In considering whether to extend deadline, court must consider lack of actual notice of filing requirements; lack of constructive notice of filing requirements; diligence in pursuing one's rights; absence of prejudice to defendant; and reasonableness of plaintiff's remaining ignorant of notice requirements. Plaintiff did not produce any evidence that defendant delayed or contributed to the delay in plaintiff's filing of adversary. No evidence that defendant led plaintiff to believe that an extension of time would be agreed or that there were any communications between attorneys. Plaintiff failed to file motion to extend time before expiration of deadline and in fact waited unto more than a month after expiration of deadline. Plaintiffs were not sufficiently diligent in pursuing rights before expiration of deadline. Although defendant did not show any prejudice, defendant did have expectation of entry of discharge after deadline for filing actions expired.

JP Morgan Chase, NA v. Harris, Case No. 10-6706 (Bankr. E.D. Mi. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. Plaintiff failed to demonstrate cause to extend time to file Adversary proceeding where parties previously stipulated to one extension of time to a date specific and creditor did not file adversary proceeding until one day after expiration of agreed upon extension. Equitable tolling requires (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing creditor's rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of filing requirement. Parties were aware of and had discussions about looming deadline but did not have any agreement about further extensions. Plaintiff had ample notice of deadline and opportunity to act either by filing complaint or by filing motion seeking additional extension. Failure to file based on counsel's calendar error is not "excusable neglect" that would form basis to extend time to file adversary complaint.

In re McConkey, 2011 WL 1436431 (Bankr. D. Md. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. In order to establish equitable tolling, Plaintiff must show that failure to file a complaint within the time provided was the result of (1) extraordinary circumstances, (2) beyond Plaintiff's control or external to Plaintiff's own conduct, (3) that prevented Plaintiff from filing on time. Errors of counsel that prevent timely filing are neither extraordinary or external. Complaint was not timely filed because Plaintiff's counsel was unfamiliar with the Rules and so was not aware of need to file the complaint within 60 days. Creditor's Motion for Relief From Stay filed to permit state court litigation to proceed did not constitute Motion for Extension of Time to file adversary proceeding where the motion did not allege that Plaintiff was attempting to have debt declared non-dischargeable.

Guillen v. Wilson, Adv. No. 06-4608 (Bankr. E.D. Mi. 2009) - Creditor's Motion for Extension of Time to file documents in connection with an adversary proceeding objecting to the dischargeability of certain debts denied as moot as the adversary proceeding had been dismissed before the Motion was filed.

12.45 Ripeness – Advisory Opinions

In re Gourlay, 2013 WL 4414827 (E.D. Mi. 2013) – Court will not rule on matters that are not ripe or that seek strictly advisory opinion. Motion for order clarifying that debts may be subject to non-dischargeability action under Section 523 sought advisory opinion where party had not actually commenced any adversary proceeding. Motion sought opinion of court as to what may happen in an as-yet unfiled action.

Erikson v. Internal Revenue Service, 2013 WL 2035875 (Bankr. E.D. Mi. 2013) – Action does not present any justiciable controversy unless action demonstrates concrete and particularized injury that is actual or imminent, as opposed to conjectural or hypothetical; a fairly traceable causal connection between injury and alleged conduct; and likelihood that injury would be redressed by favorable decision. Court lacks jurisdiction to rule in action that is not ripe or in which plaintiff lacks standing. Action brought by debtor against IRS for declaratory relief regarding dischargeability of taxes was not ripe for adjudication. Debtors filed for Chapter 7 and included non-priority taxes in scheduled debts. Debtors then received a discharge. Debtors brought adversary seeking order that tax debts be discharged. Parties agreed that taxes were unsecured and non-priority such that only possible exception would be Section 523(a)(1)(C), that returns were fraudulent or that debtors made willful attempt to evade taxes. IRS responded that it has no present intent to bring a claim against debtors for fraudulent returns, nor did IRS have any information that would warrant an investigation. Debtors' adversary sought to deal with what was only a

remote possibility that IRS may, at some point in the future, conduct an investigation and that that following that investigation. IRS may at some point commence enforcement activity. Plaintiff did not allege any injury in fact and as IRS had not begun enforcement actions, any possible harm was remote and hypothetical. Further, if IRS commenced action in future, Debtors would be allowed to raise discharge as bar to those proceedings.

Winget v. JP Morgan Chase Bank, 537 F.3d 565 (6th Cir. 2008) – Guarantors action against lender for alleged violation of asset purchase agreement was not ripe for adjudication where no actions have yet been brought to enforce the Guarantee Documents. Any attempt to bring a claim before the lender attempts to repossess the collateral is premature as it rests upon contingent future events that may not occur as anticipated or at all.

J. Service of Process

12.46 Deadline for Service

Spirit SPE Portfolio 2007-1 LLC v. Paxos, 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires service to be complete within 120 days of filing the complaint. If Plaintiff can establish good cause, Court must extend time for service. Plaintiff failed to show good cause where Plaintiff served debtor but failed to serve debtor’s counsel as required by Rule 7004. Court has discretion to extend time even in absence of good cause, where required extension is of short duration; extension is not prejudicial to defendant; defendant had actual notice so lawsuit; dismissal without prejudice would substantially prejudice plaintiff as lawsuit would be time barred; and plaintiff made good faith efforts at proper service. Requested extension was just 8 days. Debtor had actual notice of lawsuit and filed both motion for extension of time to file responsive pleading and motion to quash service. Plaintiff’s action would be barred by statute of limitations, such that dismissal would effectively be with prejudice; and debtor failed to demonstrate any actual prejudice. Court prefers to resolve matters on merits and plaintiff could cure any defect in service by immediately serving copy of complaint on debtor’s attorney.

12.47 Rule 7004

Crow v. Ocwen Loan Servicing, LLC, 2013 WL 4668558 (Bankr. N.D. Ohio 2013) – Service on corporate entity can be accomplished by mailing a copy of the summons and complaint to the attention of an officer, managing or general agent, or other agent authorized by appointment of law to receive service. Service was sufficient where certificate of service indicated that plaintiff mailed the required documents by certified mail to the Defendant and also mailed copies by certified mail to two individually named members of the Board of Directors at the address of the corporate headquarters. Addressing mailing to a specific named person constitutes mailing “to the attention of” as required by Rule 7004; and members of board of directors would be assumed to be agents to accept service of process.

Pixler v. Huff, 2013 WL 3423530 (W.D. Ky. 2013) – Absent defendant’s consent to waive service, Plaintiff must serve defendant following formal procedure for service of process. Record indicated that Plaintiff never obtained summons directed to defendant signed by clerk and bearing court seal.

Spirit SPE Portfolios 2007-1 LLC v. Paxos, 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires that if the debtor is represented by an attorney, service must also be made on the attorney.

Spidle v. Hogan, 2013 WL 1504053 (M.D. Tn. 2013) – Complaint against United States for actions taken in official capacity must be served by (i) delivering a copy of the summons and of the complaint to the United States Attorney for the district where the action is brought; or sending a copy of each by registered or certified mail to the civil-process clerk at the United States attorney’s office; and sending a copy of each by registered or certified mail to the Attorney General of the United States in Washington, DC; and if the action challenges an order of a non-party agency or officer of the United States, sending a copy of each by registered or certified mail to the agency or officer. Plaintiff failed to demonstrate proper service where Plaintiff only served the named defendant by US Mail but did not even attempt service on US Attorney or on the Attorney General. If Plaintiff intended to sue government official or agency, then service must be accomplished by serving the United States and also the named officer. Plaintiff allegedly served the named individual but did not serve the United States. Action dismissed for failure to achieve proper service within time permitted.

Jahn v. Clayton, 2012 WL 112940 (Bankr. E.D. Tn. 2012) – Court can deny entry of default where evidence indicates that debtor did not receive summons or complaint. Service on debtor by mailing to address shown on petition is sufficient service even if it was substantially likely that debtor did not reside there as debtor’s chapter 13 plan surrendered the property more than 2 years earlier. Debtor had continuing duty to advise court of current address. Any failure to maintain current address on record of court is fault of debtor that does not defeat propriety of service.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 4(e) governs service within the United States, and allows service by delivery to the individual’s dwelling or usual place of abode. Debtor’s temporary employment outside of the United States did not alter status of debtor’s home in Michigan as his “usual place of abode”. Debtor’s wife was someone of suitable age who resided at the same premises; debtor listed the property as his residence in his Chapter 7 bankruptcy schedules; and debtor claimed an exemption under U.S.C. § 522(d)(1), for the property.

American Home Mortgage Servicing, Inc. v. Johnson, 2011 WL 2115652 (E.D. Ky. 2011) – Rule 7004 governs services of process in adversary proceedings. It permits service by first class mail upon a corporation by mailing a copy of the summons and complaint to

the attention of an officer or any other agent authorized by appointment or by law to receive service of process. Request for Notices filed in main Bankruptcy Case stating that notice should be directed to an appointed agent for service of process does not supersede Rule 7004. Summons addressed to Corporate President at correct corporate address constitutes proper service even if person served and address used differed from that in the Request for Notice.

PNC Mortgage v. Rhiel, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of “Officer, Managing or General Agent” without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.

In re Miller, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an “insured depository institution,” Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors’ post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

LaBankoff v. GMAC Mortgage, LLC., Case No. 09-1294 (9th Cir. BAP 2010) – Service on an attorney for a party is not sufficient service in an adversary proceeding. Rule 7004(b)(3) requires service by mail to the attention of an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service. Without proof that the attorney has been designated as agent to accept process, service on the attorney is not sufficient. The party effectuating service bears the burden of proof that the person served is authorized to accept service. Attorney can become an implied agent for service where the attorney repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority, based on extensive involvement in the underlying bankruptcy proceeding coupled with evidence that the Attorney previously had been served with papers in the bankruptcy proceeding on behalf of the client without objection and the party’s acknowledgement that the attorney acts as general counsel and is regularly and routinely consulted on bankruptcy matters. Attorney whose only connection with bankruptcy case was filing of Notice of appearance 18 days before the alleged service evidenced no intent of the client to appoint the attorney as an agent for service.

Sims v. US Bank Home Mortgage, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

Steed v. Buckalew, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) –Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail.

Duetsche Bank National Trust Company v. Rogan, 2009 WL 3415462 (E.D. Ky. 2009) –Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor’s Proof of Claim which listed “Bankruptcy Department” as agent for receipt of all notices regarding Bankruptcy Case constituted “appointment” for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

12.48 Failure to Serve

LaBankoff v. GMAC Mortgage, LLC., Case No. 09-1294 (9th Cir. BAP 2010) – Court disregarded Supplemental Certificate of Service and concluded that defendant had not been properly served where the Court record reflected that Plaintiff had never filed the “Supplemental Certificate” and Plaintiff’s own Motion for Default referenced earlier date on which proper service had not been made and failed to reference alleged later, proper service.

Galloway v. Reis, Case No. DT 09-10374 (Bankr. W.D. Mich. 2010) – Personal service of Summons and complaint on defendant ineffective where personal service occurred 39 days after summons issued. Rule 7004(e) required service within 10 (now 14) days after issuance of summons. After expiration of time to serve, Summons became stale and could not confer personal jurisdiction. Service of summons by mail ineffective where Plaintiff timely mailed summons to Defendant but failed to mail a copy to debtor’s counsel as required by Rule 7004(g). Service by mail does not require proof of receipt by debtor, but does require mailing to debtor and, if represented by counsel, to debtor’s counsel. Service of process is means by which Court acquires personal jurisdiction – Court must insist on strict compliance with service requirements.

Greenhill v. Beneficial Michigan, Inc., Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed where Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and offered no excuse or explanation for failure.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Federal Rule of Civil Procedure, incorporated through

Bankruptcy Rule 7012, allows for service of an adversary proceeding complaint on corporation by first class mail addressed to the attention of an officer, managing or general agent, or other agent authorized by appointment or applicable law to receive service. Service properly made on person identified on defendant's website as "CEO" notwithstanding assertion by defendant that party had resigned as CEO prior to the date on which service was made. However, certificate of service failed to show service on individual defendant – court lacked jurisdiction over individual defendant.

K. Parties

12.49 Necessary and Indispensable Parties

Still v. Hopkins, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Rule 7019 defines "required party" as one who is subject to service of process; whose joinder will not deprive court of subject matter jurisdiction; and that either in absence of party, court cannot accord complete relief, or that the person claims an interest in the action and disposing of action in absence of party may as a practical matter impede or impair the person's ability to protect their interest or leaves an existing party subject to double or inconsistent obligations. A person or entity is only indispensable, within the meaning of Rule 19, if (1) it is necessary, (2) its joinder *cannot* be effected, and (3) the court determines that it will *dismiss the pending case* rather than proceed in the case without the absentee. In normal case, where debtor has completely divested himself of any interest in property that is subject of the action, Debtor is not necessary party as debtor has no interest in the outcome of the matter. Trustee sought to set aside transfer of property owned by debtor, which granted fee title to debtor's children but retained a life estate for debtor. Debtor's life estate constituted an interest in the real property that is the subject of the action and is so situated that disposing of the adversary may impair or impede Debtor's ability to protect that interest. Resolution of adversary involves Debtor's claim of exemption and court cannot accord complete relief among parties absent Debtor's joinder. Court can join debtor without raising issues of subject matter jurisdiction. However, Debtor did not have interest in property that would be impaired by outcome of adversary where debtor's interest was limited to the monetary value of \$12,500, and no particular right to actually use or possess the specific property. If trustee prevails in adversary and sells property, debtor will receive \$12,500 and will have opportunity to protect debtor's interest at that point. Debtor is not indispensable party to adversary to avoid transfer as fraudulent.

Lyon v. Rappaport, 2011 WL 652744 (6th Cir. BAP 2011) – Sixth Circuit has three-step analysis to determine whether a case should proceed in the absence of a particular party. Court must first determine whether person is necessary to the action. If so, the court must determine whether the party is within the Court's jurisdiction. Finally, the court must determine whether equity and good conscience would permit case to proceed or whether the missing party is indispensable. Case should be dismissed only if party is indispensable and is beyond the jurisdiction of the court or cannot be joined without destroying subject matter jurisdiction. Party was not indispensable where full relief would be afforded among the parties without the joinder of the additional party. Defendant's potential liability for fraudulent transfers was independent of any potential liability of any third party not joined in the suit as defendant was individually responsible for any damages the plaintiff may recover. However, omitted party was necessary and could be joined without destroying court's jurisdiction. Proper course of action is not to dismiss case, but to order joinder of necessary party.

12.50 FDIC as Receiver

Shirk v. JPMorgan Chase Bank, N.A., (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.

Jahn v. Bedford Consulting Group, LLC., 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

12.51 Identity of Plaintiffs

Sequatchie Mountain Creditors v. Detweiler, 2011 WL 3471519 (Bankr. N.D. Ohio 2011) – Caption of Complaint that named various individuals "known as the Sequatchie Mountain Creditors" joined only named individuals as plaintiffs and did not join members of the Sequatchie Mountain Creditor group that were not specifically named. Federal Rule of Civil Procedure 10(a), made applicable through Federal Rule of Bankruptcy Procedure 7010, requires title of complaint to name all parties with specificity.

L. Pleadings

12.52 Calculation of Deadlines – Generally

Kim v. U.S. Department of Education, Adv. No. 10-80774 (Bankr. W.D. Mi. 2012) – Debtors failure to serve initial summons did not create any obligation of defendant to respond. Defendant's failure to respond within 30 days of service of original complaint could not support

entry of default. Suit against US DOE is suit against US or an agency or officer thereof, with the defendant having 35 days to respond. Amended Summons served December 22 and US filed answer on January 26, exactly 35 days after service. Answer was timely, precluding entry of default.

Allstate Insurance Company v. Harris, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Rule 9006 provides for additional three days in calculating deadline to respond, and applies whether the pleading was served by mail or electronically through Court’s ECF system. Court order required service of answer within 14 days of service of amended complaint. Amended complaint filed and served on June 1. Allowing 14 days produces deadline of June 15, plus three additional days extends deadline to June 18. Answer filed on June 18 was timely under Rule 9006.

12.53 Complaint

DWR International, Inc. v. Job, 2013 WL 1438035 (S.D. Ohio 2013) – Transfer can be avoided under Uniform Fraudulent Transfer Statute if made either with actual intent to hinder, delay or defraud creditors; or if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether the debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the debtor; (6) Whether the debtor absconded; (7) Whether the debtor removed or concealed assets; (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor. Complaint sufficiently alleged fraud under *Twombly* standard where complaint alleged that the Plaintiff had sued the defendant prior to the date on which the defendant transferred assets to insider; that defendant transferred assets and money aggregating over \$1.6 million with knowledge of the pending litigation; defendant did not receive any value in exchange for the transfer; and that defendant was insolvent at the time of the transfer. Specific factual allegations supported at least 5 “badges of fraud” sufficient to state cause of action under *Twombly* standard.

Moyer v. Koster, Case No. 12-80174 (Bankr. W.D. Mi. 2012) – Adversary complaint seeking to recover allegedly fraudulent transfers must do more than parrot the statutory elements for constructively fraudulent transfers. Trustee’s complaint alleging numerous transfers by debtor to third parties as part of “ponzi scheme” sufficiently alleged debtor’s intent to hinder, delay and defraud creditors which meets the *Iqbal* and *Twombly* standard. Very nature of a Ponzi scheme allows court to infer fraudulent intent. Complaint is based on multiple transactions and ongoing artifice and deception going back many years, and it would be impossible for Trustee to enumerate every misrepresentation in the context of a Ponzi scheme. However, complaint did not state cause of action for transfers allegedly made by debtor’s “alter ego” entities because complaint referenced only transfers “from the debtor” with no reference to any transfers allegedly made by any third party and did not state that property transferred was property of the debtor, amounts allegedly transferred by each of the transferors, or when during the relevant “look back” period the transfers occurred.

Sharrieff v. Huntington Bank, 2012 WL 3253160 (W.D. Tn. 2012) – Court can summarily dismiss action where complaint fails to state cause of action or to demonstrate court’s jurisdiction. Plaintiff did not file complaint to commence action. Instead, Plaintiff filed Affidavit of Negative Averment, Opportunity to Cure, and Counterclaim that contained few coherent factual allegations. Plaintiff alleged that Huntington sold the original note but failed to give credit to Plaintiff’s account” and that the “note was created on my credit, and signature, and was not an asset of” Defendants. Remainder of Plaintiff’s filing is unintelligible. The case caption describes Plaintiff as a Third Party Plaintiff in Admiralty, yet this is not an admiralty case. The filing contends that Defendants do not have the original note, and it refers to “Dishonor in commerce, Theft, Fraud, Conspiracy, and Racketeering and Trespassing authorized by U.S. Code Title 18.” The filing avers that Plaintiff tendered a lawful payment to Huntington to settle his debt and that, by accepting the payment, Defendants have “chosen to dishonor [Plaintiff’s] lawful payment and [have] refused to zero the account.” Plaintiff further avers that “Lawful Money no longer is available for payment of debt in our economic system.” To the extent complaint alleged violations of 18 USC Sections 241 and 242, those are criminal statutes for which no civil remedy is available. To the extent complaint attempted to state cause of action for RICO, allegations were well short of Rule 9 requirement that party must plead with particularity fraud or mistake. Allegations of complaint were insufficient to determine whether diversity jurisdiction existed and did not establish any independent basis for federal court jurisdiction given failure to state any legally cognizable federal cause of action.

Degirolamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularity the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of “badges of fraud” including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices. Under Ohio state law, preference action requires “(1) a sale, conveyance, transfer, mortgage, or assignment made by a debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged “design to prefer” by alleging that sales of fuel at below market prices resulted in Debtor’s inability to pay suppliers, leading to involuntary petition. Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to

amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers.

Richardson v. Checker Acquisition Corporation, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “ ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ Plaintiff’s obligation to provide the grounds for relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Lyon v. Rappaport, Case No. 10-8059 (6th Cir. 2011) – Action to recover fraudulent transfer under Section 548 must be pled with specificity. Complaint that failed to plead factual basis for every element of cause of action would be dismissed. Mere “formulaic recitation” of elements of statute is insufficient.

Morris v. Paine, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Rule 9 requires that complaint alleging fraud or mistake must state with particularity circumstances constituting fraud or mistake. Plaintiff must, at a minimum, allege the time, place and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. Debtor’s complaint very generally alleged that the three Bankruptcy Judge defendants tried to play a game of “bait and switch” by constantly having a judge who was not assigned to his bankruptcy case hear a particular matter; and that the defendants conspired against him to deprive him of his property by confirming no automatic stay was in effect when his prior chapter 13 case was filed. Debtor did not plead fraudulent allegations with any specificity as to date, time, place, etc.. Even if he had, claims of the judges playing “bait and switch” with him are wholly without merit. A bankruptcy judge in one judicial district is not prohibited from hearing another case in that same district. Section 362(c)(4)(A)(i) mandates that if a debtor has had “2 or more single or joint cases ... pending within the previous year ... that were dismissed ... the stay under subsection (a) *shall not go into effect* upon the filing of the later case.” Subsection ii provides that if a creditor requests an order confirming the automatic stay did not go into effect pursuant to § 362(c)(4)(A)(i), “the court *shall promptly enter an order confirming no stay is in effect.*” A Bankruptcy Judge has no discretion in issuing said order. If the debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect. Defendants’ simply did what the Bankruptcy Code dictated they must do.

Montano-Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894 (M.D. Tn. 2009) - Although a complaint need not plead detailed factual allegations, those allegations must be enough to raise a right to relief above the speculative level. The factual allegations must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. Although Federal Rule of Civil Procedure 8 establishes a “liberal system of notice pleading, plaintiff’s must plead more than labels and conclusions, or a formulaic recitation of the elements of a cause of action.

D.A.N. Joint Venture, III, LP v. Shekerjian, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

12.54 Third Party Complaint

Swain v. Swain, 2010 WL 2812727 (Bankr. N.D. Ohio 2010) – Defendant in adversary proceeding can file third party complaint to join non-parties where proposed third party defendant is jointly liable with main defendant or where third party defendant may have derivative liability. Third-party defendant’s liability must be derivative and must flow to the third-party plaintiff; mere liability by the third-party defendant to the main plaintiff will not suffice. Third-party practice usually involves claims in the nature of contribution, indemnity, and subrogation. Third party complaint not proper merely because claims arise out of same transaction where third party liability is independent of primary action. Third party complaint dismissed where allegations, if true, would make third party defendant liable directly to the primary defendant; outcome of main action does not drive outcome of third party action; and defendant could maintain direct action against third party defendant in unrelated adversary proceeding. Plaintiff’s main action was for non-dischargeability under Section 523(a)(2). Nothing in the third party complaint could leave the third party defendants secondarily liable to debtors.

12.55 Answer and Affirmative Defenses

McDermott v. Swanson, Case No. 12-6028 (8th Cir. BAP 2012) – In action to deny discharge under Section 727(a)(3), debtor’s justification for failing to keep or maintain records is not affirmative defense that must be pled. Lack of justification is essential element of Plaintiff’s case. Allegation that merely negates element of plaintiff’s prima facie case is not an affirmative defense and is not waived merely because

defendant does not plead that in response to the complaint.

Bondi v. Bank of America, 2011 WL 135825 (2d Cir. 2011) – *In pari delicto* defense is available as defense to action brought by Trustee to same extent it would have been available had action been brought directly by debtor prior to commencement of bankruptcy case. Trustee's status as Trustee does not insulate Trustee from Debtor's prior conduct, and Trustee steps into shoes of debtor in all actions and is subject to same defenses. *In pari delicto* prevents a party from suing others for a wrong in which the party itself participated.

Unencumbered Assets Trust v. JP Morgan Chase Bank, 2011 WL 1397813 (S.D. Ohio 2011) – *In pari delicto* defense can be raised against a bankruptcy trustee to the same extent that the defense could have been raised against the debtor. *In pari delicto* defense is available only when: (1) the plaintiff bears at least substantially equal responsibility for the wrongs he seeks to redress, and (2) preclusion of suit would not significantly interfere with the purposes of the law or harm the public interest. Substantially equal responsibility requires plaintiff to be an active, voluntary participant in the unlawful activity that is the subject of the suit. Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. Corporate debtor was entirely controlled by principals who used corporate debtor to perpetuate massive fraud and to loot corporate assets. Interests of corporate debtor and principals were so closely aligned and principals exercised such high degree of control as to warrant imputation knowledge of principals to corporate debtor. Chapter 7 Trustee could not recover damages from defendant where defendant participated in allegedly fraudulent scheme masterminded and implemented by debtor's principals as principals, and by extension corporate debtor, bore substantially equal responsibility for the losses.

Gordon v. Ameriquest Mortgage Corp., 2011 WL 1659873 (Bankr. N.D. Ga. 2011) – Affirmative defenses must be pled with same specificity as is required of complaint itself. The Court decisions in *Iqbal* and *Twombly* are equally applicable to affirmative defenses. Affirmative defenses stated as summary conclusions with no statement of the factual basis for the defense would be stricken.

Phillips v. Deutsche National Trust, Case No. 09-6109 (Bankr. N.D. Ohio 2010) - Answer to complaint must be filed within 30 days unless the court sets a different time. Court can extend the time even after the time has expired if the failure to file the answer in a timely manner is caused by inadvertence, mistake, or careless, as well as by intervening circumstances beyond the party's control. In determining whether neglect is excusable the Court should consider all relevant circumstances including the danger of prejudice, the length of the delay, the reason for the delay, and whether the movant acted in good faith. Court would extend time to file answer where it is unlikely that the plaintiffs would be prejudiced by allowing the defendants to respond as evidenced by the plaintiffs' reluctance to prosecute their case. Further, parties were involved in settlement discussions and, at one time, believed that the case would settle.

Hunts with Double Indoor, LLC, v. Daniel A. Peyerck Living Trust, Case No. 10-4525 (Bankr. E.D. Mi. 2010) – Michigan Statute of Frauds prohibits promise made to creditor to pay debts owed by third party unless the promise is in writing and signed by the party agreeing to make the payments. However, Statute of Frauds does not apply where third party assured debtor directly that third party would pay debtor's obligations. A promise to pay the debts of another does not fall within the Statute of Frauds when the promise is made directly to the debtor rather than to a creditor. Therefore, the oral promise made to the debtor that third party would pay debtor's debts is enforceable as long as the promising party received consideration for the promise.

General Motors Acceptance Corporation v. Flynn, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Trustee's complaint is not subject to affirmative defenses which are based on the pre-petition conduct of the Debtor. Defenses of waiver, estoppel, laches, setoff, accord and satisfaction, and negligence, all based on Debtor's pre-petition conduct did not bind the Trustee as Trustee lacked privity with the Debtor and the defenses constitute defenses personal to the Debtor.

Gold v. Deloitte & Touche, LLP, 2009 WL 1738465 (E.D. Mi. 2009), *aff'd*, 2010 WL 3782187 (6th Cir. 2010) – Cause of action for professional negligence is governed by state law. Negligence requires (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. Proof of causation requires both cause in fact and legal, or proximate, cause. When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury. Where evidence indicated that nobody relied on audit report prepared by defendants, plaintiff could not maintain cause of action for professional negligence. Further, plaintiff cannot recover where defendant's alleged negligence prevented third parties from learning about, and stopping, improper transactions of which plaintiff was fully aware.

12.56 Statute of Limitations

Bridge v. Ocwen Federal Bank, 2013 WL 4784292 (N.D. Ohio 2013) – Statute of limitations does not preclude foreclosure based on earlier default, where debtor, in response to demand from lender, cured prior default, and debtor continued to make payment on the note. After later default, lender accelerated note and demanded full payment. Foreclosure based on this latest default was brought within statute of limitations as action was brought well within 2 years of the last default and acceleration.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Statute of limitations for fraud runs from time claim accrues, which is date on which the wrong is committed regardless of when discovered. Alleged fraud in loan documents occurred when parties executed loan agreement, not date on which Plaintiff allegedly discovered the fraud. Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan. Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction. Home Ownership and Equity

Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date. Statute of limitations for state law malpractice claim is two years from the date on which the claim arises, regardless of whether plaintiff has notice of the violation.

USACM Liquidating Trust v. Deloitte & Touche, Case No. 11-15626 (9th Cir. 2013) – Section 108 does not extend statute of limitations where applicable state statute of limitations expired prior to commencement of bankruptcy case. Corporation was aware of inaccurate audits where principals of corporation were active participants in the underlying fraud that was not discovered by auditors. Knowledge of principals was imputed to corporation. As such, corporation knew or should have known of the errors in the audits on the dates the audits were prepared which was outside the state statute. Corporation’s argument that it did not actually discover the errors until years later did not overcome imputation of knowledge of principals to corporation years earlier, even if the alleged errors related to the wrongful acts of the principals which the principals had every incentive to conceal.

Fogel v. Shabat, Case no. 12-3888 (7th Cir. 2013) – Appointment of interim trustee in case converted from Chapter 13 to Chapter 7 does not toll statute of limitations pursuant to Section 546. Statute of limitations to avoid transfers is 2 years from commencement of case. Section 546 provides for extension of deadline for one additional year if the appointment or election of “the first trustee” under Section 702 occurs before the expiration of the initial 2 year term. Debtor converted case from Chapter 13 to Chapter 7 one day short of 2 years after initial bankruptcy filing. Interim trustee was appointed on date of conversion, but permanent trustee was not appointed until 45 days later, after creditors attempted but failed to elect permanent trustee. Section 546 expressly references Section 702, which is the permanent trustee; and does not reference Section 701 regarding appointment of an interim trustee. The permanent trustee was not appointed or elected within the two year period from commencement of the case, and the statute of limitations expired on the avoidance actions.

Allstate Insurance Company v. Harris, 474 BR 816 (Bankr. E.D. Mi. 2012) – Statute of Limitations in action against attorney for professional malpractice expires 2 years after the claim accrues or 6 months after plaintiff discovers, or should have discovered, the malpractice, whichever is later. Claim for legal malpractice “accrues” when the attorney discontinues serving the plaintiff in a professional capacity as to the matters involved, regardless of when plaintiff actually discovers the claim. Statute of Limitations expired more than 2 years before case commenced where attorney stopped acting as Plaintiff’s attorney in various state court matters, even though plaintiffs did not know that attorney was purportedly acting on behalf of Plaintiff. Although attorney’s actions gave every appearance to courts and to other parties in action that attorney represented Plaintiff, Plaintiff never in fact hired, or even met, attorney, and Plaintiff had no knowledge that attorney purportedly represented Plaintiff until more than 2 years later. Action dismissed.

Brandt v. Weyant, 2010 WL 3719102 (Bankr. M.D. Tn. 2010) – Provision of Servicemembers’ Civil Relief Act that period of service “may not” be included in computing time is discretionary and does not mandate extension of statute of limitations in action brought by soldier. Although Plaintiff was a life-long member of the armed forces and was currently on active duty, nothing indicated that Plaintiff’s status as active duty in any way precluded or inhibited Plaintiff from prosecuting action. Plaintiff failed to present sufficient evidence of hardship to warrant invocation of discretionary extension of statute of limitations.

Torrez v. Eley, Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff’s complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.

Gold v. Deloitte & Touche, LLP, 2009 WL 1664583 (E.D. Mi. 2009) – Cause of action for “aiding and abetting breach of fiduciary duty” is subject to three-year statute of limitations under Michigan law because it is a common law Court claim. Claim barred by statute of limitations where bankruptcy petition filed March 28, 2003 but adversary complaint not filed until March 31, 2006.

12.57 Statute of Limitations – Tolling

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Statute of Limitations can be equitably tolled where defendant fraudulently conceals operative facts that are basis of cause of action notwithstanding due diligence by Plaintiff to discover facts. Plaintiff did not establish basis for equitable tolling where Plaintiff did not make any effort to obtain allegedly withheld documents until well after statute of limitations had expired.

In re Vertrue Inc. Marketing and Sales Practices Litigation, 2013 WL 1607295 (6th Cir. 2013) – Commencement of Class Action litigation suspends applicable statutes of limitations as to all asserted members of the class who would have been parties had the action been permitted to proceed as a class action. All members have the right to file individual claims if class certification is denied as long as those actions are commenced within the time remaining on the statute of limitations.

12.58 Laches

In re Peake, 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Laches requires proof that plaintiff delayed filing suit for unreasonable and inexcusable length of time from the time plaintiff knew or reasonably should have known of the claim, and the delay operated to prejudice of defendant. Further, there is “strong presumption” that the delay is not unreasonable where the statute of limitations has not lapsed. Creditor’s action to declare debt non-dischargeable under Section 523(a)(5) not barred by laches. Any delay in commencement of case was

result, at least in part, of debtor's failure to schedule debt. Further, actions under Section 523(a)(5) can be brought at any time. Statute of limitations on action founded on judgment or decree is 10 years, and action was commenced less than 10 years after entry of divorce. Debtor failed to produce evidence of prejudice based on delay.

12.59 Cross Claims

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Creditor's "cross-claim" in adversary proceeding was actually attempt to recover damages against Debtor for which creditor failed to file a proof of claim. Creditor cannot use cross claim to circumvent requirement of Federal Rule of Bankruptcy Procedure 3002 that a creditor timely file a claim by the claim deadline.

12.60 Motion to Dismiss

Advantage Windows, Inc. v. Dunn, 2013 WL 1553007 (Bankr. E.D. Tn. 2013) – If four corners of complaint states cause of action, dismissal under Rule 12(b) is improper. In considering Rule 12 Motion, court must consider only the complaint and any exhibits incorporated. Defendant's motion to dismiss included additional documents not referenced in the complaint. Those additional documents would not be considered in connection with a Rule 12 motion. If documents outside the complaint are considered, the court must convert the motion to dismiss into a motion for summary judgment and give the parties a reasonable time to present all evidence in support of such a Rule 56 motion.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Motion to dismiss under Rule 12 is limited to matters contained within 4 corners of complaint and properly referenced exhibits. Court denied Defendant's Motion where could would have had to consider matters outside the complaint, including Plaintiff's bankruptcy file. Motion denied without prejudice to defendant filing Motion for Summary Judgment. Court can dismiss action based on statute of limitations if the defect is apparent from face of complaint.

M-Heat v. Jost, Adv. No. 12-4868 (Bankr. E.D. Mi. 2012) – Court would not consider grounds for motion to dismiss that are raised for first time in reply to defendant's response to the motion. It is impermissible to raise note issue for first time in reply brief as opposing party has no opportunity to respond.

Lee-Taylor v. Martin, 2011 WL 6032835 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12 requires that complaint fail to state cause of action on its face. Court cannot consider matters beyond 4 corners of complaint. Motion to Dismiss based on Collateral estoppel required review of documents and matters beyond 4 corners of complaint. Motion denied without prejudice to Defendant renewing Motion using proper procedure for Summary Judgment.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Plaintiff's failure to establish jurisdiction in Complaint is basis to dismiss adversary complaint. However, that Complaint alleges as basis for jurisdiction an inapplicable statute does not mandate dismissal where factual allegations of complaint are sufficient to demonstrate existence of jurisdiction. Action for contempt based on alleged violation of discharge injunction is clear "core" proceeding over which Court has subject matter jurisdiction. Failure to cite specific statute on which claim is based is not fatal defect where factual allegations are sufficient to apprise defendant of substance of action. Complaint for violation of automatic stay failed to state cause of action where complaint alleged that debt was included in bankruptcy and defendant continued efforts to collect, but did not allege that defendant knew either of commencement of bankruptcy case or existence of automatic stay.

Anthony v. Miller, 2011 WL 3585603 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12(b)(6) for failure to state cause of action must be made either in separate pleading before a responsive pleading is filed or in the initial responsive pleading. Motion to Dismiss filed well after Defendant filed answer to complaint was untimely and must be denied, even where based on failure to plead fraud with specificity as required by Rule 9. However, Court exercised inherent authority to require pro se plaintiff to file amended complaint where "complaint" in the form of letter initially mailed to court was unfocused and request for relief was not tied to any Code provision and was unclear as to whether Plaintiff sought relief against both debtors or only one of the two.

Morris v. Paine, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Case will be dismissed where Complaint based on statutes that did not provide for private right of action. 18 USC Section 1346 (defining criminal violation for fraud), 18 USC Section 1918 (sedition) and 10 U.S.C. Section 333 (insurrection) are criminal statutes for which no private right of action exists. Action under 42 USC Section 2000d is one for discrimination in state and local government programs. Bankruptcy Judges and Trustees are not within the scope of defendants defined in Section 2000d and Debtor's prior bankruptcy filings did not constitute the receipt of federally provided financial assistance which is required under Section 2000d. Eleventh Amendment creates protection for state from Federal interference, but does not provide any independent basis for action by private individual.

Spradlin v. Baker, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Rule 12(b)(6) made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), is for failure to state a claim upon which relief can be granted. Complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The complaint must possess enough heft to show that the pleader is entitled to relief. Court, in determining such a motion must presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. The purpose of a motion to dismiss is to assess the legal

sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. Court does not have to accept every allegation in the complaint as true in assessing its sufficiency nor sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual allegations. Motion to Dismiss denied where Plaintiff alleged that Defendant agreed to limit exemptions and Defendant did not counter the Plaintiff's declaration and defendant produced no other challenge to the sufficiency of the Complaint.

Swanigam v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Motion to dismiss for failure to state a claim only tests whether a cognizable claim has been pled. Court can dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and it must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests. Complaint must provide more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Complaint must have a factual foundation, and the mere possibility that a plaintiff might later establish some set of undisclosed facts to support recovery is insufficient to survive a 12(b)(6) challenge. Court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiff. Only well-pleaded facts must be taken as true, and the court need not accept legal conclusions or unwarranted factual inferences. Where parties rely on materials outside the pleadings, Court has discretion to treat Motion as Motion for Summary Judgment under Rule 56.

Bowen v. Mountain Commerce Bank, 2010 WL 2430777 (Bankr. E.D. Tn. 2010) - Moving party in a Rule 12(b)(6) Motion has the burden of proving that no claim exists. Complaint is to be liberally construed, but must more than bare assertions or legal conclusions. Factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the nonmoving party but court need not accept unwarranted factual inferences. Complaint must present enough facts to state a claim to relief that is plausible on its face. Claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not a "probability requirement," but requires more than a sheer possibility that a defendant has acted unlawfully. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Complaint alleged that bank had been paid in full during debtor's chapter 13 proceeding, leaving no debt left owing for the bank to collect and preventing finding that conduct of which debtors complained was an attempt by the bank to collect a debt. Reporting of credit information about a debtor or refusing to remove credit information posted about a debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor's refusal to update the status of a debt on a credit report after a request has been made by the debtor can result in a discharge injunction if creditor deliberately refuses to change reporting of debts from "past due or owing, charged off as bad debt" rather than "discharged in bankruptcy" notwithstanding request by debtor to update reports. Debtor's complaint fails to state cause of action where complaint alleged only that bank failed to remove a negative reference from credit bureau without providing any details explaining the allegations and failed to contain anything more than "unadorned, the-defendant-unlawfully-harmed-me" accusations. Complaint failed to identify in any respect what the debtor's claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to "negative reference" without providing any factual explanation or support for the allegations.

Smith v. Bluegrass Mortgage, 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – A complaint is subject to dismissal if it fails to allege a required element which is necessary to obtain relief sought or if a bar to relief is apparent from the face of the complaint. The court's task under Rule 12(b)(6) is then to determine the sufficiency, and not the merits, of the Complaint. To survive a motion to dismiss, complaint does not need detailed factual allegations. However, plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. Court, in determining such a motion must presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. Motion to dismiss is to assess the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. In considering motion to dismiss, court does not have to accept every allegation in the complaint as true in assessing its sufficiency. Allegations must be "well-pleaded" and the court need not accept sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual. Complaint objecting to debtor's discharge would be dismissed where Complaint contained "sweeping and unwarranted averments of fact," most of which appear to be accusations of misdeeds by various non-party judges, attorneys, trustees, and other parties at whose hands the Plaintiff believes he has been wronged. Complaint did not contain any allegation sufficient to state a claim that is plausible on its face to sustain any action against this Defendant, if for no other reason that Debtor was a Corporation and would not be entitled to a discharge as a matter of law.

Maxus Capital Group, LLC. v. Uhrich, Case No. 09-8047 (6th Cir. BAP 2010) – In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. Dismissal is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of a claim for relief. Court is not required to accept unwarranted legal conclusions or factual allegations. Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or

that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.

Nehasil v. Greiner, 430 BR 446 (E.D. Mi. 2010) – Rule 12(b)(6) allows court to dismiss complaint that fails to state claim upon which relief can be granted. Court can determine whether Plaintiff is entitled to legal relief assuming every allegation in the complaint is true, and will all inferences construed most favorably to Plaintiff. Complaint must contain either direct or inferential allegations regarding all material elements of cause of action. Complaint cannot rely on mere labels or conclusions and must be more than a formulaic recitation of elements of cause of action. Complaint must contain sufficient factual allegations to state a claim that is plausible on its face. Federal Rule 9 requires fraud to be plead with particularity, although state of mind such as malice, intent and knowledge may be plead generally. Complaint that specifically referred to state court fraud judgment is sufficient to provide Defendant with full understanding of Section 523 complaint. Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State court judgment for fraud which required that Defendant have obtained money as a result of the fraud.

Budzynski v. Stephens, Case No. 10-4230 (Bankr. E.D. Mi.), *aff'd* 2010 WL 4286186 (E.D. Mi. 2010) – When addressing a motion to dismiss under rule 12, court should construe complaint in light most favorable to plaintiff, accepting all factual allegations as true. Court is not required to accept legal conclusions where unwarranted factual inferences are true. Court should determine whether complaint contains either direct or inferential allegations respecting material elements of claim.

Torrez v. Eley, Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff's complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.

Montano-Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894 (M.D. Tn. 2009) – In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." The Federal Rules of Civil Procedure require only that a plaintiff provide "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. It may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Challenges to the merits of a plaintiff's claim should be "dealt with through summary judgment under Rule 56. To survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level – a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely. Complaint that is nothing more than conclusions is not entitled to the assumption of truth. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

D.A.N. Joint Venture, III, LP v. Shekerjian, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

12.61 Motion to Strike Pleadings

Smith v. Bluegrass Mortgage, 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – Complaint objecting to debtor's discharge would be stricken where debtor was a Corporation and would not be entitled to a discharge as a matter of law.

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Motion to strike affirmative defenses are disfavored as resolution requires Court to evaluate legal merits of a defense before the factual background of the case is fully developed. Court can strike affirmative defense that is legally insufficient, immaterial, impertinent or scandalous. A defense is legally insufficient if it cannot succeed under any circumstances; immaterial if it bears no essential or important relationship to the primary claim for relief; impertinent if it contains statements that do not pertain to or are unnecessary to the issues in question; and scandalous if they improperly cast a derogatory light on the opposing party. Bankruptcy trustee is not in privity with the Debtor and the alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee's fraudulent transfer claim. Court properly struck defenses that were based on alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees as those defenses attempted to impermissibly attribute to the trustee the wrongdoing of the Debtor. Defenses of accord and satisfaction and set off are not defenses to a fraudulent transfer action. Laches defense struck where trustee brought avoidance action more than one year after case commenced but within time permitted under section 546(a).

12.62 Amendments to Pleadings – Generally

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Plaintiff should be granted leave to amend complaint on liberal basis. However, Rule 15 allows amendment only with opposing party’s consent or with leave of court. Plaintiff did not request consent of opposing party and did not file Motion for leave to file amended complaint. However, Plaintiff included in response to Motion to Dismiss a request to be allowed to file an amended complaint. Although Plaintiff failed to comply with any procedural requirement, court would allow amendment subject to determination that amended complaint states cause of action.

Reed v. U.S. Bancorp, 2013 WL 1249231 (E.D. Tn. 2013) – Plaintiff may amend complaint to change the party or the naming of the party against whom a claim is asserted and that amendment will relate back to the date of the original pleading if: (1) the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, (2) the added party received notice of the suit in the 120 days following the filing of the original complaint, (3) the notice was such that the added party will not be prejudiced in maintaining a defense on the merits, and (4) the added party knew or should have known that but for a mistake of the identity of the proper party, the action would have been brought against it. Focus is not on whether Plaintiff should have known identity of correct party, but whether correct party knew or should have known that it would have been named but for an error. Amendment to add correct party is not new cause of action that precludes relation back. Amendment demonstrated that Plaintiff attempted to sue correct party, not to add a new party against whom Plaintiff would assert new claims. Corporate relationships between originally named defendant and later, corrected defendant were complex; the correct defendant was at all times aware of the claims including a determination by the EEOC of a right to sue; and once the mistake was discovered, Plaintiff acted quickly to correct the error.

Adamovic v. Lazarevic, 2012 WL 3778946 (Bankr. E.D. Tn. 2012) – Rule 7015, which incorporates Federal Rule 15, allows amendments of pleadings only with the consent of opposing party or with leave of court. Court should freely grant leave where justice requires.

Haney v. Educational Credit Management Corp., 2012 WL 3693533 (E.D. Ky. 2012) – Plaintiff has no automatic right to amend complaint after dismissal. Court has discretion to determine whether to permit amendment and can consider undue delay in filing motion. Motion to amend denied where at the time the original complaint was filed, debtor was in full possession of relevant facts and could have raised issues earlier in the proceeding.

Shapiro v. Harajli, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Court can deny request to file amended complaint where doing so would prejudice defendant; or where filing an amended complaint would be futile. Trustee did not unduly delay in requesting leave to file amended complaint where assertion of new claim would not require defendant to expend significant additional resources to conduct discovery and prepare for trial and would not significantly delay the resolution of the action. However, Plaintiff failed to identify in request for leave to amend any particular claim that Plaintiff would add and, based on Court’s earlier ruling on Summary Judgment, it did not appear that Plaintiff could plead any facts or cause of action that would support a meritorious cause of action against defendant.

Richardson v. Checker Acquisition Corporation, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Request for leave to file Amended Complaint must be requested in written motion unless made during a hearing. The requirement for a written motion in Rule 7(b)(1) and Bankruptcy Rule 9013 serves two functions, a record-making function and a notice function. The record-making function permits the court and the parties to determine what occurred. The notice function permits the opposing party and the court to prepare adequately. Rule 7(b)(1) assures that parties will know of contentions and requests in a litigation and will have the opportunity to oppose—or at least address—such views and demands. Oral argument on previously filed Motion to Dismiss is not the type of hearing where an Oral motion to amend is proper. On proper request, plaintiff should be given at least one chance to amend the complaint before dismissal with prejudice, but Court is not required to permit amendment where proposed amendment would be futile. Plaintiffs alleged delay in requesting leave to amend, resulting in two hearings rather than just one, would not be basis to deny Motion to Amend. However, Court could award defendant attorney fees and costs incurred in attending second, avoidable, hearing.

Stevens v. Citizens Tri-County Bank, 2011 WL 6812807 (Bankr. E.D. Tn. 2011) – Court denied Motion to Amend Complaint where proposed Amended Complaint failed to state cause of action.

Cornwell Quality Tools Company v. Paavo, Case No. 11-10831 (E.D. Mi. 2011) – Court properly denied Creditor’s Motion to Amend Complaint where proposed amended complaint failed to state a cause of action.

Appalachian Oil Co., Inc. v. Kentucky Lottery Corp., 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend should be freely granted, absent evidence of undue delay, bad faith or dilatory motive, undue prejudice to opposing party, or futility of amendment. Proposed amendment is futile if it would not withstand Motion to Dismiss under Rule 12(b)(6).

Sequatchie Mountain Creditors v. Detweiler, 2012 WL 4120386 (N.D. Ohio 2011) –Amendment of complaint should be permitted where justice requires. Court must consider whether there has been undue delay; lack of notice to opposing party; bad faith by moving party; repeated failure to cure deficiencies in prior amendments; and a futility of amendments; with notice and substantial prejudice being critical factors. Amendment to complaint to add parties as additional plaintiffs is permitted if (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. Opposing party did not demonstrate prejudice merely because case had been pending for 21 months, where opposing party had already conducted discovery into possible causes of action by as-of-then persons who were not plaintiffs. Although confusion regarding proper plaintiffs was result of poor drafting by plaintiff, that alone did not present prejudice. Discovery had not closed and there would be substantial overlapping testimony were all of the plaintiffs purchased lots

in the same real estate development and claims of the proposed new plaintiffs were the same as the existing plaintiffs, where the claims turned on when each plaintiff learned of the land for sale, whether timber rights were involved, and whether the purchased was financed. . Court's desire to move cases on docket did not warrant denial of amendment, although court could limit discovery to avoid unnecessary delays in light of 21 month delay by plaintiff in naming proper parties.

Imagepoint, Inc. v. GM-DI Leasing Corp., 2010 WL 3037436 (Bankr. E.D. Tn. 2010) - Leave to amend should be freely given when justice so requires. Courts should consider undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. Amendment will be "futile" if no set of facts can be proved that would constitute a valid and sufficient claim. Amendment was not "unduly delayed" where adversary complaint was filed while case was pending in Chapter 11 and was later converted to Chapter 7, Amended Complaint was filed less than one year after commencement of the case; discovery was still pending; Trustee has not previously requested leave to amend; Chapter 7 case had large number of complex proceedings pending at the time of the Trustee's appointment. Even if delay is "unjustified" leave to amend will not be denied where delay was not intended to harass or causes any ascertainable prejudice to the party opposing the motion. To determine "prejudice", court will consider whether the assertion of the new claim or defense would require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction. Record did not demonstrate prejudice where discovery was still ongoing and there was no assertion that the addition of these new claims will delay the scheduled trial. Allowing amendment would be more economical and efficient than a new action. Both the old and the new claims arise out of the same agreements and overlap with respect to the setoff contentions.

Dottore v. National Staffing Services, LLC, 2010 WL 2891705 (N.D. Ohio 2010) – Decision to permit amendments is within the discretion of the court. A court may deny a motion to amend on the basis of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of the proposed amendment. Delay alone-regardless of length-is an insufficient basis for a court to deny an otherwise appropriate motion for leave to amend where delay is not intended to harass and does not cause any ascertainable prejudice. Prejudice depends on whether the amendment would 1) require the opposing party to expend significant additional resources to conduct discovery and prepare for trial; 2) significantly delay the resolution of the dispute; or 3) prevent the plaintiff from bringing a timely action in another jurisdiction. Discovery taken in case provided clear notice that Plaintiff had some sort of fraud action against Defendant and allegations of fraud were largely based on same allegations as initial complaint, precluding any finding of prejudice and amendment would not require expenditure of significant additional resources as Defendant had already engaged in discovery relevant to fraud claim.

Montano-Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894 (M.D. Tn. 2009) - After responsive pleadings are filed, a party may amend its complaint only with leave of court or with written consent of opposing counsel. Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be freely given "when justice so requires." Leave should be given unless there is a showing of undue delay, bad faith or dilatory motive on the part of the moving party, undue prejudice to the non-moving party, or futility of the proposed amendment. Motion for Leave to Amend granted where Defendant failed to demonstrate that amendments would be "futile" or that claim would be subject to dismissal if asserted in the Amended Complaint.

Winget v. JP Morgan Chase Bank, 537 F.3d 565 (6th Cir. 2008) – District Court is not required to grant leave to amend the complaint where the Court reaches the legal conclusion that the proposed amendment would not survive a motion to dismiss. Further, District Court is not required to grant leave to amend where the party has failed to seek leave to file an amendment. District Court is not required to grant leave to amend where plaintiff failed to file amended complaint until after District Court entered final judgment dismissing the case.

Lewis v. McClatchey, 2009 WL 1607773 (S.D. Ohio 2009) – Although Motion for Leave to Amend should be freely granted when justice requires, Court may deny leave to amend in cases of bad faith, dilatory motive, or undue prejudice to opposing party. Motion for Leave to Amend denied where motion was not made until three months after case was dismissed; new claims bore no connection to claims asserted originally; proposed amendment involved claims against two entities that were not parties to the suit; and proposed amendment failed to state claim upon which relief could be granted rendering proposed amendment futile.

12.63 Amendments to Pleadings – Relation Back

Bowden v. American Home Mortgage Servicing, Inc., 2013 WL 195672 (6th Cir. 2013) – Proposed amended complaint would not relate back, and so would be untimely, where plaintiff had previously filed an original and two amended complaints and yet never raised matter that plaintiff now sought to assert.

Render v. Render, Adv. No. 11-3414 (Bankr. E.D. Mi. 2012) – Leave to Amend should be liberally granted. Complaint will relate back if the amended claim arises out of the same conduct, transaction or occurrence as the original complaint. Amended complaint can add new legal theory as long as it arises out of the same transaction or occurrence. Allegations in amended complaint to object to discharge were identical to actions alleged in original complaint, which supported conclusion that amended complaint related back.

Adamovic v. Lazarevic, 2012 WL 3778946 (Bankr. E.D. Tn. 2012) – Amended complaint relates back to date of prior pleading if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out, or attempted to be set out, in the original pleading. Amendment related back where original complaint sought to deny discharge under Sections 272(a)(2), (3), (4), (5), (6)

and (7) and to except debt from discharge under Section 523(a)(4). Amendment that sought to add counts under Section 523(a)(2)(and (6) were sufficiently related to the prior claims to relate back. Opposing party would not have been surprised by amendment as new claims were all based on same facts as original complaint and will require similar evidence to support the claims; and there was no evidence of undue delay.

Richardson v. Checker Acquisition Corporation, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court would not rule in whether amended complaint dates back in advance of any motion filed by defendant to dismiss based on statute of limitations. If Defendant seeks dismissal, then court will determine whether amended complaint states new actions or are causes of action that are related to the previously alleged causes of action.

Krupski v. Costa, 130 S. Ct. 2485 (2010) – Rule 15(c) has three requirements before an amended complaint, including against a newly named defendant, can relate back to the original complaint. First, the claims must have arisen out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; second, the newly added defendant must have received such notice of the action that it will be not be prejudiced in defending on the merits; and third, the newly added defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

DeGirolamo v. Quarry Golf Club, LLC, 2011 WL 4372699 (Bankr. N.D. Ohio 2011) – Proposed Amended Complaint demonstrated sufficient relationship to original Complaint for purposes of relating back where Amended Complaint was based on web of interrelated transactions and each transaction involved the same players and property. Proposed added party knew or should have known that Trustee was asserting claims based on transactions in which proposed party was involved and that but for information not originally known by the Trustee the party would have been named in the first instance. Party to be added failed to demonstrate any prejudice beyond conclusory statement that the party would be prejudiced. Party was represented by same attorney and had same business address and same managing member as other parties already in case.

Appalachian Oil Co., Inc. v. Kentucky Lottery Corp., 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend cannot be granted if statute of limitations has expired after filing of initial complaint, unless amendment relates back to date of original complaint. To relate back, amendment must assert claim or defense that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. If the facts in the original complaint put the defendant on notice that it could be called to answer for the allegations in the amended complaint, the amended complaint will date back. Original complaint alleged preferential transfer when Debtor allegedly paid same invoice twice. Amended complaint to include set off based on double payment was within same facts as Defendant already knew Debtor complained of double payment under different legal theory. However, proposed amendment to add cause of action for post-petition transfers would not date back ad nothing in the original complaint related to any transaction or transfer that occurred post-petition. As original complaint was based exclusively on pre- petition facts and allegations, amended complaint that would not date back to the extent it now sought to recover post-petition transfers.

In re Fries, 2010 WL 3700205 (Bankr. W.D. Ky. 2010) – Creditor not permitted, after deadline for filing non-dischargeability actions, to amend otherwise timely filed Complaint under Section 727 to add non- dischargeability count under Section 523(a)(4), even if Section 523(a)(4) action was premised on same set of facts. Action under Section 523 has gross differences as to the type, measure and burden of proof, as well as differing legal effects on the debtors should judgment be entered in favor of the plaintiff.

Jahn v. Bedford Consulting Group, LLC, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Amended Complaint will not relate back to original filing where amended complaint adds new parties not named in complaint originally filed. Complaint that corrects mis-identification of party will relate back, but not one that adds entirely new party.

Stevenson v. Daudlin, Case No. 10-5075 (Bankr. E.D. Mi. 2010) – Amended pleading dates back where the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Amended complaint would not date back and would be untimely where original complaint sought to deny discharge under Section 727(a)(4)(D) for failure to produce documents, while amended complaint would seek to deny discharge based on alleged false statements and omissions under Section 727(a)(4)(A) that were discovered once documents requested were provided. Causes of action had different bases and relied on proof of different allegations.

Dottore v. National Staffing Services, LLC, 2010 WL 2891705 (N.D. Ohio 2010) – Amended Complaint that arises out of same conduct, transaction or occurrence set forth or attempted to be set forth in original pleading dates back to filing of pleading being amended. Where complaint was timely filed within Statute of Limitations, amended complaint filed after Statute expired would date back and be deemed timely where amendment arose out of the same conduct, transaction and occurrence set forth in the original complaint and contained much of the same language as the original claim.

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

and complaint (within 120 days from the date of the filing of the complaint). Claims asserted in Complaint and Amended Complaint were identical and Defendant received electronic notice of the Adversary Proceeding when initially filed and had been named as a Defendant throughout. Defendant should have known that action would have been brought against him but for clerical error. Amended Complaint related back.

12.64 Scheduling Order

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Rule 26 requires that party must provide a computation of damages claimed by the disclosing party. Plaintiff failed to make a sufficient disclosure where complaint sought \$5,000 in damages and supplemental discovery responses indicated damages of \$4,500 but failed to include the computation of those damages as required by Rule 26.

Lawyers Title Insurance Company v. McKenzie, Adv. No. 08-4641 (Bankr. E.D. Mi. 2009) - Court refused to approve Parties Stipulation to Modify Scheduling Order to extend time to file dispositive motions and to adjourn Final Pretrial and Trial dates. Parties seeking to modify Scheduling Order must demonstrate good cause. Agreement of the parties, without more, does not constitute "cause".

12.65 Attorney Fees as Element of Recovery

Sharma v. Salcido, Case No. 12-1302 (9th Cir. BAP 2013) – Court erred in awarding attorney fees in action under Section 523(a)(2). In general, parties to litigation are responsible for payment of their own fees unless attorney fee awards are authorized by contract or statute. Bankruptcy code itself does not afford general right to recover attorney fees. Bankruptcy court cannot award attorney fees unless creditors would be entitled to attorney fees had the action been concluded in state court without any bankruptcy intervention. If attorney fees are awarded in Section 523 action, that award is also non-dischargeable, but that standing alone does not support award of fees in first instance. Attorney fee provision that authorized award in any action to enforce or interpret agreement did not encompass fees for non-dischargeability action based on fraudulent inducement to enter into that agreement or any alleged fraud that led up to execution of agreement.

Antioch Company Litigation Trust v. Morgan, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Plaintiff's claim for attorney fees from defendant must be plead as a separate count in the complaint and not as an adjunct to another substantive count. Court for fees must be plead with specificity and must, at a minimum, plead the legal and factual basis for an award of attorney fees.

M. Preemption

12.66 Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action

Kline v. Mortgage Electronic Security Systems, 2010 WL 3796584 (Bankr. S.D. Ohio 2010) – Bankruptcy Code preempts state law as to events and actions occurring in bankruptcy proceeding. Debtor not entitled to maintain non-bankruptcy causes of action based on Federal Truth In Lending Act, Ohio Consumer Protection Statutes or common law breach of contract and unjust enrichment based on proof of claim filed that asserts amounts due for bankruptcy fees and accrued late charges. Bankruptcy Code is complex set of laws necessary to regulate the rights of debtors and creditors that protects the bankruptcy process from even slight incursions and disruptions that would result from non-bankruptcy causes of action.

N. Financial Institutions Reform Recovery and Enforcement Act (FIRREA)

12.67 Generally

Shirk v. JPMorgan Chase Bank, N.A., _____ (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.

Jahn v. Bedford Consulting Group, LLC., 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

O. Dismissal

12.68 Failure to Prosecute

HALO Wireless, Inc. v. Tennessee Regulatory Authority, 2012 WL 5248858 (M.D. Tn. 2012) – Cause of action commenced by debtor prior

to commencement of Chapter 7 case dismissed for failure to prosecute where Chapter 7 Trustee indicated that Debtor would not pursue cause of action. Court issued order allowing any party 14 days to file response indicating why case should not be dismissed, failing which the case would be dismissed with prejudice.

Kohut v. Lamos, Case No. 10-6206 (Bankr. E.D. Mi. 2010) – Motion for Extension of Time to submit Order dismissing adversary case denied where failure to timely submit proposed Order would result in Court's entry of Order of Dismissal without prejudice. If the parties believe that further action is needed to approve a settlement agreement, the parties can request reopening of the case for that purpose.

M-Tech Associates, LLC v. General Motors Company, Case No. 09-6794 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where parties advised court that matter had been settled but failed to submit a proposed Order embodying the resolution.

Taj Graphic Enterprises, LLC v. LWD Creditors Committee, Case No. 09-6952 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed where Plaintiff failed to serve "Order Confirming Action Taken at October 25, 2010, Status Conference" as required.

Lee Wholesale Supply, Inc. v. Strunk, Case No. 09-7216 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an Application for Default Judgment within 14 days of Clerk's entry of Default.

Morabito v. Cothorn, Case No. 10-6046 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an adversary cover sheet, failed to issue a summons, failed to serve a summons or complaint, and failed to pay adversary filing fee within time permitted by Court.

Merchants Credit Resource v. Yesayan, Case No. 10-5268 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed with prejudice where Plaintiff failed to file amended complaint within time permitted by Court.

Dakmak v. Hutchinson, Case No. 09-6941 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

Taunt v. Chebbani, Adv. No. 08-5158 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

Americredit Financial Services, Inc. v. Burgess, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

12.69 Voluntary Dismissal

Reyes v. Burer, Case No. 11-8070 (6th Cir. BAP 2012) - Bankruptcy Court improperly dismissed adversary complaint with prejudice where plaintiff filed notice of voluntary dismissal without prejudice. Voluntary dismissal pursuant to rule 41 of the Federal Rules of Civil Procedure best voluntary dismissals within the sound discretion of the trial court. However, at adversary proceeding is not to be dismissed with prejudice where plaintiff did not request dismissal with prejudice and court did not give plaintiff notice of intention to dismiss with prejudice. Plaintiff is entitled to opportunity to be heard in opposition to dismissal with prejudice and must be given opportunity to withdraw request for voluntary dismissal and proceed with litigation.

Toder-Stokes v. Wells Fargo Bank, Adv. No. 09-4506 (Bankr. E.D. Mi. 2009) - Debtor's "Notice of Withdrawal of Adversary Complaint and Summons" filed in main bankruptcy case treated as Notice of Dismissal of adversary case. Adversary Complaint in this case was duplicate of already pending adversary proceeding.

12.70 Lack of Subject Matter Jurisdiction

Superior Materials, Inc. v. Mehlhose, Case No. 10-5811 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

J.L. Gislason, II, Trust v. Hardcastle-Melhouse, Case No. 10-5797 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

Dye-Shelman v. Wells Fargo Bank, Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

Huffman v. Chase Home Finance, LLC, Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

Nathan v. Hendricks, Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

Kyewski v. Countrywide Home Loans, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

Daniel v. LaSalle Bank, Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

Huston v. First Mariner Bank, Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

12.71 Dismissal as Moot

TCF Bank v. Sammut, Adv. No. 12-4649 (Bankr. E.D. Mi. 2012) – Section 523 action dismissed as moot once discharge denied under Section 727.

Savage v. Sammut, Adv. No. 12-4653 (Bankr. E.D. Mi. 2012) – Section 523 action dismissed as moot once discharge denied under Section 727.

Stevenson v. Wicker, Adv. No. 12-4459 (Bankr. E.D. Mi. 2012) – Adversary proceeding rendered moot by entry of Order denying debtor a discharge. Case dismissed.

Aerostar Castings & Molds, LLC v. Stewart, Adv. No. 12-4593 (Bankr. E.D. Mi. 2012) – Adversary proceeding by Plaintiff against debtors dismissed as moot where Court had already entered judgment denying debtors a discharge.

Humphrey v. Morgan, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Action to except debt from discharge under Section 523 rendered moot when debtor waived a discharge. Adversary proceeding dismissed.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed. Voluntary cessation of conduct does not render moot action for injunctive relief unless events make it clear that conduct would never reoccur. Voluntary cessation, even if permanent, does not render moot action for damages or contempt for past conduct.

Braun v. Citizens Bank, Case No. 10-7116 (Bankr. E.D. Mi. 2011) – Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

Champney v. Comerica Bank, Case No. 10-6841 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

Stewart v. Citifinancial, Inc., Case No. 10-6713 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

Pendley v. Regional Medical Center, Case No. 10-4033 (Bankr. W.D. Ky. 2010) - Adversary proceeding to recover money garnished during preference period dismissed as moot where creditor voluntarily returned money to debtor.

Superior Materials, LLC v. Mehlhose, Case No. 09-6904 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to declare debts non-dischargeable under section 523 dismissed as moot where court, in separate adversary proceeding, entered default judgment denying debtor a discharge under section 727.

Carmody v. Citimortgage, Case No. 09-6611 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to strip second mortgage rendered moot by Debtor's stated intention to convert proceedings to Chapter 7. Although Debtor had not yet filed a Notice of Conversion, Debtor failed to appear for hearing on Motion for Summary Judgment based on stated intention to convert where Debtor had absolute right to convert.

Stokes v. Wells Fargo Bank, N.A., Adv. Case no 09-4483 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.

Scott v. Banks, Adv. No. 09-4272 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.

Patterson v. Homecomings Financial, LLC., Adv. No. 09-4466 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order declaring that upon entry of a discharge the second mortgage would be extinguished, terminated and discharged.

12.72 Dismissal by Court *Sua Sponte*

In re Hann, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss a complaint or appeal *sua sponte* for lack of subject matter jurisdiction; or where the allegations of the complaint are totally implausible, attenuated, insubstantial, frivolous, or devoid of merit. Debtor's adversary proceeding constituted a convoluted but calculated attempt to circumvent the State of Michigan civil proceedings related to Debtors conviction and incarceration. Debtor's complaint that the State failed to "turnover" items which had been seized under the Michigan Forfeiture Act lacked any basis in law.

12.73 Failure to Pay Filing Fee

In re Logan, 2012 WL 3628771 (Bankr. N.D. Ohio 2012) – Miscellaneous fee schedule of Bankruptcy Court does not provide express authority to waive filing fee in action by creditor to challenge dischargeability of debt. However, 28 USC Section 1930(f)(3) allows court to waive fees in accordance with Judicial Conference policy. Although no parameters exist for exercise of discretion, Court concluded that based on creditor's assertion of indigent status was sufficient to waive filing fee in this case.

Ricci v. Grier, Adv. Case No. 10-4727 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to pay filing fee within deadline established by Order of Court.

In re Rutherford, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.

P. Default

12.74 Generally

Sharma v. Salcido, Case No. 12-1302 (9th Cir. BAP 2013) – Court can issue default final judgment declaring debt to be non-dischargeable under Section 523(a)(2) where well pleaded allegations of complaint are sufficient to meet all elements of cause of action. Default entered by court established truth of all well pled allegations in complaint and court needed only to determine whether those factual allegations met requirements of Section 523. Court was not required to hold separate hearing on damages where damages had already been liquidated in agreed final judgment in state court, as Federal court would be required to give state court judgment preclusive effect.

Langland v. Cadwallader, 2013 WL 1737360 (Bankr. W.D. Mi. 2013) – Complaint to liquidate a contract claim held by debtor prior to commencement of bankruptcy and based entirely on state law is not core proceeding and Bankruptcy Court lacks jurisdiction to enter final judgment. Complaint sought to recover on promissory notes between debtor and defendants that substantially preceded bankruptcy proceeding. Default by defendants in failing to respond to complaint does not constitute consent by defendants to entry of judgment. Court would enter report and recommendations on Plaintiff's Motion for Default Judgment for review by District Court.

Bennett v. Holley, 2013 WL 791549 (E.D. Mi. 2013) – Bankruptcy Court properly entered default against defendant who failed to participate in preparation of pre-trial statement, failed to appear for the pre-trial conference, and failed to file any objection to amount of damages itemized by Plaintiff.

French v. Johnson Law Group, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Entry of clerk's default for failure of defendant to respond to the complaint does not automatically entitle plaintiff to judgment. Court must independently review well pleaded allegations to determine if complaint demonstrates all elements of the relief. Court has discretion to conduct a hearing to determine the truth of any allegation and to determine damages.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Final Default Judgment must not differ in kind from, or exceed amount, demanded in pleadings. Government's complaint alleged outstanding tax debt of \$40,970.30. Actual tax debt was \$38,663.18, which was amount requested in Motion for Default Judgment. Discrepancy in amount did not preclude entry of default judgment, as amount

requested did not exceed amount listed in complaint and was not different in kind from the debt described in the pleadings. However, actual amount remained unliquidated where IRS was also pursuing recovery from co-obligor. Until that action was completed and amounts recovered credited to debtor's account, exact calculation of liability was not possible. Motion for Default Judgment denied without prejudice to IRS renewing motion once liability is liquidated.

Perkons v. American Acceptance, LLC, 2010 WL 4922916 (D. Ariz. 2010) – Granting default judgment is within the Court's sound discretion. In exercising that discretion, the Court may consider such factors as (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Default judgment warranted where Defendant failed to file Answer to complaint and Defendant discharge attorney but failed to retain new counsel in time permitted by Court. Plaintiff would suffer prejudice if default judgment was not entered because she would be without recourse for recovery. Complaint adequately alleged several violations of the FDCPA and the defendant has not asserted that the complaint fails to state a FDCPA claim. The sum of money at stake is not completely disproportionate or inappropriate to the allegations made in the complaint. Court would construe all well-pled allegations in favor of plaintiff and defendant made no attempt to challenge the allegations in the complaint related to damages. Defendant's failure to file an answer was not due to excusable neglect given that the defendant, either through prior counsel or through notices sent directly to it by the plaintiff and the Court, has had notice of everything filed in this action, and the defendant's default has made it impossible to render a decision on the merits.

In re Couch, Case No. 09-30805 (Bankr. E.D. Mi. 2010) – Creditor failed to amend Proof of Claim within the time permitted but did amend the claim prior to entry of an Order disallowing the claim. Defaults are generally disfavored and are reserved for rare occasions where no doubt exists that default is proper. Where doubt exists as to whether default should be granted or vacated, doubt should be resolved in favor of defaulting party. Court would not disallow claim by default where amended claim was filed, although untimely. Court did award Debtor attorney fees incurred as a result of Creditor's failure to timely amend.

Harmon Autoglass Intellectual Property, LLC v. Leiferman, Case No. 10-6007 (8th Cir. 2010) – Bankruptcy Court correctly struck defendant's answer and entered default judgment in favor of plaintiff in non-dischargeability action. Federal Rule of Bankruptcy Procedure 7037, which incorporates Federal Rule of Civil Procedure 37, permits Court to enter sanctions for failure to obey an Order regarding discovery. Court should resort to sanction of dismissal only when the failure to comply with Court's Orders regarding discovery is due to willfulness, bad faith or fault of the non-responding party; and where non-compliance with Order is prejudicial to the other party. Defendant failed to cooperate in discovery for nearly one year while adversary was pending. Court repeatedly advised Defendant that lack of cooperation would lead to sanctions including striking pleadings and entry of default judgment. Notwithstanding multiple extensions of time to comply, Defendant never meaningfully complied with multiple court orders compelling discovery.

12.75 Entry – Discretion of Court

Sharma v. Salcido, Case No. 12-1302 (9th Cir. BAP 2013) – In considering whether to enter default as sanction for failure of a defendant to participate in litigation, court must consider possibility of prejudice to plaintiff; merits of plaintiff's claim; sufficiency of complaint; sum of money at stake; possibility of a dispute concerning material facts; whether default was due to excusable neglect; and strong policy favoring decision on merits. Defendant's discovery misconduct already led to delays and increased costs and, but for default judgment, likely would have continued to prejudice plaintiff by additional delays and expenses. Complaint sufficiently stated cause of action under Section 523(a)(2) such that well pled allegations, taken as true, were sufficient to support entry of final judgment as a matter of law. Amount of money in controversy was significant as plaintiff was unemployed person in dire financial straits and debtor convinced plaintiff to hand over all of the debtors remaining assets. There was no genuine dispute as to material facts of underlying ponzi scheme. Defendant's failure to participate in discovery was not excusable neglect, and discovery abuses led to sanctions which ultimately led to entry of default. Policy favoring adjudication merits did not overcome other factors in this case.

World Savings Community Bank v. Skidmore, 2011 WL 6254877 (Bankr. N.D. Ohio 2011) – Court has discretion to deny entry of default even where defendant has failed to timely respond to complaint. court should take into account: 1) possible prejudice to the plaintiff; 2) the merits of the claims; 3) the sufficiency of the complaint; 4) the amount of money at stake; 5) possible disputed material facts; 6) whether the default was due to excusable neglect; and 7) the preference for decisions on the merits. Plaintiff failed to request entry of default until prompted by court and defendant promptly responded to that motion. None of the parties have attempted to move case forward. Defendant's failure to file answer attributable to miscommunication as there were two separate adversary proceedings filed arising out of same events, and defendant responded to one but was not aware of need to separately respond to second. Case presented serious questions of law and fact that needed court review and amount at stake was significant to both plaintiff and debtor. Defendant granted leave to file late answer.

12.76 Setting Aside

Rajala v. Taylor, Case No. 13-020 (10th Cir. BAP 2013) – Motion to vacate judgment must be first presented in court that entered judgment. Where debtor never filed a motion to set aside judgment in bankruptcy court, appellate court lacked ability to set aside order. Setting aside judgment is in discretion of trial court and appellate court cannot conclude that trial court abused discretion when trial court was never presented with the issue in the first instance.

Bennett v. Holley, 2013 WL 791549 (E.D. Mi. 2013) – Bankruptcy Court properly denied request to set aside default where defendant failed to participate in drafting pre-trial statement, failed to appear for pre-trial conference, and failed to file objection to Plaintiff's statement of damages. Defendant's assertion that the failure to respond was caused by dissolution of prior law firm and delays in migration of data from old computer to new computer, which resulted in defendant's calendar to fail to update to show deadlines did not constitute excusable neglect. All of the events that led up to entry of default occurred prior to dissolution of firm or any computer issues. Defendant was fully aware of any deadlines before any alleged shut down of firm and planned shutdown was not type of "clerical or office problem" that establishes excusable neglect.

S & D Investors, LLC v. Langley, 2012 WL 3555484 (Bankr. W.D. Mi. 2012) – Rule 60 allows court to set aside default only for one of the 6 reasons listed. Court cannot vacate default where debtor demonstrates possible valid defense but does not demonstrate any basis under Rule 60. Defendant cannot be relieved of a default judgment unless the default was the product of mistake, inadvertence, surprise, or excusable neglect. It is only when the defendant can carry this burden that defendant will be permitted to demonstrate the existence of a meritorious defense and the absence of substantial prejudice to the plaintiff should relief be granted. Defendant failed to demonstrate excusable neglect under Rule 60(b)(1) where court advised defendant of need to move to set aside default early in case but defendant waited until one year after entry of the judgment to seek relief. Defendant failed to demonstrate newly discovered evidence for purposes of Rule 60(b)(2). Defendant knew of potential defense of identity theft before judgment was entered. Separate lawsuit by another person against alleged identity thief was not "newly discovered". Rule 60(b)(6) requires extraordinary or exceptional circumstances which are not addressed by any of the other subparagraphs. Meritorious defense coupled with plea for "interests of justice", standing alone, is not sufficient for Rule 60(b)(6).

Rogan v. Litton Loan Servicing, LP, 2011 WL 4445651 (6th Cir. BAP 2011) – Court can vacate default under Rule 55 for good cause, and may set aside default judgment under Rule 60(b) for good cause. Adversary defendant who had transferred any and all interest in the underlying mortgage had valid excuse for not responding to adversary complaint seeking to set aside mortgage, and defendant did not assert any interest and assumed defendant had no reason to file an answer. Default was not result of culpable conduct of defendant and defendant had valid defense to action, and plaintiff could not demonstrate prejudice as plaintiff had no valid cause of action in the first instance.

Wheat v. Reiser, 2011 WL 2559551 (S.D. Ohio 2011) – Bankruptcy Court properly entered default and denied motion to set default aside. Party did not attend scheduled pre-trial conferences, did not participate in Rule 26 conference, and did not respond to discovery requests, and failed to attend trial. To set aside default, party must demonstrate that default was not the product of the defaulted party's culpable conduct.

Kohut v. Rigney, 2011 WL 2693662 (E.D. Mi. 2011) – Bankruptcy Court properly vacated default under Rule 60(b)(4). Court concluded that service of process was improper and failed to comply with due process. Default also properly vacated under Rule 60(b)(6) where case presents an "unusual and extreme circumstance where principles of equity mandate relief and undue hardship will result if relief is not granted." Trustee sought to seize Defendant's sole asset in which neither the Debtor nor the Trustee have a stake and as to which the Trustee lacked a viable legal theory.

PNC Mortgage v. Rhiel, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of "Officer, Managing or General Agent" without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.

Kohut v. Rigney, Case No. 07-6287 (Bankr. E.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1-3) must be brought within one year of entry of default judgment. Judgment will be void under Rule 60(b)(4) only when the service of process was improper. Service by mail is controlled by Rule 7004(b) which permits service by mail to the individual's dwelling house or usual place of abode. Service is not proper where mailed to an address that is not Defendant's dwelling house or usual place of abode even if the address is the only address known to Plaintiff. Improper service results in a lack of due process as defendant was not properly notified of pendency or action, warranting setting aside default judgment. Defendant's "last known address" is not the address for proper service under Rule 7004. Further, Plaintiff's action was legally insufficient to sustain a judgment compelling relief from judgment under Rule 60(b)(6). Divorce judgment in 1998 conveyed ex-husband's property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband's bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

Town & Country Co-op, Inc. v. Ward, 2010 WL 4286211 (Bankr. N.D. Ohio 2010) - Rule 7055 incorporates Rule 55 and Rule 60(b) as basis for setting aside a default. Section 60(b)(1) allows relief for mistake, inadvertence, surprise or excusable neglect. Court must consider (1) prejudice to plaintiff if default vacated; (2) whether a meritorious defense exists; (3) whether the defendant should be held accountable for failure to respond to the complaint; and (4) whether the default is the result of culpable conduct by the plaintiff. Defendant advised plaintiff of desire to retain counsel only 4 days after complaint was served; defendant contacted counsel and thought counsel was going to represent him only to later learn the attorney declined; defendant contacted another attorney who could not

undertake case because of a conflict; defendant filed motion for extension of time which contained detailed information on his attempts to obtain counsel and thought that motion had been granted based on a misunderstanding of a court order; and defendant did retain counsel who contacted Plaintiff's counsel before Plaintiff filed Motion for Default. Entry of default was not caused by any culpable conduct of Defendant and was the result of mistake or excusable neglect. Defendant filed Motion to Vacate Default only 4 days after entry, and there were at least 4 months remaining before the case was set for trial, resulting in no prejudice to plaintiff. Defendant's Motion demonstrated facially possible defenses based on lack of knowledge or intent and lack of and misrepresentations, raising clear issues of fact as to underlying causes of action.

J.L. Gisalsen, III, Trust v. Mehlhose, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.

In re Miller, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post - confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

Duetsche Bank National Trust Company v. Rogan, 2009 WL 3415462 (E.D. Ky. 2009) – Default Judgment must be vacated where record indicated that Defendant had never been served with the Complaint. Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor's Proof of Claim which listed "Bankruptcy Department" as agent for receipt of all notices regarding Bankruptcy Case constituted "appointment" for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

Q Technology, Inc. v. Allard, Case No. 08-14655 (E.D. Mi. 2009) – In deciding whether excusable neglect exists under Rule 60(b)(1), Court must consider the length of the delay, the reason for the delay, whether the movant acted in good faith, the potential impact of the delay on judicial proceedings, and the danger of prejudice to the other party. Excusable neglect sufficient to set aside default requires that default not result from Defendant's culpable conduct. Party will be culpable if is motivated by an intent to thwart judicial proceedings, or shows a reckless disregard for the effect of the movant's conduct on those proceedings. Defendant's conscious decision not to respond to complaint served by US Mail and decision to ignore that complaint because Defendant did not realize that service by mail was warranted and thought that personal service was required constitutes culpable conduct and therefore cannot constitute excusable neglect. Further, relief is not warranted under Rule 60(b)(6) where the factual basis is the same as Defendant's argument under Rule 60(b)(1). Rule 60(b)(6) requires extraordinary circumstances which must include that the defaulted party be faultless in the delay.

Miller v. Fint, 2009 WL 2913927 (Bankr. W.D. Ky. 2009) – Rule 7055(c) of the Federal Rules of Bankruptcy Procedure states that for good cause the court may set aside a judgment by default in accordance with Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) permits the court to relieve a party from final judgment in cases of mistake, inadvertence, surprise or excusable neglect. Defendant failed to demonstrate excusable neglect. The Summons and Complaint were sent to Defendant's mailing address as listed with the Court, which was Defendant's last known address and where he had been served with a copy of the Debtor's Petition. The Summons was not returned as incorrectly delivered. Defendant's claim that he did not receive notice of the adversary proceeding is not sufficient to overcome the presumption that it was received. Defendant admitted that during the course of the bankruptcy case, Defendant and his wife separated and he moved to a new address but never informed the Court of his new address. Defendant knew that he did not often receive all of his mail from his spouse but failed to diligently pursue whether he was receiving all of his mail. Whether Defendant has a meritorious defense is irrelevant where Defendant cannot meet the threshold standard of establishing excusable neglect.

Rogan v. Countrywide Home Loans, Inc., 2009 WL 2959665 (6th Cir. BAP 2009) – Bankruptcy Court improperly vacated default judgment. Pursuant to Federal Rule 60, a default judgment may be vacated only upon a showing of "extraordinary circumstances". Defendant failed to file an appearance in the action until 59 days after the answer to the complaint was due and 55 days after the default judgment had been entered. Defendant failed to file a motion to vacate the default judgment until 73 days after the response was due. Defendant's allegation that a change of statutory agent for service of process around the time the complaint was served may have resulted in delay in the complaint being properly routed did not demonstrate any exceptional circumstance to warrant relief under Rule 60(b)(6). Defendant, as moving party, bears burden of proof of facts to demonstrate unusual or extreme circumstances or how extreme or undue hardship would result from the failure to vacate the default judgment. Defendant's failure to timely respond to a properly served complaint, without more, does not constitute a basis to vacate a default judgment.

In re Alfes, Case No. 05-55084 (Bankr. E.D. Mi. 2009), *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Federal Rule of Civil Procedure 60, incorporated by Federal Rule of Bankruptcy Proceeding 9024, sets forth 6 grounds to grant relief from a Judgment or Order: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable

diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b)(6) applies only in exceptional or extraordinary circumstances not addressed by the other 5 enumerated grounds, and where principals of equity mandate relief and where extreme and undue hardship will result if the Order is not set aside. A meritorious defense, standing alone, does not constitute exceptional or extraordinary circumstances.

12.77 Final Judgment After Default

Bowers v. Banks, 2013 WL 1091634 (Bankr. E.D. Tn. 2013) – To obtain default judgment, Plaintiff must properly serve the defendant with process; plaintiff must seek entry of default by demonstrating that the opposing party has failed to answer or otherwise respond to the complaint; if the defendant has entered an appearance, then the defendant must be served with notice at least seven days before the hearing; the plaintiff must submit an affidavit stating that the defendant is not an infant or incompetent person; and, plaintiff must submit an affidavit stating whether the defendant is in military service, or if plaintiff is unable to determine whether the defendant is in military service, stating so. Affidavit must include more than a “bare assertion” based “upon information and belief,” and must set forth specific facts establishing the plaintiff’s efforts to determine whether the defendant is in military service. Conservator for incompetent defendant “appeared” by appearing at scheduling conferences and show cause hearings and filed statements in the adversary proceeding. Fact that Conservator was later determined not to be proper representative as Conservator was not attorney, and pleadings and papers filed by Conservator were stricken did not eliminate fact that Conservator did appear and received notice of the proceedings including the request for default judgment.

Q. Settlement

12.78 Approval by Court Required

In re Fodale, 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee has authority, subject to court approval, to settle claims available to debtor.

In re Ridley, 2012 WL 3154843 (Bankr. W.D. Ky. 2012) – Bankruptcy Rule 9019(a) authorizes a trustee to seek a compromise or settlement of claims available to the debtor, upon motion and after notice and a hearing.

Hindelang v. Mid-State Aftermarket Body Parts, Inc., 2012 WL 1233019 (6th Cir. 2012) – Trustee in bankruptcy has authority to settle claims that are available to debtor, but any settlement is subject to approval by Bankruptcy Court. Approval or denial is vested in “significant discretion” of Bankruptcy Court. However, Court must not “rubber stamp” settlement or just rely on trustee’s word that settlement is reasonable.

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Court has discretion to approve proposes settlement by virtue of Rule 9019(a) which directs that court may approve settlement or compromise on motion by the Trustee and after notice and hearing.

Ames v. Rubin, 2011 WL 1630139 (N.D. Ohio 2011) – Federal Rule of Bankruptcy Procedure 9019(a) governs procedure to obtain approval of settlement of adversary.

12.79 Approval by Court Not Required

12.80 Limits on Jurisdiction

Brown v. Brown, 2013 WL 2338233 (E.D. Ky. 2013) – Bankruptcy Court had jurisdiction to approve settlement of adversary proceeding brought by Debtor to invalidate post-nuptial agreement. Debtor commenced adversary while case was pending as Chapter 11. After case converted, Chapter 7 trustee proposed to resolve adversary with judgment that endorsed the Antenuptial agreement as valid and binding. Debtor contended that court lacked jurisdiction to approve settlement as court lacked jurisdiction to approve or disapprove of Antenuptial agreement. Court concluded that Bankruptcy Court had jurisdiction. 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.

In re Brown, 2012 WL 3670640 (E.D. Ky. 2012) – Court cannot approve portion of settlement agreement where action would exceed court’s jurisdiction. Court lacked authority to approve portion of settlement agreement that purported to declare debtor’s will “void ab initio”. Probate exception to federal court jurisdiction defined in *Marshall v. Marshall*, 547 US 293 (2006) prohibits federal court from entering orders relating to probate or annulment of will or administration of estate. Further, as the maker of the will was not yet dead, any finding concerning validity of will would be premature as issue was not yet ripe. However, portion of settlement agreement that would declare Antenuptial Agreement void is not within domestic support exception under *Marshall*, as issues do not involve divorce decree, award of maintenance or custody determination.

12.81 Standards for Approval

In re McInerney, 2013 WL 5674462 (Bankr. E.D. Mi. 2013) – Bankruptcy court must make independent judgment as to whether compromise is fair and equitable, and must weigh conflicting interests of relevant parties, considering factors including probability of success on merits, complexity and expense of litigation, and reasonable views of creditors. Court declined to approve settlement of claim potentially worth \$14 million for a payment of \$250,000.00. While the probability of success was debatable, as debtor had already lost at trial court and matter was on appeal, court determined that debtor had substantial basis for appeal and appeared likely to prevail; to the extent that debtor prevailed, the defendant was fully collectable; issues were not complex and were governed by well established law; and trial attorneys had case on contingency basis minimizing risk to creditors from costs of litigation. Recovery by debtor on cause of action would produce sufficient funds to pay all claims in full. However, settlement amount would produce, at best, a nominal dividend to unsecured creditors, such that creditors had little, if anything, to lose by rejection of the settlement. While settlements are generally favored, given strength of debtor’s claims, minimal if any harm to creditors by rejection of settlement, and substantial “upside” to creditors if debtor prevails, settlement was not fair and equitable.

Brown v. Brown, 2013 WL 2338233 (E.D. Ky. 2013) – Bankruptcy Court properly approved settlement of action between debtor and ex-spouse regarding validity of Antenuptial agreement which included court approval of validity of Antenuptial agreement. Court must consider litigation’s likelihood of success; difficulty in collecting on claims; litigation’s complexity and expense, inconvenience and delay; and creditors’ assessment of settlement. Debtor’s claim to invalidate Antenuptial did not appear to have substantial chance of success on merits where Antenuptial appeared to have been lawfully and validly negotiated and executed and that debtor had complete information and adequate representation at the negotiation and execution of agreement. Agreement was not substantively unconscionable just because agreement allowed debtor to retain substantial millions that he brought to marriage, while giving debtor relatively small amount. Fact that agreement did not equally divide assets did not make agreement manifestly unfair – it merely allowed each party to retain the property that party brought to the marriage and divided any property acquired during the marriage. As it appeared that debtor’s cause of action was essentially meritless, approval of settlement that ended litigation and eliminated ongoing costs and expenses was reasonable under circumstances.

In re Batt, 2013 WL 849219 (Bankr. W.D. Ky. 2013) – Courts are required to form educated estimate of complexity, expense and likely duration of litigation, as well as possible difficulties in collecting any judgment, and any other factors relevant to a full and fair assessment of wisdom of proposed settlement. Courts will consider: (a) the probability of success in the litigation, including value and likely outcome of claims to be settled; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Proposed settlement was reasonable where merits of claim presented close questions of fact; settlement would avoid lengthy, expensive and complex litigation; and would preserve assets of Chapter 7 while producing additional funds for distribution to creditors. Settlement would avoid likely substantial difficulties in collection and would avoid possibility that one or more defendants would, themselves file bankruptcy and thwart any collection efforts. Proposed settlement was above the lowest point in the range of reasonableness and would foster economic interests of creditors by increasing pool of assets available and shortening time for distribution of those assets. Settlement of Section 727 action is not objectionable merely because debtor is “buying a discharge” as that would prevent settlements in all Section 727 cases.

In re Fodale, 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee has authority, subject to court approval, to settle claims available to debtor. Court cannot act as rubber stamp and must affirmatively apprise itself of the underlying facts and make independent judgment as to whether compromise is fair and equitable. Court will consider (a) probability of success in litigation; (b) difficulties, if any, to be encountered in collection; (c) complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) paramount interest of creditors and proper deference to their reasonable views. Trustee’s proposed settlement reasonable where settlement produced \$60,000 for estate and (a) there were no viable causes of action on behalf of the estate against the creditor, his trust, or any entities he owns; (b) the money was actually lent by creditor to the Debtor, and creditor has properly perfected security interest of approximately \$7,500,000; and (c) broad scope of release was not impediment where there were no viable claims against the creditor.

In re Schwartz, 2012 WL 4965287 (Bankr. W.D. Ky. 2012) – Federal courts have developed four factors bankruptcy court should consider: (a) probability of success in litigation; (b) difficulties in collection; (c) complexity of litigation involved, and expense, inconvenience and delay necessarily attending it; (d) paramount interest of creditors and proper deference to their reasonable views. Court approved settlement of debtor’s claim against prior attorney for malpractice. While Trustee had strong claims against some defendants, other claims were more tenuous, leaning neither for nor against settlement. Similarly, trustee would likely have little difficulty collecting from some defendants but a great deal collecting from others, leaning neither for nor against settlement. Complexity of malpractice claims, and expense of continued litigation, discovery, trial, appellate costs and attorney fees were likely to be substantial and full trial and likely

appeal would result in substantial delay, particularly where underlying bankruptcy had been pending 8 years. Trustee indicated on behalf of creditors that settlement would favor creditors by allowing prompt distribution to creditors, and trustee's business judgment indicated that settlement was in best interests of estate and creditors. Where cause of action was property of estate, Trustee was not required to contact debtor to obtain consent to settlement.

Rabin v. Skoda, Minotti & Co., 2012 WL 3201932 (N.D. Ohio 2012) – In considering possible approval of settlement of adversary proceeding brought by Trustee, Court will consider: (1) the probability of success in litigation; (2) the complexity of the litigation involved, as well as the expense, inconvenience and delay necessarily attendant to the litigation; (3) the difficulties to be encountered in collecting or enforcing any judgments that might be rendered; and (4) the paramount interest of creditors with proper deference to their reasonable views. Terms of the compromise are fair and equitable and in the best interests of the bankruptcy estate where settlement would assure an opportunity of recovery to the estate for the distribution to creditors and avoid the cost and uncertainties of litigation.

In re Brown, 2012 WL 3670640 (E.D. Ky. 2012) – Under Bankruptcy Rule 9019(a), Bankruptcy court has affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court must weigh the conflicting interests of all relevant parties, considering the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Bankruptcy judge need not conduct mini-trial or write extensive opinion but must be apprised of the relevant facts and law so that he can make an informed and intelligent decision and set out the reasons for that decision. Among factors bankruptcy judge should consider are [I] the litigation's probability of success, [ii] the litigation's complexity, [iii] the litigation's attendant expense, inconvenience, and delay (including the possibility that disapproving the settlement will cause wasting of assets) and [iv] the creditors' objections to the settlement; however, the creditors' views are not controlling. Settlement approved where Trustee thoroughly evaluated benefits of the proposed Settlement Agreement and the weakness of the Estate's claims and was supported by overwhelming weight of the evidence. Trustee is a very experienced bankruptcy professional who has worked as a trustee for a large part of his career and has experience in determining whether claims of a bankruptcy estate should be resolved to benefit that estate, the valuation of claims and assets of an estate and benefits obtained by estates under such agreements. Evidence in this case clearly shows that the claims the Estate has against the Conservator Parties, which the Estate is compromising, have little value while the Estate is obtaining the right to liquidate approximately \$1,000,000 in assets and to distribute the proceeds to creditors. In addition, the Defendants' subordination agreement giving creditors, other than the Defendants, rights to the first \$100,000 in distributions is highly beneficial to the Estate and the other allowed creditors. Expense of continued litigation would be significant and clearly outweighs any benefit the Estate could realize from such litigation. Finally, no creditors objected to the proposed Settlement Agreement.

In re Ridley, 2012 WL 3154843 (Bankr. W.D. Ky. 2012) – Bankruptcy court should consider when determining if a compromise or settlement should be approved (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Settlement of actions for malpractice approved where litigation would be lengthy and expensive, as costs for pre-trial preparation, trial and appeals would likely be substantial and would substantially prolong proceedings before any recovery to creditors. Case had already been pending for 2 years. Settlement would provide creditors with immediate recovery without further delays and risks of litigation and collection. Business judgment of Trustee also supported settlement as supporting paramount interests of creditors in receiving recovery.

Hindelang v. Mid-State Aftermarket Body Parts, Inc., 2012 WL 1233019 (6th Cir. 2012) – Chapter 7 Trustee's Motion to Approve settlements in two federal court lawsuits granted. Court cannot merely "rubber stamp" proposed settlement or merely rely on Trustee's word that settlement is reasonable. Court must apprise itself of underlying facts and make independent judgment as to whether settlement is fair and equitable. Court must consider probabilities of ultimate success; and must form educated estimate of complexity, expense and likely duration of litigation as well as possible difficulties in collecting on any judgment; and should consider any other factors the Court deems relevant to a full and fair assessment of the wisdom of proposed settlement with view toward paramount interests of creditors. Objecting creditor did not present any evidence of collusion among parties. Debtor's non-bankruptcy counsel was experienced in trademark infringement litigation which was basis for both suits. Parties had sufficient time to conduct discovery in underlying litigation. Going to trial would have been time consuming, expensive and risky, and proposed settlement which would pay estate more than \$1 million was far preferable to possible zero dollar recovery. Major witness for the debtor was uncooperative and potentially hostile. Area of law was complex. Proposed settlement amount was far in excess of average jury verdicts in similar litigation and any litigation would likely be followed by appeals that would further delay administration of case and increase expenses. Further, only 2 creditors objected to the settlement, while the remaining creditors, including the largest creditors, were unanimous in support of the settlement.

