

Amended Complaint failed to state cause of action.

- (6845) *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.
- (6846) *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).
- (6847) *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.
- (6848) *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.
- (6849) *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.
- (6850) *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.
- (6851) *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.
- (6852) *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.

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- (6853) *Ball v. United Cumberland Bank*, 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Complaint dismissed without leave to amend where Court dismissed initial complaint and Court specifically warned Plaintiff that it would have one chance to amend to fix issues, and Plaintiff filed two additional amended complaints, neither of which addressed defects in initial complaint, and Plaintiff did not file Motion for Leave to file another Amended Complaint. Justice did not require another opportunity to amend where Initial Complaint and the Amended Complaints were poorly drafted and contained obvious mistakes. Allowing another chance to amend is unduly prejudicial to the Bank. Further, any amendment would be futile. Contractual setoff is not a judicial or quasi-judicial process that would violate 42 U.S.C. § 407 and Bank had contractual right of setoff exercised by the Bank at a time when there was no bankruptcy proceeding.
- (6854) *Sodexo Management, Inc. v. Benton Harbor Area School District*, 2016 WL 845338 (W.D. Mi. 2016) – Motions for leave to amend answer should be freely given, but court may deny request where amending is result of bad faith or dilatory motive, evidences bad faith of moving party, or where amendment is either futile or would result in undue prejudice. Delay alone is not basis to deny motion absent unwarranted burden on court or prejudice to opposing party, and party must show that he acted with due diligence after learning of facts that would support amendment or where party knew of acts on which amendment is based at time original pleading filed and there was no excuse for failure to plead them. Request to amend answer based on e-mails between parties in the years preceding commencement of case did not warrant granting motion where party had e-mails in its possession well before answer filed, and party could not allege that e-mails were newly discovered. Motion to amend was not filed until after plaintiff filed dispositive motion, and defendant failed to explain delay in filing when it had all information in its possession and could have raised issues in original pleading. Amending would also prejudice opposing party where defendant sought to change “admissions” in prior answer after plaintiff had relied on those admissions in prosecuting action and seeking dispositive relief.
- (6855) *Sweet v. Blue Skies Energy, LLC*, Case No 14-3156 (Bankr. E.D. Mi. 2015) – Whether party will be granted leave to amend answer to add affirmative defenses and counterclaims depends on whether moving party has complied with court’s scheduling order; and whether moving party has acted diligently and potential prejudice to non-moving party. Although motion to amend was filed after date specified in scheduling order, court would modify scheduling order to allow amendment to be filed where evidence did not indicate any lack of diligence and plaintiff could not demonstrate prejudice. Issues to be raised in counterclaim were initially raised indirectly in affirmative defenses and in motion for summary judgment. Defendant moved diligently to amend once court announced ruling on motion for summary judgment where issue was actually argued. Plaintiff could not demonstrate prejudice where underlying facts were raised in connection with prior affirmative defenses and amendment would not produce inordinate delay or expenditure of time, money or resources by plaintiff or any loss of any services previously performed.
- (6856) *River City Resort, Inc. v. Frankenberg*, 2014 WL 3385234 (Bankr. E.D. Tn. 2014) – Defendant permitted to amend answer to assert additional defenses or assert counterclaim where defendant has not unduly delayed in seeking to amend pleadings and amendment would not be futile as matter of law. Courts should freely grant leave to amend when justice requires. Debtor would be permitted to amend where Debtor sought to amend very shortly after obtaining standing to file counterclaim; issues in counterclaim were same issues as were being litigated in State Court proceeding prior to commencement of bankruptcy case; and there was no assertion of bad faith or repeated failure to cure deficiencies in prior amendments. There was no evidence of prejudice where matter was not set for imminent trial and parties agreed that additional discovery was necessary regardless of whether counterclaim was permitted.
- (6857) *DAGS II, LLC v. Huntington National Bank*, 2013 WL 6884242 (W.D. Mi. 2013) – An answer to a complaint can be amended within 21 days after service of the answer; or after 21 days with leave of court. Court should grant leave freely when justice requires. Court can deny leave where there exists undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party, futility of the amendment, or other grounds as determined by the trial court. Defendant would be allowed to amend answer to change response to specific paragraph in complaint from admission to denial. Plaintiff could not demonstrate prejudice where admission was directly contradicted by denial in same answer. In response to all discovery requests, defendant responded consistent with defendant’s position that the allegation was denied. Proposed amendment was at early stage of litigation and would not cause any additional discovery expense.