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Bankruptcy Court has significant discretion in approve settlements. Court must make sure that the settlement is fair and equitable. Court must make independent judgment by review of all facts necessary for an intelligent and objective opinion of probabilities of ultimate success; and must form an educated opinion on the complexity, expense and likely duration of litigation, possible difficulties in collection on any judgment, and any other factor relevant to full and fair assessment of the wisdom of proposed compromise. Court approves settlement of litigation where prospects for success were exceedingly slim; debtors did not have sufficient funds to consummate transaction as required by contract; and any benefit to creditors would have been minimal as Trustee would have been required to immediately resell property at price that likely would not have produced net gain in excess of proposed settlement amount.

In re SCBA Liquidation, Inc., 2011 WL 2636854 (Bankr. W.D. Mi. 2011) – To evaluate the fairness and equity of the proposed settlement, the court must weigh four major factors: (1) the probability of success in the litigation; (2) the difficulties of collecting any

judgment; (3) the complexity of the litigation and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Court approved settlement of adversary where defendant paid estate \$5 million and withdrew claim in exchange for full release. After 65 days of trial, factual issues were substantial and there were significant questions of law regarding defendant's liability. Creditor's general opposition that the Trustee could not state with certainty the impact on the estate or the pro rata distribution to creditors would not preclude settlement, where these issues also depended on outcome of numerous other proceedings filed to liquidate claims. Alleged delay by the Chapter 7 Trustee in realizing difficulty in prevailing not basis to reject settlement that ultimately produced benefit (including withdrawn claims) of approximately \$9 million. Creditor's argument that in "hindsight" litigation was not warranted no basis to reject settlement that produced benefit to estate and creditors.

Ames v. Rubin, 2011 WL 1630139 (N.D. Ohio 2011) – Court must apprise itself of the underlying facts and make an independent judgment as to whether the compromise is fair and equitable. Court must weigh conflicting interests of all relevant parties, considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Settlement is fair and equitable and is in the best interests of the estate. Court would approve settlement where claims brought by Trustee were plausible but were not assured and Trustee faced risk that these claims could be dismissed on the pending motions to dismiss, on summary judgment, or that the claims may fail at trial leaving Trustee with no recovery for the estate while incurring great expense prosecuting the action. Director's and Officer's insurance policy had a declining balance, with over \$3 million having already been spent out of a \$10 million policy before even reaching discovery. Even if Trustee secured judgment there were substantial concerns about collectability given the financial state of the Defendants and the declining balance of the insurance policy. Trustee's determination that this settlement is in the best interest of the estate is entitled to great weight and no creditor objected to the settlement on the grounds that it is not in the estate's best interest.

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

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

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

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

12.82 Standing to Object

In re B & P Holdings, Inc., 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Standing requires that a party have a pecuniary interest in the outcome of the matter. Corporate shareholder does not have standing where assets of case will be insufficient to pay claims, leaving no surplus for distribution to shareholders. Trustee's adversary against shareholder for alter ego and veil piercing did not indicate any

likelihood of success. Resolution of the matter to be settled did not impact shareholder even though amount of recovery would reduce any liability of shareholder where there was minimal chance that shareholder would be liable and court could take into account settlement of other adversary in evaluating any possible liability of shareholder in alter ego action.

12.83 Burden of Proof

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Proponent of settlement agreement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable.

12.84 Setting Aside Settlement

Cuyahoga Valley Ry. Co. v. U.S. Bank Trust, NA, 2013 WL 611369 (6th Cir. 2013) – Settlement agreements are a type of contract, formation and enforceability of which are governed by state law. If agreement is clear and unambiguous, court is not required to hold evidentiary hearing to enforce agreement. Court must conduct evidentiary hearing where situation presents substantial factual issues related to formation or consummation of agreement. Lack of signatures alone does not render settlement agreement unenforceable. Court required to conduct evidentiary hearing to determine whether agreement was enforceable where not signed or whether there were other requirements or conditions before agreement would be enforceable.

12.85 Interpretation of Settlement Agreement

Cuyahoga Valley Ry. Co. v. U.S. Bank Trust, NA, 2013 WL 611369 (6th Cir. 2013) – Material factual disputes as to whether settlement agreement was enforceable without signature of all parties and whether one party would be bound by agreement prior to completion of satisfactory accounting required evidentiary hearing to determine whether agreement was enforceable. Affidavit filed by one party indicating that party had advised other signatories that party would not enter into any settlement agreement until accounting was complete raised material issues as to validity of agreement.

Lefkowitz v. Gainey, Case No. 10-8090 (6th Cir. BAP 2011) – Court must enforce settlement agreement as agreed to by the parties and is not permitted to alter terms of agreement. Settlement announced on record did not expressly address one specific issue. Court could examine record as whole and conclude that parties had certain specific intent. Court concluded that where settlement agreement did not mention impact on litigation involving third parties, settlement was not intended by parties to have preclusive effect.

12.86 Settlement Agreement – Injunctions Against Non-Debtor

Papas v. Buchwald Capital Advisors, LLC, 728 F.3d 567 (6th Cir. 2013) – In evaluating settlement that would enjoin prosecution of actions by non-debtors, court must determine whether outcome of actions that would be enjoined would affect the bankruptcy estate. Although enjoining of claims of non-parties is disfavored, Court does have authority under Section 105 to release a non-debtor from liability as a condition of a settlement. Bar order must be carefully tailored to ensure that only claims that are extinguished are those where the injury relates to the non-settling defendant's liability to the plaintiff, such as claims for indemnity or contribution. Bar order that included claims arising out of or reasonably flowing from facts and allegations in adversary proceeding may be excessively broad given potential to bar independent claims for damages. Case remanded to District Court for further consideration of bar order under guidance provided in opinion.

Apps v. Morrison, Case no. 12-15451 (11th Cir. 2013) – Bankruptcy Court did not abuse discretion in approving settlement that included Bar order prohibiting continued prosecution of cases in State Court by non-debtor. Principals of Debtor were subject to multiple suits in state court arising out of collapse of Debtor. Trustee brought action against principals to recover fraudulent transfers. Trustee determined that principals had \$1 million of available assets that could be used to satisfy fraudulent transfer claims, but that funds would be exhausted if principals were required to defend state court cases. Trustee and principals agreed to settlement that provided for payment to estate of \$800,000 coupled with bar against further litigation against Debtor and the non-debtor principals. State court actions were related to bankruptcy, and as such within court's jurisdiction, as outcome of state court litigation could have had effect on administration of bankruptcy by reducing funds available to estate by \$800,000 settlement amount. Settlement was consistent with paramount interest of creditors where, absent settlement, creditors would receive nothing, and principals were parting with 80% of their available assets. Although settlement would produce dividend of only 2% of unsecured creditors, that is better than creditors would have done without settlement.

R. Collateral Estoppel and Res Judicata

12.87 Elements Generally

Myers v. Peoples Bank of Ewing, 2013 WL 5310181 (E.D. Tn. 2013) – Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. Bankruptcy Court Order lifting stay to allow bank to proceed with litigation does not determine any issue in litigation but only determines whether creditor has colorable claim against estate.

Auto Owners Insurance Company v. Fitzgerald, 2013 WL 4853316 (Bankr. N.D. Ohio 2013) – State Probate Court judgment established that debtor, as personal representative of estate, had (1) a pre-existing fiduciary relationship, (2) debtor breached that relationship, and (3) the estate suffered a resulting loss. Under Ohio law, there are four elements to the application of the doctrine of collateral estoppel: (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. Debtor was party to state court proceeding that imposed surcharge based on debtor's self-dealing and failure to properly administer assets. Debtor actively participated in and defended action for surcharge by filing response to motion for surcharge and appeared at and participated in the hearing that resulted in judgment. Issue of breach and loss were actually litigated in and determined by state court.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Collateral estoppel requires (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. If State Court judgment is entitled to preclusive effect, issue preclusion also prevents later consideration of compulsory counterclaim that was not asserted. Purpose is to avoid multiple rounds of litigation that concern a single transaction or occurrence, and sweeps in all claims that are "logically related" to the claims adjudicated in the state court proceeding.

Green v. Baiardi, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – Collateral estoppel precludes relitigation of issues in a subsequent but different cause of action between same parties, where prior proceeding resulted in valid final judgment and issue was actually and necessarily litigated.

Key Bank v. Hartmann, 2013 WL 1312013 (E.D. Ky. 2013) – Collateral estoppel requires 5 elements: (1) at least one party to be bound in the second case must have been a party in the first case; (2) the issue in the second case must be the same as the issue in the first case; (3) the issue must have been actually litigated; (4) the issue was actually decided in that action; and (5) the decision on the issue in the prior action must have been necessary to the court's judgment and adverse to the party to be bound. Settlement of claims in agreement between debtor, Lender and committee was not considered "actually litigated" where it appeared that parties negotiated agreement without involvement of Court, and only court order was one approving the settlement agreement without contest. Underlying action presented no evidentiary hearing, no dispositive motions and no actual proof of any issue. Settlement was not collateral estoppel as to later action by Lender against principals of debtor based on personal guarantees.

Bean v. Farrar, 2103 WL 1317877 (E.D. Mi. 2013) – Under Arizona law, final judgment entered by Arizona Court collaterally estop further litigation where parties to the prior action are the same as the parties to the current action; and the pertinent issue was actually and necessarily decided in prior case. Defendant actively participated in case during 4 year pre-trial process, yet failed to appear for the trial and instead filed for bankruptcy. Arizona court entered default against defendant, took testimony on issues of damages, and issued final judgment finding that defendant had committed fraud and awarded damages.

Young v. Fannie Mae, 2013 WL 12842332 (N.D. Ohio 2013) – Res judicata precludes second action on a claim, or any part of a claim, that has previously been adjudicated, as well as any action that could have been raised in earlier action. Parties who do not assert counterclaims in initial action are precluded from bringing those claims as separate action after entry of final judgment in original case. Counterclaims for alleged wrongful foreclosure were logically related to foreclosure action itself and were res judicata as to any effort to raise same issues in separate action.

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Issue preclusion requires (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. Plaintiff's claim to standing to assert pre-petition causes of action not determined by prior Court Order that allowed Plaintiff to conduct post-judgment discovery. Order allowing discovery is not final judgment on the merits as required. Order also did not involve same issues as presented by Defendants' Motion to dismiss based on Plaintiff's alleged lack of standing, as Order was limited to parameters of what could be discoverable in a context that is much broader than what would be allowed in evidence in fact-finding proceeding.

Kentucky Automotive Center of Grayson, LLC v. Nissan North America Inc., 2013 WL 663574 (E.D. Ky. 2013) – Claim is barred by res judicata if (1) there is a final decision on merits by court of competent jurisdiction; (2) subsequent action involves same parties or their 'privies'; (3) issue in subsequent action was litigated or should have been litigated in prior action; and (4) an identity of causes of action. Plaintiff's action alleging violation of Kentucky Motor Vehicle Sales Act barred by res judicata where claims related to franchisee's bankruptcy and were initially brought by plaintiff in that bankruptcy action. Complaint alleged that debtor's bankruptcy court appointed CLO wrongfully passed over plaintiff's bid to award franchise to different bidder during bankruptcy auction. Bankruptcy court was court of competent jurisdiction to consider validity of sale, and bankruptcy court order confirming sale constituted "final decision on merits" of propriety of sale.

Lucas County Department of Job & Family Services v. Perrin, 2013 WL 509130 (Bankr. N.D. Ohio 2013) – Court would afford preclusive effect to administrative order determining that debtor received food assistance by falsely representing that debtor and spouse did not live

together. Debtor had full and fair opportunity to litigate issues at agency level and issues were actually litigated. Agency issued final order resolving issues that were core of non-dischargeability action, finding that debtor falsely represented that he was not living with his spouse, that the debtor knew the statement was false, that he made the statement with intent that the State rely on the statement in considering food assistance, and that the state relied on the statement as a condition of eligibility for aid.

Gurjal v. Kalinowski, Adv. No. 11-6030 (Bankr. E.D. Mi. 2012) – Actual fraud does not require misleading omissions or misrepresentations, and encompasses any intentional scheme to deprive or cheat another of property or a legal right. Plaintiff must prove course of conduct intended to deceive, justifiable reliance, and proximate cause. Plaintiff sued debtor in state court to pierce corporate veil, alleging that debtor as sole member of corporation commingled finances, failed to maintain corporate records, and otherwise used corporate entity as extension of personal financial accounts, had complete identity of interests with corporation to permit piercing of corporate veil to make debtor's personal assets available to corporate creditors. State court judgment did not establish fraud as corporate veil can be pierced either for fraud or where honoring the corporate structure would subvert justice. Absent express finding by state court of fraud, state court order did not necessarily determine the issue of fraud as required for collateral estoppel.

Dean v. Hunter, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Under Virginia law, party asserting collateral estoppel must satisfy five requirements: (1) the parties to the two proceedings must be the same or in privity; (2) the prior proceeding must have resulted in a valid and final judgment against the party against whom preclusion is sought or his privity; (3) the factual issue to be precluded must have been actually litigated in the prior proceeding; (4) the factual issue to be precluded must have been essential to the judgment in the prior proceeding; and (5) there must be mutuality – that is, a party is generally prevented from invoking the preclusive force of a judgment unless that party would have been bound had the prior litigation of the issue reached the opposite result. Issue must be identical to issue previously litigated. State court judgment collaterally estopped debtor in action under Section 523(a)(4). Plaintiff sued for embezzlement and larceny. Although state court judgment was not clear on which theory judgment was based, allegations and evidence presented supported both theories of liability. Although judgment did not state that debtor acted fraudulently or intentionally, State court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.

Dantone v. Dantone, 477 B.R. 28 (6th Cir BAP 2012) – Plaintiff's state court judgment not entitled to preclusive effect in action under Section 523(a)(4). State court complaint contained claims for breach of fiduciary duty, common law conversion, statutory conversion and negligence, in connection with artifacts for shipwreck that plaintiff delivered to debtor for display in store. Judgment that does not specify which of alternative causes of action on which judgment is based can nonetheless have preclusive effect where record of state court proceedings leads to only one conclusion regarding basis for judgment. Amount of judgment left no doubt that judgment included treble damages for statutory conversion.

Morris v. Brown, 2012 WL 2989236 (6th Cir. 2012) – Collateral estoppel requires that the issues in the first case be identical as those in the case where estoppel is to be applied and that action involve same parties or their privities. Action by property owner against three people who allegedly trespassed on Plaintiff's property was not same as action brought by two defendants against debtor for contribution. Action also did not raise same issues. Plaintiff's action against defendants alleged only that defendants trespassed on plaintiff's land. Defendants' action against debtor for intentional and willful injury did not establish any injury or damage to property of co-defendants or that debtor acted in such a way as to either intend to cause injury to co-defendants or that debtor's actions were substantially certain to cause harm to co-defendants. Absent identity of issues, judgment in state court action would not be collateral estoppel on issues of dischargeability of debts. Even if state court judgment could have been collateral estoppel, state court findings only established that debtor entered plaintiff's land with intent to convert timber, but did not establish that actions were willful and malicious. Mere intent to convert plaintiff's timber did not amount to willful and malicious injury to property of co-defendants.

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect. Under Michigan law, collateral estoppel applies where there is identity of parties to proceedings; there is valid final judgment in first proceeding; same issue was actually litigated; and party against whom doctrine is asserted had full and fair opportunity to litigate in the prior proceeding.

Hussein v. Shugarman, 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Collateral estoppel promotes judicial economy by preventing the same parties or their privies from re-litigating facts and issues in a subsequent suit that were fully litigated in a prior suit. Collateral estoppel principles apply to bankruptcy proceedings and can be used in nondischargeability actions to prevent the re-litigation of issues already decided in another forum such as a state court. Pursuant to the full faith and credit principles of 28 U.S.C. § 1738, Bankruptcy Court must give the same issue preclusion effect to a state court judgment as it would be given under that state's law. Party asserting collateral estoppel must prove four elements: (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. Arbitration decision confirmed by the state court having jurisdiction over the matter is entitled to preclusive effect. Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award included specific findings of fact that Defendant intentionally used false and forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs.

In re Rathore, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final

judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff's complaint in the first action constitutes an adjudication on the merits. Plaintiff's action to recover allegedly fraudulent transfers from debtors and their transferees was barred by res judicata. Plaintiff had previously brought action in Michigan State Court. State court dismissed action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court's order was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.

Savage v. Murphy, 2012 WL 2006310 (Bankr. W.D. Ky. 2012) – Under Kentucky law, default judgment is given preclusive effect and will be given that effect in action to except debt from discharge. Defendant was arrested, indicted and pled guilty to assault. Plaintiff then filed action in state court and received default judgment for actual and punitive damages. Judgment held non-dischargeable. "Assault is almost the very definition of willful and malicious injury. ... There is no doubt that the defendant committed assault upon the Plaintiff, having plead guilty to that crime." Final default judgment established all elements of assault and was entitled to preclusive effect.

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.

Tweedie v. Hermoyian, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect. Under Michigan law, collateral estoppel applies where there is identity of parties to proceedings; there is valid final judgment in first proceeding; same issue was actually litigated; and party against whom doctrine is asserted had full and fair opportunity to litigate in the prior proceeding.

Clearview Designs, Inc. v. Angelilli, 2012 WL 76033 (Bankr. N.D. Ohio 2012) – Collateral estoppel, or issue preclusion, precludes re-litigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action. Collateral estoppel will apply where (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) The issue must have been identical to the issue involved in the prior suit. State Court Judgment in favor of Plaintiff for violation of State Trade Secrets Act constitutes judgment between same parties for purposes of Collateral Estoppel. State Court judgment found that Debtor caused injury and intended to cause injury or that injury was substantially likely to occur when Debtor misappropriated trade secrets. Judgment further determined that Debtor had no legal right to misappropriate the trade secrets constituting malicious actions. Issues in Section 523(a)(6) action were determined in State Court Judgment. Collateral estoppel required summary judgment in favor of Plaintiff determining debt to be non-dischargeable.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Collateral estoppel requires that the issue in the subsequent litigation be identical to that resolved in the earlier litigation; the issue was actually litigated and decided in the prior action; the resolution of the issue was necessary and essential to the judgment on the merits in the prior litigation; the party to be stopped was a party to the prior litigation or was in privity with a party; and the party to be estopped had a full and fair opportunity to litigate the issue. Decision denying action to deny debtor alleged discharge under Section 727 based on debtor's fraudulent transfer of assets on eve of bankruptcy filing found as matter of fact that alleged transfers were not made with fraudulent intent so as to bar discharge. Trustee collaterally estopped in subsequent fraudulent transfer action based on alleged actual fraud in connection with same transfer.

In re Damron, 457 BR 662 (Bankr. S.D. Ohio 2011) – Administrative Hearing determining that debtor fraudulently obtained workers compensation benefits was preclusive in action under Section 523(a)(2). Administrative hearings will be given preclusive effect if (1) the administrative body acted in a judicial capacity; (2) there is an identity of parties and issues; (3) the administrative body resolved factual disputes that were clearly relevant to the issues properly before it; and (4) the parties have had a full and fair opportunity to litigate and seek review of any adverse findings.

Murtha v. Spencer, 2011 WL 4101092 (Bankr. W.D. Mi. 2011) – Under Michigan law, collateral estoppel applies when: (1) there is identity of parties across the proceedings; (2) there was a valid, final judgment in the first proceeding; (2) the same issue was actually litigated and necessarily determined in the first proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Judgment of divorce is valid and binding final judgment that determined whether obligations were in the nature of support or property settlement which was the very issue pending before this court.

Simon v. JPMorgan Chase Bank, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) - In the Sixth Circuit, a claim is barred by the res judicata effect of prior litigation if each of these four elements are established: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Order granting creditor relief

from stay is not res judicata on issue of validity of underlying lien of avoidability of lien under Sections 544 and 547. Order on stay relief motion is limited in scope and does not impact same legal or factual issues as are present in action under Section 544 and 547. Procedural differences – stay relief is contested matter done by motion versus preference litigation which requires adversary proceeding – preclude holding that stay lift is res judicata or collateral estoppel on adversary proceeding. Issues in stay lift are far more limited and based on different facts than preference litigation, defeating any allegation of “identity” of causes of action.

Jones v. Leedey, 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – Collateral estoppel bars re-litigation by the same parties of legal or factual issues actually raised and determined in an earlier proceeding whereby the court’s decision is conclusive against the parties in subsequent proceedings. Party asserting estoppels must prove (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. State court judgment that contained specific finding that debtor removed and converted money from Plaintiff without proper authority or justification, the amount of \$131,489.99 was sufficient to support collateral estoppel’s judgment in adversary under Section 523(a)(4).

Bell v. Sims, Case No. 11-4802 (Bankr. E.D. Mi. 2011) – Collateral estoppel requires that issue be actually litigated and determination must be essential to the underlying judgment. Basis for underlying judgment must be clear, definite and unequivocal. Judgment would not be preclusive where State Court complaint alleged causes of action for breach of contract, promissory estoppel, unjust enrichment and fraud, and judgment did not specify on which of the causes of action the judgment was based.

King’s Welding & Fabricating, Inc. v. King, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff’d* 2012 WL 3732514 (N.D. Ohio 2012) – Issue preclusion, also known as collateral estoppel, requires entry of final judgment determining the fact or matter sought to be precluded. Orders granting or denying partial summary judgment do not have preclusive effect because they are not final, appealable judgments on the merits.

Old Republic National Title Insurance Co. v. Licavoli, Case No. 084065 (Bankr. E.D. Mi. 2011) – Federal Court will give state administrative agency fact findings same preclusive effect as would applicable state courts. In Michigan., administrative determinations are adjudicative in nature and collateral estoppel applies when the parties are the same or substantially identical; the administrative proceeding resulted in a valid final judgment; and the issue in question was actually litigated.

In re Mullins, 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding.

Clark v. Springhart, 450 BR 725 (Bankr. S.D. Ohio 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, the second action is based upon a different claim and the judgment in the first action precludes re-litigation of only those issues actually and necessarily litigated and determined in the first suit. Under South Carolina law, default judgment does not have preclusive effect as issues were not actually litigated; and would not have res judicata effect because bankruptcy proceeding was one to determine dischargeability which could not have been determined by State Court.

In re Henney, 2011 WL 1642853 (W.D. Mi. 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. Michigan law requires (1) a question of fact essential to the judgment must have been actually litigated and determined in a valid, final judgment; (2) the same parties must have had a full (and fair) opportunity to litigate the issue; and (3) “there must be mutuality of estoppel. State court judgment not preclusive on issue of debtor’s intoxication at time of accident where debtor was not a party to that action.

Bowling v. Jones, 2011 WL 204280 (Bankr. E.D. Tn. 2011) – Collateral estoppel, or issue preclusion, is an “extension” of the doctrine of *res judicata*, and its purposes are to relieve the parties of multiple lawsuits, conserve judicial resources, and promote finality by preventing inconsistent decisions. Federal courts must give state court judgments “the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. State Court final judgment that evidenced all elements of non- dischargeability of debt would be collateral estoppel in action under Section 523.

POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc., Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Full Faith and Credit Act, 28 USC Section 1738, requires federal court to give preclusive effect to state court judgment when the court of the state in which the judgment was entered would do so. *Res judicata* bars claims actually litigated plus all claims that arise from the same transaction and that could have been raised but were not. Order dismissing case with prejudice constitutes a judgment for purposes of *res judicata*; state court proceeding involved same parties; and arose out of same management agreement and alleged breaches that were the subject of the state court action. Where third party in second case asserts *res judicata* as a defense, *res judicata* can still apply even though third party was neither party in the prior suit nor in privity with one who was a party. Action against third party for conspiracy, based on the same events as formed the basis of the prior state court action, was precluded by *res judicata*.

Thomas v. City of Detroit, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *aff'd*, 2011 WL 3706669 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor's alleged claims against City were res judicata and could not assert recoupment as defense to City's Proof of Claim.

Educational Credit Management Corporation v. Alfes, Case No. 10-5557 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Res judicata requires final decision on the merits by a court of competent jurisdiction; subsequent action between same parties or their privies; issue in the subsequent action either was or should have been litigated; and identity of causes of action. Default judgment entered in adversary to determine dischargeability of student loan was not res judicata in later action against separate student lender. Default against one defendant has no res judicata effect as to second defendant in same action. Order in favor of second defendant dismissing Plaintiff's action as matter of law is res judicata in later action between plaintiff and second defendant for alleged violations by second defendant of discharge injunction where second defendant instituted collection proceedings on student loan debt post-discharge.

Hudson & Muma, Inc. v. Muma, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – Bankruptcy Court required to afford state court judgment preclusive effect to the same extent a court in the state in which the judgment was rendered would give the judgment preclusive effect. Under Michigan law, state court judgment is entitled to preclusive effect if the state court proceedings culminated in a valid final judgment and the issue was (1) actually litigated and (2) necessarily determined. State court judgment finding that debtor did not commit fraud was not preclusive on issue where state court used "clear and convincing evidence" standard but standard under Section 523 is "preponderance of evidence". Judgment for misappropriation of trade secrets did not require finding of either willfulness or malice as required for non-dischargeability under Section 523(a)(6), so final judgment was not preclusive on that issue. Res Judicata bars a second action when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first action. Under Michigan law, res judicata is broadly interpreted to preclude litigation of every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. Res judicata did not preclude action to recover allegedly converted checks where Debtor had already been convicted and ordered to pay restitution. Action at state court that arose out of Debtor's relationship with former employer for other breaches of duty would not have included claims that were already subject to criminal court order of restitution for purposes of res judicata.

In re McDowell, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue.

Daniels v. Miller, 2010 WL 3724780 (Bankr. E.D. Ky. 2010) – Default judgment must contain express findings of fact and conclusions of law to be given preclusive effect in subsequent litigation between the parties. The court being asked to give preclusive effect to a default judgment in a subsequent litigation must have some reliable way of knowing that the decision was made on the merits. The best evidence would be findings of fact and conclusions of law by the court entering the default judgment. State Court default judgment predicated on allegations of fraud would not have preclusive effect where State Court Judgment did not contain any findings of fact and stated only that the Debtor, "having filed no answer and made no objections in writing or in person, ... [the Court] finds that the Defendant committed fraud upon the Plaintiff" left the Bankruptcy Court with no way to determine whether the judgment of fraud was made on the merits of the case.

Phillips v. Weissert, Case No. 09-8032 (6th Cir. BAP 2010) - Where state court determines factual question using the same standards as the bankruptcy court would use, collateral estoppel should be applied to promote judicial economy. Default Judgment would be given preclusive effect where default determined only liability, and damages were subsequently actually litigated at which Debtor appeared and had a full and fair opportunity to litigate that issue. However, default judgment that determined only liability and damages, but did not consider whether conduct was "willful and malicious" as defined in the Bankruptcy Code would not constitute collateral estoppel on issue of non-dischargeability.

Fairdale Area Community Ministries, Inc. v. Hollingsworth, 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – Collateral estoppel may be used in the bankruptcy context to preclude parties from re-litigating issues previously litigated in a state court forum. Collateral estoppel may be applied in dischargeability proceedings, such as this adversary proceeding. To invoke collateral estoppel, a party must (1) show the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, (2) show it was actually litigated, and (3) show that its determination was necessary to the outcome in state court. State Court Judgment for conversion constituted collateral estoppel on issues pertaining to dischargeability under Section 526(a)(6) where state court found not only that Hollingsworth converted Ministries property, but that he also intended to interfere with Ministries' possession. Issue of conversion was central finding in state court litigation; matter was actually litigated where Debtor participated in discovery and had opportunity to respond to Motion for Summary Judgment but chose not to do so, allowing Judgment to be entered unopposed; and issue of conversion was necessary to outcome in state court, where State Court needed to find that Debtor converted Plaintiff's property with intent to deprive Plaintiff of rightful possession.

Willis v. Chase Home Finance, LLC., 2010 WL 3430712 (N.D. Ohio 2010) – In the case of a completed foreclosure action, plaintiff seeks to litigate matters which were raised or which should have been raised in the state court foreclosure and eviction proceedings, a federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. Under Ohio law, an existing final judgment or decree is conclusive as to all claims which were or might have been litigated in the first lawsuit. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action he files, or forever be barred from asserting it. Plaintiff's federal court action alleging loan fraud, illegal foreclosure and breach of loan modification agreement were issues that were or could have been raised in state court foreclosure proceeding and so were barred from further review by *res judicata*.

In re Perkins, Case No. 09-32328 (Bankr. E.D. MI. 2010) - State Court Default Judgment in case where defendant did not appear was not "actually litigated" and is not entitled to preclusive effect.

Kelly v. Aho, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Full Faith and Credit Act applies in dischargeability proceedings. Court must determine whether a state court judgment would receive preclusive effect in the state where it was rendered. If so, Bankruptcy Court must give judgment preclusive effect unless an exception to the Full Faith and Credit Act applies. Preclusive effect depends on whether the question of fact raised in the later case was actually litigated in the prior case where both parties had full and fair opportunities to litigate the issue. A claim is "actually litigated" when put into issue in the pleadings, submitted to the trier of fact, and determined; and where the determination is essential to the prior judgment and can be clearly ascertained. Parties are precluded unless party against whom judgment to be imposed could not, as a matter of law, have appealed the judgment in the initial action; or the issue is one of law and the second action either presents claims that are unrelated to those in the prior action or there has been a change in controlling law; or new determination is warranted by differences in quality of procedures or extensiveness of jurisdiction; or party against whom preclusion is sought had a higher burden of proof in the first action than would be present in the new action or the burden of proof has been shifted to the party seeking to impose estoppel; or there is some other clear and convincing need to a new determination of the issue.

Livingston v. Transnation Title Insurance Co., 2010 WL 1404530 (6th Cir. 2010) – Principles of collateral estoppel apply in non-dischargeability actions. Michigan Supreme Court has held that collateral estoppel precludes re-litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally. The inability of a court to determine the basis for the prior judgment precludes defense of collateral estoppel. A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are governed by the appellate decision. Thus if the trial court rests its judgment on two grounds, each of which is independently adequate to support it, the judgment is conclusive as to both; but if the appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine. The issue must be identical to that determined in the prior action to have been actually litigated. Court will look beyond the pleadings to consider both the "factual focus" of the prior proceedings and whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue. For an issue to have been "necessarily determined," it must have been essential to the judgment. Fraud for purposes of non-dischargeability action is defined by federal bankruptcy law and by state common law in state court, requiring Bankruptcy Court to determine whether the state law counts adjudicated by the state trial court and the Michigan Court of Appeals require identical elements to an action under 11 U.S.C. Section 523(a)(2)(A). Under 11 U.S.C. Section 523(a)(2)(A), a creditor must prove: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false misrepresentation; and (4) its reliance was the proximate cause of the loss. Intent requires actual or positive fraud, not merely fraud implied by law, meaning that the debtor must have acted maliciously and in bad faith. Under Michigan law, actionable fraud requires: (1) That defendant made a material representation; (2) that it was false; (3) that when the defendant made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff thereby suffered injury. Under Michigan law, fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. Accordingly, the elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargeability under 11 U.S.C. §523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors' knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors' unpersuasive arguments that they were uninformed or mistaken regarding their financial obligations; Debtor-wife's purposeful ignorance of the terms of the documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. State court rulings and factual findings support finding of "bad faith" and "actual or positive fraud".

Guerra & Moore, Ltd. v. Cantu, 2010 WL 3059175 (5th Cir. 2010) – Parties may invoke collateral estoppel in certain circumstances to bar re-litigation of issues relevant to dischargeability and collateral estoppel can provide an alternate basis to satisfy the elements of Section 523(a)(6). Effect of judgment rendered by a Texas state court, determined by Texas rules of issue preclusion. Under Texas law, collateral estoppel bars re-litigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. Judgment finding Debtor has tortuously interfered with a contract was not collateral estoppel on issue of dischargeability under Section 523(a)(6) where Texas law did not require proof of intent to injure as element of tortious interference claim. Where underlying state claim does not have as one of its elements one of the requirements for a finding of non-dischargeability, state court judgment is not collateral estoppel on dischargeability to the extent of the issues not covered by the state court judgment.

State of Michigan v. Turner, Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Collateral Estoppel and res judicata require a pre-Bankruptcy finding by a Court or State or Federal Administrative Agency in a proceeding in which the party to be bound has had notice and an opportunity to appear. An internal determination by the Michigan Unemployment Agency that debtor improperly received benefits, where Agency did not conduct hearing and debtor was not provided notice or an opportunity to appear is not entitled to preclusive effect on that issue. Fact that debtor was given opportunity to contest or litigate factual determination only after the Agency had made its initial determination did not constitute an opportunity to contest or litigate the factual determinations prior the determination being issued.

Hogan v. George, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – In order to determine if collateral estoppel applies, the Court must look to the law of the state which rendered the judgment to see if the courts of that state would give the judgment preclusive effect. Colorado courts apply the doctrine of collateral estoppel if (1) the issue precluded is identical to the issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted was a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Collateral estoppel may be employed in cases involving dischargeability questions if the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, if it was actually litigated, and if its determination was necessary to the outcome in state court.

Heynen v. Webb, Case No. 09-3182 (Bankr. E.D. Tn. 2010) – Plaintiff in adversary under Section 523(a)(2) and 523(a)(6) not entitled to preclusive effect of State Court Order that found Debtor liable but did not liquidate damages. Collateral estoppel requires (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. A final judgment that resolves all of the parties' claims and leaves the court with nothing to adjudicate is required for a finding of collateral estoppel. An interim order that adjudicates liability but does not resolve damages to which the Plaintiff was entitled remained to be decided is not and cannot support collateral estoppel.

Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc., - 422 BR 93 (6th Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Action is barred by res judicata where (1) there has been a final decision on the merits in the first action; (2) the second action involves the same parties, or their privies; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) there is an identity of the cause of action. Confirmation Order is “final judgment” for purposes of res judicata. All creditors constitute parties to the first action for purposes of res judicata effect of confirmation order. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior to confirmation.

McDonald v. Redstone Federal Credit Union, Case No. 09-12652 (11th Cir. 2010) – elements of res judicata in Alabama are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. Res judicata prohibits party from re-litigating the same cause of action against the same defendant or a different claim not previously litigated but which arises out of the same evidence.

Double v. Cole, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Collateral estoppel, also known as issue preclusion, precludes re-litigation of a matter actually litigated and decided in another forum. Bankruptcy Court will give state court judgment the same preclusive effect that the judgment would have under the law of the State where the judgment was rendered. Under Ohio law, collateral estoppel requires: (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. Agreements executed solely between private parties, even if accomplished within the framework of litigation, do not qualify as nor have the force of a judgment for purposes of collateral estoppel unless the agreement is incorporated into a final judgment. Dismissal of the prior suit after execution of a settlement agreement is fatal to collateral estoppel as the issue has never been actually litigated before the prior court. Thus, settlement agreement executed between plaintiff and debtor, following which case was voluntarily dismissed by plaintiff, would not support finding of collateral estoppel as to dischargeability of debt.

Nehasil v. Grenier, Case No. 09-14011 (E.D. Mi. 2010) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Collateral estoppel bars re-litigation of issues previously decided in when the issues were raised in a different cause of action between same parties. Ultimate issues underlying first action must also be involved in the second action, and parties must have had full opportunity to litigate issues in prior case. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

Sullivan v. Smith, Case No. 10-4335 (Bankr. E.D. Mi. 2010) – Collateral estoppel can be applied by bankruptcy court to avoid re-litigating any grounds for non-dischargeability which were litigated in a prior proceeding. If a state court judgment would receive

preclusive effect in the state where it was rendered, bankruptcy court must give that judgment preclusive effect. State court judgment rendered by default is entitled to same preclusive effect. However, Michigan courts do not give collateral estoppel to consent judgments. Court concluded that post judgment forbearance agreement which merely stated that judgment indebtedness “is not dischargeable and bankruptcy” did not have preclusive effect where forbearance agreement did not contain specific factual statements identifying the false representations and related facts which would be required for a determination under section 523(a)(2).

Murawski v. Campbell, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Res judicata refers to the preclusive effect of a judgment and prevents re-litigation of the very same claim. Collateral estoppel refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or different claim. Claim under Section 523(a)(2) is not precluded by res judicata where state court never entered judgment due to automatic stay. Res judicata does not control dischargeability action as Section 523 claims are solely within the jurisdiction of the Federal Court and the issues addressed in the state court could not be identical with those of Section 523 as those issues did not exist at the time of the state court litigation because debtor had not yet filed for bankruptcy.

Tomlin v. Crownover, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – Full Faith and Credit Clause of the United States Constitution requires that judicial proceedings of any state had the same effect in every chord within the United States that they had in the originating court. Federal court must give state court judgment the same effect it would have under state law for purposes of res judicata and collateral estoppel. Res judicata deals with the effect of an earlier judgment on a claim asserted by a party in later litigation. Collateral estoppel deals with factual findings necessary to prove a claim. Plaintiff an action under section 523(a)(2) and (a)(6) can rely on state court judgment to establish claim that debtor violated Tennessee Consumer Protection Act. However, Tennessee judgment is not res judicata on issue of whether debt is accepted from discharge as federal courts have exclusive jurisdiction to determine discharge ability of claims. Collateral estoppel principles do apply to non-dischargeability proceedings. When the state court has determined factual issues using standards identical to those in dischargeability proceedings, collateral estoppel bars re-litigation of those issues in bankruptcy court.

Sher v. Dunbar, 2010 WL 4038741 (Bankr. W.D. Mi. 2010) – Final but unconfirmed arbitration award entitled to preclusive effect under doctrine of collateral estoppel. Effectiveness of arbitrator’s decision does not depend upon confirmation by a state court. Collateral estoppel would apply where both parties had a full and fair opportunity to litigate the issues and it would be unfair to provide either party with a “second bite at the apple”. We litigating the same issues in the context of a non-discharge ability action would be inconsistent with federal policy in favor of arbitration and would be wasteful of judicial resources. Collateral estoppel may be invoked where (one) the issue precluded is the same one involved in the prior proceeding; (two) the issue was actually litigated in the prior proceeding; (three) determination of the issue was a critical and necessary part of the decision in the prior proceeding; and (four) the prior forum provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. Record demonstrated that issue of fraud was actually litigated and that conclusion that party did not commit fraud with necessary part of arbitrator’s decision.

Winget v. JP Morgan Chase Bank, 537 F.3d 565 (6th Cir. 2008) – Action is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

Sanderson Farms, Inc. v. Gasbarro, 2008 WL 4764118 (6th Cir. 2008) - State Court judgment is entitled to preclusive effect in a non-dischargeability action if the law of the state would give collateral estoppel effect to the judgment. To assert collateral estoppel under Ohio law, a party must plead and prove the following: (1) the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; (2) there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; (3) the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and (4) the issue in the present action is identical to the issue involved in the previous action.

ABS Industries, Inc. v. Fifth Third Bank, 2009 WL 1811915 (6th Cir. 2009) – “[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Claim preclusion consists of four elements: (1) prior final, valid decision on the merits by a Court of competent jurisdiction; (2) a second action involving the same parties or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. Privity merely requires a mutuality of interest, including identity of desired result; and identification of interest of one person with another as to represent the same legal right. Principle-agency relationship is sufficient to establish privity.

Collins & Aikman Corp. v. Valeo, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Order confirming plan of reorganization constitutes a final judgment for res judicata purposes. Res judicata does not apply to claims asserted prior to entry of the Order Confirming Plan. Therefore, res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors’ Plan of Reorganization.

Huntington National Bank v. Moore, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – State Court judgment entitled to same preclusive effect that the order would have in State Court proceeding. “Issue preclusion” prevents re-litigation of issue that was actually and necessarily litigated and determined by Court of competent jurisdiction.

Computer Business World v. Jamil, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Factual findings of State Court decision that is on appeal are entitled to collateral estoppel effect, subject only to possible reversal of the decision. Bankruptcy Court must give preclusive effect to State Court Order to same extent that Order would receive in the State where the judgment was rendered. Collateral estoppel precludes the re-litigation of an issue in a subsequent, different action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was actually litigated and necessarily determined.

Winget v. JP Morgan Chase Bank, 537 F.3d 565 (6th Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

RDM Holdings, Ltd. v. Continental Plastics Company, Case No. 278912 (Mich. Ct. App. 2008) – Court must apply federal law in determining whether doctrine of res judicata requires dismissal of case where judgment on which res judicata would be based was entered by federal Court. Accordingly, where issue turns on impact of intervening bankruptcy case, federal claim preclusion law will apply in determining the preclusive effect of any actions in the bankruptcy Court.

12.88 Same Parties

Citizens Insurance Company v. King, 2013 WL 5770275 (Bankr. E.D. Mi. 2013) – Prior adjudication has preclusive effect only where prior litigation involved same parties and produced a mutuality of estoppel. Debtor's guilty plea and criminal conviction for felonious assault with a deadly weapon carries no preclusive effect in subsequent litigation brought by insurer to declare debt non-dischargeable, as insurer was not party to criminal proceeding and would not have been bound by adjudication had debtor been adjudicated not guilty. While guilty plea may be relevant in dischargeability litigation, plea does not prevent debtor from contesting that elements of Section 523(a)(6) are met.

In re Stepp, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Debtor is not estopped from asserting exemption in tax refund merely because state court divorce judgment declared refund to be marital property and ordered refund to be distributed. Debtor's failure to assert a right of exemption in funds in state court did not preclude debtor from claiming exemption in bankruptcy. Divorce action was between debtor and spouse. Spouse was not party to Trustee's objection to exemption and trustee was not in privity with spouse. Further, the issue of exemption was neither litigated nor necessary to be litigated in divorce action.

Porter v. Chase Home Finance, LLC, Case No. 10-80587 (Bankr. W.D. Mi. 2013) – Trustee had full right to litigate validity of mortgage and to enter into settlement that dismissed action with prejudice, and then abandoned real estate back to debtor. Debtor obtained interest in real estate from the trustee and is in privity with trustee in connection with real estate for purposes of res judicata. Dismissal with prejudice bound debtor as privity with trustee and debtor's later action against mortgage company was barred.

Green v. Baiardi, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – State Court receiver was "same party" where prior judgment was in action between debtor and ex-husband, and receiver had been appointed only after entry of final judgment where debtor refused to cooperate in sale of property as ordered. Order that was basis for action under Section 523(a)(6) was state court order awarding receiver fees and costs to which debtor and receiver were actual parties.

12.89 Claims Actually and Necessarily Litigated

Tyler v. DH Capital Management, Inc., 2013 WL 5716131 (6th Cir. 2013) – Plaintiff's voluntary dismissal without prejudice is not adjudication on merits for res judicata purposes.

In re Stepp, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Debtor is not estopped from asserting exemption in tax refund merely because state court divorce judgment declared refund to be marital property and ordered refund to be distributed. Debtor's failure to assert a right of exemption in funds in state court did not preclude debtor from claiming exemption in bankruptcy. Divorce action was between debtor and spouse. Spouse was not party to Trustee's objection to exemption and trustee was not in privity with spouse. Further, the issue of exemption was neither litigated nor necessary to be litigated in divorce action.

Forristall v. McCaulley, 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Claims are not actually and necessarily litigated where matters were not essential to underlying state court judgment. State Court judgment based on unfair and deceptive practices statute did not require proof of, and court did not make any finding regarding, justifiable reliance by creditor on debtor's representations. State statute also did not require, and State Court did not make any findings whether, debtor's statement were both knowing and intentional. Further, state court judgment did not establish willful and malicious actions by debtor where state statute did not require finding of malice or intent to cause harm. Although State Court judgment posited possible alternative bases for entry of judgment that would have included findings of intent and reliance, those were not in fact the grounds on which the Court based its judgment and, therefore, were not essential to judgment as required to have preclusive effect.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Final Judgment in state court foreclosure proceeding was

not res judicata or collateral estoppel as to amount of lender's fees and costs, where the judgment did not indicate that court had actually considered amounts of those fees. Judgment awarded amount but did not indicate any consideration of itemized charges or make any finding of reasonableness. Further, judgment stated that it did not allow "one or more specific items" that were precluded by State Law, and it appeared that proof of claim may have included additional charges that were incurred after entry of State court judgment. However, 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 be compulsory counterclaims logically connected to main action to foreclose 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.

Green v. Baiardi, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – Action regarding dischargeability of debt owed to receiver was not actually and necessarily litigated in state court proceeding. State Court proceeding addressed only amount of fees and expenses that receiver was entitled to receive. There was no allegation in state court proceeding that debtor had acted in any willful or malicious manner toward receiver and state court made no such finding in awarding receiver fees and costs.

Yust v. Henkel, 2013 WL 1785415 (Bankr. S.D. Ohio 2013) – Collateral estoppel precludes re-litigation of claims raised and claims that could have been raised based on same operative facts as those that underlie the State Court Judgment. State court judgment against debtor for fraud and breach of contract precluded counterclaims of breach of contract in connection with creditor's later action to except debt from discharge. Bankruptcy complaint involved same parties and same nucleus of facts and debtor could have raised counterclaims in state court action.

12.90 Valid Final Judgment – Generally

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – State Court summary judgment in foreclosure action is valid final judgment for purposes of res judicata and collateral estoppel.

Green v. Baiardi, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – State Court order awarding Receiver fees in post-judgment proceedings constituted final judgment for purposes of collateral estoppel at least as to amount of fees owed to receiver.

12.91 Valid Final Judgment - Involuntary Dismissal of Complaint

In re Rathore, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff's complaint in the first action constitutes an adjudication on the merits. State court action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court's order was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.

12.92 Dismissal With Prejudice

In re Gandy, 2013 WL 3216130 (Bankr. E.D. Tn. 2013) – Dismissal with prejudice of adversary proceeding is final judgment for purposes of res judicata. Losing party could not later file another adversary complaint seeking same relief against same parties.

Porter v. Chase Home Finance, LLC, Case No. 10-80587 (Bankr. W.D. Mi. 2013) – Federal court order dismissing lawsuit with prejudice operates as final disposition of all claims that were or could have been raised in litigation. Chapter 7 trustee commenced litigation against mortgage company challenging validity of mortgage. Action was resolved with dismissal with prejudice, and trustee abandoned real estate to Debtor. Debtor then filed action against mortgage company contesting validity of mortgages on same basis as was alleged by Trustee. Trustee had full right to litigate validity of mortgage and to enter into settlement that dismissed action with prejudice. Debtor obtained interest in real estate from the trustee and is in privity with trustee in connection with real estate for purposes of res judicata.

12.93 Valid Final Judgment - "True Default Judgment"

Yust v. Henkel, 2013 WL 1785415 (Bankr. S.D. Ohio 2013) – Under Ohio law, default judgment that has not been vacated, reversed or set aside on appeal is valid final judgment entitled to preclusive effect.

Comerica Bank v. Kory, 2013 WL 1340215 (Bankr. E.D. Mi. 2013) – State Court "stipulated default judgment" entered after defendant filed answer and affirmative defenses, participated in discovery and asserted position that defendant did not sign the underlying documents was true default judgment entitled to collateral estoppel effect as to validity of defendant's signature on loan documents. Defendant and Plaintiff entered into "stipulated default judgment" in which defendant withdrew all pleadings and allowed default judgment to be entered. Collateral estoppel precluded defendant from asserting in later nondischargeability proceeding that defendant had not signed the loan documents in question. Although Michigan probably affords collateral estoppel effect to default where defendant does not appear or defend, in this case defendant also substantially participated in litigation before default judgment was entered which warrants collateral estoppel effect.

Dean v. Hunter, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Under Virginia law, fact that judgment is by default does not preclude finding that issue was actually litigated where defendant failed to appear but testimonial and documentary evidence was presented *ex parte*.

McCallum v. Pixley, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a “true default judgment”, defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. “True default” meets “actually litigated” requirement for estoppel under Michigan law.

12.94 Valid Final Judgment - Separation Agreement and Dissolution of Marriage

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Voluntary marital separation agreement that distributes property is not entitled to preclusive effect even if later incorporated into final judgment. Even if property is distributed by court rather than through voluntary settlement, goals of state court to achieve equitable distribution are different than bankruptcy code goal of reasonable equivalence. Reasonable equivalence turns on value surrendered versus value received, while equitable distribution looks to factors such as duration of marriage, desirability to award family home to spouse that will care for children, liquidity, and other factors designed to achieve fairness in distribution.

Suhar v. Bruno, Case no. 11-8081 (6th Cir. BAP 2012) – Separation Agreement and attendant Order dissolving marriage is not entitled to preclusive effect and court can look behind statement in Order that division of property is fair, just and equitable in considering possible constructive-fraudulent transfer. Unlike contested divorce proceedings in which the parties actually litigate, decree granting agreed dissolution entered upon submission of settlement agreement that is parties’ resolution reached without any assistance from court is not an issue that has actually been litigated. Further, decree does not demonstrate identity of parties as dissolution judgment is between debtor and ex-spouse, while fraudulent transfer action is brought by Trustee on behalf of all creditors. Standards for fairness in dissolution of marriage action is not the same as issue of reasonably equivalent value in fraudulent transfer case, such that court could enter dissolution judgment that meets state statutory standards but not meet “reasonable equivalence” standard.

12.95 Valid Final Judgment - Default Judgment – Failure to Defend

Forristall v. McCauley, 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Under Texas law, “post-answer” default judgment is entitled to preclusive effect. Defendant filed an answer in state court litigation but did not appear at the trial. Trial court took evidence and entered judgment, which is sufficient for collateral estoppel purposes.

Bean v. Farrar, 2103 WL 1317877 (E.D. Mi. 2013) – Under Arizona law, final judgment entered by Arizona Court collaterally estop further litigation where parties to the prior action are the same as the parties to the current action; and the pertinent issue was actually and necessarily decided in prior case. Defendant actively participated in case during 4 year pre-trial process, yet failed to appear for the trial and instead filed for bankruptcy. Arizona court entered default against defendant, took testimony on issues of damages, and issued final judgment finding that defendant had committed fraud and awarded damages.

Dantone v. Dantone, 477 B.R. 28 (6th Cir BAP 2012) – State court judgment is entitled to preclusive effect only to extent state courts in state where judgment was issued would give judgment preclusive effect. In dicta, court stated that Michigan courts do not give preclusive effect to default judgments. However, court refused to rule based on this issue where debtor did not raise issue in lower court or in the briefs at the appellate court.

McCuride v. Strozewski, 458 BR 397 (Bankr. W.D. Mi. 2011) – Bankruptcy court will afford judgment same preclusive effect as it would have had in state court in which judgment was entered. Michigan law precludes re-litigation of valid final judgment where issue was actually litigated and necessarily determined. Case was “actually litigated” where defendant appeared, filed pleadings, attended mediation, and participated in discovery. Judgment was ultimately entered when defendant failed to appear for a status conference. Defendant’s actions in participating up to the eve of trial is sufficient participation to have issues actually determined.

12.96 Particular Claims Barred

In re Gandy, 2013 WL 3216130 (Bankr. E.D. Tn. 2013) – Court would not extend time to object to dischargeability where issues regarding dischargeability had already been determined in final judgment entered earlier in case. Any later attempt by plaintiff to contest dischargeability would be res judicata. Case commenced as Chapter 13. Movant filed adversary to declare debts non-dischargeable. That action was concluded by entry of final judgment in favor of debtor which dismissed all counts with prejudice. After case was converted to Chapter 7, creditor sought extension of time to re-file same adversary proceeding. Later action is barred by res judicata. Fact that case was converted from one chapter to another after entry of initial judgment does not vitiate prior judgment or eliminate effect of that judgment. Prior judgment was final decision by court of competent jurisdiction; subsequent action was between same parties; issue in subsequent litigation was or should have been litigated in prior action; and there was identity of causes of action.

Her, Inc. v. Barlow, 2012 WL 1165503 (Bankr. S.D. Ohio 2012) – Statutory damage award for violation of Federal Anticybersquatting Consumer Protection Act constitutes award for willful and malicious injury and is non-dischargeable under Section 523(a)(6). District Court Judgment found Debtor registered and used the internet domain names of debtor’s direct competitor to diverted to debtor’s web site traffic intended for Debtor’s competitor. Debtor acted intentionally with a bad faith intent to profit, and willfully and deliberately violated

the ACPA. Debtor exhibited bad faith intent to profit by registering and using the domain names associated with competitor. Debtor's use of the domain names could harm the goodwill of Plaintiffs' marks and was designed to achieve some commercial gain. Debtor admitted that he registered five of the six domain names hoping internet users would "Google" the personal names of the Plaintiffs and discover that Plaintiffs were "not smart enough" to register their own names, which ultimately would embarrass Plaintiffs among their peers and customers. Debtor conceded that he found it "funny" that Plaintiffs were "not smart enough ... to register their own names." Debtor acted intentionally, knowingly registering and using direct competitor's names in web sites. Debtor acted willfully as he either willed and desired harm or believed that injury was substantially certain to occur. Actions were clearly malicious – Debtor's actions were innocently registering what Debtor imagined to be a proper domain name but later determined that his choice caused confusion among consumers, nor did Debtor defendant not know and understand the potential harm the domain registration could cause to their rightful owners.

Barracco v. JP Morgan Chase Bank, N.A., 2011 WL 3329755 (E.D. Mi. 2011), *aff'd* 2012 WL 3198531 (6th Cir. 2012) – Judicially confirmed arbitration award was collateral estoppel in separate action between same parties. Although arbitration award was unclear as to whether award included plaintiff's claims against defendant, State Court entered Order Confirming Arbitration award that stated that the award disposed of all claims between the parties, including the defendant. Confirmed Arbitration award, which did not award any damages against defendant, displaced earlier entered default judgment as Order confirming incorporated Arbitration Award in its entirety.

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable.

Peebles v. Hayes, 2012 WL 2682788 (Bankr. M.D. Tn. 2012) – Debtor caused willful and malicious injury to neighboring property owner where Debtor intentionally built home higher than required, graded lot so as to drain toward neighbor, and turned all of the downspouts toward Plaintiff's property, causing water to literally cascade onto Plaintiff's property when it rained. Debtor's actions, at a minimum, caused a nuisance that resulted in damages to Plaintiff. State court's judgment that "more likely than not" the actions were intentional and done with intent to cause harm to plaintiff was sufficient to apply collateral estoppel in adversary action.

In re Rathore, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff's complaint in the first action constitutes an adjudication on the merits. Plaintiff's action to recover allegedly fraudulent transfers from debtors and their transferees was barred by res judicata. Plaintiff had previously brought action in Michigan State Court. State court dismissed action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court's order was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.

Tweedie v. Hermoyian, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable.

McCuride v. Strozewski, 458 BR 397 (Bankr. W.D. Mi. 2011) – Determination as to whether debt results from willful and malicious injury and whether debt should be excepted from discharge lies solely in bankruptcy court. However, court will apply collateral estoppel where there is prior final judgment that incorporates findings of fact and determine whether, based on the facts that were actually and necessarily determined in the other tribunal, matter rises to level of willful and malicious. State court judgment for intentional infliction of emotional

distress established that debtor either intended to cause harm or was so reckless that reasonable person would now harm would result, and that actions were extreme and outrageous demonstrated that actions were willful and malicious.

Busenhart v. Repass, 2011 WL 6013089 (Bankr. E.D. Ky. 2011) – State Court Judgment holding that actions of debtor, although potentially libelous, did not cause any damage to Plaintiff collaterally estopped Plaintiff from recovering under Section 523(a)(6). Once the issue of damages had been fully and fairly litigated in state court action, bankruptcy court would give preclusive effect to state court judgment.

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

Barracco v. JPMorgan Chase Bank, N.A., 2011 WL 3329755 (E.D. Mi. 2011), *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. State Court arbitration award entitled to same preclusive effect as would be given by State Court in which arbitration occurred. Ultimate issue in arbitration was amount, if any, of deficiency balance owed after foreclosure. Arbitrator's decision that debtor was not further indebted to creditor was preclusive on issue and required disallowance of creditor's claim.

Livingston v. Transnation Title Insurance Co., 2010 WL 1404530 (6th Cir. 2010) – Elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargeability under 11 U.S.C. § 523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors' knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors' unpersuasive arguments that they were uninformed or mistaken regarding their financial obligations; Debtor-wife's purposeful ignorance of the terms of the documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. State court rulings and factual findings support finding of "bad faith" and "actual or positive fraud".

Hogan v. George, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – State Court litigation established that Defendant's failure to list known defects in written Disclosure Form connection with sale of real property gave false information to the claimant in the course of a transaction in which the defendant had a financial interest or use of the claimant in a business transaction; that defendant was negligent in communicating the information; defendant gave information with the intent or knowing that the claimant would act or decide not to act in reliance on the information; claimant relied on the information supplied by the defendant; and reliance on the information supplied by the defendant caused damage to the claimant; supported final judgment under Section 523(a)(2)(A) as fraudulent representations and as actual fraud based on collateral estoppel.

McDonald v. Redstone Federal Credit Union, Case No. 09-12652 (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.

Maxus Capital Group, LLC. v. Uhrich, Case No. 09-8047 (6th Cir. BAP 2010) – Confirmation Order that that is not appealed is binding on all parties. Collateral attack by party who did not take direct appeal of Confirmation Order is prohibited by laches, finality and binding provisions of confirmed plan. Confirmation of plan has effect of a judgment and res judicata bars re-litigation of any issue that was or could have been raised in confirmation proceedings. Party who was aware of alleged fraudulent statements leading up to confirmation of plan who failed to raise those issues during confirmation and failed to take direct appeal precluded from collateral attack to revoke confirmation.

MacDonald v. Gunther, Case No. 08-8108 (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.

ABS Industries, Inc. v. Fifth Third Bank, 2009 WL 1811915 (6th Cir. 2009) – Where plaintiff previously sued lead Bank in loan syndication and that case was dismissed with prejudice, plaintiff's subsequent action against participant banks was barred by *res judicata*. Plaintiff alleged in prior lawsuit that lead bank was not agent for participant banks and was now prohibited from "about-face attempt to retract its allegations of agency".

Baker v. Wentland, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Debtor who plead guilty to criminal fraud and ordered to pay

criminal restitution collaterally estopped from denying liability or contesting damages in action to deny discharge under Section 523(a)(4). Full amount of criminal award deemed non-dischargeable.

Computer Business World v. Jamil, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Arbitrator's decision in action that alleged fraud in the inducement against Debtor constitute determination of all issues necessary to finding of non-dischargeability under Section 523(a)(2)(A). Fact that decision may have been on appeal does not prevent decision from being given preclusive effect until and unless reversed on appeal.

Lewis v. McClatchey, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Action against Chapter 7 Trustee for allegedly fraudulent conduct in sale of property of estate barred by *res judicata* where Plaintiff's claims had already been rejected in multiple other actions.

RDM Holdings, Ltd. v. Continental Plastics Company, Case No. 278912 (Mich. Ct. App. 2008) - Chapter 7 trustee's final report and final account and entry of order by bankruptcy Court closing estate constitutes final order of bankruptcy Court which can support finding of *res judicata*. Creditor could not assert fraudulent transfer claim against recipient of transfers from Debtor prepetition where those actions were not pursued in a bankruptcy proceeding, either by the trustee or by the creditor. Fraudulent transfer actions could have been brought in a bankruptcy Court.

Lewis v. Countrywide Home Loans, 2009 WL 2777005 (E.D. Mi. 2009) - Debtors confirmed Chapter 13 plan provided for the surrender of Debtor's residence to the mortgage company. Debtor is prohibited by *res judicata* from post-confirmation, instituting legal proceedings against mortgage company for alleged violation of Truth in Lending Act. *Res judicata* bars the re-litigation of any issue decided or which could have been decided at confirmation. Plaintiff could have asserted TILA claims prior to confirmation of their Chapter 13 plan. Plaintiff's attempt to re-litigate the issue is barred.

12.97 Particular Claims Not Barred

Wilmer v. Yeager, 2013 WL 5863059 (Bankr. S.D. Ohio 2013) - Section 523(a)(6) requires finding that injury was both willful and malicious. State court judgment against debtor for battery against creditor not entitled to preclusive effect where judgment did not demonstrate that injuries were willful and malicious. Similarly, state court judgment would not be given preclusive effect against willful and malicious merely because state court declined to award punitive damages. However, state court judgment was preclusive as to whether debtor committed battery and amount of damages suffered by creditor as a result. State court judgment was not clear as to whether debtor's action were intended to cause injury, or whether debtor intended the act that led to injury.

Collision Shop of America, Inc. v. Maurer, 2013 WL 1316718 (Bankr. E.D. Mi. 2013) - Action to determine dischargeability of debt based on fraud is not collaterally estopped or subject to *res judicata* based on state court judgment for breach of contract. Fact that creditor did not include fraud count in complaint at state court is not preclusive as to whether debt is non-dischargeable, as creditor at state court level would not have had reason to seek relief that would produce non-dischargeability judgment where bankruptcy was not yet filed.

McDermott v. Swanson, Case No. 12-6028 (8th Cir. BAP 2012) - State court finding that Debtor did not keep records of business activities did not bar debtor from denying that he has insufficient records in action to deny discharge under Section 727(a)(3). Minnesota statute on which judgment was based did not require finding that defendant failed to keep records, and there was no indication that state court relied on that fact in rendering decision in state court action. Further, state court judgment against debtor and two others, jointly and severally, for funds allegedly wrongfully received did not collaterally estop debtor from denying receipt of funds, as state court judgment did not indicate whether debtor ever received any funds or amounts, versus how much may have been received by other defendants. Issues decided in prior litigation were not identical to those presented in Section 727 action for purposes of collateral estoppel.

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) - Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business. Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4). Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malicious were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.

Tweedie v. Hermoyan, 466 BR 348 (Bankr. E.D. Mi. 2012) - Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business. Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4). Arbitration award not collateral

estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malicious were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.

McCallum v. Pixley, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a "true default judgment", defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were "actually determined" as part of default judgment. Legal standards for judgment in Michigan for Fraud meets requirements of legal standards under Section 523(a)(2)(A). However, factual allegations in State Court Complaint, even if assumed to be true, failed to support action under Section 523(a)(2) where complaint never alleged any reasonable reliance by Plaintiff on any representation by Debtor. Allegations of complaint established that even minimal investigation would have uncovered alleged fraudulent statements, making any reliance, although actual, not reasonable as required for action under Section 523(a)(2). State Court complaint for conversion could meet requirements of "willful and malicious" under Section 523(a)(6) if conversion under Michigan is based on willful and intentional deprivation of another of property. However, allegations of complaint failed to demonstrate willful and malicious where complaint alleged only that debtor converted property, as Michigan also allows action for conversion for unwittingly converting property or for use of property in improper ways or improper purpose, even where use did not actually deprive another of possession. Judgment for conversion, that did not expressly find willful and malicious conversion as opposed to "unwitting" conversion, did not establish all elements of willful and malicious injury.

In re McDowell, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue. Factual findings in State Court judgment did not conclusively demonstrate that Debtor's actions were evidence of fraud as required for non-dischargeability for embezzlement or that Debtor wrongfully obtained possession of Plaintiff's property as required for non-dischargeability for larceny. Parties entered into contractual arrangement and Debtor's actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property.

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

Walker v. Sallie Mae Servicing Corp., Case No. 09-6022 (8th Cir. BAP 2010) – Although Discharge Order generally is res judicata on all issues that are or could have been considered at time of entry, Discharge Order will not prevent later consideration of dischargeability of student loan on basis of undue hardship. Student loans are only "self executing" exception to discharge where Debtor bears the burden of proving entitlement to a discharge. Debtor permitted to bring action for to determine dischargeability of student loans for hardship more than 4 years after entry of Discharge Order.

Sanderson Farms, Inc. v. Gasbarro, 2008 WL 4764118 (6th Cir. 2008) - State Court action to pierce corporate veil did not conclusively establish that defendant's actions were willful and malicious. Ohio law permits piercing corporate veil where the defendant exercised control over the corporation but does not require that control be gained or exercised with malice or fraud.

Collins & Aikman Corp. v. Valeo, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Res judicata does not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding. Therefore, res judicata not applicable to fraudulent transfer actions pending at time of confirmation of Debtor's Plan that specifically preserved "Causes of Action arising or permitted under chapter 5 of the Bankruptcy Code or applicable state law, including preferences under § 547 of the Bankruptcy Code and fraudulent transfers." Res judicata cannot apply to claims asserted prior to entry of the Order Confirming Plan. Therefore, res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors' Plan of Reorganization.

Collins & Aikman Corp. v. Valeo, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Debtor's prior assertion in first day motion that cash management system that pooled money from various subsidiaries into one account and paid expenses for various subsidiaries out of that account would result in significant benefit to Debtor not clearly inconsistent with action to recover specific individual transfers to specific defendants out of that account.

Huntington National Bank v. Moore, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Divorce judgment which was not clear as to whether Debtor had misrepresented assets to Creditor and lack of necessity to determine alleged misrepresentations to Creditor as part of divorce proceeding (although Court did need to address Debtor's alleged financial misconduct in order to divide marital assets) did not preclude litigation of that issue in action to determine dischargeability pursuant to section 523.

RDM Holdings, Ltd. v. Continental Plastics Company, Case No. 278912 (Mich. Ct. App. 2008) – Creditor not prohibited from bringing action to pierce the corporate veil of the Debtor's parent corporation. There is no legal basis for a subsidiary to attempt to pierce the corporate veil of its own parent. Accordingly, cause of action could not have been maintained by the Chapter 7 trustee and, therefore,

survives the bankruptcy proceeding. Further, claims of “successor liability” against company which took over operations after Debtors Chapter 7 filing were not actions which could have been brought in a bankruptcy case. Those actions would constitute non-core proceedings as the actions would lie solely between creditors and the alleged successor corporation.

S. Stare Decisis

12.98 Binding Effect of District Court Decisions

In re Silverman, 2010 WL 3169415 (9th Cir., 2010) – District Court decisions do not bind Bankruptcy Courts in other districts. BAP decisions are persuasive but are not binding on any Bankruptcy or District Court.

12.99 Binding Effect of Federal Court Decisions on State Court

First Place Bank v. Casino Concepts by Design, Inc., 2013 WL 3351572 (Mi. App. 2013) – State Courts are bound by decisions of United States Supreme Court on matters of federal law, but are not bound by decisions of any other federal courts. Michigan Court of Appeals not bound by Sixth Circuit precedent merely because Michigan lies within scope of Sixth Circuit.

T. Claim Preclusion

12.100 Defined

Amedisys, Inc. v. Hosch, 2012 WL 3740685 (6th Cir. 2012) – Claim preclusion is the effect of a judgment in foreclosing litigation of a matter that has never been litigated, but should have been litigated in earlier proceeding. Claim preclusion requires (1) final decision on merits in earlier action; (2) subsequent action between same parties or privies; (3) issue in later action that should have been litigated in earlier action; and (4) identity of causes of action. Prior suit involved dispute over ownership of funds allegedly pledged by borrower. Second suit also involved dispute over title to funds and involved same parties, all claims raised in second suit could have been raised in first suit, and new claims were merely different legal theories on which claims could have been based in first case.

U. Judicial Estoppel

12.101 Elements

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. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Judicial estoppel applies where party to be estopped has asserted legal position that is inconsistent with prior position; court accepted the prior position; and the party did not act inadvertently. Debtor had full knowledge of cause of action as debtor brought suit but did not disclose cause of action to bankruptcy court, constituting the assertion of an inconsistent position. Inadvertence requires that the debtor either did not know of the inconsistent position or lacked motive to conceal. Debtor knew of personal injury claim and knew that claim had not been previously disclosed, and debtor had motive to conceal in order to keep claim from creditors. Debtor judicially estopped from pursuing undisclosed cause of action. However, Chapter 13 Trustee not estopped as Trustee did not have notice of the cause of action or make any assertions in bankruptcy court that would be inconsistent with assertion of post-petition cause of action and can pursue cause of action for total value of recovery, even if total recovery exceeds amounts due to creditors. In that event, any surplus proceeds would be returned to debtor.

Myers v. Peoples Bank of Ewing, 2013 WL 5310181 (E.D. Tn. 2013) – 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. Debtor not estopped from disputing validity of debt merely because debtor listed debt in bankruptcy schedules without indicating that the debt was disputed. There was no evidence that scheduling was done with any intent to mislead bankruptcy court by scheduling debt as undisputed.

Thompson v. Bruister & Associates, Inc., 2013 WL 4507734 (M.D. Tn. 2013) – Doctrine of judicial estoppel preserves integrity of courts by preventing a party from abusing the judicial process through cynical gamesmanship. Doctrine will bar employment related claims not disclosed in bankruptcy proceedings where (1) the debtor assumed a position contrary to one she asserted under oath while in bankruptcy; (2) bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) the debtor's omission did not result from mistake or inadvertence. Judicial estoppel recognizes the importance of debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests. Even if doctrine results in benefit to defendant, judicial estoppel nonetheless applies to protect the importance of full and honest disclosure on bankruptcy process. Party asserting judicial estoppel is not required to prove that omissions were in bad faith – debtor must prove a lack of bad faith by pointing out evidence where debtor attempted to correct initial non-disclosure and to demonstrate that omission was result of inadvertence or mistake. Evidence indicated that debtors never informed bankruptcy trustee or court of pending action, establishing a lack of good faith in the non-disclosure. Plaintiffs made no effort to substitute trustee as party in interest even though motion for summary judgment based on judicial estoppel had been pending for 10 months.

Epps v. United States, 2013 WL 4096001 (W.D. Tn. 2013) – Judicial estoppel prevents party from asserting in Bankruptcy Court that

debtor has no causes of action and then, after obtaining relief from Bankruptcy Court, attempting to change positions by asserting a cause of action. Debtor's cause of action is judicially estopped where Debtor did not list in bankruptcy schedules a cause of action where debtor knew of action at time bankruptcy case commenced yet did not disclose that in schedules or otherwise prior to entry of Order confirming Chapter 13 Plan. Court presumed that debtor had a motive to conceal where debtor did not present any contrary evidence, and debtor did not present any evidence that failure to disclose was result of mistake or otherwise lacked bad faith.

Buzulencia v. Ohio Bell Telephone Co., 2013 WL 4049679 (N.D. Ohio 2013) – Judicial estoppel requires court to consider whether debtor's non-disclosure is result of mistake or inadvertence, based on whether: (a) debtor lacked knowledge of the factual basis of the undisclosed claims; (b) debtor had a motive for concealment; and (c) the evidence indicates an absence of bad faith. Debtor did not fail to disclose cause of action where, at time of commencement of bankruptcy, debtor had not filed a lawsuit or sought assistance of counsel, and had only a union grievance pending, where grievance sought only reinstatement of debtor's employment. Once debtor actually filed litigation, debtor promptly reopened bankruptcy case and disclosed action and the Trustee was fully advised of the matter, indicating that debtor lacked any intent to conceal. 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 where, even allowing exemption as claimed, action could produce recovery sufficient to generate proceeds for creditors.

Quin v. County of Kauai, Case No. 10-16000 (9th Cir. 2013) – Judicial estoppel does not preclude prosecution of action where failure to disclose action is result of mistake or inadvertence. Debtor indicated that failure to disclose cause of action for husband's loss of employment was because debtor did not understand that she could have had cause of action. When creditor raised issue at trial court, debtor promptly sought to reopen bankruptcy case and to list the lawsuit as an asset. Debtor's attorney acknowledged that failure to disclose was result of misunderstanding. Five months after debtor amended the schedules the Chapter 7 trustee abandoned the cause of action and re-closed the Chapter 7 estate. Although re-opening of case does not necessarily cure failure to disclose in first instance, where evidence indicates that failure to disclose was result of mistake, prompt correction of that mistake will preclude application of judicial estoppel.

Hayden v. GR Spring & Stamping, Inc., 2013 WL 2382831 (Bankr. E.D. Ky. 2013) – Judicial estoppel requires: (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) the omission did not result from mistake or inadvertence. In determining whether omission resulted from mistake or inadvertence, court considers whether: (1) debtor lacked knowledge of factual basis of the undisclosed claims; (2) debtor had a motive for concealment; and (3) an absence of bad faith including debtor's attempts to advise the bankruptcy court of omitted claim. Debtor failed to disclose possible EEOC claim in bankruptcy schedules although debtor was fully aware of facts supporting claim. Debtor did not take any steps to correct omission and discharge was entered. Five months after entry of the discharge, Debtor commenced litigation. Litigation was barred by judicial estoppel where debtor had knowledge of claim but failed to disclose it. Debtor had motive to conceal, as doing so would allow debtor to retain asset while discharging debt. Debtor failed to evidence good faith where debtor never at any point attempted to correct non-disclosure or to advise court or trustee of omission. Debtor's first effort to disclose did not occur until after defendant filed motion to dismiss, which did not support finding of good faith.

Taylor v. Praxair, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] 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 omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith.

Cook v. St. John Health, 2013 WL 2338376 (E.D. Mi. 2013) – Judicial estoppel requires a clear inconsistency between the later and earlier positions; that the court was persuaded to accept the earlier position such that acceptance of the later position would create perception that court was misled; and that prior inconsistent statements not be the result of mistake or inadvertence. Non-disclosure is inadvertent where debtor lacks knowledge of factual basis for claims and where debtor lacked motive to conceal. Debtor failed to list pending employment discrimination claim in petition, statement of financial affairs, or schedule B. After confirmation of plan, plaintiff filed suit but did not amend schedules to disclose claim, although debtor did amend schedules on three separate occasions for other reasons. Debtor had motive to conceal as it is always in debtor's interests to minimize assets. Debtor made no attempt to amend to disclose until more than 4 months after defendant filed motion for summary judgment based on judicial estoppel. Bankruptcy court confirmed plan based on prior representation that not such claims existed. Plaintiff's action dismissed based on judicial estoppel.

Lubber, Inc. v. Optari, LLC, 2013 WL 1245679 (M.D. Tn. 2013) – Judicial estoppel is equitable doctrine that prevents party for assuming a certain position in judicial proceeds and prevailing, and then attempting to assert a contrary position. Judicial estoppel in bankruptcy context requires that: debtor assumed a position that was contrary to the one that was earlier asserted under oath in the bankruptcy proceedings; bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and debtor's omission did not result from mistake or inadvertence. Whether conduct resulted from mistake or inadvertence depends on whether debtor lacked knowledge of the factual basis of the undisclosed claims; whether debtor had a motive for concealment; and whether the evidence indicates an absence of bad faith. Court unable to determine that debtor's failure to disclose possible cause of action was due to bad faith,

where debtor fully disclosed the information to the Bankruptcy Trustee and Trustee could have inquired into the precise nature of the claim from sources including debtor's litigation counsel. Evidence did not indicate that Trustee filed Report of No Distribution based on debtor's statements rather than on results of Trustee's own inquiry.

Harrah v. DWS, Inc., 852 F.Supp.2d 900 (N.D. Ohio 2012) – Disclosure obligations of consumer debtors is at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving bankruptcy discharge. Debtor's disclosure obligation is a continuing one that does not end once the forms are submitted to the bankruptcy court but continues after the Chapter 13 plan is confirmed. Judicial estoppel barred former employee's claims against former employer for age discrimination and retaliation, where employee failed to list those claims against employer on her schedule of assets in her Chapter 13 bankruptcy proceeding, she did not amend her schedule to include the claims against employer until almost three years after she filed her Chapter 13 petition and after the bankruptcy court entered order confirming the bankruptcy plan, and only did so after employer moved for judgment on the pleadings.

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.

In re Stiltner, 2012 WL 1805423 (Bankr. E.D. Tn. 2012) – Judicial estoppel 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. 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 remains 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.

Auday v. Wet Seal Retail, Inc., 2012 WL 124080 (E.D. Tn. 2012), *aff'd on other grounds* 2012 WL 5259002 (6th Cir. 2012) – Judicial estoppel bars party from asserting a position that is contrary to one asserted under oath in a prior proceeding where the court adopted the contrary position either as a preliminary matter or as part of a final disposition. Debtor's failure to disclose employment discrimination claim in bankruptcy schedules and receipt of discharge based on statements in those schedules was inconsistent with debtor's later lawsuit against employer.

Official Committee of Unsecured Creditors v. Dwyer, Cambre & Suffern, 2011 WL 3879501 (Bankr. N.D. Ohio 2011) – Judicial estoppel applies to prevent party from asserting inconsistent positions. Unsecured Creditors Committee is separate entity from Debtor. Committee is not responsible for statements made by Debtor in Bankruptcy Schedules and is not judicially estopped from asserting fraudulent transfer action based on alleged omissions in Schedules.

Mark A. Goldman & Assoc. P.C. v. Kattouah, 2011 WL 2533657 (E.D. Mi. 2011) – Isolated and contradictory statement in answer to complain filed by creditor is not a binding judicial admission to a material fact. To constitute "admission" statement must be deliberate, clear and unambiguous. Court has broad discretion to relieve party of consequences of admission in appropriate case.

Whitten v. Fred's Incorporated, 601 F.3d 231 (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.

Swanigan v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Judicial estoppel is an equitable doctrine that protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. Action is barred by judicial estoppel where: (1) the party's later position must be clearly inconsistent with its earlier position; (2) the party must have succeeded in persuading a court to accept its prior position, suggesting that either the first or the second court was misled; and (3) there must be the potential for the party to derive an unfair advantage on the opposing party if not estopped. Estoppel will not be appropriate where failure to disclose is result of mistake or inadvertence, evidenced by a lack of knowledge of the factual basis for the undisclosed claim or that debtor, aware of action, has no

motive for concealment. Constant affirmative efforts to conceal action demonstrate that omission was not in good faith or inadvertent. Debtor filed petition with Title VII action pending before EEOC failed to list action on schedules. Debtor admitted that she failed to disclose the action until after Court confirmed Chapter 13 Plan. Court's confirmation of the Plan constitutes adoption of Debtor's statement that she has no potential causes of action. Plaintiff does not dispute that she had such knowledge. Debtor's argument that because she will pay her creditors at one hundred percent (100%), she possessed no motive to conceal the claims where Debtor did not amend the Plan to increase the percentage paid to Debtor's unsecured creditors until after the Defendant filed a Motion to Dismiss for judicial estoppel. Amending the plan only after the Motion to Dismiss suggests intentional concealment of the instant claims in an attempt to keep any proceeds from this cause of action. Debtor's amendments continued to misrepresent nature of claim, valuing the claim in Amended Schedule B at \$1,000 while demanding in Title VII pleadings at EEOC and the Rule 26 disclosure that she sought damages will in excess of \$1.7 million.

Moses v. Howard University Hospital – Case No. 08-7087 (D.C. Cir. 2010) – Judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable doctrine invoked by a court at its discretion. There are at least three questions that a court should answer in deciding whether to apply judicial estoppel: (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped? Judicial estoppel can bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case if there is a meaningful connection between that proceeding and the judicial proceeding in which judicial estoppel is sought.

G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247 (3d Cir. 2009) – In diversity cases, whether an action is barred by judicial estoppel will be determined using federal law, not otherwise applicable state law. Under federal law, judicial estoppel generally applies where party asserts (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) where estoppel addresses the harm and no lesser sanction is sufficient. As a general rule, a party who asserts a position that is not accepted by a court will not be precluded from asserting an inconsistent or contrary position. There may be circumstances where judicial estoppel will apply even where a court has not adopted the prior position, where doing so is necessary to neutralize threats to judicial integrity, such as reliance on statements by a debtor in bankruptcy on which creditors relied.

Sher v. Dunbar, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Judicial estoppel is judicially created doctrine designed to protect court's integrity by preventing parties from playing fast and loose with judicial machinery. Judicial estoppel requires (1) the party's later position must be inconsistent with its earlier position; (2) the party asserting the inconsistent position must have successfully persuaded the court to accept that position so that acceptance of it later in consistent position would create the perception that the prior court was misled; and (3) the party asserting inconsistent positions would gain an unfair advantage. Debtor's counsel who previously argued that arbitration proceeding was flawed and award should not be confirmed later asserted inconsistent position by arguing that unconfirmed arbitration award should be afforded collateral estoppel effect. However, debtor's counsel's prior assertion was not the basis on which the court ruled in the prior matter – therefore, counsel was not precluded from asserting an inconsistent position. Further, debtors were not gaining an unfair advantage as creditor was seeking to confirm the arbitration award and, therefore, debtor's argument that the award should be considered binding was not inconsistent with relief that the creditor itself had requested.

ABS Industries, Inc. v. Fifth Third Bank. 2009 WL 1811915 (6th Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.

Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP, 546 F.3d 752 (6th Cir. 2008) - Where party to action asserts a position and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Judicial estoppel is an equitable doctrine that preserves the integrity of the Courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior Court adopted the contrary position either as a preliminary matter or as part of a final disposition. A Court should also consider whether the party has gained an unfair advantage from the Court's adoption of its earlier inconsistent statement. There is no set formula for assessing when judicial estoppel should apply but at a minimum, a party's later position must be ‘clearly inconsistent’ with its earlier position. Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the Court because the doctrine precludes a contradictory position without examining the truth of either statement.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Judicial estoppel does not prevent Trustee from asserting positions in current adversary proceeding that are inconsistent with allegations in prior adversary proceeding where Court rejected allegations in prior action. Judicial estoppel requires that the party against whom judicial estoppel is asserted must have successfully persuaded the Court to accept contradictory position.

In re Blöse, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – Judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Judicial estoppel “preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” The three considerations that are

typically relevant in determining whether judicial estoppel should apply: (1) “a party's later position must be clearly inconsistent with its earlier position”; (2) “whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceedings would create the perception that either the first or the second court was misled”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Judicial estoppel does not apply where the prior inconsistent position occurred because of “mistake or inadvertence.” Failure to disclose a cause of action may be deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim.

12.102 Parties Estopped

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. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Debtor judicially estopped from pursuing undisclosed cause of action. However, Chapter 13 Trustee not estopped as Trustee did not have notice of the cause of action or make any assertions in bankruptcy court that would be inconsistent with assertion of post-petition cause of action.

EEOC v. New Breed Logistics, 2013 WL 4495114 (W.D. Tn. 2013) – Judicial Estoppel bars only party who made inconsistent declaration from asserting later position. Debtor's failure to disclose cause of action for discrimination in bankruptcy schedules may have estopped debtor from later pursuing action, but defendant failed to identify any inconsistent statement made by EEOC. EEOC action is not simply to recover money for aggrieved claimant, but is intended to enforce statutes against discrimination and to vindicate public interest. Although employee may receive some collateral benefit from recovery, that does not create the identity of interests that would be necessary to impute omissions of debtor to EEOC.

Stevenson v. Haddad, 2013 WL 3214981 (6th Cir. 2013) – Debtor's errors or omissions are not attributable to Trustee for purposes of judicial estoppel.

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.

12.103 Particular Claims Barred

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 judicial estoppel. 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.

Payne v. Central Defense Services, LLC, 2013 WL 3974575 (W.D. Tn. 2013) – Debtor's action for wrongful termination barred by judicial estoppel. Debtor filed EEOC complaint 2 months prior to filing Chapter 13 petition yet failed to disclose discrimination charge he had filed two months earlier, although debtor did disclose another discrimination charge he had filed against a former employer. Debtor's Chapter 13 plan was confirmed based on the inaccurate schedules. On the same date, debtor received a “right to sue” letter from the EEOC. About eight weeks later, debtor filed a pro se complaint against former employer. Although debtor on two separate occasions mentioned the bankruptcy proceeding in the District Court, debtor never amended bankruptcy schedules or took steps to advise bankruptcy court of pendency of action. Debtor had factual knowledge of claim as evidenced by EEOC complaint filed two months prior to commencement of bankruptcy case. Debtor had motive to conceal as doing so would minimize proceeds for creditors and allow Debtor to retain recovery. Debtor failed to disclose cause of action to bankruptcy attorney. To extent Debtor claimed that his attorney failed to advise Debtor of need to disclose, evidence indicated that Debtor's failure to disclose was none-the-less in bad faith, particularly when coupled with Debtor's ongoing failure to disclose. Amendment to disclose cause of action filed after defendant filed Motion to Dismiss does not show lack of bad faith, but only conduct taken only after wrong doing had been discovered and disclosed by adverse party.

Bone v. Taco Bell of America, Inc., 2013 WL 3848755 (W.D. Tn. 2013) – Debtor's action for pre-petition wrongful termination barred by judicial estoppel. Debtor scheduled contingent action in Schedule B and disclosed it in Statement of Financial Affairs and claimed it as exempt, with no objection by Trustee. However, Debtor valued the asset in Schedules at \$0.00 as contingent and unliquidated. Debtor's assertion in the bankruptcy filing that the action was worth \$0.00 was inconsistent with debtor's assertions in the bankruptcy case that the action had value, and debtor never attempted to amend the schedules to disclose that debtor believed that the action had value. Bankruptcy Court relied on debtor's assertion that claim was worth nothing in granting discharge. Debtor fully knew of factual basis of claim that made claim valuable where debtor filed suit demanding damages in excess of \$25,000 while bankruptcy case was still pending; and had incurred almost \$10,000 in medical bills even before filing bankruptcy. Debtor had motive to mis-state value of claim to obtain benefit of exemption that would otherwise have been limited to no more than \$10,000, allowing debtor to keep any proceeds for herself. Record indicated lack of good faith as debtor had an ongoing duty to disclose value of claim yet never filed any amendments.

Curry v. Rother International, L.P., 2013 WL 3874702 (W.D. Tn. 2013) – Chapter 13 Debtor’s action against former employer for discrimination based on sex barred by judicial estoppel. Debtor was aware of potential claim as debtor had already filed EEOC complaint prior to commencement of bankruptcy case. Debtor’s Schedule B stated that debtor was not party to any lawsuits or administrative proceedings and also stated that debtor did not have any contingent or unliquidated claims. At no point in the Petition, Schedules or SOFA did debtor mention discrimination claim. Documents were signed by debtor under penalty of perjury stating that the answers were true and correct. After commencement of bankruptcy case but prior to confirmation of plan, debtor filed suit in Federal Court against former employer for discrimination. Debtor did not bring this suit to the attention of the Court or the Trustee. Shortly thereafter, the Court confirmed debtor’s Chapter 13 plan. More than one year later, debtor amended her bankruptcy schedules to disclose, for the first time, an “expected EEOC settlement” from debtor’s former employer resulting from the discrimination suit. Debtor assumed contrary position in bankruptcy case by stating that debtor did not have any suits or claims. Bankruptcy court adopted that position in confirming debtor’s plan. Omission was not result of mistake or inadvertence. Debtor was fully aware of factual basis of claim prior to commencement of bankruptcy case, where debtor had already filed complaint with EEOC and received Notice of Right to Sue from EEOC. Debtor had motive to conceal asset in effort to minimize assets and income, thereby reducing amount Debtor would have to pay creditors in Chapter 13 and allowing Debtor to retain full benefits of undisclosed asset. Debtor did not amend to disclose until Employer’s attorney in discrimination suit raised issue of judicial estoppel based on failure to disclose and indicated that counsel would be filing Motion to Dismiss based on lack of disclosure. Debtor’s failure to disclose until after opposing party evidenced intent to seek dismissal evidences a lack of good faith on part of Debtor as debtor did not disclose until compelled to do so by events in litigation rather than any true, good faith attempt to disclose previously undisclosed action.

Curry v., Aerotek, Inc., 2013 WL 3146812 (W.D. Tn. 2013) – Chapter 13 Debtor’s action against former employer for discrimination based on sex barred by judicial estoppel. Debtor was aware of potential claim as debtor had already filed EEOC complaint prior to commencement of bankruptcy case. Debtor’s Schedule B stated that debtor was not party to any lawsuits or administrative proceedings and also stated that debtor did not have any contingent or unliquidated claims. At no point in the Petition, Schedules or SOFA did debtor mention discrimination claim. Documents were signed by debtor under penalty of perjury stating that the answers were true and correct. After commencement of bankruptcy case but prior to confirmation of plan, debtor filed suit in Federal Court against former employer for discrimination. Debtor did not bring this suit to the attention of the Court or the Trustee. Shortly thereafter, the Court confirmed debtor’s Chapter 13 plan. More than one year later, debtor amended her bankruptcy schedules to disclose, for the first time, an “expected EEOC settlement” from debtor’s former employer resulting from the discrimination suit. Debtor assumed contrary position in bankruptcy case by stating that debtor did not have any suits or claims. Bankruptcy court adopted that position in confirming debtor’s plan. Omission was not result of mistake or inadvertence. Debtor was fully aware of factual basis of claim prior to commencement of bankruptcy case, where debtor had already filed complaint with EEOC and received Notice of Right to Sue from EEOC. Debtor had motive to conceal asset in effort to minimize assets and income, thereby reducing amount Debtor would have to pay creditors in Chapter 13 and allowing Debtor to retain full benefits of undisclosed asset. Debtor did not amend to disclose until Employer’s attorney in discrimination suit raised issue of judicial estoppel based on failure to disclose and indicated that counsel would be filing Motion to Dismiss based on lack of disclosure. Debtor’s failure to disclose until after opposing party evidenced intent to seek dismissal evidences a lack of good faith on part of Debtor as debtor did not disclose until compelled to do so by events in litigation rather than any true, good faith attempt to disclose previously undisclosed action.

Taylor v. Praxair, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] 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 omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith. Debtor failed to disclose pending EEOC claim in bankruptcy schedules in Chapter 7 case. Debtor received discharge and case was closed as “no asset” case. Debtor did not lack knowledge of claim as debtor had brought claim a year prior to commencing bankruptcy case. However, record was unclear as to whether attempted to conceal, where record was unclear as to whether debtor told attorney and attorney failed to list claim. In light of ambiguity in record, court would not dismiss case based on judicial estoppel.

Cook v. St. John Health, 2013 WL 2338376 ((E.D. Mi. 2013) – Judicial estoppel requires a clear inconsistency between the later and earlier positions; that the court was persuaded to accept he earlier position such that acceptance of the later position would create perception that court was misled; and that prior inconsistent statements not be the result of mistake or inadvertence. Non-disclosure is inadvertent where debtor lacks knowledge of factual basis for claims and where debtor lacked motive to conceal. Debtor failed to list pending employment discrimination claim in petition, statement of financial affairs, or schedule B. After confirmation of plan, plaintiff filed suit but did not amend schedules to disclose claim, although debtor did amend schedules on three separate occasions for other reasons. Debtor had motive to conceal as it is always in debtor’s interests to minimize assets. Debtor made no attempt to amend to disclose until more than 4 months after defendant filed motion for summary judgment based on judicial estoppel. Bankruptcy court confirmed plan based on prior representation that not such claims existed. Plaintiff’s action dismissed based on judicial estoppel.

Kimberlin v. Dollar General Corp., 2013 WL 1136563 (6th Cir. 2013) – Debtor’s action against former employer who fired debtor after debtor reported that supervisor assaulted her barred by judicial estoppel. Debtor had previously filed Chapter 13. Debtor was fired after confirmation of the Plan but before debtor made the final payment under the Plan. Debtor never amended her schedules or other

bankruptcy documents to disclose potential claim against employer. After debtor completed plan and received discharge, debtor files suit against employer. Debtor assumed contrary position in Bankruptcy court by failing to amend schedules to disclose action. Court relied on debtor's contrary position in entering a discharge where debtor had paid only 3% to unsecured creditors as required by the confirmed Plan; and debtor's omission did not result from mistake or inadvertence. Although termination of employment occurred very close to the end of debtor's plan, had debtor disclosed the action the Court could have fashioned a remedy that would permit creditors to recover additional proceeds; or the court could have converted the case to one under Chapter 7 or dismissed it outright. Debtor made no effort to disclose cause of action to Court or Trustee, evidencing a lack of good faith and an intent to conceal. Lower court properly dismissed action based on judicial estoppel.

Pees v. Citimortgage, 2012 WL 4465505 (Bankr. S.D. Ohio 2012) – Plan proposed to surrender property to mortgage holder confirmed by court. After confirmation, Trustee became aware of possible defect in mortgage execution which could permit mortgage to be set aside. Trustee's later action to avoid mortgage barred by judicial estoppel. Confirmation of plan was res judicata on issues regarding status of mortgage. Plan disclosed existence and treatment of mortgage and Chapter 13 trustee never contested validity of mortgage or opposed confirmation based on alleged defect in mortgage. Trustee's present position regarding avoidability of lien was inconsistent with that taken at confirmation hearing and allowing trustee to now change positions would result in unfair detriment to mortgage lender.

In re DeGroot, Case No. 05-12996 (Bankr. W.D. Mi. 2012), *aff'd* 484 BR 311 (6th Cir. BAP 2012) – Section 544 deems any property that is scheduled under Section 521 is abandoned if not administered at the closing of the case. Property that is not abandoned and is not administered remains property of estate. Court can order otherwise based on circumstances of case. Debtor never properly scheduled receivable owed by ex-wife, and trustee's knowledge of unscheduled asset, without more, does not revest asset in debtor at closing. Debtor must strictly comply with obligations to schedule asset in order to earn the return. However, Trustee also failed to take steps to administer the receivable before filing "no asset" notice and notice to close case. Trustee would be judicially estopped from now administering receivable. Trustee took position that receivable was fully administered in response to pressure from UST to close cases, thereby inducing Court to close case. Trustee then sat quietly for several years with no contact with ex-wife and no effort to collect receivable. Unique circumstances of case indicated that trustee was engaged in "cynical gamesmanship" by failing to administer asset of which trustee was well aware. Evidence also indicated that ex-wife relied on trustee's inaction in making financial decisions over years since closing of bankruptcy case including substantial expenditures for family needs and efforts to renegotiate mortgage.

Dickerson v. Federal Express, 2010 WL 8747316 (W.D. Tn. 2010) – Judicial estoppel applies where debtor knows of alleged cause of action but intentionally fails to disclose action in bankruptcy documents. Debtor failed to amend documents to disclose post-petition cause of action for employment discrimination although debtor filed charges with EEOC based on termination of employment. Debtor has ongoing duty to disclose – duty to disclose does not end when bankruptcy forms are submitted to the court. Debtor did not take any steps to advise Chapter 13 trustee of cause of action although Chapter 13 continued for at least one year after Debtor's complaint to EEOC. Circumstances indicated that debtor intended to conceal cause of action for purposes of keeping proceeds rather than have proceeds become part of bankruptcy estate. Failure to disclose could not be inadvertent as debtor was fully aware that debtor was in Chapter 13 proceeding at time claims filed with EEOC and debtor did not make any effort to inform the trustee or the court of the accrual of the cause of action.

Love v. Tyson Foods, Inc., Case No. 10-60106 (5th Cir. 2012) – Debtor's complaint for damages based on alleged discrimination and retaliation dismissed based on the doctrine of judicial estoppel. Debtor/Plaintiff failed to disclose claim and lawsuit for discrimination and retaliation in bankruptcy proceeding that existed at time of plan confirmation. Detrimental reliance by litigant is not necessary element of judicial estoppel because the doctrine of judicial estoppel is designed to protect the judicial system rather than the litigants. Judicial estoppel is particularly appropriate when an asset is undisclosed in bankruptcy and debtor pursues a claim in a separate proceeding based on the undisclosed asset and the omission is not inadvertent. A failure to disclose a claim is inadvertent only where a debtor lacks knowledge of the claim or has no motive to conceal the claim. Debtor filed a claim with EEOC 30 days after commencing chapter 13 proceeding and more than four months prior to confirmation of debtors chapter 13 plan. Nonetheless, debtor never disclosed a claim either in the initial schedules or in any amendments.

Seus v. Kohler Co., 2012 WL 1071235 (E.D. Tn. 2012) - Debtor's action for product liability based on an alleged defective lawnmower dismissed based on judicial estoppel. Although debtor knew of claims for at least five months prior to commencement of debtor's chapter 7 case, debtor did not list those claims in either the original petition or in the numerous amendments filed by debtor between commencement of the case and the entry of the chapter 7 discharge. Two months after receiving discharge, debtor filed action against manufacturer and seller of lawnmower. Debtor assumed a position that was contrary to the one asserted under oath in the bankruptcy proceeding that no cause of action existed; and bankruptcy court adopted that representation in entering the discharge in debtor's chapter 7 case.

Auday v. Wet Seal Retail, Inc., 2012 WL 124080 (E.D. Tn. 2012), *aff'd on other grounds*, 2012 WL 5259002 (6th Cir. 2012) – Judicial estoppel bars party from asserting a position that is contrary to one asserted under oath in a prior proceeding where the court adopted the contrary position either as a preliminary matter or as part of a final disposition. Debtor's failure to disclose employment discrimination claim in bankruptcy schedules and receipt of discharge based on statements in those schedules was inconsistent with debtor's later lawsuit against employer. Debtor never included potential lawsuit in schedules and never amended schedules to disclose. Duty of disclosure is a continuing one. Sending letter to Chapter 7 Trustee advising of cause of action prior to entry of discharge is not sufficient to avoid judicial estoppel. Letter to Trustee is not functional equivalent of amending schedules or making proper disclosure to the Bankruptcy Court and creditors.

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

Hamlin v. Baptist Memorial Hospital, 2011 WL 901208 (W.D. Tn. 2011) – Plaintiff’s failure to disclose claim for discrimination in schedules or statement of financial affairs, although Debtor was simultaneously pursuing those actions in District Court, precluded by judicial estoppel. Debtor’s failure to list suit constituted assumption of inconsistent position on which the bankruptcy court relied. Failure to disclose was not inadvertent or result of mistake, as debtor had knowledge of claims when bankruptcy schedules were filed and debtor had motive to conceal and debtor evidenced bad faith by failing to amend bankruptcy schedules to disclose the claims after the issue became known.

Player v. Kansas City Southern Railway Co., 2011 WL 1790494 (W.D. La. 2011) – Debtor failed to list pending action for racial discrimination in schedules and at the 341 meeting denied being involved in any lawsuits where debtor was suing anyone. Debtor convinced the court and the trustee that debtor had no potential or pending claims, obtaining relief based on misrepresentations to the court. Debtor could not prove that omissions were inadvertent. It is not necessary that the omission be done with “deceitful motive”. Inadvertence applies only when debtor lacks knowledge of the claim or lacks motive to conceal it. Debtor admittedly knew of pending lawsuit when bankruptcy filed and had motive to conceal lawsuit in effort to protect proceeds from creditors.

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

Dorbeck v. Sykora, 2010 WL 3245327 (Bankr. E.D. Mi. 2010) – Debtor barred from pursuing action against former employer for wrongful termination. Debtor’s schedules failed to disclose that debtor: (a) is a shareholder of Galleon International Corporation owning 178,000 shares of Galleon stock (44.5% of the total outstanding) having a book value as determined by debtor of \$7 million; (b) was the president and a member of the board of directors of Galleon from November 2005 through June 17, 2009; (c) is one of the inventors and co-owners of the patents related to Galleon's business; and (d) is entitled to salary and dividends from Galleon for his work on its behalf since Galleon's formation in November 2005. Debtor’s Schedules also failed to disclose that Debtor is, and has been since 2002, a principal of Pivotal Technologies. Debtor knowingly misrepresented several critical matters when filing his Chapter 13 petition, and now seeks to recover what could be a substantial amount of money for the assets the Debtor denied having when he filed the bankruptcy petition.

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

Kaufman v. Robinson Property Group, Ltd., Case No. 09-60758 (5th Cir. 2010) – Debtor who failed to disclose known personal injury claim in bankruptcy schedules creates “clear inconsistency” by stating that she “had no claims”, prohibited from pursuing action after completion of bankruptcy. Inconsistent positions result in judicial estoppel against later pursuit of personal injury action.

ABS Industries, Inc. v. Fifth Third Bank. 2009 WL 1811915 (6th Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.

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

deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim. Debtor testified in State Court deposition that Debtor knew of her potential claims at the time of she filed for relief under Chapter 7 and admitted that although she had spoken with an attorney prior to the filing of the bankruptcy case, she never scheduled the claim nor amended the schedules to do so post-petition. Debtor clearly had motive to conceal claim, as any post-discharge recovery would come to her rather than to the estate. Debtor's ongoing concealment also evidenced bad faith. Debtor did not disclose these claims to the Trustee or this court until after the Defendant moved for summary judgment in state court. Debtor waited over *seven years* before notifying the Trustee and the court as to her claims. Debtor did not orally notify the Trustee at the meeting of creditors or correspond with the Trustee with how to proceed with her claims. Only after Debtor realized that her state law claims were in peril did she move to reopen the case to list the lawsuit as an asset. Debtor immediately claimed the lawsuit exempt. Debtor's actions were "too little, too late". Debtor is judicially estopped from pursuing undisclosed causes of action.

Whitten v. Fred's, Incorporated, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor who suffered injuries and incurred medical expenses cannot recover those expenses from tortfeasor to the extent those expenses are discharged in subsequent bankruptcy proceeding. Debtor can recover medical expenses that are not discharged, such as future medical expenses after the bankruptcy case was closed, and she is free to argue that Fred's is liable for those post-bankruptcy medical expenses.

12.104 Particular Claims Not Barred

Crankshaw v. CSX Transp., Inc., 2013 WL 5276573 (E.D. Tn. 2013) – Debtor not estopped from asserting claim that arose more than 30 days after debtor completed payments under chapter 13 plan. Although bankruptcy case was still open when claim arose, and debtor did not receive discharge until 90 days after claim arose, evidence did not disclose any intent by debtor to deceive or conceal. Debtor had paid all of the payments under the Chapter 13 Plan and had paid all creditors who had filed claims, and only two creditors who had not been paid had not filed claims and were not entitled to be paid.

Owens v. Dolgencorp, LLC, 2013 WL 5181524 (S.D. Ohio 2013) – Debtor failed to disclose action for alleged violation of Family Medical Leave Act. Two months after debtor was allegedly wrongfully terminated, debtor filed for relief under Chapter 13. Debtor's schedules and Statement of Financial Affairs did not disclose any potential claim and debtor never informed the Court or the Trustee of the possibility of any claim although debtor's plan expressly required the debtors to keep the trustee informed. However, record indicated that non-disclosure may have been inadvertent, sufficient to preclude entry of summary judgment, where debtor may have been aware of facts surrounding termination but not that the facts may amount to claim against employer. Seven month gap between bankruptcy filing and debtor first consulting an attorney created issue of fact as to whether debtor knew of potential claim. Once debtor became aware of issue, debtor filed motion to substitute trustee as real party in interest. If granted, trustee would not be judicially estopped. Record was not sufficiently developed for court to enter summary judgment.

BACM 2001-1 Central Park West, LLC v. Gersten, 2012 WL 8887160 (N.D. Ohio 2012) – Creditor's non-filing of proof of claim after Trustee issued notice of no assets and notice not to file claims is not assertion of position that creditor lacks a claim against debtor. Creditor is not judicially estopped from pursuing recovery from third parties who also may be obligated on debt merely because creditor did not file proof of claim. Non-filing of proof of claim is not assertion of any position. Further, bankruptcy notice expressly stated that creditors should not file proof of claim.

Taylor v. Praxiar, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] 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 omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith. Debtor failed to disclose pending EEOC claim in bankruptcy schedules in Chapter 7 case. Debtor received discharge and case was closed as "no asset" case. Debtor did not lack knowledge of claim as debtor had brought claim a year prior to commencing bankruptcy case. However, record was unclear as to whether attempted to conceal, where record was unclear as to whether debtor told attorney and attorney failed to list claim. In light of ambiguity in record, court would not dismiss case based on judicial estoppel.

Eckhardt v. Federated Capital Corp., Case no. 12-12668 (E.D. Mi. 2012) – Judicial estoppel requires that party take action in one court or action that is inconsistent with position being asserted in later action. Creditor who sued original obligor on credit card not estopped from later filing suit against third party who assumed debts as part of asset purchase agreement with original obligor. Debtor assumed debts and became guarantor of payment. Suit against original obligor is not inconsistent with later action against guarantor.

EEOC v. CRST Van Expedited, Inc., 2012 WL 1583026 (8th Cir. 2012) – Debtor's failure to disclose sexual harassment claim in schedules would estop debtors from pursuing recovery but did not bar action by EEOC.

Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011) – Chapter 7 Trustee is not precluded by judicial estoppel from pursuing recovery of litigation that was not disclosed by debtor. Although grounds existed to find that debtor was judicially estopped, Trustee will

not be estopped absent evidence of unusual circumstances demonstrating some element of fault of Trustee.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) - Borrower's action contesting validity of foreclosure sale not barred by judicial estoppel. At time debtor filed first bankruptcy case, debtor did not know of grounds to file complaint against mortgage company and many of the facts underlying the action did not occur until after first bankruptcy case had been dismissed. Debtors did disclose potential cause of action in schedules in second case in "other liquidated debts owed to debtor". Action may have been better disclosed under "suits and administrative proceedings" but disclosure was sufficient to place court and parties in interest on notice.

Whitten v. Fred's, Incorporated, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor not barred from asserting claim post-discharge where debtor listed potential claim and Trustee chose to abandon the claim. Debtor's decision to institute litigation after abandonment of the asset without "supplementing" bankruptcy schedules to indicate suit had been filed did not constitute concealment as debtor had no duty to supplement the schedules at that point. Debtor's actual disclosure of the claims precludes a finding that she acted in bad faith.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - Judgment obtained by fraud may be set aside by the Court where enforcement of the judgment would be manifestly unconscionable. The party attacking a judgment based on fraud on Court must prove by clear and convincing evidence (1) conduct, (2) on the part of an officer of the Court, (3) directed to the "judicial machinery" itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. Conduct must have actually subverted the judicial process" by preventing the judicial machinery from performing in the usual manner to impartially adjudicate the case presented. Chapter 11 representative's action to recover money paid to creditor where creditor's claim was based on an allegedly fraudulently obtained judgment failed to prove either that the creditor made any representations leading to entry of the judgment that the creditor knew were false or with reckless disregard for truth; and failed to prove how the Court rendering the judgment was misled or deceived.

In re Two Springs Membership Club, 408 B.R. 475 (Bankr. N.D. Ohio 2009). Judicial estoppel only barred party from presenting argument on issue; it did not preclude resolution of the issue in its favor.

V. Equitable Estoppel

12.105 Elements – Governmental Action

O'Rourke v. United States, 587 F.3d 537 (2d Cir. 2009) – Governmental agency will not be equitably stopped absent evidence of affirmative misconduct. Even if IRS was negligent in maintaining Certified Mail log, no evidence presented that the failure was the failure was result of "affirmative misconduct" sufficient to preclude IRS from relying on Log to demonstrate mailing of notice of deficiency.

12.106 Elements – Fraudulent Transfer

Shapiro v. Jamil, Case No. 08-70828 (Bankr. E.D. Mi. 2010) – Equitable estoppel requires (1) conduct or language amounting to a representation of material fact; awareness of the true facts by the party to be estopped; intention by party to be stopped that party asserting estoppel has a right to believe that the former's conduct is intended; unawareness of the true facts by the party asserting estoppel; and detrimental and justifiable reliance. Party must, by representation, admission or silence intentionally or negligently induce another party to believe certain facts, the other party justifiably relies and acts on this belief, and the other party will be prejudiced if the party to be estopped is permitted to deny the existence of the facts as represented. Debtor's conduct in listing assets in personal tax returns that Debtor later asserted he did not own would not form basis of equitable estoppel where there was no evidence that the debtors intended the Trustee to rely on the information in the tax returns or that the Trustee was aware of or actually relied on those statements. Statements made in Debtor's tax returns for the years 2003 through 2006 would not form basis for estoppel by Trustee where Debtor did not commence bankruptcy proceeding until 2009.

W. Promissory Estoppel

12.107 Elements

Mullins v. FNMA, 2013 WL 5707798 (E.D. Mi. 2013) – Promissory estoppel requires a promise, that the promisor should reasonably have expected to induce an action of a definite and substantial character on the part of the promisee, and that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. Although lender allegedly orally indicated that plaintiff had been approved for loan modification, plaintiff's complaint indicated that plaintiff never received any paperwork confirming any loan modification and never made any payments after being advised of the loan modification, and that plaintiff thereafter received notice of the foreclosure sale. Even if lender made promise regarding loan modification, plaintiff could not show reliance or that plaintiff took action in reliance on promise that was detrimental.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Promissory estoppel requires a promise which the promisor reasonably expects to induce action or forbearance on part of the promisee or a third party and that does induce action or forbearance. Promissory estoppel requires that (1) the detriment suffered in reliance was substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance was foreseeable by the promisor; and (3) the promisee acted reasonably in justifiable reliance on the promise as made. Promissory estoppel is alternative to express contract, and does not depend on a finding of an express contract but does require the establishment of an enforceable contract. Bank's statements that it would consider a request for loan modification was not sufficient where plaintiff did not allege that any misrepresentations were intentional or knowing or reckless, or without any intention to perform. Bank only promised to consider a loan modification, not that a loan modification had been approved.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Promissory estoppel is based on promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance. Promise is binding if injustice can be avoided only by enforcement of the promise. Plaintiff must show (1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment. Promissory estoppel is available only where there is no valid, enforceable contract between parties. Plaintiff and defendant had existing, valid contractual relationship in the form of the underlying loan and mortgage. Plaintiff's action for promissory estoppel sought to impose changes to the terms of the loan and mortgage by imposing a loan modification. Promissory estoppel cannot be used to modify terms of existing contractual agreements. Plaintiff also failed to allege any conduct by lender akin to fraud, where complaint did not allege any specific promise, when any promise was made, or who made it.

X. Law of the Case

12.108 Elements

Mason v. Ocwen Loan Servicing, LLC, 2013 WL 4052905 (Bankr. E.D. Ohio 2013) – Law of the case means that issues decided at early stage of litigation, either explicitly or by necessary inference, constitute law of the case that will not be reconsidered unless (1) substantially different evidence is raised at trial; (2) subsequent contrary view of law is decided by controlling authority; or (3) decision is clearly erroneous and would work manifest injustice. Trial court had already determined that recording of *lis pendens* coupled with entry of foreclosure judgment constituted perfection of previously unperfected lien. Creditor precluded by law of case from later arguing that *lis pendens* alone was sufficient to perfect where state court had later vacated the judgment itself. Creditor did not demonstrate any different evidence on issues of recording; there was no change in the law as court was applying pre-existing state law that required both *lis pendens* and judgment of foreclosure to constitute perfection; and there was no evidence that prior ruling was either erroneous or would produce manifest injustice.

Gonsalves v. Belice, Case No. 11-048 (1st Cir. BAP 2012) – On remand, court is to consider only issues on which case has been remanded. Lower court must follow letter and spirit of mandate, taking into account appellate court opinion and circumstances it embraces. Bankruptcy court dismissed Section 523(a)(3) action for failure to state cause of action. Appellate court reversed and remanded “to consider the merits” of the claim. On remand, bankruptcy court again dismissed case based on alleged failure of creditor to timely file complaint. On further appeal, appellate court reversed again. Court held that prior order directed bankruptcy court to consider action on merits. Bankruptcy court's dismissal of action on procedural grounds, without reaching merits, violated law of case as established in first appeal.

Williams v. Franklin Towers Homeowners Association, Inc., 2010 WL 2780974 (9th Cir. 2010) - Under the law of the case doctrine, one panel of an appellate court will not reconsider questions that another panel has decided on a prior appeal in the same case.

In re Lundeen, Case No. 0951277 (Bankr. S.D. Ohio 2010) – “law of the case” applies only in the case in which the court made the decision on which law of the case is based. Party cannot rely on decision made in separate case, brought by separate plaintiffs, even if the other case involved identical issues against same defendant. Further, law of the case does not apply where the decision relied on recognized unresolved factual issues that could alter the decision.

Kendrick v. CIT Small Business Lending Corp., 2009 WL 2835754 (Bankr. E.D. Ky. 2009) - When a court decides upon a rule of law, that decision governs the same issues in subsequent stages in the same case. The doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition. When an appellate court issues a decision and remands the case to the lower court for further proceedings, the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court. The trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into consideration the appellate court's opinion and the circumstances it embraces. Law of the case may be disregarded only where one of three exceptional circumstances exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.

12.109 Particular Claims Barred

Williams v. Franklin Towers Homeowners Association, Inc., Case No. 08-55109 (9th Cir. 2010) - Debtor's appeal of Bankruptcy Court remand order barred by law of the case where Debtor has previously appealed that order and the appellate court affirmed.

Kendrick v. CIT Small Business Lending Corp., 2009 WL 2835754 (Bankr. E.D. Ky. 2009) – Bankruptcy Court bound by decision of Appellate Court that the notary statement contained in Defendant's mortgage did not comply with the requirements of KRS 423.130 and the mortgage was, therefore, unrecordable as a matter of law and so was avoidable as a preference. On remand, Creditor argued that the mortgage was also recorded as a “fixture filing” that should be considered a perfected security interest in the fixtures attached to the real estate. Bankruptcy Court concluded that prior holding of Appellate Court that mortgage was invalid rendered Mortgage invalid for all purposes. Creditor would not be permitted to circumvent Appellate Court's holding by attempting to re-characterize the invalid mortgage as a “fixture filing”.

12.110 Particular Claims Not Barred

Y. Evidentiary Issues

12.111 Generally

In re Second Chance Body Armor, Inc., 421 B.R. 823 (Bankr. W.D. Mich., 2010) – Court must apply Rules of Evidence with an eye to the fundamental purpose of fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. Court can admit evidence that would be “problematic” and can exclude that evidence later if it proves to be irrelevant or inadmissible. Court cannot necessarily determine full admissibility of evidence during middle of trial, as admissibility may not be clear until the case is fully developed. A party will not be barred in advance from presenting evidence that the opposing party asserts is unduly prejudicial. Court can determine probative value and potential undue prejudice only in the context of the trial. Court will not prematurely exclude evidence and will not exclude evidence merely to be expedient.

12.112 Privilege – Time for Asserting Generally

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Assertion of attorney-client privilege in response to discovery request must be made before deadline to respond to discovery. Party waived privilege by partially responding to Request for Admissions without assertion of privilege, and cannot later assert privilege in response to Motion to Compel Discovery.

Holly Performance Products, Inc. v. United States, 457 BR 598 (Bankr. W.D. Ky. 2011) - Claims of privilege that were not raised with respect to documents that were the subject of subpoena until after bankruptcy court had already entered its order enforcing subpoena were not timely raised, and could be denied on that basis.

12.113 Fifth Amendment Privilege

General Motors Corp. v. Heraud, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Party to adversary proceeding can invoke Fifth Amendment privilege. Trier of fact can draw adverse implications from the invocation of privilege, and party invoking privilege cannot introduce any other evidence on the issue involved. Court is not required to abate adversary proceeding to await outcome of criminal proceeding.

12.114 Attorney-Client Privilege

In re Cardinal Fastener & Specialty Co., 2012 WL 425858 (Bankr. N.D. Ohio 2013) – Section 542 mandates turnover to Trustee of all financial information, including books, documents, records and papers relating to debtor's property or financial affairs. Trustee's right to demand turnover is expressly subject to any applicable privilege including attorney-client and work product. Attorney client privilege under Federal Law applies (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. Only the client can invoke the privilege. Chapter 7 Trustee controls privilege as to communications between Debtor and special counsel retained while case was in Chapter 11. Debtor as the client is entitled to assert or waive privilege and Chapter 7 trustee controls the debtor post-conversion. To extent special counsel represented by Debtor and its officers and directors individually, privilege applies to prevent disclosure to third parties but does not preclude use of or restrict access to communications between attorney and joint clients as to matters in which they had a common interest and collectively consulted counsel. Special counsel represented Debtor and Directors and Officers in insurance litigation which precluded individual joint-clients from asserting privilege to prevent disclosure to Chapter 7 Trustee.

In re Elkins, 2012 WL 4327044 (Bankr. N.D. Ohio 2012) – Attorney-client privilege applies to documents: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to the purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except where the protection has been waived. It includes correspondence that reveals the client's motivation for seeking legal representation, the nature of the services to be provided, strategies for litigation, and other confidential information exchanged during representation.

Degrolamo v. Daily & Haskins, 2011 WL 6000799 (Bankr. N.D. Ohio 2011) – Whether Chapter 7 Trustee can waive attorney-client privilege on behalf of individual debtors is determined on a case by case basis. Case by case approach is designed to balance interests of full and frank discussion in attorney-client relationship and potential harm to debtor against the trustee's duty to maximize the estate for benefit of creditors. Trustee permitted to waive privilege for purposes of pursuing professional malpractice action against debtor's counsel.

Trustee and debtor are not in adversarial relationship. Trustee did not seek information to use against debtors. Recovery by the trustee would benefit debtors. The role of the defendant law firm was central to the Trustee's case against the firm and the trustee's overriding duty to act on behalf of the estate.

Holly Performance Products, Inc. v. United States, 457 BR 598 (Bankr. W.D. Ky. 2011) – Documents that would have been protected by attorney-client privilege lost privilege when turned over to accountant.

In re Rapoport, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Court would not prohibit or restrict Rule 2004 Examination based on possible attorney-client privilege issues. Privilege issues are more properly dealt with in the context of the examination and the specific questions posed. Attorney-client privilege does not attach to (1) the existence of the attorney client relationship or the identity of the client unless the identity of the client would somehow divulge the nature of the advice sought; (2) the purpose for which the attorney was retained and the terms of the engagement including the fee arrangement; (3) the factual circumstances surrounding the alleged privilege including, the date the communication took place, the identities of the participants, and the names of persons who received allegedly privileged documents; and (4) billing statements and hourly records except to the extent those contain privileged information. Further, privilege may be asserted or waived only by the client or the attorney acting on behalf of the client.

State Farm Mutual Automobile Insurance Company v. Hawkins, 2011 WL 595810 (E.D. Mi. 2011) – crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons for the privilege fail. Crime-fraud exception applies where the party shows that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime of fraud and (2) that the communications were in furtherance thereof. The crime-fraud exception applies only where the advice from an attorney refers to future, not past, wrongdoing and requires proof that client's communication was seeking advice in furtherance of crime or fraud. Attorney's unilateral actions in furthering crime or fraud does not trigger exception to privilege.

GATX Corp. v. Appalachian Fuels, LLC, 2010 WL 5067688 (E.D. Ky. 2010) - The attorney-client privilege attaches to confidential communications between an attorney and client that are made for the purpose of facilitating the rendition of professional legal services to the client. Documents that are primarily business related are not privileged. When communications contain both legal advice and non-legal considerations, a court must consider whether the predominant purpose of the communication is to render or solicit legal advice. The burden of establishing the existence of a privilege rests with the party asserting the privilege. The burden of showing that a privilege has not been waived also falls on the party claiming the privilege. A privilege is waived by a voluntary disclosure in a Federal proceeding, and extends to undisclosed materials if (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness be considered together. Inadvertent disclosure does not operate as a waiver if: (1) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (2) the holder promptly took reasonable steps to rectify the error. Party failed to identify any particular document that was allegedly "inadvertently" disclosed, leaving Court to assume the disclosure of these documents was not inadvertent. Only 25 pages out of over 200 that actually contained some form of privileged communication which does not necessarily support a finding of an intentional waiver of the attorney-client privilege and party producing documents timely sought the return of the documents it considers privileged once disclosure became known.

12.115 Work Product Privilege

In re Cardinal Fastener & Specialty Co., 2012 WL 425858 (Bankr. N.D. Ohio 2013) – Work-product doctrine protects attorney's trial preparation materials from discovery. Work product includes tangible and intangible materials which reflects attorney's efforts at investigating and preparing a case. Work-product does not normally protect situations where client is asking for access to documents and information created or collected by counsel in the scope of the representation. Chapter 7 Trustee stepped into shoes of debtor and is the client, such that counsel for debtor prior to conversion to Chapter 7 could not shield information from Chapter 7 Trustee. To extent work-product was developed in course of representing joint clients, work product cannot be used to shield materials from one of those clients.

In re Elkins, 2012 WL 4327044 (Bankr. N.D. Ohio 2012) – The work-product doctrine protects an attorney's trial preparation materials from discovery to preserve the integrity of the adversarial process. The work-product doctrine is a procedural rule of federal law.... [Federal Rule of Civil Procedure] 26(b)(3) protects (1) "documents and tangible things"; (2) "prepared in anticipation of litigation or for trial"; (3) "by or for another party or its representative." Work product applies only to party to the litigation. Documents prepared for one who is not party to the present suit are not protected by work product. City could not assert work product privilege where City was not party to present action.

Holly Performance Products, Inc. v. United States, 457 BR 598 (Bankr. W.D. Ky. 2011) - Work product privilege does not apply to documents that were not prepared in anticipation of litigation. Documents prepared in anticipation of the claims process in the bankruptcy case does not necessarily equate to litigation.

12.116 Accountant-Client Privilege

Wells v. THB America, LLC, 2012 WL 3678602 (Bankr. E.D. Mi. 2012) – Michigan law provides accountant-client privilege with respect to information relative to and connection with an examination or audit of, or report on, books, records, or accounts that the accountant or a person employed by the accountant was employed to make. Information derived from or as a result of professional service rendered by

CPA is confidential and privileged. Chapter 7 Trustee's attempts to recover work papers and correspondence relating to Defendant's 2008 tax return fell within ambit of privilege. Accountant's work on tax returns is clearly within scope of privilege. However, privilege is limited to information provided by client to accountant, not to information provided by accountant to client. Court would review documents to determine extent to which documents contained information provided by client and, therefore privileged; and which documents contain only information generated by accountant or third parties that is not privileged.

Holly Performance Products, Inc. v. United States, 457 BR 598 (Bankr. W.D. Ky. 2011) – Documents prepared by accountant are not covered by work product privilege and there is no Federally recognized accountant-client privilege. Documents provided to tax preparer for purposes of compiling tax returns are not privileged. Documents that would have been protected by attorney-client privilege lost privilege when turned over to accountant.

12.117 Membership Lists

In re Deliverance Christian Church, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Membership lists are subject to heightened protections because of potential chilling effect on First Amendment freedom of association. Creditor failed to demonstrate need for Church to produce membership list disclosing names of all members. Numbers of members on the rolls, number of people attending services, number of people financially supporting Church would be subject to discovery, but actual membership list is beyond scope of permitted discovery and is privileged.

12.118 Expert Witnesses

Rosenberg v. DVI Receivables, XIV, LLC, 2012 WL 3870351 (Bankr. S.D. Fl. 2012) – Expert witnesses are normally not permitted to testify as to meaning or interpretation of law. Trial judge is to be jury's sole source of explanation of applicable bankruptcy law. Allowing parties to present witnesses would create risk of confusion concerning applicable law. District Court jury instructions would cover bankruptcy law and standards to determine whether involuntary petition was filed in bad faith and the consequences of a bad-faith filing. Although Federal Rule of Evidence 704 permits an expert witness to give expert testimony that "embraces an ultimate issue to be decided by the trier of fact," an expert witness is prohibited from rendering a legal opinion because doing so would usurp the court's role and possibly confuse the jury.

Synergeering Group, LLC v. Jonatzke, 2012 WL 36554464 (Bankr. E.D. Mi. 2012) – Rule 702 allows expert testimony if based on sufficient facts or data and is the product of reliable principles and methods. Expert can rely on facts or data that have been provided to expert or those which expert personally observed. If experts in the particular field would reasonably rely on those types of facts or data, then the underlying facts or data need not themselves be admissible for the opinion to be admitted. Court must determine whether opinion rests on reasonable foundation or is instead unsupportable speculation.

Advantage Bank v. Starr, 2012 WL 2921451 (Bankr. N.D. Ohio 2012) – Expert testimony is appropriate on any matter where the expert's knowledge will help the trier of fact to understand the evidence or determine a fact in issue. Expert testimony is not normally appropriate to offer a legal conclusion that invades the province of the Court to determine applicable law. However, Trial court has discretion to admit or exclude expert testimony that arguably contains a legal conclusion due to the difficult nature of determining whether a legal conclusion is implicated by the testimony. Proposed expert witnesses for Plaintiff in dischargeability proceeding provided reports that stated in part that, "I have been told that Mrs. Starr's representations in this regard were false, that she had previously transferred the property to a self-settled trust and gave a mortgage on the property to her ex-husband, Chris Starr, on account of an undisclosed debt. I have also been told that Advantage Bank would not have twice modified the promissory note given by Ms. Starr and would have been able to protect its interests prior to Ms. Starr's bankruptcy had Ms. Starr been truthful. ... I have been provided copies of the personal financial statements Ms. Starr provided to Advantage Bank which state that Advantage Bank was relying on the truth and accuracy of her disclosures." Reports also stated, "In my experience and in my professional opinion, it is customary for lenders such as Advantage Bank to rely on the truth and accuracy of financial disclosures concerning the ownership of borrowers' homes. The vast majority of borrowers are truthful in these disclosures. It is not customary for lenders to confirm the ownership of personal residences in personal financial statements provided by borrowers, particularly when such assets are not being taken as collateral as it costs time and money to do so. ... In my opinion, Advantage Bank's reliance on the truth and accuracy of Irene Starr's statement that she was the owner of the above described real property was reasonable and customary." Testimony admissible as it stated the opinion of the experts concerning customary practices of lenders in reviewing financial disclosures. Language did not state legal conclusion, but provided basis and reasoning for opinion that Bankr relied on representations when extending Debtor credit.

In re Creekside Senior Apartments, LP, 477 B.R. 40 (6th Cir. BAP 2012) – Federal Rule of Evidence 702 governs testimony of expert witnesses. Before allowing expert testimony, court must determine that the witness is qualified by knowledge, skill, experience, training or education; that the testimony is based on sufficient facts or data; that the testimony is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. The court must not initially determine credibility or accuracy of opinion but must only ensure that the opinion is based on reliable factual foundation and not speculation. Expert testimony must be on issue that will assist trier of fact – testimony must be sufficiently tied to facts of case and there must be 'fit' between testimony and an actual factual issue in the trial. Whether appraisal conforms to one particular standard is not factor in determining admissibility of opinion, but can be used as basis to contest reliability and weight. Use of accepted methodology but use of flawed data does not require exclusion of opinion but can be used to contest reliability and weight. To the extent that the appraiser used accepted methodology but allegedly used "extraordinary assumptions", those assumptions go to the weight of the opinion and can be used on cross-examination, but

are not a basis to exclude opinion testimony in its entirety.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court has broad discretion to exclude untimely expert witness testimony. Court should not exclude testimony unless allowing the testimony would be both unjustified and harmful, and the failure to provide the expert information earlier results in prejudice. Opinion testimony of a “non-expert” must be rationally based on perceptions of the witness, helpful to a clear understanding of the testimony, and not based on “technical knowledge” within the scope of Federal Rule of Evidence 702. Expert witness opinions are based on specialized knowledge. Affidavit of untimely disclosed expert witness was not opinion of “non-expert” where opinion related to status of title and recorded documents in the public records and was based on the witness’s lengthy experience in real estate, title, closings and escrow matters. Although the witness was also a “fact” witness and could offer factual testimony concerning the closing of the transaction itself, the witness proposed to go beyond that and offer expert testimony that had not been the subject of Rule 26 disclosures and would be prejudicial as the opposing party would not have a meaningful opportunity to prepare for rebuttal.

Nelson v. Walnut Investment Partners, L.P., 2011 WL 2711318 (S.D. Ohio 2011) – Expert testimony is admissible under Rule 702 if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The trial judge must act as a gatekeeper, admitting only that expert testimony that is relevant and reliable. Trial court must initially determine whether the reasoning or methodology used is scientifically valid and is properly applied to the facts at issue in the trial, considering: 1) whether the scientific knowledge can or has been tested; 2) whether the given theory or technique has been published or been the subject of peer review; 3) whether a known rate of error exists; and 4) whether the theory enjoys general acceptance in the particular field. Admissibility does not depend on the correctness of the expert’s conclusions but the soundness of his methodology. Opinion of business valuation expert was admissible where expert was provided with extensive written materials. Although expert did not speak with the owner or visit the physical location of the property, these matters went to the credibility, rather than the admissibility, of the report.

Hall v. Huntington National Bank, 2011 WL 1135955 (N.D. Ohio 2011) – Bankruptcy Court properly permitted expert to testify although party proffering expert failed to fully comply with Federal Rule 26(a)(2) regarding pre-trial disclosures. Party provided notice that expert witness would be called and provided a preliminary judicial report, in compliance with an order of the Bankruptcy Court, that it would use as an exhibit at the evidentiary hearing and provided opponent with full opportunity to *voir dire* the witness regarding qualifications before permitting expert to testify. Any omissions, such as the failure to provide information on his prior opinion testimony, were not prejudicial, since they would not have been beneficial to opposing counsel or helpful to the court. Potential financial interest of expert in outcome of case goes to weight of evidence and credibility of witness and not admissibility *vel non*.

In re Gainey Corporation, Case No. GG 08-09092 (Bankr. W.D. Mi. 2008) - Bankruptcy Court can, on its own initiative, appoint an expert witness pursuant to Federal Rule of Evidence 706(a). Retained expert would not be appointed as a professional for either the Debtor or any specific creditor, although expert could be appointed as expert for Creditors Committee on request of that Committee where possible future retention could benefit the estate and assist in administration and eliminate delay and expense. Expert witness fees would be paid pursuant to Federal Rule of Evidence 706 and would be borne by Debtor and can use cash collateral for that purpose.

12.119 Trade Secrets

In re Deliverance Christian Church, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Trade Secrets are generally defined as any information on scientific or technical information, method, or business information or plans that derive independent economic value from not being generally known or generally ascertainable and that are subject to reasonable efforts to maintain secrecy. Financial summary information is not generally regarded as trade secret. Further, debtor previously provided lender with similar information in similar format without objection, indicating a lack of efforts to maintain secrecy.

In re Waring, 406 BR 763 (Bankr. N.D. Ohio 2009) - Court is required to protect trade secrets, confidential research and development, or commercial information, although Court has discretion to determine what type of protection is required. “Trade Secret” is process or device for continuous use in the operation of the business such as procedures related to the sale of goods or to other operations in the business. Factors include: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of money or effort which was expended to develop the information; and (6) the ease or difficulty by which the information could be acquired or duplicated by others. “Commercial Information” is information that is so critical to an entity’s operations that disclosing the information will unfairly benefit that entity’s competitors.

12.120 11 USC Section 107(b)

In re Deliverance Christian Church, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Section 107 does not create any independent basis for a privilege, but establishes a framework within which a privilege can be asserted as to any matter to be filed with a court. Party cannot use Section 107 to oppose discovery request as discovery materials are not ordinarily filed with the Court and so are not open to public review. Further, creditor’s proposed protective order, which precluded filing or disclosure of information to third parties, would cure any possible opposition to discovery under Section 107.

12.121 Constitutional Limitations on Discovery

In re Deliverance Christian Church, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – First Amendment requires higher level of scrutiny before discovery will be ordered from a religious institution to ensure proper balance of First Amendment rights with need for information. Party from whom discovery is sought must first present prima facie case of entitlement to First Amendment privilege by demonstrating that the discovery information would impinge on some protected aspect of the organization's activities. Church met burden of showing that compelled disclosure of membership lists and private information of donors including addresses, social security numbers, and amounts given, would have chilling effect on relationship with membership and giving, and impinges in the privacy right that goes hand in hand with free association. Creditor demonstrated need for financial information in summary form, but did not demonstrate compelling need for personal information including donor names and addresses. Debtor proposed reasonable solution to disclose information but to replace personally identifying information with unique number for each donor, which allows Creditor to review financial information without unnecessarily disclosing personal information or impinging on First Amendment rights.

12.122 Hearsay – Government Report

In re Second Chance Body Armor, Inc., Case No. GT 04-12515 (Bankr. W.D. Mi. 2010) – Government reports investigating alleged defects in bullet proof vests were admissible under Federal Rule of Evidence 803(8) in litigation against supplier of materials. The report contained only factual findings based on two phases of testing and did not include “subjective feelings and beliefs of individual scientists”. Defendant failed to demonstrate that the report was not “trustworthy”. Factors to consider in determining “trustworthiness” include (1) timeliness of the investigation; (2) the investigator's skill and experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view toward possible litigation. Court concluded that the reports were trustworthy where the reports were prepared at the direction of the United States Attorney General shortly after potential defects in the vests were disclosed and the investigations were performed by persons with a high level of skill and experience. The reports were prepared to inform law enforcement personnel about potential safety related issues and not in anticipation of future litigation.

12.123 Subsequent Remedial Measures

In re Second Chance Body Armor, Inc., Case No. GT 04-12515 (Bankr. W.D. Mi. 2010) – Federal Rule of Evidence 407 normally bars evidence of subsequent remedial measures following an “event” that causes injury. Rule 407 does not apply outside of a specific accident or occurrence. Action did not involve claim for personal injury or wrongful death. Instead, action was one for breach of contract for sale and delivery of defective materials. Defendant's study designed to create a new product was not a subsequent measure intended to address the problems with prior products. Further, the information involved testing and discussions by Defendants' scientists and did not involve any actual modifications to design or manufacture. Rule 407 prohibits evidence of subsequent remedial measures, not evidence of a party's analysis of its own product.

12.124 Parol Evidence Rule

Gordon v. Wehrle, 2010 SL 3835223 (N.D. Ohio 2010) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Parties stipulated that underlying agreement was unambiguous, rendering parol evidence of meaning of agreement inadmissible.

Lund v. Jevne, Case No. 08-56655 (9th Cir. 2009) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Prior to bankruptcy, debtor signed promissory note promising to repay debt with interest. Debtor precluded from later introducing evidence that payee orally promised that he would not sue on the outstanding debt and would only use the 2001 agreement for purposes of obtaining a tax deduction. The parol evidence rule bars introduction of prior or contemporaneous oral representations that contradict integrated terms of a written agreement. Where fraud claim is based on alleged false promises that are excluded by parol evidence rule, evidence of the contrary terms is irrelevant as a matter of law. Fraud action cannot be based on alleged fraudulent promise not to sue that is inconsistent with written terms of agreement itself.

12.125 Judicial Notice

Buchanan v. Pilgrim's Pride Corp., 2011 WL 3047333 (E.D. Tn. 2011) - Court may take judicial notice of proceedings in other courts, including the related bankruptcy matter.

12.126 Waiver – Inadvertent Disclosure

Samaritan Alliance, LLC v. Commonwealth of Kentucky, 2013 WL 653624 (Bankr. E.D. Ky. 2013) – Federal Rule of Evidence 502 provides that disclosure of an otherwise privileged document does not waive the privilege if the disclosure is inadvertent; holder of privilege took reasonable steps to prevent disclosure; and holder promptly took reasonable steps to rectify error. Party failed to demonstrate any reasonable steps to prevent or rectify disclosure of e-mails. Party acted too slowly where party waited more than 20 days after being notified of disclosure of potentially privileged e-mails and until a day after the e-mails were used in a deposition before making any objection or request for return of the documents, and party did not lodge objection to use of e-mails at the deposition. Disclosure is more likely to be inadvertent where disclosure involves large number of documents. Here, total number of pages produced was only 645, which

was not so large as to prevent adequate review before production. Content of e-mails was central to issue, which imposed heightened duty to review – disclosure of such important documents suggests that party waived any privilege that may have attached.

Z. Discovery

12.127 Generally

In re Merena, Case No. 08-1342 (9th Cir. BAP 2009) – Defendant who failed to take discovery for over six months while adversary proceeding was pending would not be granted continuance or delay of trial to prepare. Party never sought to compel discovery and adversary proceeding had waited until either the trial before requesting continuance. Party was aware from entry of scheduling order a trial would occur approximately 4 months later. Party's failure to diligently pursue discovery does not constitute grounds to request an adjournment of the scheduled trial.

12.128 Motion for Leave to Take Discovery

In re Innatech, LLC., Case No. 10-49380 (Bankr. E.D. Mi. 2010) – Plaintiff's Ex Parte Emergency Motion for Leave to Take Discovery denied where Motion failed to state anything specific about what subject matter party sought discovery on, preventing Court from properly assessing party's need for discovery.

12.129 Depositions

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Motion to Adjourn Deposition denied where pattern of conduct indicated lack of good faith in participating in the discovery process. Plaintiff failed to advise Defendant of alleged scheduling issues when the notices of deposition were received, causing Defendant to prepare for the depositions on the assumption that they would be proceedings as noticed. Plaintiff advised Defendant that after 5:00 in the afternoon that Plaintiff would not be attending depositions set for following date. When Defendant rescheduled the depositions for a week later, Plaintiff filed a Motion to Adjourn those deposition one day before the re-scheduled date.

12.130 Request for Admissions

Oak Street Funding, LLC v. Blair, 2013 WL 2154795 (Bankr. E.D. Tn. 2013) – Defendant who failed to respond to Request for Admissions within 30 days of service and who failed to request extension of time to respond would be deemed to have admitted all matters requested and those items would be conclusively determined for purposes of consideration of motion for summary judgment.

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Responses to requests for admissions must be forthright, specific and unconditional. Responding party can assert lack of knowledge only after making reasonable inquiry. Party's failure to admit or deny actions allegedly taken by party's own attorney, and instead assertion that party did not know what their attorney did, failed to indicate a reasonable inquiry. Responses indicated lack of good faith and indicated that party made little or no effort to properly respond. Court deemed Requests for Admission to be deemed admitted pursuant to Rule 36.

GATX Corp. v. Appalachian Fuels, LLC, 2010 WL 5067688 (E.D. Ky. 2010) – Party to whom Request for Admissions is directed can assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. Answers to Request for Admissions that stated that the party made a reasonable inquiry regarding the subject matter of the request for admission, and the information that the party has, or can readily obtain, was insufficient for it to answer the request conforms with Rule 36.

12.131 Interrogatories

Bank of America v. Killgrove, Adv. No. 11-6687 (Bankr. E.D. Mi. 2012) – An interrogatory is not objectionable merely because it asks for opinions or contentions that relate to application of law to fact. However, an interrogatory that asks solely for case citations is not within scope of rule. Answers must not be evasive or incomplete. Interrogatory seeking valuation of relevant assets is permissible. Motion to Compel granted to extent that answers failed to contain the substance required under Rule 36(a)(4).

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Each interrogatory must, to the extent not objected to, be responded to separately and fully in writing. Party responding is not generally required to conduct extensive research but must make reasonable effort to respond. Responses that stated “unknown” and “unknown at this time” were insufficient as the responses were not fully and complete and there was no indication that party made reasonable effort to respond.

GATX Corp. v. Appalachian Fuels, LLC, 2010 WL 5067688 (E.D. Ky. 2010) – Federal Rule of Civil Procedure 33 states that an interrogatory may relate to any matter that is relevant and nonprivileged. The party upon whom interrogatories are served must answer each interrogatory separately and fully. Party did not properly respond to interrogatory that stated “If you stated that you lack sufficient information to either admit or deny any Request for Admission served upon you ... then for each Request to which you gave such a response please describe in detail your method and scope of inquiry into its subject matter and describe in detail all information that is known or readily obtainable by you” by responding that the party “made a thorough search of its files and records. Plaintiff also made inquiries of former and current employees of both GATX and GE Capital Corporation. Plaintiff has propounded discovery requests upon

Larry Addington in an attempt to gain information regarding the subject matter of this request. At the time Plaintiff answered this request, Addington had been uncooperative and almost completely unresponsive to Plaintiff's discovery. All information that was known or readily obtainable by Plaintiff at the time of its answer to these requests was provided to Defendant in Plaintiff's response to discovery. Discovery is not complete on the subject matters of these requests." Responding party must provide details of party's attempt to comply with Rule 36 and identify any documents it has disclosed during discovery that may be responsive to the interrogatory.

12.132 Requests for Admissions

Bank of America v. Killgrove, Adv. No. 11-6687 (Bankr. E.D. Mi. 2012) – Party may not decline to admit or deny based on alleged lack of knowledge unless the party also states that the party made reasonable inquiry and that the information it knows or can readily obtain is insufficient to admit or deny. Defendant's response failed to include this statement. Court would grant Motion to Compel defendant to reply.

12.133 Protective Orders

Samaritan Alliance, LLC v. Commonwealth of Kentucky, 2013 WL 653624 (Bankr. E.D. Ky. 2013) – Court can, for good cause, issue order to protect party from annoyance, embarrassment, oppression, or undue burden or expense, and may forbid inquiry or limit scope of disclosure to certain matters. Party failed to show good cause why protective order should be granted where motion alleges only that party is concerned about questions that may be asked at a future deposition. Party failed to provide any information that may establish either that the inquiry would invade any privilege or otherwise be burdensome or oppressive.

In re Munaco, Case No. 11-69588 (Bankr. E.D. Mi. 2012) – Although styled Motion for Protective Order, Motion actually sought declaratory relief that Trustee does not have grounds to object to discharge. Relief requested was premature as Trustee had not filed nor indicated that Trustee intended to file any adversary proceeding. If Trustee files an adversary, Debtor will have the full opportunity to defend. Trustee did not have pending any motion to compel discovery or to seek any sanctions against debtor.

In re Elkins, 2012 WL 1981787 (Bankr. N.D. Ohio 2012) – Federal Rule of Civil Procedure 26, incorporated by reference in Federal Rule of Bankruptcy Procedure 7026, allows court to enter protective order to protect party or person from embarrassment, annoyance, oppression, or undue burden or expense. Party seeking protective order in response to discovery request must articulate specific facts showing a clearly defined and serious injury resulting from the discovery sought. Potential for annoyance, embarrassment, oppression or undue burden must be illustrated with a particular and specific demonstration of fact rather than just stereotyped or conclusory allegations. United States issued subpoena to non-party. Person from whom discovery was requested failed to demonstrate any basis for protective order that would have precluded United States from turning over information gained to any other law enforcement agency for legitimate law enforcement purposes. Party could not demonstrate any potential injury if the documents indicate a potential criminal violation and are then turned over to law enforcement agencies for further investigation.

12.134 Motion to Compel

In re McInerney, 2012 WL 2974660 (Bankr. E.D. Mi. 2012) – Debtor in Chapter 11 case failed to comply with discovery requests directed to Debtor's ability to confirm and then to consummate a Chapter 11 plan. Debtor refused to answer questions at a Rule 2004 exam regarding debtor's sources of consulting income and failed to respond to questions regarding Debtor's prospects for future employment which was essential to debtor's ability to fund Chapter 11 plan. Debtor stated only that debtor was "uncomfortable" discussing employment prospects as those had not been finalized. Debtor disclosed for the first time at the hearing on sanctions that debtor had located employment and signed consulting agreement, although debtor did not disclose this consulting agreement at the Rule 2004 exam taken only 8 days earlier. Debtor's claim that any discussion of possible employment would have been speculative was not legal basis to refuse to answer questions. Debtor should have testified openly and honestly about possible prospects and to the extent prospects were speculative or unsettled, debtor could have explained that in his testimony.

Silagy v. Pachan, 2010 WL 4286218 (Bankr. N.D. Ohio 2010) - Before considering a motion to compel, the court requires sincere effort to resolve the dispute without court intervention. Plaintiff made satisfactory efforts where Plaintiff sent repeated communications to Defendant but Defendant refused to communicate. Order compelling discovery warranted where Defendant responded to the requests only after Plaintiff filed a motion to compel, Defendant offered no explanation for her failure to timely respond to the discovery, nor is an explanation given for her failure to communicate with Plaintiff. It appears the motion to compel was the catalyst for the discovery responses. Defendant failed to timely respond to the discovery requests without substantial justification. Defendant instructed to provide appropriate verification of discovery responses. Defendant's failure to timely respond to Plaintiff's request for admissions results in requested items being deemed admitted.

Rhiel v. Hook, 2009 WL 2182594 (Bankr. S.D. Ohio 2009) – Party not entitled to compel discovery where party has failed to make good faith effort to resolve dispute before seeking intervention of Court. Motion to Compel must certify that party has in good faith conferred or attempted to confer with opposing party and must state who, where, how and when the parties attempted to resolve the dispute. Certification that made only general allegations without specifics did not constitute certification of "good faith effort". Letter that "demanded" compliance not good faith effort to resolve dispute but was threat to seek judicial involvement if opposing party did not accede to movant's demands.

First Mutual Bank v. Burkett, Adv. No. 09-4130 (Bankr. E.D. Mi. 2009) - Motion to Compel Response to Discovery denied where

discovery not served until after deadline set forth in Court's Adversary Proceeding Scheduling Order. Defendant failed to demonstrate good cause as required to amend or modify Scheduling Order.

In re Johnson, 408 B.R. 115 (Bankr. S.D. Ohio 2009) - Movant did not satisfy "conferment" or "good faith" requirements for motion to compel discovery from plaintiff Chapter 7 trustee.

12.135 Sanctions

Bash v. Osler, 2013 WL 592110 (N.D. Ohio 2013) – Striking defenses and entry of final judgment against defendant warranted by defendant's ongoing failure to cooperate with discovery. Defendant had previously been sanctioned for litany of discovery related non-compliance including failure to respond when due, incomplete responses, and filing to respond to Motion to Compel Discovery. Defendant failed to purge as allowed by prior order and continued to fail to comply notwithstanding warning by the court that continued failure to comply could lead to entry of judgment by default. In assessing sanctions courts consider four factors: (a) whether failure to cooperate in discovery is due to willfulness, bad faith or fault, (b) whether adversary was prejudiced by party's failure to cooperate in discovery, (c) whether party was warned that failure to cooperate could lead to sanction, and (4) whether less drastic sanctions were imposed or considered before dismissal or default was ordered. Discovery conduct is willful when there is a conscious disregard and intentional failure to comply. Based on earlier sanction order and repeated admonitions by court, defendant's conduct was clearly willful and intentionally disregarded obligations. Ultimate sanction appropriate where discovery defaults rendered prosecution of the action an impossibility and defendants have had more than one full year to cooperate. Warning was given repeatedly that default judgment may be possible for continued non-compliance. Lesser sanctions would not be availing given defendant's repeated disregard of prior orders and warnings.

Bakdaleyeh v. Warpup, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Court can enter any order that the court deems appropriate to deal with party's failure to make disclosures or comply with discovery. Although court can dismiss case where plaintiff fails to comply, court should not immediately go to drastic and harsh remedies unless it appears that those remedies are necessary or that less severe sanctions would not induce compliance. Case presented relatively straightforward question of violation of Michigan Builders Trust Fund Act. Plaintiff ordered to produce all documents intended to be utilized at trial and to respond to all outstanding discovery requests within 14 days, with defendant to have additional 42 days to complete discovery.

In re McInerney, Case No. 11-58953 (Bankr. E.D. Mi. 2012) – In determining sanctions, court must determine whether party's failure to comply with discovery rules is due to willfulness, bad faith or fault; whether the adversary was prejudiced; whether the party was warned that failure to comply could lead to dispositive relief such as dismissal; and whether less drastic sanctions were imposed or considered before dispositive relief is ordered. Debtor's refusal to provide discovery was conscious and intentional, where debtor refused to testify about future employment prospects without legal basis to object, and based solely on debtor's belief that the prospects were speculative. Information was essential to confirmability of debtor's chapter 11 plan. Creditor was clearly prejudiced as creditor was not able to prepare for contested hearing on confirmation of debtor's Chapter 11 plan and had debtor been permitted to testify as to new employment, creditor would have been surprised and would have had no opportunity to investigate. Adequate relief can be granted short of dispositive order by giving creditor additional opportunity to obtain full discovery of debtor's future consulting and employment prospects including an additional Rule 2004 exam at which debtor will fully answer all questions. Court would also require debtor to reimburse creditor's attorney fees incurred because of Debtor's failure to provide discovery.

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1966285 (Bankr. N.D. Ohio 2012) – Federal Rule of Civil Procedure 37, incorporated by reference in Federal Rule of Bankruptcy Procedure 7037, provides that if a party fails to provide information as required by Rule 26(a), party shall not be allowed to use that information as evidence on motion, hearing or trial unless failure was either harmless or substantially justified. Court entered order requiring defendant to provide computation or documentation of damages by date specific, failing which court would entertain motion in limine to exclude evidence. Where party fails to appear for deposition, court can also award reasonable fees and expenses of other party associated with the deposition. Party had pattern of non-responding and stalling during discovery process, forcing opposing party to file numerous pleadings that would have been unnecessary had party complied with discovery requests, causing prejudice to opposing party and unnecessarily delaying and prolonging litigation.

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Sanctions were appropriate based on party's lack of good faith in the discovery process. Party failed to answer majority of discovery requests. Requests were not burdensome, did not require an unreasonable amount of time to answer, and constitute basic, normal discovery requests. Sanctions included fees and costs in an amount to be determined after submission of records to detail the reasonable legal fees and costs that are directly attributable to the motion to compel.

Melody v. Bank of America, 2012 WL 1155704 (Bankr. N.D. Ohio 2012) - Attorney who failed to make good faith responses to discovery requests sanctioned under Federal Rule of Civil Procedure 37. Attorney filed standard response to multiple interrogatories, requests for production of documents, and request for admissions merely stating "This request is vague, ambiguous, and overly broad and burdensome; requests irrelevant, immaterial or inadmissible information or information protected by privilege and/or contains questions in violation of law, rule or regulation." Attorney later acknowledged in response to inquiry from court that attorney "used boilerplate language in all of these objections, which language did not, in fact, apply to this case. ... [Attorney] inserted the admittedly inapplicable boilerplate and intended to supplement the answers when she got more information." Show Cause Order dissolved based on Attorney's representation that Attorney will no longer handle discovery requests in this matter.

Sequatchie Mountain Creditors v. Detweiler, 2011 WL 2650591 (Bankr. N.D. Ohio 2011) – Court would not dismiss case for failure of plaintiff to comply with discovery rules. Although Plaintiff was more than one year late in responding, Defendant did acknowledge that Plaintiff ultimately had complied. Court would impose sanctions in the form of attorney fees and expenses incurred by Defendant in effort to obtain discovery and filing Motion to Compel.

Rhiel v. Hook, 2009 WL 2182608 (Bankr. S.D. Ohio 2009) – Sanctions imposed against party who failed to appear for deposition. Failure to attend is not excused unless party has filed Motion for Protective Order within reasonable time. Motion for Protective Order filed 2 hours prior to scheduled commencement of deposition did not excuse party's obligation to appear or prevent award of sanctions where party had notice of deposition for more than one month yet failed to timely raise any objection to the deposition. Party would be required to pay Trustee's costs and expenses directly attributable to party's failure to appear.

In re Johnson, 408 B.R. 127 (Bankr. S.D. Ohio 2009). Defendant's last minute filing of motion for protective order did not excuse failure to attend deposition to be held by Chapter 7 trustee that had been noticed and scheduled.

AA. Pre-trial Disclosures

12.136 Generally

Norris v. First Federal Savings & Loan of Lorain, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Rule 26 requires that party must provide a computation of damages claimed by the disclosing party. Plaintiff failed to make a sufficient disclosure where complaint sought \$5,000 in damages and supplemental discovery responses indicated damages of \$4,500 but failed to include the computation of those damages as required by Rule 26.

12.137 Failure to Make

Tribble v. Michigan Protein, Inc., Case No. 12-80339 (Bankr. W.D. Mi. 2013) – Rule 26 requires party to disclose names and contact information of each person likely to have discoverable information that the disclosing party may use to support claims or defenses, and must make that disclosure even without request by opposing party. Plaintiff did not disclose witnesses either in Rule 26 disclosure or in responses to interrogatories, or in any other manner until Plaintiff filed affidavits of witnesses in response to Motion for Summary Judgment filed more than a month after discovery cutoff. Rule 37 states that party who fails to disclose information or witnesses is precluded from using information or witness in connection with motion or trial unless the court finds that failure to disclose was harmless or substantially justified. Plaintiff knew of likelihood that he would need omitted witnesses to make prima facie case, and opposing party was prejudiced by failure to disclose as failure deprived defendant of opportunity to offer best possible articulation of summary judgment argument. However, sanction of witness preclusion would be too harsh where case had not yet been set for hearing and court could obviate harm by reopening discovery as to the two omitted witnesses. Court would consider at later date possible monetary sanctions to extent defendant could demonstrate expenses and costs that would not have been incurred had disclosures been made in timely manner.

In re McNerney, Case No. 11-58953 (Bankr. E.D. Mi. 2012) – Debtor failed to produce witness or exhibit lists or produce exhibits in advance of hearing on confirmation of plan. In fashioning remedy, Court must consider whether party's failure to comply with discovery rules is due to willfulness, bad faith or fault; whether the adversary was prejudiced; whether the party was warned that failure to comply could lead to dispositive relief such as dismissal; and whether less drastic sanctions were imposed or considered before entering sanctions in form of dispositive order. Court could fashion effective remedy by adjourning confirmation hearing with express warning that failure to serve witness list, exhibit list or exhibit copies by new deadline could result in additional sanctions including dismissal or conversion of case.

BB. Summary Judgment

12.138 Timing of Motion

Swanigan v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court.

Ferguson Enterprises, Inc., v. Hardy, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. However, Court retains considerable control over the timing of Motions and can deny a Motion where the opposing party has not been afforded a meaningful opportunity for discovery and entry of a judgment at that early stage may be hasty and ill-considered. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.

Sher v. Dunbar, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Motion to Dismiss adversary proceeding which reached beyond the four corners of complaint and relied on motion papers and transcripts of proceedings on a prior motion would be treated as a Motion for Summary Judgment under Federal Rule 56.

Fox Brothers Company v. Slaney, Adv. No. 08-4378 (Bankr. E.D. Mi. 2008) – Motion for Summary Judgment filed after deadline for filing dispositive motions in the Adversary Proceeding Scheduling Order denied as untimely.

Allard v. Flannigan, Adv. No. 08-4348 (Bankr. E.D. Mi. 2008) - Motion for Summary Judgment erroneously filed in main case (instead of adversary proceeding) on last day for filing dispositive motions would be treated as timely filed. Motion to Strike Motion for Summary Judgment as Untimely denied.

SCS General Contractors, Inc. v. Wells Fargo Bank, Case Nos. 08-8096 and 08-8097 (6th Cir. BAP 2009) – Court should not consider or grant summary judgment where the non-moving party has not been afforded a sufficient opportunity for discovery. Court must inquire as to (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the discovery would have changed the ruling below; (3) how long the discovery period lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests. The Bankruptcy Court did not abuse its discretion in denying Creditor’s request for additional time to respond to the Motion where Creditor did not propound any discovery until nine months after the adversary proceeding was initiated and Creditor failed to demonstrate how the information it sought was material to the motion for summary judgment or how it would change the outcome of the ruling below.

12.139 In Favor of Non-Moving Party

Bowers v. Rogers, 2012 WL 3929813 (Bankr. S.D. Ohio 2012) – Court can grant summary judgment to non-movant if court provides other party with notice and reasonable opportunity to respond. Court should not grant summary judgment sua sponte. Bankruptcy court erred in granting summary judgment to non-moving party with no prior notice or opportunity of other party to respond, and where there appeared to be number of issues regarding claim for conversion and extent of damages. Question of law remained as to whether real property could even be the subject of conversion.

Cornwell Quality Tools Company v. Paavo, Case No. 11-10831 (E.D. Mi. 2011) – Court can *sua sponte* grant summary judgment to party who has not filed Motion when done in response to Motion filed by other party. Moving party had full notice and opportunity to argue why summary judgment should be granted in its favor and suffered no prejudice from Court’s conclusion, based on merits presented by both parties, that summary judgment in favor of non-moving party was warranted.

McTevia & Assoc. LLC v. United States Debt Recovery III, L.P., 446 BR 808 (E.D. Mi. 2011) – Where one party moved for summary judgment, Court could not enter summary judgment in favor of opposing party absent a timely filed cross-motion. Party against whom summary judgment is to be entered is entitled to notice and opportunity to come forward with evidence in response to motion.

12.140 Burden of Proof

D.T. McCall & Sons v. Martelle, 2012 WL 1833906 (Bankr. E.D. Tn. 2012) – Although Local Rules require non-moving party to respond to motion for summary judgment, Court must still consider merits of motion even in the absence of a response.

POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc., Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment must prove that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Summary Judgment denied where each party filed affidavits that were conflicting as to material issues, leaving court unable to conclude that party was entitled to judgment.

Rogan v. Citimortgage, Inc., 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Only disputes over facts which might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.

Swanigan v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court. Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Hearsay evidence may not be considered on a motion for summary judgment, but evidence need not be in a form that would be admissible at trial. The evidence and justifiable inferences based on facts must be viewed in a light most favorable to the nonmoving party. Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Once a properly supported motion for summary judgment has been made, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must be by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial. A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. To avoid summary judgment, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.

Russell v. U.S., 2010 WL 2545182 (Bankr. N.D. Ohio 2010) - Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All inferences must be viewed in the light most favorable to the party opposing the motion. Party moving for summary judgment always bears initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits if any which it believes demonstrate the absence of a genuine issue of material fact. Where the moving party has met its initial burden, the adverse party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable fact finder could find in favor of the nonmoving party.

Himmelspach v. Hunter, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Summary Judgment is appropriate where party fails to establish an essential element of that party's case and on which that party bears the burden of proof at trial. Moving party must inform the court of the basis of the motion and identify those portions of the record that establish the absence of a material fact. Once movant does that, non-moving party must come forward with specific facts showing a genuine issue of material fact. While all inferences will be drawn in favor of non-moving party, non-moving party must present sufficient evidence to support a jury finding in his favor; a mere scintilla of evidence is not sufficient.

All Points Capital Corp. v. City of Cheyboygan, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden to demonstrate the absence of a genuine issue of material fact as to an essential element of non-moving party's case which may be met by pointing out that non-moving party, having had sufficient time for discovery, has no evidence to support an essential element of the case. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. Non-moving party must present affirmative evidence to defeat a properly supported motion and cannot merely hope that the trier of fact will disbelieve the movant's denial of a material fact. Trial Court does not have the duty to search the entire record to determine whether material fact exists or not. Cases involving state of mind are not necessarily inappropriate for summary judgment.

State of Michigan v. Turner, Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden of proof, and the Court must construe evidence and draw all reasonable inferences in favor of non-moving party. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. A "genuine" issue is one where a reasonable jury could return a verdict for the non-moving party.

Hagan v. Goldstein, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Defendant who was alleged hospitalized when the Motion for Summary Judgment was filed and claimed that hospitalization left her unable to respond to the Motion for Summary Judgment has burden to file affidavit or submit other proof to explain why Defendant is unable to respond. Defendant cannot simply ignore the Motion, let Judgment be entered, and then seek reconsideration based on hospitalization that was known, but not brought to the Court's attention, prior to entry of the judgment.

Double v. Cole, Case 08-3371 (Bankr. N.D. Ohio 2009) – A party will prevail on a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The moving party must demonstrate all the elements of the cause of action and the Court is directed to view all the facts in a light most favorable to the party opposing the motion. Determinations concerning a debtor's culpable state of mind are usually not appropriate on motions for summary judgment as it deprives the trier-of-fact of the opportunity to assess the debtor's credibility. Summary judgment may be appropriate where purely legal issues are involved.

Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.), 426 B.R. 282 (Bankr. S.D. Ohio 2009) - Summary judgment is appropriate where pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Court views the evidence, all facts, and any inferences drawn therefrom, in the light most favorable to the nonmoving party. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Court may also enter interlocutory summary judgment on liability alone, even if there is a genuine issue on the amount of damages. Party opposing Summary Judgment may not rely merely on allegations or denials in pleading but must set out specific facts showing a genuine issue for trial. If party opposing Motion alleges specific reasons why it cannot present facts essential to justify its opposition, the court may (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order. The party must show that postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.

Ferguson Enterprises, Inc., v. Hardy, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. Normally, when a moving party, through affidavits or other admissible evidence, establishes a lack of genuine issue of material fact, the non-moving party must present competent evidence to establish the existence of an issue. However, where the Motion is filed at the earliest stage of litigation and the opposing party has not been afforded a meaningful opportunity for discovery the Court can deny the Motion if the non-moving party can demonstrate some reason to

believe that discovery would establish the existence of material facts in dispute. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.

Nehasil v. Grenier, Case No. 09-14011 (E.D. Mi. 2010) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Summary judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must construe evidence and draw all reasonable inferences in favor of non-moving party.

Murawski v. Campbell, Case No. 08-3178 (Bankr. E.D. Mi. 2010) - The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Moving party must inform the Court of the basis of its motion and identify those portions of the record that establish the absence of a material issue of fact. Once the movant fulfills this responsibility, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. This requires the non-moving party to do more than simply show that there is some metaphysical doubt as to the material facts. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. To demonstrate a genuine issue, the non-moving party must present sufficient evidence upon which a jury could reasonably find for the non-movant; a scintilla of evidence is insufficient. A material fact is one that would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of an appropriate principle of law to the rights and obligations of the parties. The court must believe the non-movant's evidence and draw "all justifiable inferences" in her favor.

Dalvit v. United Airlines, Inc., Case No. 08-1283 (10th Cir. 2009) – Summary judgment is appropriate if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Court must examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' Affidavits submitted in support of Motion for Summary Judgment must be limited to information what would be admissible at trial. Affidavits that are replete with inadmissible hearsay and speculation, were cumulative and contained conclusory, unsubstantiated statements would be stricken. If portions of an affidavit are otherwise admissible, Court will disregard inadmissible portions and consider balance of affidavit.

Tomlin v. Cronover, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – The motion for summary judgment requires the court to view the evidence in the light most favorable to the debtor. The court can grant summary judgment only if it determines that there is no genuine issue as to any material fact, and based on the undisputed facts, the law entitles the plaintiffs to judgment in their favor. The movants have the burden of proving there is no genuine issue of material fact to be decided by a trial.

Clark v. Walt Disney Co., 664 F. Supp. 2d 861 (S.D. Ohio 2009) – Summary judgment should be cautiously invoked, and only where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. It must be quite clear what the truth is and that no genuine issue remains for trial. Summary Judgment is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. The court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury. Moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law. All the evidence and facts, as well as inferences to be drawn from the underlying facts, must be considered in the light most favorable to the party opposing the motion. Any "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. A "material" fact is one that "would establish or refute one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of the appropriate principle of law to the rights and obligations of the parties. An issue of material fact is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Once the moving party meets its burden, and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. The nonmoving party must demonstrate that there is a genuine issue for trial. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Lewis v. Negri Bossi USA, Inc. 423 BR 643 (E.D. Mi. 2010) - Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has an initial burden of showing the absence of a genuine issue of material fact. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

Kerr v. Hurd, 2009 WL 2824556 (S.D. Ohio 2009) – Party seeking Summary Judgment must demonstrate that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law based on the pleadings, depositions, answers to

interrogatories, admissions on file and affidavits. The existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment – the requirement is that there be no *genuine* issue of *material* fact. A fact is “material” if its resolution affects the outcome of the lawsuit. An issue is “genuine” if a reasonable jury could return a verdict for the nonmoving party. All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party. The Judge must not weigh the evidence or determine the truth of the matter, but must determine only whether there is a genuine issue for trial. Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.

Swope v. Scott, 2009 WL 2877080 (Bankr. N.D. Ohio 2009) – Discharge will be revoked pursuant to Section 727(a)(3) where Debtor fails to obey a lawful order of the court, other than an order to respond to a material question or to testify. Court ordered Debtor to account for tax refund that Debtor improperly retained by paying Trustee \$1,535.78 per month for 10 months. Debtor allegedly paid only \$100.00. However, Trustee failed to accompany Motion for Summary Judgment with any affidavit or other evidence to support allegations. Motion for Summary Judgment denied without prejudice.

12.141 Failure to Respond to Motion

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Party who fails to respond to well supported motion for summary judgment waives right to object to entry of judgment. Failure to respond, standing alone, is sufficient for entry of judgment in favor of moving party.

12.142 Affidavits – Requirements

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Affidavit in support of or opposition to summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify. Affidavit that does not satisfy these requirements may be stricken by the court.

Kaylor v. Holsinger, 437 BR 260 (Bankr. S.D. Ohio 2010) - Affidavits used to support or oppose a motion for summary judgment must meet three requisite elements. The affidavit must (1) be made on personal knowledge, (2) set out facts that would be admissible in evidence, and (3) show that the affiant is competent to testify on the matters stated. Personal knowledge must be the basis for any facts or statements contained in the affidavit and may be inferred from the content of the affidavit, if no express basis for the knowledge is given. However, any statements based only on information communicated to the affiant or on a personal belief of the affiant, even if sincerely held, are not considered personal knowledge. Any statement not made solely on personal observations, experience, or factual knowledge is not admissible in an affidavit. Party may not attempt to create a genuine issue of material fact after a motion for summary judgment has been filed by submitting an affidavit which contradicts earlier deposition testimony. Factors the court should employ to determine the existence of a sham factual issue include: whether the affiant was cross-examined during the earlier testimony, whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Portions of an affidavit that explain or reveal information that was not fully explored during earlier testimony are not directly contradictory to the earlier testimony. Affidavit does not contain any new information discovered after the deposition testimony was given, it merely explains or explores the effect of Defendants' verbal communication on the Plaintiff more fully than the deposition testimony.

12.143 Affidavits – Motion to Strike

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Affidavit in support of or opposition to summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify. Affidavit that does not satisfy these requirements may be stricken by the court.

Kaylor v. Holsinger, 2010 WL 3789832 (Bankr. S.D. Ohio 2010) - Affidavits must (1) be made on personal knowledge, (2) set out facts that would be admissible in evidence, and (3) show that the affiant is competent to testify on the matters stated. Affidavit that does not meet the requirements is subject to a motion to strike the affidavit. Movant seeking to strike affidavit must specify which statements are inadmissible and set forth specific reasons for the inadmissibility. If portions of an affidavit are sufficient, court will not strike entire affidavit, but will strike only the non-conforming portions and will consider only the admissible portions of the affidavit in ruling on the underlying matter. Statements that are speculative and unreliable are inadmissible. Redundancy is not an applicable reason to strike an affidavit that do not contain speculation or impermissible legal conclusions. Opinions or inferences that are unsupported by personal knowledge or observation of the Plaintiff and cannot be rationally based on any perception of the Plaintiff and Plaintiff's own inferences and conclusions regarding circumstantial evidence are in fact legal conclusions that go impermissibly beyond attempting to offer a clear understanding of the witness' testimony or assist with the determination of a fact in issue, and instead attempt to determine the legal issues of this case. Portions of the Plaintiff's Affidavit which constitute speculation not rationally based on the perception of the Plaintiff or legal conclusions not helpful to a clear understanding or factual determination may be stricken.

12.144 Presentation of Record

In re Kabbara, 2010 WL 3430497 (Bankr. N.D. Ohio 2010) - Motion to Supplement Motion for Summary Judgment granted to allow presentation of newly discovered evidence. Although supplementing record would cause delay, there was no evidence that delay or

expense would be undue and there was no evidence that the need to supplement the record was the result of bad faith or other misconduct. Supplementing record would further Court's desire to decide case on merits.

12.145 Particular Cases – Summary Judgment Granted

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy Court properly granted summary judgment where record on appeal overwhelmingly supported Court's conclusion that defendant breached Purchase Agreement. Defendant paid only \$58,000 for assets for which he was contractually obligated to pay \$559,000. Purchase agreement did not allow defendant any right of set off against the purchase price.

SCS General Contractors, Inc. v. Wells Fargo Bank, Case Nos. 08-8096 and 08-8097 (6th Cir. BAP 2009) – Creditor filed Adversary Proceeding alleging that Creditor had pre-petition equitable liens against Debtor's real estate that were superior to Bank's Mortgage claims based on construction and repair services that Creditor claimed benefitted both Debtor as tenant and the Owners of the property. Validity and priority of equitable liens are determined by State law. Mississippi law provided an equitable lien can be created by express contractual language that grants a contractor a lien; or where necessary to prevent "unjust enrichment". However, as a general rule the rights of a materialman to assert a lien are limited to those set forth in the Mechanics Lien statute. Mississippi law afforded "abundance of protection for mechanics and materialmen" but also require the person seeking the benefits of those protections to comply with the statute, failing which their remedies are no better than any other creditor. Where a materialman or a mechanic such as Creditor fails to take steps to perfect a lien, the claims are subordinate to those who take for consideration and without notice. When Debtor filed for relief under Chapter 11, Debtor assumed position of hypothetical bona fide purchaser for value against whom an equitable lien cannot be enforced. As Creditor held neither an express contractual or properly perfected statutory lien nor an enforceable equitable lien, Creditor's rights were subordinate to the perfected lien interests of the Lender.

12.146 Particular Cases – Summary Judgment Denied

All Points Capital Corp. v. City of Cheyboygan, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment denied where agreements between the parties on which the claims were based were ambiguous and Court could not determine which party drafted the agreement or whether agreement was joint product of both parties based on extensive negotiations. Court could also not determine whether underlying agreement was assignable or whether such an assignment, if available, would violate public policy; and whether party now objecting to the assignment knew of the assignment at the time of execution and failed to object, thereby ratifying the assignment.

In re Te-kon Travel Court, Inc., Case No. 04-01848 (Bankr. W.D. Mi. 2009) – Lender's Motion for Summary Judgment denied where record demonstrated genuine issue of material fact concerning Lender's breach of Joint Plan of Reorganization. Plan called for Debtor to give deeds to Lender to hold in escrow pending Debtor's effort to refinance property. Lender inadvertently released deeds from escrow and caused deeds to be recorded prematurely. Lender argues that premature recording did not cause harm to Debtor. Debtor countered with affidavits that Debtor had lined up bridge financing that would allow Debtor to sell property and repay loans to Lender, but premature recording of the deeds caused lender to pull out of the transaction. Genuine factual issues existed regarding Lender's actions and effect of those actions on Debtor, as well as Debtor's defenses of estoppel and excuse for non-performance.

Kerr v. Hurd, 2009 WL 2824556 (S.D. Ohio 2009) – Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.

Attard v. American Home Mortgage Services, Inc., Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

CC. Judgment on the Pleadings

12.147 Time for Filing

Oak Street Funding, LLC v. Blair, 2012 WL 4506913 (Bankr. E.D. Tn. 2012) – Motion for Judgment on Pleadings can be filed only after close of pleadings. Motion to Dismiss Complaint is not a responsive pleading and does not close pleadings. Motion for Judgment on Pleadings filed before Answer is premature.

DD. Jury Trial

12.148 Actions Subject to Jury Trial

McKinstry v. Sergeant, 2012 WL 3731304 (E.D. Ky. 2012) – Action brought against liquidating trustee of corporate debtor against officers and directors could have historically been brought as action at law for negligence or for breach of fiduciary duty in equity; and remedy includes concurrent equitable and legal relief in the form of money damages. Action to recover money damages within 7th amendment protection of right to jury trial. Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution

process, such as claims by debtor against former officers and directors, are not removed from right to jury trial.

Parker v. Barkan & Robon, Ltd., 2011 WL 3667638 (Bankr. N.D. Ohio 2011) – Seventh Amendment guarantees right to jury trial in suits at common law, which includes not only common-law causes of action but also statutory causes of action that are analogous to common law actions ordinarily decided by English Law Courts of the late 18th century. Further, remedy sought must be legal, not equitable, in nature. If these factors support a right to jury trial, court must then determine whether Congress has assigned jurisdiction for the claim to a relevant non-Article III court that does not use a jury as a fact finder. Actions under Bankruptcy Code, and in particular actions to recover fraudulent transfers and to avoid a mortgage under Section 549 are inherently equitable and are not subject to jury trial.

In re ImagePoint, Inc., 2011 WL 1500124 (Bankr. E.D. Tn. 2011) – Supreme Court established three-part analysis to determine if the right to a jury trial exists in the bankruptcy context: (1) compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity; and (2) examine the remedy sought and determine whether it is legal or equitable in nature. If these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, Court must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as fact finder. a party may waive its right to a jury trial. Process of allowance and disallowance of claims is triable in equitable action triggered by a creditor's filing a proof of claim. Once a creditor files a proof of claim, he consents to the bankruptcy court's equity jurisdiction and waives any right to a jury trial. Proof of claim filed by creditor waives right of successor in interest to jury trial, as successor is invested with same rights and assumes same burdens as original creditor. However, action of subsidiary corporation in obtaining cash collateral order in bankruptcy does not waive parent corporation's right to jury trial absent substantive grounds to pierce corporate veil.

Mattingly v. Piccinini, 424 BR 767 (Bankr. E.D. Mi. 2010) - Determinations of dischargeability are equitable in nature and a creditor seeking such a determination is not entitled to a jury trial. However, plaintiff in an adversary proceeding that seeks a money judgment is entitled to a jury trial if the cause of action is of a type brought in the courts of England prior to the merger of the courts of law and equity and whether the remedy sought is legal or equitable in nature. Creditor who files a proof of claim subjects his otherwise legal claims to the bankruptcy court's equitable power, negating any right to a jury trial. Further, joinder of action to determine dischargeability into liquidate the amount of a money judgment converts the entire action to the equitable jurisdiction of the court because it is impossible to separate the determination of dischargeability from the determination of the amount of the debt. Creditor who filed to proofs of claim and who then instituted proceedings to determine amount and dischargeability of debts waived the right to jury trial as to the issue of amount of damages.

12.149 Waiver of Right to Jury Trial

McKinstry v. Sergeant, 2012 WL 3731304 (E.D. Ky. 2012) – Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution process, such as claims by debtor against former officers and directors, are not removed from right to jury trial. Earlier “Engagement Letter” waived party's right to jury trial. However, later settlement agreement that resolved certain questions and stated that it superseded all prior agreements did not contain waiver of right to jury trial. In light of strong presumption against waiver of right to jury trial, later settlement agreement that superseded the prior agreement that it, itself, did not contain waiver of jury trial, did not support finding that party had waived jury trial on remaining issues.

Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc., 472 BR 731 (E.D. Ky. 2012) – Creditor who files proof of claim in bankruptcy case waives right to jury trial in proceedings to recover fraudulent transfers or preferences.

EE. Motion for New Trial or Amendment of Judgment – Rule 9023

12.150 Grounds

Auday v. Wet Seal Retail, Inc., 2012 WL 124080 (E.D. Tn. 2012) – Federal Rule of Civil Procedure 59, incorporates through Rule 9023, does not list specific grounds for relief. Court may alter or amend under Rule 59 if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Motion must be based on controlling authority that was overlooked or presents evidence or argument that could not have previously been submitted.

Kahn v. Regions Bank, 2011 WL 6179941 (Bankr. E.D. Tn. 2011) – Courts have established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. motion under Rule 59 is not, intended to provide the parties an opportunity to relitigate previously-decided matters or present the case under new theories. Burden of demonstrating the existence of a manifest error of fact or law rests with the party seeking reconsideration. A manifest error is one that is direct, obvious and observable. Debtor's arguments concerning standing to object to claim in Chapter 7 proceeding were fully considered at the time of the prior hearing and Motion failed to demonstrate any clear error of law or fact in concluding that debtor in insolvent Chapter 7 lacks standing to object to claims.

King v. Spivey, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 59 is not intended to provide parties opportunity to re-litigate issues or present case under new theories. Alleged errors in interpretation or construction of disputed factual issues are not basis for Rule 59 relief.

In re Solomon, 2010 WL 3369146 (Bankr. W.D. Mi. 2010) – Rule 59 allows alteration or amendment of a judgment only where there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Debtor’s case was properly dismissed when Debtor failed to obtain prepetition credit counseling prior to the filing of his bankruptcy case, as required by 11 U.S.C. Section 109(h)(1). Debtor was not exempt from pre-petition credit counseling based on incarceration. Incarceration is not incapacity, disability or active duty in the military and is not a disability as required by Section 109(h)(4).

Shares v. Sage Financial, Ltd., 2010 WL 283410 (Bankr. S.D. Ohio 2010) - Motion to alter or amend the judgment is brought pursuant to Rule 59 which is made applicable to bankruptcy cases pursuant to Bankruptcy Rule 9023. Courts have established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion denied where Plaintiff failed to demonstrate any error in prior Judgment.

12.151 Time for Filing

Links v. U.S., 2010 WL 3452426 (Bankr. N.D. Ohio 2010) – Debtor’s Motion seeking to overturn order based on alleged improper application of law is a Motion under Rule 59(e) that must be brought within 28 days of entry of judgment. Debtor’s failure to file Motion for almost one year after entry of judgment precluded relief under Rule 9023 and Rule 59.

FF. Motion for Relief From Judgment or Order – Rule 9024

12.152 Grounds Generally

Auday v. Wet Seal Retail, Inc., 2012 WL 124080 (E.D. Tn. 2012) – Rule 60 lists grounds for relief from judgment, which are very similar to those used under Rule 59. Rule 60 allows court to correct manifest errors of law and fact and to review newly discovered evidence or to review prior decision where there has been a change in controlling law.

12.153 Grounds – Fraud, Misrepresentation or Misconduct

King v. Spivey, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 60(b)(1) allows court to grant relief from judgment (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. Moving party must demonstrate (1) that the party seeking relief is lacks culpability due to mistake, inadvertence, surprise, or excusable neglect; (2) the party opposing relief will not be prejudiced; and (3) the party seeking relief has a meritorious claim. Alleged errors of counsel in failing to follow the court’s local rules and the Pretrial Order concerning the pre-marking and pre-filing of trial exhibits, untimely offering into evidence exhibits the Defendant required to be successful at trial, and failing to properly prepare for trial by not interviewing witnesses, taking the Plaintiffs’ depositions, calling witnesses for trial, preparing the Defendant and his wife for trial examination, and preparing for cross-examination of the Plaintiffs, not sufficient for relief under Rule 60. Attorney’s actions or inactions in preparing for trial were not excusable.

Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc., 422 BR 93 (6th Cir. BAP 2010) – Burden in independent action attacking finality of a final judgment is narrower in scope than would be required for a timely motion under Rule 60(b)(3). Fraud on the court is (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. E-mails between parties to Chapter 11 proceeding did not contain communications of any officer of the court and were not directed to the court itself. Instead, e-mails evidenced at best agreement by employees of debtor to oust Corporate Officer. “Grand allegations” a conspiracy that did not involve court or attorneys could not constitute “fraud on the court” sufficient to support action to overturn prior Court orders.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - Judgment obtained by fraud may be set aside by Court where enforcement of the Judgment would be manifestly unconscionable. Party attacking judgment must prove by clear and convincing evidence (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. Conduct must prevent Court from impartially adjudicating the case presented. Allegedly fraudulently obtained judgment failed would not be set aside where moving party failed to prove that the creditor obtained entry of Judgment using knowingly any false representations or representations made with reckless disregard for truth; and failed to prove how the Court rendering the judgment was misled or deceived.

12.154 Grounds – Mistake, Inadvertence or Surprise

Southern Heritage Bank v. Hart, 2012 WL 3263912 (Bankr. E.D. Tn. 2012) – Court’s failure to include in Final Judgment in adversary proceeding a Judgment for the amount found to be non-dischargeable was mistake that would be corrected under Rule 60. Final Judgment liquidated amount owed and entered judgment stating that amount was not dischargeable, but erroneously did not include judgment awarding Plaintiff those amounts.

In re McKenzie, 2010 WL 3386012 (Bankr. E.D. Tn. 2010) – In deciding whether relief is warranted under Rule 60, court will review the culpability of the party seeking relief; whether the party opposing relief will be prejudiced; and whether the party seeking relief has a meritorious defense or claim. A party demonstrates a lack of culpability by demonstrating mistake, inadvertence, supplies or excusable neglect. Debtor's alleged medical condition is not an excuse for failing to object to motion to approve sale and debtor's medical records where debtor was actively participating in bankruptcy case and debtor's medical records indicated that debtor had sufficient mental capacity at time of order approving sale. Disagreement concerning value of property to be sold is not a mistake for purposes of rule 60. Evidence indicated that there may have been a mistake in Sale Order concerning exact property being purchased. However, court could fashion effective relief by clarifying sale order where buyer and the Trustee agreed on property to be conveyed without need to set aside sale order.

In re Lebbos, Case No. 09-58805 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee's lack of legal representation at the time of service of Motion for Relief from Stay does not constitute basis for setting aside Order Granting Relief from Automatic Stay. Trustee's failure to timely investigate basis for, and respond to, Motion for Lease is not excusable to collect. The fact that the trustee was not represented by counsel is of no particular significance if for no other reason than the fact that the trustee himself as an attorney. Although the motion itself may have contained a misstatement of fact or an incorrect legal conclusion regarding the location of the underlying property, absent some sort of fraud on the Court, these defects are properly dealt with by way of timely objections or responses to the Motion.

12.155 Grounds – Excusable Neglect

Fujitrans USA v. Barko Enterprises, Inc., 2013 WL 793056 (S.D. Ohio 2013) - Rule 59 requires clear error of law, newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice. Rule 60 allows court to grant relief for excusable neglect which includes failure to comply with deadline that is attributable to neglect. Rule 60 requires court to consider danger of prejudice to non-moving party; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was within reasonable control of movant; and whether movant acted in good faith. Appellant failed to demonstrate any basis for relief. Basis alleged by Appellant at best described over-crowded work schedule without any allegation of extraordinary circumstances. Appellant had three extensions of time and was clearly warned that no additional extensions would be entertained and that failure to timely file a brief may result in dismissal.

In re Rutherford, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.

In re Reiman, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Relief under Rule 60 is available only when the moving party shows that the underlying order is the result of: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. After abandonment, the lender conducted a foreclosure sale, at which the foreclosure bid was significantly less than what the Trustee believed the value to be. Trustee sought to revoke abandonment and sell the property, redeem the mortgage, and return the surplus profit to the unsecured creditors. Court concluded that no basis existed to revoke abandonment of a properly administered and investigated asset in a fully administered case where the Trustee's request was based solely on the fact that the property was more valuable than originally believed. The Code's strong interest in finality is respected in all cases and applies to abandonment of assets.

In re Lebbos, Case No. 09-58805-wsd (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee's lack of legal representation at the time of service of Motion for Relief from Stay does not constitute basis for setting aside Order Granting Relief from Automatic Stay. Trustee's failure to timely investigate basis for, and respond to, Motion for Lease is not excusable to collect. Failure to recognize potential misstatement of fact or incorrect legal conclusion does not amount to "excusable but collect" and should have been out with by way of timely objection or response to motion.

12.156 Newly Discovered Evidence

Burrage v. Homecomings Financial Network, 2011 WL 6000794 (6th Cir. BAP 2011) – Debtor's Motion for Reconsideration failed to demonstrate "newly discovered evidence". The additional evidence that Debtor wanted to introduce, consisting of a phone bill and an affidavit from an alleged witness, were both fully known to Debtor prior to date of initial hearing. "Newly Discovered Evidence" is limited to those items that were not known, and could not reasonably have been discoverable, prior to date of initial hearing.

12.157 Void Judgment

Rowe v. Pechiney World Trade, Inc., 2010 WL 2745976 (Bankr. W.D. Ky. 2010) - Personal jurisdiction and due process objections can be waived by a party's failure to timely act. Thus, even if the service of process was deficient, and the Court lacked personal jurisdiction,

the judgment would be merely voidable, not void, and could be set aside upon timely application to the court. Motion under Rule 60(b)(4) must be made within a reasonable time. Motion filed pursuant to Rule 60(b)(4) is untimely where a significant amount of time has passed between the filing of the motion and the date the judgment was entered. "Reasonable time" depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief. Defendant's Motion for Relief From Judgment denied where Defendant waited more than 5 years after entry of judgment and more than 22 months after Defendant admittedly became aware of judgment to file Motion. Defendant chose to sit on its rights rather than file motion in timely manner. If the judgment is vacated, it would have been extremely difficult for the Trustee to rebuild this case at this time under these circumstances. Defendant's action inaction unnecessarily caused a substantial increase in legal expenses by the Trustee. Equities did not favor Defendant when it deliberately chose to not act and waited almost two years to seek to vacate the default judgment resulting in substantial legal maneuvering and expense. Defendant provided no sufficient explanation for its delay in filing the present motion.

12.158 Satisfaction, Release or Discharge

12.159 Other Grounds

In re Duckett, 2010 WL 3941910 (Bankr. N.D. Ohio 2010) – "Residual clause" in Rule 60(b)(6) permits the court to grant relief based on extraordinary circumstances not addressed by the first five numbered clauses of Rule 60(b). Order Granting Relief From Automatic Stay vacated. Debtor's Chapter 13 plan provided for direct payments to the mortgage company. Debtor fell behind and the Court entered an order that debtor would make all future payments timely and would include additional amount necessary to "cure" the post-petition delinquency; and that if debtor failed to make the payments, creditor would receive stay relief on filing of Affidavit of Default. Creditor later submitted Affidavit and court lifted stay. Debtor filed motion for relief under Rule 60. Court found sufficient basis to set aside order where Debtor provided uncontested and credible evidence, including documents, showing that she tendered her regular monthly payment plus the additional \$38 as required by the court's November 29 order. Debtor received notice, without further explanation, that one payment had been declined by her creditor. Debtor continued to make the required monthly payments until she was unable to make one monthly payment apparently Debtor's loan was transferred to different loan servicing agents but Debtor was not provided with notice of those transfers. Debtor made or attempted to make by tendering funds to the entity she believed was the correct servicing agent all required payments, and payments were not accepted in June 2008 and February 2009 through no fault of Debtor. Court's understanding of the facts now differs materially from those understood at the time of its July 8, 2010, order terminating the automatic stay on the basis of the servicing agent's affidavit of default warranting vacation of the to accomplish justice.

12.160 Time for Bringing Motion

Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc., 422 BR 93 (6th Cir. BAP 2010) – Motion for relief from judgment under Rule 60(d) is governed by Rule 60(b) time limits. Motion to set aside orders based on "fraud on the court" untimely where the alleged fraudulent conduct has been known for up to two years, Court Appointed Examiner had completed investigation early on in case, and Party had filed at least five prior attempts to overturn various orders based on alleged fraud. Party's latest motion was just another, belated attempt to relitigate same issues.

GG. Enforcement of Judgment

12.161 Taxable Costs

El Camino Resources, Ltd. v. Huntington National Bank, 2012 WL 4808741 (W.D. Mi. 2012) – Federal Rule of Civil Procedure 54(d)(1) provides that costs should be allowed to the prevailing party absent a statute, rule or court order otherwise. Award of costs is presumed and court's discretion to deviate is limited, such that party opposing award must show circumstances that warrant denial of costs. Items of taxable costs are enumerated in 28 USC Sections 1911- 1929. To be recoverable, items must be necessarily incurred and reasonable in amount. Expert witness fees are allowable as costs even if not expressly provided for in 28 USC Section 1920. Copy costs are recoverable for copies necessarily made in course of case and including costs to electronically scan and image documents. However, expense paid to outside electronic document vendor for services in connection with electronic discovery are recoverable only to extent of costs attributable to scanning paper documents for digital production, converting data, creating the electronic production, converting certain documents to TIFF format, printing redactions, and printing exhibits for use at deposition. Party is entitled to reimbursement for expenses for private process servers as long as rate does not exceed rate charged by US Marshalls. Depositions and court transcripts are taxable if necessary rather than merely for the convenience of the parties.

12.162 Rate of Interest on Judgment

FCS Advisors, Inc. v. Fair Finance Company, Inc., Case No. 09-2609 (2d Cir. 2010) - In diversity cases, post-judgment interest should ordinarily be calculated in accordance with the federal rate provided for under 28 U.S.C. § 1961(a). Although parties may agree to a different rate by contract, absent clear, unambiguous and unequivocal language expressing an intent that a particular interest rate apply to judgments or judgment debts, a general choice-of-law provision does not alter the application of the federal rate to the calculation of post-judgment interest.

12.163 Garnishment

Evangel Builders & Construction Managers, LLC. v. Upfall, Case No. 06-5026 (Bankr. E.D. Mi. 2010) – Bankruptcy Court judgment that declared debt non-dischargeable under Section 523(a)(6) was not enforceable money judgment. Judgment only declared that a prior state court judgment was non-dischargeable and did not enter any money judgment on which garnishment could issue.

12.164 Statute of Limitations

McGuffin v. Baumhaft, 2010 WL 2574200 (E.D. Mi. 2010) - Federal Court judgment can be registered in the District Court of any district and enforced as a judgment of that Court. Judgment must be registered within statute of limitations for jurisdiction where judgment rendered. Once registered, prescriptive period for enforcement runs from date of registration, and not date of original entry of judgment. South Carolina Federal Court Judgment registered in Michigan 8 years after entry was entered within 10 year statute of limitations period in South Carolina. Plaintiff did not exceed statute of limitations where collection activity occurred more than 10 years after entry of the Judgment but within the Michigan limitations period measured from date of registration.

HH. Specific Causes of Action

12.165 Tortious Interference with Contract

Saab Auto, AB v. General Motors Co., 2013 WL 3013677 (E.D. Mi. 2013) – Action for tortious interference with economic expectancy requires (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) intentional interference causing or inducing a termination of the relationship or expectancy; and (4) resultant actual damage. Valid business expectancy requires more than subjective expectation of entering into a business relationship. Contract that is nothing more than agreement to negotiate series of additional agreements is nothing more than a framework subject to multitude of additional agreements and commitments necessary to actually execute a final agreement, all of which would also have been subject to approvals and contingencies of multiple companies and governments. “Intentional interference” prong of action requires proof that defendant’s actions were done for improper purpose or motive. Defendant’s actions motivated by legitimate business reasons are not improper motive or interference. Statements that are true cannot be basis of tortious interference with business relations claim. GM merely stated its position pursuant to contracts that it had with Plaintiff. Public statements made by GM in reference to legal, bargained for rights were “motivated by legitimated business reasons” and could not be improper interference as a matter of law. Even lawful actions can constitute intentional interference if done with malice and without justification. Actions taken to protect one’s own business interests in protecting competitive position and business relationships cannot constitute improper motive. Plaintiff did not allege any fact that would support finding that defendant had motive other than protection of legitimate business relations or with intent to interfere with Plaintiff’s business relationships.

Irwin v. Frankenmuth Credit Union, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Action for tortious interference requires actions that are intentionally per se wrongful or are done with malice and without justification, all with purpose of invading a contractual or business relationship of another. Party who acts with legitimate business reason does not improperly interfere with contract or business relationship. Credit Union’s requirement that Debtor enter into written contracts with potential customers is not per se wrongful or without justification, where actions were justified and consistent with prudent lending practices. Credit Union’s actions were designed to determine if Debtor had the ability to repay loans.

12.166 Innocent or Negligent Misrepresentation

LeBlanc v. Bank of America, 2013 WL 3146829 (W.D. Tn. 2013) – To state claim for negligent misrepresentation, plaintiff must allege that the defendant supplied information to the plaintiff; [2] the information was false; [3] the defendant did not exercise reasonable care in obtaining or communicating the information[;] and [4] the plaintiffs justifiably relied on the information. Plaintiff’s complaint failed to state cause of action against lender for refusal to permanently modify loan where complaint made only general allegations without specifically identifying misrepresentations or identity of person making misrepresentations.

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.

12.167 Punitive Damages

R & L Pricecorp, LLC v. Hall, 2013 WL 1739658 (Bankr. E.D. Tn. 2013) – Punitive damages warranted based on Debtors willful and malicious damage 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.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – General rule is that punitive damages are not allowed against a municipality absent express statutory authority.