12.132 Amendments to Pleadings – Relation Back

- (6858) *Tow v. Bulman*, Case No. 15-3179 (Bankr. S.D. Tx. 2017) – Statute of Limitations under Section 546 for any action under Section 544, Section 547 and Section 548 must be brought within one year of conversion of case from Chapter 11 to Chapter 7. Although initial complaint was timely filed, amended complaint that sought to identify additional defendants was filed 14 months after limitations period had expired. Motion to Amend Complaint denied as futile where proposed action against additional defendants is barred by statute of limitations.
- (6859) *Moyer v. Rosich*, 2017 WL 33520 (Bankr. W.D. Mi. 2017) – Although leave to amend should be freely given, leave will be denied when amendment would be futile. Futility exists where proposed pleading falls outside court’s jurisdiction; does not state a claim; or is subject to ironclad defense such as time barred. Whether amended pleading dates back to prior pleading depends on whether the amendment asserts claim or defense that arose out of the same conduct, transaction or occurrence set out, or attempted to be set out, in the original pleading, such that party asserting statute of limitations defense has been placed on notice by earlier pleading that he could be called to answer to allegations raised in amended pleading. Claim based on entirely different operative facts does not provide appropriate notice and will not relate back. Initial complaint asserted that transfer of property located in Michigan from Debtor’s self-styled revocable trust to Debtor and her husband was avoidable under section 544. Allegations did not “relate” to allegations in proposed amended complaint regarding sale of property in South Carolina or disposition of proceeds. Operative facts regarding sale of South Carolina property differed from those related to transfer of Michigan property from revocable trust, as allegations involved different asset, different transferee, and a different point in time. Defendants would not have been a notice of Trustee’s intent to avoid sale of South Carolina property and original complaint did not implicitly seek to recover proceeds from sale of South Carolina property. Trustee had ample opportunity to investigate sale of South Carolina property prior to commencing adversary proceeding it filed adversary proceeding relating only to transfer of Michigan parcel from revocable trust.

- (6860) *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.
- (6861) *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.
- (6862) *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 complain and will require similar evidence to support the claims; and there was no evidence of undue delay.
- (6863) *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.
- (6864) *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.
- (6865) *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.
- (6866) *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.
- (6867) *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.
- (6868) *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.
- (6869) *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.
- (6870) *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.

- (6871) *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.

12.133 Amendment of Pleadings to Confirm to Evidence

- (6872) *Ryan v. Morris*, 2017 WL 6512215 (Bankr. W.D. Ky. 2017) – Federal Rule of Bankruptcy Procedure 7015, which incorporates Federal Rule of Civil Procedure 15, allows Motion to Amend to Conform to be made during trial. Motion to amend Complaint filed two weeks before commencement of trial did not qualify as Motion to Conform.

12.134 Scheduling Order

- (6873) *Gatza v. DCC Litigation Facility, Inc.*, 717 Fed.Appx. 519 (6th Cir. 2018) – Rule 16 requires disclosure of experts by deadline for filing Scheduling Order under rule 26. If party cannot meet deadline, party can move to amend scheduling order based on good cause where modification would not result in prejudice to opposing party, and on showing that movant made diligent effort to meet original deadline based on when moving party learned of issue that is the subject of discovery; how discovery would affect proceedings; length of discovery period; whether moving party was dilatory; and whether adverse party was responsive to discovery requests. Movant admitted that counsel could have met original deadlines as counsel had necessary information before expiration of deadline. Expert was available and identifiable before expiration of deadline but attorney did not make disclosure. Court did not abuse discretion in denying Motion to Extend deadlines for disclosure of expert witnesses or in excluding expert witnesses from testifying at trial, even where striking of witnesses would prove fatal to Plaintiff's cause of action.
- (6874) *Fick v. Fick*, 2015 WL 5145114 (Bankr. N.D. Ohio 2015) – Motion to extend deadlines set out in scheduling order are governed by Rule 7016(b)(4), which incorporates Federal Rule 16. Party seeking to extend deadlines to permit additional discovery requires consideration of (1) when the moving party learned of the issue that is the subject of discovery; (2) how the discovery would affect the ruling below; (3) the length of the discovery period; (4) whether the moving party was dilatory; and (5) whether the adverse party was responsive to discovery requests. Proceeding had been pending for less than one year and discovery period covered only 5 months. Defendant did not wait until last minute to pursue discovery and party from whom defendant sought discovery engaged in dilatory tactics including rejecting the discovery request as "overly broad" requiring defendant to alter and resubmit request. Although there was no indication of bad faith or any pattern of delay by plaintiff, extension of discovery cutoff was warranted. Court extended deadline for completion of discovery.
- (6875) *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.
- (6876) *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".