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

12.168 Conversion

First Tennessee Bank, NA v. Hansen, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Conversion requires proof that party appropriated property of another for party's own use and benefit; that party intentionally exercised dominion and control over property; and that party did so in defiance of rights of true owner. Bank converted property of debtor after foreclosure by hiring company to remove personal property from residence and destroy that property. Bank repeatedly contacted debtors' attorney to make arrangements to remove debtors' personal property from house. Although debtors did not remove property, Bank did not have right to personal property and knew that debtors wanted contact information so they could attempt to retrieve property. Although debtors admitted that they were not able to hire someone to retrieve property and that debtors never had anything more than a "hope" of their ability to retrieve property, debtors never indicated an intent to abandon property. Instead, Bank grew tired of waiting and instructed agent to remove and destroy property. However, debtors failed to produce evidence of value of property destroyed, preventing entry of judgment against Bank.

Boyd v. Direct Capital Corp., 2010 WL 4259981 (Bankr. W.D. Mi. 2010) – Security agreement was sufficient as matter of New Hampshire law to create security interest which included motor vehicle. Although Security Agreement did not expressly reference "motor vehicles" the general inclusion of "consumer goods" was sufficient as the vehicle was purchased primarily for personal, family or household use. Creditor's seizure of the automobile prior to commencement of the bankruptcy case was not conversion as creditor had a lawful right of possession as the holder of a valid security agreement.

Tyree v. Shrum, 2010 WL 2851011 (Bankr. M.D. Tn. 2010) – Property may be converted in three different ways: 1) A person may personally dispossess another of tangible personal property; or 2) A person may dispossess another of tangible property through the active use of an agent; or 3) Under certain circumstances, a person who played no direct part in dispossessing another of property, may nevertheless be liable for conversion for receiving personal property. Debtor obtained money from third parties and used funds to purchase Certificate of Deposit in Debtor's own name. Debtor then borrowed money and pledged CD as collateral. After Debtor defaulted, Bank exercised right to offset the default by taking the money out of the CD. Bank did not personally dispossess third parties of funds, as third parties paid funds to Debtor, not Bank. There was no evidence that Debtor was acting as agent for Bank when Debtor obtained funds from third parties. Bank had no knowledge of involvement of third parties and had no knowledge that money deposited to purchase CD was not Debtor's rightful property. Bank could not be held liable for conversion of funds belonging to third parties.

12.169 Unjust Enrichment

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Complaint failed to state cause of action for unjust enrichment. Rights and duties of the parties were governed and controlled by terms of mortgage and note. Action for unjust enrichment will not lie where there is express contractual relationship between parties. Remedy, if any, is for breach of contract.

Shapiro v. Harajli, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Unjust enrichment requires proof that the defendant unjustifiably retained money or benefits that, in justice and equity, belonged to another. Defendant's use of line of credit in the names of both debtor and defendant, and on which debtor and defendant were jointly liable, did not "unjustly enrich" defendant at debtor's expense. Defendant's obtaining and retaining the proceeds was not unjust as defendant was fully liable for repayment and saddled defendant with full debt secured by lien on defendant's own homestead. Further, debtor could not demonstrate any injury as result of defendant's use of line of credit, as lender never sought or attempted to seek recovery from debtor personally and any liability of debtor to lender was unsecured debt that was discharged in the bankruptcy proceeding. Debtor's debt to lender was not the cause of debtor's bankruptcy filing – creditor was not pursuing recovery and debtor had more than \$230,000 of other unsecured debt entirely unrelated to line of credit. Further, hold harmless clause in divorce decree, which required defendant to hold debtor harmless from claims of lender, did not give debtor a right to one-half of the proceeds that defendant drew from the line of credit as extension of credit, itself, was not "harm" within scope of hold harmless clause.

12.170 Foreclosure Fraud

Connolly v. Deutsche Bank National Trust Co., 2013 WL 4084742 (E.D. Mi. 2013) – Based on Michigan Supreme Court decision in *Kim v.*

JPMorgan Chase Bank, NA, 825 N.W.2d 329 (2012), failure to comply with statutory requirements for foreclosure by advertisement renders sale voidable, not void ab initio. To set aside the sale, plaintiff must prove that failure to comply with statute caused prejudice, by showing that plaintiff would have been in a better position to preserve their interest in the property but for defendant's non-compliance. Prejudice requires that plaintiffs were misled into believing that not sale had been held; plaintiff acted promptly after becoming aware of the facts on which they base the complaint; that plaintiffs made an effort to redeem the property during the redemption period; whether plaintiffs were represented by counsel during the foreclosure process; and whether the defendant relied on the apparent validity of the sale by taking steps to protect its interest in the property. Affidavit of expungement of earlier sale is sufficient to expunge prior sheriff deed and to restore property and mortgage to full force and effect.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Under Tennessee law, substitute trustees or loan servicers have authority to pursue foreclosure proceedings as agents for secured creditors. Deed of trust in question specifically allowed lender to appoint substitute trustee or successor trustee who would then have all powers and duties of trustee including power to sell property. Tennessee law did not preclude appointment as successor trustee of out-of-state entity. Notice of sale was sufficient where notice identified successor trustee as having been appointed as substitute trustee, it identified the loan documents, and it stated that the sale would be held on specific date and time and at specific location.

Hermiz v. FHLMC, 2013 WL 3353928 (E.D. Mi. 2013) – Owner cannot contest validity of foreclosure sale after expiration of redemption unless owner can make clear showing of fraud, or irregularity in foreclosure process itself. Fraud requires representations made by the mortgagee to the owner that were material, false, and made either with knowledge of falsity or with reckless disregard for truth, such that owner relied on representations and suffered harm. Owner did not demonstrate fraud where lender's representative allegedly told owner that foreclosure sale was scheduled for one week later than it was, where lender had previously posted the property for sale for four weeks and published notice in newspaper, all of which stated the correct date for the sale and provided sufficient warning to owner of actual date of sale.

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Owner of property is precluded from challenging foreclosure once redemption has expired. Upon expiration of redemption, title vests absolutely in the purchaser at the sale and there is no basis for a court to alter that outcome. To extent owner has any remedy, that is limited to either contesting sale before redemption expires, or holding over after redemption and contesting foreclosure sale as part of summary proceedings for possession. Only exception is where mortgagor makes strong showing of fraud or irregularity. Fraud requires false statements by lender. Defect under Section 600.3205 requires proof that failure to comply with statutory foreclosure laws resulted in prejudice to owner, such that owner would have been in better position to preserve interest in property had lender not failed to comply with statute. Allegation that debtor does not recall receiving notice of foreclosure sale does not rise to level of either fraud or prejudice. Debtor did not present any facts that would entitle him to render the foreclosure sale voidable. Debtor admittedly was aware that a foreclosure sale of his home was going to occur and he was not misled into believing that one might not occur and, there is no evidence that he made any effort convert the summary proceedings to a judicial foreclosure or to redeem the property after the foreclosure sale, but prior to expiration of the redemption period. Debtor had the advice of counsel, at least during the summary eviction proceedings, such that there was no basis for the Federal Court to disturb foreclosure process.

Wheeler v. Federal National Mortgage Assn., 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – Failure to redeem property within six month period following foreclosure sale divests former owner of all rights to the property. Former owner can maintain action contesting foreclosure after expiration of redemption only if owner files action before expiration of redemption and makes a clear showing of irregularity or fraud by defendant. Plaintiff failed to demonstrate basis for equitable extension of redemption where plaintiff did not establish that sale did not comply with Michigan foreclosure statutes, or that any alleged irregularity prejudiced owner by adversely affecting owner's ability preserve interest in property. Owner did not show that but for lender's alleged wrongful actions or irregularities in the sale, debtor would have been able to redeem property or otherwise prevent loss of property through foreclosure process.

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Complaint failed to state cause of action for foreclosure fraud against law firm representing lender. Complaint must (1) specify the statements that plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. General allegation that law firm used fraudulent affidavit in foreclosure process failed to state cause of action.

Young v. Fannie Mae, 2013 WL 12842332 (N.D. Ohio 2013) – Tenant in property lacks standing to contest validity of foreclosure sale.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on a fraud claim in Michigan, plaintiff is required to prove: (1) defendant made a material representation; (2) that was false; (3) that party knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) made it with intention that plaintiff would rely on it; (5) plaintiff acted in reliance upon it; and (6) plaintiff thereby suffered injury. Federal Rule 9 requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy this standard, a claimant must "(1) specify the statements the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent." Plaintiff's complaint alleged only that agents of FHLMC indicated that plaintiff could redeem at any time up to eviction. Plaintiff failed to alleged that statement was false as plaintiff could have

redeemed up to point where redemption expired and perhaps could have done so even after redemption, and there was no evidence that plaintiff tried to redeem but was rejected by FHLMC.

Assasepa v. JPMorgan Chase Bank, 2012 WL 88162 (S.D. Ohio 2012) – Complaint failed to state cause of action for fraudulent foreclosure. Although complaint alleged violations of TILA and RESPA and alleged that documents were “robo-signed”, plaintiffs did not dispute that they defaulted on their mortgage, that they were current with their mortgage payments, or that the documents allegedly “robo-signed” contained false information. Rather, the complaint includes allegations that plaintiffs were aware of their default and sought to determine the amount owed *after* the foreclosure had taken place. Plaintiff’s conclusory assertions that “robo-signing” occurred are insufficient to establish a claim for fraud.

12.171 Legal Malpractice

Kelsey v. Fitzgerald, Case No. 08-80501 (Bankr. W.D. Mi. 2010) – Legal malpractice claim requires proof of an attorney client relationship, negligence in the legal representation, negligence that was the proximate cause of an injury, and the nature and extent of the injury suffered. Record on Summary Judgment did not clearly evidence existence of attorney-client relationship. Factual issues remained that precluded entry of summary judgment.

XIII. Appeals

A. Parties

13.1 Standing to Appeal

In re Alvarado, 2013 WL 1809061 (N.D. Ca. 2013) – Debtor’s counsel has standing to appeal dismissal of debtor’s case where dismissal order also required disgorgement of fees. Disgorgement of fees made debtor’s counsel a “person aggrieved” for purposes of Article III standing.

Dietrich v. Nathan, 2013 WL 3188922 (E.D. Mi. 2013) – Debtor in insolvent Chapter 7 estate lacks standing to appeal orders allowing compensation to trustee, attorney for trustee, or accountant for trustee. Debtor lacks any financial interest in outcome of appeal as reduction or elimination of fee awards would not produce any distribution to debtor. Orders in question would neither produce assets in excess of liabilities entitling debtor to distribution of surplus; nor affect debtor’s discharge.

McIntosh v. LaBarge, Case No. 12-6070 (8th Cir. BAP 2013) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order. However, Order confirming plan over objection of Debtor is final and appealable. Debtor filed a plan and court denied confirmation. Debtor amended plan to leave out provision that Court found objectionable. Debtor then objected to debtor’s own plan which was then confirmed over debtor’s objection. Confirmation order was final and debtor had standing to seek appeal.

Gentile v. DiGiacomo, Case no. 12-071 (1st Cir. BAP 2013) – Debtor lacks standing to appeal order approving sale of property under Section 363 where debtors could not demonstrate that denial of motion would produce funds in excess of that necessary to pay creditors in full and produce additional funds for payment to debtors. Where estate is not sufficient to pay claims in full whether or not the sale is approved, debtors lack pecuniary interest in outcome of sale motion. Dissenting opinion asserted that where liens exceeded value of property to be sold, there was no conceivable benefit to the estate and trustee lacked any sound business reason for proposed sale, such that debtors should be allowed to argue that property should be abandoned rather than sold.

Lunan v. Jones, 2013 WL 1693983 (6th Cir. 2013) – Only person aggrieved by the order has standing to appeal. The person must have a financial stake in the outcome and must be directly and pecuniarily affected by the order to be appealed. Chapter 7 debtor will rarely have standing to appeal asset sales because estate will rarely have sufficient funds to return assets or proceeds to debtor. If debtor can prove that successful appeal would result in assets in excess of liabilities, thus generating distribution to debtor, then debtor is personally aggrieved. Debtor lacked standing where estate was insolvent and appeal would not produce distribution. Debtor’s claim that trustee improperly took property belonging to debtor’s husband did not give debtor standing as injured party, if any, would be husband.

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.

Mentag v. GMAC Mortgage, LLC, 2013 WL 489181 (E.D. Mi. 2013) – Debtor has standing to appeal order lifting stay even where property is sold at foreclosure sale during pendency of appeal. Debtor had standing when appeal filed and debtor retained personal state in the outcome of the appeal sufficient to convey standing for appeal.

Leavitt v. Alexander, Case No. 11-1114 (9th Cir BAP 2012) – Appellant who prevailed at lower court on one theory of law but was unsuccessful on another theory lacks standing to request appellate review of issue on which Appellant prevailed. Debtor claimed exemption under two separate theories. Bankruptcy Court sustained the Trustee’s objection based on one theory but overruled it on another and Trustee appealed both rulings. BAP ruled on the issue on which Trustee had lost at the lower court but dismissed appeal of issue on

which Trustee had succeeded, as Trustee lacked standing to appeal issue on which Trustee was the prevailing party at the lower court.

In re Baer, 2012 WL 2368698 (6th Cir. BAP 2012) – Appellate standing is limited to persons with a financial stake in the bankruptcy court's order. Appellant must establish both an injury in fact and that the interest to be protected is one that the Bankruptcy Code seeks to protect. Debtor has standing to appeal decision regarding alleged violation of automatic stay under Section 362. Debtor had standing to appeal decision of Bankruptcy court that creditor's post-petition repossession of vehicle did not constitute violation of automatic stay.

Hock v. Stevenson, 2011 WL 2173837 (E.D. Mi. 2011) – Buyer at foreclosure sale lacks standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. The only change is that the trustee, rather than the debtor, would be the person redeeming the property. That trustee may be more likely to redeem than the debtor would have been does not change the legal rights or status of the buyer.

Aja v. Emigrant Funding Corp., 2011 WL 167034 (1st Cir. 2011) – Chapter 7 debtor lacks standing to appeal order granting relief from automatic stay. Debtor acknowledged that there was no equity in property. Successful appeal would not affect her discharge and estate was insolvent so there would be no money left to pay Debtor after payment to creditors.

Phillips v. Weissert, Case No. 09-8032 (6th Cir. BAP 2010) - Court has jurisdiction to independently determining standing even when issue is not raised by either party. Plaintiff who prevailed in lower court lacked standing to bring appeal for other plaintiff in the action.

Moses v. Howard University Hospital – Case No. 08-7087 (D.C. Cir. 2010) – A trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. When Trustee abandoned interest in State Court litigation, Debtor reacquired standing to prosecute appeal of adverse State court Judgment.

Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc., 422 BR 93 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or “federal” standing. Party has appellate standing only if the party is directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Creditor whose Proof of Claim has been disallowed is not a creditor and so is not a person aggrieved by orders of Bankruptcy Court.

Wilhelm v. Urlich – Case No. 09-8043 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Party who has not filed a Proof of Claim and who entered into a settlement agreement with Debtor that released all claims Party had against debtor lacked any pecuniary interest in the Order confirming Debtor's Chapter 11 Plan and, therefore, lacked standing to appeal that Order.

Maxus Capital Group, LLC, v. Uhrich, Case No. 09-8047 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Party who has filed a Proof of Claim that has not been disallowed has sufficient pecuniary interest in the Order confirming Debtor's Chapter 11 Plan and, therefore, has standing to appeal that Order.

Stark v. Moran, 566 F.3d 676 (6th Cir. 2009) – One co-shareholder of Corporation lacks standing to contest bankruptcy sale of stock on the other co-shareholder of Corporation. Order permitting the sale of stock of other co-shareholder does not “directly and adversely affect pecuniary interest” of the non-Debtor co-shareholder. Bankruptcy Trustee's sale of stock back to Debtor did not harm any interest and co-shareholders shares or co-shareholders interest in the underlying Corporation. Further, Co. shareholder lack standing to appeal sale of stock back to Debtor on any “competing bidder” theory where stock was sold back to Debtor for a sum sufficient to pay off creditors in full. Co-shareholder in closely held corporation did not have interests aligned with those of bankruptcy estate's creditors where no creditors were left unsatisfied as a result of the sale and any allegations of impropriety, even if true, could not increase any creditor's recovery.

Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc., 555 F.3d 231 (6th Cir. 2009) - Doctrine of "appellate standing" which is applicable only in Bankruptcy appellate matters, limited persons who can pursue an appeal to those directly and adversely affected pecuniarily. Persons such as shareholders or creditors of corporation lack standing to appeal decisions dealing with assets of corporation. However, where party at secondary level of appeal unquestionably had standing to participate in the appeal at the District Court level, that party has standing to appear in the appeal at the Circuit Court.

LPP Mortgage, Ltd. v. Brinley, 547 F.3d 643 (6th Cir. 2008) – To have standing, party must show (1) party has suffered injury that is actual or imminent, not conjectural or hypothetical and is concrete and particularized; (2) injury is fairly traceable to the challenged actions of the defendant; and (3) is likely rather than merely speculative that the injury will be redressed by a favorable decision. Unsecured creditor has economic interest in having unencumbered equity in property as a result the avoidance of judgment means preserved for benefit of bankruptcy estate.

Moran v. LTV Steel Company, Inc., 560 F.3d 449 (6th Cir. 2009) - To have appellate standing, party must be directly and adversely

affected pecuniarily by the order. Appellate standing requires direct financial stake in the order such that it diminishes Appellant's property, increases burdens, or impairs rights. Possibility of future litigation is not enough to support appellate standing. Bankruptcy Court appointed Committee of Administrative Claimants to represent interests of administrative creditors. Company's former CEO did not have standing to appeal the Court's Standing Order where only interest of CEO was to prevent Committee from filing suit against CEO.

Ford Motor Credit Co. v. Morton, 410 BR 556 (6th Cir. BAP 2009) – Party has standing to appeal only if party has been “directly and adversely affected pecuniarily by the order”. A party may appeal in order only if the order diminishes their property, increases their burdens or impairs their rights. Creditor has standing to appeal order disapproving proposed reaffirmation agreement. Order denying reaffirmation agreement sufficiently affects creditor’s assets and detrimentally affects creditor’s rights.

Baud v. Carroll, Case No. 09-10673 (E.D. Mi. 2009) – Debtor has standing to appeal Order Confirming Plan in Chapter 13 proceeding where Debtor involuntarily altered the provisions of the plan to conform to the Court’s ruling. Debtor is an “aggrieved party” with standing to appeal.

13.2 *In Forma Pauperis*

Michigan First Credit Union v. Smith, 2013 WL 5770286 (Bankr. E.D. Mi. 2013) – Court may allow debtor to appeal without paying filing fee only where court finds that appeal is taken in good faith, including that appeal is not frivolous or presents a substantial question. Motion denied where motion did not present any good faith basis for appeal where appeal would be frivolous and present no substantial question.

In re Morris, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Court may waive the filing fee for an appeal if the party submits an affidavit that he is unable to pay the fee or give security therefore. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith, lacks merit or is frivolous. Failure to timely file Notice of Appeal resulted in appellate court lacking jurisdiction over appeal resulting in appeal being frivolous and lacking merit. Motion to proceed *in forma pauperis* denied.

Lewis v. McClatchey, 2009 WL 1607773 (S.D. Ohio 2009) – Motion for leave to appeal *in forma pauperis* and request to obtain transcripts at government expense denied where any appeal would be frivolous.

In re Hall, Case No. 08-51096 (5th Cir. 2009) – Motion for leave to proceed *in forma pauperis* denied where debtor failed to make sufficient evidentiary record to support request. Debtor filed bankruptcy petition and sought leave of the court to excuse the filing fee. Bankruptcy Court denied motion as financial documents filed by Debtor were insufficient to determine whether debtor was eligible for *in forma pauperis* relief. On appeal, debtor submitted the same insufficient financial documents to the appellate court. As documents were still insufficient, court dismissed appeal.

13.3 Waiver of Right to Appeal

Weik & Associates v. Carroll, Case No. 08-12964 (E.D. Mi. 2008) – Party waived right to appeal Order awarding attorney fees where party agreed to entry of the Order being appealed. Bankruptcy Court expressed general guidelines about what time expenditures may be justifiable and under what circumstances additional justification may be appropriate. The Court then asked the parties to develop guidelines and “see if you can agree upon what my ruling would be if it had to be presented to me and submit an order and be guided accordingly in the future.” Thereafter, the law firm and the trustee submitted a stipulated Order to the Court awarding fees and costs in a specific amount. Appellate Court concluded that the Bankruptcy Court’s expression of opinion was designed to guide the parties in discussions to potentially resolve the pending issues and did not constitute ruling on those issues. Appellant entered into a Consent Order determining the amount of those fees. “Where the parties have agreed to entry of an order or judgment without any reservation relevant to the issue sought to be appealed, one party may not later seek to upset the judgment, unless lack of ‘actual consent’ or a failure of subject matter jurisdiction is alleged”.

13.4 Cross-Appeal

Leavitt v. Alexander, Case No. 11-1114 (9th Cir BAP 2012) – Rule 8002 requires notice of cross appeal to be filed within 14 days of filing of Notice of Appeal. Appellee who fails to file Notice of Cross-Appeal waives right to raise issues not raised by Appellant. Absence of Notice of Cross Appeal precludes any attempt by Appellee to “enlarge his own rights” by obtaining relief that was not awarded by lower court. “Supplemental Statement of Issues” filed by Appellee does not substitute for Cross-Notice of Appeal. Party may file Cross-Statement of issues only if appellee has also filed a notice of cross-appeal. Debtor claimed asset as exempt under two separate theories. Bankruptcy Court disallowed one basis but overruled Trustee on other basis and determined asset to be exempt. Trustee appealed Court order allowing exemption, but debtor did not file Cross-appeal. Debtor precluded from asserting error in Court’s disallowance of one of the claimed bases for the exemption.

B. Appellate Jurisdiction

13.5 Generally

American Express Bank v. Askenaizer, 418 BR 495 (1st Cir. BAP 2009) – Appellate Courts have jurisdiction over final judgments, orders and decrees; and with leave of court from certain interlocutory orders.

13.6 Exceptions

Dalvit v. United Airlines, Inc., Case No. 08-1283 (10th Cir. 2009) – Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

13.7 Content of Notice of Appeal

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Notice of appeal that did not indicate that order of dismissal was being appealed did not preserve issue of dismissal for appeal. Although notice of appeal attached copy of Order dismissing case, failure to identify that order in the notice was fatal to the appeal, and attaching the order did not “cure” the deficiency.

Bowden v. American Home Mortgage Servicing, Inc., 2013 WL 195672 (6th Cir. 2013) – Court lacks jurisdiction to review orders not identified in the Notice of Appeal. Although Debtor appealed Order dismissing adversary complaint, Debtor did not appeal order denying rehearing. Motion for rehearing relied on information wholly absent from original request for leave to amend and thus presented a new claim. Failure to identify order denying rehearing precluded Court from reviewing that order or the allegations in the Motion for Rehearing.

Dietrich v. Tiernan, Case No. 11-1848 (6th Cir. 2012) – Court lacked jurisdiction over appeal of order entered in main bankruptcy case where Notice of Appeal filed in the adversary case. Main case and adversary proceedings are distinct for purposes of appeal. They have separate docket numbers, separate issues, and separate parties.

Matthews v. Educational Credit Management Corp., 2011 WL 197835 (E.D. Ky. 2011), *aff’d* Case No. 11-6218 (6th Cir. 2013) – Form of notice of appeal is jurisdictional. Form must (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Notice of appeal must designate the judgment, order, or part thereof being appealed. Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. Courts will liberally permit notices of appeal technically at variance with the letter of a procedural rule but that amount to the functional equivalent of what the rule requires. *Pro se* appellant’s Notice of Appeal was not perfect, but did comply with requirements of Federal Rule of Bankruptcy Procedure 8001. Plaintiff’s failure to designate in Notice of Appeal any of the Bankruptcy Court’s orders on various motions challenging Defendant’s standing did not preclude those issues from appeal – appeal of final judgment is sufficient to preserve for review all of the Bankruptcy Court’s prior non-final rulings and orders, including those on Plaintiff’s previous challenges to Defendant’s standing.

C. Time for Filing Appeal

13.8 Filing Before Order Entered

Moses v. Howard University Hospital – Case No. 08-7087 (D.C. Cir. 2010) – Notice of appeal filed during pendency of timely filed Rule 59 Motion is timely and becomes effective upon entry of an order disposing of the Rule 59 Motion.

Mentag v. GMAC Mortgage, LLC, 430 B.R. 439 (E.D. Mi. 2010) – Notice of appeal filed after entry of Order Lifting Stay but before Order became effective not premature. Time for filing Notice of Appeal runs from date on which Order is docketed with the Clerk, not the date on which the Order becomes effective.

Moran v. LTV Steel Company, Inc., 560 F.3d 449 (6th Cir. 2009) – Notice of appeal filed after Court issues oral ruling but before entry of judgment or order being appealed is premature. Under Federal Rule of Bankruptcy Procedure, 8002(a), Notice of Appeal will be deemed filed as of the entry of the judgment or order. District Court erroneously dismissed appeal of Bankruptcy Court Order as premature.

13.9 Deadline for Notice of Appeal

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Rule 8002 requires Notice of Appeal to be filed within 14 days of entry of the order being appealed. Failure to timely file notice of appeal deprives appellate court of jurisdiction. Court Order dismissing Debtor’s Chapter 7 case entered July 28, notice of appeal filed September 1, 45 days later, was untimely.

Bosch v. First National Bank, Case No. 12-20135 (5th Cir. 2012) – Rule 8002 requires notice of appeal to be filed within 14 days of entry of order. Failure to timely file notice deprives appellate court of jurisdiction. Appellant did not file Notice of Appeal within 14 days of entry of Order Modifying Stay or Order Confirming Plan, requiring dismissal.

Hills v. McDermott, Case No. 12-13697 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of entry of order being appealed if order is final. Court’s Order imposing sanctions is final order.

Lim v. DiMercuiro, 2012 WL 4513795 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of date on which order being appealed becomes final. Time when order becomes final depends on (1) the extent order leaves the Bankruptcy Court nothing to do but to execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding. Although denial of motion is normally not a final order, when denial has effect of terminating some element of litigation, order can be final. Order Denying Trustee’s Motion to Defer Deadline for filing action under Section 727 was final when entered. Motion was filed before deadline expired but denied after deadline expired. Thus, order terminated any right of trustee to object to discharge. Order left nothing further for Court to do other than issue discharge. Delay in obtaining review would prevent appellant from obtaining effective relief as complaint to object to discharge would be time-barred. Reversal would require reversal of entire proceeding, setting aside discharge order. Notice of Appeal not filed when Order was entered but only after entry of discharge was untimely. Appeal dismissed.

Baker v. Lyon, 2011 WL 3515181 (E.D. Ky. 2011) – Notice of Appeal must be filed within 14 days of entry of Final Judgment. Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.

In re Caterbone, 2011 WL 1226462 (3d Cir. 2011) – Pursuant to 28 U.S.C. § 158(c)(2) and the Federal Rules of Bankruptcy Procedure, an untimely filing such as the one at issue here deprives subsequent reviewing courts including both the District Court and Circuit Court of jurisdiction over appeal. Notice of appeal filed with District Court after expiration of time under Rule 8002 *sua sponte* dismissed as untimely causing District Court to lack subject matter jurisdiction. Where District Court never acquired jurisdiction of appeal, Circuit Court similarly would lack jurisdiction over appeal of dismissal by District Court.

In re Morris, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Notice of Appeal filed 21 days after entry of order was untimely and appellate court therefore lacked jurisdiction.

In re Jacobowitz, Case No. 10-1369 (3d Cir. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Appellate court lacked jurisdiction to consider appeal where Notice of Appeal not filed until 30 days after entry of order sought to be reviewed.

Mashburn v. Scrivner, 2010 WL 1220730 (10th Cir. 2010) - Appeal of partial final judgment revoking discharge premature where Trustee had filed Motion to Alter or Amend Judgment as to second count which sought turnover of property from debtors. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.

Ultimate Appliance CC v. The Company, 601 F.3d 414 (6th Cir. 2010) – Federal Rule of Appellate Procedure 4 requires Notice of Appeal to be filed within 30 days of entry of the Judgment or Order appealed. Party may move for extension up to 30 days after the expiration of the initial time. Rule 4 is jurisdictional. Appellate Courts lack jurisdiction and must dismiss appeal where Notice not filed within initial 30 days and did not seek an extension until 32 days after expiration of the initial 30 day time limit. District Court properly denied Appellant’s untimely Motion for Extension of Time to file Notice of Appeal.

Woosley v. Woosley, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – Rule 9021 requires a separate document for every judgment entered in an adversary proceeding. Where a separate document is not entered, the time for taking the appeal did not run. A party may waive the “separate document” rule to allow an appeal to go forward, but such a waiver cannot be used to defeat appellate jurisdiction.

Lassiter v. Grove-Merritt, 406 BR 778 (S.D. Ohio 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. Notice of appeal filed 12 days after entry of order was untimely and appellant failed to establish excusable neglect to extend the time for filing an appeal. Accordingly, District Court lacked jurisdiction over appeal and appeal must be dismissed.

Hann v. Michigan, 2009 WL 2496666 (E.D. Mi. 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. A Motion to Rehearing filed within 10 days of rendition of order under Federal Rule of Bankruptcy Procedure 9023 extends the time for filing a Notice of Appeal until 10 days after entry of an Order on that Motion. An untimely Motion for Rehearing does not extend the time for filing a Notice of Appeal. Debtor’s Motion for Rehearing filed 14 days after entry of the order and Notice of Appeal filed 15 days from rendition of order left Appellate Court with no jurisdiction. Debtor’s appeal dismissed as jurisdictionally barred.

Sunde v. Wells Fargo Home Mortgage, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant’s Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.

K & B Capital, LLC v. Official Unsecured Creditors’ Committee, 2009 WL 1747834 (6th Cir. 2009) – Court lacked appellate jurisdiction over Order denying Rule 60 motion to vacate a Rule 60 Order entered two years previously. Any appeal from the prior rule 60 Order would have to have been brought within the appropriate time from entry of an Order and not by a collateral attack in the form of a second Rule 60 motion.

Doucet v. Drydock Coal Co., 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment, at which time Order became final.

13.10 Effect of Motion for New Trial or Amendment of Judgment

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Timely filed Motion for Rehearing extends time to file Notice of Appeal until 14 days after entry of order. However, untimely filed motion does not extend deadline. Motion for Rehearing filed September 14 was not timely where Order dismissing case had been entered in mid-July. Appeal of dismissal order dismissed for lack of jurisdiction.

Overstreet v. Joint Facilities Management, LLC, Case No. 11-51141 (5th Cir. 2012) – Untimely Motion to alter or amend judgment under Rule 59 does not extend time for filing notice of appeal of the underlying order. However, where lower court ruled on untimely filed Rule 59 motion, appellate court has jurisdiction to review whether Order denying Rule 59 Motion was abuse of discretion.

Haney v. Educational Credit Management Corp., 2012 WL 3683533 (E.D. Ky. 2012) – Untimely motion to alter or amend judgment under Rule 9023 does not extend time to file notice of appeal.

Sunde v. Wells Fargo Home Mortgage, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant's Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.

13.11 Motion for Leave to File Untimely Notice of Appeal

Hansjurgens v. Bailey, Case no. 11-00202 (11th Cir. 2013) – Rule 8002 allows court to accept untimely filed notice of appeal where failure to file timely notice is due to excusable neglect. Pro se debtor did not establish excusable neglect where debtor claimed that former attorney told debtor that time for taking appeal was 30 days rather than 14 days. Excusable neglect is equitable concept that considers risk of prejudice to debtor; length of delay and potential impact on proceedings; reason for delay including whether delay was within reasonable control of moving party; and whether movant acted in good faith. Error based on misunderstanding of law is insufficient basis for excusing late filed notice of appeal.

Hills v. McDermott, Case No. 12-13697 (E.D. Mi. 2012) – Motion to extend time for filing notice of appeal must be filed before time for filing notice of appeal has expired or may be filed within 21 days after expiration of the deadline for excusable neglect. Appellant offered no explanation why notice of appeal not timely filed and appellant failed to pay the required filing fee. Appeal dismissed.

Schaffner v. U.S. Trustee, 2012 WL 2683320 (E.D. Ky. 2012) – Court can extend time to file Notice of Appeal on Motion filed within 14 days of rendition of order to be appealed. Court can extend time to file Notice of Appeal even if Motion is filed more than 14 days after rendition of order if delay is the result of “excusable neglect”. Excusable neglect is elastic concept not limited strictly to omissions caused by circumstances beyond the control of the movant. An extension may be granted even when “the failure to comply with a filing deadline is attributable to negligence. The determination whether neglect is “excusable” is an equitable one, taking account of all relevant circumstances including danger of prejudice to the non-movant; the length of the delay; the reason for the delay including whether it was in the reasonable control of the movant; and whether the movant acted in good faith. Motion demonstrated excusable neglect sufficient to extend time to file Notice of Appeal. Appellant, an attorney representing himself, was ill on the date of the hearing and oral decision of the bankruptcy court. He had moved for a continuance of the hearing, but the motion was denied. He was confined to bed rest the next day. His medical records show that he had been and was taking a potpourri of prescribed medications. Granting the motion would have involved virtually no delay in the proceeding. Appellant would be severely prejudiced by being denied his right to appeal as underlying decision disbarred attorney and, if disbarred in the bankruptcy court, he would also be disbarred in all United States District Courts and the United States Courts of Appeals and, perhaps, in the state courts. Appellant did not act in bad faith where delay was not in his control, considering his medical condition.

Gruber v. Kaplan, Case No. 11-4022 (3d Cir. 2012) – Debtor's Motion to Extend Time to file Notice of Appeal denied. Factors to be considered are danger of prejudice to non-movant; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was in the reasonable control of the movant; and whether movant acted in good faith. Party who fails to follow clear dictates of court rule will rarely be given relief. Although delay presented little risk of prejudice and was not unreasonably long and there was no evidence of bad faith, Motion nonetheless denied as failure to timely file notice of appeal was within control of debtor. Debtor contended that debtor did not receive a copy of the judgment to be appealed, but debtor knew that judgment would be forthcoming and had a duty to monitor the court file. Further, debtor was in court when Bankruptcy Judge orally announced ruling and could have filed notice of appeal at that point without waiting for judgment to enter. Debtor knew that opposing party had submitted order to court for entry and debtor consented to entry of that judgment.

In re Edward, Case No. 99-51514 (Bankr. E.D. Mi. 2008) – Bankruptcy Court can extend time for filing Notice of Appeal on Motion filed (1) before expiration of time for filing Notice of Appeal or (2) within 20 days after expiration of time for filing Notice of Appeal upon showing of excusable neglect. Motion for Leave to file untimely Notice of Appeal did not support finding of excusable neglect

where Notice of Appeal not timely filed due to misunderstanding by counsel of time for filing appeal. Counsel's erroneous belief that deadline to file Notice of Appeal was 21 days does not constitute excusable neglect.

D. Appealable Orders

13.12 Finality of Order

Huntington National Bank v. Richardson, 2013 WL 4417515 (6th Cir. 2013) – Order denying motion for substantive consolidation is non-final, non-appealable order. While order granting substantive consolidation may be appealable because of impact on future case administration, order denying substantive consolidation has minimal impact and parties to administration of case can protect interests using standard rules and normal case administration.

Lindsey v. Pinnacle National Bank, 2013 WL 4055273 (6th Cir. 2013) – Order denying confirmation of Chapter 11 plan is non-final, non-appealable order. Party seeking to appeal non-final order must either obtain district court certification of finality as to some claims or parties under Rule 54; or must seek permissive interlocutory review.

Heavrin v. Schilling, 2013 WL 3166175 (W.D. Ky. 2013) – Order extending deadlines to object to discharge is non-final, non-appealable order.

McIntosh v. LaBarge, Case NO. 12-6070 (8th Cir. BAP 2013) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order. However, Order confirming plan over objection of Debtor is final and appealable. Debtor filed a plan and court denied confirmation. Debtor amended plan to leave out provision that Court found objectionable. Debtor then objected to debtor's own plan which was then confirmed over debtor's objection. Confirmation order was final and debtor had standing to seek appeal.

Lim v. DiMercuiro, 2012 WL 4513795 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of date on which order being appealed becomes final. Time when order becomes final depends on (1) the extent order leaves the Bankruptcy Court nothing to do but to execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding. Order Denying Trustee's Motion to Defer Deadline for filing action under Section 727 was final when entered. Order left nothing further for Court to do other than issue discharge. Delay in obtaining review would prevent appellant from obtaining effective relief as complaint to object to discharge would be time-barred. Reversal would require reversal of entire proceeding, setting aside discharge order. Notice of Appeal not filed when Order was entered but only after entry of discharge was untimely. Appeal dismissed.

McDow v. Dudley, Case No. 09-336 (4th Cir. 2011) – Bankruptcy Court's order denying a Chapter 7 motion to dismiss as abusive pursuant to 11 U.S.C. §707(b) is a final order appealable to the district court. Orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the bankruptcy case. Denial of a §707(b) motion does dispose of a discrete dispute, since it conclusively resolves the issue of whether the case is an abusive filing. Practical limitations also required immediate appeal. If the case continues with the liquidation and distribution of a debtor's assets, then those resources that could otherwise be used to pay creditors would be exhausted. Congress intended the question of abuse to be a threshold matter, since such a motion to dismiss cannot be filed at any other time during the bankruptcy case.

Baker v. Lyon, 2011 WL 3515181 (E.D. Ky. 2011) – Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.

In re USA Baby, Inc., 2011 WL 2076342 (7th Cir. 2011) – Order denying Equity Holder's Motion to pursue pre-petition claims that trustee was allegedly failing to pursue was final order for appellate purposes.

In re McKenzie, 2011 WL 2670208 (E.D. Tn. 2011) – Order appointing counsel for the Trustee is non-final, non-appealable order. Order did not award compensation to counsel and did not end any litigation on the merits. Appellant failed to demonstrate need for immediate appeal to warrant interlocutory appeal.

BAC Home Loans Servicing v. Duong, 2011 WL 1706615 (N.D. Ohio 2011) – Order to Show Cause that does not impose sanctions is not final, appealable order. Alleged creditor filed objection to confirmation and then sought to withdraw objection as alleged creditor was not actually a creditor in the case. Court entered Order to Show Cause why creditor should not be sanctioned and entered subsequent Order directing creditor to file an affidavit showing that creditor has taken steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues. Upon review of that report, Court would consider further actions or hearing. Although Order imposing sanctions, including non-monetary sanctions, can be an appealable final order, Court in this case did not impose a sanction or end the show cause hearing. Order only focused on steps creditor had taken or would take to prevent future errors and was in response to creditor's offer to provide a satisfactory explanation to the Court. Court did not impose a fine, make any ruling, or even reprimand creditor.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial

finding of contempt and imposition of sanctions.

French v. Shapiro, 2011 WL 1357754 (E.D. Mi. 2011) – Order dismissing adversary proceeding without prejudice to re-filing is not a final, appealable order.

In re Fleurantin, Case No. 09-4376 (3d Cir. 2011) - Order converting case from 13 to 7 is final and appealable. Court lacked jurisdiction over appeal of conversion order where debtor waited until court ultimately dismissed Chapter 7 case to file appeal. Appeal of final order must be filed within time permitted in Rule 8002(a)

BAC Home Loans Servicing, L.P. v. McDermott, 2011 WL 1257209 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

In re Donovan, 2011 WL 1257965 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

In re Gray, 447 BR 524 (E.D. Mi. 2011) – Order is final for bankruptcy appellate purposes when the order finally disposes of discrete disputes within the larger case. A “discrete dispute” is one that is essentially separable from the main case and disposition would be final as a standalone suit outside of the bankruptcy case. Order that merely resolves “discrete issue” within a case is not appealable. Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

Baker v. Simpson, 2010 WL 2977329 (2d Cir. 2010) – Order denying Motion for Permissive Abstention is not a final order and is not appealable. Circuit Court lacks jurisdiction to consider appeal of district court’s decision.

American Express Bank v. Askenaizer, 418 BR 495 (1st Cir. BAP 2009) – Appellate Courts have jurisdiction over final judgments, orders and decrees; and with leave of court from certain interlocutory orders. Decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Interlocutory order decides some intervening matter but requires further steps to be taken in order to enable the court to adjudicate cause on the merits.

Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC, Case No 09-8041 (6th Cir. BAP 2010) – Appellate Court has discretion to allow appeal of interlocutory order on Motion or based on a timely notice of appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for interlocutory appeal.

Mentag v. GMAC Mortgage, LLC, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

State of New Jersey v. Fuld, Case No. 09-2891 (3d Cir. 2010) – Appellate Court has jurisdiction to hear appeals of “final decisions”, which are decisions that ended the litigation on the merits and leave nothing for the court to do but execute the judgment; or one by which the court disassociates itself from a case. Appellate Court may also have jurisdiction under “collateral order doctrine” for that small class of orders that finally determined claims of rights separable from, and collateral to, other rights asserted in the action through the rights are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Collateral Order Doctrine applies to decisions that do not in the litigation but nonetheless should be considered “final” for appellate purposes. Collateral Order Doctrine requires that order conclusively determine disputed question; resolve an important issue completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment. Order denying three-man of action removed from state court to federal court conclusively determines the disputed question as to where the action will proceed and resolves an important issue completely separate from the merits of the action. However, an erroneous order denying a motion to remand can be adequately addressed on direct appeal from a final judgment. Appeal of order denying motion to remand dismissed for lack of jurisdiction.

Hughes v. Jamestown Square, LLC, Case No. 09-11676 (11th Cir. 2009) – Court has appellate jurisdiction pursuant to 28 USC Section 158 only over final judgments, orders and decrees. “Final Order” is one that ends litigation on the merits and leaves nothing for the court to do but execute the judgment. Order dismissing Involuntary Petition without prejudice is not appealable order as dismissal did not end litigation on the merits.

K & B Capital, LLC v. Official Unsecured Creditors’ Committee, 2009 WL 1747834 (6th Cir. 2009) – Appeal dismissed as the orders being appealed were not final orders and, therefore, the appellate Court lacked jurisdiction.

Sparks v. HSBC Auto Finance, 2008 WL 4694795 (6th Cir. 2008) – Appellate Court lacks jurisdiction to consider appeal of non-final order. Order is final only if Order terminates judicial labor and leaves only ministerial tasks to be performed.

CIT Small Business Lending Corp. v. Kendrick, 558 F.3d 482 (6th Cir. 2009) – “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the

further proceedings contemplated are of a purely ministerial character.”

Doucet v. Drydock Coal Co., 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment at which time Order became final.

13.13 “Collateral Order” Doctrine

In re Gray, 447 BR 524 (E.D. Mi. 2011) – Collateral Order doctrine allows appeal of that small class of decisions that finally determine a right separable from and collateral to rights asserted in the action and which are too important to be denied review but too independent to defer appellate consideration until whole case is concluded. Order must (1) conclusively determine the disputed question; (2) resolve an important question completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment. Discovery orders are generally not reviewable under collateral order doctrine because discovery order such as Rule 2004 Exam Order does not conclusively determine any disputed question or claim of right.

13.14 Interlocutory Appeal

Heitmanis v. Rayes, 2013 WL 5719240 (E.D. Mi. 2013) – Whether district court may permit an appeal on a certified interlocutory order depends on whether (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation; and should be granted only sparingly. Question is controlling if there question is abstract question of law and not merely an issue of fact on which there is a substantial ground for difference of opinion and resolving the issue will materially affect outcome of litigation. Motion for leave to appeal denied where order involved mixed issues of law and fact, there was no showing that debt would be excluded from discharge under Section 523(a)(7) and there was no need for immediate appeal where claims based on Sections 523(a)(4) and (6) remained pending.

In re Noblit, 2013 WL 4017283 (E.D. Tn. 2013) – Order granting partial summary judgment is not final order for purposes of appeal. Court will grant leave for interlocutory appeal only when appeal raises question of law on controlling issue and a substantial ground for difference of opinion, and where appeal would materially advance the ultimate conclusion of the litigation. Bankruptcy Court’s partial summary judgment on issue of equitable tolling did not rise to level of interlocutory appeal, even if appellant prevailed, as issue can be adequately addressed on final appeal.

Heavrin v. Schilling, 2013 WL 3166175 (W.D. Ky. 2013) – Court would not grant leave for interlocutory appeal of order extending time to object to discharge. Extending deadline does not involve controlling question of law as to whether there is substantial ground for difference of opinion and immediate appeal would not materially advance resolution of case.

In re Nettles, 2013 WL 1748453 (E.D. Mi. 2013) – Order awarding interim fees is not appealable final order. Interim fees are subject to further review and adjustment when considering final fee application. Only order on final fee application is final and appealable. Debtor failed to demonstrate any basis for interlocutory appeal. Attorney expressly stated that he would be filing additional, final application. Issue on appeal is not one of controlling law, but involves Bankruptcy Court’s exercise of discretion in determining fees. Immediate appeal would have no impact on case administration as debtor was in the middle of a confirmed Chapter 13 case and outcome of appeal would not in any way impact on the status of the case. Denying leave to appeal would not waste judicial resources, as Court can reconsider interim fees in connection with final application. Denying leave to appeal would further efficient administration of case as it is likely that debtor would appeal interim order and appeal again from any further or final fee application orders.

In re Graves, 2012 WL 5509476 (E.D. Mi. 2012) – 28 USC Section 158(a)(3) allows appellate court discretion to hear appeal of interlocutory order where order on appeal involves controlling question of law as to which there is substantial ground for difference of opinion; an immediate appeal may materially advance the ultimate termination of litigation; and denying leave to appeal would result in wasted litigation and expense. Court order denying Motion to Dismiss Adversary Complaint failed to meet standard for interlocutory appeal. Motion to Dismiss claimed that Bankruptcy court lacked jurisdiction to hear actions to recover fraudulent transfers based on *Stern*. Court concluded that even if *Stern* precluded entry of Final Judgment by Bankruptcy Court, that did not deprive Bankruptcy Court of authority to hear matter up to entry of final judgment. As such, there was no material difference of opinion as to controlling law on jurisdiction of bankruptcy court. Immediate appeal would also not advance resolution of adversaries and would not avoid waste of judicial resources. Regardless of whether action proceeds in bankruptcy court or district court, it will proceed, and dismissing and requiring plaintiff to start over in another forum would be inefficient.

GATX Corp. v. Addington, 2012 WL 4886942 (E.D. Ky. 2012) – Federal Rule of Civil Procedure 54 allows court to enter final judgment against fewer than all parties or on fewer than all claims where the Final Judgment would involve one or more but fewer than all claims; and whether there is a just reason for delay in entering the Judgment. Order that dismissed with prejudice claims against 2 defendants while leaving remaining claims against other defendants pending meets first requirement. To determine whether reason for delay exists, court will consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. However, there was “just reasons” for delaying entry of the Final Judgment and any appeal. Unadjudicated claims bore strong legal and factual basis to adjudicated claims. Claims arose out of same alleged fraudulent

transfers and were brought against three alleged transferees. Dismissal order went to two of the transferees, but same cause of action, on same factual predicate remained as to third transferee. Need for appellate review could be obviated by outcome of action against remaining defendant, if court concluded that not fraudulent transfer occurred. Although nature of specific issue on appeal did not involve remaining defendant, such that there was no risk that the appellate court could have to decide the same issue again, and the parties seeking to appeal had not filed counterclaims, mere delay in opportunity to appeal did not warrant immediate entry of final judgment under circumstances of case.

Bowers v. Banks, 2012 WL 4739100 (Bankr. E.D. Tn. 2012) – Generally, order granting absolute or qualified immunity is not immediately appealable absent a Rule 54 certification. Rule 54 certification requires two findings: the order must expressly direct entry of final judgment as to one or more but fewer than all of the claims or parties; and there must be no just reason to delay appellate review. Certification is vested in sound discretion of court issuing order. Court should consider (1) the relationship between the adjudicated an unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counter-claim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. Court would certify appeal where relationship between concluded and pending claims as claims remained against counsel for Trustee for services performed while counsel was counsel for Debtor. Further proceedings will not moot the need for the appeal as the outcome of the remaining claims will not affect the liability of defendant for claims as to which immunity applied. Certification could avoid duplicate appeals and certification may allow District Court to more efficiently review issues given that District Court is already considering same issues in related appeals. Instant issue was one piece of highly complex and interwoven set of adversary proceedings and motions, many of which were also on appeal, such that by certifying appeal court may be able to consolidate appeals and further judicial efficiency.

Anderson v. Banks, 2012 WL 4739100 (Bankr. E.D. Tn. 2012) – Generally, order granting absolute or qualified immunity is not immediately appealable absent a Rule 54 certification. Rule 54 certification requires two findings: the order must expressly direct entry of final judgment as to one or more but fewer than all of the claims or parties; and there must be no just reason to delay appellate review. Certification is vested in sound discretion of court issuing order. Court should consider (1) the relationship between the adjudicated an unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counter-claim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. Court would certify appeal where relationship between concluded and pending claims as claims remained against counsel for Trustee for services performed while counsel was counsel for Debtor. Further proceedings will not moot the need for the appeal as the outcome of the remaining claims will not affect the liability of defendant for claims as to which immunity applied. Certification could avoid duplicate appeals and certification may allow District Court to more efficiently review issues given that District Court is already considering same issues in related appeals. Instant issue was one piece of highly complex and interwoven set of adversary proceedings and motions, many of which were also on appeal, such that by certifying appeal court may be able to consolidate appeals and further judicial efficiency.

Bellanti v. Land Escape Outdoor Maintenance, LLC, 2012 WL 3237933 (E.D. Mi. 2012) – Order granting relief under Rule 60 from Order Dismissing Adversary Proceeding is appealable interlocutory order. Although order vacating dismissal undoubtedly contemplates further judicial involvement and does not terminate judicial labor, concept of finality for purposes of appeal is considered in more pragmatic and less technical way than most other contexts. Even if considered a non-final order, Rule 8003 allows court to grant leave to appeal if a notice of appeal was timely filed. Appellant moved at oral argument for leave to appeal and appellee did not object to request.

McKinstry v. Sergeant, 2012 WL 3731304 (E.D. Ky. 2012) – Appeal allowed from interlocutory order only where the appeal presents a controlling issue of law where there exists substantial grounds for difference of opinion, where immediate resolution may materially advance ultimate conclusion of litigation. A substantial ground for disagreement includes a difference of opinion between district courts within the circuit, a circuit split where the controlling circuit court has not ruled, precedent that does not substantially guide the Court's decision, or a novel and difficult question of first impression. Party seeking to appeal must request certification from court issuing opinion. If the court certifies the case to the appellate court, then the appellate court can elect to accept or reject certification in its discretion. Request for certification must normally be made within 10 days of entry of order. However, Rules do not prohibit court from certifying order after the ten day period expires. In that case, the lower court must merely amend the prior order or add the request for certification. Request for certification made 28 days after entry was not unreasonable delay and non-moving party could not demonstrate any prejudice from delay. Court would deny request for certification of ruling on Plaintiff's entitlement to jury trial where there was no substantial question. Action brought against liquidating trustee of corporate debtor against officers and directors could have historically been brought as action at law for negligence or for breach of fiduciary duty in equity; and remedy includes concurrent equitable and legal relief in the form of money damages. Action to recover money damages within 7th amendment protection of right to jury trial. Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution process, such as claims by debtor against former officers and directors, are not removed from right to jury trial.

Gold v. Bandman, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order. Although Appellant did not file separate Motion for Leave to appeal, under Rule 8003 appellate court can treat notice of appeal itself as request for leave to appeal. District Court's issuance of a scheduling order is ministerial task and does not constitute order authorizing interlocutory appeal. Appellant failed to demonstrate any substantial grounds to overturn Bankruptcy Court Order. Bankruptcy Court's conclusion that 28 USC Section 1409(b) does not apply to avoidance actions because those arise under Title 11 with venue being

appropriate in district where case is pending; rather than action arising in or related to Title 11 where venue is appropriate only in the district court where the defendant resides. Although there was split of authority on the issue at the Bankruptcy Court level, the majority of decisions were consistent with that reached by Bankruptcy Court. Further, immediate appeal would not materially advance the litigation but would only delay litigation and increase costs without reaching ultimate issue as to whether Trustee could recover allegedly fraudulent transfers.

Chrysler Group, LLC v. South Holland Dodge, Inc., 2012 WL 1903884 (E.D. Mi. 2012) – 28 USC Section 1292 allows court to certify non-final order for interlocutory appeal where the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Court then has discretion to certify or not certify the order for appeal and is not required to certify even if standards of Section 1292 are otherwise met. Section 1292 is to be used sparingly and only in exceptional cases. Under Sixth Circuit law, ‘substantial grounds for difference of opinion’ exist only when there is conflicting authority on an issue. Although question to be appealed involving enforceability of contractual provision for arbitration was controlling question of law, appellant did not identify a single decision by any court that reached a conclusion contrary to the conclusion in the Order sought to be appealed, precluding finding of “substantial ground for difference of opinion”. Further, although the issues were issues of first impression, the issues were not difficult and turned on provisions of the Federal Arbitration Act and claims of pre-emption of the Act. Immediate appeal also would not materially advance outcome of litigation, where case had already been pending for several years and Court had ability to enter expedited scheduling order to allow action to conclude in short order.

Official Committee of Unsecured Creditors v. City of Pritchard, Alabama, 2011 WL 2383984 (S.D. Al. 2011) – Order authorizing compensation to creditors committee in Chapter 9 proceeding not subject to interlocutory appeal. Although the issue presented a question of controlling law for which there was a substantial difference of opinion based on conflict between various sections of the bankruptcy Code, Resolution of appeal would not necessarily advance the ultimate termination of the Chapter 9 proceeding

Mecca-Tech, Inc. v. Lange, 2011 WL 3847122 (W.D. Mi. 2011) – Order denying Motion for Summary Judgment is non-final Order. Court will authorize interlocutory appeal only where (1) question is one of law; (2) resolution of question is dispositive of underlying action; (3) there is a substantial ground for difference of opinion respecting correctness of decision; and (4) immediate appeal would materially advance ultimate termination of litigation. Bankruptcy Judge’s conclusion that matters within scope of request for admissions may be beyond the permitted scope of Rule 7036 was not strict question of law. Bankruptcy Court’s refusal to follow prior District Court decision on same issue of law was not subject to interlocutory appeal. Although binding nature of District Court decision is question of law on which there is substantial split of authority, outcome would not necessarily be controlling because, if Court determines that District Court decisions are not binding authority, interlocutory appeal would do nothing to bring matter to resolution.

Murawski v. Campbell, 2011 WL 768644 (E.D. Mi. 2011) – Court may permit an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Motion to appeal denial of summary judgment on one count of multi-count complaint did not demonstrate substantial difference of opinion regarding correctness of underlying decision and appeal at this stage would not materially advance resolution of litigation where there were 2 remaining counts that still needed to be adjudicated.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Order denying Motion to Dismiss Adversary Complaint is not final, appealable order. District court may hear an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Interlocutory appeal denied where immediate appeal would not materially advance ultimate termination of litigation and would instead prolong litigation. Debtor’s tax liability, if any, ultimately would have to be determined either by the Bankruptcy Court or the District Court even if the adversary proceeding is dismissed. Judicial economy is furthered by allowing adversary to proceed.

BAC Home Loans Servicing v. Cuong, 2011 WL 1706615 (N.D. Ohio 2011) – Court would not entertain interlocutory appeal of order that falls within the inherent case management powers of Bankruptcy Court. Creditor filed pleadings that incorrectly named the creditor holding the claim, which has potential to jeopardize bankruptcy case. Bankruptcy Court wanted to assure itself of accuracy of future filings by requiring creditor to take steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues.

BAC Home Loans Servicing, L.P. v. McDermott, 2011 WL 1257209 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparingly granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

In re Donovan, 2011 WL 1257965 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparingly granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order.

Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

In re Gray, 447 BR 524 (E.D. Mi. 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparing granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

Probuild Company, LLC. V. Doria, Case No. 10-11914 (E.D. Mi. 2010) – Interlocutory appeals are permitted only when (1) the order involves a controlling issue of law; (2) there is a substantial ground for difference of opinion; and (3) immediate appeal may materially advance termination of litigation. Substantial ground for difference of opinion requires showing that the issue is of first impression and involves more than just a strong disagreement between the parties. Adversary Defendant's request for interlocutory appeal of Order denying Motion to Dismiss Adversary based on alleged untimely filing of complaint denied where 60-day deadline to file adversary fell on weekend or legal holiday and adversary was filed on first business day thereafter.

Lewis v. Negri Bossi USA, Inc., Case Nos. 09-13148 and 09-13149 (E.D. Mi. 2009) – In deciding whether to exercise jurisdiction over appeal of interlocutory order, courts typically consider (1) whether the appeal involves a question of law; (2) whether the resolution of that question controls the outcome of the case; (3) whether there exist substantial grounds for differences of opinion about the question; and (4) whether an immediate appeal would materially advance the ultimate termination of the litigation. Lower Court granted partial summary judgment and, based on that summary judgment, enjoined Defendant from certain action. Defendant has appealed the injunction as a matter of right and seeks to appeal the partial summary judgment on which the injunction is based. Reversal of the summary judgment would mandate vacating the injunction. Simultaneous appeals will materially advance the ultimate termination of the litigation and immediate appeal of the summary judgment is appropriate because the appeal presents controlling questions of law.

In re Carmona, 2009 WL 2058587 (E.D. Mi. 2009) – District Court has jurisdiction to hear bankruptcy appeals of interlocutory orders and decrees. District Court authorized under 28 USC Section 158(a)(3) and 28 USC Section 1292(b) to accept appeal of interlocutory order where order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Woosley v. Woosley, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – In considering whether to certify an interlocutory appeal the Bankruptcy Court must consider whether this is a final judgment as to an individual claim in a multiple claim case, and whether there is no just reason for delay. Where multiple claims share a common factual background or arise out of a single transaction, they should be considered a single claim even though different theories of liability may have been asserted and neither claim will be final until both have been decided. To determine whether there is "just reason" for delaying the appeal, the Court must consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. A complaint that sought to declare a debt to be non-dischargeable under Section 523(a)(5), (a)(15) and (a)(2)(A), although involving the same damages, require proof of distinct elements, as does that portion of the Complaint that seeks to deny a discharge under Section 727. Allowing an interlocutory appeal of the Court's Order finding the debt to be non-dischargeable is in the best interest of judicial economy where the Plaintiff won on summary judgment, and a trial on the remaining issues would require potentially unnecessary litigation and expense that will neither increase nor decrease the amount of the Plaintiff's claim. If the Summary Judgment is affirmed on appeal, the other issues will become moot and no further litigation will be necessary. If this Court's Summary Judgment is reversed on appeal, the Court will be able to hold one trial that would address all of the Plaintiff's claims then remaining.

13.15 Default Judgments

Sharma v. Salcido, Case No. 12-1302 (9th Cir. BAP 2013) – Party is not required to seek relief from default judgment under Rule 60 prior to appealing where appellant participated in the action prior to entry of default or where appeal raises new factual issues. Given Appellant's extensive participation at the trial level, remanding case to trial court would not produce any additional information and would just return case to appellate court in same posture as it currently sat.

13.16 Particular Orders Appealable

Mort Ranta v. Gorman, 2013 WL 3286252 (4th Cir. 2013) – Order denying confirmation of Chapter 13 plan is final, appealable order, even where Chapter 13 case is not dismissed.

Bosch v. First National Bank, Case No. 12-20135 (5th Cir. 2012) – Order Modifying Stay and Order Confirming Plan each constituted final, appealable order. To be "final" for appellate purposes, Order must only constitute a final determination of the rights of the parties to secure the relief they seek, or dispose of a discrete dispute within the larger bankruptcy case.

Budzynski v. United States, 2012 WL 1392343 (E.D. Mi. 2012) – Order imposing sanctions under Rule 9011 is final, appealable order.

Order concludes the judicial proceedings as to the Rule 9011 Motion.

Rogan v. Litton Loan Servicing, LP, 2011 WL 4445651 (6th Cir. BAP 2011) – Bankruptcy court order dismissing an adversary complaint for failure to state claim upon which relief may be granted, or on motion for judgment on the pleadings, is a “final,” appealable order.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

Mentag v. GMAC Mortgage, LLC, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

American Express Bank v. Askenaizer, 418 BR 495 (1st Cir. BAP 2009) – Order allowing or disallowing Claim is final order for purposes of appeal. Order denying trustee’s request for fees is also a final order for purposes of appeal.

13.17 Particular Orders Not Appealable

Chambers v. Sweet, Case No. 12-14111 (E.D. Mi. 2013) – Order denying Motion to Dismiss is non-final order. Court will allow appeal of non-final order only where order involves controlling question of law; a substantial ground for difference of opinion exists regarding correctness of decision; and immediate appeal may materially advance ultimate termination of litigation. Denial of Motion to Dismiss based on alleged lack of subject matter jurisdiction by bankruptcy court already resolved by prior order withdrawing reference for purposes of trial but allowing matter to remain at bankruptcy court for pre-trial proceedings. District Court will conduct ultimate trial and has subject matter jurisdiction for purposes of entering final judgment.

In re Graves, 2012 WL 5509476 (E.D. Mi. 2012) – Order denying Motion to Dismiss Adversary Complaint is not final, appealable order. Although “final” in bankruptcy cases is construed with a view toward functionality, such that the order must finally dispose of a discrete dispute within the larger case, an Order denying a Motion to Dismiss does not dispose of any issue and does not terminate any judicial labor.

Gold v. Bandman, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order.

Smith v. Bluegrass Mortgage Services, Inc., Case No. 10-5785 (6th Cir. 2012) – District Court Order denying Motion to Withdraw Reference is non-final, non-appealable order.

Rogan v. Litton Loan Servicing, LP, 2011 WL 4445651 (6th Cir. BAP 2011) – Bankruptcy court order granting motion to set aside default judgment is interlocutory order, reviewable after entry of final judgment in underlying adversary proceeding.

LaBoy v. Doral Mortgage Corp., 2011 WL 2119316 (1st Cir. 2011) – Summary Judgment which determined liability but did not reach issue of damages is not final judgment for appeal purposes.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

French v. Shapiro, Case No. 10-11333 (E.D. Mi. 2011) – Order adjudicating party to be in civil contempt for violation of Court’s stay orders is not final order for purposes of appeal. Order holding non-party in contempt is final order for purposes of appeal. Order of civil contempt entered as part of ongoing adversary proceeding would not be appealable until final disposition of adversary proceeding as a whole.

Mashburn v. Scrivner, 2010 WL 1220730 (10th Cir. 2010) - Appeal of partial final judgment revoking discharge is not appealable where Trustee had filed Motion to Alter or Amend Judgment as to second count which sought turnover of property from debtors. Appeal was premature as Judgment which Debtor sought to appeal was not yet final. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.

Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC, Case No 09-8041 (6th Cir. BAP 2010) – Order denying Committee’s application to retain financial advisor is not final order for purposes of direct appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for interlocutory appeal.

K & B Capital, LLC v. Official Unsecured Creditors’ Committee, 2009 WL 1747834 (6th Cir. 2009) – Order substituting counsel for Committee of Unsecured Creditors over objection of one member of creditor’s committee is not a “final order” over which the Court

would have appellate jurisdiction. Order partially determining damages which expressly contemplated further hearings to determine whether certain of the damages awarded would ultimately be refunded to the creditor is not a final order as the order expressly contemplates further proceedings on the issue of damages. Order denying motion to withdraw a reference and have proceeding adjudicated in District Court is a non-final, non-appealable order.

CIT Small Business Lending Corp. v. Kendrick, 558 F.3d 482 (6th Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of defendant in a preference action is not a final, appealable order. Determination of whether the elements of a preference action were met is not “final” order as Order does not terminate judicial actions. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated are of a purely ministerial character. ... Proceedings to prove the elements of a preference action are not ministerial, but instead concern the merits of the claim.”

Buckeye Retirement Co. v. Swegan, 555 F.3d 510 (6th Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of Debtor in action to deny a discharge under section 727 is not a final, appealable order. BAP’s decision to remand for further proceedings is not “final” and, therefore, the Sixth Circuit lacks appellate jurisdiction. Reversal of a summary judgment contemplates further fact-finding by the bankruptcy Court.

Settembre v. Fidelity & Guaranty Life Insurance Co., 552 F.3d 438 (6th Cir. 2009) –United States District Court’s reversal of summary judgment in creditors adversary proceeding objecting to Debtors discharge under section 727(a)(3) is not “final”. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated her on a purely ministerial character.” Proceedings to determine Debtors entitlement to a discharge are not ministerial, but instead concern the merits of the claim.

Sparks v. HSBC Auto Finance, 2008 WL 4694795 (6th Cir. 2008) – Order denying confirmation of Chapter 13 plan without also dismissing the case is not a final, appealed the order. Appellate Court lacks jurisdiction to review order that denies confirmation and orders Debtor to file amended plan.

Doucet v. Drydock Coal Co., 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Order denying Motion to Dismiss by definition contemplates further judicial involvement.

Black Diamond Mining Co., LLC., v. Official Committee of Unsecured Creditors, 400 BR 207 (6th Cir. BAP 2009) – Order denying Application for Retention of Counsel is non-final, non-appealable order.

E. Stay Pending Appeal

13.18 Jurisdiction to Enter Stay

In re Pertuset, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Rule 8005 provides that Motion for Stay Pending Appeal is to normally be brought in bankruptcy court although moving party can request stay directly from appellate court if movant can show why the relief was not obtained from the bankruptcy court in the first instance.

In re McInerney, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Rule 8005 allows bankruptcy court to suspend or order the continuation of proceedings in bankruptcy case or make any other appropriate order so as to protect the rights of the parties.

Global Technovations, Inc. v. Onkyo USA Corp., Case No. 03-5078 (Bankr. E.D. Mi. 2011) – Bankruptcy Court lacks authority to issue stay pending appeal of matter to 6th Circuit Court of Appeals. Stay of matter appealed to Sixth Circuit can be entered only by District Court that issued decision being appealed.

In re Scarborough, 2010 WL 2893626 (3d Cir. 2010) – Court lacks jurisdiction to consider stay pending appeal where court does not have jurisdiction over appeal itself. Debtor appealed Bankruptcy Court decision to dismiss case. Debtor sought stay from Bankruptcy Court which denied Motion. Debtor then sought stay from District Court where appeal was pending, which also denied Motion. Debtor then requested stay from Third Circuit Court. Court dismissed Motion as Circuit Court did not have jurisdiction to rule in appeal pending before District Court.

13.19 Elements of Stay

In re Pertuset, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Stay pending appeal requires consideration of likelihood of success on merits of appeal; likelihood that moving party would be irreparably injured if the stay is not granted; prospect that others will be harmed if stay is granted; and public interest in granting or denying stay. Likelihood of success does not require high probability of success but must show, at a minimum, serious questions going to the merits of the case and more than just an assertion of expectation of success. Motion for stay did not evidence likelihood of success on merits where Motion merely reasserted same legal arguments that were considered by court in the first instance. Irreparable harm must be certain and immediate. Generally, resumption of collection activities alone is not irreparable harm. Debtor demonstrated risk of irreparable harm if order dismissing Chapter 12 case is not stayed, as debtors face imminent foreclosure of farm and repossession of farm equipment, where several creditors held judgments against debtors and there

was a pending foreclosure action. Risk of loss of farm is beyond normal risk faced in collection activities, where money can be returned to debtor if dismissal were overturned. Stay would cause harm to creditors who would be further delayed in efforts to collect debts or to enforce judgments entered prior to commencement of bankruptcy case. Creditors have already faced substantial delay in receiving payment and debtor did not propose collateral or other surety bond to protect against harm resulting from additional delay. While court acknowledged that public policy did not favor dispossessing debtors from their assets, Court noted that debtors' conduct in Chapter 12 proceeding evidenced intent to delay and hinder creditors rather than a good faith effort to reorganize and provide fair repayment. Debtors were afforded two opportunities to promulgate confirmable plan and failed to do so. Public policy did not support stay under these circumstances.

In re McInerney, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Determination as to whether to enter stay pending appeal requires consideration of (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed absent stay; (3) harm that may be suffered by others if court grants stay; and (4) public interest in granting stay. Factors are not prerequisites but are interrelated considerations that must be balanced. Degree of likelihood of success is inversely proportional to amount of irreparable injury that moving party would suffer without the stay – the greater the harm, the lower the burden of showing likelihood of success. Debtor not likely to prevail on appeal of order converting case where Notice of Appeal designated only the Order Denying Reconsideration and did not designate the Order of Conversion as an order on appeal. Even if Appellate Court construed Notice of Appeal as including both the Dismissal Order and the Order Denying Rehearing, the standard on appeal is abuse of discretion, which is very high burden that Debtor was not likely to achieve given bankruptcy court's detailed order converting the case in the first instance. Debtor failed to demonstrate any irreparable harm if no stay is implemented. Debtor's only argument was that if the case proceeds in Chapter 7, the trustee may compromise claims for less than their true value. Debtor's arguments were mere speculation, particularly where Debtor had lost at state court on the alleged claim prior to commencement of bankruptcy case, and there was no indication that the Chapter 7 Trustee would compromise the claim in any way. Stay denied.

Asaro v. McClarty, 2012 WL 4903488 (E.D. Mi. 2012) – Whether to issue stay pending appeal depends on: 1) whether applicant has demonstrated a likelihood of success on the merits; 2) whether applicant will be irreparably injured absent a stay; 3) whether issuance of stay will substantially injure other interested parties; and 4) whether public interest would be served by issuing stay. Bankruptcy Court entered order compelling debtors to cooperate with the Trustee in the sale and disposition of property of the estate. On appeal, debtors failed to demonstrate any likely success on merits, as court did not order sale of property. Debtors did not demonstrate any irreparable injury would result as trustee has not sold, nor attempted to sell, property or assets. Other parties could be injured by delay if trustee is unable to expeditiously market property as delay creates risk of foreclosure or devaluation of property. Public interest would not be served if debtors were able to continue to refuse to cooperate with or assist trustee.

In re Holstine, 458 BR 392 (Bankr. E.D. MI. 2011) – Stay pending appeal requires demonstration of strong showing of likelihood of success on appeal; irreparable harm if proceedings are not stayed; whether issuance of stay would cause substantial harm to others including appellee; and whether public interest would be served by stay. Appellant did not demonstrate likelihood of success on merits of appeal from order overruling objection to exemption for workers compensation payments. Workers Compensation award that debtor had received and deposited into bank account was traceable to payment in compensation for loss of future earnings that is exempt to extent reasonably necessary for support of debtor and dependents. Section 522(d)(11)(E) is not limited to tort recoveries and does not exclude other sources of replacement income such as workers compensation. Appellant also failed to demonstrate irreparable harm. If Appellant prevails on appeal, debtor will be required to pay money to appellant. Monetary harm is not irreparable injury, even if delay would allow debtor to dissipate funds and render debtor unable to answer to any judgment.

In re Rahim, 2011 WL 833804 (E.D. Mi. 2011) – Motion for stay of dismissal of Chapter 7 case denied. Debtor failed to demonstrate any likelihood of success on merits where Bankruptcy Court dismissed case as abuse where debtors had income of \$39,000 per month and claimed expenses of \$39,000 per month including 3 homes, 3 luxury automobiles, and expensive private school tuition. Debtors also failed to demonstrate irreparable harm. Possible future collection activities by creditors are not "irreparable" harm. Creditors would suffer substantial harm from further delays in enforcing claims. Public interest would not be furthered where underlying bankruptcy case substantially challenged the integrity of the bankruptcy process.

In re Seidel, 443 BR 411 (Bankr. S.D. Ohio 2011) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Attorney failed to demonstrate basis for stay of order that required Attorney to disgorge to the Debtor's credit card issuer the fees and costs which he received through credit card charge, (2) suspended the "no look fee" for Chapter 13 cases filed by Attorney, (3) required Attorney to complete six hours of bankruptcy ethics instruction satisfactory to the Court, (4) required Attorney to submit to the Court a list of all bankruptcy clients from the last five years who paid attorney's fees or costs using a credit card, and (5) directed the United States Trustee to investigate Attorney's practice to determine whether further action should be taken. Motion for stay denied where attorney failed to demonstrate any of required elements.

Hock v. Stevenson, 2011 WL 2173837 (E.D. Mi. 2011) – Motion for Stay Pending Appeal denied where appellant, Buyer at foreclosure sale, lacked standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. Appellant could not demonstrate any likelihood of success where Appellant did not even have standing to prosecute the appeal.

In re Forum Health, 2011 WL 1680417 (Bankr. N.D. Ohio 2011) – In deciding whether to grant stay pending appeal from earlier order of

bankruptcy court allowing debtors to voluntarily dismiss their Chapter 11 cases, court would consider the following: (1) likelihood that the party seeking stay would prevail on merits of appeal, (2) likelihood that moving party would be irreparably harmed absent a stay, (3) prospect that others would be harmed if stay were granted, and (4) the public interest in granting a stay; however, these factors were not prerequisites that had to be met, but interrelated considerations that had to be balanced together. Court denied stay where creditors could not prove harm would result if stay was denied and granting stay would have effect of forcing not-for-profit debtor to remain in case involuntarily in violation s letter and spirit of Bankruptcy Code which exempts non-profit corporations from involuntary petitions.

In re Greene, 2011 WL 1500120 (Bankr. E.D. Tn. 2011) – Request for Stay is based upon the same factors traditionally considered concerning preliminary injunctions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Creditor could not demonstrate likelihood of success in appeal that voided lien where lien was never properly recorded prior to commencement of bankruptcy case. Creditor also failed to prove irreparable harm where debtor has not sought permission to sell property. If judgment is reversed on appeal, property will still be subject to Bankruptcy Court jurisdiction for purposes of preserving creditor’s alleged mortgage interest.

In re Mains, 451 BR 428 (Bankr. W.D. Mi. 2011) – Stay of proceedings pending appeal is to be determined based on what best protects interests of all parties. Debtor seeking to stay dismissal of Chapter 13 case pending appeal must show strong or substantial likelihood of success; that debtor will suffer irreparable harm if the proceedings are not stayed; whether the stay would substantially injure other parties; and where the public interest lies. Debtors failed to demonstrate substantial likelihood of success. Although issue of whether debtors must include Social Security income for funding of plan has not been conclusively determined in Sixth Circuit, substantial body of case law exists to hold that good faith requires debtors to contribute Social Security notwithstanding exclusion from CMI calculation.

In re Amir, 2010 WL 3522474 (Bankr. N.D. Ohio 2010) – Debtor’s Motion for Stay of BAP decision pending appeal to Sixth Circuit must be presented to BAP for consideration. Bankruptcy court lacks authority to stay BAP opinion pending appeal. To extent Debtor’s Motion seeks to stay Bankruptcy Court Order that gave rise to BAP decision and to subsequent appeal to Sixth Circuit, Motion denied where Appellant failed to demonstrate any likelihood of success on merits. Appellant failed to timely file objections to claims. Debtor’s belated amended objections failed to proffer evidence or a legal basis to defeat *prima facie* validity of a claim under Rule 3001(f). All of the grounds alleged by Debtor were presented to, and rejected by, the BAP in its August 5, 2010. Absence of a stay of a decision disallowing objections to claims will not irreparably harm the debtor where appeal will be decided before any funds are ever distributed to creditors. Public interest would be better served by having case go forward without a stay.

In re Grass, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Bank that admitted it had violated automatic stay did not present any likelihood of success on merits of appeal of Order imposing sanctions for stay violation. Denial of stay posed no risk to Bank where property could not be sold without notice to creditors and approval of court, which would afford Bank opportunity to be heard on issue. Granting of stay would adversely affect debtor and remaining creditor body as stay would prevent confirmation of debtor’s Chapter 13 Plan and would delay commencement of payments to creditors.

In re Davis, Case No. 10-40065 (Bankr. E.D. Mi. 2010) – Rule 8005 allows court to stay order pending appeal if appellant has a strong or substantial likelihood of success on appeal and appellant would suffer irreparable harm if the stay is not granted, and where other parties would not suffer substantial injury from stay. Debtor’s Motion denied where Motion failed to offer any explanation as to why Debtor did not respond to Creditor’s Motion for Relief From Stay, thereby admitting essential elements of request for relief. Debtor’s appeal was predicated on argument that sheriff sale was not conducted by a person duly appointed to conduct sales, but Debtor failed to produce any support for this allegation. Debtor would not be prejudiced as effect of order is only to grant stay relief, and Debtor is free to assert any defenses he has in the State Court proceeding. Granting stay would merely enable Debtor to continue to unnecessarily delay Creditor and increase litigation expenses.

Syllabi v. US Bank, N.A., 2010 WL 2817187 (Bankr. N.D. Ohio 2010) Factors for Court to consider in evaluating Motion for Stay Pending Appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. The movant bears the burden of proof, providing specific facts and affidavit supporting assertions that these factors exist. Defendant’s conclusory statement that “it has substantive issues of merit to present on appeal regarding the specific acknowledgment at issue in this adversary proceeding” falls short of demonstrating Defendant is likely to succeed on the appeal. Defendant’s failure to show that it is likely to succeed on the appeal is not fatal because the balancing of the factors could still tip in Defendant’s favor. Defendant’s argument concerning irreparable harm focus on the loss of rights as a secured creditor, more specifically its inability to drive the foreclosure process fails to demonstrate harm that is both certain and immediate, rather than speculative or theoretical. If Trustee sells the property while the appeal is pending, Defendant’s lien will attach to the proceeds. Only upon final disposition of the appeal will the proceeds be distributed, thereby protecting Defendant’s secured status. Defendant’s arguments focused on speculation and conjecture, not specific and irreparable harm. The stay could hinder other creditors because there will be no immediate distribution regardless of whether the stay is approved. Delaying the sale could mean a decline in value, either through market forces or deterioration. Any expenses incurred in maintaining or securing the property would be funded by the estate, depleting resources. Motion for Stay denied.

Spring Creek Airpark, Inc. v. Roswell Holding, LLC, 2010 WL 2573745 (W.D. Ky. 2010) - A motion for a stay of the judgment, order, or decree of a bankruptcy judgment ordinarily be presented to the bankruptcy judge in the first instance. Only after the bankruptcy court has failed to grant the stay or has failed to grant it on terms acceptable to the appellant that the appellant may seek relief in the district court in accordance with the provisions of Rule 8005. Court must consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction - (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. A movant seeking a stay pending review will have greater difficulty in demonstrating a likelihood of success on the merits and must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Movant need not establish a high probability of success on the merits but must movant show serious questions going to the merits. Appellant not entitled to stay of Order Granting Relief From Stay. Decision to lift stay is committed to the discretion of the Court, and will be overturned only upon a showing of abuse of discretion.

Countrywide Home Loans, Inc. v. McDermott, 2009 WL 3259131 (N.D. Ohio 2009) – Appellate Court has authority to stay enforcement of a judgment to preserve the rights of the parties during the pendency of the appeal and to ensure that the Appellate Court can responsibly fulfill its role in the judicial process. A stay is an exercise of judicial discretion and not a matter of right. Court must consider : (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Bankruptcy Court sanctioned creditor who filed Proof of Claim and Objection to Confirmation in Chapter 13 Case notwithstanding that Creditor had satisfied loan more than 18 months prior to the Petition Date. Bankruptcy Court Order required Creditor to submit a four-page Worksheet, created by the bankruptcy judge, whenever Creditor submits a proof of claim in any case before that judge; and to file the same Worksheet as a supplement to all proofs of claim Creditor had filed in previous cases pending on that judge's docket. Creditor made “compelling arguments” that the bankruptcy judge exceeded her authority under any statute and/or federal or local bankruptcy rule to require Creditor to use a Worksheet that arguably amounts to an improper judicial amendment/revision of Official Bankruptcy Form 10. If a stay is not granted and Creditor ultimately prevails on its appeal, irreparable harm will have been suffered by Creditor as Creditor will have been required to implement a new protocol tailored specifically for cases pending before a single bankruptcy judge at considerable cost. Stay will be of relatively short duration as District Court “is committed to resolving the bankruptcy appeal as soon as possible after the briefing is complete”.

Indiana State Police Pension Trust v. Chrysler, LLC., 129 S.Ct. 2275 (2009) – Supreme Court would not stay Order approving sale of assets pending appeal. In determining whether to grant a stay, Court considers whether the applicant has demonstrated (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay. In a close case Court will also balance the equities and assess the relative harms to the parties as well as the interests of the public at large. “A stay is not a matter of right, even if irreparable injury might otherwise result.” Party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

In re Noble International, Ltd., 2009 WL 1607704 (E.D. Mi. 2009) – In determining whether to grant a stay in a bankruptcy appeal, the Court must balance four factors: (i) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (ii) the likelihood that the moving party will be irreparably harmed absent a stay; (iii) the prospect that others will be harmed if the Court grants the stay; and (iv) the public interest in granting the stay. Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time.

13.20 Scope of Stay

In re Noble International, Ltd., 2009 WL 1607704 (E.D. Mi. 2009) – Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time. Stay limited to actual closing of the sale and parties are free to take all steps and perform due diligence and conduct any necessary discovery in effort to prepare for closing.

13.21 Effect of Failure to Obtain Stay - Mootness

Karam, Inc. v. BW Holdings, LLC, 2013 WL 3243540 (W.D. Ky. 2013) – Appeal of order granting relief from stay rendered moot when property later sold at foreclosure sale. Court lacked any effective relief once property had been sold, as reversal of order granting relief from stay would not reverse sale or bring property back into bankruptcy estate.

ML-CFC 2006-3 Seasons, LLC, v. Seasons Partners, LLC, Case No. 11-16999 (9th Cir. 2013) – Appeal dismissed as equitably moot where creditor did not obtain stay of order confirming Chapter 11 plan where plan has been substantially consummated and modification of plan would negatively impact interest of parties not before the court, including interests of investor who infused \$2.5 million into venture in reliance on confirmed plan.

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.

Northcutt v. Leasure, 2013 WL 2458709 (W.D. Ky. 2013) – Appeal of Court order authorizing sale of assets under Section 363 dismissed

as moot where appellant did not request or receive stay of sale order prior to closing. Appellant's assertion that property was not property of estate and that sale violated party's fifth amendment rights was not appealable where party failed to obtain stay. Section 363(m) applies to any attempt to appeal a sale order regardless of legal basis for the challenge to the sale order.

Clearview Energy, LLC v. Mammoth Resources Partners, Inc., 2013 WL 1411220 (W.D. Ky. 2013) – Appeal of Court order authorizing sale of assets under Section 363 dismissed as moot where appellant did not request or receive stay of sale order prior to closing. Appellant's assertion that property was not property of estate and that Court lacked ability to approve sale did not constitute basis to appeal Bankruptcy Court's contrary ruling without obtaining stay of sale order. Section 363(m) applies to any sale authorized under Section 363 without regard to whether authorization itself was correct or incorrect.

Staker v. Jubber, Case No. 12-091 (10th Cir. BAP 2013) – Appeal of orders dismissing adversary proceedings dismissed as moot where intervening events rendered Appellate court incapable of rendering effective order. An appeal is moot where the issues presented are no longer live such that the reviewing court is incapable of rendering effective relief or restoring parties to their original positions. Prior to commencement of bankruptcy case, debtor sued various parties to quiet title to two parcels of real estate. Actions were pending when debtor filed chapter 7. Trustee entered into settlements with defendants that required defendants to pay money to the Trustee, and Trustee released any claims estate had against defendants. Court entered order approving settlement and no party appealed. Thereafter, the Court dismissed the quiet title actions based on the settlement and debtor appealed. Court lacked ability to enter meaningful relief even if dismissals had been improper, as reversing dismissal orders would not create any right of debtor to any further relief. The settlement had become final and, even if the adversary cases were reinstated, court lacked ability to grant debtor any affirmative relief, as estate released all claims.

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. Subsequent sale of Domain Name by Trustee pursuant to Section 363 not subject to attack if order allowing sale is not stayed pending appeal as long as later sale was to buyer acting in good faith. Entity may purchase property in good faith even if the entity knows that an appeal of the sale authorization is pending. Subsequent sale did not render appeal moot where purchaser expressly took title subject to claims and defenses of prior purchaser and pending a ruling on the adversary proceeding in which the prior purchaser's rights were to be determined. Order allowing the sale also stated that order was not final until the rights of the estate in the Domain name were determined in the adversary proceeding.

In re Timco, LLC, 469 BR 688 (E.D. Mi. 2012) – Debtor's appeal of order remanding removed action to state court and modifying stay to allow party to seek order confirming arbitration award rendered moot when debtor did not obtain stay of order and state court confirmed award while appeal was pending. Appeal becomes constitutionally moot when subsequent events result in either appellant receiving the relief sought when it is factually impossible to receive the relief sought. The order being appealed was to determine whether it was proper to remand case to state court and to allow state court to enter judgment. State court subsequently entered judgment. Appeal could not now grant relief that would prevent entry of that state court order. State court order became final and non-appealable at a time when the automatic stay remained lifted for that purpose. Nothing the bankruptcy or appellate courts could now do could change that result.

Coleman v. ANMP, 2011 WL 1979855 (9th Cir. 2011) – Appeal of confirmation of plan of reorganization of Chapter 11 plan that called for sale of debtor's business rendered moot by Section 363 where appellant did not obtain stay of proposed sale pending appeal.

Asset Based Resource Group, LLC v. United States Trustee, Case No. 09-2860 (8th Cir. 2010) – Sale free and clear of liens with liens to attach to proceeds is a sale under Section 363(b) to which Section 363(m) applies. When sale closed without stay pending appeal, appeal must be dismissed as moot where effect of order reversing the order approving the sale would affect the validity of the underlying sale itself. Challenge to portion of order that permitted sale free and clear of liens, if reversed on appeal, would effectively unwind the sale. Appeal dismissed as moot.

In re Hake, Case No. 08-8039 (6th Cir. BAP 2008) – Bankruptcy Court Order to Show Cause why *pro hac vice* status should not be revoked did not become moot merely because Counsel agreed to voluntarily withdraw his *pro hac vice* admission. "A disciplinary action and consequent disqualification may expose counsel to further sanctions by the bar and portends adverse effects upon counsel's career and public image. The effects of disqualification will linger long after the closing of the case. The controversy thus remains live and demands consideration. ... [T]he 'brand of disqualification' on grounds of dishonesty and bad faith could well hang over his name and career for years to come." Filing of Motion to Withdraw as Counsel did not moot Court's Show Cause Order regarding whether counsel had engaged in argumentative, disrespectful, and antagonistic conduct toward bankruptcy Court.

City of Akron v. Akron Thermal, LP, 2009 WL 1707907 (N.D. Ohio 2009) – In determining whether a bankruptcy appeal is equitably moot, Court must weigh: (1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the Court or the success of the plan. Concept of "equitable mootness" is designed to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal and is designed to protect parties settled expectations and the ability of a Debtor to emerge from bankruptcy. Equitable mootness will not prevent appeal of portions of Confirmation Order where outcome of appeal would not require abandonment of plan or substantially upset the plan of reorganization. Thus, appeal could proceed to determine amounts owed under assumed lease where outcome would not result in termination of lease and Court could fashion relief that would not disrupt confirmed plan. Issues dealing with whether plan should have been confirmed in the first instance and whether plan complied with Section 1129 were equitably moot

where outcome of appeal would be to overturn confirmation order and eviscerate the plan.

Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC, 2009 WL 1617860 (6th Cir. 2009) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363 (m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) applies whenever a party fails to obtain a stay from an order permitting the sale of the Debtor’s assets.

Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC, Case No. 09-5817 (6th Cir. BAP 2010) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363(m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) whenever a party fails to obtain a stay from an order permitting the sale of the Debtor’s assets.

In re Nashville Sr. Living, LLC, 407 B.R. 222 (6th Cir. BAP 2009). Unstayed order approving sale to good faith buyer mooted appeal from portion of order allowing sale of non-debtor’s interest.

13.22 Effect of Stay

Allstate Insurance Company v. Harris, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant’s counterclaim filed after entry of order staying further proceedings pending interlocutory appeal would be dismissed, without prejudice to defendant to defendant either filing counterclaim after appeal is resolved or, if defendant believes there is some urgency to file such as a statute of limitations or other time-bar problem, defendant can file motion asking court to make exception to scope of stay pending appeal.

Allstate Insurance Company v. Harris, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant did not violate stay pending interlocutory appeal by filing answer to complaint. Stay order specifically required defendant to file answer within 14 days of service of amended complaint. Court would add to that deadline additional three days pursuant to Rule 9006 which extended deadline to June 18, the date on which the answer was filed.

Burrage v. Homecomings Financial Network, Inc., 2011 WL 6000794 (Bankr. N.D. Ohio 2011) – Stay pending appeal relieves appellee of obligation to comply with order being appealed. Appellant who obtained stay pending appeal cannot simultaneously complain that appellant failed to perform as required by the order being appealed.

13.23 Supersedeas Bond

Newton v. Bank of America, 2011 WL 2112410 (Bankr. E.D. Tn. 2011) – Federal Rule of Bankruptcy Procedure 7062 allows for an appellant to obtain a stay by posting a Supersedeas bond only where the matter involves a money judgment. Where the judgment is non-monetary, Rule 62 does not apply. Court order allowing Trustee to sell property free and clear of holder of unrecorded lien was not “money judgment”. Further, proposed bond of \$10,000 could not possibly cover the actual damages from the loss of a sale for \$170,000.00.

F. Appeal Costs

13.24 Filing Fee

Rowan v. Southwest Tennessee Community College, 2013 WL 3242486 (W.D. Tn. 2013) – 28 USC Section 1915(a)(3) provides that appeal may not be taken *in forma pauperis* if the trial court certifies in writing that the appeal is not taken in good faith. Appeal that is frivolous is not taken in good faith. Where trial court certified that appeal was not taken in good faith, Appellant must pay filing fee within 30 days of filing notice of appeal.

Constant v. Nadolski, 2012 WL 353878 (E.D. Mi. 2012) – 28 USC Section 1915(a)(1) allows any court to waive payment of filing fees or security if the litigant submits an affidavit demonstrating that the litigant is unable to pay the fees or provide security. Although appealing creditor did not file “affidavit” he did submit letter declaring under penalty of perjury that his income was \$785 per month and he had less than \$60 in the bank.

13.25 Appeal Bond

In re Countrywide Financial Corp. Customer Data Security Breach Litigation, 2010 WL 5147222 (W.D. Ky. 2010) – Federal Rule of Appellate Procedure 7 permits court to condition right to appeal on posting of bond to ensure payment of costs on appeal if appellee prevails. In determining necessity and amount of bond, court must consider (1) the appellant’s financial ability to post a bond, (2) the risk that the appellant would not pay appellee’s costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.

13.26 Taxable Costs

In re Countrywide Financial Corp. Customer Data Security Breach Litigation, 2010 WL 5147222 (W.D. Ky. 2010) – Prevailing party to appeal may recover taxable costs as specified in 28 USC Section 1920 and Federal Rule of Appellate Procedure 39, including (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a Supersedeas bond or other bond to preserve rights pending appeal; (4) the fee for filing the notice of appeal; (5) marshal and clerk fees; (6) court reporter fees; (7) printing and witness fees; (8) copying fees; (9) docket fees; and (10) compensation of court appointed experts and interpreters. Attorney fees are taxable as costs only if provided for in underlying statutes or contracts on which cause of action is based.

13.27 Sanctions – Frivolous Appeal

Smith v. Silverman, 2011 WL 1901040 (2d Cir. 2011) – Appellate court had authority to impose sanctions for frivolous appeal. Bankruptcy Court and District Court both warned appellant that conduct in litigation and appeal were borderline sanctionable, yet appellant pressed same issue on further appeal to Circuit Court. Sanctions equal to double costs plus additional damages where appellant pursued patently frivolous appeal and forced appellee to defend vexatious litigation.

In re Messina, 2011 WL 2006903 (7th Cir. 2011) – Federal Rule of Appellate Procedure 38 allows Court to award sanctions against appellant who brings frivolous appeal. Debtor's third appeal of same issue, having lost two prior appeals of the same issue, is patently frivolous. Sanctions included award of double attorney fees and costs incurred by appellee.

WMS Motor Sales, Ltd. v. Reese, 2011 WL 1882383 (6th Cir. BAP 2011), *aff'd* 2012 WL 2149752 (6th Cir. 2012) – Court would impose sanctions against attorney who filed frivolous appeal. Appeal from Order denying dischargeability was not timely filed and appeal was dismissed. Attorney then appealed that dismissal. Court held that the appeal of dismissal was frivolous as there was no basis in the law to allow an untimely filed notice of appeal. Further, appellee wrote letter to court advising that appellee had never authorized attorney to file appeal. Bankruptcy Court properly entered sanctions against attorney for frivolous appeal in the amount of attorney fees expended by appellee in dealing with frivolous appeal. Sections warranted where appeal is wholly without merit; there was no reasonable expectation of altering lower court order; or where appeal is result of "sheer obstinacy"

G. Dismissal

13.28 Voluntary Dismissal

13.29 On Motion by Party

Richard v. Spradlin, 2013 WL 1571059 (E.D. Ky. 2013) – Rule 8010 is intended to give the court and opposing parties notice of the aspects of the court decision that the appeal targets. Court would not dismiss cross appeal based on failure of brief to comply with rules regarding format, where brief lacked table of contents, statement of jurisdiction, state of issues, or statement of the case. Court would grant defendant's motion for leave to amend brief to correct deficiencies. Plaintiff failed to identify any element of prejudice that resulted from omissions and based on plaintiff's response brief, plaintiff was able to discern all of the relevant materials.

Spring Creek Airpark, Inc., v. Roswell Holding, LLC, 2010 WL 2573745 (W.D. Ky. 2010) - Appellant's designation of record included entire bankruptcy court record and failed to timely file statement of issues on appeal. Blanket designation of the bankruptcy court record is improper. Purpose of designation is to afford the reviewing court a complete understanding of the case. Designation that provides for all documents filed in the Bankruptcy case amounts to no designation at all. District Court has discretion to dismiss appeal where appellant fails to comply with non-jurisdictional rules and requirements. Dismissal of an appeal, however, is rarely an appropriate action. Power to dismiss should not be exercised unless omission arose from negligence or indifference of appellant - where good faith is shown, the court may direct that the omission be corrected by a supplemental transcript or remand the cause for a finding on controverted fact questions. Usual practice is to direct that the omission be corrected.

Stevenson v. Siciliano, Mychalowych, Van Dusen and Feul, P.C., 2010 WL 2671311 (E.D. Mi. 2010) - Rule 8006 requires appellant to file with the Clerk of the Appellate Court a designation of record and statement of issues on appeal within 14 days of filing Notice of appeal. Time limits under Rule 8006 are not jurisdictional. Dismissal of bankruptcy appeal is unjustified where the appellant filed a timely notice of appeal but an untimely designation of record and statement of issues absent evidence of bad faith, negligence or indifference. Case would not be dismissed where designation of record and statement of issues were timely but inadvertently filed with the Bankruptcy Court and error was corrected and designation and statement re-filed in District Court only 2 days later. Delay was minimal, resulted in no prejudice to any party, and was result of good faith error rather than bad faith or negligence.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - Delay in filing Designation of items to be included in the record not basis for dismissal of appeal. Rule 8006 requires designation to be filed within 14 days of the filing of the Notice of Appeal. Party incorrectly calculated time to run from date Clerk of Bankruptcy Court issued Notice of Requirement to File Designation and filed Designation 4 days after the time had expired under Rule 8006 but within 14 days of Bankruptcy Notice. Rule 8001 provides that any action other than timely filing a notice of appeal is not jurisdictional. Failure to timely comply with any other requirement may be a basis for dismissal but

does not automatically require dismissal. Court should not dismiss appeal for technical non-compliance unless non-compliance results from negligence or indifference. Delay did not result from negligence or indifference but rather from a reading of the Bankruptcy Court Notice that appeared to require the Designating within 14 days of issuance of that Notice.

13.30 Dismissal by Court *Sua Sponte*

Dietrich v. Wyndham Worldwide Corp., Case No. 11-4039 (3d Cir. 2013) – District Court properly dismissed appeal where appellant did not file brief for 10 months after filing notice of appeal, and had failed to comply with either long-established deadlines or orders of the district court, and otherwise acted in bad faith.

Lunan v. Jones, 2013 WL 1693985 (6th Cir. 2013) – Appeal dismissed where appellant repeatedly failed to provide transcript of hearing that produced order that was the subject of the appeal.

Fujitrans USA v. Barko Enterprises, Inc., 2013 WL 793056 (S.D. Ohio 2013) – Court dismissed appeal where appellant failed to file initial brief notwithstanding multiple extensions of time. Court Order granting final extension set deadline and expressly stated that court would not entertain any further extensions.

Bosch v. First National Bank, Case No. 12-20135 (5th Cir. 2012) – District Court had discretion to dismiss appeal where appellant failed to file a designation of items to be included in record on appeal within 14 days of filing of notice of appeal as required by Rule 8006. Court should not lightly dismiss appeal for failure to comply with Rule 8006, but dismissal was warranted where appellant failed to file designation, failed to provide copies of the orders being appealed, and failed to order the transcript of the hearing. Total failure to produce record for appeal warranted dismissal.

Hancock v. McDermott, 2011 WL 1878240 (6th Cir. 2011) – District Court correctly summarily affirmed lower court's decision without consideration of merits. Appellant engaged in a clear pattern of delay and contumacious conduct and a lesser sanction would be insufficient. Appellant did not file any brief in the district court until more than 7 months after filing the notice of appeal; the brief as filed completely disregarded both the district court filing requirements and the bankruptcy rules including being more than 100 pages in length notwithstanding rule limiting initial briefs to 50 pages; appellant ignored district court's first order to show cause and responded to second order to show cause with disrespectful remarks and unacceptable explanations for delays; and district court had acted with considerable leniency, giving appellant the opportunity to make proper filings. Summary affirmance by district court was not motivated by failure of technical compliance, but rather by pattern of flagrant non-compliance.

In re Nora, 2011 WL 1395566 (7th Cir. 2011) – Court properly dismissed appeal where appellant failed to file brief after extended delays and repeated extensions of time. Appeal can be dismissed where court finds that appellant is willfully failing to prosecute appeal. Court must balance seriousness of misconduct, potential for prejudice, and possible merits of action. Debtor's failure to file initial brief even after multiple extensions coupled with debtor's statement that her physical condition may prevent her from ever filing a brief essentially requested indefinite extension of time. Debtor also failed to explain why her physical condition prevented her from submitting a brief when debtor was simultaneously actively litigating in bankruptcy court and had filed numerous substantive motions in the Bankruptcy case.

French v. Shapiro, Case No. 10-11333 (E.D. Mi. 2011) – Appeal of Order Dismissing Adversary proceeding without prejudice to refile upon termination of stay imposed by Bankruptcy Court dismissed as moot. Bankruptcy Court subsequently lifted the stay to permit plaintiff to re-file adversary proceeding. Appellate Court could not provide any meaningful relief where Appellate court could only confirm that plaintiff had the right to file the complaint, as plaintiff is now free from any prohibition against re-filing.

In re Wathen, 2011 WL 9042 (9th Cir. 2011) – Bankruptcy appeals became moot when Bankruptcy Court dismissed underlying bankruptcy case for reasons unrelated to issues on appeal. Appeal dismissed for lack of jurisdiction.

In re Hann, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss appeal sua sponte for lack of subject matter jurisdiction or where the allegations are totally implausible, attenuated, a substantial, frivolous, or devoid of merit.

Hamel v. Lalliss, 2010 WL 1141489 (9th Cir. 2010) - Appellant's failure to provide transcripts of lower court proceedings rendered it impossible to understand basis of bankruptcy court order, precluding effective review.

13.31 Reconsideration of Dismissal

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Timely filed Motion for Rehearing extends time to file Notice of Appeal until 14 days after entry of order. However, untimely filed motion does not extend deadline. Motion for Rehearing filed September 14 was not timely where Order dismissing case had been entered in mid-July. Appeal of dismissal order dismissed for lack of jurisdiction.

Render v. Render, Adv. No. 11-3414 (Bankr. E.D. Mi. 2012) – Reconsideration of order of dismissal warranted where dismissal order was entered in error. Although court dismissed adversary complaint, court intended to reserve jurisdiction to consider Plaintiff's Motion for Leave to Amend.

Lewis v. McClatchey, 2009 WL 1607773 (S.D. Ohio 2009) – Rule 60 permits Appellate Court to grant relief from Order dismissing appeal where dismissal is based on fraud, misrepresentation or misconduct by opposing party; or where Court lacked jurisdiction over the subject matter or over the parties or if it acted in a manner inconsistent with due process. Unintelligible allegations of alleged fraudulent conduct by purchaser of property from bankruptcy trustee constitute mere disagreements with Court’s analysis of purchaser’s Motion to Dismiss and do not demonstrate fraud by any opposing party. Motion for Reconsideration failed to allege any viable theory under which the Appellate Court would have lacked jurisdiction over the subject matter or the parties and Movant failed to demonstrate any alleged inconsistency with due process.

13.32 Vacatur

U.S. v. Marcola, 2012 WL 995289 (E.D. Mi. 2012) – When a bankruptcy case becomes moot pending appellate adjudication, the District Court can reverse or vacate the judgment. Vacatur clears the path for future re-litigation by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is appropriate when mootness occurs through circumstances not attributable to the parties or the unilateral action of the party who prevailed in the lower court. Mootness by reason of settlement does not justify vacatur of judgment under review absent equitable or exceptional circumstances. In the typical case in which settlement results in dismissal of the appeal, the parties have settled the dispute involved in the appeal. However, in this case the appeal was rendered moot by dismissal of the underlying case, without compromise of the issue presented on appeal. The pendency of bankruptcy case while the appeal was pending harmed the United States in a different way than the adverse Order appealed to this Court and that was not cured by the dismissal of the underlying case. Vacatur would allow for re-litigation of the issue and avoid the absurd result of maintaining the disputed Order’s declaratory ruling while preventing the United States from prosecuting the appeal of the adverse Order because the underlying bankruptcy case was dismissed.

H. Issues on Appeal

13.33 Mootness

In re Marroquin, Case No. 12-1451 (9th Cir. BAP 2013) – Court dismissed appeal of order denying debtor leave to file Chapter 13 Petition where debtor advised court that debtor no longer sought to file bankruptcy. Given debtor’s decision, there was no longer live controversy as to validity or enforceability of earlier court order barring debtor from filing for 20 years, or court’s conclusion that debtor failed to show cause for court to allow filing notwithstanding bar.

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Appellate court lacks jurisdiction when intervening events result in inability of court to enter effective relief. Debtor’s appeal of dismissal of first adversary proceeding rendered moot when debtor filed second adversary proceeding seeking same relief against same defendant and the second adversary was dismissed for failure to state a claim under Rule 12. Even if court reversed order dismissing first adversary proceeding, the bankruptcy court had already concluded in second adversary that plaintiff failed to present any colorable claim and that dismissal order has become final and non-appealable.

Timco, LLC v. T and M Sales Agency, Inc., 2013 WL 150105 (6th Cir. 2013) - Matter is moot for appellate purposes when events occurring while appeal is pending render it impossible for court to grant effective relief. Appeal of Order Lifting Automatic Stay to allow state court to confirm arbitration award rendered moot once State Court entered its order. Once State Court confirmed award, order lifting stay became academic, as even if order lifting stay was reversed on appeal, that would not set aside order confirming arbitration award itself. Once stay was lifted, State Court had authority to act. Later determination that stay relief may have been inappropriate does not retract that authority or invalidate what occurred in state court during time when stay had been lifted.

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Plaintiff’s claims to recover fraudulent transfers are not moot merely because any recovery would belong to debtor’s estate and would be distributed to corporate creditors. Although Plaintiff would not receive transfers of funds directly from Defendants, a creditor under State law has standing to pursue recovery of distributions by LLC to members at a time when the LLC is insolvent. Corporate members would be ordered to refund money to Bankruptcy Estate of LLC for distributions to creditors including Plaintiff.

Siolon v. Allard, 2011 WL 2160267 (E.D. Mi. 2011) – Settlement of issue pending on appeal deprives court of “case or controversy” requiring dismissal of the appeal as moot.

Alvarez v. Smith, Case No. 08-351, _____ U.S. _____ (2009) – United States Constitution permits Federal Courts to decide legal questions only in the context of an actual case or controversy. If at any point during the pendency of the case the “actual controversy” ceases to exist, the Court must dismiss the case. Action becomes moot for appellate purposes when appellate court can no longer fashion effective relief. In action between individuals and State regarding seized property, action became moot when State returned property to individuals and there were no pending claims for damages. When action becomes moot as a result of the passage of time or “happenstance”, appellate court should dismiss case as moot and also vacate the order being appealed, in order to avoid prejudicing any party in the event of future litigation. When case becomes moot as a result of a settlement between the parties, appellate court will not ordinarily vacate lower court order as the settlement constitutes a waiver by the losing party of their legal remedies.

B-Line, LLC v. Wingerter, 594 F.3d 931 (6th Cir. 2010) – Lower Court conclusion that creditor violated Rule 9011 is not rendered moot for appellate purposes where Lower Court has elected not to impose sanctions. Mootness results when subsequent events render court unable to grant effective relief. The Lower Court’s conclusion that creditor’s conduct violated Rule 9011 not rendered moot

merely because no sanctions are imposed. Finding that creditor violated Rule 9011 has serious and significant consequences for the Creditor including potentially subjecting Creditor to future sanctions and would have necessitated complete restructuring of Creditor's business operations.

13.34 Consideration by Lower Court

Thomas v. Aquil, 2013 WL 781643 (6th Cir. 2013) – Issues not raised at Bankruptcy Court or in District Court are waived and will not be considered on appeal.

Lemaire v. Fannie Mae, 2012 WL 3841295 (E.D. Mi. 2012) – Court will not consider issues not raised in bankruptcy court. Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.

In re Estate of Gray, 2011 WL 3946729 (E.D. Mi. 2011) - Court will not consider issues not raised in bankruptcy court. Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.

In re Mayer, 41 BR 702 (E.D. Mi. 2011) – Ordinarily an appellate court does not give consideration to issues not raised in the Bankruptcy Court. Further, raising an issue at the Court below does not mean that all arguments related to that issue are preserved. Court may deviate from general rule in exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if appeal presents a particular circumstance warranting departure; or if doing so would serve an overarching purpose other than simply reaching the correct result in this case. Court should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case. Court permitted Debtor to raise additional issues regarding constructive trust where the challenged issues (1) are purely legal, (2) require no further factual development, and (3) have been fully briefed by the parties in their respective appellate pleadings; and a resolution of the contested issue would likely promote finality in the litigation.

Ershowsky v. Freedman, 2011 WL 2078644 (11th Cir. 2011) – Issues not presented to District Court on appeal from Bankruptcy Court Order are waived for purposes of further appeal. Appellate Court will only consider issues raised at lower court. Only exceptions are (1) whether the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) whether the appellant had an opportunity to raise the objection in the trial court; (3) whether the interest of substantial justice is at stake; (4) whether the proper resolution is beyond any doubt; and (5) whether the issue presents significant questions of general impact or great public concern.

B.O.C. Law Group, P.C. v. Carroll, 2011 WL 2148603 (E.D. Mi. 2011) – Appellee may, without taking cross appeal, urge affirmance on any basis appearing in record even if the argument is based on matters overlooked or ignored by the lower court. Party's failure to advance at the lower court an argument raised by the lower court *sua sponte* does not amount to waiver of that issue on appeal.

Gold v. Deloitte & Touche, LLP, Case No. 0814567 (E.D. Mi. 2009) –Appellate Court ordinarily will not consider issues which were not raised and litigated below. Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Although appellate Court can consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry.

13.35 Specification of Issues - Generally

Key Bank v. Hartmann, 2013 WL 1312013 (E.D. Ky. 2013) – Issues raised for first time in reply brief on appeal are not properly before the Court.

Thomas v. Aquil, 2013 WL 781643 (6th Cir. 2013) – Issues raised at District Court but not on appeal are considered abandoned and are not reviewable. Passing reference to Chapter 13 Plan unaccompanied by any argument considered waived, as issues adverted to in perfunctory manner unaccompanied by some effort at developed argument are deemed waived.

Leavitt v. Alexander, Case No. 11-1114 (9th Cir BAP 2012) – Appellant's failure to specify issues in Statement of Issues on Appeal waives right to appeal issue. Court lacks jurisdiction to consider issues not stated in Statement of Issues even where parties have otherwise fully briefed issues.

13.36 Specification of Issues – Failure to File

Pikeville Energy Group, LLC v. Spradlin, 2013 WL 1718801 (E.D. Ky. 2013) – Bankruptcy Court erroneously denied Motion to File Specification of Issues two days after deadline where delay was caused by death of appellate counsel's father. Delay was not prejudicial and balancing of equities indicated that the moving party was not acting in bad faith. Bankruptcy Court's reference to a consistent lack of good faith in the prosecution of the adversary itself, without more, did not indicate that defendant acted in bad faith in failing to timely file the Specification of Issues in this appeal. While the party was not entirely blameless and acknowledged that the failure to file the specifications resulted from appellate counsel's failure to follow up, excusable neglect does not require freedom from all fault, but only that

to the extent party is at fault, facts and circumstances indicate that party can be excused for non-compliance.

I. Record on Appeal

13.37 Disputes – Jurisdiction to Resolve

In re McKenzie, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Bankruptcy court has jurisdiction to resolve disputes regarding contents of record on appeal of order issued by bankruptcy court.

13.38 Disputes – Generally

In re McKenzie, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Court struck portions of designated record that addressed issues not presented in connection with matter to be resolved or where items were not introduced into evidence at hearing where inclusion would not improve the understanding of the appellate court but would confuse the appeal with an issue that had already been resolved by the Circuit Court in prior appeals. Designation of record should be liberally construed to allow anything that has a connection to the issue on appeal, but this does not require or allow inclusion in record of everything in the bankruptcy case itself.

13.39 Redaction of Transcript

In re Immanuel, LLC, 2011 WL 1522335 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party’s request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

J. Standards of Review

13.40 Question of Law

13.41 Question of Fact

Brock v. Hammonds, 2011 WL 2646549 (6th Cir. BAP 2011) - The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed de novo. Under the clearly erroneous standard, the Panel must give deference to the bankruptcy court as the finder of fact. If the court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.

XIV. Avoidable Transfers

A. Trustee Strong Arm Powers

14.1 Trustee as Judicial Lien Creditor

Higgason v. Richardson, 2013 WL 5349036 (Bankr. E.D. Ky. 2013) – Trustee entitled to summary judgment avoiding lien on Mobile Home where creditor failed to note lien on certificate of title as required by state law.

Higgason v. Vanderbilt Mortgage & Finance, Inc., Case no. 12-5763 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends “must have been intended” by legislature.

Rogan v. Vanderbilt Mortgage & Finance, Inc., 2013 WL 19909497 (Bankr. E.D. Ky. 2013) – Trustee has powers of hypothetical judicial lien creditor. Scope of those powers in particular whether Trustee has interest superior to or subordinate to other liens or interests is determined by state law. Trustee could not avoid properly executed note and recorded mortgage based on later assignment of mortgage but lack of negotiation of note. Although there may be question as to lienholder’s ability to enforce lien where lienholder does not also hold note, that is not basis to avoid mortgage under Section 544.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded lis pendens prevents trustee from avoiding line using power of hypothetical bona fide purchaser as lis pendens constitutes constructive notice of adverse claims. Similarly, properly recorded lis pendens prevents hypothetical judgment lien creditor from obtaining rights superior to party recording lis pendens. Thus, while lender never recorded mortgage, Trustee could not avoid mortgage as judgment lien creditor where lender recorded lis pendens prior to commencement of bankruptcy case.

In re Vickers, 2013 WL 1619814 (Bankr. E.D. Ky. 2013) – Trustee as hypothetical judicial lien creditor can avoid unrecorded and unperfected security interests. Lender's mortgage was properly perfected and was not avoidable where mortgage had been properly recorded by original lender and successor creditor held promissory note endorsed to it in blank. When the note was endorsed in blank and delivered to lender, lender became holder entitled to enforce terms of note. Fact that endorsement is signed with an unintelligible signature does not defeat validity of the endorsement itself. Bank was holder of note and mortgage for at least 2 years pre-petition. Although instrument was endorsed to Bank of New York Mellon, and creditor was now Bank of New York but note was not re-endorsed to Bank of New York, evidence indicated that Bank of New York was the same entity where documents filed with state indicated that Bank of New York Mellon had changed name to Bank of New York. Record was sufficiently clear to establish identity of lender holding the note and mortgage. Any alleged defect in the endorsement as in violation of the trust agreement between lender and the trust beneficiaries did not have any relevance to validity of endorsement as against borrower, even if the endorsement may have been violation of trust agreement, as neither borrower nor Bankruptcy Trustee were parties to the lender's trust instrument.

In re DeGroot, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Trustee's status as hypothetical judgment lien holder has interest superior to statutory lien held by debtor's ex-wife for unpaid child support. Trustee can collect entire receivable owed to debtor from ex-wife free and clear of any statutory lien in receivable held by ex-wife to secure payment of future child support.

Rogan v. CitiMortgage, Inc., 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed husband's name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband's later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.

Baker v. General Electric Credit Union, 2012 WL 86778 (Bankr. E.D. Ky. 2012) – Title Certificate that incorrectly named different lender did not operate to perfect lien of correct creditor. Clerk of County Court inadvertently listed lender as "Nissan Motor Acceptance Corporation". Kentucky law requires lender's name and address to be listed on the Certificate of Title to perfect lien. Lender, General Electric Credit Union, was not named on Certificate of Title and, therefore, lien was unperfected and could be avoided by Trustee.

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.

Gold v. Pasternak, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – Trustee could avoid under strong arm powers a security interest that is not properly perfected. Financing statement must be filed to perfect security interest in inventory. Financing statement must be filed in the name of the debtor. Financing Statement filed under name of Corporation's "registered trade name" is not filed under Corporate name and is not sufficient under Michigan law. Registration by Corporation of Assumed Name does not make Assumed name the Corporate Name.

Rogan v. Litton Loan Servicing, LP, 2011 WL 4445651 (6th Cir. BAP 2011) – Section 544(a)(1) allows the Trustee to avoid a security interest that is not perfected or is improperly perfected before the bankruptcy petition is filed. Under Kentucky law, a mortgage may not be enforced absent proof of a valid and enforceable debt. Mortgagee who holds mortgage but is not the holder of the underlying note holds unperfected security interest that can be avoided by Trustee. Trustee's complaint alleging that second mortgage holder did not hold note was sufficient to state cause of action, and could be defeated only by affirmative evidence that as of the date of the petition, the mortgage holder was also the holder of the underlying debt. Section 544 cannot be used to attack alleged post-petition transfers of the mortgage and note, as Section 544 applies only to the facts as they exist on the date of filing. Post-petition transfers may be contested, if at all, only as objections to a Proof of Claim.

Vanderbilt Mortgage and Finance, Inc. v. Westenhoefer, 2011 WL 4356358 (E.D. Ky. 2011), *aff'd*, 2013 WL 2301940 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends "must have been intended" by legislature.

Higgason v. Vanderbilt Mortgage and Finance, Inc., 2011 WL 4433620 (Bankr. E.D. Ky. 2011), *aff'd* 471 BR 876 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further, even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544.

Lim v. Anton, Case No. 10-41460 (Bankr. E.D. Mi. 2011) – Trustee could avoid sale of boat where certificate of title was not signed by the seller and the buyer never filed the Bill of Sale with the Coast Guard. Vessel was registered with Coast Guard. Ship Mortgage Act requires any transfer of an interest in a registered vessel to be recorded with the Coast Guard to be perfected. Buyer's attempt to record the transfer with the Coast Guard post-petition would not perfect transfer as recording did not occur within any "safe harbor" period for perfection.

Westenhoefer v. Vanderbilt Mortgage & Finance, Inc., 2011 WL 1984061 (Bankr. E.D. Ky. 2011) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.

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

Degiolamo v. Suntrust Mortgage, Inc., 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – "Mere defect" in execution of mortgage results in the mortgage company holding an equitable lien against the property which cannot be avoided by judicial lien creditor. Therefore, Trustee cannot avoid mortgage under Section 544(a)(1).

Rogan v. Mila, Inc., 2010 WL 3168094 (Bankr. E.D. Ky. 2010) – Trustee attacked validity and enforceability of mortgage where Note was payable to Mila, Inc., but Mortgage defined the mortgagee as MERS. Split between payee of note and named mortgagee did not render mortgage subject to avoidance by hypothetical judicial lien creditor where mortgage was properly recorded prior to the commencement of the bankruptcy case and provided record perfection of the mortgage as a matter of law.

Sovereign Bank v. Hepner, 2010 WL 2816472 (10th Cir. 2010) – State law controls priority of obligations and determines whether trustee status as lien creditor is superior to unrecorded interest. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor attaching the collateral in the meantime. Debtor's bankruptcy filing within that 20 day window would not permit trustee to avoid Bank's security interest which was properly perfected post-petition but within 20 day safe harbor.

Stockton Mortgage Corporation v. Schlarmann, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by Debtor and co-owner that defined "Borrower" only as the co-owner did not constitute a grant of the mortgage against Debtor's interest in the property. Under Kentucky law, party must be named in the body of the mortgage for the mortgage to be effective as to third parties. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Debtor's interest in the Property is not encumbered by the Mortgage executed by only Northcutt because the Debtor and Northcutt held the property as joint tenants, and one party could not encumber the Property as a single, indivisible estate. Accordingly, the Trustee holds superior title to the extent of that interest.

Johnson v. BAC Home Loans Servicing, L.P., 2010 WL 2667393 (Bankr. E.D. Ky. 2010), *aff'd*, 2011 WL 3608095 (6th Cir. 2011) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by husband and wife that defined "Borrower" only as the Husband did not constitute a grant of the mortgage against Wife's interest in the property. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife's interest in the property, rendering the mortgage avoidable pursuant to Section 544.

Rogan v. Citimortgage, Inc., 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Mortgage that named MERS as mortgagee not subject to attack by judicial lien creditor where mortgage defined MERS as "nominee" for Lender and granted MERS the power of sale and enforcement. MERS later assignment of mortgage to Citimortgage was valid where assignment appeared regular on face and MERS passed corporate resolution ratifying signature on assignment. Attached promissory note included blank endorsement converting note into bearer instrument, and transfer of note operated to transfer security interest attached to note by operation of Kentucky law. Citimortgage held original note endorsed in blank, giving Citimortgage right to enforce mortgage.

Limor v. First National Bank of Woodbury, 2010 WL 2509176 (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. Trustee's ability to defeat security interest under Section 544 is determined by facts as they existed on the date of the petition. Subsequent acts by Creditor could not release or adversely affect status of security interest or Trustee's ability to avoid interest under Section 544. Creditor's security interest should not be prejudiced by post-petition delivery to the Trustee of money or property of the estate. However, turnover or release of funds does waive ability to setoff pursuant to Section 553 as of moment of petition not subject to attack by judicial lien creditor. Subsequent turnover of the funds to the Trustee does not alter the Bank's secured position.

Drown v. Wells Fargo Bank, N.A., 424 BR 315 (Bankr. S.D. Ohio 2010), *aff'd* 2011 WL 1188434 (S.D. Ohio 2011) – Section 544(a)(1) grants each of the Trustees "the status of a hypothetical lien creditor who is deemed to have perfected his interest as of the date of the filing of the bankruptcy petition and also grants the Trustees the power to avoid transfers of property that could be avoided by a judicial

lien creditor. Bankruptcy trustee cannot avoid a properly recorded mortgage even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a “defective deed” may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

French v. Luyben, 2009 WL 2169217 (Bankr. N.D. Ohio 2009) – Judgment lien in personal property is deemed perfected when property is seized in execution of judgment. Where seizure of motorcycle did not occur until after bankruptcy petition had been filed, judgment creditor which held as of the moment of the filing only an unsatisfied execution held unperfected security interest as of the date of the filing which was subject to avoidance under section 544(a)(1).

14.2 Trustee as Holder of Unsatisfied Execution

Rogan v. Litton Loan Servicing, LP, 2011 WL

14.3 Trustee as Bona Fide Purchaser

In re First Mortgage Fund, Inc., 2013 WL 4807164 (E.D. Mi. 2013) – Trustee’s strong arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender’s rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor’s later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff’s deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.

Gold v. JPMorgan Chase Bank, NA, 2013 WL 3270346 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of the debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgage were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. However, Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544.

Goddard v. Heldt, Case No. 12-6027 (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.

Field v. Ocwen Loan Servicing, LLC, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee’s strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded lis pendens prevents trustee from avoiding lien using power of hypothetical bona fide purchaser as lis pendens constitutes constructive notice of adverse claims. Trustee could not avoid unrecorded mortgage where lender recorded lis pendens prior to commencement of bankruptcy case.

Rhiel v. Central Mortgage Company, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record lis pendens prior to bankruptcy filing. Properly recorded lis pendens also operates as constructive notice that would have been sufficient to defeat trustee’s status as BFP.

Rogan v. CitiMortgage, Inc., 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed

husband's name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband's later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.

Bank of America v. Greene, 2012 WL 124278 (E.D. Tn. 2012) – Deed of Trust properly recorded but then inadvertently deleted from records by error of register of deeds did not provide constructive notice for purposes of defeating Trustee's status as BFP. As a result of the error of the register of deeds, the deed of trust would not have been discoverable by a search of the public records. Striking notice from records is akin to mis-filing in the records, which prevents the instrument from being enforceable against subsequent BFP.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Trustee as hypothetical bona fide purchaser for value takes title clear of unrecorded liens and interests. BFP status does not override constructive notice provisions of state recording statutes. Trustee did not have actual or constructive notice of mortgage where sequence of recording removed mortgage from debtor's chain of title. Debtor's principal purchased property and executed mortgage to lender. Principal then quit-claimed deed to corporation owned by principal. County clerk recorded documents in incorrect order, such that the deed to the principal and the quit-claim deed to the company were recorded before mortgage given by principal. Mortgage did not appear in debtor's chain of title and mortgage, at time of recording, appeared to be made by a person who was, at that time, a stranger to title. Inquiry notice can also defeat BFP status if party did not have actual or constructive notice but nonetheless had sufficient facts and information from which actual knowledge can be inferred, even if the facts and information do not disclose the full state of facts and circumstances. 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 sell 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.

Rogan v. Fifth Third Mortgage Company, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

Tibble v. Wells Fargo Bank, N.A., 2001 WL 3583278 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee's standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated "Lot 6" was actually intended as mortgage on Lot 5.

Ransier v. Countrywide Home Loans, Inc., 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Trustee, as hypothetical bona fide purchaser, avoid transfers to extent that the transfer would not be binding against a bona fide purchaser as a matter of state law.

14.4 Trustee as Unsecured Creditor

Still v. Hopkins, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Trustee's power to bring state court action under Section 544 depends on existence of actual unsecured creditor who could have brought action as of the commencement of the bankruptcy case. Complaint is not required to identify any specific unsecured creditor to state cause of action, but can allege generally that there is a category of unsecured creditors that could assert the claim. Complaint that alleged that debtor has "unsecured debt in excess of \$42,330.39" was sufficient to state cause of action under Section 544.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Trustee has power under Section 544 to assert any claims that unsecured creditor could assert under state law. To bring action under state fraudulent transfer statute, Trustee must prove that there is at least one creditor holding an allowable unsecured claim; and that the transfer is voidable under state law.

Bash v. Somerset CPAs, PC, 2012 WL 3202774 (Bankr. N.D. Ohio 2012) – Complaint stated cause of action to recover proceeds that were improperly diverted to other entities controlled by debtor's insider for no value. Complaint alleged that debtor obtained funds from third parties that debtor was supposed to invest, but instead debtor entered into series of worthless loans with debtor's parent and other related companies. Complaint alleged sufficient facts to demonstrate that debtor was nothing more than a ponzi scheme that wrongfully diverted funds for benefit of insiders at expense of investors. Complaint sought to collapse series of transactions that began by debtor transferring funds to parent corporation which then passed funds to various related third party entities. Complaint specifically alleged that the Transfers were part of a single, integrated transaction that, taken together, diminished the value of debtor's estate. Complaint further alleged that the Transfers were made by debtor for less than fair consideration or were made by debtor with actual fraudulent intent and that defendant knew or should have known of debtor's scheme. Complaint contained detailed factual allegations that specifically identify fraudulent conduct which, if taken as true, would establish the "actual intent to hinder, delay, or defraud" element of an actual fraudulent transfer claim. The complaint also contains detailed factual allegations as to the transfers at issue being made for less than reasonably equivalent

value as well as debtor's insolvency. The complaint also contained detailed factual allegations that specifically identify each of the Transfers that the trustee seeks to avoid, including an identification of the recipient, amount and dates of those transfers.

Onkyo USA Corp. v. Global Technovations, Inc., 2011 WL 1299356 (E.D. Mi. 2011), *aff'd* 2012 WL 4017386 (6th Cir. 2012) – Under Section 544(b), Trustee can avoid any transfer of property of debtor that is avoidable by an unsecured creditor who held a claim. Trustee can file action under Florida state fraudulent transfer statute as long as there was at least one actual unsecured creditor who could have pursued recovery under Florida law.

14.5 Standing

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.

Mitrano v. US, 2011 WL 4459102 (Bankr. E.D. Va. 2011) – Debtor lacks standing to pursue avoidance action under Section 544. Powers of debtors are listed in Section 1303. Avoidance powers are not included in powers listed.

US Bank, NA v. Barbee, 2011 WL 6141648 (6th Cir. BAP 2011) – Debtor has derivative standing to pursue avoidance action where bank allegedly failed to perfect lien on title of mobile home.

Countrywide Home Loans v. Dickson, 427 BR 399 (6th Cir. BAP 2010), *aff'd* 2011 WL 3768684 (6th Cir. 2011) – Debtor has direct and derivative standing to pursue action under Section 522(h) and Sections 544 and 547 where the creditor obtained the judgment lien during the preference period. Court has equitable power to allow Debtor to pursue avoidance actions where the Trustee fails or refuses to do so. Chapter 13 Trustee typically lacks resources to pursue avoidance action and lacks ability to sell assets to fund a war chest for litigation.

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

Lewis v. Mortgage Electronic Registration Systems, Inc., Case No. 07-6381 (Bankr. E.D. Mi. 2010) - Debtor lacks standing to avoid a lien under section 544, adopting majority view that Chapter 13 debtor lacks standing to assert trustee's avoidance powers except to extent explicitly permitted by Bankruptcy Code.

14.6 Defenses - Earmarking

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a "new creditor" and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

14.7 Defenses – Reasonably Equivalent Value

Onkyo USA Corp. v. Global Technovations, Inc., 2011 WL 1299356 (E.D. Mi. 2011) *aff'd* 2012 WL 4017386 (6th Cir. 2012) – Florida statute on fraudulent transfers does not define reasonably equivalent value. Courts generally consider many factors, including the good faith of the parties, the disparity between the fair value of the property and what the debtor actually received, and whether the transaction was at arm's length. Debtor who paid \$13 million to acquire assets worth only \$6.9 million did not receive "reasonably equivalent value" for stock acquisition.

Solomon v. Felsner, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor's fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé "gifted" to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit- claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction

and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

14.8 Defenses – Stockholder Distributions

Official Committee of Unsecured Creditors v. American United Life Insurance Company, Case No. 12-4720 (2d Cir. 2013) – Payments by debtor to holders of private placement notes issued by one of debtor's affiliates were not recoverable as preferences, and payments constituted transfers made in connection with a securities contract within meaning of Section 546(e).

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Trustee's action to avoid preferential transfer under Section 544 is subject to defenses available under applicable state law. Fraudulent transfer based on payments by Corporations will be governed by Michigan Business Corporation Act and not Michigan Fraudulent Transfer Act if the payment constitutes "distribution" under MBCA. "Distribution" is a payment made to or for the benefit of shareholders that is made in respect to the corporate shares. Transfers made to or for the benefit of persons who are not shareholders cannot be "distributions" under MBCA. Payments will be "in respect to corporation's shares" if the distributions are made "in recognition of share ownership". Transfers to Chief Executive Officer and to Directors because of their status as officers and directors are not transfers "in recognition of share ownership" and so are not governed by MBCA.

QSI Holdings, Inc., v. Alford, 2009 WL 1905237 (6th Cir. 2009) – Payments made to shareholder in connection with leveraged buyout of Debtors stock and privately held corporation were not avoidable. Shareholder payments qualified as "settlement payment" for purposes of Section 546(e), which generally bars trustees avoidance of prepetition margin and settlement payments made by two commodity broker, forward contract merchant, stockbroker, financial institution, financial disciplined or securities clearing agency. Transaction had characteristics of common leveraged buyout involving merger of nearly equal companies, nothing in statute indicating congressional intent to restrict statutes protection to publicly traded securities, and there was no reason to conclude that unwinding settlement would have less of an impact on financial markets than a settlement involving publicly traded securities. Role played by bank and leveraged buyout of privately held securities satisfied requirement that payment be made to financial institution where bank collected shares of corporate Debtors stock from individual shareholders, transfer those securities to the acquiring company, and distributed consideration to individual shareholders.

14.9 Defenses – Constructive Notice

Higgason v. Cantrell, 2013 WL 4777172 (Bankr. E.D. Ky. 2013) – Lien that is not properly perfected under state law does not provide constructive notice for purposes of trustee's strong arm power. Lien on mobile home may be perfected only by notation on the certificate of title. Mortgage recorded against land on which mobile home resided, which included both land and mobile home, was not perfected as to mobile home by recording in public records only. Mobile home becomes part of the real property only if the mobile home is permanently affixed and the owner surrenders the certificate of title. Where debtor had permanently affixed mobile home but had not surrendered certificate of title, recording of lien in public records is not proper perfection.

Jahn v. FirstBank, 2013 WL 5347452 (Bankr. E.D. Tn. 2013) – Generally any description is sufficient if the identity of the premises can be established, or if the description furnishes the means of identification, of the property covered by the mortgage reasonable certainty, and without the exercise of arbitrary discretion, which can include a description can be made certain within the terms of the instrument; or is sufficient to allow a surveyor to locate the land establish its boundaries; or by which a party familiar with the locality is able to identify the premises intended to be conveyed with reasonable certainty. Court will declare a deed void for uncertainty of description only where, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by the instrument remains a mere matter of conjecture, or where the description cannot be made applicable to but one definite tract. Deed of trust that contained a mistaken reference to a lot number rather than a condominium unit number was not defective. Deed of trust included correct street address and the Deed of trust referred to the unit deed that correctly identified the property. Deed of trust necessarily referred to some existing tract of land, and its terms can be applied to one tract only.

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. Security interest is not avoidable by Trustee under strong arm powers where neither Vendor nor Vendee recorded deed, as public records would reflect Vendor as record title holder, providing constructive notice of possible interest that is adverse to interest of Debtor as Vendee.

Northedge v. Beckett, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Recorded quit claim deed that referenced lien created by judgment of divorce constituted constructive notice of existence of lien sufficient to prevent assertion of BFP status. Fact that JOD itself was not recorded or that there was not a separate mortgage recorded did not defeat fact that person reviewing record would find deed that conspicuously referenced lien.

Gold v. JPMorgan Chase Bank, NA, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the "transfer" of the debtor's interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgages were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages.

Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544.

Field v. Ocwen Loan Servicing, LLC, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee's strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.

Burks v. Deutsche Bank National Trust Co., 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Chapter 13 Trustee could avoid mortgage where mortgage was not executed in accordance with state law. Mortgage lacked notary clause, which was required by state law for mortgage to be recorded. As such, mortgage was not entitled to be recorded. Fact that mortgage was recorded did not constitute constructive notice in light of defect in execution.

Nelson v. Countrywide Home Loans, Inc., 2012 WL 7991237 (Bankr. S.D. Ohio 2012) – Mortgage signed by debtor-wife on property solely owned by debtor-husband validly encumbered wife's dower interest in property notwithstanding that wife did not also sign the promissory note. Mortgage given to secure obligation of third party is valid as lien against property, but does not create in creditor any right to pursue signor for deficiency. Obligation is limited to potential foreclosure of collateral.

Kellner v. City of Kettering, 2013 WL 618537 (S.D. Ohio 2013) – Recorded mortgage not per se defective for purposes of constructive notice merely because of typographical error in notary clause. Although improperly executed mortgage is not entitled to be recorded and, if recorded, is treated as not being recorded, defect in acknowledgement is not fatal where error appears on face of mortgage and mortgage itself supplies the means of making the correction. Mortgage clearly identified debtor as the mortgagor. However, notary clause contained an incorrect name as "the above-named mortgagor". The person named in the notary block was not named anywhere in the mortgage and had no connection to the property, the mortgage, or the debtor. Viewing the document as a whole, there was no doubt that debtor, rather than person named in acknowledgement, signed Mortgage and personally appeared before notary to acknowledge the signing of the mortgage. Mortgage substantially complied with statutory requirements and is valid and enforceable. Error was so obvious that no third party purchaser could legitimately claim to be misled as to who acknowledged execution of the Mortgage.

Rogan v. Farmers Home Administration, 2012 WL 3228989 (Bankr. E.D. Ky. 2012) – Mortgage in name of partnership as mortgagor, signed by general partner with authority to do so pursuant to partnership agreement, is properly executed for purposes of notice to defeat status of Trustee as bona fide purchaser. Entity was properly listed as mortgagor and it was not necessary or appropriate for mortgage to list general partner as mortgagor. Although signature did not expressly state that person signing did so in capacity as general partner, law presumes that documents signed by agent are done with intent to bind principal and are acts of the principal. Alleged defects in notary acknowledgement did not defeat notice where statute provided that a document that is recorded is valid for purposes of providing notice even if the document is not acknowledged at all. Any technical defect in the acknowledgement would not prevent recorded mortgage from defeating status as BFP.

Field v. Wells Fargo Home Mortgage, 474 BR 521 (Bankr. S.D. Ohio 2012) – Constructive notice defeats status as bona fide purchaser for value. Under Ohio law, if a lien is not noted on the title, then the purchaser is not bound by the lien. Mortgages noted on title may provide constructive notice of liens, if the legal descriptions in the mortgages sufficiently describe the property. Address shown in mortgage was address for the property in question, but legal description was for separate and distinct parcel. Extrinsic evidence supported finding that mortgage was intended to encumber property at issue and was sufficient to defeat Trustee's status as bona fide purchaser. Inconsistency in description of property did not render execution of mortgage invalid, where Ohio law does not require a legal description in the mortgage. Accurate non-legal description is all that is required and the mortgage at issue contained the accurate street address.

Rhiel v. Central Mortgage Company, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record *lis pendens* prior to bankruptcy filing. Properly recorded *lis pendens* also operates as constructive notice that would have been sufficient to defeat trustee's status as BFP.

Mostoller v. Dover Mortgage Company, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Complaint failed to allege any basis to avoid mortgage. Although creditor may have failed to provide documents to Trustee to show perfection of mortgage, review of public records unambiguously established that there was a properly perfected lien and Plaintiff failed to plead any facts to support avoidance of lien.

Rogan v. CitiMortgage, Inc., 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Even if Mortgage signed by wife who signed her name and also signed husband's name was defective, trustee not entitled to avoid lien where mortgage was recorded substantially prior to commencement of bankruptcy case and state law provided that if a mortgage is not properly acknowledged or proved but is recorded, the recording constitutes constructive notice to all parties of the recorded instrument.

Richardson v. Deutsche Bank National Trust Co., 2012 WL 1941846 (Bankr. W.D. Mi. 2012) – Recording of affidavit of lost mortgage with copy of mortgage attached is sufficient to provide constructive notice of lien, precluding trustee from acquiring status as bona fide purchaser; expressly disagreeing with *Turner-Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi. 2009). Purpose of recording is to put subsequent purchasers on notice, to raise a “red flag” alerting them to a claimed interest in property. Recorded affidavit of lost mortgage provides constructive notice and controls over subsequent purchaser.

Rogan v. Wachovia Mortgage Corp., 2012 WL 1813120 (Bankr. E.D. Ky. 2012) – Notice of lis Pendens filed prior to commencement of bankruptcy case provided constructive notice to Trustee of claimed interest of lender, precluding status of Trustee as bona fide purchaser for value.

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.

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.

Rogan v. Fifth Third Mortgage Company, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined “borrower” solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as “borrower”. Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

Rogan v. American General Home Equity, Inc., 451 BR 421 (6th Cir. BAP 2011) – Inclusion of property description in attachment to mortgage after signatures of borrowers rather than body of mortgage itself and before signatures did not render mortgage invalid, where body of mortgage stated “Exhibit A Legal Description” and mortgage attached legal description denominated “Exhibit A”. Statutory requirement that borrower sign mortgage at or near end of document did not abrogate doctrine of incorporation by reference.

Fifth Third Bank v. JPMorgan Chase Bank, N.A., 2011 WL 30770 (W.D. Ky. 2011) – Defect in notary clause did not render mortgage invalid or unenforceable. Under Kentucky statute in effect at time of recording, mortgage recorded is deemed to provide constructive notice regardless of defects in execution.

Wells v. CF Bancorp, Case No. 10-73332 (Bankr. E.D. Mi. 2011) – Recording copy of mortgage with affidavit of lost instrument is not sufficient to perfect mortgage under Michigan law. Michigan law requires recording of the original mortgage bearing original signature of mortgagors. Trustee could avoid mortgage where only copy of mortgage was recorded, leaving mortgage effectively unrecorded.

Hardesty v. CitiFinancial, Inc., 2011 WL 693235 (6th Cir. 2011) – Mortgage execution was not defective so as to be avoidable under Trustee's power as bona fide purchaser where mortgage certification stated that the mortgage was “executed before me” rather than “acknowledged before me”. Ohio law requires that notary clause state that the mortgage was “acknowledged before me” or the “substantial equivalent”. Acknowledgement requires that person signing appear before the person taking the acknowledgement; that the person acknowledge that he signed the document; that the person signed the document for the purpose stated in the document; and that the person taking the acknowledgement had satisfactory proof of identification of the person signing. In this case, there was no dispute that debtor signed the mortgage in the presence of the notary who also signed and that debtor presented satisfactory identification. Additional language in the signature block stated that debtor examined and read the mortgage and signed of his own free act and deed, satisfying requirement that the document be signed for the purpose stated. Notary clause that referenced “executed” rather than “acknowledged” not so deficient as to allow Trustee to avoid mortgage as bona fide purchaser.

Drown v. Kondaur Capital Corp., 2010 WL 4057814 (Bankr. S.D. Ohio 2010) – Mortgage recorded with defective acknowledgement provides no notice at all of the underlying obligation. Under Ohio law, mortgage must be signed by the mortgagor; the signing must be acknowledged before the notary public; the notary public must certify that acknowledgement; and the notary public must sign his or her name to the certificate of acknowledgement. The person whose signature is being acknowledged must also produce identification at the time of execution. Acknowledgement was not fatally defective where the acknowledgement did not include the name of the debtor but inserted the word “mortgagor” in the two places that called for identification of the party signing, where the mortgage

elsewhere defined the debtor by name as the mortgagor. Failure of the notary public to circle the appropriate pronoun (his-her-their) alone did not result in a failure to substantially comply with Ohio law. The harm caused by the failure to circle the appropriate pronoun in this case is minimized because Debtor was the sole mortgagor and the failure to circle the appropriate pronoun would not mislead a subsequent purchaser as to who is acknowledging the Mortgage. Further, lender filed action to foreclose mortgage and obtained judgment of foreclosure prior to commencement of bankruptcy case. Filing state court action gave rise to *lis pendens* sufficient to place subsequent purchasers on notice and defeat bona fide purchaser status. Even if the mortgage had been defective and of no effect when it was recorded, the *lis pendens* standing alone serves as sufficient notice.

Ransier v. Countrywide Home Loans, Inc., 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Under Ohio law, a mortgage must be properly executed for the recording to be effective. Recording a defective mortgage provides no notice as a matter of law. However, *lis pendens* that arises when mortgage creditor files action to foreclose does give rise to constructive notice sufficient to defeat status of subsequent purchaser as “bona fide purchaser”. Although the mortgage was incorrectly executed, when Lender filed state court action pre-petition to reform the mortgage and then to foreclose the mortgage and had obtained Final Judgment reforming the mortgage and ordering the property sold at foreclosure sale, that suit gave rise to a *lis pendens* that defeats the Trustee’s status as bona fide purchaser and renders mortgage unavoidable by Trustee.

Helbling v. Cleary, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Mortgage that was defective where notary block failed to recite the names of the parties whose signatures that were being acknowledged did not constitute constructive notice of the existence of the mortgage for purposes of defeating Trustee’s status as Bona Fide Purchaser. However, Bank’s mortgage foreclosure complaint filed before commencement of Bankruptcy Case constitutes statutory notice of the pendency of the action and prevents any third party from acquiring an interest superior to that of the Plaintiff, preventing Trustee from acquiring status as Bona Fide Purchaser.

Degiolamo v. Suntrust Mortgage, Inc., 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – Under Ohio law, filing of complaint operates as *lis pendens* preventing any interest from being acquired that would be superior to Plaintiff’s title. Bank filed foreclosure proceeding prior to commencement of bankruptcy case. Resulting *lis pendens* prevented Trustee from acquiring status as bona fide purchaser for value.

Menninger v. Mortgage Electronic Registration Systems, Inc., Case No. 09-1097 (Bankr. W.D. Ohio 2010) - To comply with Ohio law, mortgage must be signed by the mortgagor; (2) the signing of the mortgage must be acknowledged before a notary public; (3) the notary public must certify the acknowledgment; and (4) the notary public must subscribe his name to the certificate of acknowledgment. Mortgage invalid as to debtor-wife where mortgage identified only debtor husband as the “borrower”. Even though debtor-wife signed the mortgage, there was no predicate language in the mortgage itself to include debtor-wife as mortgagor.

Felner v. Monticello Banking Co., Case No. 09-1050 (Bankr. W.D. Ky. 2010) - Trustee is not a bona fide purchaser if he has notice of facts which would cause a reasonably prudent person to make a further investigation to ascertain if there is an adverse interest in the property. A bona fide purchaser of real property is put on constructive notice of a prior interest in the property by the presence of a recorded deed or mortgage, acknowledged according to law. Debtor’s mortgage given to secure loan to closely held corporation valid and enforceable where Debtor signed personal guaranty of the obligation. That Debtor did not personally sign the note does not control where Debtor did sign the guaranty of the Note. Mortgage was properly executed and recorded. Trustee’s complaint to avoid lien dismissed.

Stubbins v. Espenschied, Case No. 08-2266 (Bankr. S.D. Ohio 2010) - Mortgage that was not properly perfected did not provide constructive notice sufficient to defeat Trustee’s status as bona fide purchaser. Notary Acknowledgement did not name the party allegedly signing the mortgage as required by state law. Recording of defective mortgage does not constitute “notice” even if mortgage is otherwise properly executed by Debtor and recorded in the Public Records.

Stockton Mortgage Corporation v. Schlarman, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee’s position as bona fide purchaser as of the petition date defeats any attempt by mortgage company to reform mortgage which had been effectively executed. Property was owned jointly by debtor and a co-owner. However, mortgage was executed only by the co-owner. Although Debtor had repeatedly represented prior to the filing of the bankruptcy case that the debtor had contributed substantial sums to the acquisition and maintenance of the property, mortgage company could not rely on these allegations to defeat superior interest of Trustee as bona fide purchaser as of the date of the petition.

Johnson v. BAC Home Loans Servicing, L.P., 2010 WL 2667393 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable by a bona fide purchaser for value. Mortgage against property owned by husband and wife that defined “Borrower” only as the Husband did not constitute a grant of the mortgage against Wife’s interest in the property. Signature by Wife as “Borrower” does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife’s interest in the property, rendering the mortgage avoidable pursuant to Section 544.

Richardson v. Wells Fargo Home Mortgage, Inc., 421 BR 426 (Bankr. W.D. Mi. 2009) *aff’d*, 2010 WL 3370071 (W.D. Mi. 2010) – Mortgage that failed to reference property lot number or plat number as required by Michigan law left mortgage invalid even though it contained property’s street address. Recording of a defective mortgage does not provide constructive notice as a matter of law so as to defeat the interests of a bona fide purchaser. Michigan law requires all recorded sales, conveyances or mortgages, contain the caption of the Plat and Lot Number on all property located within a platted subdivision.

Helbling v. Oberaitis, Case No. 09-16122 (Bankr. N.D. Ohio 2010) – Defective certificate of acknowledgement in mortgage prevents mortgage from providing constructive notice. Trustee entitled to avoid mortgage as bona fide purchaser.

Chase Manhattan Bank, USA, NA v. Taxel, 594 F.3d 1073 (9th Cir. 2010) – Unrecorded mortgage arising out of refinance transaction is avoidable by Trustee under Section 544(a)(3). Debtor refinanced mortgage with same lender. Lender recorded satisfaction of prior mortgage but failed to record new mortgage. Debtor's listing of the unrecorded mortgage in the Bankruptcy Schedules does not provide notice to Trustee sufficient to defeat status as bona fide purchaser. Trustee's status is determined as of moment petition is filed. Schedules filed later, even if filed immediately after the petition, do not alter that status. State law required mortgage to be recorded to constitute constructive notice and unrecorded mortgage is void as against any subsequent purchaser in good faith. Equitable subrogation would not render mortgage unavoidable, as the prior lien was satisfied and revival would work prejudice to creditors and the estate and the Trustee as bona fide purchaser. Further, applicable state law provides that bona fide purchasers have priority even over a creditor holding a claim by equitable subordination.

Miller v. LaSalle Bank N.A., 595 F.3d 782 (7th Cir. 2010) – Mortgage with technically defective acknowledgement that failed to identify individuals who appeared before the notary and executed the mortgage would nonetheless constitute "constructive" notice based on 2007 State Law that provided that recorded mortgage would be sufficient for notice purposes notwithstanding certain technical defects. State law amendment applied to all mortgages recorded in Indiana, regardless of whether the mortgage was recorded before or after the adoption of the 2007 law, as the law indicated an intent to operate retroactively to all mortgages of record, regardless of recording date.

Drown v. National City Bank, 420 BR 414 (6th Cir. BAP 2009), *aff'd*, 2011 WL 2899366 (6th Cir. 2011) – Mortgage was not defective for purposes of Section 544(a)(3) where notary block indicated that mortgage had been signed by both husband and wife, when the mortgage in fact had been signed by wife on her own behalf and also by wife on behalf of husband pursuant to valid power of attorney.

Rogan v. New South Federal Savings Bank, 2009 Fed. App. 001 (6th Cir. BAP 2009) – Mortgage not invalid where notary's bond was not signed by clerk as required. Nothing on the face of the mortgage indicated that the notary who witnessed the execution of the mortgage may have had a defect in the appointing paperwork. Requiring a borrower or lender to independently verify the credentials of the notary would serve no purpose and would only undermine reliability of public records. Further, alleged defect in paperwork was technical non-compliance – notary had been administered proper oath but the clerk failed to sign the appointing paperwork to confirm that oath. Kentucky state law allows a facially valid acknowledgement to be attached only for fraud or mistake by the notary. Later enacted Kentucky law which provided that instruments otherwise properly recorded would be valid for notice purposes even if not properly acknowledged or proved also supported validity of mortgage.

Drown v. Wells Fargo Bank, N.A., 424 BR 315 (Bankr. S.D. Ohio 2010) – Under Section 544(a)(3), a trustee has the status of a bona fide purchaser of real property from the debtor that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case. The legal fiction created by Section 544(a) assumes a transfer from the debtor to a bona fide purchaser on the date of filing. The trustee is then clothed with whatever legal rights the bona fide purchaser would possess. Trustee has constructive notice of properly executed and recorded real-estate instruments only, not of improperly executed or unrecorded ones. Strong-arm power does not clothe a trustee with protective mantle of a bona fide purchaser if there was no way, under the applicable state law, that anyone could attain the status of a bona fide purchaser and does not immunize a trustee who has constructive knowledge of a prior mortgage. The Mortgagees will withstand the attacks from the Trustees if the mortgages are perfected. Whether a mortgage is properly perfected is an issue of State law. Under Ohio law, properly recorded mortgage constitutes perfected interest in property of the debtor even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a "defective deed" may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

Burden v. CIT Group/Consumer Finance, Inc., 2009 WL 723197 (6th Cir. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Kentucky law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Immediately below the mortgage's signature block appears the certificate of acknowledgment, which stated: "The foregoing instrument was acknowledged before me this 08 day of MAY, 2001" . The acknowledgement was insufficient as a matter of law because it did not identify the people who allegedly signed the mortgage itself, even though those signatures appeared immediately prior to the acknowledgement.

Lewis v. Public Service Credit Union, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee's status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.

DeGironlamo v. Countrywide Home Loans, Inc., 2009 WL 2169049 (Bankr. N.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Further, even if improperly executed mortgage gave rise to an equitable lien in favor of the lender, that unrecorded equitable interest is insufficient to negate the avoiding powers of the trustee under section 544(a)(3).

Daneman v. National City Mortgage Co., 2009 WL 2179128 (Bankr. S.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Failure to identify person signing the mortgage does not “substantially comply” with statutory requirements for recording a mortgage as mortgage failed to contain any indication that Debtor acknowledged the instrument before the notary.

Rieser v. Fifth Third Mortgage Company, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife’s name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband’s one-half interest. Mortgage effective only as to wife’s one-half interest in the property.

Shapiro v. Merchants Bonding Company, Adv. No. 07-4083 (Bankr. E.D. Mi. 2008) – Claim of Lien that is not properly recorded provides neither actual or constructive notice of the lien and, therefore, cannot prevail over subsequently recorded mortgage. The Indemnity Agreement executed by the Debtor provided that the Agreement count if recorded, would constitute a consensual lien upon any and all real estate owned by Debtors. Lender recorded a claim of lien but failed to attach a copy of the indemnity agreement. Failure to attach indemnity agreement constituted failure to comply with the contractual requirements for obtaining lien. Therefore, recording claim of lien without attaching Indemnity Agreement did not create a lien as a matter of law. Failure to comply with contractual requirements to obtaining lien could produce neither actual nor constructive notice of any alleged lien. Therefore, creditor’s claim was unsecured and subsequently recorded mortgage constituted first lien against the property.

In re Wahl, 407 B.R. 883 (Bankr. S.D. Ohio 2009). Mortgage was invalid under Ohio law and could be avoided by Chapter 7 trustee using the “strong-arm” powers.

In re Cornelius, 408 B.R. 704 (Bankr. S.D. Ohio 2009). Mortgage was defectively acknowledged (because debtor/mortgagor’s name was not on the acknowledgement) and avoidable in Chapter 7 trustee’s strong-arm proceeding.

Argent Mortgage Co., LLC. v. Drown, 578 F.3d 487 (6th Cir. 2009) – Trustee cannot set aside a mortgage where, under state law, recorded mortgage was sufficient to give constructive notice of the mortgage to third parties. Under Ohio law, recorded mortgage that contained street address of residential property but not legal description was sufficient to give constructive notice of the mortgage. The mortgage documents, while not containing a formal legal description, indicated that they related to a specific street address. Nothing in the documents indicated that the mortgage company sought a lien on anything less than the full property and the description included a tax identification number that applied to the entire property. Therefore, the recorded mortgage provided sufficient notice such that the trustee could not avoid the mortgage using the trustee’s strong-arm powers under section 544.

Kohut v. New Century Mortgage Corp., Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording.

14.10 Defenses – Lien Strip of Subordinate Lien

Burks v. Deutsche Bank National Trust Co., 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Fact that debtor previously stripped off second mortgage on basis that first mortgage debt exceeded value of property was not defense to Trustee’s later action to avoid first mortgage under Trustee’s strong-arm powers. Although junior mortgage was stripped based on assumption that senior mortgage was valid, at confirmation Trustee and senior lender agreed that confirmation would not affect trustee’s right to prosecute strong-arm claim.

14.11 Defenses - Statute of Limitations

In re McKenzie, 2012 WL 4742708 (E.D. Tn. 2012) – Section 544 imposes 2 year statute of limitations. Trustee did not bring action to avoid

security interest within 2 years. However, Trustee is not precluded from using avoidance power as affirmative defense to action for relief from stay, as long as Trustee does not seek any further relief beyond defense to stay lift. a trustee, when acting defensively pursuant to § 502(d), can use his avoidance powers even after the statute of limitations has expired.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Statute of Limitations applicable to action under Section 544 to avoid fraudulent transfer is defined by state law. Under Michigan law an action for fraudulent transfer accrues when the transfer occurs regardless of when the damage results. Transfers made within 6 year statute of limitations but made pursuant to contractual agreements made more than 6 years prior to the commencement of the case are not barred by statute of limitations. Each payment of money by a Debtor was a separate “transfer” whether or not the payment was made under a pre-existing contract, and whether or not such contract was “divisible” or not.

14.12 Defenses – Equitable Defenses

Drown v. Dollar Bank, FSB, 437 BR 253 (Bankr. S.D. Ohio 2010) – Trustee in action under Section 544 is not subject to equitable defenses that lender may have had to any action brought by debtor outside of bankruptcy. Lender could not assert defenses of estoppel by deed, equitable subordination, or “equitable restoration” in defense to action by Trustee. Trustee, as hypothetical bona fide purchaser, takes title free and clear of equitable defenses.

14.13 Defenses – Solvency

B. Fraudulent Transfers

14.14 Actual Fraud

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Actual fraud requires proof that debtor made transfer with actual, subjective intent to hinder, delay or defraud creditors. Marital settlement agreement that conveyed to ex-spouse virtually all of the marital assets including substantial equity in marital home raised presumption of actual fraud, where transfer was made while debtor was subject of present and threatened future litigation including possible criminal sanctions; debtor was insolvent or became insolvent as a result of transfer, as transfer left debtor with virtually no assets, while pending and threatened litigation raised claims for hundreds of thousands of dollars; transfer was made without reasonably equivalent value; and transfer was virtually all of debtor’s assets, where debtor transferred 95% of assets to ex-spouse; and debtor obtained a waiver of future child support, effectively accelerating unmatured future obligation and allowing debtor to pay that at expense of current creditors.

DWR International, Inc. v. Job, 2013 WL 1438035 (S.D. Ohio 2013) – Transfer can be avoided under Uniform Fraudulent Transfer Statute if made either with actual intent to hinder, delay or defraud creditors; or if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether the debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the debtor; (6) Whether the debtor absconded; (7) Whether the debtor removed or concealed assets; (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor. Complaint sufficiently alleged fraud under *Twombly* standard where complaint alleged that the Plaintiff had sued the defendant prior to the date on which the defendant transferred assets to insider; that defendant transferred assets and money aggregating over \$1.6 million with knowledge of the pending litigation; defendant did not receive any value in exchange for the transfer; and that defendant was insolvent at the time of the transfer. Specific factual allegations supported at least 5 “badges of fraud” sufficient to state cause of action under *Twombly* standard.

Degiolamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularity the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of “badges of fraud” including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices.

Steed v. Hawkins, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can recover any transfers made where Debtor had actual intent to hinder, delay or defraud creditors. Defendant liable for recovery of grossly inflated salary and extravagant payments and gifts received from debtor. Debtor operated a ponzi scheme, and used portion of proceeds to pay defendant extravagant salary. Debtor knew at the time that debtor would be unable to repay investors and that the Debtor would eventually collapse. Debtor’s knowledge that future investors would not receive payments was sufficient to establish actual intent to defraud those investors.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Actual fraud turns on “badges of fraud” including secrecy of transaction, inadequate consideration, close relationship between parties, transferor’s continued relationship with the transferred property, and transferee’s knowledge of transferor’s financial difficulties. Prior finding in action under Section 727 that debtor did not act with actual intent to defraud collaterally stopped Trustee from arguing actual fraud in action under Section 548.

U.S. v. Krause, 2011 WL 1206178 (10th Cir. 2011) – Debtor’s transfer of property to children’s trusts was fraudulent transfer. Using “badges of fraud” (1) a relationship between the grantor and grantee; (2) the grantee’s knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantee’s part that the contract was the grantor’s last asset subject to execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures, Court found that transfer was to debtor’s wife who then transferred them to trust for no consideration and after debtor knew that IRS had commenced audit and had already disallowed certain deductions. Trustee was debtor’s brother and debtor retained operational control over assets in trusts including using assets in trusts to pay debtor’s personal expenses.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition with actual intent to hinder, delay or defraud creditors. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor’s extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work; and also received checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00, a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor’s business account. Defendant’s testimony that she had “forgotten” about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property made with “intent to hinder, delay or defraud creditors” Debtor had been contemplating bankruptcy for a number of months and believed that transfer of property to “paramour” was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any debt.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on actual fraud must be plead with specificity pursuant to Federal Rule of Civil Procedure 9. when a plaintiff’s intentional fraudulent transfer claim is premised on a Debtor’s actual intent “to defraud,” plaintiff must plead the “circumstances constituting fraud” with particularity including (1) the date of the transfer; (2) the amount of the transfer (or if the transfer was of property other than money, the property that was transferred and its value); (3) the name of the transferor; (4) the name of the initial transferee; and (5) the consideration paid.

14.15 Constructive Fraud

McClarty v. University Liggett School, 2013 WL 4786861 (Bankr. E.D. Mi. 2013) – Pre-petition payments for debtor’s minor children to attend private school is not constructively fraudulent. Debtor has a statutory obligation to provide schooling for children. As such, debtor received reasonably equivalent value for tuition payments. Case distinguished from *Gold v. Marquette University*, as *Gold* involved payment of college tuition for adult child, which debtor had no legal obligation to pay and for which debtor did not receive any reasonably equivalent value in the form of discharge of a legal duty.

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered to debtor’s closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where debtor is not also responsible for payment, do not amount to reasonably equivalent value.

Lingham Rawlings, LLC v. Gaudio, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 548(a)(1)(B) carries no element of intent. Whether transfer is fraudulent is based solely on comparison of value of property transferred with the value received by the debtor in exchange; and whether debtor was insolvent at time of transfer.

Degirrolamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers. *Steed v. Hawkins*, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can avoid any transfer that is made for less than reasonably equivalent value where the debtor was insolvent or rendered insolvent as a result of the transfer. Debtor’s compensation paid to primary employee substantially exceeded the reasonable value of services provided. Defendant received payments for compensation and bonuses of approximately \$500,000 while reasonable salary for services rendered during defendant’s 10 month employment would have been no more than \$68,000.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. “Value” includes property or satisfaction of an antecedent debt”. Court will compare value of property transferred to value of what the debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because the debtor, and consequently the estate, received an amount reasonably equivalent to what it paid, no fraudulent transfer occurred. Debtor did not receive any value from transfer of money to debtor’s son. Debtor sold her home and paid \$150,000 of the

proceeds to debtor's son. Debtor's son then purchased a new condominium unit in his name alone, using the \$150,000 contributed by debtor plus \$50,000 of son's money. Condo was titled in name of son alone and debtor held no interest in that unit. Son's promise that debtor could live in the unit during debtor's lifetime was not "value" in the form of property or satisfaction of debt and did not provide any benefit to creditors who were harmed as a result of the transfer.

Gold v. Marquette University, 2011 WL 1344732 (Bankr. E.D. Mi. 2011) – "Constructively fraudulent transfer" requires transfer of interest of debtor in property. If debtor's sole interest in property is that of trustee under express trust, then the property transferred is not property of the debtor but is the property of the beneficiary and the transfer cannot be fraudulent. An express trust can be written or oral as long as evidence establishes that title to the property was held by the debtor as trustee. Debtor who received proceeds of son's student loan may have been holding funds as trustee. Although there was no written trust agreement, evidence was conflicting on whether oral trust existed where testimony was that money was held by parent for purposes of paying tuition expense but the debtor was actually a co-borrower on the loan and the loan check was payable to both debtor and son jointly and was deposited into the household bank account of debtor and spouse and co-mingled with other household funds rather than being segregated; and not an account in which son had any interest. Court unable to resolve on summary judgment status of loan proceeds as "trust corpus". Creditor could not rely on constructive trust if no express trust existed, as bankruptcy court recognized constructive trust only as remedy which does not exist until imposed by a court, and no such trust had been imposed on these funds prior to commencement of the case.

Russell v. Little, 2010 WL 4959948 (Bankr. E.D. Tn. 2010) – Under Section 548(b)(1)(B), a trustee may avoid any transfer made by the debtor within two years of filing for bankruptcy if the debtor received less than a reasonably equivalent value in exchange for such transfer and: (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. Actions for Fraud must be plead with specificity. Complaint that failed to specifically plead that the debtor was insolvent failed to state cause of action and would be dismissed with leave to amend.

Smith v. SIPI, LLC., 2010 WL 2899118 (7th Cir. 2010) – State Tax Deed sale did not vest title in purchaser until recordation of tax deed after expiration of statutory redemption period, at which point the deed becomes effective against bona fide purchaser as a matter of state law. Section 548(d)(1) applies only when the transfer become effective against a bona fide purchaser more than two years prior to the commencement of the bankruptcy case. Bankruptcy petition filed less than two years after recording of deed rendered transfer avoidable as a fraudulent transfer.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(B) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition where the debtor received less than reasonably equivalent value and was insolvent at the time of the transfer. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor's company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

Valley City Steel, LLC v. Liverpool Coil Processing Inc., 2009 WL 2017787 (6th Cir. 2009) – Plaintiff in constructive fraudulent transfer action must present affirmative proof of the value of the property transferred in order to support allegations that property was transferred for less than reasonably equivalent value. Where plaintiff is unable to establish value of property transferred, defendant is entitled to judgment as a matter of law.

Collins & Aikman Corp. v. Valeo, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Motion for Summary Judgment denied where evidence presented raises questions of whether Debtor received any value in exchange for the transfers or whether that value, if any, was "reasonably equivalent".

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property not constructively fraudulent. Transferee, Debtor's live-in "Paramour" constituted "insider"; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on constructive fraud is not required to be plead with specificity. Complaint needs only to state short and plan statement of the claim sufficient to provide Defendant with reasonable

notice of plaintiff's claim and the grounds upon which it rests. Federal Rule 9 does not apply to action for constructive fraud because transferee is not accused of an act of fraud or deception; conduct and mental state of the transferee is irrelevant.

14.16 Transfer of Property of Debtor

Murk's Village Markets, Inc. v. Bank of America, NA, Case No. 13-80141 (Bankr. W.D. Mi. 2013) – Fraudulent transfer action requires a transfer of property of the debtor or of the debtor's interest in property. Property transferred was not property of debtor. Debtor embezzled funds from employer and used those funds to pay debtor's creditors. However, the checks to the creditors were issued directly from corporate accounts and payable directly to the creditor. Debtor never had the funds and never had an interest in the funds, as the funds passed directly from employer to creditor. As such, payments to creditors using funds embezzled from employer were not avoidable as fraudulent transfers. Embezzler does not acquire any title to or interest in embezzled funds as a matter of state law.

The White Family Companies, Inc. v. Slone, 2013 WL 3925820 (6th Cir. 2013) – Fraudulent transfer action requires that property transferred have been property of the debtor at the time of the transfer. Property held in trust by a debtor, where debtor holds only bare legal title, is not property of debtor. Debtor, a title company, acted as intermediary between private lender and borrower, where lender would deposit funds into Debtor's trust account which Debtor would then forward to borrower upon execution of appropriate loan documents. Borrower would repay loans by depositing funds into Debtor's trust account and Debtor would forward payment to the lender, less Debtor's fees. After a series of transactions between lender and borrower worked as designed, lender made another loan to borrower using the same process. Borrower then repaid the loan by giving Debtor a check for the amount owed, which Debtor deposited into its trust account. The Debtor's bank gave debtor immediate "provisional credit" for the deposit and Debtor forwarded funds to the lender without waiting for check from borrowers to clear. When the borrower's check bounced, the Bank reversed the provisional credit, creating a substantial negative balance in the trust account and forcing Debtor out of business. The Court found that the money paid to the lender was property of the debtor. Although the money had been deposited into the trust account, the check that had been entrusted to the debtor bounced, which prevented the creation of any trust relationship between Debtor and borrower 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. Debtor's forwarding of those funds to the lender constituted a constructively fraudulent transfer of property of the estate.

Stathopoulos v. Alford, Case No. 11-12353 (11th Cir. 2012) – To be avoidable, property transferred must have been property of the debtor at the time of the transfer. Mere deposit of money into debtor's account with no express restriction on use of funds did not establish debtor's control over funds sufficient to make later transfer one of property of the debtor. Third-party corporation agreed to lend money to corporation in which debtor had an interest. Third-party deposited funds into debtor's account and, on the same date, accompanied debtor to the bank to purchase cashier's check payable to third party construction company as down payment on a purchase of property that debtor planned to later acquire from corporation. At no time did debtor receive anything of value in connection with the wire transfer into the account or the cashier's check out of the account. Although there is presumption that any funds under the control of the debtor are debtor's property, presumption can be rebutted where evidence shows that funds merely passed through debtor's hands but were never in fact debtor's property. In determining whether debtor had control over funds, Court will look at source of funds, which party benefitted from the transaction, and whether debtor had the power to designate who will receive funds and to actually distribute funds. Evidence indicated that funds were in debtor's account for only a few hours. Debtor did not have authority to designate who would receive funds or to disburse funds because funds were specifically designated under terms of agreement between debtor and Corporation. Corporation that provided the money was not in any way indebted to debtor. All of the funds were provided by third-party corporation and were paid to separate corporation, with debtor having no interest in either.

14.17 Payments Under Employment Contracts

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Payments made under employment agreement made more than 2 years prior to commencement are not avoidable even if payments themselves were made fewer than 2 years prior. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Execution of separate "Severance Agreement" at termination of employment did not create new or distinct severance obligation where Severance Agreement merely restated terms of original Employment Agreement regarding amount and timing of severance payments.

14.18 Transfer of Property of Estate

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. Fact that debtor/real estate title agency may have commingled, with funds that it held on its customers behalf in client trust account, funds that it had earned in connection with closings on other loan transactions in no way affected the fact that funds which could not be traced to such earnings were trust funds in which agency had no beneficial 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.

14.19 Particular Transfers Avoidable

Sikirica v. Wettach, 2013 WL 1289149 (Bankr. W.D. Pa. 2013) – Debtor’s deposit of paychecks into joint account with spouse, made after debtor had been sued, were partially fraudulent to extent of the amount deposited that was not thereafter used to pay household or personal expenses of debtor.

In re Neal, 478 BR 261 (6th Cir. BAP 2012) – Bankruptcy Court could revisit property distribution in domestic relations case to determine if allocation of assets is fraudulent transfer. Where one party received assets of value grossly disproportionate to value of assets received by other, transfer is avoidable under Section 548.

Janvey v. Democratic Senatorial Campaign Committee, Inc., Case No. 11-10704 (5th Cir. 2012) – Receiver could recover from various Democratic and Republican campaign committees as fraudulent transfers under state UFTA campaign contributions. Federal Campaign Finance laws do not preempt fraudulent transfer statutes. (Interestingly, there is no indication in the opinion that the campaign committees contended that the contributor received “reasonably equivalent value”).

Sweet v. Chambers, Adv. No. 11-3071 (Bankr. E.D. Mi. 2012) – Complaint alleged cause of action under Sections 548 and 550. Complaint alleged that debtor was conspiring with defendants by having promissory notes prepared from defendants to debtors with the intent of reassigning those notes to debtor’s wife for no consideration.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) and 548(a)(1)(B) permitted the trustee to avoid transfers to Debtor’s “significant other”. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor’s extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor’s company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor’s business account. Defendant’s testimony that she had “forgotten” about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

Lewis v. Public Service Credit Union, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee’s status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.

Bash v. Sun Trust Banks, Inc., 2008 WL 3271090 (6th Cir. 2008) – Debtor’s use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor’s interest in property sufficient to sustain a cause of action for state law fraudulent conveyance. Debtor’s ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being “property of the estate” notwithstanding creditor’s argument that the funds actually belonged entirely to the co-account holder.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor’s transfer to “paramour” of one-half interest in Debtor’s real property was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer.

14.20 Particular Transfers Not Avoidable

Borders v. King., 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in

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

Kohut v. Rigney, Case No. 07-6287 (Bankr. E.D. Mi. 2011) – Divorce judgment in 1998 conveyed ex-husband's property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband's bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor quit-claimed one-half interest in real property to "paramour" in order to allow paramour to refinance property and pay off prior mortgage that was in foreclosure was not fraudulent transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieve Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

14.21 Reasonable Equivalent Value

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Reasonably equivalent value has two separate inquiries: (1) did debtor receive anything that can be properly be considered 'value;' and (2) was that value reasonably equivalent to what was transferred. Distribution of assets under voluntary marital separation agreement constitutes a transfer of value where debtor transferred entire interest in marital home that had substantial equity. Ex-spouse's alleged waiver of right to receive child support did not constitute "value" for fraudulent transfer purposes as value includes money or property or satisfaction an existing debt, but does not include any unperformed promise to furnish support. Further, facts indicated that even if debtor was required to pay support, there was no reason to believe that support would ever be paid as debtor had been convicted of multiple crimes and sentence to lengthy prison term, and debtor's former employer held criminal restitution judgment against debtor. Any obligation to pay support would have been illusory and does not constitute value.

Suhar v. Bruno, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave debtor's unsecured creditors worse off because debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by debtor to ex-spouse of amount of spouse's share of marital debt.

Wojcik v. Hudson Funding, LLC, 2013 WL 3525708 (N.D. Ohio 2013) – Determining reasonably equivalent value is a question of fact and considerable latitude must be allowed to the trier of facts. Complaint stated cause of action for fraudulent transfer where debtor purchased accounts receivable and resold those to related entities for no profit, while retaining servicing duties in exchange for only 25% of collection amounts, effectively allowing purchasing entity to retain 75% of receivables for doing nothing. Complex business relationships between debtor and purchaser precluded dismissal at early stages of case.

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor's pre-petition payments to law firm as payment for services rendered to debtor's closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where debtor is not also responsible for payment, do not amount to reasonably equivalent value.

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh'g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Debtor and her mother entered into sale of debtor's interest for reasonably equivalent value where mother paid debtor \$35,000 for property that appraised, at most, for \$30,000. Even if the deed was not recorded at that time, the transfer was for a price that was reasonably equivalent for purposes of Section 548.

Barbacci v. Mikstay, 2013 WL 3878165 (Bankr. N.D. Ohio 2013) – In determining reasonably equivalent value, court must first determine what value, if any, the debtor received; and then determine whether the value is reasonable. Value can consist of payments or consideration paid to third party rather than the debtor directly, if the consideration lands in the debtor's hands or produces some economic benefit to the debtor such that the debtor's economic status and net worth have been preserved. Debtor sold corvette for \$3,000 cash plus purchaser's agreement to waive unpaid wage claim against Debtor's wholly owned business. Court was unable to determine from the record whether the value received by the business fell within indirect benefit rule or whether consideration was reasonably equivalent for purposes of summary judgment.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Reasonably equivalent value requires comparison of value that debtor gave up with value received by debtor. Dollar-for-dollar equivalent is not required, but focus is on whether estate was depleted. If transfer does not leave unsecured creditor worse off, debtor received reasonably equivalent value and transfer is not fraudulent. Value includes either property or satisfaction of antecedent debt. Debtor received value of management services performed by defendant. Satisfaction of accrued liability for management services based on employment contract constitutes reasonably equivalent value to extent of outstanding balance. Loans made by defendant to debtor that were repaid constituted reasonably equivalent value. Balance of funds did

not appear to have been repayment of antecedent obligations and would be constructively fraudulent. Where court also found that part of the transfers were preferential, court would use care to ensure that court did not award double recovery for same transfers.

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Later payment of severance was in fulfillment of earlier, unavoidable obligation under employment agreement. Payment of pre-existing enforceable obligation constitutes “reasonably equivalent value” rendering payments not avoidable as fraudulent transfers.

Steed v. Hawkins, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Defendant has burden of proof on issue of reasonably equivalent value and good faith. Although defendant produced evidence that she received transfers in good faith as compensation for services rendered, defendant did not produce evidence of actual value of services rendered. Trustee’s expert testified that reasonable value of services rendered would be less than \$70,000, while defendant received total compensation of more than \$500,000.00. Transfers avoided to extent amount transferred exceeded reasonable value of services.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. “Value” includes property or satisfaction of an antecedent debt”. Court will compare value of property transferred to value of what the debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because the debtor, and consequently the estate, received an amount reasonably equivalent to what it paid, no fraudulent transfer occurred. Debtor did not receive any value from transfer of money to debtor’s son. Debtor sold her home and paid \$150,000 of the proceeds to debtor’s son. Debtor’s son then purchased a new condominium unit in his name alone, using the \$150,000 contributed by debtor plus \$50,000 of son’s money. Condo was titled in name of son alone and debtor held no interest in that unit. Son’s promise that debtor could live in the unit during debtor’s lifetime was not “value” in the form of property or satisfaction of debt and did not provide any benefit to creditors who were harmed as a result of the transfer.

Southeast Waffles, LLC v. United States Department of Treasury, 2011 WL 6155719 (6th Cir. BAP 2011) – Prepetition payment of tax penalties to IRS cannot be constructively fraudulent. Payments reduced debtor’s obligation on a dollar-for-dollar basis, providing reasonably equivalent value to support transaction. That payments were applied to penalties and not to tax liability itself did not change conclusion that payment reduced debtor’s total tax liability by the corresponding amount.

Stevenson v. Leonard Turowski & Son Funeral Home, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if made for reasonably equivalent value. Transfer made to pay off antecedent debt is for reasonable equivalent value to the extent that the debt is satisfied in an amount equal to the amount of the payment.

Walls v. Cocchini, 2011 WL 2747377 (Bankr. E.D. Tn. 2011) – Transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation. Courts generally compare the value of the property transferred with the value of what the debtor received to ascertain whether there was a reasonably equivalent value, although a dollar-for-dollar equivalent is not required. Investors in Ponzi scheme who receive partial return of invested amounts in 90 days pre-petition are not liable for receipt of preferential transfers. In Ponzi schemes, investors will be liable for preferences only to the extent investor received payments in excess of the principal invested.

Gold v. Marquette University, Case No. 10-4608 (Bankr. E.D. Mi. 2011) – “Value” flowing to third party can constitute reasonably equivalent value to the debtor if the consideration ultimately ends up in the debtor’s possession or confers an economic benefit on the debtor such that the debtor’s net worth has been preserved. Debtor did not receive “value” in exchange for tuition payments for Son’s college education. Benefit of payments flowed directly to the son and did not confer any economic benefit to the debtor. Although debtor may have felt moral obligation to pay tuition, debtor lacked any legal obligation to do so. Items such as “peace of mind” that son will have college education that and provide opportunities to son that he would not have absent college education is insufficient to constitute economic benefit to debtor.

Weir v. Chadwick, 2010 WL 3724823 (Bankr. E.D. Tn. 2010) – Action to recover under State Uniform Fraudulent Transfer Act for “constructive fraud” requires proof that debtor, as transferor, did not receive reasonably equivalent value. In determining whether value is reasonably equivalent, focus should be placed upon the consideration received by the debtor rather than the value given by the transferee to determine the net effect of the transfers on the debtor’s estate and the funds available to unsecured creditors. As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred. The debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value. Debtor transferred Debtor’s interest in residence to Family Limited Partnership allegedly in exchange for interest in partnership and forgiveness of pre-existing debt owed to other members of partnership. Summary Judgment denied where Court was not able to determine value of debtor’s fractional ownership interest in house that was transferred or the value of the either the partnership interest received or the debts allegedly satisfied.

Solomon v. Felsner, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor’s fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé “gifted” to Debtor

money for down payment. Eight days later, Debtor closed on sale of property and immediately quit-claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

14.22 Insolvency

Richardson v. Checker Acquisition Corp., 2013 WL 3279791 (Bankr. W.D. Mi. 2013) – Transfer is constructively fraudulent if transfer is for less than reasonably equivalent value and debtor is insolvent at the time of, or becomes insolvent as a result of, the transfer. Insolvency is based on comparison of fair value of assets and sum of debts. Transfer generally equates to balance sheet approach, although balance sheet usually does not carry assets on current value basis and may not include all liabilities. Only debts that meet definition of "claim" under Section 101(5) are included in calculation. Debtor's potential liability for withdrawal from multi-employer pension plan is not a claim where debtor had not actually withdrawn from the pension plan as of the date of the petition.

Hebling v. Wagner, 2013 WL 392450 (Bankr. N.D. Ohio 2013) – Debtor's bare assertion of solvency at time of transfer is insufficient to defeat action for fraudulent transfer where balance sheet compiled by Trustee indicated that debtor's liabilities exceeded assets as of the date of the transfer by more than \$29,000.00.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made when debtor was insolvent or that debtor became insolvent as a result of the transfer. Insolvent is defined using balance sheet test – whether assets exceeded liabilities excluding value of preferences, fraudulent conveyances and exemptions. Debtor became insolvent as a result of transfer of \$145,000 where, prior to transfer, debtor had assets totaling \$162,000 versus liabilities of \$121,000. After transfer, debtor's assets dropped to only \$17,000, far less than liabilities which remained at \$121,000. Thus, transfer rendered debtor insolvent and further evidenced that debtor did not receive reasonably equivalent value.

14.23 Defense – Leveraged Buyout

QSI Holdings Inc. v. Alford, 571 F.3d 545 (6th Cir. 2009) – Section 546(e) precludes Trustee from recovering from shareholders payments made as part of a leveraged buyout of the Debtor as fraudulent transfers. Section 546(e) is applicable to transfers of both privately traded and publically traded securities and exempts from avoidance "settlement payments" made by or to a "financial institution". Payment of funds to HSBC as financial intermediary on behalf of the individual stockholders qualified as a payment to a "financial institution" even though the institution was merely the conduit through which the money passed and did not have any ultimate interest in or right to retain the proceeds.

14.24 Defense – Forward Contract Payment

DeGirolamo v. McIntosh Oil Co., 2013 WL 832407 (Bankr. N.D. Ohio 2013) – Section 546(e) creates safe harbor from avoidable transfers where payment is settlement payment to or for benefit of forward contract merchant or is made in connection with a forward contract that was made prior to commencement of case. Forward contract is any contract for purchase, sale or transfer of a commodity or any similar good, article, service, right or interest which presently or in the future becomes the subject of dealing in the forward contract trade, where the maturity date is no more than two days after date contract is entered into. Diesel fuel is commodity within meaning of forward contract. Maturity date is the date on which the benefit or detriment of the contract will be realized. In connection with contract for sale of diesel fuel, maturity date is date on which fuel is delivered, as that is the date on which any benefit or loss will be realized. Forward contract merchant is one who is engaged in business in whole or part in forward contracts and contract must involve commodity. Party was forward contract merchant where party was not producer or end user of fuel and purchased fuel strictly for resale. Defense requires only that one party or other be merchant. "Settlement payment" is defined broadly, is consideration used to settle contract after maturity date, and does not need to be cash but can be the delivery of the commodity itself. Although Section 546 is not directly applicable to action under Section 548(a)(1) for actual fraud, payment on forward contract is payment "for value" and in good faith for purposes of Section 548(c).

14.25 Defense – Wrongful Conduct of Debtor

Kirschner v. KPMG, LLP., 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporations interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy trustee is not in privity with the Debtor. Alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee’s fraudulent transfer claim. Affirmative defenses based alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees impermissibly attribute to the Trustee the wrongdoing of the Debtor. Defenses of and satisfaction and set off are not defenses to a fraudulent transfer action. Latches defense stricken where trustee brought avoidance action more than one year after case commenced but within the time permitted under section 546(a).

14.26 Defense – Earmarking

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor’s estate. Creditor that refinanced a pre-existing mortgage was not a “new creditor” and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

14.27 Defense – Prepetition Return of Money to Third Party

U.S. v. Moyer, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals’ personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. Where IRS pre-petition refunded to the corporate principal amounts that were deemed “overpayments” of taxes based on principal’s amended tax return, Chapter 7 Trustee is not entitled to also recover the amount of those payments. IRS had no discretion regarding the tax refund, and IRS never had dominion and control over the amount of the overpayment. The IRS was a mere conduit for the payment of the refund to principal and IRS was not a transferee at all, much less an initial or mediate transferee, with respect to the amount of the refund.

14.28 Defense – Good Faith

Wren Alexander Investments, LLC v. Internal Revenue Service, Case no. 12-50376 (5th Cir. 2013) – Recipient of allegedly fraudulent transfer of real property can defend if transferee can prove it is good faith purchaser for value. Transferee could not demonstrate good faith status where transferee was insider of transferor and transferee knew that transferor was insolvent on date of transfer.

14.29 Statute of Limitations

Fitzpatrick v. King of Hearts, Inc., 2012 WL 1565129 (Bankr. E.D. Mi. 2012) – Where Trustee brings avoidance action under state law pursuant to Section 544, state statute of limitations applies to state cause of action and limitation contained in Section 547 or 548 apply to federal cause of action. Complaint was timely where complaint was filed more than 2 years after commencement of bankruptcy but within State statute of limitation 5 year period. To the extent complaint contained counts under Section 548, those counts were barred by 2 year statute and would be dismissed.

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Trustee can bring avoidance action within time permitted under Section 546(a) even if that period is longer than normally available under applicable state law.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) –Quit-claim deed recorded more than 2 years prior to Debtor’s Bankruptcy Petition was outside statute of limitations under Section 548. Action could still be prosecuted under Ohio law which had 4 year statute of limitations if the transfer occurred with actual intent to hinder, delay or defraud creditors. Although “paramour” constituted “insider”; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer; Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt. However, Debtor’s later transfer to paramour of remaining one-half interest was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

Gold v. Deloitte & Touche, LLP, Case No. 0814567 (E.D. Mi. 2009) – Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Appellate Court ordinarily will not consider issues which were not raised and litigated below. Although appellate Court does have authority to consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry. Accordingly, appellate Court would not consider doctrine in affirming dismissal of fraudulent transfer action based on the applicable statute of limitations.

14.30 Damages

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Damages for alleged fraudulent transfer of marital home as part of property settlement agreement would be measured by value of property received, less reasonable costs of sale of the one half of the property defendant received in the transfer. Defendant could not reduce transfer by costs of sale of Defendant's one half of the property he already owned prior to the transfer.

Daff v. Wallace, Case no. 12-1513 (9th Cir. BAP 2013) – When transfer is avoided and property is brought back into estate, Trustee takes same title as debtor would have had as of commencement of the bankruptcy case had the transfer never occurred. Debtor fraudulently transferred residence to her daughter. After the transfer, a judgment creditor properly recorded a judgment lien against all real property owned by debtor. The lien did not attach to the residence as debtor did not own it as of the date of the recording. Debtor thereafter filed for bankruptcy. When the Trustee successfully recovered the property, the Trustee did so subject to the recorded judgment lien. Had the property not been transferred, the judgment lien would have attached to debtor's interest upon recording, and would not have constituted an otherwise avoidable transfer standing alone. Debtor had sufficient equitable interest in property that had been fraudulently transferred that judgment lien could attach to, and that interest predated bankruptcy filing and acquisition of interest by trustee.

Suhar v. Bruno, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave debtor's unsecured creditors worse off because debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by debtor to ex-spouse of amount of spouse's share of marital debt.

Hagan v. Classic Products Corp., Case No. 11-80417 (Bankr. W.D. Mi. 2011) – Remedy in action to avoid transfer has two elements, judgment avoiding the transfer and judgment awarding damages. Court would decline to enter default judgment that avoided the transfer but failed to include award of damages, with instructions to submit new proposed Final Judgment containing both types of relief.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Pursuant to Section 550(a), Court can award judgment for the amount of money that is fraudulently transferred. Where the fraudulent transfer consisted of property, Court can enter judgment either for the return of the property itself or for the value of the property. Where the property transferred included an automobile that had subsequently been traded in, a diamond ring that had allegedly been stolen, and furniture that was subsequently sold, Court could not order the return of the property, and so entered money judgment against Defendant for the value of the property at the time of the fraudulent transfer.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Debtor and "significant other" entitled to "net" transfers of money from significant other to Debtor against funds transferred by Debtor to significant other to determine total amount of funds allegedly fraudulently transferred. Over year preceding filing of case, significant other gave more money to Debtor than Debtor gave to significant other, constituting "reasonably equivalent value" for transfers from Debtor to significant other. Debtor's transfers into significant other's bank account were used to pay Debtor's share of ongoing household expenses. Significant other's use of these funds to pay household expenses constitutes reasonably equivalent value.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor's transfer to paramour of one-half interest in real property was avoidable fraudulent transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

14.31 Complaint

In re Rathore, 2012 WL 2131133 (E.D. Mi. 2012) – In action based on Michigan's version of Uniform Fraudulent Transfer Act, complaint to avoid alleged fraudulent transfer must include as defendant the party allegedly making the transferor. Action brought solely against transferee and that did not also join alleged transferor properly dismissed by State Court for failure to join necessary party.

14.32 Parties Liable – Initial Transferee

U.S. v. Moyer, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals' personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. "Initial transferee" requires more than the party be the one to whom the funds were initially paid, and must involve the right of the recipient to exercise dominion over the funds. Corporate officer who caused check to be issued would not be the "initial transferee" where funds were transferred directly from LLC to IRS without actually or constructively passing through hands of corporate officer individually. Fact that check paid corporate officer's tax liability did not make the payment a constructive distribution to the officer and the subsequent transfer by the officer to the IRS for purposes of making the IRS a mediate, rather than initial, transferee.

14.33 Mediate and Immediate Transferee of Initial Transferee

Liquidating Trustee of App Fuels Creditors v. Bowie Resources, LLC, 2012 WL 1854285 (Bankr. E.D. Ky. 2012) – Section 550 allows recovery of avoidable transfer against initial transferee and against any immediate or mediate transferee from the Initial Transferee.

However, transfer is not avoidable against mediate or immediate transferee if transfer was in good faith, for value including satisfaction of present or antecedent debt, and without knowledge of avoidability of transfer; or from any subsequent transferee. Knowledge of the avoidability of the transfer will be inferred where transferee knew facts that would lead reasonable person to believe that transfer was avoidable, but transferee is not required to initiate investigation where there are no such facts. Party to litigation received allegedly avoidable settlement payment and used portion of proceeds to pay party's attorney. Chapter 11 Liquidating Trustee brought action against attorneys to recover funds alleging that attorneys were immediate transferees of the initial transferee. Evidence did not indicate existence of any facts that should have caused attorneys to question alleged avoidability of settlement payment and attorneys had no actual knowledge that settlement payment may have been avoidable. Good faith of attorneys in receipt of funds operated as complete bar to any action to recover funds from attorneys.

C. Turnover of Property

14.34 Generally

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.

14.35 Parties

14.36 Procedure

In re Donato, 2011 WL 6057551 (Bankr. N.D. Ohio 2011) – Avoidance actions must be brought by adversary proceeding. Debtor's Motion for Turnover of Funds Garnished Pre-petition denied even where creditor failed to file answer or otherwise respond.

In re Reynolds, Case No. 09-79550 (Bankr. E.D. Mi. 2010) – Debtor's Motion for Turnover of funds garnished pre-petition denied. Turnover action must be brought by Adversary Proceeding pursuant to Rule 7001.

D. Preferences

14.37 Standing to Bring Action

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 1107 grants to DIP power to prosecute adversary to avoid transfers under Section 547.

Johnston v. City of Middletown, 484 BR 698 (Bankr. S.D. Ohio 2013) – Debtor in no-asset Chapter 7 lacks standing to bring preferential transfer action. Section 522(h) grants standing to Chapter 7 debtor only to extent property could have been exempted. Debtor did not claim exemption in allegedly preferential transfer. Otherwise, Section 547 expressly limits application to the Trustee and not to the debtor. Trustee's no asset report did not give debtor ability to pursue action that trustee chose not to pursue.

Jahn v. Carley Jewels, LLC, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – Trustee's Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

Jahn v. Joeb Enterprises, LLC, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – Trustee's Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

In re Reep, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Debtor has standing to obtain refund of money recovered by Trustee as alleged preferential transfer. Prior to filing, Debtor borrowed money from her Mother to pay student loan creditor. After petition was filed, Trustee made demand on student loan creditor for refund of apparently preferential transfer and student loan creditor returned the funds. Debtor then brought action against Trustee asserting that the transfer to the student loan creditor was not preferential under the Earmarking Doctrine. Court first concluded that transfer was protected by Earmarking Doctrine and so was not avoidable. Court then held that Debtor had standing to recover from the Trustee the funds that were returned to him in error by the creditor.

14.38 Transfers to "Insiders"

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Section 547 "lookback" extends to one year where transferee was "insider". Transferee must constitute an insider at the time the transfer was made, and that it is not enough that the transferee be an insider at the time the transfer was arranged. Although recipient was "insider" of corporation at time of execution of Employment Agreement that gave rise to severance payments, recipient had terminated relationship with corporation prior to receipt of severance payment. Therefore, recipient no longer constituted "insider" for purposes of Section 547. Payments under Employment Agreement made outside of 90 days but within one

year constituted payments made beyond “lookback” and were not avoidable.

Gold v. Rubin, 2011 WL 3734912 (Bankr. E.D. Mi. 2011) – Defendant’s status as second cousin of Debtor’s corporate president does not make defendant an insider for purposes of Section 547. Section 101(45) defines “relative” as related within third degree as determined by common law. Under Michigan law, one determines degree of relation by starting at either of the persons claiming relationship, counting up to the common ancestor, and then down to the other person, with each step being one “degree”. Common relative was great-grandparent, resulting in three degrees of separation up and another three degrees down.

14.39 Parties Liable – Initial Transferee

In re Foley, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Garnishor of debtor’s income pre-petition liable for amount garnished where garnishment constituted preferential transfer. Because garnishor was also debtor’s sister, garnishor liable for all funds garnished within one year pre-petition.

Wells Fargo Home Mortgage, Inc. v. Lindquist, 592 F.3d 838 (6th Cir. 2010) – Trustee can recover preferential transfer from initial transferee or from any intermediate or mediate transferee of the initial transferee. Creditor could not avoid liability for avoided mortgage merely because creditor had assigned the mortgage to a third party. Although the third party may also be liable, Trustee is permitted to choose the defendant.