12.135 Attorney Fees as Element of Recovery

- (6877) *Rose v. Friendly Finance Co.*, 2016 WL 98597 (S.D. Ohio 2016) – Ohio law prohibits creditors from recovering attorney fees in suits to collect debts involving personal, family or household debts, absent showing that borrower breached underlying contract in bad faith.
- (6878) *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.
- (6879) *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.

12.136 Offer of Judgment

- (6880) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015), *aff'd*, 2016 WL 344971 (M.D. Tn. 2016) – Where defendant in adversary proceeding makes offer of judgment that plaintiff declines, if plaintiff later recovers amount less than offer, defendant can recover attorney fees and costs incurred after date of offer under Rule 68 and Bankruptcy Rule 7068. Judgment included any amounts awarded for attorney fees by plaintiff. Thus, defendant's offer, which was greater than principal amount recovered, was less than

total judgment amount once attorney fees were awarded, precluding award of attorney fees to defendant. Further, court is not obligated to award attorney fees even if defendant prevails where record indicates that offer was not intended to propose settlement of litigation, as amount offered was far less than what had already been incurred by Debtor in prosecuting adversary proceeding and defendant escalated litigation costs by chronically failing to comply with discovery requests and by raising same issues numerous times rather than comply with agreed order previously entered.

M. Preemption

12.137 Conflict with State Law

- (6881) *Strohmeyer v. Chase Bank, NA*, 2018 WL 2669991 (E.D. Tn. 2018) – Fair Credit Reporting Act preempts state law claims that do not allege willfulness; and preempts any claim alleging willfulness if claim involves subject matter regulated under FCRA. State law claims of invasion of privacy; negligence; and other unspecified state law claims including negligent hiring and supervision preempted as claims related directly to duties and responsibilities of furnishers of information to consumer reporting agencies.
- (6882) *State of Tennessee v. Hildebrand*, 2017 WL 710473 (6th Cir. 2017) – Interest rate for unpaid property taxes is determined by “applicable non-bankruptcy law” pursuant to Section 511. “Applicable non-bankruptcy law” is any statute that is not aimed solely at bankruptcy proceedings. “Bankruptcy law” includes both Federal provisions in Code itself and any state law that is targeted to bankruptcy proceedings and does not constitute “applicable non-bankruptcy law”. State law provided for interest rate of 12% plus 6% penalty rate provided for interest at 12%. Statute that purported to “convert” penalty into interest solely in bankruptcy cases qualified as “bankruptcy law” as it applied only in bankruptcy cases, and so was not “applicable state law and did not apply under Section 511. Plan needed to provide for interest at rate of 12% as that was rate specified by non-bankruptcy law.
- (6883) *In re Bratt*, 2015 WL 894472 (Bankr. M.D. Tn. 2015) – State law that has purpose or effect of interfering with effectiveness of federal statute is invalid as unconstitutional. State statute that attempted to define post-petition penalties for unpaid taxes an “interest” violated Section 506 and Section 511 as state was attempting to collect penalties that are not allowed under Section 506.

12.138 Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action

- (6884) *Bednar v. Pierce & Associates, PC*, Vase No. 16-638 (N.D. Ill. 2016) – Bankruptcy Code preempts state law where claim would not exist but for some violation of Bankruptcy Code. Debtor could not bring action under State Consumer Protection Act for Creditor’s alleged violation of stay as violation of stay was uniquely bankruptcy related and Code provided its own remedy. State law preempted to extent that claim was based on violation of Section 362.
- (6885) *Rosenberg v. DVI Receivables XVII*, Case No. 15-2622 (3d Cir. 2016) – Section 303(i) which allows Debtor to recover costs, damages and attorney fees against party filing involuntary petition does not preempt state law claims of non-Debtors resulting from involuntary petition. Defendant filed involuntary petition against individual and related businesses. After involuntary was dismissed, court awarded Debtors damages under Section 303(i). Debtor’s spouse and various affiliated business entities then brought suit against Involuntary Petitioner for tortious interference based on filing of involuntary petition. Preemption is not presumed and will not be found unless Federal Statute contains clear and manifest intent by Congress to preempt the entire field or where Congress specifically provides for preemption. Section 303 lacks any “clear and manifest” intent of Congress to preempt entire field of damages arising out of failed involuntary petition.
- (6886) *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)