14.40 Mediate and Immediate Transferee of Initial Transferee

Liquidating Trustee of App Fuels Creditors v. Bowie Resources, LLC, 2012 WL 1854285 (Bankr. E.D. Ky. 2012) – Section 550 allows recovery of avoidable transfer against initial transferee and against any immediate or mediate transferee from the Initial Transferee. However, transfer is not avoidable against mediate or immediate transferee if transfer was in good faith, for value including satisfaction of present or antecedent debt, and without knowledge of avoidability of transfer; or from any subsequent transferee. Knowledge of the avoidability of the transfer will be inferred where transferee knew facts that would lead reasonable person to believe that transfer was avoidable, but transferee is not required to initiate investigation where there are no such facts. Party to litigation received allegedly avoidable settlement payment and used portion of proceeds to pay party’s attorney. Chapter 11 Liquidating Trustee brought action against attorneys to recover funds alleging that attorneys were immediate transferees of the initial transferee. Evidence did not indicate existence of any facts that should have caused attorneys to question alleged avoidability of settlement payment and attorneys had no actual knowledge that settlement payment may have been avoidable. Good faith of attorneys in receipt of funds operated as complete bar to any action to recover funds from attorneys.

Stevenson v. Genna, Case No. 09-5490 (Bankr. E.D. Mi. 2010), *aff’d* Case No. 10-11353 (E.D. Mi. 2010) – Section 550 allows the Trustee to recover an avoidable transfer from the initial transferee or any immediate or mediate transferee but prohibits recovery from an immediate or mediate who takes for value, including satisfaction of a present or antecedent debt, in good faith and without knowledge of the avoidability of the transfer. Knowledge of possible bankruptcy filing, without more, is not “knowledge of the avoidability of the transfer”. Law firm was not “initial transferee” of proceeds recovered on a writ of garnishment where the Law firm received funds on behalf of client and deposited the funds in the Firm Trust Account pending further order of the State Court. State Court then ordered that a portion of the funds be paid to the Law firm and the balance to the Plaintiff, resulting in Law firm being an “immediate transferee”. Funds are not recoverable from Immediate transferee where initial transferee gave funds to immediate transferee in good faith and without intent to hide or shield funds from recovery by Trustee and the transfer is otherwise not tainted by fraud; or if the Law firm had been unequivocally advised that Debtor was filing bankruptcy, rather than merely considering filing and at a time when the parties were engaged in good faith settlement negotiations. Law firm received money for payment of attorney fees owed and apparently received money in good faith. Transfer of funds to Law firm not avoidable under Section 547 and Section 550.

14.41 Elements - Generally

DiGirolamo v. Double M Ltd, 2103 WL 4541237 (Bankr N.D. Ohio 2013) – Complaint stated cause of action where complaint identifies specific transfer of \$200,000.00 by debtor, sufficiently established that the transferee was a creditor, and alleged that the transfer was on account of an antecedent debt. Complaint specifically alleged that transferee was attorney who previously provided services to debtor and that payment was on account of prior legal bills. Trustee alleged with specificity that the transfer occurred within 90 days preceding commencement of the Case, such that debtor was presumptively insolvent; and that transfer enabled transferee to receive more than any expected return based on estate assets liquidated to date or expected to be recovered. Fact that transfers may have run through Debtor’s closely held LLC did not insulate ultimate transferee as transfers benefitted the debtor who was indebted to the transferee.

Gold v. Lippincott-Ace Electric Co., 2012 WL 4468530 (Bankr. N.D. Ohio 2012) – Transfer is preferential if there is transfer of debtor’s interest in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Defendant has been supplier of equipment to debtor and accrued large debt. Within 30 days prior to commencement of bankruptcy, Debtor made 2 large payments to defendant. There was no doubt that debtor made payments or that payments were on account of antecedent debt. Because transfers were within 90 days of filing, debtor was presumptively insolvent and defendant offered no evidence to rebut this presumption. However, Plaintiff failed to demonstrate that defendant received more than defendant would have had the transfer not been

made and the creditor had been paid through debtor's bankruptcy. Bankruptcy case was in its infancy and there was possibility that amount that would ultimately be distributed to creditors would exceed amount actually paid to defendant.

Swope v. Grove, 2012 WL 4435117 (Bankr. N.D. Ohio 2012) – Section 547(b) allows Trustee to avoid any transfer of property of debtor to creditor on account of antecedent debt while debtor was insolvent, and within 90 days of petition if transferee is not an insider, and where transfer allows creditor to receive more than the creditor would have received in Chapter 7 had the transfer not happened. Debtor owed Defendant a debt pursuant to an agreement settling Defendant's sexual harassment lawsuit and the payment was on account of an antecedent debt. The transfers of money in debtor's checking account constituted transfers of an interest of Debtor in property. Defendant received more than she would have received had the transfers not been made and she received her pro rata share of the property of the estate under Chapter 7. Defendant received full payment of Defendant's claims against Debtor while creditors in Debtor's Chapter 7 case will not receive full payment and had the transfers not been made, Defendant's pro rata share of the bankruptcy estate would have been far less than the total amount paid by Debtor in settlement of Defendant's claims against it. However, record did not show that transfer occurred within 90 days of petition or that debtor was insolvent as of the date of the transfer. Settlement statement that showed date on which defendant received her money from her attorney's trust account did not establish the date on which the checks written by Debtor cleared his bank. A transfer for preference purposes occurs when the check clears the drawee bank. Absent evidence that the Debtor's checks cleared the bank within the relevant 90 day window, Trustee failed to meet burden of proof on all elements of action.

Degirolamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Under Ohio state law, preference action requires “(1) a sale, conveyance, transfer, mortgage, or assignment made by a debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged “design to prefer” by alleging that sales of fuel at below market prices resulted in Debtor's inability to pay suppliers, leading to involuntary petition.

Guinn v. Lester, 2012 WL 71013 (Bankr. E.D. Tn. 2012) – Lookback period is one year for transfers to insiders. Debtor's payments to father for pre-existing loans subject to one year lookback period. However, insolvency is presumed only for the 90 days preceding the petition, even for transfers to insiders. For transfers made more than 90 days before the petition, Trustee bears burden of proving that debtor was, in fact, insolvent on the date of each transfer. Reference to debtor's schedules is unavailing as those reflect only debtor's financial picture on date of petition and not on dates of transfers.

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.

Soto-Rios v. Banco Popular de Puerto Rico, Case No. 10-2270 (1st Cir. 2011) – Mortgage not avoidable as preference even where mortgage deeds 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. Strong-arm powers could not be used to avoid the un-recorded mortgages where a bona-fide purchaser of the debtors' property would take the property subject to the mortgagee's interest in the debtors' property. 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).

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor's father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.

Simon v. JPMorgan Chase Bank, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – In Michigan, perfection of interest in real property occurs upon recording. Notice of Lis Pendens recorded within 90 days of commencement of case avoidable as preference where lender failed to record mortgage.

Kohut v. Rigney, 2011 WL 2693662 (E.D. Mi. 2011) – Divorce judgment rendered in 1998 operated to transfer title to assets to ex-wife. Ex-wife's recording of deed in 2007 was not a transfer because, as of the date of recording of the ex-wife was not a creditor of debtor. Under Michigan law, a divorce award of real property has the same effect as a quit claim deed, passing all the estate which the grantor could lawfully convey by a deed of bargain and sale. When the divorce judgment awarded ex-wife the Michigan property, and the Debtor signed a quit claim deed, the Debtor effectively transferred all of his interest in the property to ex-wife. Failure to record the deed created an unnecessary cloud on title, but did not change the character of the transaction between the parties. As of date of divorce judgment and quit claim deed, ex-wife ceased to have any claims against debtor, so recording of deed could not have been preferential.

Antioch Company Litigation Trust v. Morgan, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Complaint to recover preferential transfers failed to state cause of action where complaint failed to allege date on which transfer occurred.

Minefee v. Perchka-Marion, 2011 WL 66104 (Bankr. W.D. Ky. 2011) – Section 547 creates rebuttable presumption that debtor was insolvent during 90 days prior to commencement of case. Plaintiff did not overcome presumption of insolvency by affidavit alleging that Debtor spend significant sums of money on illegal drugs.

Gocha v. Cooper, Case No. 09-80349 (Bankr. W.D. Mi. 2010) – Transfer will be avoidable under Section 547 only if transfer is payment for antecedent debt. Agreement for payment entered into prior to bankruptcy filing constitutes “claim” and holders of claim are “creditors” for purpose of bankruptcy case. Debtors borrowed money from parents to construct improvements to their house, with the provision that when debtors sold the house, they would repay the loans. Debtors later defaulted on mortgage and withdrew money from 401-k loan to repay loan from parents. Although property was never sold, at the time of the repayment, parents had enforceable right to payment even if that right was contingent on future events. Debtors’ repayment of that obligation within 90 days prepetition constituted payment of an antecedent debt which could be recovered under Section 547.

Jahn v. Carley Jewels, LLC, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – “Consignment” transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

Jahn v. Joeb Enterprises, LLC, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – “Consignment” transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

In re Foley, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Funds garnished by debtor’s sister during year preceding bankruptcy filing were recoverable where there was no dispute that debtor was, at all times, unable to pay debts as they came due and had liabilities in excess of assets, and garnishment permitted creditor to recover more than creditor would have received in Chapter 7 as Chapter 7 estate was administratively insolvent.

Helbling v. Cleary, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. Filing of suit to foreclose mortgage constituted *lis pendens* which perfects the on the date foreclosure proceedings were commenced, which was within 90 days of commencement of case.

In re Miller, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor’s financial statements are not dispositive but are admissible evidence as statements against interest. Summary judgment denied where financial information left genuine issue of material fact as to debtor’s solvency on date of transfer.

In re Williams, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables the creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

Boyd v. Petrie, 430 BR 453 (Bankr. W.D. Mi. 2010) – To prevail on a preference avoidance claim, the Bankruptcy Trustee must establish a transfer of an interest of the Debtor in property; (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Debtor and his then-wife borrowed money from Wife’s parents and gave a mortgage encumbering the Debtor’s and Wife’s residence. Debtor later transferred the Property to a Trust established by the Parents to satisfy the Mortgage Note in full. Shortly thereafter, the Debtor and Ms. Petrie were divorced and the Debtor filed a voluntary Chapter 7 bankruptcy petition. The transfer to a Trust controlled by the creditor constituted a transfer to or for the benefit of a creditor. Although the “Trust” would not be an insider as defined in Section 101, transfer to Trust would be deemed transfer to an insider for purpose of one-year look-back where the parties all acted as if the Parents were the actual creditor; Wife’s Mother handled all details of loan although wife was not a trustee of the Trust; and the circumstances surrounding the transaction from start to finish indicated that the loan was from the Parents to their daughter and the Debtor out of family concern, rather than for business or estate

planning reasons. Court can find “insider” status even absent a relationship where the Transfer was not an “arms length” situation, given the familial ties between the Parents, their daughter, and their grandchildren-ties that survived the divorce. Status of property as tenancy by the entireties which, under Michigan law would not be an “asset” for fraudulent conveyance purposes (except with respect to joint creditors) is an interest in the property for purposes of preferential transfers. The transfer allowed Parents to recover more than Parents would have received in a Chapter 7 where Parents never recorded the mortgage and so the mortgage could have been avoided by a Chapter 7 Trustee.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.

Himmelspach v. Hunter, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation.

Wells Fargo Home Mortgage, Inc. v. Lindquist, 592 F.3d 838 (6th Cir. 2010) – “Transfer” of property pursuant to unrecorded mortgage is deemed to “occur” as the moment prior to filing. Post-petition attempt to belatedly record mortgage does not alter status of mortgage as unperfected as of the moment of filing.

Countrywide Home Loans v. Dickson, 427 BR 399 (6th Cir. BAP 2010), *aff’d* 2011 WL 3768684 (6th Cir. 2011) – Lender’s lien against Manufactured Home would be avoided as preferential where Lender did not record the lien on the title to the Manufactured Home either by filing an affidavit of conversion of the Manufactured Home to real property or by recording the lien on the certificate of title. “Perfection” did not occur as a matter of public record until the State Court entered its Judgment imposing lien on Manufactured Home, which occurred less than 90 days prior to the commencement of the case. The *lis pendens* did not operate to perfect the transfer as a *lis pendens* does not create or perfect a lien under Kentucky State Law. The “transfer” would have the effect of allowing lender to recover 100% of the claim in a Chapter 13 case that provided for less than 100% of their allowed claims.

Shapiro v. Art Leather, Inc., Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

Kohut v. New Century Mortgage Corp., Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

14.42 Elements – Transfer of Property

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Delay in recording deed caused transfer of property to occur as of date of recording. Debtor sold property to mother years prior to commencement of case but mother did not record deed until shortly before filing. Court rejected debtor’s argument that debtor held property in trust for mother based on lack of recording of deed where there was no express trust ever created or intended. Debtor could not assert resulting trust as there was no evidence that at time of sale, the parties intended to create a trust but failed to actually do so. Debtor also could not assert a constructive trust as constructive trusts are used to prevent fraud or unjust enrichment, and facts of transaction did not reflect either fraudulent conduct by debtor or that debtor would be unjustly enriched; and there has not been any state court determination of a constructive trust and Bankruptcy Court will not impose constructive trust in the first instance as doing so disrupts goal of ratable distribution.

Burden v. Richardson, 2013 WL 2370720 (Bankr. E.D. Ky. 2013) – Clear and convincing evidence indicated that real property was owned by debtor in trust for mother. Debtor purchased property in own name, using funds provided by mother for down payment and financing balance. Mother made all mortgage payments and three years after closing, mother made large lump sum payment to pay off mortgage.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 547 allows Trustee or DIP to recover property or value of property transferred. “Transfer” is any direct or indirect, absolute or conditional, voluntary or involuntary, action or method of disposing of or parting with property or an interest in property. Checks written by corporation within 90 days of commencement of bankruptcy case were “transfers” made for purposes of repaying prior debt.

14.43 Elements – Perfection of Security Interest

Mason v. Ocwen Loan Servicing, LLC, 2013 WL 4052905 (Bankr. E.D. Ohio 2013) – Lien against property that is not perfected as of petition date is deemed to constitute transfer immediately before the date of the petition. Unrecorded lien became perfected by recording of *lis pendens* at commencement of foreclosure action and entry of foreclosure judgment as part of litigation. When foreclosure judgment was subsequently vacated, *lis pendens* lost effect of perfection and mortgage remained unperfected when debtor later filed for bankruptcy. Whether mortgage would otherwise appear in chain of title did not defeat preferential nature of transfer as actual notice or lack of actual notice of the mortgage is not element of preference litigation.

Gold v. JPMorgan Chase Bank, NA, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of the debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgage were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. However, Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.

14.44 Elements – Antecedent Debt

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered for debtor prior to commencement of case were preferential transfers. Debtor’s argument that payments were retainer for future services did not avoid conclusion that payments were preferential where law firm admitted that it did not hold the payment in trust but applied it to debtor’s pre-existing balance.

Suhar v. Agree Auto Services, Inc., 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed on that car and agreeing to include the deficiency on the prior car in the financing of the new car. Debtor purchased a new car at a price of \$6,488 plus the deficiency on the prior car of \$4842.15, for a total “purchase price” of the new car of \$11,970.00, with a down payment of \$3,518.50 and the balance financed. Payment on deficiency was payment on account of antecedent debt that allowed creditor to receive more than creditor would have received in Chapter 7 proceeding.

Pryor v. New York State, Department of Taxation and Finance, 2013 WL 1856459 (Bankr. E.D.N.Y. 2013) – Payment of income taxes is not preferential if payment is made by date on which payment can last be made without penalty. Taxes are considered due on the last date on which payment can be made, so payment of taxes before that date are not on account antecedent debt. Debtor who obtained extension of time to file return had until extended due date to pay taxes in timely manner.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is made on account of antecedent debt where payments are made in connection with a debt that precedes the allegedly preferential transfer. Debt is incurred on the first date on which debtor becomes legally obligated to repay. Corporation’s payment to principal of sums in repayment of loans and in payment of deferred compensation were payments on account of antecedent debt.

14.45 Elements - Insolvency

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Code defines insolvent in terms of partnership where sum of entities debts exceeds all of entities property, exclusive of any property that has been transferred, concealed, or removed with intent to hinder, delay or defraud creditors, or property that may be claimed as exempt. Insolvency is based on balance sheet, based on fair market value of assets that could be obtained if sold in prudent manner within a reasonable time to pay debts. Debtor is presumed insolvent on and during the 90 days preceding commencement of the case. Defendant failed to prove solvency where creditor relied solely on debtor’s books and records, which were maintained on historic basis and did not necessarily reflect true current fair value of assets. Financial statements of corporate debtor did not support finding of solvency where financial statements admittedly failed to include \$200 million in bond debt that corporate debtor had guaranteed to corporate parent.

14.46 Elements – Timing of Transfer

Melaragno v. CitiMortgage, Inc., 2013 WL 3991971 (Bankr. W.D. Pa. 2013) – Recording of *lis pendens* as part of quiet title action constituted perfection of previously unrecorded mortgage. *Lis pendens* was recorded more than 90 days pre-petition, removing “transfer” from scope of preference statute, although actual quiet title judgment was entered less than 90 days before filing.

Graham v. Huntington National Bank, 2013 WL 5492533 (Bankr. N.D. Ohio 2013) – Payment may be preferential only if payment is made within 90 days of bankruptcy filing or within one year if creditor at time of transfer was insider. Transfer made 9 months prior to petition date could be preferential only if made to insider. Prior to commencement of bankruptcy, creditor caused the appointment of a state court receiver. That receiver then transferred money to the creditor. Trustee’s complaint sufficiently alleged that creditor controlled receiver and had ability to direct actions of receiver as to make creditor an insider of the debtor. Complaint specifically alleged that (1) throughout the course of the receivership, receiver and counsel conferred regularly with creditor; (2) receiver was under the direction and control of

creditor throughout the receivership; (3) creditor directed receiver to pay creditor the net proceeds of the settlement with the Common Pleas Defendants; (4) receiver caused debtor to pay creditor as directed; (5) creditor is an insider of debtor as a result of its control over receiver; (6) receiver made transfer to creditor without the authority of state court that appointed receiver; and (7) payment to creditor was in payment for an unsecured obligation. Insider includes person in control of debtor such that insider can exercise sufficient authority over debtor as to dictate corporate policy and control disposition of corporate assets. While causing appointment of receiver, standing alone, would not make creditor an insider, complaint alleged sufficient facts to raise issue of whether receiver was so under control of creditor as to effectively allow creditor, through receiver, to dictate corporate policy including disposition of assets and payment of creditors.

14.47 Elements – Allow Creditor to Recover More Than Hypothetical Chapter 7

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is preferential only where transfer allows creditor to recover more than creditor would have received had transfer not been made and debtor had been liquidated on Chapter 7. Unless estate is sufficient to pay 100% to all unsecured creditors, any payment to unsecured creditor by definition allows creditor to recover more than would have been recovered in Chapter 7. Court finding that debtor was insolvent at time of transfer demonstrates that debtor would not have paid 100% to unsecured creditors, establishing that payment to insider unsecured creditor allowed that creditor to receive more than creditor would otherwise have received.

14.48 Setoff as Preference

Morris v. U.S. Dept. of Agriculture, 2013 WL 3146925 (Bankr. W.D. Ky. 2013) – Under Section 553, setoff is avoidable as a preference only to the extent the creditor improved its position within the 90-day period immediately preceding the commencement of the bankruptcy case. Improvement of position test is three step process. Court must first determine what the creditor’s insufficiency was at the time the setoff occurred, measured by the extent to which the claim against the debtor exceeds the amount of the mutual debt owed to the debtor. The Court must then determine the creditor’s insufficiency on the 90th day preceding commencement of the case or, if no insufficiency existed on the 90th day, then the amount of the insufficiency on the first date on which an insufficiency existed. The Court must then compare the two figure and if the insufficiency as of the date of setoff was less than the insufficiency as of the 90th day preceding the petition (or the insufficiency that first existed, whichever is applicable). The extent to which the deficiency was less on the date of the setoff than it was on the 90th day is the measure of the preference. Debtor owed USDA on the 90th day pre-petition \$27,238.17. On January 1, debtor became entitled to a tax refund of \$8,357.00, which is also the date on which the mutual debt first arose, leaving an “insufficiency” of \$18,607.72 (after crediting the mutual debts). The offset against the tax refund occurred on February 17, after debtor filed her tax return and the IRS determined the amount of the overpayment, and sent that overpayment to the Department of Agriculture. As of February 17, the amount of the insufficiency (after applying the offset and other payments and credits) was \$18,088.53. Thus the difference between the insufficiency as of the date of first mutual debts and the date of the offset was \$18,607.72 - \$18,088.53 = \$ 519.19. This was the amount of the avoidable preference that the USDA would be required to return to debtor as an avoidable preference.

US Department of Agriculture v. Riley, 485 BR 361 (W.D. Ky. 2012) – Where creditor exercises right of setoff prior to commencement of case, court must determine whether setoff allowed creditor to improve position. Court first determines “insufficiency” as of date of setoff – that is, amount by which debt owed to creditor exceeded debt owed by creditor to debtor. Court then determines the “insufficiency” as of the date that is 90 days pre-petition or, if there was no insufficiency on the 90th day, the insufficiency determined on the first day on which there was an insufficient. To extent first calculated insufficiency is greater than second calculated insufficiency, creditor has improved its position and is liable for the preference. Creditor did not receive preference when creditor setoff against debtor’s tax refund. Creditor did not mutual debt on 90th day pre-petition as that date was prior to December 31 of the tax year for which the refund was to be paid. On January 1, right of setoff arose. On that date, creditor was owed \$8,000; and debtor’s overpayment was determined to be \$5,000, leaving an “insufficiency” of \$3,000.00. Once creditor exercised right of setoff, creditor was still owed (the remaining “insufficiency”) was still \$3,000.00. Thus, creditor did not improve its position by exercising statutory right of setoff or improve its position at expense of other creditors.

14.49 Defenses – De Minimis Transfers

In re Nelson, 419 BR 338 (Bankr. W.D. Ky. 2009) – Section 547(c)(8) provides that a preference may not be avoided if the aggregate value of all property that constitutes or is affected by such transfer is less than \$600. Judgment entered against defendant in favor of four separate plaintiffs, apportioning recovery between four plaintiffs. Writ of garnishment served on defendant employer produced a total of \$862 in garnished funds distributed pro rata to the creditors. No individual creditor received more than \$600. Section 547(c)(8) limitation applies based on amount received by each creditor, not by aggregate amount paid to all creditors. Where no creditor received more than \$600, trustee could not recover alleged preferential transfers.

14.50 Defenses – Safe Harbor – 547(c)(3)

Brock v. Branch Banking and Trust Co., 2010 WL 2629704 (6th Cir. 2010) – Lender could not rely on a 20 day “safe harbor” provided by section 547(c)(3) where the Lien was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk’s office nine days after the financing transaction occurred, two-week delay by clerk in uploading Lien for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as and when the required paperwork and fees are submitted to the clerk.

14.51 Defenses – Not Primarily Consumer Debts – 547(c)(9)

Jones v. Citizens Bank, Adv. No. 11-2168 (Bankr. E.D. Mi. 2012) – Transfer otherwise avoidable under Section 547 is not avoidable if debtor has debts that are not primarily consumer debts, and aggregate value of property transferred or affected by transfer is less than \$5,850.00. Vehicle was repossessed and sold at auction in sale that produced active competitive bidding with a successful bid of \$4,000.00. Even if auction price was a little below market, there was no evidence that successful bid was more than \$1,850 less than actual value. Although debtor valued vehicle at \$6,800 because of its excellent condition, there was nothing in the record to support that valuation. Testimony of owners is viewed with skepticism. And debtor's own testimony established that vehicle depreciated at a rate of \$1,000 per year, which would produce value of approximately \$5,000.00. Court did not use auction price, but factored in other items that could possibly have affected value, but nothing in the record would have supported value greater than \$5,850.00.

14.52 Defenses - Earmarking

Cage v. Hardy Rawls Enterprises, LLC, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through "seller financing". Debtor would then pool the contracts and sell those to an investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using debtor's own funds in comingled account. If debtor repossessed and sold car, debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. Evidence did not indicate that particular funds received by debtor from any particular source were "earmarked" or were in any way used other than as debtor's own property. Lump sum payments to investor within 90 days of filing were avoidable preferences.

In re Reep, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Earmarking is an equitable doctrine created to except transfers borrowed from but directed by a third party to a creditor, for the benefit of the debtor, to be excluded as transfers of interests in a debtor's property. Payment of property belonging to a third party to a particular creditor, even if it flows through the debtor, is not property of the debtor/estate. Debtor's mother gave debtor money to pay off student loan. Immediately after depositing the funds into Debtor's checking account, Debtor paid the student loans as agreed with Mother. Money property was that of a third-party and the transfer was directed by the third-party, Debtor's mother. Debtor's mother provided the funds specifically to pay Debtor's obligation to Nelnet and the funds were actually used for that purpose. The borrowed funds have been specifically earmarked by the lender for payment to a designated creditor, resulting in no transfer of property of the debtor even if the funds pass through the debtor's hands getting to the selected creditor. Earmarking doctrine rendered the transfer to student loan creditor to not be a transfer of an interest of the debtor.

MBNA America Bank v. Meoli, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called "convenience checks" as preferential transfers. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to sue those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. "Earmarking" applies only where the borrowed funds used to discharge the debt are specifically earmarked by the lender for payment to a designated creditor. Here, the funds were not restricted by Lender to be paid solely to MBNA to be credited against Debtor's credit card debt. The checks could have been used to transfer balances, pay bills, make a purchase, or get extra cash. In such an instance, the Debtor possessed sufficient control over the funds to determine where they would go once the credit was accessed.

Yoppolo v. MBNA America Bank, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. Debtor controlled disposition of the funds and determined to use those funds to pay first lender. Issuer of convenience check did not direct or require that the funds be paid to first lender, rendering earmarking doctrine is inapplicable.

In re Wells, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Fact that mortgage was given as part of the refinancing of an existing mortgage did not protect mortgage from avoidance under "earmarking" doctrine. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) –Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a "new creditor" and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers

by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

14.53 Defenses – Administrative Expenses

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

14.54 Defenses – Payments for Fines and Penalties

In re Silverman, 2010 WL 3169415 (9th Cir. 2010) - The plain language of Section 547(b) does not except criminal restitution payments. Allowing the Trustee to recover the restitution payment to State Fund will not interfere with California's state criminal proceedings. Criminal restitution payments are non-dischargeable. Therefore, the Trustee's recovery of the restitution payment will not eliminate Debtor's obligation to pay the restitution money post-bankruptcy. Recovery of the preference does not compromise or dilute the Debtor's state sentence. Excepting non-dischargeable debts like criminal restitution payments from Section 547(b) would allow a debtor to pay off this non-dischargeable debt during the preference period and leave other creditors with nothing, would, motivating debtors to pay off these non-dischargeable debts during the preference period, leaving all other debts to be extinguished in bankruptcy. An economically rational debtor would likely prefer this outcome over one where the debtor is left with non-dischargeable debts post-bankruptcy.

14.55 Defenses – Contemporaneous Exchange of Value

Suhar v. Agree Auto Services, Inc., 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed on that car and agreeing to include the deficiency on the prior car in the financing of the new car. To be contemporaneous, both debtor and creditor must intend that the transfer be contemporaneous exchange; exchange must, in fact, be contemporaneous; and exchange must be for new value. Payment of deficiency on prior car was not contemporaneous exchange for new value, where purchase price of new vehicle was \$6,931.34 but total price including deficiency balance was more than \$11,000.00. Value received by debtor was limited to value of new vehicle. Any additional sums paid were paid on account of antecedent debt for which debtor did not receive any new value and which served to diminish the Chapter 7 estate.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer for or on account of an antecedent debt owed by the debtor before such transfer was made. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

14.56 Defenses – New Value

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 Appalachian Oil Co., Inc., 2012 WL 4754675 (Bankr. E.D. Tn. 2012) – “New Value” defense protects otherwise avoidable transfer where the creditor extended new value in exchange for payment. To extent new value is extended, the preference is repaid to the estate. Creditor must establish that following payment by the debtor, (1) the creditor gave new value to the debtor; (2) the new value was unsecured, and (3) the debtor, after receiving the new value, did not thereafter make an unavoidable transfer to the creditor. New value can consist of money, services or new credit. Retailer sold lottery tickets for Virginia Lottery with payment to be made by EFT transfers. After EFT payment bounced, debtor wire transferred payment to Lottery Commission. Following payment, Virginia allowed debtor to continue to sell lottery tickets. However, “new value” exception is not available as Debtor had made other payments to Lottery Commission after date of wire transfer that were, themselves, not avoidable. New value cannot be used if subsequent credit extended by creditor is later repaid with non-avoidable transfer, as doing so would result in debtor receiving “double credit”, once for the prior payment and a second time for the later payment. If a debtor has repaid the new value, and the trustee is unable to avoid that payment because of

another exception, the new value has not replenished the debtor's estate

14.57 Defenses – Liquidation Amount in Chapter 7

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor's father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made. Debtor's subsequent reaffirmation of obligation to father does not change fact that as of petition date, claim was unperfected secured claim that would not be recognized in Chapter 7.

In re Miller, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor's financial statements are not dispositive but are admissible evidence as statements against interest.

Shapiro v. Art Leather, Inc., Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct "hypothetical Chapter 7 case" to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

14.58 Defenses – Ordinary Course of Business

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh'g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Sale of property by debtor to mother was not in ordinary course of business where neither debtor nor mom in the ordinary course of business bought or sold real estate; and the six year delay in recording deed after date of sale was not on ordinary business terms.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is in ordinary course of business where transfer is made in ordinary course of business of debtor and transferee; or is made on ordinary business terms. After BAPCPA, tests are administered in the disjunctive – transfer is in ordinary course if either test is met. Whether transfer is ordinary course based on business transactions between debtor and transferee is subjective determination, while determination as to whether transfer is made on ordinary business terms is objective standard based on normal commercial practices in the industry in general. Subjective analysis considers length of time involved in the preference period transaction; whether amount of form of payment differed from previous transactions; whether transaction involved any unusual collection or payment activity; and circumstances under which transfer was made. Payments were not in ordinary course between debtor and transferee where transferee had previously infused money into debtor without knowledge of debtor's principal and debtor's principal never authorized any repayments to be made on any alleged cash infusions. Although infusion in and repayments from debtor may have been in defendant's ordinary course, these transfers could not have been in ordinary course of debtor's business because debtor's management was unaware that transfers were occurring. In addition, any prior advances and repayments had been relatively small, far less than \$61,000 involved in the instant transfer.

In re Appalachian Oil Co., Inc., 2012 WL 4754675 (Bankr. E.D. Tn. 2012) – Otherwise preferential transfer may not be avoided to extent the debt was in the ordinary course of business of the debtor and creditor; and is made either in the ordinary course of business or financial affairs of debtor or made according to ordinary business terms. Goal is to protect recurring, customary credit transactions which are incurred and paid in the ordinary course of business of the debtor and the transferee. Analysis must examine the payment from the debtor's perspective. Wire transfers from debtor to Virginia Lottery Commission to pay for lottery tickets were within ordinary business terms. Debtor originally made payment to Lottery commission by EFT transfers but, after debtor had experienced financial difficulties and Tennessee Lottery Commission terminated relationship with debtor, debtor changed to payments by wire transfers. In doing so, debtor went out of its way to ensure that Virginia Lottery was paid immediately to avoid cut-off in ability to sell tickets with stated intention of going back to normal ticket payment processing when finances stabilized. Wire transfers were outside parties' ordinary course of business dealings. Wire transfers were unusually activities and resulted in payment being made a day earlier than past dealings. Change was more than mere change in method by which payments were made and reflected change in debtor's past practice because of current financial conditions. As for payment according to ordinary business terms, Court does not have to find industry standard for payments. Rather, court should determine whether transaction is so unusual as to render it an aberration in the relevant industry. Regulations from other state lotteries indicated that payment by wire transfer is acceptable, or even mandated, method of payment. Virginia regulations provided for payment by wire transfer after a check or draft is dishonored, and regulations allowed Virginia Lottery to designate any other form of payment beyond EFT.

Cage v. Hardy Rawls Enterprises, LLC, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through "seller financing". Debtor would then pool the contracts and sell those to an

investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using debtor's own funds in comingled account. If debtor repossessed and sold car, debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. There was no evidence that this method of transacting business was either in the ordinary course of the motor vehicle financing arena nor that this particular method was within normal course of business between debtor and investor, particularly where method of dealing with funds was directly contrary to requirements of contract between debtor and investor. Lump sum payments to investor within 90 days of filing were avoidable preferences.

Davis v. Barcom, Inc., 2012 SL 37547 (Bankr. E.D. Tn. 2012) – Ordinary Course of Business defense designed to protect customary credit transactions incurred and paid in ordinary course of business of debtor and transferee. Court must consider history of the parties' dealings, timing, amount at issue, and circumstances of transaction. Court will normally refer to contractual terms compared to dates of transfers, but defendant can rebut presumption with evidence that late payments were in the normal course of business between the parties. Invoices required payment within 60 days of issuance. Parties had only one transaction prior to transfers at issue, and that was more than 25 months prior to commencement of the case, precluding any finding of "history of late payments". Payments made more than 91 days and as many as 109 days after invoice were not in the ordinary course of business between parties.

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Ordinary Course of Business is a transaction incurred and paid in the ordinary course of business of the debtor and the transferee and focuses on transfers that are routine and not atypical. Father's loan of money to debtor/daughter to purchase car and later repayment of that loan by debtor were not ordinary course. Father did not regularly loan money to daughter. Father obtained money by cash advance on his credit card and debtor repaid part of loan from proceeds of a bonus, neither of which were "ordinary course of business" for the parties. Family relationship does not necessarily defeat "ordinary course of business" but does raise burden of proof to show that loan was actually ordinary course of business and not just a moral obligation.

Stevenson v. Leonard Turowski & Son Funeral Home, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms. In determining "ordinary course of business", court should consider timing, the amount and manner a transaction was paid and the circumstances under which the transfer was made. Transaction can be in the ordinary course of financial affairs even if it is the first such transaction undertaken by the customer if the transaction would not be out of the ordinary for a person in the borrower's position. Debtor's use of life insurance proceeds to pay for deceased husband's funeral expenses was "ordinary course of business". Family member incurring debt in connection with funeral expenses is "perfectly normal" and it is the ordinary course of business of the funeral home to provide funeral services.

14.59 Defenses – Constructive Notice

Simon v. JPMorgan Chase Bank, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – Recorded Claim of Interest was not sufficient to provide constructive notice of unrecorded mortgage. Claim of Interest is not within statutory definition of documents that can be recorded to create constructive notice. Perfection of mortgage requires recording of original mortgage bearing original signatures. Recording of another document that references or reflects mortgage does not constitute notice.

14.60 Particular Transfers – Avoidable

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor's father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.

Brock v. Branch Banking and Trust Co., Case No. 08-5088 (6th Cir. 2010) – Purchase Money Security Interest avoidable under section 547 where the security interest is not properly perfected until more than 20 days after the security interest attached. Lender could not rely on a 20 day "safe harbor" provided by section 547(c)(3) where the security interest was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk's office nine days after the financing transaction occurred, two-week delay by clerk in uploading security interest for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as or when the required paperwork and fees are submitted to the clerk.

MBNA America Bank v. Meoli, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called "convenience checks" as preferential transfers.

Yoppolo v. MBNA America Bank, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. Economic substance of transaction was same as if the bank handed Debtor the currency which Debtor then used to pay the debt.

In re Wells, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred.

In re Ohio Business Machines, Inc., 2008 WL 3271090 (6th Cir. 2008) – Debtors use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor’s interest in property sufficient to sustain a cause of action for preferential transfers. state law fraudulent conveyance. Debtor’s ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being “property of the estate” notwithstanding creditor’s argument that the funds actually belonged entirely to the co-account holder.

Rieser v. Fifth Third Mortgage Company, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife’s name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband’s one-half interest. Therefore, mortgage as to husband’s undivided one-half interest deemed to have occurred immediately prior to the commencement of the case, rendering mortgage an avoidable preferential transfer.

14.61 Particular Transfers – Not Avoidable

Kohut v. Rigney, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex- husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

In re Williams, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor. Post-petition turnover of Debtor’s State Tax Refund to creditor not avoidable where the writ of garnishment was served on the State more than 90 days pre-petition.

Himmelspach v. Hunter, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation. Trustee could not avoid fixing of security interest where UCC-1 failed to contain debtor’s full legal name but had a sufficient description to allow one searching the public records to locate the UCC-1 Financing Statement. Although Section 440.9503 requires financing statement to contain the name of the debtor, Section 440.9506 also excuses minor error or omissions that do not make the financing statement seriously misleading. Search of public records using Debtor’s exact name would not disclose financing statement, but search based only on Debtor’s last name or last name and first initial would disclose financing statement. Financing Statement that identified the debtor as “Jon Wardin” instead of Debtor’s legal name, “Jonathan P. Wardin” was not sufficiently misleading that a party conducting a reasonable search would not locate the Financing Statement. As the creditor held valid security interest, any payments to the creditor up to the value of the collateral could not be preferential as a matter of law, as the transfers did not permit the creditor to receive more than the creditor would have received in a hypothetical Chapter 7 case.

Fitzpatrick v. Toyota Motor Credit Corp., 2009 WL 2971762 (Bankr. E.D. Tn. 2009) – A secured claim is deemed perfected according to and at the time dictated by State law. Under Tennessee law, a lien in a motor vehicle is perfected when by delivery to the department or the county clerk of the existing certificate of title, if any, title extension form, or manufacturer’s statement of origin and an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee. The security interest is perfected as of the date of delivery to the county clerk or the department. When the security interest is perfected, it constitutes notice of all liens and encumbrances against the vehicle described in the security interest to creditors of the owner, to subsequent purchasers and encumbrances. Constructive notice dates from the time of first delivery of the request for the notation of the lien or encumbrance upon the certificate of title by either the department or the county clerk acting as agent for the department, as shown by its endorsements of the date of delivery on the document. The Creditor properly delivered the necessary documents to the appropriate governmental agency. The failure of the governmental agency to note the lien on the certificate of title did not prevent the security interest from being perfected. Further, the later request by the Creditor for a Duplicate Certificate of Title that reflected the lien did not delay perfection of the lien until the date of issuance of the Duplicate Title. Where the original documents were delivered to the appropriate governmental agency well prior to the preference period, the issuance of the Duplicate Title less than 90 days prior to commencement of the Bankruptcy case did not constitute a preferential transfer, as the Duplicate Title did not accomplish either a transfer of title or perfection of a security interest.

St. James, Inc. v. Cananwill, Inc., Adv. No. 07-6329 (Bankr. E.D. Mi. 2009) – Transfer of Debtor’s right to a refund of unearned premiums paid for Debtor’s insurance policies were subject to creditor’s security interest. Creditor’s receipt of those premiums could not constitute preferential transfer. Creditor provided financing to Debtor for payment of insurance premiums. Security Agreement executed by Debtor and creditor expressly assigned to creditor the right to receive any unearned premiums or other amounts with respect to the

policies assigned as security. Creditor's right to receive unearned premiums is vested at the time the policies are funded by the creditor. Creditor's right to receive refunds does not constitute an attempt to assign a mere contingent or future right to unearned insurance premiums. Premium Finance Agreement was governed by M.C.L. Sections 500.1501 – 500.1514 which expressly authorize and permit the creation of a perfect security interests in the right to receive unearned premiums.

Kohut v. New Century Mortgage Corp., Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

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

14.62 Procedure

In re Berry, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Preferential Transfer denied without prejudice. Action to avoid preferential transfer pursuant to Section 547 must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2).

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Complaint to avoid preferential transfers is not required to itemize each allegedly preferential transfer and can allege just a summary or total of the alleged preferences. Complaint needs only to state short and plan statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff's claim and the grounds upon which it rests.

E. Post-Petition Transfers – Section 549

14.63 Elements

Gold v. Nova World International, LLC, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Under Section 549(a), the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case; and that is not authorized under the Code or by the court. There are three requirements for avoidance under Section 549(a): (1) a transfer of property of the estate; (2) that occurred after the commencement of the case; and (3) that was not authorized by any provision of the Bankruptcy Code or by the court.

In re Wengerd, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Trustee ordinarily can avoid transfer of property of the estate that occurs after commencement of the case and that was not authorized by Order of Court.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a “cash on delivery” basis were avoidable transfers under Section 549.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor's “significant other” which she used to purchase a house. Judgment entered against “significant other” for \$225,000 transferred post-petition.

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

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

14.64 Defenses

Richardson v. McCollins, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Defense under Section 549(b) did not apply as transfer by debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Defendant can assert as defense a right of set off to the extent of counterclaims brought by defendants against Trustee or Estate. Defendants' argument is essentially a defense to the avoidance claim, that the transfers of tobacco by the Debtor to Joseph Irving may not be avoided because the Trustee authorized the Debtor to sell tobacco on behalf of the estate. If the Defendants are correct that the Trustee authorized the Debtor to conduct sales on behalf of the bankruptcy estate, then the Trustee cannot prevail on his avoidance claim since the transfers must be unauthorized to be subject to avoidance. If on the other hand the Debtor had no authority to act on behalf of the estate, then the transfers are avoidable, assuming that the tobacco sold was property of the estate and there is no other basis for authorization. Thus, the transfers were either authorized contracts on behalf of the estate or they were not. This court knows of no authority—and none has been cited—for the proposition that an action by a trustee to avoid an unauthorized transfer by the debtor constitutes a breach of a contract that the debtor had no authority to enter into. Consequently, the defendant's breach of contract counterclaim must be dismissed except to the extent that it is a denial that the transfers were unauthorized. Alleged negligence of Trustee in failure to supervise, monitor, or otherwise limit the Debtor's authority, and the Trustee's failure to monitor payments made by buyers for purchased is not defense to action under Section 549. Trustee is not seeking recovery against the Defendants for losses caused by the Debtor or sustained by the bankruptcy estate. Section 549 allows the trustee to avoid specified post-petition transfers, whether or not they deplete the estate. Fraud by the debtor and good faith on the part of the transferee are irrelevant to the application of this section. Defense based on Tennessee Consumer Protection Act requires proof that (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated. Trustee is not bound by actions of Debtor. Debtor's conduct cannot constitute unfair and deceptive trade practice by Trustee.

Barbacci v. Wengerd, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Section 549(c) prevents avoidance of post-petition transfer of real property where the transferee is a good faith purchaser without knowledge of the commencement of the case; the transfer is for fair equivalent value; and the Trustee had not recorded a copy of the bankruptcy petition with the county recorder of deeds. Bankruptcy Petition is not a "complaint" for purposes of Ohio statute that provides that a complaint acts as a *lis pendens* for purposes of placing parties on record notice. Even if a complaint in an Adversary Proceeding would comply with Ohio law and constitute a *lis pendens*, the transfer happened before any adversary proceedings were filed.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods.

14.65 Defenses - Involuntary Petitions

Gold v. Nova World International, LLC, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.

14.66 Particular Transfers Avoidable

Richardson v. McCollins, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Evidence indicated that property had been transferred by debtor to defendant after debtor filed for relief under Chapter 11. Debtor scheduled property in Schedule A at outset of case and paid taxes and upkeep and other expenses on the property post-petition. Further, evidence indicated that debtor did not deliver the deed to the defendant until post-petition. Transfer of property by deed is not effective until deed is delivered by transferor and accepted by transferee, regardless of stated date on deed itself. Defense under Section 549(b) did not apply as transfer by debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Amended complaint stated cause of action. Complain described in sufficient detail transfers to the Defendants that took place after the Debtor’s bankruptcy case was filed, and which are alleged to be unauthorized transfers of property of the estate. Amended complaint alleged facts indicating that the Defendants received the transferred property directly from the Debtor and suggesting that they had dominion over the property such that they are initial transferees within the contemplation of Section 550. Complaint alleged that after commencement of Chapter 11 proceeding and before appointment of Trustee, debtor allowed insiders to sell crops belonging to the debtor and to retain the proceeds of the sales without paying the proceeds to the debtor. Insider’s actions in selling assets and retaining proceeds constituted action to obtain possession and control of property of estate in violation of Code.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant’s lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a “cash on delivery” basis were avoidable transfers under Section 549.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor’s “significant other” which she used to purchase a house. Judgment entered against “significant other” for \$225,000 transferred post-petition.

14.67 Particular Transfers Not Avoidable

Rushton v. Bank of Utah, Case no. 11-098 (10th Cir. BAP 2012) – Action to recover property transferred post-petition in violation of automatic stay dismissed where recovery would not produce any net benefit to the estate. At time of petition, bank had number of loans to debtor secured by pledge of Certificate of Deposit. Post-petition, and in violation of stay, Bank set off against CDs in partial payment of loan. Trustee brought action against Bank to recover amount of CD, alleging that bank’s setoff was improper post-petition transfer. Court held that if the transfer is set aside, the parties must be restored to their prior positions, which would leave the bank with a security interest in the certificate of deposit that was not sufficient to pay the loan in full. Restoration of the CD to the estate would not leave estate with any equity or interest in the CD as the amount of the loans exceeded the value of the CD.

In re Fleming, 424 BR 795 (Bankr. W.D. Mi. 2010) – Trustee cannot recover property from the debtor pursuant to Section 549 where the debtor has already transferred that property to a third party. Section 550, which provides the remedy for post-petition transfers, allows recovery only from the transferee. Nothing in Section 550 implies that the transferor who no longer owns or holds the property can nonetheless be required to turn that property over to the Trustee.

14.68 Persons Liable

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – To the extent a transfer is avoidable under Section 549, the trustee may recover the property, or the value of the property, from the initial transferee of such transfer or the entity for whose benefit such transfer was made; or any immediate or mediate transferee of such initial transferee. An “initial transferee” is generally the party who receives a transfer of property directly from the debtor and has dominion or control over the property.

F. Reformation of Loan Documents

14.69 Standing

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – As a matter of State law, one who does not hold the Mortgage is not entitled to bring an action to reform the Mortgage. Acquisition of the Mortgage after commencement of an action to reform the mortgage cannot cure a lack of standing in the first instance. In Bankruptcy, however, where the Trustee brought the action, the Defendant can bring as a defense a request for reformation of the mortgage to clarify the ownership and extent of the lien. Standing in Bankruptcy Court is not limited by State Court, and Bankruptcy Court will construe standing as appropriate to adjudicate merits of claims before it.

14.70 Requirements

JP Morgan Chase Bank, NA v. Winget, 901 F.Supp.2d 955 (E.D. Mi. 2012) – Michigan law allows court to reform contract if the written instrument fails to express the intention of the parties because of mutual mistake. Mutual mistake is an erroneous belief shared by and relied on by both parties involving a material fact that affects the substance of the transaction and is in existence at the time the contract is executed. Reformation can also be awarded where one party was acting under mistake and other party knew of mistake but conceals the truth. Where agreement was for trust to sign loan documents solely for purposes of perfecting security interest in stock owned by trust, inclusion of trust in section of loan agreement that purported to make trust liable for entire loan balance was error that could be cured by reformation.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court of equity can reform instrument or

deed where it fails to reflect true intention of parties., where error resulted from mutual mistake or where one party's mistake was induced by fraud of other party. Plaintiff failed to allege any defects or mistakes in the deed or mortgage themselves, but only in the process by which those documents were recorded. Reformation cannot be used to correct recording errors.

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – Reformation of a mortgage is governed by State law where the property is located. Ohio law permits reformation of a mortgage where there is an error, omission or other defect by reason of inadvertence of an officer, party, person or “body corporate”. The mortgage can be reformed to give effect to the true, manifest intention of the parties. The fact that the error was made by the party now seeking reformation does not defeat the ability of the Court to reform the instrument.

14.71 Statute of Limitations

Hensley v. Associates First Capital Corp., 2013 WL 4505908 (E.D. Ky. 2013) – Under Kentucky law, action to reform mortgage must be brought within 5 years of discovery of error or, in any event, within 10 years of execution of allegedly erroneous document. Document executed in March, 2000, action for reformation filed October, 2010, more than 10 years after execution. Even if action first raised in amended complaint could date back to initial complaint, which was filed less than 10 year after execution, plaintiff failed to demonstrate that error was not and could not have been discovered before initial 5 year limitation period expired.

14.72 Laches

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) - Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. Although more than two years passed from the execution of the mortgage to the institution in State Court to reform the mortgage, there was no evidence as to when the creditor actually discovered the error or any other evidence of undue delay. Further, the Trustee cannot demonstrate any prejudice resulting from the delay as Trustee would have been required to deal with the issue whether the Creditor had brought the action earlier or later. Absent evidence of undue delay and prejudice, Creditor's claim for reformation was not barred by laches.

G. Effect of Avoidance

14.73 Preservation for Benefit of Estate

Tribble v. Wells Fargo Bank, N.A., Case No. 10-80005 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee's standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated “Lot 6” was actually intended as mortgage on Lot 5. Avoided mortgage is preserved for benefit of estate.

Smith v. U.S. Bank, 2010 WL 3277795 (Bankr. E.D. Ky. 2010) – Avoidance of unrecorded security interest in mobile home did not vest mobile home in debtor free and clear of avoided lien. Avoided lien is preserved for the benefit of the estate and the estate has full power and authority to enforce the lien.

In re Neal, 424 BR 235 (Bankr. E.D. Mi. 2010) – Unrecorded Mortgage avoided by Chapter 7 Trustee under Section 544 does not affect relative priority of lien. Avoidance only transfers ownership of the mortgage from the mortgagee to the Trustee, who has full authority to then enforce the mortgage. Trustee can either foreclose the mortgage or, alternatively, exercise power to sell property of the estate. The mortgage as avoided preserves its status vis-à-vis debtors' claimed exemptions. Where the mortgage is superior to the exemptions, the Trustee is entitled to full satisfaction of the mortgage before remitting to the Debtors the value of the exemptions.

14.74 Damages

Rodriguez v. Daimler Chrysler Financial Americas, LLC, Case No. 09-1332 (10th Cir. 2010) – Section 551 permits Trustee to avoid security interest and preserve interest for benefit of estate. Section 550 permits the Trustee to recover either the property transferred or the value of the property transferred. Although Section 550 and section 551 are not mutually exclusive, Court will not award relief under Section 550 where avoidance of lien under Section 551 is adequate to make the estate whole. Relief under Section 550 is appropriate where avoidance of lien does not produce recovery for estate, such as where underlying property has been destroyed or sold. Lender whose lien was avoided could not also be charged with value of the lien itself as doing so would amount to a double recovery for the estate.

XV. Collateral Attack – Final Orders

A. Parties Bound

15.1 Successor Trustee

Solomon v. Duncan, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use Rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

B. Particular Orders

15.2 Confirmation Order

Travelers Indemnity Co. v. Bailey, 129 S.Ct. 2195 (2009) – Debtor's confirmed Chapter 11 Plan included release of Debtor's insurers and precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves. Where Court's Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final, terms were binding on all parties even if the Confirmation Order included provisions that, had an objection been raised to confirmation, would have prevented confirmation. An order which became final is no less preclusive in effect merely because the attack on the order is based on the Court's alleged lack of underlying subject matter jurisdiction – "[e]ven subject-matter jurisdiction ... may not be attacked collaterally." Confirmation Order which included provision had long become final and could not be collaterally attacked.

Storey v. Pees, Case No. 07-8049 (6th Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is res judicata and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard as to when a post confirmation modification is permitted. Section 1327 precludes modification of a confirmed plan under section 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. Modification under section 1329 is limited to matters that arise post confirmation and is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly. Trustee would not be permitted to modify plan to address an issue that could have been decided that confirmation had the trustee or an unsecured creditor with an allowed claim objected.

15.3 Sale Orders

Solomon v. Duncan, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

Lewis v. McClatchey, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Proper procedure for contesting validity of Bankruptcy Court order approving sale of property is by appeal of that order within 10 days of entry. Court lacked jurisdiction over sale once sale order became final without any timely appeal and could not be collaterally attacked in adversary proceeding.

Winget v. JP Morgan Chase Bank, 537 F.3d 565 (6th Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

XVI. Closed Cases

A. Reopening and Reinstatement

16.1 Reinstatement of Dismissed Case

Smith v. Silverman, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee's attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening

case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee's decision not to pursue actions were well within scope of business judgment.

16.2 Reopening Case

In re Underhill, 498 BR 170 (6th Cir. BAP 2013) – Court can reopen case to administer undisclosed assets or to consider valuation of assets that may have been understated in first instance. Debtor's schedules valued debtor's interest in wholly owned LLC at \$0.00; and indicated that debtor was not the holder of any contingent claims; effectively representing that neither debtor nor the LLC owned any causes of action. Shortly after debtor received a discharge, debtor caused the LLC to commence litigation based on a cause of action that accrued 2 years prior to filing of bankruptcy. Debtor then settled that claim for \$80,000, giving debtor's interest in LLC substantial value. Claim was rooted in pre-bankruptcy conduct such that settlement funds constituted property of estate. Debtor's failure to disclose cause of action coupled with debtor's apparent knowing understatement of value of LLC prevented abandonment even when Chapter 7 estate was closed. Case re-opened to allow bankruptcy court to determine what portion of settlement proceeds belonged to LLC to be paid to LLC's creditors and what portion belonged to debtor personally for turnover to Chapter 7 trustee for administration for benefit of debtor's creditors.

In re Trombley, 2013 WL 4417425 (E.D. Mi. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the debtor, or for other cause. Court correctly denied motion to reopen where request to reopen was for purposes of rearguing matters that were already adequately addressed in prior order that had not been appealed. Party cannot use reopening of case to collaterally attack otherwise final and non-appealable orders.

In re Hoffman, 2013 WL 3155591 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Newell, 2013 WL 3049296 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Parthemore, 2013 WL 3049291 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Sadoski, 2013 WL 2481532 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Owsley, 2013 WL 2352604 (Bankr. E.D. Tn. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the debtor, or for other cause. Reopening case grants no relief. Court should only reopen case where moving party demonstrates compelling reason to do so. The longer the time between closing and the motion to reopen, the more compelling the reason must be. Court should not reopen case where court cannot grant effective relief to moving party. Pre-BAPCPA version of Section 523(a)(5) allowed for discharge of domestic support obligations only where the debt, while denominated as child support, was in fact not such; or where the debt had been assigned to an entity other than a governmental entity Debtor's pre-petition child support obligation had been assigned to the state for purposes of recovering amounts advanced to former spouse constituted obligation assigned to governmental unit that was not dischargeable. Treatment of obligation as unsecured in confirmed plan did not make debt dischargeable at end of Plan. Personal liability for unpaid child support is unaffected by discharge in Chapter 13 case. Nothing in the plan purported to determine dischargeability of debt. Plan merely addressed how debt would be paid during term of plan. Court would not reopen case for purposes of allowing debtor to bring contempt action against State where debt had not been discharged and State actions were, therefore, not violation of discharge injunction. Reopening would be futile act as debtor was not entitled to any relief.

In re Wright, Case No. 12-47606 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied as court lacked ability to grant meaningful relief. Reaffirmation Agreement must be made before discharge. Reaffirmation agreement indicated it was signed by parties well after entry of discharge. As such, reaffirmation agreement was unenforceable as a matter of law.

In re Collum, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit debtor to file certificate regarding post-petition financial management course, contingent on debtor's payment of fee to re-open case.

Smyth v. Edamerica, Inc., Case No. 11-8035 (6th Cir. BAP 2012) – Section 350 allows court to reopen case to grant relief to debtor. Court will not reopen case where court lacks ability to grant additional relief or where reopening would be pointless. Debtor's Motion to Reopen Chapter 7 Case to declare student loans to be discharged denied as court could not grant effective relief. Fact that debtor listed student loans on Schedule F and received discharge does not discharge student loans where debtor did not file adversary proceeding and did not

otherwise request finding of undue hardship. Debtor's reliance on *Espinosa* misplaced, as *Espinosa* was Chapter 13 case that turned on confirmation of plan, neither of which occurred in this Chapter 7 case.

In re Cooper, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to debtor or for other “cause”. Case would be reopened to allow debtor to complete financial management education course and file certificate, at which point debtor would be entitled to discharge. However, to extent debtor sought to reopen case to add omitted creditor, case was closed as no asset case. Therefore, the court could not grant any additional relief and motion, to that extent, denied as unnecessary.

In re Mausolf, Case No. 11-58499 (Bankr. E.D. MI. 2012) – Motion to Reopen Bankruptcy Case to File Reaffirmation Agreement denied. Section 542 requires reaffirmation agreement to be signed before entry of discharge. Reaffirmation Agreement debtor sought to file was signed by debtor more than 3 months after entry of the discharge and signed by creditor 4 months after entry of discharge could not constitute enforceable reaffirmation agreement. Therefore, there was no reason to reopen the case.

Republic Bank & Trust Co. v. Hutchinson, 444 BR 728 (W.D. Ky. 2011) – Court has jurisdiction to reopen closed Chapter 7 case to administer previously undisclosed asset. Creditor has standing to request reopening if creditor can prove existence of unadministered asset.

In re Hopkins, 2011 WL 1542079 (Bankr. E.D. Tn. 2011) – Court clerk erroneously closed case prior to filing of final report or discharge of trustee. Case would be reopened to allow Trustee to continue to liquidate assets and pursue recoveries for unsecured creditors.

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

In re R & D Contracting, LLC, Case No. 02-43540 (Bankr. E.D. Mi. 2008) - Court clerk closed case prematurely while there was a pending fee application. Court reopened case for purposes of adjudicating fee application.

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

16.3 Filing Fee

In re Brady, 2012 WL 3870441 (Bankr. N.D. Ohio 2012) – Reopening fee must be paid when reopening case, unless waived by court. Court can waive fee to permit complaint under Rule 4007; or when debtor alleges violation of discharge injunction; or when reopening is necessary to correct administrative error. Debtor's request to reopen case to deal with judicial liens recorded immediately before filing is not an action to deal with the discharge but is merely attempt to remedy debtor's pre-petition oversight for failing to avoid the liens during the case. Debtor did not allege that creditor did anything that would constitute violation of discharge injunction.

In re Russ, Case No. 12-44482 (Bankr. E.D. MI. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied where reopening case would serve no purpose. Under Section 524(c)(1), reaffirmation agreement must be made before granting of discharge under Section 727. Record indicated that reaffirmation agreement was not signed by both debtor and creditor prior to entry of discharge. Therefore, Court could not approve reaffirmation agreement even if case were re-opened.

In re Kissinger, 2011 WL 2632856 (Bankr. W.D. Mi. 2011) – Court could not waive filing fee to reopen case to allow debtor to file Certificate of Financial Management Class. Guidelines promulgated by Judicial Conference specifically prohibit waiving filing fee to reopen a case where the court declined to enter a discharge because debtor failed to certify completion of financial management program. Court would give debtor additional time to pay the filing fee and have case reopened.

In re Gibson, Case No. 10-63612 (Bankr. E.D. Mi. 2010) - Debtor's Motion to pay filing fee to reopen case in installments denied as unnecessary. Case will not be reopened unless and until debtor pays the filing fee and Court will not consider any other motions filed in the case until case is re-opened. Order permitting debtor to pay filing fee in installments would be of no effect.

In re Baumler, 2010 WL 3585412 (Bankr. N.D. Ohio 2010) – Waiver of filing fees is specifically addressed by 28 U.S.C. Section 1930(f). Subsection (f)(1) does not apply to fee to reopen case as that fee is not a fee “payable to the clerk upon the commencement of a case under chapter 7”. Subsection (f)(2) grants a bankruptcy court authority to waive other filing fees for in forma pauperis debtors. Court would not grant a waiver where reopening was necessary to deal with a judgment lien that was recorded prior to the bankruptcy filing and could have been addressed before the case closed. Debtors failed to produce evidence that debtors would meet the standards for proceeding in forma pauperis where one year passed since the case was filed and Debtors' financial situation has most likely changed.

In re Arini, Case No. 04-74744 (Bankr. E.D. Mi. 2010) – Request to waive filing fee to reopen case denied. Motion failed to state any legal basis on which Court could waive filing fee in connection with a Motion to Reopen Case.

In re Scales, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Court lacked authority to waive filing fee to re- open case where Court did not waive initial filing fee and debtor paid that fee.

In re Kinsey, Case No. 09-34245 (Bankr. N.D. Ohio 2009) – Motion to Waive Filing Fee to Re-open Case for purposes of filing post-petition Certification regarding post-petition financial management course denied. Party seeking substantive relief required to pay filing fee before case can be re-opened. Judicial Conference generally prohibits waiver of the filing fees due upon filing a motion to reopen a case except where reopening is necessary either to correct an administrative error by the clerk or the court itself or to commence an action relating to discharge. Court can waive the filing fee if a debtor qualifies for in forma pauperis status under 28 U.S.C. § 1930(f) and an application completed on the appropriate Official Form is filed and granted. Debtors do not qualify for IFP status where debtor has income significantly greater than 150% of the income official poverty line as defined by the Office of Management and Budget for a household of the debtor's size.

In re Matthews, Case No. 09-51127 (Bankr. E.D. Mi. 2009) - Court lacks authority to waive filing fee in connection with Motion to Reopen Case.

In re Isquith, Case No. 08-66945 (Bankr. E.D. Mi. 2009) - Debtor who seeks to reopen case for purpose of filing Certificate of Financial Management Course must pay filing fee before case can be reopened.

XVII. Post-Petition Financial Management Education

A. Requirement

17.1 Generally

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.2 Waiver of Requirement

In re Graham, Case No. 09-59610 (Bankr. E.D. Mi. 2012) – Court would excuse deceased debtor from financial management requirement. Section 109(h)(4) allows excusal where debtor is “disabled”. Death is “ultimate disability”.

White v. Glennville Bank, 2011 WL 3426166 (Bankr. S.D. Ga. 2011) – Debtor who died before completing post-petition debtor education program not entitled to discharge. There is no “death” exception to Section 1328(g)(1).

In re DiMarco, Case No. 08-46204 (Bankr. E.D. Mi. 2011) – Motion to Excuse Debtor From Compliance with Instructional Course Concerning Personal Financial Management Course based on death of debtor denied without prejudice as filed by a person without standing. Motion was filed by attorney. At death of debtor, attorney’s authority to act terminated. Motion must be signed by personal representative of the debtor’s estate, as the only person with authority to act on behalf of the debtor.

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) – Debtor’s completion of a Financial Management Court can be waived only if (1) the United States Trustee determines for a particular judicial district that a waiver of the course is appropriate; or (2) if the debtor is incapacitated by mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; or is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing; or (3) is on active military duty in a military combat zone. Debtor’s incarceration in a correctional facility does not constitute any of the three grounds for waiver. If Debtor cannot complete the Financial Management course while incarcerated, Debtor can, after being released, move the Court to reopen the case to file the statement regarding the financial management course, at which time Debtor could receive the discharge.

17.3 Attendance by Person Other Than Debtor

In re Ebert, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Duty to attend post-petition financial management class is non-delegable duty. Purpose of course is to help debtor avoid financial difficulties in the future. Allowing third party to attend in lieu of debtor defeats that purpose. Debtor-husband could not attend financial management course on behalf of debtor-wife by acting under “power of attorney”. Wife’s failure to attend financial management course leaves her ineligible for discharge.

B. Failure to Obtain

17.4 Closing Case Without Discharge

In re Ebert, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Wife’s failure to attend financial management course leaves her ineligible for discharge.

In re Amos, 08-54842 (Bankr. E.D. Mi. 2009) - Case closed without discharge due to Debtor's failure to file required Certification of

Completion of Post-petition Instructional Course Concerning Financial Management. Court would grant relief and enter the discharge upon Debtor filing Motion to Reopen Case and paying \$260 filing fee.

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

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.5 Reopening Closed Case

In re Collum, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit debtor to file certificate regarding post-petition financial management course, contingent on debtor's payment of fee to re-open case.

In re Cooper, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to debtor or for other "cause". Case would be reopened to allow debtor to complete financial management education course and file certificate, at which point debtor would be entitled to discharge.

XVIII. Judicial and Trustee Immunity

A. Judicial Immunity

18.1 Generally

Garza v. Isgur, 2012 WL 3696480 (S.D. Ohio 2012), *report and recommendation after objection*, 2012 WL 4107895 (S.D. Ohio 2012) - Complaint against Bankruptcy Judge for actions taken in course of adversary proceeding dismissed based on judicial immunity.

B. Trustee Immunity

18.2 Generally

In re McKenzie, 2013 WL 4046289 (E.D. Tn. 2013) – Party seeking to institute litigation against bankruptcy trustee in non-bankruptcy forum must apply to the appointing court for leave to file suit. Complaint filed in State Court alleging that Trustee acted outside scope of authority did not obviate need for bankruptcy court permission to file suit. Creditor compounded error by failing to dismiss State Court Action after bankruptcy court denied permission to prosecute that action. Creditor's actions in commencing action and actions in failing to dismiss constituted contempt of the bankruptcy court for which sanctions were appropriate. Further, trustee has quasi-judicial immunity for any actions taken in course and scope of role as trustee, and trustee has the right to raise that defense without seeking prior relief from the bankruptcy court on the issue of course and scope. Trustee's action against defendants to recover money, while unsuccessful, was undoubtedly undertaken as representative of and on behalf of estate for purposes of immunity.

Lunan v. Jones, 489 BR 711 (Bankr. E.D. Tn. 2013) – Chapter 7 trustee is entitled to broad immunity for suits when acting within scope of authority and pursuant to court order. All actions taken by trustee were pursuant to bankruptcy court orders, and Trustee is provided absolute immunity in carrying out the terms of court orders. Further, under *Barton* doctrine, Bankruptcy court must give prior approval before party can sue Chapter 7 Trustee in non-bankruptcy forum for actions taken by Trustee in official capacity and within trustee's authority as officer of court. State court complaint clearly fell within *Barton* standard as contesting Trustee's actions in seizing and selling assets pursuant to orders of court and within official capacity and authority as officer of court and consistent with primary duty of Chapter 7 trustee to collect and reduce to money property of the estate.

Anderson v. Banks, 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. However, actions taken by attorneys as counsel for debtor are not entitled to immunity. Where attorneys for debtor subsequently become attorneys for Trustee following appointment of trustee, attorneys are entitled to immunity only for actions taken in capacity as attorney for Trustee. Court must evaluate each allegedly wrongful action to determine scope of authority when action taken to determine whether counsel is immune.

Anderson v. Banks, 2012 WL 1851007 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity.

Where Trustee is immune from action, counsel for the Trustee is also immune. Trustee is not entitled to immunity because his actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.

Bowers v. Banks, 2012 WL 3597389 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune.

Bowers v. Banks, 2012 WL 1717857 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. Trustee is not entitled to immunity because his actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.

Smith v. Silverman, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee's attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee's decision not to pursue actions were well within scope of business judgment.

Warren Investments, Inc. v. General Casualty of Wisconsin, Case No. 10-7092 (Bankr. E.D. Mi. 2011) *aff'd*, 2011 WL 3319864 (E.D. Mi. 2011) – Chapter 7 Trustee is liable in personal capacity only for willful and deliberate acts. Proposed Amended Complaint that sought to allege gross negligence of trustee did not state cause of action for willful and deliberate act and would be dismissed.

18.3 Limitations

In re Vistacare Group, LLC, 678 F.3d 218 (3d Cir. 2012) – Party seeking to file action in non-bankruptcy forum against bankruptcy trustee for acts done in official capacity must first obtain leave of bankruptcy court under *Barton* doctrine. A judgment against a trustee would be satisfied out of trust property without regard to rights of other creditors, leaving the party bringing suit the ability to obtain an advantage over other claimants. Although *Barton* has not been expressly codified, 28 USC Section 959 allows suits against trustees for actions in carrying on business connected to trust property. By implication, any action against a trustee other than for actions in carrying on business require prior court approval. Court approval warranted where Plaintiff demonstrated that the claims to be brought were “not without foundation”. Plaintiff alleged that Trustee's sale of undeveloped lots violated Land Use Restrictions and caused damage to Plaintiff who also owned lots in development. Once plaintiff demonstrates colorable basis for suit, bankruptcy court is not required to consider Trustee's possible defenses to action and may defer consideration of those defenses to the non-bankruptcy court.

Dash v. Winnecour, 2011 WL 6019222 (W.D. Pa. 2011) – Action by former debtor alleging trustee failed to timely make payments on mortgage was improperly filed in District Court. Action was integrally related to bankruptcy case administration and fell within core jurisdiction of bankruptcy court. Action could be pursued only in bankruptcy court which appointed trustee absent consent of appointing court to action in another forum.

Grant, Konvalinka & Harrison, P.C. v. Still, 471 BR 884 (E.D. Tn. 2012), *aff'd* 2013 WL 2274006 (6th Cir. 2013) - *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Trustee's prosecution of state court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee's duty to collect and reduce to money the property of the estate and to investigate financial affairs of the debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple state court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

Grant, Konvalinka & Harrison, P.C. v. Banks, 2011 WL 3439081 (Bankr. E.D. Tn. 2011) – *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Limited exception applies only to actions taken by Trustee in carrying on business connected with property of the estate, but does not apply to actions taken while administering the estate or in preserving, holding or liquidating assets. In determining whether to permit action to be prosecuted in non-bankruptcy forum, bankruptcy court should consider: 1. Whether the acts or transactions relate to the carrying on of the business connected with the property of the bankruptcy estate. If the proceeding is under 28 U.S.C. Section 959(a) as one for damages while carrying on business connected with property of estate, then no court approval is necessary. However, the moving party may request this initial review by the bankruptcy court. 2. If approval from the appointing court appears necessary, do the claims pertain to actions of the trustee while administering the

estate? By asking this question, the court may determine whether the proceeding is a core proceeding or a proceeding which is related to a case or proceeding under Title 11. 3. Do the claims involve the individual acting within the scope of his or her authority under the statute or orders of the bankruptcy court, so that the trustee is entitled to quasi-judicial or derived judicial immunity? 4. Are the movants or proposed plaintiffs seeking to surcharge the trustee; that is, seeking a judgment against the trustee personally? 5. Do the claims involve the trustee's breaching her fiduciary duty either through negligent or willful misconduct? Trustee's prosecution of state court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee's duty to collect and reduce to money the property of the estate and to investigate financial affairs of the debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple state court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

Grant, Konvalinka & Harrison, P.C. v. Banks, 2011 WL 3585622 (Bankr. E.D. Tn. 2011) *affd* 2013 WL 2274006 – Immunity protects Trustee and staff and attorneys for Trustee from suit for actions taken within scope of duties of Trustee. Actions will be presumed within scope of Trustee duties. Court cannot impose liability on the Trustee for carrying out his duties in good faith and based on his business judgment. Trustee can be held personally liable for actions outside the scope of his authority as trustee such as seizing property that is not property of the estate; or breached a fiduciary duty owed to some claimant such as failure to collect estate property or failure to preserve it. Trustee sued to recover property from third party. Court concluded that property was not property of estate and dismissed action. Creditor sued Trustee for malicious prosecution. Immunity required dismissal of case as Trustee's actions, although unsuccessful, were within scope of Trustee's duties to marshal assets even if in hindsight the Trustee's action was unsuccessful and legally incorrect. Case did not involve rogue trustee who actually seized assets that were not property of estate. Strong policy reasons protect a trustee from liability for exercising his judgment in how to maximize the assets available for creditor or how to collect possible assets of the estate.

Cappuccilli v. Lewis, Case No. 10-11690 (E.D. Mi. 2010) – Creditor violated *Barton* doctrine by filing suit in state court against Chapter 7 Trustee's attorney without prior approval of Bankruptcy Court.

Unencumbered Asset Trust v. Hampton-Stein, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) – Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the "Barton Doctrine") requires leave of the bankruptcy Court before instituting an action in a non-bankruptcy forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the Court. Barton Doctrine encompasses acts by counsel or others performing as functional equivalent of trustee or where they act at the direction of the trustee for the purpose of administering the estate or protecting its assets. Action seeking to hold agents of Liquidating Trust liable for actions taken in official capacities as the Court-approved trustee of the Chapter 11 Debtor's liquidating trust are entitled to protection under the Barton Doctrine. Counsel for trustee is also Court appointed officer who represents the estate is also protected by Barton Doctrine.

Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.), 426 B.R. 282 (Bankr. S.D. Ohio 2009) – Party may not commence state action against bankruptcy court appointed trustee without prior consent of Bankruptcy Court under the Barton Doctrine. Court will presume that court appointed trustee is acting within the scope of authority unless the party bringing the action processes information rebutting that presumption at the time of commencement of the state court action. Where state court plaintiff needed additional discovery concerning scope of authority of the court appointed trustee, state court plaintiff must either file action Enid the Court that appointed the trustee or obtain permission from that court to commence the action elsewhere. Failure to do so will result in entry of a permanent injunction against plaintiff pursuing the action in any court other than the court that appointed the trustee in the first instance. Party who commences action in state court in violation of Barton Doctrine can be held liable for damages incurred by other parties to action as a result of having to defend a state court action. Further, court that appointed trustee can enter permanent injunction against prosecution of action in any form other than appointing court where state court action seeks to hold Trustee liable for actions taken after commencement of bankruptcy case.

In re Amir, 2009 WL 1748701 (Bankr. N.D. Ohio 2009) – Creditor's State Court action against Trustee to determine title to property which is alleged to be property of estate barred under Barton doctrine. Trustee cannot be sued without leave of Bankruptcy Court for actions taken in administration and liquidation of estate. Party who continues to pursue litigation after being advised that actions are prohibited liable for sanctions including attorney fees.

In re National Century Financial Enterprises, Inc., 407 B.R. 895 (Bankr. S.D. Ohio 2009). Preliminary injunction against prosecution of adversary defendant's state court action against Chapter 11 trustee and debtor's counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

XIX. Bankruptcy Crimes

A. Fraud

19.1 Generally

U.S. v. Johns, Case No. 11-3299 (7th Cir. 2012) – Conviction for bankruptcy fraud upheld. Debtor made material false statements to Chapter 13 Trustee with regard to second mortgage and also took action to intentionally defeat purpose of bankruptcy code. Alleged

mortgage purported to secure a debt that did not exist in favor of party who never even met the debtor. Debtor's representations that the mortgage was valid and enforceable was materially false. Although statements did not adversely affect creditors, as creditors received 100% dividends in Chapter 13 case, actions nonetheless sought to defeat the purposes of the code by ignoring and usurping Trustee's exclusive power to administer estate. Case remanded for consideration as to whether fraud produced any actual injury to any third party to support Lower Court's enhancement at sentencing.

U.S. v. Moser, Case No. 10-3288 (10th Cir. 2011) – Conviction for bankruptcy fraud upheld on appeal. Evidence established that Debtor failed to disclose assets in Chapter 7 proceeding or in Chapter 13 proceeding instituted following discharge in Chapter 7. In Chapter 7, Defendant failed to disclose a sub-lease agreement and an option to purchase real property (valued at \$1.5 million) to the chapter 7 trustee, and Debtor claimed on his SOFA a transfer of property (coins and stamps) worth \$125,000, even though the property was later returned to him because it was, in reality, only pledged collateral, not a transfer. In later Chapter 13, Defendant did not initially disclose his interest in the coins or stamps, but later amended his SOFA to include a transfer of the coins and stamps valued at \$10,000. Defendant convicted on multiple counts of failing to disclose assets in schedules and at multiple Section 341 meetings. Although each failure to disclose was based on same assets, each non-disclosure was separate violation and subject to conviction on multiple counts.

U.S. v. Spurning, Case No. 10-31128 (5th Cir. 2011) – Debtors, husband and wife, convicted of several counts of bankruptcy crimes, including concealment of bankruptcy assets, false oaths in bankruptcy filings and, for Husband only, bankruptcy fraud. Court rejected Wife's argument that she could not be held criminally liable for Husband's concealment. There was more than enough evidence for a reasonable jury to find that Wife ratified her Husband's acts and omissions, because she never objected her Husband's statements at the 341 meeting and clearly knew about, and even benefited from, the concealed assets. Husband's conviction for fraudulently answering Trustee's question reversed because the trustee's question was sufficiently ambiguous to allow a reasonable jury to find Husband's answer to be true. Wife's testimony during trial that she understood the answer to be false at the time and yet did not offer to correct the false statement supported conviction. Husband's attempt, although unsuccessful, to conceal fraudulent scheme allowed conviction for bankruptcy fraud. "Just because he failed [to conceal his scheme] does not mean he did not try."

U.S. v. James, 2010 WL 4513799 (S.D. Ohio 2010), *aff'd* 2012 WL 3608612 (6th Cir. 2012) – False statements in bankruptcy petition constitutes violation of 18 USC Section 152. Defendant's argument that false statements in petition cannot constitute false statements in a bankruptcy case as there is no case in existence until the petition is filed, and that only post-petition statements can constitute bankruptcy fraud, rejected by Court. Signing Bankruptcy Petition constitutes verification under oath that the statements are true and correct.

U.S. v. Hyatt, Case No. 08-12610 (11th Cir. 2010) – Debtors' repeated bankruptcy filings did not match information disclosed on debtors' tax returns. Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Jury rejected defense that falsehoods were mistakes; that they lacked criminal scienter; that they had wrongly "guesstimated" their income; or their attorneys had made scrivener's errors. Omissions included failing to disclose tens-of-thousands of gambling winnings.

U.S. v. Boulware, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling constituted knowingly and fraudulently making a false declaration, certification, verification, and statement under penalty of perjury in violation of 18 U.S.C.A. § 152(3).

U.S. v. Hayat, Case No. 09-10296 (5th Cir. 2010) – Debtor's failure to disclose unexpired lease in bankruptcy schedules constituted bankruptcy fraud sufficient to enhance criminal sanctions in related conviction for bank fraud and wire fraud.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Debtor and spouse engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings.

19.2 Failure to Disclose Names

US v. Marston, Case No. 11-2100 (1st Cir. 2012) – Debtor's failure to disclose two different names under which debtor had obtained credit cards constituted fraud. Debtor stole the identities of two acquaintances and obtained credit cards in those two names. Debtor did not disclose either of those names in the petition where debtor is required to list all names used in the prior 6 years. Debtor "used" the names to obtain credit. Debtor's failure to disclose those names constituted bankruptcy fraud.

19.3 Failure to Disclose Assets

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.

US v. Carver, Case No. 12-3026 (6th Cir. 2012) – Conviction for concealing assets in bankruptcy in violation of 18 USC Section 152(1) requires proof that bankruptcy proceeding existed; defendant concealed interest in property from trustee or creditors; concealed interests belonged to the estate; and defendant acted knowingly and fraudulently. Conviction for making false oath in violation of 18 USC Section

152(2) requires proof that there was bankruptcy proceeding; defendant made or caused to be made a false declaration of statement under penalty of perjury; declaration related to some material matter; declaration was false; and defendant made declaration knowingly and fraudulently. Evidence indicated that debtor owned extensive wine collection that defendant failed to disclose in schedules. Debtor testified at the Section 341 meeting that he had sold the collection and no longer had any of the wine inventory. However, after commencement of case, debtor caused a third party to sell a part of the wine collection and remit more than \$195,000 in proceeds to third parties including more than \$119,000 to debtor's future wife.

19.4 Failure to List Creditors

US v. Marston, Case No. 11-2100 (1st Cir. 2012) – Schedules require debtor to list all creditors and claims including contingent and unliquidated claim. Debtor fraudulently failed to disclose credit card issuers on cards obtained fraudulently by debtor using stolen identities of acquaintances. Debtor's statement that she thought that fraudulent use of credit card created liability of person whose identity was stolen but did not create liability of debtor to the card issuer was unavailing. Upon fraudulent use of cards, debtor incurred some legal liability to the issuer, whether in fraud, contract or restitution. However, Government did not prove amounts owed to creditors, if any, without which government could prove that omitted card issuers were actual creditors.

19.5 Alteration or Destruction of Documents

U.S. v. Johnson, 2012 WL 2564437 (S.D. Ohio 2012) –

19.6 Sanctions

U.S. v. Hyatt, Case No. 08-12610 (11th Cir. 2010) – Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Wife sentenced to 12 months and Husband to 60 months in prison and ordered \$4,020,243.22 in restitution.

U.S. v. Boulware, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling sentenced to 15 to 21 months in jail.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Debtor who engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings, sentenced to 10 years in prison and ordered not to have contact with spouse for 24 months as condition of spouse's probation.

United States v. Mason, 2008 WL 4280123 (6th Cir. 2008) - Defendant sentenced to 42 months in prison for bankruptcy fraud.

United States v. Johnson, 2009 WL 1707484 (N.D. Ohio 2009) - Defendant sentenced to three years of probation, six months of location monitoring, payment of restitution in the amount of \$14,745.05, and other terms and conditions, as a result of her plea of guilty to one count of concealing assets in bankruptcy.

XX. Personally Identifiable Information

A. Generally

20.1 Statutory Requirements

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Gramm-Leach- Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information. The E-Government Act of 2002, 44 USC Section 3501 *et. seq.* directs adoption of rules by Courts to protect privacy.

B. Information Considered “Personally Identifiable”

20.2 Account Numbers

In re Chubb, 426 BR 695 (Bankr. E.D. Mi. 2010) – Utility company account number constituted “personally identifiable information” that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.

C. Remedies

20.3 Disclosure in Proof of Claim

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

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

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

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.4 Damages

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, does not provide private right of action and Court will not imply one in light of clear provisions of Act. Bankruptcy Code Section 105 does not authorize Court to create private right of action unless a private right of action otherwise exists in connection with another section of the Code.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Debtor does not have private right of action against creditor who files proof of claim which includes “personally identifiable information” as defined in 11 USC Section 101(41A). Section 107 of the Bankruptcy Code, entitled “Public access to papers”; Federal Rule of Bankruptcy Procedure 9037 which requires “personally identifiable information” be redacted from papers filed with the Court; the Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, which imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information; and the E-Government Act of 2002, 44 USC Section 3501 *et. seq.* which directs adoption of rules by Courts to protect privacy; do not individually or collectively create a private cause of action for disclosure of “personally identifiable information”.

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.5 Contempt

In re Robinson, 2013 WL 1313564 (Bankr. N.D. Ohio 2013) – Bankruptcy Court has jurisdiction to enforce court orders through contempt, where order requires defendant to take specific action but defendant fails to do so. However, Judgment in question was standard judgment in non-dischargeability action that awarded damages and declared amount to be non-dischargeable. Contempt is not available as a remedy for mere failure to pay money as ordered in Final Judgment.

In re Moohaven Dairy, LLC, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed , that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of debtor. Counsel’s continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) –Court will not use civil contempt power to punish disclosure of personally identifiable information absent clear and convincing evidence that the offending party “violated a definite and specific order of the Court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the Court’s order”. Contempt action may lie under Section 105 if Debtor can prove that creditor filed a proof of claim disclosing “personally identifiable information” willfully or in deliberate disregard of Federal Rule of Bankruptcy Procedure 9037.

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against

creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.6 Redaction from Transcript

In re Immanuel, LLC, Case No. 10-11585 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party’s request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

XXI. Real Estate Settlement Procedures Act

A. Generally

21.1 Statutory Authority

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – RESPA action is based on 12 USC Section 2605(e) and 24 CFR 3500.21. Mortgage servicer is required to respond to requests for information. Action for payment or acceptance of referral fees without disclosure is subject to one year statute of limitations.

21.2 Construction With Bankruptcy Code

Conley v. Central Mortgage Co., 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – Real Estate Settlement Procedures Act and Bankruptcy Code do not irreconcilably conflict. Chapter 13 Debtors not precluded by Bankruptcy Code or Rules from sending Qualified Written Request to mortgage loan service even if confirmation of Debtors’ Chapter 13 Plan was in dispute at time QWR was sent. RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. Although Debtor can obtain the same information through the Bankruptcy Code under the supervision of the Bankruptcy Court, Debtor may use the procedures afforded in RESPA. The Court cannot arbitrarily enforce the Bankruptcy Code in preference to RESPA.

B. Qualified Written Request

21.3 Defined

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from a borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Qualified Written Request includes a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

Conley v. Central Mortgage Co., 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – A QWR is any written correspondence, other than a notice on a payment coupon or payment media, and includes or enables the servicer to identify the name and account of the borrower and includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provide sufficient detail to the service or regarding other information sought by the borrower.

21.4 Servicer’s Duty to Respond

Tann v. Chase Home Finance, LLC, 2011 WL 3799841 (E.D. Mi. 2011) – RESPA authorizes a borrower of a federally related mortgage loan to submit a qualified written request (QWR) to a lender seeking correction of an account believed to be in error or requesting specific information pertaining to the servicing of a loan. Lender must acknowledge the borrower’s request within twenty days and substantively respond to the inquiry within sixty days by providing the information requested or an explanation why the information is unavailable; or the lender may make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Mortgage servicer is required

to respond to requests for information. Loan servicing is defined as receiving scheduled periodic payments from borrower pursuant to terms of a loan and making payments in principal and interest payments received from borrower. Loan servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Servicer must make any appropriate corrections in the account and advise borrower of corrections and provide borrower with a written explanation or clarification that includes a statement of the reasons that the servicer believes the account is correct and provides the name and telephone number for borrower to contact.

Conley v. Central Mortgage Co., 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. A servicer must provide a written response acknowledging receipt of the QWR within 20 days. Servicer has 60 days to conduct an investigation and either make appropriate corrections and notify the borrower of those corrections; or provide a written statement of the reasons the service or believes the account is correct; or provide a written statement indicating reasons why that information is not available.

C. Notice of Assignment, Sale or Transfer of Servicing

21.5 Duty to Notify Borrower

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from a borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – RESPA requires notification to the borrower in writing of any assignment, sale or transfer of the servicing of a loan, to be provided within 15 days of the date of the transfer. Complaint dismissed where it alleged no facts that would show violation of this requirement and where it appeared from complaint that Chase was the original lender and servicer.

D. Remedies

21.6 Pleading Requirements

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

Lessl v. CitiMortgage, Inc., 2011 WL 4351673 (E.D. Mi. 2011) – Owner’s written request for escrow statement constituted Qualified Written Request under RESPA. Lender must acknowledge request within 20 days and respond substantively within 60 days. Complaint dismissed where owner alleged violation of RESPA but did not allege any actual damages from the violation.

21.7 Actual Damages

In re Garza, 2012 WL 4738651 (Bankr. S.D. Tx. 2012) – Creditor who fails to provide annual RESPA reconciliation waives any right to recover the resulting deficiency. Analogizing to Rule 3002.1, court ruled that creditor’s failure to provide notice of payment changes in years 2008, 2009 and 2010 precluded creditor from recovering shortfall in payments that resulted. However, creditor’s failure to comply could not provide basis for sanctions against creditor as rule did not apply in 2008, 2009 or 2010 and creditor had no reason to know at that time that Rule would later be adopted that would require notices.

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Even if lender violated RESPA by failing to identify the holder of original note, plaintiff did not allege any actual or statutory damages as a result of violation, requiring dismissal of complaint.

Tann v. Chase Home Finance, LLC, 2011 WL 3799841 (E.D. Mi. 2011) – Damages flowing from a RESPA violation are limited to a borrower’s actual damages plus additional damages up to \$1000 if the borrower shows the lender engaged in a pattern and practice of committing violations. Complaint that alleged only that Plaintiff sent QWR to lender and that Plaintiff thereafter called lender multiple times did not demonstrate factual basis for violation of RESPA. Further, allegations of complaint demonstrated that lender acknowledged receipt of letter within 20 days, and sent the plaintiff a substantive response letter within the 60-day response time allowed by the statute that included most of the information requested, as well as an explanation regarding why some information was not included and contact information if the plaintiff had any further concerns. Dispute over status of mortgage, standing alone, is not violation of RESPA.

21.8 Exemplary Damages

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. RESPA applies only to loan servicers. Action against lender for failure to respond to QWR fails to state cause of action and must be dismissed. Remedy against servicer who fails to comply include actual damages plus “any additional damages” not to exceed \$1,000 pursuant to Section 2605(e) if the borrower can prove pattern or practice of non-compliance. Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

XXII. Other Current Issues

A. Foreclosures

22.1 Standing to Foreclose

Donaldson v. US Bank, NA, 2013 WL 4744805 (E.D. Mi. 2013) – Based on Michigan Compiled Laws 600.3204(1)(d), foreclosing party must either be an owner of or have an interest in the indebtedness, or be a loan servicer. Where Bank was indisputably loan servicer, standing to foreclose did not depend on whether underlying instrument had ever been assigned to Bank.

In re First Mortgage Fund, Inc., 2013 WL 4807164 (E.D. Mi. 2013) – Trustee’s strong arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender’s rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor’s later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff’s deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544. Allegedly defective assignment does not render mortgage invalid. Assignment of mortgage does not transfer any interest in underlying real property, such that assignment does not need to be recorded to be effective.

Nachar v. PNC Bank, NA, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Lender retains right to foreclose mortgage after underlying note is discharged in bankruptcy, but cannot pursue borrower personally.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Assignment of mortgage without note has no impact on validity of mortgage, particularly where there is no evidence that mortgagor faces double liability.

Hargrow v. Wells Fargo Bank, NA, Case No. 12-709 (6th Cir. 2012) – Mortgagee has standing to pursue foreclosure even if note has been assigned to separate holder. Mortgage identified MHA Financial as the lender to whom the note was payable, but MERS as the mortgagee. Note was later assigned to Ohio Savings Bank and mortgage to Wells Fargo. Wells Fargo commenced foreclosure proceedings although it was not the holder of the note. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Mortgage can be assigned without corresponding assignment of the underlying debt. Mortgage granted to MERS the power of sale, and mortgage was properly assigned to Wells Fargo with the assignment being properly recorded.

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.

22.2 State Law Requirements

Hargrow v. Wells Fargo Bank, NA, Case No. 12-709 (6th Cir. 2012) – Under Michigan law, failure to comply with statutory requirements for foreclosure by sale results in the sale being voidable. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Chain of title must reflect any assignments of the mortgage. However, chain of title does not have to reflect any record of actual holder of note.

McRary v. Jarrard, 2011 WL 3566279 (E.D. Mi. 2011) – Michigan law permits non-judicial foreclosure only if lender has not instituted proceedings at law to enforce the underlying obligation. Lender violated statute when lender initiated non-judicial foreclosure process after debtor had filed adversary proceeding to determine validity of debt and lender asserted affirmative defense of “set off”. Asserting defense of set off constituted attempt by lender to recover on note triggering prohibition against non-judicial foreclosure.

Attard v. American Home Mortgage Services, Inc., Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne

County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

In re Finley, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff’s foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff’s sale by filing “Affidavit Expunging Sheriff’s Deed” was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ors alleged “mistake” in credit getting the full amount of the note is not “fraud” or a “mistake” sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

22.3 Redemption

Yates v. U.S. Bank, N.A., 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer’s determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer’s denial of a loan modification.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on a fraud claim in Michigan, plaintiff is required to prove: (1) defendant made a material representation; (2) that was false; (3) that party knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) made it with intention that plaintiff would rely on it; (5) plaintiff acted in reliance upon it; and (6) plaintiff thereby suffered injury. Federal Rule 9 requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” To satisfy this standard, a claimant must “(1) specify the statements the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent.” Plaintiff’s complaint alleged only that agents of FHLMC indicated that plaintiff could redeem at any time up to eviction. Plaintiff failed to allege that statement was false as plaintiff could have redeemed up to point where redemption expired and perhaps could have done so even after redemption, and there was no evidence that plaintiff tried to redeem but was rejected by FHLMC.

McRary v. Jarrard, 2011 WL 3566279 (E.D. Mi. 2011) – Redemption price is determined by successful bid price plus per diem interest calculated on the bid amount. Interest is not calculated based on full loan balance as borrower can redeem merely by paying bid amount plus interest on that bid.

22.4 Assignment of Mortgage – Validity

Bridge v. Ocwen Federal Bank, 2013 WL 4784292 (N.D. Ohio 2013) – Debtor could not contest right to foreclose based on alleged defect in assignment between original lender and assignee. Assignee had and presented original, endorsed note. Debtor could not allege any credible risk that debtor would be required to “double pay”. Assignor admitted fact of assignment and did not assert any challenge to the assignment. Record disclosed no confusion concerning promissory note.

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.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Assignment of mortgage is not conveyance of any interest in property. Assignment that was allegedly defective as not executed in accordance with state law regarding mortgages or transfers of interest in property was valid and enforceable by assignee.

22.5 Assignment of Mortgage – Standing to Contest

Robinson v. Select Portfolio Servicing, Inc., 522 Fed. Appx. 309 (6th Cir. 2013) – Person who is not party to alleged assignment of note and mortgage lacks standing to contest validity of assignment.

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.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Debtor lacks standing to contest allegedly defective assignment of mortgage. Assignment is private contract between assignor and assignee to which debtor is not party.

Slorp v. Lerner, Sampson & Rothfuss, 2013 WL 941430 (S.D. Ohio 2013) – Debtor lacked standing to contest assignment of mortgage by

Countrywide to MERS. As a non-party to transaction, debtor cannot dispute validity of the assignment.

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.

Ogle v. BAC Home Loans Servicing, LP, Case no. 11-05540 (S.D. Ohio 2012) – Debtor lacked standing to contest foreclosure based on alleged defective assignments of mortgage. Borrower’s repayment obligations under the loan documents remains unaffected and unaltered by validity or invalidity of assignment, and there was no dispute as between assignor and assignee as to validity of assignment.

Bank of New York Mellon Trust Co. v. Unger, 2012 WL 1567192 (Ohio App. 2012) – Borrower lacked standing to contest validity of assignments or to invalidate mortgage based on alleged invalidity of assignment. Assignments did not in any way alter borrower’s obligations under the note and mortgage. Any alleged defect in the assignments did not cause any harm to borrower as alleged defect did not expose them to any greater harm or loss beyond scope of mortgage and note.

B. Specific Causes of Action

22.6 Piercing Corporate Veil

Gurjal v. Kalinowski, 2012 WL 4736798 (Bankr. E.D. Mi. 2012) – Michigan law permits corporate veil to be pierced if plaintiff can demonstrate either fraud in the use of the corporation or that the injustice sought to be prevented is in some manner related to a misuse of the corporate form short of fraud or irregularity. Plaintiff sued debtor in state court to pierce corporate veil, alleging that debtor as sole member of corporation comingled finances, failed to maintain corporate records, and otherwise used corporate entity as extension of personal financial accounts, had complete identity of interests with corporation to permit piercing of corporate veil to make debtor’s personal assets available to corporate creditors.

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – As general rule, members of LLC, even single member LLC, are not responsible for debts of or judgments against LLC. Court will disregard corporate entity where entity is just a sham or dummy, or where necessary to accomplish justice, such as where entity lacks funds to pay debts due to some misconduct of officers and directors. Mere preferring of one creditor over another is not basis for piercing corporate veil. Evidence did not indicate that LLC was sham or abused, or that LLC’s inability to pay debts was in any way result of misconduct of debtor. LLC and sister company operated out of same facilities and there were various inter-corporate transfers, but there was nothing inappropriate about sharing bank, attorneys or accountants. Evidence indicated that two entities were formed at different times and for different purposes and operated different businesses. All transfers were properly documented loans or loan repayments, neither of which changed company’s balance sheet. Alleged delay in submitting insurance claims for reimbursement was not act to deny or abuse corporate existence and did not result in any loss of funds by LLC as all claims, once submitted, were paid. There is no indication that the “corporate” formalities were not observed, or that the Debtors abused or used the corporate form of Sleep Quest for an improper purpose. Nor does the evidence establish that Sleep Quest was unable to pay its obligations to its creditors due to misconduct by the Debtors that justifies the imposition of personal liability.

Blight v. Watson, 468 BR 242 (Bankr. W.D. Ky. 2012) – To pierce corporate veil, creditor must prove that corporation was influenced by owners; that there was such a unity of ownership and interest that separateness ceased to exist; and that recognizing the corporate existence would sanction fraud or promote injustice. Corporation must be mere instrumentality of shareholder, that shareholder used control over corporation to defraud or harm creditor, and that refusing to set aside corporate existence would subject creditor to unjust loss. Corporate veil would not be set aside where debtor, a 50% shareholder of corporation, was not involved in the day-to-day operations and did not maintain corporate books and records. Debtor’s involvement in corporation was limited to unloading supplies when shipments arrived and occasionally working in the office doing filing as needed. Contract was between creditor and corporation. There was no evidence that debtor treated corporate assets as her own. Fact that debtor was 50% shareholder and was a director of the corporation was not sufficient to disregard corporate existence.

In re Geiger, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) – Under Ohio law, corporate veil will be pierced where it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Party seeking to pierce veil must prove that shareholder used his control over corporation in such a manner as to defraud the third parties. Mere control over a corporation is not in itself a sufficient basis for shareholder liability. Plaintiff must prove “egregious shareholder misdeeds” and “egregious wrongs” and “extreme shareholder misconduct”. Court would not pierce corporate veil where there was no evidence of intent to mislead or defraud creditors, notwithstanding that corporation did not follow virtually any other corporate formalities: there are no officers, no corporate bank accounts, no liability insurance with the corporation as the insured party, no corporate books or minutes of corporate meetings, no business stationery; most of the assets used in the Corporation’s business are titled in Debtor’s name; all monies from the business are deposited into Debtor’s personal account, from which corporate and personal obligations are paid. Debtor receives revenue from operation of the business in his name, as well as invoices for business expenses; and there is minimal separation of Corporate and personal affairs.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Factors in deciding whether to disregard the corporate fiction under the *alter ego* theory include: (1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the Debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s). Court correctly concluded that corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

22.7 Continuation of Debtor

Per-Co, Ltd. v. Great Lakes Factors, 2008 WL 4791434 (6th Cir. 2008) - Purchaser of assets from Debtor constituted "mere continuation" of Debtor, allowing creditors of Debtor to assert claims against buyer of assets on same priority as those creditors held claims against Debtor. Buyer will be "mere continuation" where buyer acquired all or substantially all of the Debtor's assets; principal of seller is also principal of buyer; assets sold consisted of virtually all assets of Debtor that had value, leaving Debtor with only worthless or virtually worthless assets; new company had same officers, directors and shareholders as seller; buyer engaged in same business operation with same physical plant and product lines; and buyer pays inadequate consideration for purchase of assets.

22.8 Federal Tort Claims Act

Lewis v. McClatchey, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Federally insured bank is not an agency of United States Government and therefore cannot be sued under the Federal Tort Claims Act. FTCA applies only to claims against persons acting on behalf of federal agency.

22.9 Injunctions and Temporary Restraining Orders

Kagel v. Irwin, Case No. 13-80218 (Bankr. W.D. Mi. 2013) – Court would not enjoin sale of property owned by County Treasurer pursuant to a previously held tax foreclosure sale. Property had been sold at tax sale and statutory redemption period expired. Absent an order setting aside the tax deed sale, debtors held at best a bare right of possession which would remain protected by sale, but had no interest in title to property that would prevent sale by tax deed purchaser. Debtors are not precluded from seeking to set aside tax sale or from filing action for damages, neither of which would be adversely affected by resale of property as long as debtors act promptly. Further, evidence indicated that tax deed holder would be harmed by injunction as property would likely be sold at a later date at a lower price; and public interest was better protected by having finality in tax deed sales.

Adams v. Wilmington Finance/AIG, 2013 WL 1774639 (E.D. Mi. 2013) – Standard for permanent injunction is same as for a preliminary injunction, except that movant must show actual success on merits, rather than mere likelihood of success. Court also considers whether: (1) movant would suffer irreparable harm absent injunction; (2) remedies available at law, such as monetary damages, are inadequate; (3) balance of hardships between parties favors equitable remedy; and (4) requested injunction would serve public interest. Court has power under All Writs Act, 28 USC Section 1651(a), to enjoin party from filing suit. Pre-filing orders are extreme and should be rarely used, and cannot be used to prevent party from commencing actions in state court unless necessary to protect federal court order or jurisdiction. Court would enter injunction precluding party from commencing any further actions in state court where party's claims have been repeatedly rejected in multiple actions in the Federal Courts. Party's current complaint merely attempts to re-litigate claims already adjudicated and to add unrelated plaintiffs, unrelated defendants, and unrelated claims to complaint.

Edwards v. JP Morgan Chase Bank, 2013 WL 1632560 (E.D. Mi. 2013) – Injunction is remedy, not cause of action. Count of complaint that sought injunction independent of any substantive cause of action would be dismissed for failure to state claim. Injunctions are extraordinary remedies that will be granted only if required to do justice; there is no adequate remedy at law; and there exists a real and imminent danger of irreparable injury. Court will consider whether movant has shown strong likelihood of success on merits; whether movant will suffer irreparable harm if injunction is not entered; whether issuance of injunction would cause harm to opposing party; and whether injunction is in the public interest. Plaintiff failed to demonstrate basis for injunction to prevent foreclosure where plaintiff failed to allege either that plaintiff had redeemed the property or that plaintiff had otherwise resolved any monetary defaults.

Hutton v. GMAC Mortgage, LLC, 2012 WL 5252314 (E.D. Mi. 2012) – Injunction is equitable remedy and is not, itself, a cause of action. Complaint seeking injunction without alleging underlying breach or cause of action dismissed.

In re Lundeen, 442 BR 659 (Bankr. S.D. Ohio 2011) – Anti-injunction act, 28 USC 2283, prohibits Bankruptcy Court from enjoining city or state from commencing or continuing criminal proceeding in state court. Exception that allows court to enter injunction to protect court's exercise of jurisdiction does not apply as case was ready to be closed and continuation of criminal proceeding would not impact progress of case. Section 105 does not provide authority to enter injunction in violation of Anti-injunction act. Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.

Homes v. Vilsack, 2011 WL 1453819 (W.D. Mi. 2011) – Debtor whose house was about to be sold at foreclosure sale demonstrated cause for Temporary Restraining Order.

Turchan Technologies Group, Inc. v. Internal Revenue Service, Case No. 10-4315 (Bankr. E.D. Mi. 2010) – Party seeking preliminary injunction must demonstrate (i) likelihood of success on merits; (ii) irreparable harm if the injunction is not granted; (iii) probably that granting injunction will not cause irreparable harm to others; and (iv) whether public interest is advanced by injunction. In action seeking to enjoin IRS from collection of taxes, 26 USC Section 7421(a) requires clear demonstration that there are no circumstances under which the United States will prevail in tax collection efforts and that collection activities will irreparably harm the taxpayer. Debtor not entitled to injunctive relief where debtor admittedly failed to make tax deposits required by Debtor's confirmed Chapter 11 plan. IRS actions in attempting to collect priority tax claims provided for in Chapter 11 plan were proper and appropriate after debtor defaulted and IRS provided notice of default as required by Confirmation Order, and all steps taken by IRS were permitted by the Confirmation Order. Plaintiff's likelihood of success on merits of claims against IRS were "zero", mandating denial of injunctive relief.

Saleh v. Bank of America, N.A., 427 BR 415 (Bankr. S.D. Ohio 2010) – Automatic stay does not extend to third party co-obligors. Debtor can request injunction against actions against third party, and Court has authority to grant injunctive relief under Section 105. However, requests for injunctive relief that would effectively extend the stay to a non-debtor are viewed with a great deal of skepticism. Although action against third party, Debtor's wholly owned corporation, would produce adverse consequences, debtor did not demonstrate any reason why the corporation could not file its own bankruptcy. Further, extending the stay via injunction in a Chapter 13 proceeding would contravene the express provisions of Section 1301 which provide for a co-debtor stay in very limited circumstances. Debtor and corporation did not share such an identity of interests that the legal separation could be ignored. Corporation kept separate records and accounts and filed separate tax returns from debtor. Corporation owned assets separate from those owned by debtor including real property adjacent to corporation's principal place of business, accounts, inventory, equipment and a liquor license.

Unencumbered Asset Trust v. Hampton-Stein, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) - When considering motion for preliminary injunction, Court must balance four factors: (1) whether movant has a strong likelihood of success on the merits, (2) whether movant would suffer irreparable injury without the injunction, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by the issuance of the injunction. Trustee, trustee's principal, and counsel for trust, demonstrated strong likelihood of success on the merits of claim that adversary defendant violated Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the "Barton Doctrine") doctrine, which required leave of bankruptcy Court to bring state-court action against bankruptcy trustees or trustee's functional equivalents for acts done in their official capacity and within their authority as Court officers where plaintiffs action sought to hold defendants liable for actions in liquidating Debtors assets which constitute actions within the official capacities and authority as officers of bankruptcy Court. Irreparable injury requires more than possibility of some remote future injury. Defendant demonstrated irreparable injury where litigation in non-bankruptcy forum as Defendants would be distracted from their duties and non-Bankruptcy forum litigation could lead to an order that effectively sets aside the underlying Bankruptcy proceeding and threatens to directly contravene the Confirmation Order and transactions effectuated thereunder. Public interest served where preliminary injunction protects the integrity of the Debtor's bankruptcy estate and the bankruptcy process. Public interest is served by allowing bankruptcy Courts to retain control over the administration of the bankruptcy estates.

Travelers Indemnity Co. v. Bailey, 129 S.Ct. 2195 (2009) – Debtor's confirmed Chapter 11 Plan included release of Debtor's insurers from any and all claims, demands, allegations, duties, liabilities and obligations which have been or could have been or might be asserted by any person against any of the insurance companies. Scope of provision in Chapter 11 Plan precluded subsequent actions not only against Debtor, but also precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves or which are otherwise not derivative of the Debtor's wrongdoing, where Court's Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final.

In re National Century Financial Enterprises, Inc., 407 B.R. 895 (Bankr. S.D. Ohio 2009) - Preliminary injunction against prosecution of adversary defendant's state court action against Chapter 11 trustee and debtor's counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

22.10 Declaratory Relief

Hutton v. GMAC Mortgage, LLC, 2012 WL 5252314 (E.D. Mi. 2012) – Declaratory Relief is equitable remedy and is not, itself, a cause of action. Complaint seeking injunction without alleging underlying breach or cause of action dismissed.

22.11 Accounting

Hutton v. GMAC Mortgage, LLC, 2012 WL 5252314 (E.D. Mi. 2012) – Accounting is equitable remedy and is not, itself, a cause of action, and is available only where plaintiff lacks adequate remedy at law. Complaint that sought damages for fraud stated cause of action that would provide equitable remedy, precluding independent cause of action for accounting. Further, as plaintiff has pending cause of action, information would be equally available through normal discovery procedures. Action for accounting is unnecessary where discovery is sufficient to obtain information.

22.12 Recoupment

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

Thomas v. City of Detroit, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *aff'd*, 2011 WL 3706669 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor's alleged claims against City were res judicata and could not assert recoupment as defense to City's Proof of Claim.

22.13 Fair Debt Collection Practices Act

Davis v. Weinstein & Riley, P.S., 2013 WL 5428740 (N.D. Ohio 2013) – Action under FDCPA can be based on conduct that would amount to violation of discharge injunction. Action is not one to enforce discharge injunction, which would have to be brought as contempt action in bankruptcy court. FDCPA prevents actions to collect debt where collection is barred by applicable law. Discharge injunction constitutes "applicable law" that is violated, for purposes of FDCPA, when debt collector attempts to collect discharged debt.

Williams v. Federal National Mortgage Ass'n, 2013 WL 5445883 (E.D. MI. 2013) – Assignee of mortgage loan is not subject of FDCPA where loan was not in default at time of assignment. Assignee constitutes "creditor" and not "debt collector" and is not within provisions of FDCPA.

Rostorfer v. Transland Financial Services, Inc., 2013 WL 4710397 (Bankr. S.D. Ohio 2013) – FDCPA does not apply to any entity collecting a debt if the debt was not in default as of the date on which the person obtained the debt. Mortgage servicer not subject to FDCPA acquired servicing rights at a time when the debt was not in default.

Bussard v. Shermeta, Adams and Von Allmen, 2013 WL 3553942 (E.D. Mi. 2013) – Creditor's efforts to collect student loan debts did not violate FDCPA. Under Section 523(a)(8), discharge of student loans is not self executing, such that unless debtor brings action to determine that student loans are discharged, law presumes that student loan debts have not been discharged and creditor can proceed with collection. Because Plaintiff's educational debt was not discharged, Defendant did not violate the FDCPA when it contacted Plaintiff and informed him that he was still liable for the debt owed to NCT.

Currier v. First Resolution Investment Corp., 2013 WL 3364364 (E.D. Ky. 2013) – To establish a *prima facie* case for a violation of the FDCPA, plaintiff must prove: (1) that plaintiff is a natural person who is harmed by violations of the FDCPA, or is a "consumer" for purposes of a cause of action; (2) the "debt" arises out of a transaction entered primarily for personal, family, or household purposes; (3) defendant is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6); and (4) defendant has violated, by act or omission, a provision of the FDCPA. FDCPA prohibits use of unfair or unconscionable means to collect. Statute provides non-exhaustive list of actions that may be unfair or unconscionable, but list is not exclusive. Alleged violation of state law, without more, is not violation of FDCPA. Creditor's recording of judgment prior to expiration of time to request rehearing in violation of Kentucky law, is not violation of FDCPA. Method of collection of judgment, if done pursuant to state law, cannot be violation of FDCPA. Creditor did not make threat to take action merely by recording judgment in public records where action was effort to collect judgment that had already been entered. While procedural correctness of action may be debated, that does not transform recording into violation of FDCPA.

Washington v. Roosen, Varchetti & Oliver, PPLC, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – FDCPA applies to attorneys who regularly engage in consumer debt collection activity, even where activity is limited to state court litigation. Mere filing of complaint without possession of all documents necessary to prove claim is not deceptive practice. However, FDCPA does apply to statements and allegations contained in state court pleadings and is not limited to out-of-court communications. Plaintiff asserting a claim under the Fair Debt Collection Practices Act (FDCPA) for a debt collector's false or misleading statements in connection with the collection of a debt must establish that: (1) the plaintiff is a consumer, as defined by the FDCPA; (2) the debt arises out of a transaction primarily for personal, family, or household purposes; (3) the defendant is a debt collector, as that phrase is defined by the FDCPA; and (4) the defendant violated one of the prohibitions listed in the FDCPA with respect to false or misleading statements. Whether statements in state court pleadings are misleading is based on whether "least sophisticated consumer" would be misled. Even if statements would be misleading to least sophisticated consumer, statements must also be materially false or misleading, such that it would tend to cause confusion. Plaintiff's allegations in complaint that claim was based on written instrument that was not attached but which was in possession of Defendant may have been false, as Plaintiff was in possession of copies of written agreements. However, allegations were not materially false as Defendant was also in possession of documents. Further, failure to attach documents to a complaint is not fatal, as Plaintiff would have had opportunity to correct the deficiency by attaching the written instruments. However, Plaintiff's allegations that debtors had sought lines of credit with no intention of repaying amounts borrowed and thereby had engaged in fraud, stated a claim under Fair Debt Collection Practices Act (FDCPA) for false or misleading statements in connection with the collection of a debt where plaintiff had no evidence of fraud and "least sophisticated consumer" may be confused or misled into believing that action was something other than effort to collect outstanding obligations..

Haddad v. Alexander, Zelmanski, Danmer & Fioritto, PLLC, Case No 11-1954 (6th Cir. 2012) – Condo association assessments were "debtors" under FDCPA where debtor purchased unit for personal use and resided in until for 13 years before deciding to lease unit to third party. Under FDCPA, obligation constitutes "debt" if the obligation arises out of a transaction which was primarily for personal, family or household purposes. Obligation to pay condo assessments arises when unit is purchased as that was the point in time when debtor became bound by condo documents including obligation to pay assessments. At that point, debtor intended to use, and in fact did use, the unit as

his residence, undeniable a personal use. Later use of unit as rental did not change fact that when the transaction giving rise to the debt occurred, it was for personal use. Test is not based on use at the time of the alleged FDCPA violation. attorney wrote two letters advising debtor of unpaid assessments. In response to both letters, debtor sent letters asking for verification of debt, but attorneys never provided verification in violation of FDCPA.

Marshall v. PNC Bank, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – Fair Debt Collection Practices Act claim is not precluded by Bankruptcy Code. Although neither Section 105 nor Section 524 create private right of action for violation of discharge injunction, that does not implicitly repeal FDCPA statutory cause of action. While violations of FDCPA may also be violations of discharge injunction, that fact does not mean that FDCPA is superseded by Code. Repeal by implication is rare and must be used only when there is an irreconcilable conflict between the statutes. However, Court lacks jurisdiction over FDCPA claims that arose entirely post-discharge. Action under FDCPA does not arise in or under the Code and is not related to the case. Fact that Debtor's FDCPA Claim and claim for violation of the discharge injunction share a common factual nexus is not sufficient to establish jurisdiction. Debtor's FDCPA Claim could not have any conceivable effect on the Debtor's bankruptcy estate as claims arising from post-petition actions are not property of the estate and proceeds cannot be used to improve payments to creditors. Any recovery on the FDCPA Claim will inure solely to the benefit of the Debtor.

Easterling v. Collecto, 2012 WL 3734389 (2d Cir. 2012) – Debt collector violated FDCPA by sending letter to debtor post-discharge that stated “ACCOUNT INELIGIBLE FOR BANKRUPTCY DISCHARGE – Your account is NOT eligible for bankruptcy discharge and must be resolved”. Although debtor did not claim that student loan debt was discharged in Chapter 7 and did not file action to determine undue hardship, collector's statement that the loan was “ineligible” for discharge or that the loan was “not eligible” for discharge was materially misleading. Debt may have been eligible for discharge upon finding of undue hardship, and it was technically possible for debtor to discharge the student loan debt either by re-opening prior bankruptcy or by filing a new bankruptcy. Hypothetical least sophisticated consumer could reasonably interpret letter as representing, incorrectly, that a debtor is completely foreclosed from seeking discharge of student loan debt. Letter was both false and fundamentally misleading in that it suggests that debtor has no possible means of discharging student loans in bankruptcy.

Ponce v. BCA Financial Services, Inc., 2012 WL 470213 (11th Cir. 2012) – FDCPA requires collector to send written notice to consumer within 5 days after “initial communication”. Initial letter did not constitute “initial communication” where letter was sent to address where debtor had not lived for 8 months. Although creditor is not obligated to ensure delivery, creditor must use a valid and proper address at which the consumer may actually receive it. Collector's later phone call to consumer's ex-wife constituted “initial communication” which was not followed up with the requisite written notice, constituting violation of FDCPA. Collector also failed to disclose to ex-wife that collector was attempting to confirm or collect location information concerning consumer. Collector asked numerous times whether ex-wife had phone number for consumer but never made the required disclosures. Collector also violated provisions against false, deceptive or misleading communications by stating that consumer's health insurance carrier “would not go ahead and take care of this now”. Although insurance company had not paid notwithstanding efforts by provider to obtain payment, collector had no particular information to support statement about consumer's specific insurance in this specific case or whether insurance company may pay or be required to pay bill. Bona Fide Error defense requires collector to prove that violation was unintentional, was a bona fide error, and occurred despite maintenance of procedures reasonable adapted to avoid the violation. Agency's reference to internal policies with no explanation as to how errors were unintentional or how policies were intended to prevent such errors was not sufficient.

Brister v. American Home Mortgage Servicing, Inc., Case no. 11-13574 (11th Cir. 2012) – Status of individual or entity as “debt collector” is determinative of liability under FDCPA. Fact that communications related to enforcement of security interest does not automatically remove party from status as “debt collector” under Section 1692e where communications were not limited to seeking to enforce security agreement but included demands for payment on the promissory note itself. Even if collector intended communications solely to advise of foreclosure, communications also demanded payment of underlying debt for purposes of Section 1692e. Mortgage servicer could be liable for violation of FDCPA where servicer maintained “relentless assault of harassing phone calls and home inspections” in effort to collect mortgage debt. Servicer called borrowers multiple times on a daily basis and continued to call even after having been advised that borrowers were represented by attorney. Servicer used offensive and abusive language and made false statements that home was set for foreclosure sale. Servicer began sending “inspectors” to the home every day or every other day, including Thanksgiving and Christmas day. Case remanded for further proceedings as to whether servicer's principal purpose was collection of debtor or that servicer regularly collected or attempted to collect debts as required for determination as to whether servicer was “debt collector”.

Taylor v. Javitch, Block & Rathbone, LLC, 2012 WL 2375494 (N.D. Ohio 2012) – FDCPA applies only to “consumer transactions”. Claim by insurance company against negligent party for reimbursement of money paid to insured is not a consumer transaction. Debtor negligently entrusted a motor vehicle to a third party who caused an accident. The injured party recovered from its insurer under its uninsured motorist policy. The insurance company then sued the debtor of subrogation. There was no contractual relationship between debtor and the insurance company. Insurance company's claim was entirely based on a tort theory. A tort is not a consumer transaction. Absent some contractual basis for the claim, the claim falls outside the FDCPA.

Zemekis v. Global Credit & Collection Corp., Case No. 11-2334 (7th Cir.2012) – Demand letter's “insistent language” and “repeated threats of legal action” did not violate FDCPA where letter also contained statutory required notices. Statements that encouraged borrower to “act now” did not purport to establish deadline that was inconsistent with FDCPA requirements for 30 day validation. Statements were little more than “puffery” that were not such that an unsophisticated consumer would be unable to understand right to validation. Statement that creditor would use legal action did not violate FDCPA where lender had the right to institute legal proceedings, and served only to advise borrower of possible ramifications. Validation provisions located on reverse side of letter, while “undesirable”, was not insufficient

where face of letter contained bold, capitalized and conspicuous notice to “see reverse side for important consumer information”. Statement advised even unsophisticated borrower where to look for additional information.

Kline v. Mortgage Electronic Registration Systems, 2012 WL 1376995 (S.D. Ohio 2012) – Attorney-to-attorney communications are not per se excluded from FDCPA. Law firm that sent demand letter to debtor’s counsel that contained improper demand for payment of creditor’s attorney fees could constitute unfair and misleading demand even if demand was sent to attorney rather than directly to debtor.

Shoup v. McCurdy & Candler, LLC, Case no. 10-14619 (11th Cir. 2012) - Law firm’s letter to debtor potentially violated Fair Debt Collection Practices Act where letter incorrectly identified the “creditor” to whom the obligation was owed. The mortgage on debtor’s home was held by America Wholesale Lender. However, attorneys demand letter identified MERS as the creditor. Identification of MERS as the creditor is not harmless error as FDCPA provides for statutory damages even in absence of actual damages.

Cruz v. International Collection Corp., Case no. 09-17449 (9th Cir. 2012) - Debt Collector under Fair Debt Collection Practices Act is strictly liable for pursuing collection after debtor notified debt collector in writing that debt was disputed. Individual defendant was also liable since he was personally involved in violation by signing at least one of the improper collection letters.

Adams v. Mortgage Electronic Registration Systems, Inc., 2012 WL 95332 (E.D. Mi. 2011) – FDCPA applies only to third party debt collector. Creditor collecting debt owed to it as lender cannot violate FDCPA as a matter of law.

Dunham v. Portfolio Recovery Associates, LLC, Case No. 11-1553 (8th Cir. 2011) – Non-obligor erroneously targeted by collector is “consumer” protected by FDCPA. However, collector discharged obligation under FDCPA by providing verification of debt when requested that showed different last four digits of social security number, and was intended for person other than the recipient. Further, recipient took no action for more than one year at which time he filed suit. Request for sanctions denied.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – FDCPA provides civil cause of action against any debt collector who fails to comply. FDCPA requires that if a debt is disputed, the collector shall cease collection activities until collector obtains verification of debt. Complaint failed to allege any factual basis for Plaintiff’s conclusory allegation that defendant refused to cease collection activities or engaged in deceptive means to collect debt.

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Filing of erroneous or inflated proof of claim is not violation of FDCPA. FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.

Tann v. Chase Home Finance, LLC, 2011 WL 3799841 (E.D. Mi. 2011) – FDCPA does not apply to actions of creditor collecting debt owed to it. Mortgage Servicing Company is not “debt collector” if debt was current at time Servicer acquired the servicing rights.

Poteet v. eCast Settlement Corp., 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Proof of claim in Bankruptcy Court cannot constitute abusive debt collection practice proscribed by FDCPA. If claim is incomplete or fails to attach necessary documentation, proper remedy is to object to claim. Adversary proceeding for FDCPA violation dismissed for failure to state cause of action.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Letter to mortgage servicer cannot form basis of action under FDCPA against lender. Further, FDCPA does not apply to actions against lender collecting debts in its own name or to third parties collecting debts that was not in default when obtained by the collector, but applies only to persons collecting debts owed to another that are first acquired by collector post-default. Mortgage servicer that assumed servicing when mortgage was not in default could not be liable under FDCPA for subsequent alleged violations.

Fambres v. Nuvel National Auto Finance, LLC, 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – Bankruptcy court lacks jurisdiction over Adversary complaint seeking damages for violating FDCPA. All actions occurred post-petition and are not property of the estate and outcome cannot affect administration of estate. FDCPA action arises under non-bankruptcy law and neither “arises in” nor “arises under” bankruptcy code, and in light of lack of impact on estate or administration of case, is not “related to” bankruptcy case.

Rine v. Ocwen Loan Servicing, LLC, 2011 WL 1327358 (W.D. Mi. 2011) – FDCPA distinguishes between “debt collectors” and “creditors.” Creditor is broadly defined as one who _offers or extends credit creating a debt or to whom a debt is owed, while debt collector is one who attempts to collect debts owed or due or asserted to be owed or due another. Entity that acquires a current, non-defaulted debt to continue servicing it is creditor. Entity that acquires the debt for collection is debt collector. FDCPA looks at the status of the debt at the time it is acquired by the would-be collector to differentiate parties which ought to be treated as debt collectors from those which ought to be treated as creditors: Defendant is not removed from scope of FDCPA merely by calling itself a mortgage servicer. Complaint sufficiently alleged that loan was in default when acquired by Ocwen to cause Ocwen to be “debt collector” for purposes of FDCPA.

Greer v. Gateley, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – FDCPA applies only to those who meet the statutory definition of “debt collector”, which turns on whether the person “regularly” attempts to collect debts. Business that principally focuses on enforcement

security interests but who does not otherwise regularly attempt to collect debts is exempt from FDCPA except for Section 1692f(6) which prohibits taking or threatening to take property where there is no lawful right to possession or whether there is no intention to take property. Deed of Trust holder was not debt collector as only role was to enforce security agreement after default and there were no allegations that Deed of Trust holder took or threatened to take any action that would violate 1692f(6).

22.14 Truth in Lending Act

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – 15 USC Section 1641(g) requires that within 30 days of the date on which a mortgage is sold or transferred, the creditor that is the new owner or assignee must advise the owner in writing of (A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor. Creditor who fails to provide notification is liable to borrower for actual damages plus statutory damages of double the finance charge but not less than \$400 nor more than \$4000. Complaint is sufficient if it alleges that transfer took place and the owner was not notified. Owner does not need to allege specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Complaint stated cause of action for violation of Regulation Z where complaint alleged that lender failed to notify borrower of change in ownership of mortgage. Although complaint did not allege any specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 444450 (N.D. Ohio 2013) – TILA has one year statute of limitations for damage actions. Plaintiff signed mortgage in 2007 and brought action in 2012, well beyond statute, requiring dismissal of claim. Limitation period for rescission is 3 days or in some cases up to three years but does not apply to residential transaction by which borrower acquired or initially constructed the debtor's residence. As plaintiff borrowed the money for purposes of acquiring the residence, plaintiff lacked any right to rescind and could not maintain action based on alleged refusal to rescind. Rescission also requires that plaintiff restore the creditor to the position that the creditor held before the rescinded transaction – that is plaintiff must return to the creditor the principal amount borrowed. Plaintiff's action did not propose to repay lender but merely requested that plaintiff be awarded title to the property free and clear, which is not a remedy available under TILA.

Gale v. First Franklin Loan Services, Case No. 09-16498 (9th Cir. 2012) – TILA requires loan servicer who is also assignee of the loan to provide to the borrower, upon written request, the name, address and telephone number of the owner of the obligation. Debtor's action dismissed because defendant, First Franklin, was not a servicer or an assignee, but was the original creditor itself. Although 2009 amendments to TILA would require all servicers, not just servicer-assignees, to respond to inquiries, change did not help debtor where loan pre-dated amendment to TILA and, in any event, First Franklin was not a servicer.

Assasepa v. JPMorgan Chase Bank, 2012 WL 88162 (S.D. Ohio 2012) – Complaint failed to state cause of action for violation of Truth in Lending. Complaint made vague allegations but failed to specify any facts that could constitute cause of action under TILA. Complaint did not provide any specifics with regard to the dates of any of the alleged occurrences, much less the dates of the TILA violations. Plaintiff did not identify any document or reference any specific incident from which this Court can determine when the alleged TILA violations occurred. Plaintiff's "Notice of Right to Rescind" did not allege when the alleged TILA violation occurred. As it is impossible to discern from plaintiffs' allegations when the alleged TILA violations occurred, the Court cannot determine whether the TILA claim is barred by the statute of limitations.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – TILA imposes certain disclosure requirements in connection with loan secured by "principal residence" and allows for rescission within 3 days of consummation of transaction or delivery of necessary forms and disclosures, whichever occurs later; provided that the right of rescission expires three years of date of consummation even if disclosures are never provided. TILA action brought 4 years after consummation of transaction dismissed as beyond statute of limitations.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Borrower's right to rescind is subject to three year statute of limitations from date of execution of promissory note. 15 USC Section 1635 precludes any claim for equitable tolling of the statute of limitations. Balance of claims under TILA are subject to one-year statute of limitations pursuant to 15 USC Section 1640(e), but this statute is subject to equitable tolling. Fraudulent concealment to support equitable tolling requires that: 1) defendant concealed the conduct that constitutes the cause of action; 2) defendant's concealment prevented plaintiff from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action. Where the doctrine of fraudulent concealment is applied, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation. Plaintiff's failure to plead fraud with particularity precluded court from finding equitable tolling of statute of limitations. TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

Hill v. Tribeca Lending Corp., Case No. 09-2214 (3d Cir. 2010) – Federal Truth in Lending statute, 15 USC Section 1601, does not apply to loan principally for business, not consumer, purposes. Borrower re-financed home to obtain funds to infuse into borrower's struggling business. Although collateral was borrower's home, the loan was primarily for business or commercial purposes which is excluded from the requirements of TILA.

22.15 Fair Credit Reporting Act

Bailey v. Equifax Information Services, LLC, 2013 WL 3305710 (E.D. Mi. 2013) – FCRA Section 1681(b) requires consumer reporting agencies to use reasonable procedures to ensure maximum accuracy in credit reports. FCRA does not impose strict liability on credit reporting agency for any incorrect information. Plaintiff must prove that the agency reported inaccurate information about the plaintiff; the agency either negligently or willfully failed to follow reasonable procedures to assure maximum accuracy; plaintiff was injured; and agency's conduct was proximate cause. A credit report is inaccurate if it is patently incorrect or when it is misleading to such an extent that it can be expected to have an adverse impact. Agency reporting of balances on accounts where plaintiff is not borrower but is authorized user is not inaccurate or misleading. Credit report accurately showed plaintiff as authorized user and accurately reflected balance due on account. Plaintiff also failed to demonstrate that any person was misled or that she suffered any adverse action or suffered any harm as a result. FCRA Section 1681i(a)(1)(A) requires a credit reporting agency to investigate any dispute and either update or delete information as determined by the investigation within 30 days of receipt of notification; and to advise consumer of results of investigation within 5 days after completion of investigation. Plaintiff failed to present any evidence that agency either negligently or willfully failed to investigate. Plaintiff also failed to state action against creditor where plaintiff did not allege that creditor spread any inaccurate information about plaintiff, where evidence indicates that information on credit report accurately reflected plaintiff's status as authorized user and reported the balance due on the account.

Giovanni v. Bank of America, NA, 2013 WL 1663335 (N.D. Cal. 2013) – Lender does not violate FCRA by reporting late payments while debtor is in bankruptcy. Discharge in bankruptcy does not change underlying fact that during the bankruptcy, debtor's account was delinquent.

Evans v. Mercedes Benz Financial Services, LLC., 2011 WL 2936198 (E.D. Mi. 2011) – FCRA contains no provision requiring creditors to report the mere filing of a bankruptcy petition to credit reporting agencies. Creditor did not violate FCRA by continuing to report default on debt prior to entry of discharge.

Kowall v. GMAC Mortgage, LLC, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Fair Credit Reporting Act, 15 USC Section 1681b, prevents person from obtaining credit report for improper purpose. Plaintiff must prove that there was a consumer report as defined; defendant obtained or used it; and did so with no statutorily permissible purpose. Complaint that alleged that defendant obtained credit report without proper purpose stated cause of action and would survive Motion to Dismiss.

22.16 Equal Credit Opportunity Act

CB 2010 LLC v. Ithaca Coatings, 2013 WL 2250168 (E.D. Mi. 2013) – ECOA prohibits creditors from discriminating on the basis of sex or marital status, or on basis of race, color, religion, national origin or age. Statute and regulations enacted under it prohibit creditor from requiring signature of applicant's spouse or other person if the borrower meets the creditor's standards for creditworthiness for the amount and terms of credit requested. Statute is unclear as to whether it applies to commercial loans, although nothing in terms limit it to consumer transactions. Guarantee that waived any defenses given to guarantors other than actual payment and performance waived any claims or defenses under ECOA. Guarantee confirmed that waiver was knowingly and voluntarily made and there was no evidence that waiver was procured by frauds, duress, lack of consideration or mutual mistake.

Simmerman v. Ocwen Financial & Mortgages Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) – ECOA applies only to "creditors" involved in the original loan closing. ECOA does not apply to assignees who were not involved in the original loan closing. Defendant who acquired loan from original mortgage company after transaction had closed was not "creditor" to whom the ECOA applied.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – ECOA, 15 USC Section 1691(e), prohibits discrimination against any applicant with respect to any credit transaction. ECOA has two year statute of limitations from date of alleged violation. Terms of loan were clearly disclosed when loan closed and any alleged violation occurred at closing. Action brought more than two years after closing barred.

22.17 Interpleader

Plan Administrator for the Bail & Rice, Inc., Profit Sharing Plan v. Gail & Rice, Inc., 2011 WL 110904 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 22 permits a party to invoke interpleader if the plaintiff may be subject to double or multiple liabilities. Interpleader allows a party to join all other claimants as adverse parties. Court must first determine: (1) whether the stakeholder has properly invoked interpleader, including whether the court has jurisdiction over the suit, (2) whether the stakeholder is actually threatened with double or multiple liability, and (3) whether any equitable concerns prevent the use of interpleader. If so, then the court determines the respective rights of the claimants to the fund or property at stake via normal litigation processes, including pleading, discovery, motions, and trial.

22.18 Michigan Consumer Protection Act

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Tennessee Consumer Protection Act provides private right of action for person who suffers financial loss as a result of unfair or deceptive acts or practices. Plaintiff must demonstrate that defendant engaged in act or practice that is unfair or deceptive and that plaintiff suffered a loss of money, property or thing of value as a result. Lender's actions in pursuing foreclosure and debt-collection, even in context of loan modification, are not transactions within scope of TCPA. TCPA does not apply to loan modification activities. Note and Deed of Trust established payment terms and obligations, and lender is under no obligation to offer loan modification or other reductions in payments. Statements regarding loan modifications are related to terms of the loan itself.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Action under state consumer protection act is held to higher pleading standard and must set forth specific fraudulent or deceptive acts rather than general allegations. Debtor's general allegations that Bank drafted debtor's account twice in one month for mortgage payments did not plead with requisite specificity as complaint did not allege any particular date or month in which double payments were drafted or how any double draft would constitute an unfair or deceptive practice. Lender's alleged failure to cooperate in loan modification process; alleged delay in advising debtor of adverse decision on loan modification request; and alleged refusal to honor promise to modify loan that was later withdrawn by lender; were not unfair and deceptive practices as there is no cause of action under consumer protection act related to loan modifications as those are considered to arise out of the extension of credit which is beyond scope of statute.

McRary v. Jarrard, 2011 WL 3566279 (E.D. Mi. 2011) – Action violates MCPA, Section 445.901, when action favors party taking action and causes probability of confusion or misunderstanding of legal rights and obligations of other party. Lender violated MCPA by sending notice of non-judicial foreclosure sale after lender had asserted defense of set-off in adversary filed by debtor to determine validity of debt. Lender's notice incorrectly stated that "no legal or equitable proceedings had been instituted to recover the debt" which caused likelihood of confusion regarding status of action in violation of MCPA.

22.19 Conspiracy

Wallace v. Midwest Financial and Mortgage Services, Inc., 2013 WL 1729587 (6th Cir. 2013) – Complaint did not sufficiently alleged civil conspiracy where complaint alleged that multiple defendants conspired to manufacture fraudulent appraisals designed to dupe customers into obtaining unaffordable loans for which one Defendant and its principals received generous yield spread premiums; but complaint did not allege that any yield spread premium was itself unlawful. Conspiracy requires agreement of two or more people to commit an independent tort. Complaint did not allege any independent tort.

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Action under 42 USC Section 1985 for alleged conspiracy to deprive person of equal protection of law must assert some racial or otherwise class-based invidious discriminatory animus. Action that alleged only that Defendant continued with foreclosure proceedings did not allege any discriminatory animus and would be dismissed. Common law conspiracy requires two or more persons, through concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means. Conspiracy requires not only proof of the concerted action, but also of some underlying tort that conspiracy accomplished or attempted. Complaint filed to allege any underlying tort; therefore, complaint could not state cause of action for conspiracy.

22.20 RICO

Wallace v. Midwest Financial and Mortgage Services, Inc., 2013 WL 1729587 (6th Cir. 2013) – RICO provides private cause of action for any person injured by reason of a violation of one of the statute's four criminal provisions, including "racketeering activity," such as mail and wire fraud; or a conspiracy to violate any of the other criminal specified provisions. Plaintiff must show that the predicate acts alleged were both the 'but for' cause and the proximate cause of his injury. Proximate cause requires a direct link between the wrongful conduct and the injury, and that the injury be foreseeable and not speculative. Mail fraud does not require that the injured party be the recipient of the mail in question, only that the mails were used in furtherance of a scheme to defraud. Complaint alleged sufficient cause of action under RICO. Defendants used inflated appraisal to induce Plaintiff into entering into much larger loan with unfavorable terms that were never made clear to plaintiff, as a result of which Plaintiff was unable to keep up with the ever increasing payment amounts resulting in negative amortization and leaving Plaintiff unable to sell the property. Plaintiff alleged a clear link between the wrongful conduct – the false appraisal – and the harm suffered, as the inflated appraisal played a significant role in the negotiations leading up to the loan itself. Loss of the property was foreseeable and was, in fact, almost inevitable. Connection was not speculative or illogical, and the harm was not the result of intervening forces but directly related to the appraisal and the resulting mortgage.

22.21 Intentional Infliction of Emotional Distress

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Intentional infliction of emotional distress requires (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Intentional infliction of emotional distress requires conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, and does not include conduct that is mere insult, indignity, threat, annoyance, petty oppression, or other triviality. Plaintiff's complaint for allegedly wrongful foreclosure fail to demonstrate that Law Firm's conduct was extreme or outrageous.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Intentional infliction of emotional distress requires: (1)

intentional or reckless conduct; (2) conduct that is so outrageous that it is not tolerated by civilized society; and (3) conduct results in serious mental injury. Breach of contract is not by itself actionable as outrageous conduct. Plaintiff's action against lender dismissed where basis of action was Lender's refusal to modify mortgage under HAMP. Running of foreclosure notices may have caused embarrassment, but notices were not outrageous or beyond bounds of decency.

22.22 Negligent Infliction of Emotional Distress

Brown v. Orleans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Michigan law recognizes very limited action for negligent infliction of emotional distress. Plaintiff must demonstrate (1) a serious injury is threatened or inflicted *on a third person*, (2) the nature of the injury is such as to cause severe mental disturbance to Plaintiff, (3) the shock results in actual physical harm, (4) Plaintiff is a member of the third person's immediate family, and (5) Plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with that injury. Plaintiff's complaint that alleged only that Plaintiff would suffer distress if Defendant continues with foreclosure proceedings did not demonstrate any physical injury to any third party or that Plaintiff witnessed any actual or imminent injury to third party.

22.23 Constitutional Claims – Generally

Williams v. Federal National Mortgage Ass'n, 2013 WL 5445883 (E.D. MI. 2013) – FNMA is not “state actor” for purposes of fifth amendment due process claims. Action alleging violation of constitutional right of due process based on non-judicial foreclosure sale dismissed with prejudice.

FHLMC v. Shamoon, 922 F.Supp.2d 641 (E.D. Mi. 2013) – Freddie Mac was not converted into state action when Federal Housing Finance Agency became its conservator, precluding action alleging due process and equal protection violations based on Freddie Mac's purchase or property at foreclosure sale. Freddie Mac was private corporation and FHLMC, as conservator, merely stepped into shoes of Freddie Mac.

Lopez v. Bank of America, 920 F.Supp.2d 798 (W.D. Mi. 2013) – FNMA is not governmental agency and did not become one when FHFA was appointed conservatory, precluding borrower's claim that FNMA violated 5th Amendment rights by using foreclosure by advertisement.

Hermiz v. FHLMC, 2013 WL 3353928 (E.D. Mi. 2013) – FNMA is not governmental agency and is not required to use judicial foreclosure process. Michigan's non-judicial foreclosure process is sufficient for due process purposes and FNMA can validly use non-judicial foreclosures.

Kapla v. FNMA, 485 BR 136 (Bankr. E.D. Mi. 2012) – Generalized actions alleging violations of constitutional right to due process and equal protection may be brought only against governmental actor. Private party cannot be charged with alleged violation of constitutional rights. Whether private corporation can be considered governmental unit depends on whether the entity was created by Congress; whether the purpose for creating entity was to further federal government objectives; and whether any directors or officers were required to be governmental officials. FNMA is not governmental actor but is private party. Debtor's complaint against FNMA for generalized violations of equal protection and due process dismissed. Although FNMA was created by special legislation and was created to further governmental objectives. FNMA lacked permanent governmental control as legislation establishing FNMA required that entity, while chartered by the federal government, was to be entirely privately owned.

22.24 Slander of Title

Hermiz v. FHLMC, 2013 WL 3353928 (E.D. Mi. 2013) – Where redemption has expired, former owner lacks standing to challenge foreclosure sale. As alleged slander of title is predicated on sheriff's deed emanating from the foreclosure sale, former owner lacks standing to bring action as owner did not own property as of date slander allegedly occurred.

C. Mediation

22.25 When Appropriate

In re St. James Incorporated, Case No. 07-48680 (Bankr. E.D. Mi. 2009) – Creditor's Motion to Appoint Mediator denied where certain parties were unwilling to participate in mediation and because mediation did not appear likely to be fruitful and would not serve a useful purpose

22.26 Sanctions

Richard v. Spradlin, 2013 WL 1571059 (E.D. Ky. 2013) - Court had authority to enter sanctions against party who failed to comply with court's order regarding mediation, where party showed up late and, when he did show up, made demands for procedures that were outside established procedures for mediation. Party's action indicated that party did not and would not engage in meaningful negotiations and party demonstrated bad faith and disrespect for mediation process that was harmful to other parties and caused an unnecessary delay in the orderly resolution of the disputes. Bankruptcy court cited party's failure to prepare for the mediation and failure to participate in the mediation as the bases for sanctions.

D. Expedited hearing

22.27 Procedure

In re Bowlson, Case No. 08-44081 (Bankr. E.D. Mi. 2011) – Motion for Expedited Hearing denied where exigency was result of debtor’s or counsel’s failure to act in timely manner. Debtor failed to demonstrate exigency for Motion to Incur Debt to purchase new vehicle where debtor’s lease of her prior vehicle expired more than 2 months prior to filing the instant Motion. Plan confirmed more than 2 years earlier acknowledged that lease being assumed would expire in October, 2010, leaving debtor and counsel with a full two years’ knowledge that lease would expire.

In re Miles, Case No. 09-78811 (Bankr. E.D. Mi. 2010) - Debtor’s Motion for Expedited Hearing on Motion to Modify Conditions of Order Imposing Stay denied where Motion was filed too late to hold a hearing. The requested hearing date would give less than two-days notice to creditors and the Trustee and no reason was given why Motion was filed so late where Debtor had known about circumstances motivating the hearing for some time.

In re Elliott, Case No. 09-50231 – Motion for Expedited Hearing denied without prejudice where Debtor’s underlying motion failed to include the statement of concurrence as required by local bankruptcy loan 9014-1(g). Debtor is permitted to renew request for expedited hearing only after filing a supplement to the underlying motion showing compliance with local rule 9014-1.

E. Disqualification of Judge

22.28 Grounds

Dumas v. JPMorgan Chase Bank, 2013 WL 1703379 (E.D. Mi. 2013) – Magistrate judges must recuse themselves when their impartiality might reasonably be questioned, based on reasonable, objective person, knowing all of the circumstances; and must be based on extra-judicial events, and not from proceedings in the particular case or prior related cases. Party seeking to recuse judge may file affidavit setting forth facts and reasons for belief that judge is not impartial at which point the judicial officer involved must take no further action in the case. Plaintiff’s request for recusals denied where plaintiffs based motion on comments and discussions on record during hearing regarding settlement. Judge’s expression of displeasure with plaintiff’s refusal to consummate settlement agreement or statements indicating that Judge does not think highly of Plaintiff’s claims are not extrajudicial statements that support recusal. There was no evidence in the record that the Judge “strong-armed” Plaintiffs into settling, where Plaintiffs were experienced litigants who have participated in a number of lawsuits. Judge’s comments may have been “pointed and unvarnished” but did not amount to bias or impartiality.

Morris v. Paine, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor filed Motion to disqualify all of the Bankruptcy Judges in Tennessee and also the Chapter 13 Trustee and his staff attorney alleging that “they are not judges, they are “criminals dressed in black, including the officers of the clerks”, reigning terror upon the people of this state and are hereby forever disqualified from this and any other case that has to deal with Jimmy Marcell Morris for their failure to be impartial, unbiased and do fair & honest service and case fixing; abandonment of oath & duty in the bankruptcy court”. Debtor’s complaint in this Chapter 11 case arose out of debtor’s prior sequential failed Chapter 13 cases, the most recent of which was dismissed based on debtor’s failure to file the credit counseling certificate, failure to submit a plan that was feasible, and failure to file a plan that met liquidation. Debtor’s current adversary proceeding joined all of the judges and Chapter 13 Trustee as defendants, alleging that the defendants acted together against him in proceeding over and dismissing his cases, confirming no stay was in effect as to the Smyrna Property, and failing to pursue the alleged violations of the Fair Debt Collection Practices Act. Debtor sought relief under 10 U.S.C. § 333, 11 U.S.C. § 523(a)(6), Federal Rule of Bankruptcy Procedure 7001(6), 18 U.S.C. §§ 1346 and 1918, 42 U.S.C. § 2000d, the Eleventh Amendment to the U.S. Constitution, and fraud.

LaBankoff v. United States Trustee, Case No. 09-1300 (9th Cir. BAP 2010) – Party asserting judicial bias has an exceptionally heavy burden to overcome a presumption of honesty and integrity in the Judge. Bankruptcy Court comments to *pro se* Chapter 11 Debtor that Debtor had failed to comply with procedural requirements of case and that Court did not believe that Debtor could confirm a plan while entering order giving Debtor 120 days to attempt confirmation were observations were consistent with Court’s duty to advise that Debtor’s lack of legal knowledge, as demonstrated by his multiple mistakes made thus far in the case, would inevitably lead to expenses and aggravation for all concerned, and that disaster was] looming. Comments signal bankruptcy court’s sympathetic concern for Debtor, and its willingness to exercise its discretion by affording Debtor time to propose and confirm a proper plan, or to at least secure competent legal advice. Disqualification based on “extrajudicial sources” is implicated when Court’s bias originates outside the courtroom and must result in an opinion on the merits on some basis other than what the judge learned from participating in the case. Nothing in the record indicated that Judge had any personal interest, financial or otherwise, in this case. There is also no indication in the record that the bankruptcy judge’s opinions expressed in the transcripts or written documents were based on any information or events other than those originating in the bankruptcy court proceedings. Disqualification for “pervasive bias” is based on events that occur within the proceeding are particularly strong and clearly indicate judge’s inability to render fair judgment. Bankruptcy Court was not hostile or antagonistic toward Debtor. Although Court would have been warranted in dismissing case earlier, Judge afforded Debtor one last opportunity to either confirm plan or hire competent counsel. This act of discretion by the bankruptcy court is not consistent with a pattern of deep-seated antagonism against Debtor.

LaBankoff v. GMAC Mortgage, LLC., Case No. 09-1294 (9th Cir. BAP 2010) – Record failed to disclose any evidence of bias. Comments

made by a court in the course of judicial proceedings are rarely sufficient to establish bias requiring recusal. "Extrajudicial source" rule is implicated when bias originates outside the courtroom. Bankruptcy judge had no personal interest, financial or otherwise, in this case and there was no indication that the bankruptcy judge's opinions, expressed during hearings or in written memoranda in the case, were based on any information or events originating outside the bankruptcy court proceedings. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. This pervasive bias arises when a judge's favorable or unfavorable disposition toward a party, although stemming solely from the facts adduced or the events occurring at trial, nonetheless becomes so extreme as to indicate the judge's clear inability to render fair judgment.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Defendant in prosecution for bankruptcy fraud failed to raise issue of recusal before trial court. 28 USC Section 455 requires bias concerns to be raised either before the trial judge or promptly thereafter by writ of mandamus upon becoming aware of alleged bias. Judicial bias concern can be raised between trial and sentencing if bias did not become known until trial's cessation. Further, mere fact that trial judge forms negative opinion of litigant during proceeding is not bias for purposes of recusal. Recusal appropriate only where Court voices opinions that display a deep-seated favoritism or antagonism that would make fair judgment impossible. Trial Court's statement that defendant is "manipulative, narcissistic, and twisted," similarly is a reflection of the facts before the district court. This statement further served to explain why the judge imposed the sentence that he did and did not evidence improper bias.

In re Hake, Case No. 08-8039 (6th Cir. BAP 2008) – Judge can be required to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Judge shall disqualify himself where Judge has personal bias or prejudice concerning a party or personal knowledge of the disputed evidentiary fact. Judicial rulings alone almost never constitute a valid basis for bias or partiality. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the proceedings or prior proceedings do not constitute a basis for bias or partiality unless Judge displays a deep-seated favoritism or antagonism that would make fair judgment impossible. Judicial remarks during course of trial that are critical or disapproving of or even hostile to counsel, the parties or their cases ordinarily do not support a bias or partiality challenge unless comments reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Motion for recusal properly denied where record did not demonstrate that Judge's opinion of counsel was derived from an extrajudicial source or that Judge possessed such a high degree of antagonism as to make fair judgment impossible. Spirited exchanges between Judge and counsel do not rise to level of antagonism necessary to mandate recusal.

Rhiel v. Hook, 2009 BR 2182602 (Bankr. E.D. Mi. 2009) - Bankruptcy Judge may be disqualified from presiding over particular proceeding or contested matter or, if appropriate, from presiding over the case as a whole. Judge should recuse himself when impartiality might reasonably be questioned or where Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Standard for recusal is an objective one: whether a reasonable person with knowledge of all facts would conclude that the Judge's impartiality might reasonably be questioned. Extrajudicial Source Doctrine is invoked when the Judge forms opinions of the litigants based on information learned outside the course of judicial proceedings. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for bias or partiality. Pervasive Bias Exception requires recusal when Judge forms a favorable or unfavorable opinion so extreme that fair judgment appears impossible. Adverse ruling on evidentiary matter accompanied by comment regarding truthfulness of defendant's testimony does not reflect deep-seated antagonism sufficient to require recusal. Adverse decision on one issue in Bankruptcy case does not demonstrate antagonism or detract from impartiality.

In re Johnson, 408 B.R. 123 (Bankr. S.D. Ohio 2009). Bankruptcy judge's recusal was not required on "extra judicial source" theory, since an evidentiary hearing before the court is not "extra judicial". And a single comment on the party's previous testimony, in ruling against the party, was not sufficient for recusal based on "pervasive bias" theory.

22.29 Appeal of Order

Friendly Finance Service v. Dorsey, Case No. 12-30018 (5th Cir. 2012) – Denial of Motion to Disqualify is not appealable final order, is not subject to collateral order doctrine, and is not appealable interlocutory order. Party must wait for entry of final judgment to appeal judge's refusal to recuse.

F. Sealing Court Papers and Records

22.30 Section 107 and Federal Rule 5

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Federal Rule 5 allows court, for cause, to require redactions of information or limit or prohibit non-party's access to documents. Movant must make particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one. References in Plaintiff's pleadings to grievances filed by Plaintiff against Defendant's attorneys would be sealed where the grievances have not been investigated or substantiated by Grievance Commission, and information contained in pleadings was potentially inflammatory.

In re Creighton, 2013 WL 1751297 (Bankr. N.D. Ohio 2013) – Section 107 requires all papers filed in bankruptcy case to be public records but allows the Court to seal pleadings to extent necessary to protect trade secrets or confidential information; or to protect person from scandalous or defamatory matter contained within a paper. Information in court file is scandalous where material in file would cause a

reasonable person to alter their opinion of a party based on statements in the pleadings. Statements and information that is true cannot be scandalous or defamatory. Debtor failed to demonstrate that access to bankruptcy documents were cause of harm. Debtor was a public school teacher. Debtor alleged only that debtor had been experiencing incessant ridicule from several students, parents, and even fellow teachers, solely because of her bankruptcy filing. The ridiculers became aware of Mrs. Creighton's previous bankruptcy only because her filings are public records, and thus, readily accessible over a multitude of sources, including the internet. The constant, invasive, and ubiquitous nature of the ridicule has caused debtor severe emotional distress, and threatened her job performance and, ultimately, her ability to earn a living. Debtor's distress was not product of any particular bankruptcy pleading, but as a result of the way people used information about bankruptcy. Even if the court were to order that Debtor's name be redacted from the bankruptcy case, this would relate only to Pacer and not to other sources of information or to the general knowledge that debtor had filed for bankruptcy. Debtor failed to demonstrate any causal connection between any particular document or allegation in the bankruptcy filing and any alleged harm suffered by debtor. While unintended secondary consequence is negative publicity, that is regrettable but is not a basis for sealing a file.

G. Rehearing or Reconsideration

22.31 Motion to Amend Versus Motion for Relief From Judgment

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Motion filed within 14 days after entry of order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59.

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Motion filed within 14 days after entry of Order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59; while Motion made 14 days or later is considered Motion for Relief From Judgment under Rule 9024 and Federal Rule 60.

22.32 Orders Subject to Relief – Final Orders

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Rule 9023 allows court to alter or amend final orders. Partial Summary Judgment, which does not conclude judicial labors and is not a final order, is not subject to alteration under Rule 9023.

22.33 Orders Subject to Relief – Non-Final Orders

Long John Silver's, Inc. v. Nickelson, 2013 WL 1797442 (W.D. Ky. 2013) – Court has authority to reconsider interlocutory orders under court's common law powers and under Rule 56(b). Court will reconsider interlocutory order as justice requires, based on (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. Newly discovered evidence is evidence that was unattainable prior to entry of the prior order. Agreements that either pre-existed entry of order or were concocted following entry or order in effort to circumvent unfavorable ruling are not newly discovered evidence, even if those documents would have produced different legal theory for the requested relief. Arguments that merely rehash prior arguments will not support reconsideration.

22.34 Burden of Proof

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Courts generally will not grant motions for rehearing or reconsideration that merely present same issues ruled upon by court either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties were misled and that correcting the defect will result in a different disposition. Defect is palpable if it is obvious, clear, unmistakable or plain. Motion denied where motion restated same arguments made at initial hearing.

Sandweiss Law Center, PC v. Kozlowski, 2013 WL 396255 (E.D. Mi. 2013) – A motion for reconsideration will be granted only if the moving party identifies “a palpable defect by which the court and the parties ... were misled” and demonstrates that correcting the defect “will result in a different disposition of the case.” E.D. Mich. L.R. 7.1(h)(3). A “palpable defect” is one that is “obvious, clear, unmistakable, manifest or plain.” Motion that does not identify any defect, but merely reargues matters previously considered, will be summarily denied.

Overstreet v. Joint Facilities Management, LLC, Case No. 11-51141 (5th Cir. 2012) – District Court did not abuse discretion in denying Rule 59 Motion to Alter or Amend Judgment where Motion did not establish either a manifest error of law or fact; or present newly discovered evidence. Motion merely reasserted arguments and allegations initially presented to court.

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Under Rule 9023 and Federal Rule 59, moving party must show clear error of law, newly discovered evidence, an intervening change in the controlling law, or a need to prevent manifest injustice; such that a different disposition of the matter must result from correction of the error. Local Rule 9024-1 requires that the moving party demonstrate a palpable error by which the court and the parties have been misled. A palpable defect is one that is clear, unmistakable, manifest or plain. Mere assertion of error or that order needs to be corrected, or re-argument of matters previously considered by the court, without more, is not sufficient.

22.35 Grounds – Rule 59 and 9023 Generally

Maas v. Northstar Education Finance, Inc., Case No. 12-80384 (Bankr. W.D. Mi. 2013) – Party seeking reconsideration or relief from prior order must demonstrate newly discovered evidence or some change in controlling law, or that prior order results in “manifest injustice”. Motion that merely restated issues presented in original hearing and on which debtor had ample opportunity to dispute did not raise new issues but was merely a re-hash of arguments made, or that should have been made, before order entered.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 2251168 (N.D. Ohio 2013) – Motion brought within 28 days of entry of order is motion under Rule 59. To prevail, party must prove a clear error of law; newly discovered evidence; an intervening change in controlling law; or need to prevent manifest injustice. Plaintiff’s Motion for reconsideration of order dismissing complaint failed to allege anything other than issues previously raised and rejected.

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Rule 59 motion should not be granted absent highly unusual circumstances, the court is presented with newly discovered evidence, committed clear error, or there is an intervening change in controlling law. Motion must not rehash same arguments made the first time and must not assert new legal theories or facts that could have been asserted at the initial hearing. Motion that merely contended that court failed to set forth specific findings of fact or conclusions of law was insufficient to warrant rehearing. Further, rehearing was properly denied where court announced one legal basis for ruling that was incorrect, but ruling was supported by separate legal basis and was correct, even if the wrong legal basis was stated.

In re Walterhouse, Case No. 11-32645 (Bankr. E.D. Mi. 2012) – Rule 59 motion must demonstrate error of law, newly discovered evidence, intervening change of controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case. Court’s order denying motion to dismiss not erroneous. Debtor’s testimony that he pays money to parents in various amounts to help parents financially when they needed it did not evidence any wrongful payment of pre-petition debts. Debtor’s pre-petition transfer of property to brother was in connection with brother’s agreement to provide financial help to parents and did not indicate any intent to defraud. Debtor did not have lavish lifestyle. Although creditor did not agree to certain items in budget, overall budget was not unreasonable. Fact that debtor used money borrowed from creditor to pay other debts did not support dismissal as creditor made loans to debtor without restrictions on use of money and the funds were under debtor’s sole control. Debtor did not have ability to repay debts, where debtor’s income with Merrill Lynch was highly speculative and not remotely sufficient to pay debts. Evidence did not indicate any attempt to evade debt to creditor. Although debtor at first disputed debt, and thereafter attempted to negotiate a settlement, debtors actions were reactionary and the bankruptcy resulted from debtor’s inability to deal with the debt owed to creditor.

In re 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. Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.

In re Hardy, 2011 WL 2112020 (Bankr. N.D. Ohio 2011) – Chapter 7 trustee failed to demonstrate basis for reconsideration under Rule 59 of Court’s Order Dismissing Chapter 7 Case. Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in the controlling law, or to prevent manifest injustice. A motion for reconsideration is not designed to give a dissatisfied litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal. Trustee’s argument that creditors would fare better in Chapter 7 was considered and rejected in dismissing case in first instance. Trustee failed to produce any new evidence to demonstrate that dismissal was result of clear error or change in controlling law.

Fujitrans USA v. Barko Enterprises, Inc., 2013 WL 793056 (S.D. Ohio 2013) - Rule 59 requires clear error of law, newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice. Rule 60 allows court to grant relief for excusable neglect which includes failure to comply with deadline that is attributable to neglect. Rule 60 requires court to consider danger of prejudice to non-moving party; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was within reasonable control of movant; and whether movant acted in good faith. Appellant failed to demonstrate any basis for relief. Basis alleged by Appellant at best described over-crowded work schedule without any allegation of extraordinary circumstances. Appellant had three extensions of time and was clearly warned that no additional extensions would be entertained and that failure to timely file a brief may result in dismissal.

In re Harvey Goldman & Co., Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Rule 9024-1 precludes Motion for Rehearing or Reconsideration based on the same issues previously litigated. Motion is not an opportunity to retry the case just because the party does not like the outcome. Motion must demonstrate palpable defect by which the Court was misled and also show that a different disposition of the case must result from a correction thereof. Motion that does nothing more than re-argue the same evidence and testimony as was presented at trial does not warrant relief under Rule 59.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 2251168 (N.D. Ohio 2013) – Burden for relief under Rule 60 is significantly higher than standard applicable to Rule 59 Motions. While Rule 59 allows relief for any reason previously sufficient for reasons that have been granted in suits in equity. Rule 60 is limited to specified circumstances listed in Rule 60. Motion that fails to identify any particular subsection under which relief is requested and fails to allege any facts that support relief under any subsection but merely seeks to reargue same points previously raised and rejected would be denied.

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 Johnson, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.

In re Bing Construction Company, Case No. 11-57853 (Bankr. E.D. Mi. 2011) – Motion for Reconsideration denied for failure to allege any changed circumstances or error in prior Order. Creditor failed to file affidavits or other response to Debtor's Motion to Reject Contract as allowed and directed by Order of Court. Court granted Debtor's Motion. Creditor's failure to file response within time allowed by Court does not warrant reconsideration of underlying order.

In re Sharfnter, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor's Motion for Reconsideration of Order Dismissing Case failed to demonstrate any palpable defect by which the Court was misled. Debtor's Petition Cover Sheet was not signed. Court issued Notice of Deficiency, in response to which Debtor filed yet another unsigned Cover Sheet. Court issued another Notice of Deficiency, and Debtor failed to respond and case was dismissed. Six months later, Debtor filed a Motion to Reopen Case, that also was not signed. Court issued another Notice of Deficiency and Debtor did not respond, and Motion to Reopen was stricken. Four months later, Debtor filed yet another Motion to Reopen Case. Motion did not allege any defect given debtor's repeated failures to address issues raised in Court's numerous Notices of Deficiency.

Meoli v. Hoffman, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Defendants who failed to respond to complaint seeking to deny discharge under Section 707 and allowed default judgment to be entered could not demonstrate basis for relief under Rule 60(b)(6). Rule 60(b)(6) requires party to demonstrate extraordinary or exceptional circumstances not present in any of the other five subsections of Rule 60(b). Defendants failed to offer any explanation for failure to plead or respond in adversary proceeding, precluding relief under Rule 60.

In re Faraj, Case No. 10-76937 (Bankr. E.D. Mi. 2011) – Debtor's Motion to Reinstate Chapter 13 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake that may have resulted in dismissal was caused by Debtor's counsel and is attributable to Debtor for purposes of Rule 60, and Motion failed to allege any basis to determine that counsel's errors were "excusable".

JP Morgan Chase Bank, N.A. v. Taylor, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration of Order Granting Plaintiff's Motion for Summary Judgment construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Court was aware of Defendant's response to Motion for Summary Judgment in granting Motion. Defendant's Counsel's pending Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff's Motion and Motion for Reconsideration failed to offer any explanation as to why response was not timely filed.

In re Stewart, Case No. 10-52347 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Chapter 7 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file Chapter 7 Means Test form until three weeks after the deadline and two weeks after the case was dismissed.

In re Adams, Case No. 07-59818 (Bankr. E.D. Mi. 2010) - Debtor's Amended Motion to Reopen Case construed as motion to reopen case and for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion not filed within reasonable time as required by Rule 60(c) where Motion filed more than one year after order dismissing case.

In re Evans, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to obtain credit counseling prior to commencement of case, rendering debtor ineligible for relief.

In re Grass, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – Second Motion for Stay Pending Appeal is treated as Motion for Reconsideration under Rule 9023 and Federal Rule 59. Motion denied where Motion failed to allege any of the established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion merely sought to reargue same issues and facts argued in first Motion for Stay Pending Appeal.

In re Price, Case No. 10-41890 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to timely file numerous documents as outlined in Notice of Deficient Filing within time permitted by Court.

In re Smith, Case No. 10-42015 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed for failure to file matrix or Declaration Under Penalty of Perjury for Debtor Without an Attorney within time permitted by Court.

In re Penland, Case No. 09-64082 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order.

J.L. Gisalsen, III, Trust v. Mehlhose, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.

In re Turchan Technologies Group, Inc., Case No. 09-67671 (Bankr. E.D. Mi. 2010) - Motion for Reconsideration of Order Denying Debtors Motion to Approve Compromise of Claims construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Creditor lacks standing to seek rehearing of Order on Motion to Approve Compromise as only Debtor has standing to file that Motion and so only Debtor has standing to seek rehearing. Motion to Approve Compromise denied where creditor failed to appear at hearing and Motion for Rehearing failed to offer any justification.

In re McKenzie, Case No. 10-46513 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file corrected Rule 2016(b) statement within time permitted by court; and Motion contained several typographical errors including wrong Judge's name in caption and Motion requested the court to reschedule the confirmation hearing although the case was a proceeding under Chapter 7.

In re Leach, Case No. 10-45468 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file upload matrix or to file schedules, statement of financial affairs, or means test form.

In re Schweitzer, Case No. 10-65115 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where Debtor failed to file Chapter 7 Means Test form.

In re Scales, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Motion to Reopen Case denied where Motion was unnecessary. Discharge includes unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled. Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

In re Bailey, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Rule 59 does not contain express grounds for amending a judgment. Generally, a Rule 59(e) motion will only be granted only for: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Debtor's Motion that merely restated arguments that were rejected, without any new evidence or change in the law, will be denied.

Ausilio v. US, 2010 WL 2868821 (E.D. Mi. 2010) - Court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties have been misled and also show that correcting the defect will result in a different disposition of the case.

In re Szymanski, Case No. 10-53553 (Bankr. E.D. Mi. 2010) – Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Chapter 12 proceeding dismissed as to Debtor-wife where Credit Counseling Certificate indicated that she received credit counseling only after case filed, although Debtor-husband received counseling prior to commencement of case. Each debtor must obtain credit counseling. Failure to do so mandates dismissal under Section 109(h).

In re Hall, Case No. 10-53494 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 24 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

In re Lyons, Case No. 07-43671 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled. Debtor's Motion to Reopen Case to add creditor denied where Motion was unnecessary. Although Creditor was not included in the schedules, unscheduled debts are discharged in a no asset case to the same extent as if they had been discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

In re Harris, Case No. 10-55770 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Set Aside Order of Dismissal and to Extend the Time for Filing Documents construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 34 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

In re Alva, Case No. 10-55780 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where numerous documents were not timely filed.

In re Champney, Case No. 10-57311 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtors were not eligible for relief because Debtors failed to obtain credit counseling within 180 days prior to commencement of case. ECF records showed case filed on May 26 at 11:10 a.m. and credit counseling certificate indicated that the briefing occurred on May 26 at 2:55 p.m., almost 4 hours later.

In re Williams, Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

In re Jenkins, Case No. 08-59973 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening

case would produce no benefit to the Debtor that Debtor did not already receive.

Allan Falk, P.C. v. Mirch, Case No. 03-4196 (Bankr. E.D. Mi. 2010) - "Adversary Proceeding Plaintiff's Motion to Entry of an Order Re-Opening This Adversary Proceeding and for Entry of an Order Reinstating This Court's April 8, 2010 Order of Contempt and for Other Relief Directed Against Adversary Proceeding Defendant" denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result for a correction of the error. Motion also failed to establish excusable neglect under Rule 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024. Neglect or error by counsel is attributable to the party for purposes of determining whether neglect or mistake was excusable. Adversary proceeding had been repeatedly closed and reopened because of inactivity by Plaintiff. Motion failed to demonstrate any reason to set aside most recent dismissal.

Hagan v. Goldstein, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Reconsideration of judgments and orders is available only in three limited circumstances: (1) in cases involving newly discovered evidence which could not have been discovered prior to entry of the order under review; (2) in cases involving changes in controlling law; and (3) to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Nor are motions for reconsideration appropriate merely to let the losing party supplement the evidentiary record that was before the court. Defendant's Motion for Reconsideration that merely sought to supplement record with additional bank statements would not warrant relief, particularly where materials, even if considered, would not have altered outcome of Motion for Summary Judgment; and Defendant's alleged hospitalization which Defendant claimed left her unable to respond to the Motion for Summary Judgment was not raised by Defendant or counsel prior to entry of judgment.

In re Dexter, Case No. 10-42155 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file creditor matrix and numerous other required documents were blank and failed to contain any required information including the Statistical Summary; Schedules I and J; Statement of Financial Affairs; and Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.

In re Farah, Case No. 09-59067 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion was also untimely filed. Rule 60(b) requires motion for reconsideration to be brought within a reasonable time. Debtor waited over six months after Court dismissed case to file Motion and failed to present any good excuse or explanation or delay.

In re Wesson, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file correct statement of social security number and failed to file Credit Counseling Certificate; Statement of Financial Affairs; Statistical Summary; Summary of Schedules; Chapter 7 Means Test; and Chapter 13 Plan, nor did Debtor file a motion for an extension of the April 5, 2010 deadline prior to deadline established in Court's Notice of Deficiency.

In re Sinanovic, Case No. 10-44217 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to pay filing fee within time set by Order of Court and neither Debtor nor counsel appeared at hearing on Order to Show Cause.

Persall v. Citibank, Case No. 09-44381 (Bankr. E.D. Mi. 2009) – Motion to Set Aside Order Dismissing Adversary and Request for Reinstatement construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion for Reconsideration filed 11 weeks after entry of Order of Dismissal was not filed within a reasonable time as required by Rule 60(c). Plaintiff filed Motion for Default Judgment but failed to submit proposed Order notwithstanding Court Order requiring submission of an Order by specific date. When the Order was submitted, it did not comply with requirements of Court Guideline 12 and Court again requested submission of Order that complied with Court requirements. Plaintiff never submitted another order, resulting in dismissal of adversary.

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

Orlanski v. American Bank, Case No. 10-4880 (Bankr. E.D. Mi. 2010) – Plaintiff’s Ex Parte Motion to Reopen Adversary Complaint for Purposes of Filing an Amended Proof of Service construed as Motion for reconsideration of Order Dismissing Adversary Proceeding. Motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Allegations also did not establish excusable neglect under Rule 60(b)(1) or Bankruptcy Rule 9024. Dismissal of adversary proceeding was without prejudice, allowing Plaintiff to file a new adversary proceeding.

Visteon Corp. v. Collins & Aikman Corp., Case No. 07-13714 (E.D. Mi. 2009) – A party that seeks reconsideration of a Bankruptcy Court ruling must “demonstrate a palpable defect by which the Court and the parties have been misled,” and “show that a different disposition of the case must result from a correction thereof.” To establish a “palpable defect,” the moving party generally must point to “(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Court would not grant reconsideration of Order Confirming Chapter 11 Plan where party seeking reconsideration never objected to confirmation in the first instance. Creditor alleged that prior to the confirmation hearing, Debtor “promised” to include certain provisions in the Plan but never actually included those provisions. Creditor failed to object to confirmation or otherwise complain prior to confirmation about any alleged omitted provisions or agreements. Creditor failed to allege any “palpable defect” where Creditor had full notice of the terms of the Plan, a full opportunity to object to the Plan, and a full opportunity to participate at the confirmation hearing, but failed to raise those issues prior to confirmation. Although a court can grant rehearing for “excusable neglect”, excusable neglect does not include the failure to timely file a pleading even where that failure is the result of misplaced reliance on other parties or other strategic miscalculations.

In re Barnett, Case No. 08-70815 (Bankr. E.D. Mi. 2009) - "Request for Bankruptcy Reinstatement" treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 19 days after bankruptcy petition filed in violation of Section 109(h)(1).

Sims v. US Bank Home Mortgage, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Motion to Reconsider Order Regarding Improper Service of Summons and Complaint treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

In re Haines, Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted and had failed to file the missing documents even as late as the date of filing of the Motion to Reinstate.

In re Lasenby, Case No. 08-47560 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration must demonstrate "palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof." Motion failed to demonstrate palpable defect as Motion only alleged that Court did not give affidavit appropriate weight in determining underlying action.

In re Brewster, Case No. 08-61818 (Bankr. E.D. Mi. 2009) - Motion to Reopen Bankruptcy Case considered as Motion for Rehearing, denied where Debtor was not eligible to be Debtor because Debtor received pre-bankruptcy credit counseling more than 180 days prior to the commencement of the case. Fact that Debtor received counseling after the case was filed did not solve lack of eligibility when the case was initially commenced.

In re Davis, Case No. 08-69676 (Bankr. E.D. Mi. 2009) - Motion to Reconsider Re-opening Case constituted a Motion for Rehearing. Motion failed to demonstrate a palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Allegations in the Motion did not establish excusable neglect or any other valid ground for relief from the order dismissing the case.

In re Hicks, Case No. 09-41591 (Bankr. E.D. Mi. 2009) (unreported decision) - Motion failed to demonstrate palpable defect but which the Court and parties were misled or that a different disposition of the case must result from a correction thereof. Debtors obtained credit counseling more than 180 days prior to the commencement of the case, leaving Debtors ineligible for relief pursuant to Section 109(h)(1). Debtors obtaining new counseling after the case was commenced does not cure the lack of eligibility at the time case was commenced.

In re Webster, Case No. 05-85963 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Dismissing Chapter 13 Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction thereof. Motion also failed to establish any substantive basis for relief from the Order under Federal Rule of Civil Procedure 60(b); Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor's failure to file a plan modification or to seek a hardship discharge in the two months between the service of a Notice of Default and the ultimate dismissal of the case without cause for the delay prevents

the Debtor from seeking a hardship discharge post- dismissal.

In re McMahon, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Motion for Reconsideration of Order Dismissing Case denied where Motion failed to demonstrate any palpable defect and failed to allege any facts showing that the dismissal order was erroneously entered. Debtor did not allege that he had cured the default in payments in a timely manner as required by the Trustee's Notice of Default.

In re Rahman, Case No. 09-47242 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 11 days after bankruptcy petition filed in violation of Section 109(h)(1).

In re Depew, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Dismissal of Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not obtain credit counseling until after case filed. Debtor failed to demonstrate any basis for a waiver of credit counseling or authority to obtain post-petition counseling as Debtor failed to comply with Section 109(h)(3) and failed to file a Motion for Approval of Certification of Exigent Circumstances as required by Local Rule 1007-6.

In re Paris, Case No. 09-56564 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied where Motion failed to demonstrate palpable defect or that a different result would occur from a correction. Motion for Reconsideration of Order regarding payment of filing fees in installments moot where case dismissed in interim based on Debtor's failure to pay filing fees. Rehearing also not appropriate where Motion sought only authority to pay the filing fees in installments and did not seek to waive filing fees in their entirety and Debtor failed to pay the filing fees in any event.

In re Parent, Case No. 09-55888 (Bankr. E.D. Mi. 2009) - Court denied Motion to Vacate Order Dismissing Chapter 7 Case where Motion failed to allege any palpable defect or that a different disposition would occur from a correction; and failed to allege any substantive basis for relief under Federal Rule of Civil Procedure 60(b)(1), Federal rule of Bankruptcy Procedure 9024, or any other substantive basis for relief. Case was dismissed because counsel failed to file required documents within 15 days of the petition date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable..."

In re United Robotics, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Court denied Motion for Reconsideration of Order Enforcing Automatic Stay where Motion failed to demonstrate any palpable defect by which the Court and the parties have been misled. Creditor's Motion merely reargued matters previously argued in response to Debtor's Motion for Order Enforcing Automatic Stay and which had been fully considered by Court in entering Order in the first instance. Legal arguments raised in Motion for Reconsideration did not compel the Court to reach a different conclusion as a matter of law.

In re Culbert, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Motion to Reinstate Chapter 7 bankruptcy construed as Motion for Reconsideration. Motion denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Rhodes, Case No. 09-43128 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtor's case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Little Rock Baptist Charity Care Center, Inc., Case No. 08-69445 (Bankr. E.D. Mi. 2009) – “Request for New Hearing Date for Debtor's Motion for Summary Judgment and Objection to Claim” treated as Motion for Reconsideration of Order Granting Debtor's Motion for Summary Judgment and Sustaining Debtor's Objection to the Claim of Interest of Joseph M. Wright”. Motion failed to demonstrate a palpable defect by which the Court and parties have been misled or that a different disposition of the case must result from a correction thereof. Further, Motion did not allege any excusable neglect under Federal Rule of Civil Procedure 60(b)(1) or Federal Rule of Bankruptcy procedure 9024 or any other valid ground for relief. Debtor and counsel both had actual notice of the hearing date but failed to appear for the hearing and failed to demonstrate any excuse for the failure.

In re Williams, Case No. 04-40824 Bankr. E.D. Mi. 2008) - Debtor's Motion to Reinstate Chapter 13 Proceeding construed as a Motion for Reconsideration of Order Dismissing Case or, alternatively, a Motion for Relief from the Order Dismissing Case. Motion denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a

response. Any neglect or mistake by Debtor's counsel in failing to respond is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

In re McGill, Case No. 04-67742 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Reconsideration of Order Dismissing Case denied as Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof; and Motion failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Order of dismissal was properly entered when Debtor failed to comply with terms of Court Order adjourning a hearing on the Trustee's Motion to Dismiss.

In re Cantor, Case No. 05-65812 (Bankr. E.D. Mi. 2008) – Motion for Relief From Order, construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order.

In re Bell, Case No. 08-57409 (Bankr. E.D. Mi. 2009) - "Motion for Relief From The Judgment Dismissing Case Under FRCP 60(b)(1) & (6)", construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable effect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order. Debtor failed to be 100% paid in plan payments by agreed deadline. Debtor was also at fault for not scheduling payday lender as creditor in the first instance. But for Debtor's failure to schedule payday lender, lender would not have obtained money from Debtor's bank account as alleged which caused Debtor's inability to make plan payments as agreed.

In re Sandhu, Case No. 08-57203 (Bankr. E.D. Mi. 2008) - "Motion to Reopen Case and File Certificate of Counseling" denied as motion failed to demonstrate that any purpose would be served by re-opening case. Debtor did not receive credit counseling until 12 days after bankruptcy petition filed in violation of Section 109(h)(1).

In re Hutchinson, Case No. 08-59442 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Relief from Order Dismissing Chapter 13 Case for Failure to Comply With Order" denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel as alleged in Motion is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

In re Walker, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Court denied Motion to waive filing fee where schedules indicated that Debtor had sufficient exempt assets from which to pay the filing fee. Debtor's letter did not dispute this finding. Further, Debtor's schedules also indicated that Debtor has tax refunds totaling over \$4000 all of which are claimed as exempt. Court's earlier determination that Debtor not eligible for fee waiver was correct.

In re Thomas, Case No. 08-57989 (Bankr. E.D. Mi. 2008) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 26 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Ayres, Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).

In re Mathson Industries, Inc., Case No. 09-42894 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Trustee served creditor with a copy of the Motion to Approve Sale and provided the required 20 day notice. Creditor filed no objection to the sale motion until it filed the Motion for Reconsideration over one month after the objection deadline passed and 10 days after the order was entered.

Attard v. American Home Mortgage Services, Inc., Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Order denying Motion for Summary Judgment correctly entered where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure

sale or that the specific written appointment was signed by someone other than the Sheriff himself.

In re Lyons, Case No. 08-43750 (Bankr. E.D. Mi. 2009) - Motion to Reopen and Waive Reopening Fee denied where Court had denied prior Motion to Waive Filing Fee and the filing fee still had not been paid.

In re Camacho, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 13 Case constituted Motion for Reconsideration of Order dismissing case. Motion denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records. Debtor's Motion to Reinstate did not present any excuse for failure by Debtor that was prejudicial to creditors.

In re Bacevicius, Case No. 08-66257 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Debtor did not file a Bankruptcy Petition Cover Sheet until three weeks after case dismissed and never filed a Certificate of Credit Counseling, making it impossible for Court to determine if Debtor was even eligible for relief. Vague allegation that required documents were not timely filed due to a "computer problem" does not constitute grounds to set aside dismissal.

In re Maiuri, Case No. 08-69430 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Further, Motion was untimely where Motion was not filed until more than 60 days after entry of Order dismissing case and failed to allege any good excuse for delay.

In re Rusch, Case No. 08-69518 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to address filing deficiencies after being advised that several documents including Means Test form, Schedules, Statement of Financial Affairs and Credit Counseling Certificate had not been filed is not "cause" to reinstate case.

In re Thornton, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - "Objections to Order Dismissing Debtors' Bankruptcy and Motion to Vacate Order" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Case was dismissed at the time of the confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.

Greenhill v. Beneficial Michigan, Inc., Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - "Motion To Reopen Case On The Grounds That The Default Which Caused the Dismissal Has Been Or Can Be Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and has offered no excuse or explanation for failure.

In re Zia, Case No. 09-55685 (Bankr. E.D. Mi. 2009) - "Emergency Motion for Reconsideration Due to Procedural Defect, to Vacate Order for Relief From the Automatic Stay, and to Reinstate Stay as Default on Which Entry of the Order Was Based Has Been Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Any neglect or mistake by Debtor's counsel is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable.

In re Smith, Case No. 09-40132 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Statement of Social Security Number and Petition did not reflect signatures of either Debtor or Debtor's Attorney resulting in dismissal of case and Debtor failed to correct these deficiencies within time permitted by Court.

In re Johnson, Case No. 09-43191 (Bankr. E.D. Mi. 2009) - Letter to Court treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of

Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee in prior, dismissed case and failed to file a Matrix in this case and failed to cure these defects within time permitted by Court.

In re Rutherford, Case No. 09-51427 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee after Court entered Order denying Motion to Waive Filing Fee notwithstanding ample notice and opportunity.

In re Harris, Case No. 09-60790 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy for Failure to File a Matrix treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Certificate of Budget and Credit Counseling and signed Bankruptcy Petition Cover Sheet within time allowed required dismissal of case.

In re Dittman, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration Pursuant to F.R.B.P. 9024 treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Court denied Motion to Extend Automatic Stay and Court now lacks authority to extend stay as hearing cannot be completed within 30 days of commencement of case. Therefore, even if Movant demonstrated grounds for relief, Court could not grant effective relief.

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

In re Henderson, Case No. 09-55303 (Bankr. E.D. Mi. 2009) - Debtor's "Reinstatement Letter" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file credit counseling certificate and failed to file Schedules D, F, G and H and Debtor's Schedules E, I and J were blank.

In re Brock, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Denying Motion to Extend Automatic Stay denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to attend the hearing based on alleged "internal office scheduling error" did not demonstrate cause to set aside Order. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

22.37 Rule 60(b)(4) – Void Judgment

In re Leigh, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. *Rooker-Feldman* resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under *Rooker-Feldman* to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and state court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind state court determinations of validity and amount of lien which is precluded by *Rooker-Feldman*.

PHH Mortgage Corp. v. Corzin, 2012 WL 4023440 (N.D. Ohio 2012) – Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction is so glaring as to constitute a total want of jurisdiction or where no arguable basis for jurisdiction existed. Complaint to avoid lien is core proceeding within scope of court jurisdiction. Although complaint did not specifically challenge validity of lien, complaint did ask for sale of property with the court to determine extent and priority of liens, and requiring any party claiming to hold a lien to file a response to the complaint.

22.38 Meritorious Defense

In re Juarez, Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion for Rehearing of Order Awarding Attorney Fees denied. Motion failed to evidence any meritorious defense where Motion for Reconsideration admitted that funds were garnished post-petition in violation of stay and failed to return funds to debtor.

22.39 Clerical Error

In re Merkl, Case No. 06-48377 (Bankr. E.D. Mi. 2008) - Order Granting Relief From Stay vacated pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(a) where order was entered as a result of clerical error. Debtor filed response to Motion for Relief but clerk failed to enter response into docket in timely manner, resulting in Order Granting Relief From Stay by default.

In re Eatmon, Case No. 07-65731 (Bankr. E.D. Mi. 2008) - Application for Attorney Fees erroneously filed in wrong case and Order erroneously entered in that case. Order contained wrong case number and was signed by Judge not assigned to that case. Order Awarding Attorney Fees vacated pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024 as entered through clerical error.

Americredit Financial Services, Inc. v. Burgess, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) – Order dismissing adversary case entered in error and would be set aside. Clerk inadvertently issued two separate notices of initial scheduling conference. Court's dismissal for failure of plaintiff to appear for the first of those scheduling conferences was result of error of Court.

In re Vogel, Case No. 08-60317 (Bankr. E.D. Mi. 2009) - Order granting relief from stay entered after case had been closed without discharge would be vacated. Case had already been closed when Motion for Relief filed but creditor had not filed Motion to Reopen Case. Order Granting Relief entered in error sufficient to warrant relief under Rule 60.

22.40 By Court *Sua Sponte*

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

22.41 Defect in Notice

In re Hoskins, Case No. 08-62613 (Bankr. E.D. Mi. 2009) – Order Converting Case to Chapter Thirteen vacated. Debtor filed Notice of Motion but failed to file Certificate of Service evidencing timely notice on all creditors and parties in interest.

In re Miller, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

22.42 Rule 60(b)(1) - Mistake, Inadvertence, Surprise or Excusable Neglect

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) – Excusable neglect requires that the judgment be obtained based on party's neglect which is excusable under the circumstances. Defendant's Motion denied where neglect was the fault of Defendant, based on Defendant's fault in not responding to properly filed and noticed Motion for Summary Judgment. Defendant's erroneous assumption that summary judgment would not be entered as long as parties were engaged in settlement negotiations lacked any basis in law and could not support setting aside judgment.

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Motion for reconsideration of Order remanding cases to State court did not state grounds under Rule 60(b)(1). Motion alleged that state courts "have no respect for the statutes or constitution" and rule "in a rogue fashion". However, Plaintiff did not present any evidence to support the claim and did not point to any specific mistake of law or clear error of judgment in the Order for Remand.

In re Smith, 467 BR 122 (Bankr. W.D. Mi. 2012) – Motion to Set Aside Discharge Order for purposes of allowing Debtor to file reaffirmation agreement did not demonstrate mistake or excusable neglect. Debtor's statement of intentions filed at commencement of case indicated intent to reaffirm mortgage debt. Debtors misunderstanding of deadlines within which to accomplish reaffirmation agreement was not excusable neglect.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(1) allows relief from judgment or order that is the result of mistake, inadvertence, surprise or excusable neglect. Inquiry is essentially equitable one, taking into account all relevant circumstances, including danger of prejudice, length of delay, impact on proceedings, reason or the delay, whether delay was within reasonable control of moving party, and whether moving party acted in good faith. Party seeking relief must demonstrate either (1) that the party made an excusable litigation mistake or that the attorney in the litigation acted without authority; or (2) that the judge made a substantive mistake of law or error of fact in the final judgment or order. Court will consider (1) whether the party seeking relief is culpable; (2) whether opposing party would be prejudiced; and (3) whether party seeking relief has meritorious defense. Party's conduct is "culpable" where it displays either an intent to thwart judicial proceedings or a reckless disregard for effect of conduct on proceedings. Rule is not designed to relieve counsel of consequences of decisions deliberately made, and clients are generally held accountable for acts and omissions of their attorneys. Motion to set aside order denied. Debtor, through its managing member, entered into settlement agreement that required

debtor to transfer property to lender. Movant, a non-managing member, was unaware of bankruptcy filing or settlement until after order entered. Although movant was not culpable, lender would be prejudiced if order was set aside, property was not transferred to lender for less than adequate value, movant failed to demonstrate any meritorious claim, and though managing member lacked authority to unilateral file bankruptcy petition, there was no excusable neglect by managing member in signing quitclaim deed or by debtor's attorney in preparing and filing bankruptcy petition.

22.43 Newly Discovered Evidence

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – To set aside order based on newly discovered evidence, movant must demonstrate that it exercised due diligence in obtaining information and that the evidence is material and controlling and clearly would have produced a different result had the information been presented prior to entry of the order. Evidence must not be merely cumulative or impeaching. Although movant, a non-managing member of debtor, was not aware of bankruptcy filing or settlement agreement that called for transfer of property to lender and, had non-managing member known of these events he would not have agreed to these actions, his lack of knowledge was due in part to his own express consent and implied acquiescence for more than a decade during which the managing member was solely responsible for debtor's operations and management without input or assistance from non-managing member, and managing member was, for all intents and purposes, in full control of business operations of debtor.

In re Grady, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Motion for Rehearing based on newly discovered evidence must demonstrate that (1) the new evidence was not discovered until after judgment and that movant was excusably ignorant of the facts at the time of trial despite due diligence; (2) the evidence discovered must be of a nature that would probably change the outcome of the case; and (3) the evidence must not be merely cumulative or impeaching. Debtor did not exercise due diligence to obtain the "newly discovered" documents where Debtor did not make any formal discovery requests in an effort to obtain the documents prior to the evidentiary hearing and failed to request an adjournment of the evidentiary hearing to allow the documents to be obtained once their existence was disclosed at the hearing. Party's lack of diligence in conducting discovery insufficient grounds for a new trial.

22.44 Rule 60(b)(3) - Fraud, Misrepresentation or Misconduct

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment of fact when there is a duty to disclose, done to induce another to act to his detriment. Defendant failed to demonstrate that summary judgment was product of fraud by opposing counsel, where Defendant alleged only that she believed that a party should not be permitted to file a summary judgment motion while settlement negotiations are on-going. Party may file summary judgment motion at any time, and Defendant did not point to any representation by Plaintiff that Plaintiff would withhold filing a motion while settlement negotiations are ongoing.

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment where disclosure is required, done to induce another to act. Plaintiff must present clear and convincing evidence of questionable behavior that affect fairness of litigation. Plaintiff's Motion for Reconsideration of Order for Remand, alleged that Defendant's attorneys impaired Plaintiff's rights through fraud but failed to allege any substantive evidence that material facts were misrepresented or that the fairness of the proceedings was compromised.

Bellanti v. Land Escape Outdoor Maintenance, LLC, 2012 WL 3237933 (E.D. Mi. 2012) – Court properly reconsidered order dismissing adversary proceeding as sanction for failure to comply with order compelling discovery. Counsel filed notice of no response without informing court that between date of service of motion and date of certificate, opposing party paid the discovery sanctions. Conduct of counsel created a false impression that creditor had totally failed to comply with prior court order, an impression on which bankruptcy court relied in granting extreme discovery sanction of dismissal. Fraud for purposes of Rule 60 includes deliberate omissions when response is required by law, or when non-moving party has volunteered information that would be misleading without omitted material.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(3) allows court to set aside order that is product of fraud, misrepresentation or misconduct. Actions cannot be unintentional. Moving party must show that adverse party committed deliberate act that adversely affected fairness of proceeding or prevented movant from fully and fairly litigating their case. Even if adverse party acted recklessly or deliberately, motion will be denied where misconduct had no prejudicial effect on movant. Agreed Order approving settlement agreement and transfer of property from debtor to lender would be set aside on basis of debtor's managing member's misrepresentations where managing member, in willful disregard of debtor's Articles of Incorporation, filed bankruptcy petition without consent of non-member and expressly misrepresented to debtor's attorney that non-managing member had knowledge of, and presumably consented to, bankruptcy filing, and in order to further these mis-representations, either intentionally provided a false address for the non-managing member or, at least, acted recklessly by not ensuring that he provided correct address information.

22.45 Fraud on the Court

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – "Fraud on the Court" is defined as conduct on the part of an officer of the court; that is directed to the judicial machinery itself; that is intentionally false, willfully blind to the truth, or in reckless disregard for the truth; that is a positive averment or concealment when one is under a duty to disclose; and that deceives the court. Agreed Order settling litigation and directing debtor to execute deed-in-lieu would not be set aside as fraud on court as there was no evidence of any intentional or reckless action of any officer of court. Debtor's attorney reasonably relied on information provided by debtor's managing member that debtor's non-managing member knew of and consented to bankruptcy filing, and all actions taken by debtor's attorney were

in exercise of legal judgment, in debtor's best interests, and in no way deceptive or intentional. Although debtor's managing member may have misrepresented information, managing member was not attorney or other "office of court".

22.46 Void Judgment

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(4) authorizes relief from void judgment. Judgment is void only if judgment is one that, from its inception, was a complete nullity and without legal effect. Erroneous judgment is not void judgment. Absence of jurisdiction in the first instance results in judgment being void. However, mere error in exercising judgment does not render judgment void. Agreed Order dismissing case of Chapter 11 Debtor, to the extent it directed debtor to execute quit claim deed as part of settlement with lender, was not void judgment. Although debtor's managing partner failed to advise non-managing partner of bankruptcy filing, execution of settlement agreement or execution of quit claim deed, this did not result in bankruptcy court lacking jurisdiction over case or debtor. Although managing member may have violated Articles of Incorporation, that did not render the petition itself void or render any subsequent proceedings in that case void.

22.47 Equitable Relief

In re Cislo, 2012 WL 4325647 (Bankr. E.D. Mi. 2012) – Rule 60(b)(5) allows court to set aside judgment where applying the judgment prospectively is no longer equitable. Court denied Debtor's Motion for Entry of Judgment which Court construed as Motion for Relief From Judgment Denying Discharge Under Section 727. Denial of Discharge was based on Debtor's repeated failures to produce documentation to the Trustee, notwithstanding multiple orders and hearing compelling debtor to produce documents and debtor's multiple failures to produce documents by deadlines established by court, even when given additional time to do so after expiration of deadlines. Court acknowledged debtor's family difficulties and difficulties with alcohol abuse and incarceration, and lauded debtor's attempts to put his life back on track, but equities as a whole did not warrant relief from order, particularly where many other debtors facing the same hardships are able to comply with requests of Trustee and Orders of Court.

22.48 "Catchall" Provisions – Rule 60(b)(6)

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) –

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – "Catchall" provision of Rule 60(b)(6) applies only in extraordinary circumstances which are not addressed in any of the 5 preceding sections of Rule 60(b). Relief will be granted only in extreme circumstances where principals of equity mandate relief. Movant's request to set aside agreed order dismissing bankruptcy and directing debtor to transfer property alleged bases that fell within scope of four other subsections of rule, precluding relief under the catchall provision.