12.139 Generally

- (6887) *Brandt v. FDIC*, Case No. 11-2215 (Bankr. E.D. Ill. 2016) – FDIC stands in shoes of failed financial institution for purposes of administering the assets of the failed bank. Complaint seeking to recover allegedly fraudulent transfers to bank by Debtor barred by *D’Oench Duhme* and 12 USC Section 1823(e). FDIC cannot be liable for secret side agreements or any unrecorded or secret agreement not contained in records of bank. Scope of “agreements” that cannot be enforced is broad and includes not only misrepresentations but also omissions, promises to perform, and fraudulent misrepresentations or warranties; and includes schemes and arrangements including outright misrepresentations and misleading half-truths. The only relevant question is whether the agreement or representation is contained in the books and records of the institution. Trustee’s attempt to recover funds based on alleged fraudulent scheme between Debtor and equipment financing company that resulted in loans from bank and subsequent repayments. Entire cause of action was predicated on secret agreement between equipment seller/lessee and equipment buyer/lessor to falsify sale-leaseback transactions included secret agreement between seller and buyer to falsify records and obtain financing for nonexistent transactions, agreements that were not disclosed in records of bank. Fact that bank was not party to fraudulent scheme did not limit FDIC’s defense as alleged scheme was being asserted to diminish or defeat FDIC’s right, title and interest in the funds now sought to be recovered by Trustee. Scheme was one by which the institution itself was likely to be misled and were not in writing, executed by bank, or approved by board of directors of bank.
- (6888) *FDIC v. Myers*, 2016 WL 927438 (M.D. Tn. 2016) – 12 USC Section 1821 places FDIC in shoes of insolvent bank to work out claims under state law. FDIC as receiver is presumed to have right to enforce note where FDIC is suing in capacity as receiver and has possession of note. Fact that note may not have been endorsed from original creditor to subsequent holder before later holder became insolvent was

irrelevant to FDIC's right to enforce note as receiver. Under UCC, transfer of note even without endorsement conveys right to enforce, even if transferee may not be legal owner of note, as ownership and right to enforce are two separate concepts. *D'Oench* doctrine as codified in 12 USC Section 1823 precludes any defense based on any unwritten side agreement between Debtor and original lender that would alter terms of note. Agreement must be (A) in writing, (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (D) has been, continuously, from the time of its execution, an official record of the depository institution. This allows FDIC to rely on bank records in evaluating work of bank assets. Defendant's allegations of side deals and alleged agreements with president of bank to release defendant from liability lacked any written agreement as required, precluding consideration as defense.

- (6889) *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.

- (6890) *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.

12.140 Injunctive Relief

- (6891) *National Credit Union Administration Board v. Jurcevic*, 2017 WL 3442388 (6th Cir. 2017) – FIRREA alters standards normally applicable for injunctive relief by eliminating need for proof of irreparable harm or threat that loss is immediate. Liquidator for failed institution must prove only likelihood of success, that liquidator will suffer harm (irreparable or otherwise) if injunction is not granted; that benefit of injunction to liquidator outweighs harm to person to be enjoined; and that injunction is in public interest. NCUA, as liquidator for failed Credit Union, entitled to injunction against defendants' dissipating any assets where NCUA presented prima facie case that defendants engaged with officers of failed Credit Union to obtain fraudulent loans, and that preservation of assets was necessary to support NCUA's ability to collect any judgment that may ultimately be entered against defendants. Injunction did not harm defendants as injunction allowed defendants to use such assets as may be necessary to pay reasonable living expenses, minimizing harm to defendants while balancing interests of parties. Injunction supported by public interest given NCUA role in liquidating assets of failed Credit Union.