22.49 Failure to File Response

In re Juarez, Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion for Rehearing of Order Awarding Attorney Fees denied. Order entered after creditor failed to timely file a responsive pleading. Creditor's response only indicated that creditor did not receive the Motion on the date the Motion was filed, but did not establish that the Motion was not received at all. Motion failed to offer any explanation for failure to respond. Motion also failed to evidence any meritorious defense where Motion for Reconsideration admitted that funds were garnished post-petition in violation of stay and failed to return funds to debtor.

22.50 Time for Bringing Motion

Haney v. Educational Credit Management Corp., 2012 WL 3683533 (E.D. Ky. 2012) – Motion for Reconsideration constitutes motion to alter or amend judgment that must be filed within 14 days of entry of the order to which the motion is directed. Motion filed 21 days after entry of order must be denied as untimely.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Motion must be brought within reasonable time following entry of order that is subject of motion. Reasonableness depends on length and circumstances of delay, prejudice to opposing party as a result of delay, and circumstances warranting relief. One year time limit is in addition to, and not in lieu of, requirement that relief be sought in reasonable time, and if reasonable time happens to be less than one year, then movant must seek relief by earlier date. Motion by non-managing member of debtor filed in reasonable time. Although member first sought relief in state court and filed Rule 60 motion only after losing in state court, and motion was brought 16 months after order was entered which could be prejudicial to other party to agreed order who had, by time of motion, been in possession of debtor's property for 14 months, any prejudice was outweighed by fraud perpetrated by debtor's managing member who failed to notify non-managing member of bankruptcy filing, apparently intentionally prevented non-managing member from receiving notices from the court, and failed to notify movant of execution of settlement agreement with lender or execution of quit claim deed transferring property of debtor.

In re Sharfnter, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor's Motion for Reconsideration of Order Dismissing Case not filed within reasonable time. Debtor waited until six months after case was dismissed to file a Motion to Reopen Case, that was stricken by the Court as it was not signed. Debtor waited more than four additional months to file second Motion to Reopen Case. Motion to Reopen Case filed 11 months after dismissal is not filed within reasonable time.

Meoli v. Hoffman, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1) - (3) must be brought within one year of entry order from which relief is sought. Motion under Rule 60(b)(4) – (6) must be brought within reasonable time, not limited to one year.

In re Harvey Goldman & Co., Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Bankruptcy rule 9024-1 requires any motion for reconsideration to be filed within 14 days of entry of Order. Court lacked authority to extend deadline based on alleged “technical failure” with ECF that prevented filing of document. Court would extend time moving party waited until last minute to file Motion and then was prevented from doing so by ECF shutdown. Although Court had previously announced that ECF filing would be down for approximately 3 hours and yet moving party waited until 10:40 p.m. on last date to file Rule 59 motion and then attempted to do so only during the previously published shut down of ECF, the inaccessibility of the ECF system warranted extension to next business day for filing Motion.

In re Bailey, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Motion for Reconsideration was filed within 14 days after entry of the Exemption Order, the Court will consider the Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure (incorporated by Rule 9023 of the Federal Rules of Bankruptcy Procedure).

22.51 Conditional Grant of Motion

In re Real America, Inc., 2012 WL 1965667 (Bankr. N.D. Ohio 2012) – Rule 60 allows court to condition of grant of rehearing on “just terms”. Court order granting rehearing required debtor to reimburse creditor attorney fees and costs and rectifying monetary prejudice resulting from debtor’s default in the terms of the agreed cash collateral order and lender’s costs for actions taken in reliance on order granting relief from stay based on debtor’s default. Debtor required to pay stated amount by specific date, failing which the order granting stay would be re-imposed and motion for relief from that order would be finally denied.

H. Federal Court Review of State Court Actions

22.52 Limitations

Kapla v. FNMA, 485 BR 136 (Bankr. E.D. Mi. 2012) – Adversary complaint, to extent it sought to challenge validity of foreclosure sale of property and entry of state court order awarding possession based on deed received from successful purchaser, was prohibited by *Rooker-Feldman*. Counts directly challenged validity of deed and state court judgment and action would require Bankruptcy court to review state court lawsuit and make finding that state court judgment was incorrect on merits.

Wheeler v. Federal National Mortgage Assn., 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Invalidation of foreclosure sale would directly attack validity of foreclosure, requiring court to reverse state court judgment.

In re Sinta, 2013 WL 1946185 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Debtor filed Chapter 13 to prevent eviction following foreclosure sale and expiration of redemption. Bankruptcy Court granted stay relief and debtor appealed. Court refused to stay eviction proceedings as Federal court lacks jurisdiction to review State court eviction order.

In re Leigh, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. *Rooker-Feldman* resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under *Rooker-Feldman* to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and state court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind state court determinations of validity and amount of lien which is precluded by *Rooker-Feldman*.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – *Rooker-Feldman* prevents federal court from engaging in what amounts to appellate review of state court proceedings. *Rooker-Feldman* precludes federal courts other than Supreme Court from considering whether state court judgment was unconstitutional or violated federal law. However, *Rooker-Feldman* does not prevent federal court from considering matters that are independent of the state court order itself, even if federal claims deny legal conclusion previously reached by state court. Further, doctrine does not apply to third parties not in privity with parties to state court action. Bankruptcy Court not precluded by *Rooker-Feldman* from considering whether lender had properly perfected lien on property based on prior state court final judgment of foreclosure. Trustee was asserting independent grounds under Section 544 to avoid lien which did not challenge correctness of state court judgment that, as between parties, lien was valid and enforceable. Further, Trustee is not in privity with debtor at state court level.

Young v. Fannie Mae, 2013 WL 12842332 (N.D. Ohio 2013) – *Rooker-Feldman* doctrine precludes Federal review of state court decisions even if challenges allege that state court action was unconstitutional. Federal review of state court judgments is limited to Supreme Court.

Unsuccessful party in state court case is precluded from seeking what amounts to appellate review of state court order by federal court. Cause of action based on alleged wrongful foreclosure precluded by *Rooker-Feldman* where state court had entered final judgment foreclosing mortgage.

Sandweiss Law Center, PC v. Kozlowski, 2013 WL 396255 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of state court orders. Plaintiff's actions against debtor which alleged only that state court divorce judgment improperly distributed marital assets sought merely to overturn state court judgment in violation of *Rooker-Feldman*.

Rugiero v. Dinardo, 2012 WL 4800059 (6th Cir. 2012) – *Rooker-Feldman* precludes Federal court review of State court orders and judgments that are rendered prior to commencement of bankruptcy case. However, *Rooker-Feldman* does not preclude Federal Court review of efficacy and validity of State Court actions taken after commencement of bankruptcy case. Federal Court could exercise properly invoked concurrent jurisdiction to determine whether obligation is non-dischargeable Domestic Support Obligation notwithstanding State Court judgment entered post-petition that declared the obligation to be domestic support.

In re Kaid, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Federal Court is barred by Full Faith and Credit Act, 28 USC 1738, from looking behind or disregarding state court judgment. Where State court had already entered judgment in favor of creditor on guarantee of corporate obligation, Bankruptcy Court precluded from finding that creditor lacked standing to assert claim. Creditor had sold the note and mortgage but retained the guarantee, and then instituted litigation to collect on the guarantee and state court entered judgment. *Rooker-Feldman* precluded Bankruptcy Court from reconsidering whether creditor had standing to enforce the guarantee or whether severance of guarantee from note and mortgage precluded enforcement by original creditor.

Assasepa v. JPMorgan Chase Bank, 2012 WL 88162 (S.D. Ohio 2012) – *Rooker-Feldman* doctrine stands for the proposition that parties who lose in state court may not seek federal court review of the state-court proceedings. *Rooker-Feldman* does not preclude federal review if the plaintiff presents an independent claim even if predicate of federal claim denies legal conclusion that state court has reached. If the source of the injury is the state court judgment, then *Rooker-Feldman* precludes review. If the source of the injury is some other source, such as the actions of a third party, then plaintiff can maintain an independent cause of action. Plaintiff's complaint alleged violations of federal law including TILA and RESPA throughout the foreclosure process and that lender committed fraud by using "robo-signed" documents. Any injury plaintiff may have suffered is not the result of the foreclosure judgment itself, but of the processes and conduct throughout the loan and foreclosure process. Thus, actions may not be precluded by *Rooker-Feldman*.

Rugiero v. Dinardo, 2012 WL 4800059 (E.D. Mi. 2011) – *Rooker-Feldman* precludes Bankruptcy Court from reconsidering correctness of state court judgment. State Court had concurrent jurisdiction to determine whether obligation owed to creditor was non-dischargeable domestic support obligation under exception to automatic stay. *Rooker-Feldman* precludes Bankruptcy Court from reconsidering or reviewing that conclusion.

In re Mayer, 41 BR 702 (E.D. Mi. 2011) – *Rooker-Feldman* is implicated when a plaintiff complains of being injured by a state court decision. *Rooker-Feldman* is not implicated simply because a party attempts to litigate an issue in federal court that has already been litigated in state court. Where a federal plaintiff presents some independent claim, even if that claim denies a legal conclusion that a state court has reached in a case to which he was a party, *Rooker-Feldman* does not prevent Federal Court from asserting jurisdiction. Court will then look to state law to determine whether the defendant prevails under principles of preclusion. Action to avoid alleged preferential transfer of property, created when State Court imposed constructive trust, was not attack on validity of Final Judgment but only sought to determine effect of judgment in light of principals of bankruptcy law. Debtor's attack on provision of Divorce Judgment that purported to impress constructive trust was attack on prohibited by *Rooker-Feldman*. However, where Divorce Judgment was not clear as to whether specific property was subject to constructive trust, Bankruptcy Court can review matter to determine whether Divorce Judgment was sufficient to impose constructive trust.

Edwards v. Thornton, 2011 WL 134894 (6th Cir. 2011) – Action alleging violation of automatic stay violated *Rooker-Feldman*. Defendant transferred property pursuant to State Court Final Judgment. Court precluded from considering argument that underlying State Court judgment was void as Federal Court lacks subject matter jurisdiction to review validity of State Court judgment. Attack is not one on method used to enforce judgment, but on validity of judgment itself, which is matter which Federal Court cannot collaterally review.

Miller v. Deutsche Bank National Trust Co., 2011 WL 1807015 (10th Cir. BAP 2011) – Debtor prohibited from contesting lender's standing to enforce mortgage where issues had previously been addressed by State Court in proceeding to confirm non-judicial foreclosure sale.

Essek v. Vanderbilt Mortgage, Inc., 2011 WL 97716 (E.D. Ky. 2011) – *Rooker Feldman* precludes District Court action for damages resulting from state court foreclosure proceeding.

In re Bunting, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – *Rooker-Feldman* doctrine prohibits party losing in state court from seeking what in substance would be appellate review of the state court judgment in Federal Court based on the claim that the state court judgment violates the loser's federal rights or claims based on alleged state court errors in construing federal law or constitutional claims. State and federal claims need not be identical as long as the relief requested in federal court would effectively reverse the state court decision or void its ruling. Bankruptcy Court precluded from looking behind state court divorce judgment that resulted from long and extensive trial proceedings and multiple appellate proceedings including determination of amounts owed by debtor to ex-spouse.

However, Court is not precluded for reviewing debtor's claim of credits owed and offsets to the judgment amount using standards set under Rule 3001.

Willis v. Chase Home Finance, LLC., 2010 WL 3430712 (N.D. Ohio 2010) – *Rooker-Feldman* doctrine prohibits Federal Court from reviewing propriety of state court judgment of foreclosure. Where federal relief can only be predicated upon a conviction that the state court was wrong, action constitutes a prohibited appeal of the state court judgment. *Rooker-Feldman* doctrine precludes a district court's jurisdiction where the claim is a specific grievance that the law was invalidly or unconstitutionally applied in plaintiff's particular case as opposed to a general constitutional challenge to the state law applied in the state action.

In re Perkins, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - *Rooker-Feldman* does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as restful of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor.

Jones v. Federal National Mortgage Association, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - *Rooker-Feldman* prohibits Federal Court review of the proceedings already conducted by lower tribunal to determine whether it reached its result in accordance with law and applies to interlocutory orders and judgments of lower state courts. If the state court decision is the source of the injury, the doctrine bars jurisdiction in Federal court. If, on the other hand, the plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached then Federal Court has jurisdiction subject to state law determination principles of preclusion. State court denial of Motion to Dismiss based on alleged lack of standing does not preclude Federal Court from considering standing as state court order determined only that complaint stated cause of action and did not constitute final order on issue.

Williams v. Franklin Towers Homeowners Association, Inc., Case No. 08-55109 (9th Cir. 2010) - *Rooker-Feldman* prohibits Federal Court appellate review of State Court Order denying Motion to disqualify judge.

Madera v. Ameriquest Mortgage Co., 586 F.3d 228 (3d Cir. 2009) – *Rooker-Feldman* doctrine prevents Chapter 13 Debtor's action to rescind mortgage under TILA where State Court has already issued Judgment of Foreclosure. *Rooker-Feldman* prevents Federal Court for exercising appellate jurisdiction over State Court judgments. Rescission action effectively seeks finding that mortgage was invalid which would negate effect of foreclosure judgment in State Court. In foreclosing mortgage, State Court expressly or implicitly deemed mortgage valid.

Hunt v. LAJ, Inc., 2009 WL 2601921 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a "new" claim based on the treatment in the confirmed Plan. Creditor's action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.

Hamilton v. Herr, 540 F.3d 367 (6th Cir. 2008) - *Rooker-Feldman* doctrine prevents Federal Court from looking behind state Court judgment and acting as "super-appellate Court" for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, *Rooker-Feldman* does not preclude Bankruptcy Court from entering orders to enforce discharge. "State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court's discharge order." Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void *ab initio*. If the debt was not discharged pursuant to the bankruptcy Court's discharge order, then the state-Court judgment was not a modification of the discharge order and the *Rooker-Feldman* doctrine would bar federal-Court jurisdiction.

I. Section 341 – Court Authority

22.53 Generally

In re McFadden, 477 BR 686 (Bankr. N.D. Ohio 2012) – Court has extremely limited authority with regard to 341 meetings. Meetings under § 341 are within the authority of the United States Trustee. Court cannot preside over or attend 341 meetings by statutory mandate. Meetings are administrative in nature, not adjudicatory. Purpose is to allow creditors and trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. Creditor's examination of the debtor is not unfettered. If the debtor believes that the questions are beyond the scope permitted, or unduly repetitious, the debtor may object and even refuse to answer, and chapter 7 panel trustee given time constraints in conducting 341 meetings.

J. Discrimination

22.54 Section 525

Ellis v. Dep't of Homeland Security, 2013 WL 3480259 (Bankr. D. Colo. 2013) – Department of Homeland Security did not violate Section 525 by denying renewal of security clearance where “bad debt” threshold required DHS to determine whether security clearance should be revoked. Debtor can retain clearance by demonstrating that debtor is in Chapter 13 and is performing under Plan. Delay in renewing clearance was not due solely to Chapter 13 filing, but resulted from debtor’s failure to timely provide documentation to DHS showing that debtor’s was performing under plan.

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.

Myers v. Toojay’s Management Corp., 640 F.3d 1278 (11th Cir. 2011) – Bankruptcy Code’s antidiscrimination provision does not prohibit a private employer from denying employment to an individual on the ground that he is or has been in bankruptcy; although subsection (a) of the provision expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, subsection (b), which applies to private employers, is conspicuously different, in that it forbids the private sector from discriminating against those persons who are already employees but says nothing about denying employment because of bankruptcy.

Burnett v. Stewart Title, Inc., 2011 WL 754152 (5th Cir. 2011) - Section 525(a) specifically prohibits denial of employment based on bankruptcy only with respect to governmental employers, private employer can refuse to hire solely based on Chapter 13 case.

Rea v. Federated Investors, 2010 WL 5094250 (3d Cir. 2010) – Antidiscrimination provision of Section 525 does not prohibit private employer from discriminating against prospective employee on basis of prior bankruptcy filing. Although Section 525(a) prohibits a governmental agency from denying employment based on bankruptcy, Section 525(b) which applies to private employers does not contain that provision. Section 525 only prohibits private employers from discriminating against debtors who are already employed.

Davis v. Crumbley Backhoe Service, Case No. 09-16031 (11th Cir. 2010) – Section 525 does not apply to conduct that occurred prior to the commencement of the bankruptcy proceeding. Section 525(b), which prohibits discrimination in employment, applies only to “an individual who is or has been a debtor” and does not apply to an individual who “will be” a debtor at the time of the alleged discrimination. Debtor terminated from employment prior to filing bankruptcy has no cause of action against Employer under Section 525.

In re Richard, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Section 525 applies only to governmental units. A governmental unit is generally limited to the United States; States; Commonwealths; Districts; Territories; municipalities; foreign states; or other foreign or domestic government. “Government” does not include any entity that owes its existence to state action such as the granting of a charter or license. Otherwise private entity can be “government” if it carries out some governmental function or if there is a significant entwinement with governmental policies, management and control. Merely receiving public money and being subject to governmental control is not enough. Inquiry is whether the private entity is performing traditional and important governmental functions and whether there is evidence of entwinement with governmental policies, management or control. Lender which is member of Farm Credit Association, an independent agency of the executive branch that serves US agricultural interests, is sufficiently entwined with the US Government policies, management and control qualifies as governmental unit. However, lender’s refusal to pay patronage dividend does not seriously affect Debtor’s livelihood or the “fresh start”, which is the measure for whether actions constitute discrimination within Section 525. Further, implementation of standard practices and procedures that apply to all customers generally do not constitute discrimination in violation of Section 525 as the decision does not single out the Debtor for adverse treatment based on the discharge.

K. Substantive Consolidation

22.55 Authority to Substantively Consolidate Cases

In re Cyberco Holdings, Inc., 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Section 105 is statutory grant of authority to substantively consolidate cases and traces equitable origin to Bankruptcy Act of 1898. Substantive consolidation is the shorthand reference for a “long recognized” process that allows a court to exercise summary jurisdiction over all of the debtor’s property, and is accomplished thru the application of Section 542 regarding turnover and Section 502(j) regarding treatment of claims as dictated by equities of case. When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Section 105 is statutory grant of authority for the Court to exercise equitable remedies including substantive consolidation over non-Debtor parties. Bankruptcy Code creates an overriding federal interest in the

equitable and efficient distribution of a Debtor's property among its creditors which is consistent with purpose of substantive consolidation. Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Section 105 is statutory authority on which Court can substantively consolidate cases and includes ability to consolidate non-debtor and debtor entities. However, substantive consolidation is extraordinary remedy to be used sparingly, as doctrine expressly disregards legal separateness of otherwise legally distinct entities.

22.56 Standing to Request Substantive Consolidation

First State Bank of East Detroit v. Welsh, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Although Creditor lacked standing to seek substantive consolidation, Trustee's later intervention in adversary proceeding and joinder in creditor's request resolved standing issues.

In re Cyberco Holdings, Inc., 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Creditor lacks standing to seek substantive consolidation. Consolidation has its roots in Section 542 regarding turnover of property. Creditors do not have any direct right to seek relief under Section 542, as those powers are reserved to the estate. Even if Court could authorize derivative standing, Court would not do so where there was no evidence that Trustees had avoided pursuing whatever rights their respective estates would have had to take control of property of the estate.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

22.57 Grounds for Substantive Consolidation

First State Bank of East Detroit v. Welsh, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Complaint failed to state cause of action for substantive consolidation of debtor with non-debtor entities where complaint alleged only in conclusory terms that it was impossible segregate assets and liabilities of debtor and the non-debtor entities. Court would permit Trustee additional time to investigate and amend complaint if Trustee determined further prosecution of adversary complaint appeared warranted.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation requires a substantial identity between entities to be consolidated and that consolidation avoid some harm or produce some benefit. Benefit must “heavily” outweigh harm that would result from consolidation. Court will substantively consolidate non-debtor entity with debtor only where either: (i) the debtor and the non-debtor entity in their pre-petition conduct disregarded the separateness of their respective entities so significantly as to lead their creditors to treat them as one legal entity; or (ii) that post-petition, the assets and liabilities of the debtor and the non-debtor entity sought to be consolidated are so hopelessly scrambled and commingled that it is impossible to separate them and tell them apart thereby resulting in harm to all creditors. That two companies conduct joint board meetings or use consolidated financial statements is not sufficient to warrant substantive consolidation.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation is employed in cases where the interrelationships of the Debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

22.58 Effect of Substantive Consolidation

In re Appalachian Fuels, LLC, 2013 WL 1694769 (6th Cir. BAP 2013) – Substantive consolidation is employed in cases where the interrelationships of the debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. In any consolidated case, there is implicit in the Court's decision to consolidate the conclusion that the practical necessity of consolidation to protect the possible realization of any recovery for the majority of the unsecured creditors far outweighs the prospective harm to any particular creditor.

In re Cyberco Holdings, Inc., 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling assets and liabilities to produce common fund to satisfy creditors of consolidated entities. A cause of action for substantive consolidation is not the same as a cause of action to pierce a corporate veil, nor is it the same as a cause of action to determine whether, under state corporate law, there is a basis to find that two or more corporations are alter egos of one another.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities and claims of creditors against separate Debtors morph to claims against the consolidated survivor.

L. Duties of Debtor

22.59 Duty to Cooperate with Trustee

In re Wengerd, 2010 WL 4054322 (Bankr. N.D. Ohio 2010) – Section 521(a)(3) imposes continuing duty to cooperate with trustee as necessary to allow trustee to perform duties. Debtor required to provide documents and accounting of debtor's pre-petition business activities to enable trustee to perform duty to investigate financial affairs of the debtor of whether the information relates to exempt assets, whether the information relates to property of the estate and whether, in the debtors' opinion, the information is interesting.

In re Neal, 424 BR 235 (Bankr. E.D. Mi. 2010) – Debtor has a duty to cooperate with the Trustee in the performance of Trustee's duties. Debtor who occupied house that was property of the estate refused to cooperate with the Trustee in the marketing of the property. Court ordered Debtor to vacate the property immediately to permit Trustee to market and sell the property.

22.60 Schedules and Statements

Swanigan v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Debtor seeking bankruptcy protection must file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs including a legal causes of action. Duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action. The importance of this disclosure duty cannot be overemphasized.

22.61 Appointment of “Next Friend”

In re Blascak, Case No. 12-61973 (Bankr. E.D. Mi. 2012) – Debtor's Motion to Appoint debtor's daughter as “next friend to act on all matters to which the Debtor can act” pursuant to Federal Rule of Bankruptcy Procedure 1016 denied where motion does not allege or demonstrate that debtor is incompetent within the meaning of Rule 1016 and does not otherwise state adequate grounds on which relief can be granted.

M. Loan Modifications

22.62 Chapter 7 Proceeding

In re Rutledge, Case No. 10-61031 (Bankr. E.D. Mi. 2010) – Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court's subject matter jurisdiction or statutory authority to approve or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

In re Spanski, Case No. 10-52452 (Bankr. E.D. Mi. 2010) - Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court's subject matter jurisdiction or statutory authority to approve or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

22.63 Chapter 11 Proceeding

In re Shamoun, Case No. 10-66172 (Bankr. E.D. Mi. 2011) – Debtor's Motion for Court to Abstain from Approving or Disapproving Mortgage Modification denied. Any mortgage loan modification would necessarily require modification of Debtor's Plan under Section 1127(e) which requires Court approval.

22.64 Chapter 13 Proceeding

In re Wofford, 2011 WL 2200611 (Bankr. W.D. Wis. 2011) – Loan modification agreement negotiated by Chapter 13 debtors and lender whose claim was secured solely by interest in real property that was debtors' home did not have to be approved by bankruptcy court in order to be effective, and bankruptcy court would not grant lender's request for advisory opinion on propriety of modification solely to provide comfort to lender.

In re Alva, Case No. 10-58152 (Bankr. E.D. Mi. 2010) – Motion to approve loan modification is in essence a request for a plan modification as Motion sought to change treatment of Class 2 and Class 4 creditor. Relief must be requested in form of Plan Modification.

In re Kipling, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – Motion to approve loan modification is in essence a request for a plan modification. Court would deny Motion where record was incomplete and proposed modification did not appear to advance purposes of Chapter 13.

22.65 Breach of Contract

Williams v. Federal National Mortgage Ass'n, 2013 WL 5445883 (E.D. MI. 2013) – Debtor could not maintain action for breach of agreement to modify loan where debtor admittedly did not make trial modification payments as required and otherwise never complied with conditions of loan modification proposal.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Trial Loan Modification is not binding contract to enter into permanent loan modification. Trial modification contains conditions that, if met, trigger formation of contract to permanently modify loan. Failure to fulfill conditions excuses lender from any obligation to enter into permanent modification. Plaintiff's complaint did not allege that plaintiff had met all conditions and court would not infer that plaintiff met necessary conditions. Statement that plaintiff was told by defendant that he would receive a modification was not sufficient to sustain cause of action where terms of Trial modification had not been fulfilled and lender had no obligation to proceed with permanent modification.

22.66 Breach of Good Faith and Fair Dealing

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Implied covenant does not create new rights or obligations and cannot be used to circumvent or alter terms of the agreement. Bank's failure to offer loan modification is not breach of duty of good faith or fair dealing where Bank was under no duty to offer a loan modification or to assist plaintiff in avoiding foreclosure. Loan documents clearly laid out obligations regarding timely mortgage payments and bank's rights to proceed with foreclosure. Bank's actions that enforced rights afforded under the contract could not lack good faith or breach any duty of fair dealing.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Where court has already determined that there was no independent, valid contract between parties, plaintiff could not maintain cause of action for breach of implied covenant.

22.67 Negligence

Mullins v. FNMA, 2013 WL 5707798 (E.D. Mi. 2013) – Negligence requires a breach of a legal duty. Lender has no legal duty to review borrower for possible loan modification. Lender's duties are defined by the loan agreements. Plaintiff's complaint that alleged that lender had a duty to communicate honestly with her regarding possible loan modification and then breached that duty by failing to provide paperwork to complete modification while initiating foreclosure failed to state cause of action.

22.68 Fraud

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – To maintain action for fraud, complaint must allege that defendant made false statements of fact on which plaintiff relied. Complaint failed to state cause of action for fraud in connection with unsuccessful loan modification where complaint alleged that Defendant offered a loan modification that Plaintiff rejected. There was no evidence that defendant misrepresented the availability of a loan modification and defendant offered a loan modification that plaintiff rejected because of the specific terms of the modification.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Elements of a fraud claim are (1) an intentional misrepresentation of material fact; (2) the misrepresentation was made 'knowingly,' 'without belief in its truth,' or 'recklessly without regard to its truth or falsity'; (3) the plaintiff reasonably relied on the misrepresentation and suffered damages; and (4) the misrepresentation relates to an existing or past fact, or a promise of future action without the present intention to carry out the promise. Allegations that lender made inconsistent statements regarding whether plaintiffs were eligible for a loan modification do not rise to level of intentional misstatements. Fact that information is inconsistent or inaccurate, without more, does not speak with sufficient particularity and with a sufficient factual basis to support an inference that the information was conveyed with intent to defraud.

Nachar v. PNC Bank, NA, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Trial loan modification is not contract or promise by lender for permanent loan modification. Lender's promise to review request for loan modification does not create any enforceable obligation or basis for claim of promissory estoppel.

Edwards v. JP Morgan Chase Bank, NA, 2013 WL 1632560 (E.D. Mi. 2013) – Action for fraudulent or negligent misrepresentation requires that Defendant made a material representation, (2) that was false, (3) that Defendant knew was false, or that was made recklessly, without any knowledge of its truth, (4) that Defendant made it with the intention that Plaintiff would act upon it, and (5) the Plaintiff acted in reliance upon it, and (6) suffered damages. Lender did not make fraudulent statements when lender indicated that it would proceed with loan modification and provided documents to Plaintiff, but plaintiff would not agree to terms proposed.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Fraud requires (1) intentional misrepresentation of material fact; (2) knowledge of falsity or made with reckless disregard for truth; (3) reasonable reliance on the representation; and (4) misrepresentation involves a past or existing fact. Promise of future action is not fraudulent unless made with no intent to carry out promise at time promise made. However, inconsistent and contradictory statements by lender could amount to fraud. Lender made contradictory statements regarding a possible loan modification. One line of communication discussed eligibility for a modification, requested more information to continue moving the process forward, stated that the loan had been sent to underwriting for modification, and recognized that the Debtors were in Trial Loan Modification. At the same time, Lender sent multiple demand letters and foreclosure notices that contained no recognition of the Trial Loan Modification. Given contradictory content, one of the lines of communication must have been incorrect and that Lender knew that one of its positions was wrong. The communications suggesting that the Debtors were still

being considered for a loan modification may have lulled them into believing that such a modification would happen and may have encouraged them to continue paying the reduced mortgage amount. Lender's statements may have knowingly or recklessly encouraged the Debtors to continue making the reduced Trial Modification payments even after Lender knew that Debtors would not qualify for a mortgage modification pursuant to HAMP and had referred the loan to foreclosure.

22.69 Troubled Asset Relief Program (TARP)

Shirk v. JPMorgan Chase Bank, N.A., _____ (Bankr. S.D. Ohio 2010) – Alleged violation of provisions of the Troubled Asset Relief Program (TARP) by financial institution that accepted TARP funds, in purportedly failing to assist mortgage borrowers by making mortgage loans more affordable, did not give rise to private right of action against financial institution by borrowers.

22.70 Homeowners Assistance Mortgage Program (HAMP)

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – HAMP does not provide for a private right of action based on the lender's failure to offer a loan modification that is acceptable to the borrower. Plaintiff also failed to establish any contractual agreement between lender and plaintiff to modify the loan, where lender extended loan modification to Plaintiff but Plaintiff declined to accept the proffered modification.

Yates v. U.S. Bank, N.A., 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer's determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer's denial of a loan modification.

In re Yarbrough, 2013 WL 1500583 (Bankr. S.D. Ohio 2013) – While Court may lack jurisdiction to require lender to enter into HAMP loan modification, Court has jurisdiction to enter order compelling Creditor to file a report that details all actions including dates, which have been taken to process Debtor's loan modification requests; to state whether the lender recommended approval of the loan modification; if the lender did not recommend approval, to state the factual, regulatory and legal basis for denial and including copies of all relevant documents; and if the loan modification has been approved the terms of the loan modification offered to the Debtor. Court reserved jurisdiction to enforce terms of Order by contempt.

Citimortgage, Inc. v. Crawford, 2013 WL 1225387 (S.D. Ohio 2013) – Offer of trial loan modification is not contractual agreement for permanent loan modification. Trial loan modification documents state that the permanent modification becomes effective only when both parties sign final loan modification documents. Lender's acceptance of payments during trial loan period does not waive requirement for completed loan modification process or execution of final documents. HAMP loan modification is not enforceable under concept of promissory estoppel. Estoppel requires a clear and unambiguous promise; reliance on that promise; reliance that was reasonable and foreseeable; and damages caused by that reliance. Trial Loan Modification program did not have clear and unambiguous promise to modify loan where Agreement contained a number of conditions that had to occur before borrower would be considered for permanent loan modification. At best, Trial Loan Modification indicated that lender would consider a loan modification if borrowers fulfilled all obligations and that any modification would not be valid until signed by both parties. Borrowers could not have reasonably relied on any supposed promise where much of the language of the Trial Loan program is conditional.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Offer of Trial Loan Modification under HAMP is not an offer for a permanent loan modification at end of trial period. Lender rejected permanent loan modification as debtors did not qualify for HAMP loan modification as of the end of the trial period. Plaintiff did not allege that Lender's conclusion that debtors were not eligible was incorrect or that creditor otherwise rejected the loan modification on some improper basis. However, Creditor may have breached terms of Trial Loan Modification by continuing to send notices of foreclosure although terms of Trial Loan Modification stated that lender would suspend foreclosure proceedings as long as debtors made the required trial payments. Lender continued the foreclosure process including commencement of foreclosure action prior to advising debtors that debtors were not eligible for a permanent loan modification.

Adams v. Mortgage Electronic Registration Systems, Inc., 2012 WL 95332 (E.D. Mi. 2012) – There is no private right of action under HAMP.

Lessl v. CitiMortgage, Inc., 2011 WL 4351673 (E.D. Mi. 2011) – Owner had no cause of action under either HAMP or Section 600.3205c where mortgage holder offered owner a loan modification which owner declined. Mortgage holder is not required to reduce principal balance to amount shown in appraisal, particularly where Owner contends that property had significantly higher value. Although loan modification at value somewhat higher than the appraised amount may have been "shrewd", lender was not unreasonable in using a higher principal value than owner would accept. Further, HAMP discussions did not give rise to cause of action for promissory estoppel or misrepresentation. Statements regarding future conduct cannot form the basis of misrepresentation. Lender's statements that lender would consider matter further were not statements of existing fact but were at best only statements of future actions. Promissory estoppels also fails because lender never made promise that one would reasonable expect to produce action of definite and substantial character, and on which owner actually relied. Lender stated that lender would make good faith review of owner's loan modification request. Lender thereafter made two separate loan modification proposals which were rejected by owner.

In re Pauli, Case No. 08-64252 (Bankr. E.D. Mi. 2010) – HAMP requires that borrower initially qualify by demonstrating that monthly

mortgage payment (including taxes and insurance) ratio is greater than 31% of borrower's monthly gross income. HAMP contemplates an initial "trial" period. If borrower fully complies with trial program, borrower will be offered a permanent modification if the borrower still qualifies. Borrowers initially qualified for HAMP because mortgage payment plus taxes and insurance exceeded 31%. However, by the end of the trial period, Borrower's income had risen and interest rate changes caused mortgage payment to fall so that Borrower no longer met 31% ratio. Lender had right to withdraw HAMP modification and to reinstate mortgage on original terms. Trial period did not vest in Borrower any right to a permanent modification if Borrower no longer met qualification requirements.

22.71 National Housing Act (NHA)

Shirk v. JPMorgan Chase Bank, N.A., _____ (Bankr. S.D. Ohio 2010) – National Housing Act and its attending regulations do not expressly or implicitly create private right of action to mortgagors for mortgagee's noncompliance with the NHA or NHA regulations

22.72 Home Owners Loan Act

Tolliver v. Bank of America, 464 BR 720 (Bankr. E.D. Ky. 2012) – Home Owners Loan Act ("HOLA") applies only to loans which are held by federally insured depository institutions. Although originating lender was a financially chartered savings and loan, the loan had been subsequently sold and assigned to an entity which is not federally insured, particularly where factual allegations supporting complaint were directed solely to ask of the defendant in adding on allegedly unreasonable additional fees, costs and charges that were unrelated to any act of the originating savings and loan.

22.73 Home Ownership Equity Protection Act (HOEPA)

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Home Ownership and Equity Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – 15 USC Section 1639 prohibits lender from extending credit recklessly and without regard to ability to repay. Statute of limitations runs one year from date of transaction.

22.74 Michigan Compiled Laws Section 600.3205

Lopez v. Bank of America, 920 F.Supp.2d 798 (W.D. Mi. 2013) – Borrower was not prejudiced by lender's failure to serve written notice apprising borrower of right to request loan modification meeting, where borrower admittedly defaulted on loan, she received notice of the default, and was aware of the scheduled foreclosure sale.

Connolly v. Deutsche Bank National Trust Co., 2013 WL 4084742 (E.D. Mi. 2013) – Remedy for failure to comply with statute regarding loan modifications process is not to restore legal title to borrower after non-judicial foreclosure sale has occurred. Remedy is limited to demand that lender use judicial, rather than non-judicial, foreclosure process. Unless the borrower timely files a complaint seeking that relief, nothing in the statute prevents the use of non-judicial foreclosure proceedings.

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – Section 600.3205 allows foreclosure by advertisement where lender offers a loan modification and borrower rejects the proffered modification. Statute does not restrict lender's ability to foreclose where borrower rejects the offered modification.

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013) – Cause of action for failure to comply with mediation requirement of Section 600.3205c is conversion of non-judicial foreclosure to judicial foreclosure. Any remedy under Section 600.3205c(8) must be exercised prior to foreclosure sale. Once sale occurs, property owner has no right to conversion of foreclosure proceeding or any other remedy under Section 600.3205c.

Bowden v. American Home Mortgage Servicing, Inc., 2013 WL 195672 (6th Cir. 2013) – Section 600.3205(b) required debtor seeking mortgage modification mediation to contact housing counselor within 14 days after a list is provided. Debtor did not contact a counselor within allowed time. Debtor's failure to comply with statutory requirement was fatal to Debtor's cause of action. Although lender did, in fact, enter into discussions about a possible loan modification, those discussions did not waive Debtor's failure to comply with statutory requirements or allow Debtor to maintain action for alleged statutory violations.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Complaint failed to state cause of action for alleged violation of Section 600.3205c where complaint alleged that debtor requested mediation, creditor sent request for documentation to debtor, but debtor never returned documents. Failure to provide documents would not trigger requirement for mediation process. Further, remedy under Section 600.3205c is to prevent foreclosure by notice and to require judicial foreclosure. Plaintiff's failure to file complaint until after sale occurred, redemption expired, and title had passed left court without authority to set aside sale or to restore title to Plaintiff.

22.75 Statute of Frauds

Mullins v. FNMA, 2013 WL 5707798 (E.D. Mi. 2013) – Statute of frauds prevents enforcement of oral promises to modify loan where

agreement was not evidenced in writing. State law precludes enforcement of any oral promise to renew, extend, modify or permit delay in repayment or performance of loan unless evidenced by writing signed by the lender. Statute of frauds prevents not only action for alleged breach of promise, but also any action under promissory estoppel.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Oral promise to modify loan is barred by statute of frauds where state law prohibited enforcement of any oral contract for transfer of interest in land including any alleged contract to make or grant mortgage; and prohibited enforcement of any oral agreement to extend, renew, alter or supplement any agreement or commitment to lend money. Alleged oral modification is commitment to modify agreement or commitment to lend, within scope of statute of frauds. Although partial performance can constitute exception to statute of frauds, partial performance is purely equitable doctrine where plaintiff can show acts and conduct of the defendant that amount to representation that defendant would stand by agreement and not avail himself of statute of frauds to escape performance and plaintiff relied on that representation in continuing to perform plaintiff's obligations. Complaint did not allege any representations or statements by lender that would constitute waiver of statute of frauds or any inducement to plaintiff to continue to perform based on alleged oral promise.

22.76 Equitable Estoppel

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Equitable estoppel can remove oral agreement from statute of frauds if plaintiff demonstrates (1) conduct by defendant that amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, by defendant that such conduct shall be acted upon by the other party; and (3) defendant's knowledge, actual or constructive of the real facts. Plaintiff must also establish that plaintiff lacked knowledge or means of knowledge of the truth as to the facts in question; that plaintiff relied on the conduct of the party estopped; and that plaintiff prejudicially changed position based on defendant's conduct. Plaintiff failed to allege equitable estoppel in connection with oral agreement to modify loan where plaintiff failed to plead conduct of defendant with particularity as required in action for fraud, and specifically failed to state when any alleged promises were made, or who specifically made promises.

N. ECF Procedures

22.77 Electronic Filing Required

Bajas v. Wahrman, Case No. 10-5831 (Bankr. E.D. Mi. 2010) - Defendant's Answer to Adversary Complaint stricken where Defendants filed paper copy of answer without permission to file in traditional paper form.

22.78 Electronic Filing Excused

22.79 Service by ECF

In re Menden, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) - Electronic Case Filing system registered user consents to receiving electronic service of papers in lieu of mail service. ECF service of Amended Plan on Creditor's attorney who had filed Notice of Appearance was sufficient service pursuant to Rule 2002(g).

22.80 Sanctions

Schaffner v. US Trustee, 485 BR 130 (E.D. Ky. 2012) – Attorney disbarred for allowing third party to use attorney's ECF filing information and failure to supervise employee. Attorney hired former client, a convicted felon, to prepare bankruptcy documents. Employee filed using attorney's ECF information, with only cursory supervision. Employee began to accept fees and pocket money and failed to comply with code, resulting in actual and threatened dismissals. Attorney failed to keep accurate records; failed to ensure that clients were provided receipts for payments; and failed to deposit money into trust account. Attorney disregarded interest of clients and effectively trafficked in law license and ability to use electronic case filing. Disbarment was both necessary and appropriate sanction.

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.

O. Habeas Corpus

22.81 Authority to Issue Writ

Barlow v. McGee, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court, as Article I Court, has authority to enter Writs of Habeas Corpus to require person having custody over another to produce the other person for judicial proceedings.

22.82 Requirements

Barlow v. McGee, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court denied habeas petition where Defendant also filed Motion under Rule 78 to dispense with hearing and rule on the issues on the briefs submitted. Defendant already acknowledged that Court could rule without the need for a hearing, making it unnecessary put the government to the extraordinary burden, risk, and expense of transporting the Defendant for a hearing at which even he does not regard his appearance as necessary; the court would not be taking evidence eliminating any need for the Defendant to appear for purposes of testifying; and the court has afforded the Defendant ample opportunity to obtain counsel to represent him in this civil proceeding. Defendant's incarceration undoubtedly hampers his participation in this proceeding, but this is but one of the many consequences of his criminal activity, part of the liberty he lost upon conviction.

P. Choice of Laws and Forum Selection Clauses

22.83 Choice of Laws – Generally

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Where Federal Court has jurisdiction over portions of action as federal questions, court has supplemental jurisdiction over related state court actions. Federal court exercising supplemental jurisdiction must apply law of forum state to same extent state courts would do so if action was pending there. For diversity jurisdiction cases, federal court applies state law, including choice-of-law provisions. Loan agreements and other contractual relationships between plaintiff and defendant were all executed in Tennessee and Tennessee had most significant relationship with cause of action. As such, Tennessee law could control state law issues.

Saab Auto, AB v. General Motors Co., 2013 WL 3013677 (E.D. Mi. 2013) – In diversity action, choice of law is governed by law of forum state. Generally speaking, tort claim filed in Michigan is governed by Michigan law unless there is a rational reason to use law of some other jurisdiction. Where there is no conflict in laws between two different forums, court will not make choice of laws decision and will apply law of forum state. In litigation between US Company and Swedish company, Sweden has interest under Sweden law because Sweden has interest in protecting citizens and Swedish companies. However, Michigan's interests were at least as substantial, as action involves Michigan corporation with contacts throughout the State. Proper balance supported application of Michigan law.

22.84 Forum Selection Clauses - Enforcement Generally

ImagePoint, Inc. v. BFS Retail & Commercial Operations, LLC, 2013 WL 2457900 (E.D. Tn. 2013) – 28 USC Section 1404 requires transfer of case where contract between parties contains valid forum selection clause. Although forum selection clauses are not dispositive, forum selection clauses will be enforced unless enforcement is unfair or unreasonable. Where valid forum selection clause exists, burden is on plaintiff to show why clause should not be enforced and action transferred. In determining whether to transfer a case under § 1404(a), in addition to considering the forum-selection clause, the Court must consider (1) the convenience of witnesses; (2) the location of relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Enforcement was not inconvenient where some witnesses were located in Tennessee and others in Illinois, the chosen forum. Operative facts did not control where dispute was between Tennessee company and Illinois Company about work that occurred in various states. Clause included "any litigation" between the parties, which was broad enough to encompass both contract and quantum meruit claims. Although plaintiff has fewer resources than defendant, that is not basis to disregard otherwise valid forum selection clause.

22.85 Foreclosure Proceedings

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – evaluating force and effect of mortgage foreclosure action, outcome is determined by law of state in which property is located, notwithstanding separate forum selection clause in Promissory note. Note executed in Wisconsin with Wisconsin law stated as controlling did not control outcome or effect of foreclosure of property located in Michigan.

22.86 Exemption Statutes

Comfort Control Supply Company, Inc. v. Smith, Case No. 07-80005 (Bankr. W.D. Mi. 2011) – Law of foreign state will control garnishment issued by Michigan Bankruptcy Court where debtor lives in foreign state and funds to be garnished would be exempt under law of foreign state. Post-discharge collection efforts on Consent Judgment holding debt to be non-dischargeable. After the discharge, debtor moved to Colorado but was unable to secure employment and applied for and received unemployment compensation. Creditor obtained Writ of Garnishment from Bankruptcy Court and garnished Debtor's bank accounts. Debtor objected to attempt to garnish funds that were derived from unemployment compensation based on Colorado statute exempting unemployment funds. Colorado has sufficient interest in having its exemption law applied to overcome presumption that Michigan law should apply. Funds received and traceable to unemployment compensation exempt from Michigan garnishment. Funds that were co-mingled and could not be traced to unemployment versus some other source were not exempt.

Q. Governmental Sovereign Immunity

22.87 State Law Claims Against State

In re Shelbyville Road Shoppes, LLC, 2013 WL 646470 (Bankr. W.D. Ky. 2013) – Eleventh Amendment precludes federal courts from adjudicating state law claims against a state in federal court absent clear and unequivocal waiver of immunity by state. State law that provided for actions against state but proscribed single State Court in which action could be brought did not waive sovereign immunity for all purposes and did not allow federal court to assert jurisdiction. Bankruptcy Trustee can bring action only in court specified in state statute. Further, state statute waived immunity only to extent of actions on contracts. Trustee’s action did not seek to recover on the contract but sought to invalidate the contract on basis of fraudulent inducement, which is tort action.

22.88 Governmental Agencies and Subdivisions

Harchar v. IRS, 2012 WL 3968162 (6th Cir. 2012) – IRS is entitled to sovereign immunity in bankruptcy proceeding. Under 11 USC Section 106, when the government files a proof of claim against the debtor, the debtor may bring a counterclaim against the government if (1) the property that the debtor claims is the property of the estate, and (2) the debtor’s claim arises out of the same transaction or occurrence as the government’s claim. Debtor’s action against IRS based on alleged wrongful seizure of post-petition tax refund to satisfy pre-petition tax claim did not “arise out of the same transaction” as gave rise to IRS claim. IRS claim was based solely on pre-petition taxes and pre-petition conduct. Nothing IRS did or did not do, or that debtor did or did not do, after commencement of the case could affect or be considered part of debtor’s pre-petition tax liability or the claim filed for that liability.

Fugate v. Greeneville Light & Power System, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – Sovereign immunity is available only to arms of the state. Federal law determines whether an entity is an arm of the state. Whether a governmental entity is an “arm of the state” entitled to assert Eleventh Amendment sovereign immunity, as distinguished from a “political subdivision,” which is not immune, is governed by four factors: (1) the state’s potential liability for a judgment against the entity; (2) the language employed by state courts and state statutes to describe the entity, as well as the degree of control and veto power which the state has over the entity; (3) whether state or local officials appoint the entity’s board members; and (4) whether the entity’s functions fall under the traditional purview of state or local government. The potential liability of the State for the judgment is the “foremost factor.” Where the programs are designed to serve a specific local community weighs against characterizing it as an arm of the state, rather than a political subdivision. Agency is more likely to be characterized a political subdivision than an arm of the state. Municipality owned Electric Company was not “arm of the state” where there was no evidence that the State could be held to answer for a judgment against the Electric Company. Further, Electric Company was designed to serve a specific local community – the Town of Greenville.

22.89 Entity Entitled to Immunity – Native American Tribe

Bucher v. Dakota Finance Corp., Case no. 12-6004 (8th Cir. BAP 2012) – Indian Tribes and their subsidiaries are entitled to sovereign immunity. Section 106 of the Bankruptcy Code does not clearly and unequivocally abrogate that immunity. Trustee’s actions to recover payments owed by Tribe to Debtor and action to avoid lien held by Tribe subsidiary dismissed.

22.90 Congressional Abrogation

Fugate v. Greeneville Light & Power System, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – States surrendered their sovereign immunity when they ratified the Bankruptcy Clause in the Constitution. Congress has authority to enact bankruptcy legislation that treats states and state agencies in the same way as other creditors.

In re Platinum Oil Properties, LLC, 465 BR 621 (Bankr. D.N.M. 2011) – 11 USC Section 106 expressly abrogated sovereign immunity for all governmental units including “foreign or domestic government”. Native American tribe constitutes “other foreign or domestic government”. Tribe is bound by terms of confirmed Chapter 11 plan.

22.91 Waiver

Florida Department of Revenue v. Diaz, 647 WL 1073 (11th Cir. 2011) – State did not waive sovereign immunity with respect to alleged stay violation 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.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Governmental sovereign immunity has been abrogated with respect to action to determine amount or legality of any tax, and any fine or penalty relating to a tax. Sovereign Immunity is also waived if the governmental unit files a proof of claim for any claim against the governmental unit arising out of the same transaction or occurrence, which includes determination of tax debts where the IRS filed a proof of claim. Bankruptcy Court can adjudicate post-discharge dispute between IRS and debtor concerning amount of admittedly non-discharged tax debt.

22.92 Punitive Damages

In re Shelbyville Road Shoppes, LLC, 2013 WL 646470 (Bankr. W.D. Ky. 2013) – Bankruptcy Code Section 106 waiver of sovereign immunity limits abrogation to issuance of orders, processes or judgments but expressly excludes punitive damages. Complaint against

state alleging fraud and seeking punitive damages barred to the extent of the request for punitive damages.

R. Michigan Seller Disclosure Act

22.93 Generally

Cole v. Wood, 458 BR 898 (E.D. Mi. 2011) – Michigan Seller Disclosure Act requires that seller of real estate make disclosure of condition of property including whether seller aware of any settling, flooding, drainage, structural or grading problems; and that a seller disclose any pending litigation that could affect the property or the Seller's right to convey the property. Seller has a duty to disclose the condition or information to the degree indicated by the question on the disclosure form. Court may not impose on a seller a duty to disclose beyond what is plainly required by the statutory disclosure form. Seller had no duty to disclose litigation against prior owner for deficiencies in property where Seller had subsequently repaired those issues and was only seeking to recover the costs of repairs, where there was no evidence that repairs were inadequate or that Seller knew problems would recur.

S. Rule 2004 Examinations

22.94 Parties Entitled to Conduct

In re Underwood, 457 BR 635 (Bankr. S.D. Ohio 2011) – United States Trustee is party in interest entitled to conduct Rule 2004 Exam to determine whether creditor violated discharge injunction by failing to adjust mortgage records to reflect that debtor was current.

In re Rapoport, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Any party in interest can request an examination under Rule 2004. Party in interest is anyone who has a financial state in the proceedings. Creditor, a state court appointed receiver and plaintiff in pending state court fraudulent conveyance action, had standing to conduct financial investigation in his status as a creditor in the case.

In re Michalski, 449 BR 273 (Bankr. N.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents relating to components of Creditor's Proof of Claim in the Debtors' case. UST does not have to articulate a basis to dispute the Proof of Claim before exercising his right to conduct a Rule 2004 examination.

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents. Settlement between Debtor and creditor of Motion for Sanctions based on creditor's alleged violation of automatic stay did not render moot the subject of the UST examination. UST has interest in investigating the policies and actions of creditor regarding the accuracy, preparation and filing of proof of claim.

In re DeShetler, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents.

22.95 Scope

In re Underwood, 457 BR 635 (Bankr. S.D. Ohio 2011) – Rule 2004 exam should be limited so as to not be more disruptive and costly to the party being examined than the benefit to be achieved by the discovery. On creditor's examination, party seeking to take exam must show good cause, generally requiring evidence that the examination is necessary to establish a claim or that denial of the examination would result in undue hardship or injustice. Examination into lender's alleged failure to adjust mortgage records at conclusion of Chapter 13 proceeding properly requested information about specific debtor's loan history and communications between lender and debtor post-discharge. However, broad request for generally corporate policies regarding processing of payments and transfer of mortgage accounts from various mortgage servicers to this lender were excessive where UST made only vague allegations that information could lead to discovery of policies that are "in violation of the law" but did not specify any particular law or how the bankruptcy court would have jurisdiction to address those issues. Requests crossed line into full scale investigation of a non-debtor's private affairs without any serious attempt to connect them to this specific bankruptcy case.

In re Michalski, 449 BR 273 (Bankr. N.D. Ohio 2011) – Document requests that covered Creditor's internal policies and procedures represent the highest potential for intrusion into private business affairs and require a higher level of good cause before disclosure will be required. UST did not state sufficient cause for production of generally applicable policies and procedures because the Subpoena was issued in support of the Rule 2004 examination relating only to the Debtors; and did not demonstrate good cause for the production of the agreements between Creditor and third parties engaged in default servicing, property inspection and property preservation.

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – Although extremely broad, the scope of Rule 2004 is not unlimited. the Court can limit the scope of the exam where the harm to the party to be examined greatly outweighs those of the examiner such that the examination should be quashed or limited. UST's request for production of documents and for an examination limited to documents, policies and procedures that relate to the Debtor's account is not open-ended examination but instead is carefully tailored to those documents, policies and procedures.

In re DeShetler, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – Rule 2004 examination is not permitted for matters not related to the

financial condition of a debtor or a debtor's estate. Upon a creditor objection, the examiner must establish "good cause," taking into consideration the totality of the circumstances, including the importance of the information to the examiner and the costs and burdens on the creditor. Section 586 is broad enough to allow the UST to monitor the claims process, including through the investigation of proofs of claim filed by creditors, to assist in his duty of monitoring the progress of cases. Issues, with proofs of claims filed by mortgage lenders, affect the administration of cases. The level of good cause required to be established by the UST will vary depending on the potential intrusiveness involved. UST is entitled to review the original Note and any such documents that establish creditor as the holder of the Note under the Ohio Uniform Commercial Code and the date on which creditor came into possession of the original Note. To the extent that the "contemporaneously-kept transactional mortgage loan history on the Debtors' mortgage loan" is intended by the UST to capture documents in creditor's possession relating to the transfer of the Note or interests in the Note from one entity to another including documents pertaining to the chain of assignment of the mortgage and chain of endorsement of the note which would tend to support claimant's right to make the within claim in Debtor's bankruptcy case are clearly relevant to the UST's inquiry into creditor's legal basis and standing to file the proof of claim. Loan history relating to the payments made by the Debtors, charges made by the lender on the account, and other debits and credits relating to the loan evidenced by the Note and Mortgage are not properly within scope of Rule 2004 where UST is not challenging the amount of the claim filed.

22.96 Location of Examination

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – General rule is that depositions of corporate agents and officers should be taken at the principal place of business. Court would limit examination to the extent that the examination would take place in the district of creditor's principal place of business, or telephonically on terms to be agreed upon by the parties.

22.97 Motion for Examination – Granted

22.98 Motion for Examination – Denied

In re Hale, Case No. 11-33589 (Bankr. E.D. Mi. 2012) – Chapter 7 Trustee's Motion for Examination pursuant to Rule 2004 denied as unnecessary. Party to whom Rule 2004 Exam was directed was already party in action against Debtor in California to which Trustee, as Trustee, was already a party. Discovery could be fully obtained in the course of the California action and Trustee failed to demonstrate that adequate discovery could not be obtained through requests in California action. Ultimate outcome of litigation would be determined by California action where Court had already lifted the stay to allow California case to continue and staying the parallel adversary proceeding filed in Bankruptcy case. Rule 2004 is designed to allow Trustee to gather preliminary information, but once litigation is undertaken, discovery is governed by rules of court in which case was pending. Rule 2004 could not be used to circumvent applicable discovery rules.

XXIII. Sanctions

A. Authority to Impose

23.1 28 USC §1927

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Court can sanction any attorney who unreasonably or vexatiously multiplies proceedings in any case. Sanctions do not require finding of bad faith where attorney knows or reasonably should know that litigation tactics will needlessly obstruct litigation process. Attorney sanctioned where attorney made numerous errors in supplemental response to Motion to dismiss, including filing supplemental brief after briefing had closed; requesting leave to amend in improper manner and without first seeking consent of opposing counsel; requesting leave to amend in a motion that was not properly formatted or captioned; and failing to attach proposed amended complaint to request for leave to amend.

Hayes v. Internal Revenue Service, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – IRS cannot be sanctioned for filings made in District Court.

In re Greater Middle Missionary Baptist Church, 2011 WL 6349290 (Bankr. E.D. Mi. 2011) – Section 1927 allows court to impose sanctions against attorney who unreasonably and vexatiously multiplies proceedings in case. Sanctions can include excess costs, expenses and attorney fees reasonably incurred in response to the conduct. Section 1927 is intended to deter dilatory practices. Section 1927 requires something less than bad faith but something more than negligence or incompetence. Chapter 11 petition filed under emergency circumstances where attorney did not have sufficient time to fully investigate circumstances and title to property. Counsel was not experienced and accepted at face value client's version of facts without detailed independent investigation. Once counsel became fully aware of circumstances, counsel convinced client to not oppose motion to dismiss, surrender of property to creditor, and to stipulate to entry of state court judgment of possession. Counsel's conduct, particularly when coupled with timely corrective action upon discovery of true state of facts, did not rise to level of vexatious that so far exceeded zealous advocacy as to warrant sanctions.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Section 1927 is not applicable to actions or representations taken in state court proceedings. Court has no authority to impose sanctions against Trustee for actions taken by Trustee in state court employment litigation. For actions taken in Bankruptcy Court, sanctions under Section 1927 are warranted when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. When an attorney knows or reasonably should know that a claim pursued is frivolous, or that his

or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Bad faith is not required to support a sanction under Section 1927. Trustee's erroneous determination that certain assets had not been abandoned by the estate was not unreasonable or lacking in legal basis notwithstanding that the Court later determined Trustee's position to be incorrect and Trustee thereafter immediately terminated actions which Debtor contended were vexatious.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - Attorney who multiplies proceedings in any case unreasonably and vexatiously may be sanctioned by the Court. Sanctions are warranted when attorney objectively falls short of the obligations owed by a member of the bar to the Court and which causes additional expense to the opposing party. Sanctions are to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. Sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

Maloof v. Level Propane Gasses, Inc., 316 Fed. Appx. 373 (6th Cir. 2008) - Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.

23.2 Inherent Authority of Court

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 Monteagudo, Case No. 13-20044 (5th Cir. 2013) – Generally, court's inherent authority to impose sanctions requires some element of bad faith conduct. Bad faith can be inferred where conduct is patent from the record, even without specific findings by the sanctioning court. Bankruptcy Court properly sanctioned attorney for repeated and multiple filings of adversary proceedings under Section 523(a)(2) without pleading any facts or making any effort to plead fraud with specificity as required by Rule 9. Court had previously advised attorney that fraud must be pled with specificity yet attorney continued to routinely file adversaries that disregarded that admonition.

Richard v. Spradlin, 2013 WL 1571059 (E.D. Ky. 2013) – Court has authority to enter sanctions even in action where court otherwise lacks subject matter jurisdiction. Sanctions are part of court's ancillary jurisdiction that is independent of jurisdiction over underlying action, and allows court to manage its proceedings. Court had authority to enter sanctions against party who failed to comply with court's order regarding mediation, where party showed up late and, when he did show up, made demands for procedures that were outside established procedures for mediation. Party's action indicated that party did not and would not engage in meaningful negotiations and party demonstrated bad faith and disrespect for mediation process that was harmful to other parties and caused an unnecessary delay in the orderly resolution of the disputes. Bankruptcy court cited party's failure to prepare for the mediation and failure to participate in the mediation as the bases for sanctions.

In re Mehlhose, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court's inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later re-filing Court can award attorney fees and costs where the party acted in bad faith, vexatiously, wantonly or for oppressive reasons. Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

In re Burton-Katzman Development Company, Inc., Case No. 10-66734 (Bankr. E.D. Mi. 2012) – Chapter 7 proceeding dismissed where schedules showed no assets or liabilities and were, in fact, completely blank; and case was allegedly filed pursuant to a corporate resolution dated 2 years after debtor had filed Certificate of Dissolution with State of Michigan. Petition filed in bad faith effort to stall litigation between City of Dearborn as Plaintiff and Debtor and its principals as defendants. Court imposed sanctions against Debtor and its principals for fees and expenses incurred by City in having case dismissed.

In re MacFarland, 462 BR 857 (Bankr. S.D. Fl. 2011) – Debtor’s 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.

Wells Fargo Bank, N.A. v. Stewart, 647 F.3d 553 (5th Cir. 2011) – Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Court has inherent authority to impose sanctions when party acts in bad faith, vexatiously, wantonly or for oppressive reasons. Bad faith for purposes of sanctions requires (1) the claims advanced were meritless; (2) counsel knew or should have known the claims were meritless; and (3) the motive for filing the suit was for an improper purpose such as harassment. Mere lack of success is not basis for sanctions. Trustee’s opposition to Motion to Enforce Abandonment did not constitute pursuit of meritless claim or action where Trustee had good faith belief that asset had not been properly disclosed and could not have been abandoned; and once Court determined that asset had been abandoned, Trustee immediately terminated any effort to pursue recover of asset.

Dorbeck v. Sykora 2010 WL 4923215 (E.D. Mi. 2010) – Complaint filed in District Court alleged that Plaintiff held ownership interest in corporation. Plaintiff was also Debtor in Chapter 13. Bankruptcy documents failed to disclose any ownership or other interest in corporation. Court has inherent authority to assess attorney fees where claims advanced were meritless, counsel or the party knew or should have known this, and filing the suit was for an improper purpose. Plaintiff’s complaint was devoid of legal or factual merit as it clearly violated concept of judicial estoppel; Plaintiff was well aware at start of proceedings of factual inconsistencies in pleadings filed at District Court versus those filed in Bankruptcy Court; and Plaintiff demonstrated utter disregard for sanctity of judicial process by failing to disclose assets in Bankruptcy court and then filing complaint based entirely on interests that he denied having in Bankruptcy proceeding.

In re Wilson, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) - Court’s contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

In re Denison, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) - Court’s contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

Fokkena v. Countrywide Home Loans, Inc., 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has inherent power to sanction vexatious conduct presented before the Court. US Trustee’s Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor’s mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in “similar conduct”.

In re Steiner, Case No. 08-33717 (E.D. Mi. 2009) –Debtors’ Chapter 7 Attorney failed list tax refunds based on erroneous belief that tax refunds were not assets of the Bankruptcy estate. After Debtors amended to disclose and exempt the tax refund, the Court set an evidentiary hearing on the issues of good faith, but Debtors’ counsel failed to advise Debtors to attend, requiring an adjournment of that hearing. Court sanctions Debtors’ counsel \$600 to pay to the estate to compensate the Trustee for time spent preparing for the evidentiary hearing that had to be adjourned and an additional \$300.00 for failing to understand that tax refunds are part of the estate and must be scheduled as such thereby causing the Trustee to expend time and effort to recover those tax refunds for the estate.

23.3 Rule 9011

Ettinger & Assoc., LLC v. Miller, Case No. 12-3151 (3d Cir. 2013) – Safe harbor provision of Rule 9011 requires that party to give 21 days notice before filing motion. If safe-harbor notice is given by mail, Rule 9006 requires three additional days. Compliance with safe-harbor provisions is condition of relief under Rule 9011, and party who fails to comply cannot prevail on 9011 motion. Sanctions motion denied

where moving party mailed 9011 notice and then filed motion 23 days later. As party failed to strictly comply with Rule 9011 as extended by Rule 9006, Motion was defective as a matter of law.

Winterton v. Blue Pine Group, Inc., Case no. 11-60059 (9th Cir. 2013) – Rule 9011 provides for sanctions for conduct that is baseless and made without reasonable inquiry. Counsel filed and continued to pursue a bankruptcy petition without adequate investigation that it was legitimate, and after he was put on notice that clients lacked authority to file it. Sanctions must be allocated between attorney and client based on culpability, and must be limited to what would be sufficient to deter repetition of the conduct. Sanctions reduced where amount awarded by Bankruptcy Court did not allocate between counsel and client but instead held counsel solely responsible, where error stemmed in part from reliance on debtor and debtor's litigation and corporate counsel. Further, amount awarded exceeded amount which would be sufficient to deter future conduct.

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 M.P. Construction Company, Inc., Case No. 12-1306 (9th Cir. BAP 2013) – Attorney sanctioned for filing petition for corporate debtor where debtor had no assets and filing was done solely to benefit insiders by allowing debtor to transfer license to insider without any effort to answer to judgment creditors. Filing is frivolous if it is baseless in fact and made without reasonable inquiry. Attorney has duty to conduct reasonable investigation. Bankruptcy petition is "pleading" for which sanctions can be awarded. Petition is not within "safe harbor" provision. As such, creditor is not required to issue "safe harbor" letter and to give debtor opportunity to withdraw petition before seeking sanctions.

In re Halcomb, 2012 WL 3778876 (Bankr. N.D. Ohio 2012) – Motion for 9011 Sanctions fatally defective where allegedly offending pleading was withdrawn two days after party was first presented with 9011 demand.

In re Dahlgren, Case No. 11-2794 (3d Cir. 2012) – Attorney sanctioned under Rule 9011 for promulgation of Amended Chapter 13 Plan that was substantively identical to original plan, confirmation of which had already been denied. Although initial plan was not confirmed, original plan did not lack good faith basis in law or reasonable argument for modification or extension of law. However, after Bankruptcy Court denied confirmation, holding that the plan was "patently unconfirmable", counsel filed amended plan that was substantively identical. At that point, counsel knew that the provisions were not confirmable and lacked any good faith basis to believe that the plan could be confirmed, warranting sanctions under Rule 9011.

Budzynski v. US, 2012 WL 3150836 (E.D. Mi. 2012) – Motion for sanctions under Rule 9011 was itself frivolous and subject to sanctions where moving party failed to satisfy 21-day notice requirement before filing Motion. Rule 9011 requires strict compliance with "safe harbor". Further, conduct complained of was issuance by IRS of notice of levy automatically generated by computer where IRS immediately advised counsel that IRS had no intention of levying. Motion for sanctions was not reasonable and lacked any good faith basis.

Huntington National Bank v. Bruinsma, 475 BR 602 (Bankr. W.D. Mi. 2012) – Court can impose sanctions under Rule 9011 on court's own initiative. Court should enter Order to Show Cause that identifies specific conduct that violates attorney's accountability for his own representations. Attorney sanctioned for representing to court that Michigan recognized common law landlord lien where lease agreement did not grant any lien. Court concluded that Michigan did not have, and has never had, any general common-law lien on tenant's property to secured payments under the main lease. Court can impose monetary sanction for actions that result in waste of court's time. Court did not impose monetary sanctions in this case, noting that "stern warning" should be sufficient to deter future conduct.

In re Lewis, 2012 WL 1682587 (2012 WL 1682587 (Bankr. N.D. Ohio 2012) – Chapter 13 trustee filed a motion for the imposition of sanctions against Debtor's Attorney alleging that no reasonable basis existed for Attorney to assert in debtor's Chapter 13 plan that there was no arrearage claim by Lender with regard to the East Cleveland property. Attorney was on notice of the arrearage because of Attorney previously represented debtor. Attorney admitted having knowledge of the foreclosure proceedings, but asserted that he relied on information from the debtor's financial advisor, indicating that a representative of Lender had agreed to a loan modification that would add the arrearage to the end of the mortgage. It was not reasonable to rely solely on advisor's representations as to Lender's purported agreement to modify its loan with the debtor. Attorney should have obtained something in writing from Advisor, the debtor, or Lender to verify that a loan modification was at least under active consideration; or Attorney could have noted in the "special provisions" section of the plan that the arrearage would be addressed in a loan modification with Lender; or Attorney could have waited up to 14 days after filing the Chapter 13 case to file the Chapter 13 plan. It was not reasonable, under the circumstances, for Attorney to make the *unqualified* representation in the debtor's Chapter 13 plan that the estimated mortgage arrearage was \$0. Attorney did not fall within the safe harbor provision of Rule 9011 by moving for voluntary dismissal of the debtor's bankruptcy case. Safe harbor requires that the challenged paper, claim, defense, contention, allegation, or denial [be] withdrawn or appropriately corrected. Attorney did not amend the plan or withdraw the plan as required to fit safe harbor as dismissal did not "correct" the challenged paper. Rule 9011 permits a broad array of nonmonetary sanctions, plus monetary sanctions limited to what would be sufficient to deter such conduct in the future. Minimal monetary sanction, coupled with the nonmonetary sanction associated with a written finding of a Rule 9011 violation, is sufficient to deter future violations.

Attorney directed to pay the sum of \$200.00 to the clerk of court . Lack of prior sanctions and no indication that Attorney acted in bad faith would not justify award of attorney's fees to the Chapter 13 trustee.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – Sanctions under Rule 11 and 28 USC Section 1927 requires proof of unreasonable and vexatious conduct; that multiplies the proceedings; and amount of sanctions must bear financial nexus to proceedings. Rule 11 allows for sanctions for a pleading that is in bad faith for an improper purpose; that has no reasonable factual basis, or ; is based on a legal theory with no reasonable chance of success. Claims must be “objectively frivolous”. Rule 11 does not require showing of subjective bad faith. Plaintiff’s complaint did not allege any factual basis support allegation that creditor filed false statements or that any alleged inaccuracies were done with intent to hinder, deceive or harass plaintiff. Creditor filed copy of loan agreement but failed to redact social security number. Creditor immediately realized error and withdrew the exhibit and re-filed a redacted copy.

In re Taylor, 2011 WL 3692440 (3d Cir. 2011) – Attorney who blindly relied on computerized information without contacting creditor directly or taking any other steps to verify data violated Rule 9011 in filing proof of claim, response to objection to claim and Motion for Stay Relief. Proof of claim contained factual errors; the wrong mortgage was attached, debtors’ monthly payment was incorrect and the value of the debtors’ home was understated by \$100,000. Computerized data base did not reflect payments received by creditor and attorney lacked ability to contact creditor to investigate debtor’s assertions. Attorneys also served requests for admissions for matters that attorneys knew or should have known were false, including request for debtor to admit that debtor had not made payments when debtor had made payments and creditor accepted those payments. While it is “usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information”, reliance assumes a reasonable attempt at eliciting information from the client. Attorney must exercise independent professional judgment and make reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. Attorney cannot settle for only the information that the client that attorney should be provided with. Attorney preparing the court papers did not have information about the debtors’ equity in the home, yet the signed documents stated no equity. A minimal inquiry to creditor would have revealed the dispute over the flood insurance and that the debtors were continuing to make payments, yet the papers indicated that the debtors were in default, with no reference to the insurance issue. Attorney preparing the signed documents ignored clear warning signs in the debtors’ claim objection and response to the stay motion. “At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and avoid any further errors.”

Byrd v. Arvest Bank, Case No. 10-8071 (6th Cir. BAP 2011) – Sanctions under Rule 9011 are based on whether the conduct was reasonable under the circumstances as they existed when the potentially sanctionable conduct occurred. Bankruptcy Petition filed for corporate entity without authorization is sanctionable under Rule 9011. Once Court finds violation of Rule 9011, Court has broad discretion in fashioning sanctions with the twin goals of deterrence of the offending party and compensation to the injured party, and may include reasonable attorney fees taking into account the sanctioned party’s ability to pay. Court properly awarded injured secured creditor sanctions of more than \$42,000 against person who signed petition on behalf of limited partnership without authorization.

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Motion for sanctions under Rule 9011 may not be filed or presented to the court unless the alleged offending party has been provided with twenty-one days to withdraw or correct the improper pleading. Debtor failed to comply with Rule 9011 in requesting attorney fees for first time as a part of Amended Complaint.

Rankin v. Lavan, 2011 WL 3701441 (6th Cir. 2011) – Debtor’s repeated filings against numerous entities, including request for Grand Jury investigation to charge various parties with violations of Civil Rights and RICO, without evidence and with “a marked absence of coherence”, and Debtor’s general litigious behavior which culminated in Bankruptcy Court injunction against Debtors filing any further pleadings warranted imposition of sanctions for abusive conduct.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Rule 11 requires the moving party to provide notice to the other party with the other party having 21 days to withdraw the challenged document or argument, before any sanctions can be awarded. Prior notice is “mandatory prerequisite” to sanctions. Debtor’s failure to provide notice to the Trustee prior to filing Motion for Sanctions precludes award under Rule 11.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Rule 11 authorizes sanctions for a complaint that is presented for an improper purpose such as harassment or unnecessary delay or expense. Government’s complaint in District Court to determine tax debt filed while there was also adversary proceeding in Bankruptcy Court to determine same issue was not done with intent to harass. Government had legitimate interest in filing action in District Court where there was non-debtor co-obligor and government intended to have Bankruptcy Court abstain so that all matters could be adjudicated at one time in one proceeding. Further, movant failed to serve notice of intent to file the Rule 11 motion 21 days in advance as required. Although movant may have believed that any demand would only have been ignored, Rule 11 requirements for notice must be strictly complied with.

Proctor v. Educational Credit Management Corp., 2010 WL 4919670 (Bankr. S.D. Ohio 2010) – Plaintiff’s conduct in pursuing second complaint against debtor was unreasonable where plaintiff had previously filed identical complaint against same defendant and lost the prior action on Summary Judgment. Sanctions appropriate under Rule 11. Sanctions should be measured by goal of deterrence and must impose the least severe sanction that is likely to deter. Motion to Dismiss clearly identified complaint as offending pleading and plaintiff was repeatedly informed by letter than the complaint needed to be dismissed or sanctions would be sought. Defendant sufficiently identified pleading that Defendant contended should be withdrawn. Sanctions can include all attorney fees incurred after

identification of the offending pleading, including fees incurred in discovery, that are naturally incurred as a result of defending the suit. It is not necessary for party to provide an expert witness regarding the reasonableness of its attorneys fees because the court is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value. Plaintiff's history of filing frivolous claims warranted award of defendant's attorney fees in full, as anything less will not provide a sufficient deterrence of future conduct.

Burns v. George Basilikas Trust, 599 F.3d 673 (D.C. Cir. 2010) - Rule 9011 sanctions were improperly imposed against counsel whose argument was supported by unreported district court case.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - The test for imposing Rule 11 sanctions is "whether the attorney's conduct was reasonable under the circumstances." Trustee's Motion to Dismiss Appeal was not unreasonable where Debtors' designation and statement of issues were not filed on time. Untimely filing has been a basis for dismissal in the past, rendering Trustee's motion for dismissal reasonable under the circumstances.

D.A.N. Joint Venture III, L.P. v. Shekerjian, Case No. 07-55859 (Bankr. E.D. Mi. 2010) – Court dismissed adversary seeking to deny discharge after concluding that Plaintiff failed to prove that it held assignment promissory notes and, therefore, lacked standing to maintain the action and that promissory notes had been satisfied by Debtor before Plaintiff purported to acquire an interest in the notes. Sanctions under Rule 9011 are appropriate only where the attorney's conduct was unreasonable under the circumstances. A good faith belief in the merits of the action, standing alone, is not sufficient to avoid sanctions. However, where there appeared to be evidentiary support for Plaintiff's claims, Plaintiff's ultimate failure to prevail in the action does not warrant imposition of sanctions. Plaintiff made a reasonable investigation before instituting the proceeding and Plaintiff's complaint and supporting evidence was sufficient to survive pre-trial motions and to proceed to trial.

In re Lundeen, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Imposition of sanctions under Rule 9011 is discretionary with the court. Sanctions should only be imposed if it is patently clear that a claim has absolutely no chance of success, and all doubts should be resolved in favor of the signing attorney. Court refused to impose sanctions where it would not have been patently clear to counsel at the time the involuntary petition was filed that the petition had no chance of success. Alleged personal liability was a close question and that the Petitioning Creditors and their counsel had a good faith (albeit wrong) belief that debtor's personal liability was not in bona fide dispute.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - By signing pleading, Counsel certifies that to the best of counsel's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) pleading is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The test for imposition of sanctions under rule is whether individual attorney's conduct was reasonable under the circumstances. A good faith belief in merits of case is not necessarily sufficient to avoid sanctions and proof of bad faith is not required for award of sanctions. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

Maloo v. Level Propane Gasses, Inc., 316 Fed. Appx. 373 (6th Cir. 2008). Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.

Fokkena v. Countrywide Home Loans, Inc., 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has authority under Rule 9011 to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".

Countrywide Home Loans, Inc. v. McDermott, 426 B.R. 267 (N.D. Ohio 2010) - Rule 9011 allows a court to award sanctions on its own initiative only after entering an order describing the specific conduct that appears to violate the rule and directing an attorney, law firm, or party to show cause why it has not violated the rule. Bankruptcy court's imposition of sanctions without the requisite show cause order resulted in creditor lacking notice that the bankruptcy court, on its own initiative, would be considering sanctions. Creditor's "errors" consisted of the filing of *one* proof of claim and *one* objection to confirmation, neither of which was supported by the actual facts. Record was devoid of evidence of similar errors in any other bankruptcy case. Bankruptcy Court's statement that Creditor's systemic inefficiencies had caused it to file a proof of claim and an objection to confirmation of plan was not supported by the record evidence and it was an abuse of discretion for the bankruptcy court to hold that the mistaken filing of two documents amounted to sanctionable conduct. Although Court may have been frustrated by what the court perceived as a systemic problem in the mortgage servicing industry, evidence in this case did not support sanctions including sweeping directive that Creditor completely change policies and procedures for filing proofs of claim and attach documents not required by the Rules and Code.

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

B-Line, LLC v. Wingerter, 594 F.3d 931 (6th Cir. 2010) – Creditor did not violate Rule 9011 by filing Proofs of Claim without attaching originating documents and in relying on warranties and representations provided by original creditor when purchasing debt obligations. Under the Creditor’s standard Contract, the seller of the debts warrants that the debt is legal, valid and binding and that it has not been disputed by debtor or a Trustee and that no objection to a claim has been lodged. At the time Creditor filed the Proof of Claim, creditor had no reason to believe that the warranties and representations were false or that the debt was not valid and enforceable. Selling creditor had a strong track record – of 1,017 claims sold by this creditor to B-Line, only 2 were ever found to be invalid and only 5 were ever disputed. B-Line also conducted independent review before purchasing accounts, reviewing documents to ensure completeness and consistency, and only then filed a Proof of Claim. Thus, B-Line made a reasonable inquiry into the validity and enforceability of the debt before filing the Proof of Claim, satisfying its obligations under Rule 9011. Although Debtor objected to the Proof of Claim and B-Line ultimately withdrew the claim as it could not find the original loan documents, this does not establish that the claim was filed in bad faith in the first instance.

In re Wingerter, 2008 Fed App 0014P (6th Cir. BAP 2008) *reversed* 594 F.3d 931 (see above) – Bankruptcy Court imposed sanctions against debt purchasing company for filing a proof of claim without making any investigation as to the validity or enforceability of the underlying obligation and for filing proof of claim which contain erroneous information and was in complete and fail to attach an itemized statement of the account. Debt purchasing company stated that Asset Purchase Agreement pursuant to which company acquired debt required seller to confirm that the Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations in the claim is not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing companies procedures for filing proves of claim were not based on a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the bankruptcy Court, must obtain originating documentation or, when such documents and not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the Debtor. The purchaser should then attached to the proof of claim from the originating documents or an affidavit explaining the non-availability of those documents so the Debtor and other interested parties are given fair notice of the source and particulars of the claim. Bankruptcy Court did not impose monetary sanctions, any expenses incurred by debt purchasing company to be a sufficient sanction.

23.4 Discharge Injunction

In re Jones, 2012 WL 5385682 (Bankr. E.D. Ky. 2012) – Lender violated discharge injunction by filing state court foreclosure action that also sought to collect debt as personal liability after discharge in completed Chapter 13 proceeding. Although Discharge injunction does not carry private right of action, Court can enforce injunction through contempt proceedings. Sanctions are warranted where creditor’s violation is willful, which requires that creditor have knowledge of discharge and that creditor willfully brought state court action to recover discharged debt. Sanctions awarded for attorney fees incurred as a result of creditor’s conduct in sum of \$2047.50.

Marshall v. PNC Bank, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – There is no private right of action for alleged violation of discharge injunction. Remedy must be sought by motion for contempt via contested matter, and not in an adversary proceeding. Adversary would be dismissed without prejudice to debtor seeking relief via contested matter.

Holley v. Kresch Oliver, PLLC, 2012 WL 2777735 (Bankr. E.D. Mi. 2012) – Remedy for violation of discharge injunction is through civil contempt proceeding flowing from Section 105. Damages include \$16,837.50 in attorney fees as reflecting damages incurred by Plaintiff as a result of defendant’s violation of discharge injunction. However, Court would not award punitive damages because punitive damages may be awarded only in criminal contempt proceeding and bankruptcy court lacks criminal contempt powers. Further, even if court has authority, court would do so only where conduct is particularly egregious. Defendant’s violations did not rise to the level which would constitute particularly egregious.

In re Vanwoert, Case No. 11-33514 (Bankr. E.D. Mi. 2012) – Creditor admittedly violated both automatic stay and discharge injunction by sending collection letters after creditor had been notified of case filing, both before and after debtor received discharge. Although debtor did not have any actual damages, impact of letters on debtor, an elderly widow, were “substantial”. Sanctions awarded for \$500 each for first two violations and \$1500 for third violation which occurred after creditor had actual knowledge of entry of discharge. Court also awarded \$5,890 in fees.

In re Moore, Case No. 09-2783 (Bankr. W.D. Mi. 2012) – Creditor violated discharge injunction by garnishing debtor’s state tax refund post-discharge. Creditor ordered to refund garnished funds to debtor and, if creditor fails to pay by date specified, amount would increase by \$10 per day until paid in full.

In re Martin, Case No. 11-8052 (6th Cir. BAP 2012) - Creditor willfully violated discharge injunction when he filed a post-discharge state court lawsuit where the parties had not entered into a reaffirmation agreement during the pendency of the debtor’s case. Debtor’s voluntary post-petition payment did not obligate her to continue making payments to the creditor or somehow waive benefit of discharge of underlying obligation. Parties did not enter into a new contract for payment of the debt because mutual assent and consideration independent of the discharged debt were both lacking. The creditor’s mistaken belief that his actions were somehow outside the scope of

524(a)(2) does not remedy a violation of the discharge injunction. Debtor was entitled to an award of actual damages for the violation, including attorneys' fees.

Haney v. Educational Credit Management corp., 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have an provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding. Creditor's collection efforts for non-discharged student loan did not violate discharge injunction.

Bridges v. Grange Mutual Casualty Company, 2011 WL 5837053 (Bankr. W.D. Ky. 2011) – Section 523(a)(9) does not require formal action in Bankruptcy Court to declare debt non-dischargeable. Creditor, as the holder of a claim by subrogation as a result of insurance payouts, did not violate discharge injunction by filing suit in state court after entry of discharge, where complaint alleged that debtor caused injury while operating a motor vehicle while intoxicated.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Violation of Discharge Injunction can be remedied through contempt proceedings. Once contempt is established, injured party can recover damages and, if necessary to effectuate purposes of injunction, attorney fees. Proper vehicle for contempt is contested matter under Rule 9014. However, Adversary Complaint for damages for contempt would not be dismissed where adversary proceeding provided more, not less, due process protection for defendant and defendant cannot allege any prejudice because action filed as adversary rather than Motion.

In re Baer, 2011 WL 3667511 (Bankr. E.D. Ky. 2011), *aff'd* 2012 WL 2368698 (6th Cir. BAP 2012) – There is no private cause of action for violation of the discharge injunction.

Frambes v. Nuvel National Auto Finance, LLC., 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – There is no private right of action for alleged violation of discharge injunction. Party allegedly aggrieved can seek sanctions through Motion for Contempt. However, remedy must be sought by Motion rather than by Adversary Proceeding. Adversary dismissed for lack of jurisdiction.

Lassiter v. Moser, Case No. 09-8067 (6th Cir. BAP 2010) – Creditor's commencement of litigation in state court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although the discharge injunction does not, of itself, present a private cause of action for damages, debtor who suffers injury can seek sanctions for contempt. Damages, including attorney fees, are appropriate where creditor instituted suit post-discharge based on events that occurred pre-petition and were discharged.

Pickerel v. Household Realty Corp., 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

In re Greenspan, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd*, 2011 WL 310703 (6th Cir. BAP 2011) – Creditor violated discharge injunction filing two state court lawsuits against debtors in an attempt to collect a discharged debt. Although there is no private right of action for breach of discharge injunction, court can award sanctions for contempt of court. Sanctions awarded in the amount of \$12,510.00 representing attorney fees incurred in defending state court litigation on behalf of debtors. Court denied additional fees incurred in defending non-debtor co-defendants in state court litigation. Extraordinary amount of fees appropriate given creditor's persistence in pursuing the state court litigation, his opposition to the motion to reopen Chapter 7 case, his opposition to the debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.

Dalvit v. United Airlines, Inc., Case No. 08-1283 (10th Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived. Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

23.5 Contempt – Civil

People's Capital & Leasing Corp v. Power-Tec Mfg. LLC, 2013 WL 5423056 (E.D. Mi. 2013) – Contempt cannot be used to compel performance of an action that cannot be legally performed. Contempt also cannot be used merely to coerce payment of debt.

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

In re Borowski, 2013 WL 3759794 (Bankr. E.D. Tn. 2013) – Upon finding of civil contempt, fines payable to aggrieved party must be based on actual damages incurred as a result of the contempt or non-compliance. Bankruptcy courts cannot impose punitive damages as punitive damages are available only for criminal contempt and bankruptcy courts lack criminal contempt powers.

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – Court can use civil contempt power to enforce terms of its orders. Party who brings successful motion for contempt is entitled to recover from contemnor attorney fees incurred in bring the motion. Where party is only partially successful in contempt action, proving fewer than all alleged violations, Court can but is not required to reduce fees accordingly.

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.

In re Trinity Communications, LLC, 2012 WL 2367169 (Bankr. E.D. Tn. 2012) – Court has power to find contempt pursuant to Federal Rule of Civil Procedure 71, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7071, as well as section 105. Court can hold non-parties in contempt if the non-party has actual knowledge of the court order and abets a party in violating that order. Basic proposition is that all orders and judgments of courts must be complied with promptly. Contempt requires a violation of a specific and unambiguous order by a party to whom that order applied. Ambiguities must be resolved in favor of the party charged with contempt. Principal of reorganized debtor was in contempt of court for failing to comply with terms of confirmation order that required submission of additional funds necessary to pay administrative expenses. Confirmation Order was entered in reliance on principal's representations about its commitment to ensure that the Reorganized Debtor could perform its confirmation obligations. Reorganized debtor was also using funds that the Plan required to be paid to creditors for purposes other than as specified in confirmed plan. The Reorganized Debtor has no independent management other than Principal. Reorganized Debtor paid other ongoing expenses since confirmation. Principal exercised its control to cause the Reorganized Debtor to violate its obligations under the Plan.

Burrage v. Homecomings Financial Network, Inc., 2011 WL 6000794 (Bankr. N.D. Ohio 2011) - Stay pending appeal relieves appellee of obligation to comply with order being appealed. Appellee cannot be held in contempt for failing to comply with order while appeal is pending.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Violation of co-debtor stay can be remedied through civil contempt. Contempt requires that the alleged contemnor have knowledge of the order; alleged contemnor must have in fact violated order; and order violated must be specific and definite. Co-debtor stay constitutes clear and specific injunction in terms of what is prohibited. Actions of creditor in reporting information to credit bureau, without more, does not constitute violation of co-debtor stay, as reporting was not intended to coerce payment and information provided to bureau was accurate.

In re Moohaven Dairy, LLC, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed, that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of debtor. Counsel's continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available. Sanctions are to be remedial, to compel compliance with court order or to compensate other party for harm resulting from non-compliance. Sanctions can be monetary or incarceration. Court awarded attorney fees as sanction in amount equal to what creditor had to incur as a direct result of actions of contemnor.

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 of the order allegedly violated; contemnor must have actually violated that order; and order must have been specific and definite. Once established burden shifts to alleged contemnor to come forward with evidence that he is unable to comply; contemnor took all reasonable steps to comply; and demonstrated that inability to comply was not caused by contemnor. Defense requires a "literally inability" to comply, not just an "unwillingness" to comply. Once found to be in contempt, court can use monetary sanctions to coerce compliance; or can use incarceration until contemnor complies. Court imposed payment plan until amount is paid in full, with provision that if Petition Preparer fails to make a payment, court will enter warrant for arrest without further proceedings.

In re Rose, 2010 WL 3733858 (Bankr. N.D. Ohio 2010) – Creditor held in contempt of court where creditor refused to cancel lien of record and surrender title to debtor upon tender of court determined redemption amount. Court has broad discretion to award sanctions including damages and attorney fees in contempt action. Court awarded damages measured by lost income of debtor having to attend hearing on contempt motion and attorney fees incurred by debtor in attempt to obtain compliance with court order. Court further ordered creditor to satisfy lien and surrender title without debtor being required to pay previously determined redemption amount and authorized debtor to obtain clean title if creditor continued to refuse to comply. To the extent additional sanctions including attorney fees exceed redemption amount, court would offset the redemption amount against those sanctions to avoid "double recovery" by debtor.

In re Moser, Case No. 05-38518 (Bankr. S.D. Ohio 2010) – Court has authority to issue contempt sanctions pursuant to Section 105. Purpose of civil contempt is to coerce compliance with a court order and to compensate the complainer for its losses. Moving party must prove by clear and convincing evidence that the respondent violated a court order that was clear and unambiguous and that required respondent to perform or refrain from performing a specific act. Court order sealing particular document is not an order to respondent to refrain from publishing, discussing or using the document in court proceedings. Respondent's reference to the sealed document in an

appellate brief did not violate any specific court order precluding dissemination or citation.

In re Wilson, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) – Petition preparer had been previously prohibited from preparing or assisting in the preparation of bankruptcy petitions pending further order based on Preparer's improper activities as a petition preparer, its failure to disgorge excessive petition preparer fees to the debtors in that case as required by a previous court order, and its failure to appear at hearing. Preparer nonetheless prepared documents for Debtor and charged fee in excess of presumptively reasonable fee. Preparer failed to appear on Court's Order to Show Cause why it should not be held in contempt for violation of prior Order. Preparer had knowledge of both orders and failed to comply with them and was given adequate notice and an opportunity to be heard on the contempt issue, yet failed to appear and has not provided any explanation for its failure. A coercive fine is an appropriate remedy for civil contempt. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$1,000.00 per day until Preparer files a request for a hearing to explain its failure to comply.

In re Denison, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Bankruptcy Petition Preparer held in civil contempt for disregard of Court Orders. Court issued first Show Cause for Preparer to explain why Preparer charged more than the presumptively allowable fee. Petition Preparer responded with amended statement of compensation that disclosed a different social security number and different address than was stated in prior statement. Court issued second Show Cause for Preparer to explain why she filed documents listing two different social security numbers, and stated that court would consider whether she should be held in contempt for failure to obey a lawful court order and/or barred from participating as a bankruptcy petition preparer in the Northern District of Ohio and/or be referred to the United States Attorney for such action as he deems appropriate. After Preparer failed to appear, Court concluded that civil contempt finding was appropriate where Preparer was served with and had knowledge of the order and the terms of the order were specific and required her to appear on July 29, 2010. A coercive per diem fine is appropriate to encourage compliance with the court's order. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$10.00 per day until Preparer complies with the order and is barred from participating as a bankruptcy petition preparer in any case absent further order of this court. Finally, the issue of the different social security numbers is referred to the U.S. trustee for such action as he deems appropriate.

23.6 Contempt – Criminal

US v. Hills, 2013 WL 4832797 (E.D. Mi. 2013) – In order to find Hills guilty of criminal contempt, the Government must prove, beyond a reasonable doubt, the following elements: 1) Hills had notice of the court orders at issue; 2) the court orders at issue are specific, clear, and unequivocal; 3) Hills violated or disobeyed the court orders; and 4) Hills did so willfully. Party charged cannot assert alleged unconstitutionality of order that party allegedly violated as defense to contempt action. Appeal of underlying order is mechanism for contesting underlying order, and party cannot collaterally attack order as alleged defense to contempt action. Criminal contempt statute, 18 USC Section 401(3), is not unconstitutional.

Adell v. John Richards Homes Building Company, LLC, 2012 WL 3029643 (E.D. Mi. 2012) – Bankruptcy Court lacks authority to impose criminal sanctions. Court has jurisdiction to award civil sanctions when a party acts in bad faith, vexatiously, wantonly or for oppressive reasons. After debtor suffered judgment, debtor sold all assets, moved to Florida, established residency and file for bankruptcy to take advantage of Florida homestead protections. Court dismissed bankruptcy for bad faith and major creditor sought sanctions. Court properly awarded creditor attorney fees incurred in post-judgment collection actions, which debtor paid. Creditor also requested punitive damages as additional sanctions. Civil sanctions are those designed to coerce future compliance and to compensate opposing party for injuries caused by non-compliance. Criminal sanctions are those that vindicate authority of court. As debtor had already complied by paying the sanctions previously awarded, there was no order as to which compliance could be compelled. Sanctions amounted to fine against debtor as to which debtor lacked any opportunity to reduce or avoid through compliance.

23.7 Show Cause

In re Hermiller, Case No. 10-70825 (Bankr. E.D. Mi. 2010) – There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes the stay has been violated, appropriate action is motion under Section 362(f).

In re Lee-Blue, Case No. 10-42861 (Bankr. E.D. Mi. 2010) - There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes a court order has been violated, party may file a motion asking the court to hold the allegedly violating party in contempt through the mechanism in Local Rule 9014-1.

23.8 Section 105 - Generally

Hahn v. Educational Credit Management Corporation, Case No. 11-084 (1st Cir BAP 2012) – Section 105 provides court broad authority to exercise equitable powers where necessary or appropriate to implement Order or other Code provisions. However, power must be used

cautiously and only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Code. Sanctions were appropriate where creditor repeatedly called debtor post-discharge in effort to obtain payment, although Bankruptcy Court had determined that debtor had paid non-dischargeable student loans prior to commencement of bankruptcy and debtor was no longer indebted to creditor. Sanctions properly awarded for attorney fees and costs incurred in responding to creditor's post-discharge collection actions.

Chastain v. Bank of America Home Loans, 2012 WL 2377476 (Bankr. E.D. Tn. 2012) – Remedy for alleged violation of discharge injunction is motion for contempt. Neither Section 524 nor Section 105 creates private cause of action for violation. Adversary proceeding requesting finding of civil contempt and award of attorney fees and costs dismissed. Proper vehicle for seeking contempt is by motion for contempt, not by adversary proceeding.

In re Mehlhose, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court's inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later refile. Court can award attorney fees and costs where the party acted in bad faith, vexatiously, wantonly or for oppressive reasons. Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Debtors do not have a private right of action under section 105 against creditor for filing proofs of claim for time-barred debts. Section 105 does not provide a private right of action for damages for filing a false proof of claim.

In re Lundeen, 442 BR 659 (Bankr. S.D. Ohio 2011) – Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.

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

23.9 Defense – Bad Faith and Unclean Hands of Moving Party

In re Mabone, 2012 WL 1918433 (Bankr. E.D. Mi. 2012) – Creditor's Motion for Sanctions denied based on creditor's own lack of good faith. Prior to commencement of Chapter 13 case, creditor repossessed debtor's automobile. When debtor filed bankruptcy, creditor agreed to return the vehicle, but when debtor attempted to retrieve vehicle it would not start, requiring debtor to have vehicle towed. Prior to confirmation of Debtor's Chapter 13 plan, vehicle was destroyed in an accident. Creditor sought sanctions against debtor and attorneys for allegedly filing case in bad faith; pursuing entry of an order compelling creditor to return the vehicle after the vehicle had already been returned; and that debtor's schedules were false and intentionally mis-stated income and debts. Court denied creditor's motion. Reason vehicle would not start when debtor attempted to retrieve it was because creditor had installed a GPS tracking device and a starter interrupt device and, after agreeing to return vehicle, apparently used the devices to prevent the car from starting, requiring debtor to have vehicle towed to repair shop at cost of \$532.00. Creditor's actions were intentional and deliberate attempt to interfere with property of estate which, itself, was sanctionable as a deliberate and willful violation of stay.