O. Dismissal

12.141 Failure to Prosecute

- (6892) *Jennings v. Bodrick*, 2018 WL 3619643 (S.D. Ohio 2018) – Rule 41 provides Court with inherent authority to dismiss complaint with prejudice based on failure to prosecute. Case is properly dismissed where there is clear record of delay or contumacious conduct. Court must consider whether party's failure is due to willfulness, bad faith or fault; whether adversary was prejudiced by dismissed party's conduct; whether dismissed party was warned that failure to cooperate could lead to dismissal; and whether less drastic sanctions were imposed or considered. Dismissal warranted where plaintiff did not comply with clear Order of Court requiring filing written report detailing status of case; and then failing to respond to Show Cause Order for failure to file written report or commence prosecution. Show Cause Order specifically stated that failure to comply would result in dismissal of action for failure to prosecute. Plaintiff's failure to comply with clear Orders of Court constitutes bad faith or contumacious conduct warranting dismissal.
- (6893) *Cincinnati Insurance Company v. Antesberger, LLC*, 2018 WL 3057723 (S.D. Ohio 2018) – Court can dismiss case for failure to prosecute, although dismissal is harsh sanction which should be used only in extreme situations. Factors to be considered include whether party's failure to prosecute was due to willfulness, bad faith or fault; whether adversary was prejudiced by failure to prosecute; whether plaintiff was warned that failure to cooperate could lead to dismissal; and whether less drastic sanctions were imposed or considered. Motion to Dismiss denied where plaintiff's failure to prosecute resulted in large part from error of Clerk of Court who mysteriously terminated case. Lack of prosecution did not prejudice defendant where defendant waited more than one year after Clerk terminated case to question plaintiff's counsel about failure to prosecute. Plaintiff's failure to prosecute was not willful or done in bad faith and did not amount to conduct intended to thwart judicial proceedings or reckless disregard for effect of conduct on proceedings.
- (6894) *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.
- (6895) *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.
- (6896) *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.
- (6897) *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.

- (6898) *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.
- (6899) *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.
- (6900) *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.
- (6901) *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.
- (6902) *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.
- (6903) *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.

12.142 Voluntary Dismissal

- (6904) *Griffin v. Jones*, 2016 WL 3144009 (W.D. Ky. 2016) – Rule 41 permits court to condition dismissal or to outright deny request for voluntarily dismissal. Dismissal with prejudice warranted where defendant would suffer plain legal prejudice if case is dismissed without prejudice but mere threat of second lawsuit is not “prejudice”. Prejudice depends on defendant’s effort and expense of preparation for trial, excessive delay, and lack of diligence on part of plaintiff in prosecuting action, insufficient explanation for need to take dismissal, and whether defendant has filed motion for summary judgment. Dismissal with prejudice warranted where parties had extensive litigation including three prior cases raising same issues as presented in current case, other civil litigation between parties, and multiple bankruptcy filings by most entities involved in the case. Case is three years old, all discovery is complete, numerous motions to dismiss and for summary judgment have been briefed and ruled on, and trial date is only 6 weeks away. Plaintiff given option of having case dismissed with prejudice or withdrawing motion in its entirety.
- (6905) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Rule 41 permits plaintiff to request voluntary dismissal of action without prejudice. Whether to grant voluntary dismissal is within sound discretion of trial court, and court can deny request where defendant would suffer plain legal prejudice. Whether dismissal would result in plain legal prejudice demands on defendant’s effort and expense in preparing for trial; excessive delays or lack of diligence by plaintiff in prosecuting action; insufficiencies in plaintiff’s explanation of need for dismissal; and whether case is pending summary judgment by defendant. If granted, court can condition dismissal on payment of costs and attorney fees incurred by defendant where plaintiff did not act in good faith in filing or prosecuting action; defendant incurred substantial costs where action was at advanced state of proceedings; plaintiff unduly delayed in requesting dismissal; and where work could not be used in any subsequently filed action.
- (6906) *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. Rule 41 of the Federal Rules of Civil Procedure vests voluntary dismissals within the sound discretion of the trial court. However, 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.
- (6907) *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.

12.143 Voluntary Dismissal Without Prejudice

- (6908) *Leonard v. RDLG, LLC*, 2016 WL 1178649 (6th Cir. 2016) – Court may dismiss adversary proceeding without prejudice unless dismissal would result in plain legal prejudice to opposing party. Fact that opposing party may face second lawsuit is not sufficient to deny request to dismiss without prejudice. Relevant factors include the effort and expense of preparation, excessive delays and lack of diligence by plaintiff, insufficient explanation for need to dismiss, and whether defendant has filed motion for summary judgment. Court’s denial of cross-motions for summary judgment did not require dismissal with prejudice as orders merely concluded that legal issues could not be determined, and claims for monetary damages did not require any additional effort to defend. Dismissal without prejudice to allow plaintiff to liquidate damages claim in State Court warranted under circumstances.
- (6909) *Cory v. Bennett*, 2015 WL 5105178 (W.D. Ky. 2015) – Federal Rule 41 allows a court to dismiss a case on request of the plaintiff, with the dismissal being without prejudice to plaintiff re-filing litigation at later date unless otherwise ordered by the court. Court’s decision to dismiss case is reviewed on abuse of discretion standard. Rule 41 is intended to protect non-moving party from unfair treatment. Attorney fees can be awarded if necessary to compensate defendant for unnecessary expenses that litigation caused. Whether dismissal would prejudice defendant depends on defendant’s effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant. Moving party demonstrated that (i) little time or expense had been expended in preparation for trial, as the majority of time in the case had been spent on settlement and the appeal of that settlement; (ii) they timely prosecuted the action; (iii) they

offered adequate reason for their request; and (iv) Cory had filed no motion for summary judgment at the time of their dismissal motion. Dismissal would not unfairly prejudice defendant and Court's dismissal without prejudice did not meet standard of "plain legal prejudice" sufficient to overturn lower court's exercise of discretion. Court also has discretion to award attorney fees but is not required to do so. Non-moving party did not assert claim to attorney fees in opposing dismissal without prejudice and so court did not abuse discretion in not awarding fees as a condition of dismissal.

12.144 Lack of Subject Matter Jurisdiction

- (6910) *Dietrich v. Patti*, 2016 WL 3682957 (E.D. Mi. 2016) – 28 USC Section 1915 allows person meeting "pauper status" to file complaint without paying filing fee. However, 28 USC Section 1915(e)(2)(B) requires Court to then review complaint and dismiss the case if Court is satisfied that action is frivolous, malicious, fails to state claim on which relief can be granted, or seeks monetary relief from defendant who is immune for monetary damage awards. Complaint under Civil Rights Act, 42 USC Section 1928, was frivolous as defendant was private attorney representing private party in bankruptcy proceeding. Civil Rights claims can be brought only against government employees or those acting under color of state law. Private attorney is not acting under color of state law merely by acting as attorney in legal proceeding. Action under Civil Rights Act was frivolous and dismissed. Remaining claims were all based entirely on state law causes of action. Court lacked diversity jurisdiction as complaint alleged that plaintiff and defendant were both citizens of Michigan. Without pending Federal cause of action or basis for diversity jurisdiction, court lacked jurisdiction over remaining causes of actions allowing case to be dismissed.
- (6911) *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).
- (6912) *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).
- (6913) *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).
- (6914) *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).
- (6915) *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).
- (6916) *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).
- (6917) *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).
- (6918) *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).

12.145 Dismissal as Moot

- (6919) *Ellmann v. Griebel*, Case No. 12-5534 (Bankr. E.D. Mi. 2015) – Dismissal of main bankruptcy case renders adversary proceeding moot. Court loses subject matter jurisdiction as there is no longer any pending case under Title 11, such that adversary proceeding is no longer proceeding "arising under title 11, or arising or related to" a case under Title 11.
- (6920) *Hadley v. Chrysler Group, LLC*, 2014 WL 988962 (E.D. Mi. 2014) – Litigation between Purchasers of vehicles and manufacturer of vehicles to determine whether a safety defect existed in the vehicles rendered moot when manufacturer issued recall notices admitting defect. Recall notice issued prior to commencement of litigation, such that there was never any "live" dispute over which court could exercise jurisdiction. Defendant had already conducted repairs and there were no allegations that repairs were insufficient to cure the defect. Complaint that repairs "should have been done quicker" is not sufficient to support jurisdiction where repairs have been done and plaintiffs could not point to any damages resulting from repairs.
- (6921) *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.
- (6922) *Savage v. Sammut*, Adv. No. 12-4653 (Bankr. E.D. Mi. 2012) – Section 523 action dismissed as moot once discharge denied under Section 727.
- (6923) *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.

- (6924) *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.
- (6925) *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.
- (6926) *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.
- (6927) *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.
- (6928) *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.
- (6929) *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.
- (6930) *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.
- (6931) *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.
- (6932) *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.
- (6933) *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.
- (6934) *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.
- (6935) *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.

12.146 Dismissal by Court *Sua Sponte*

- (6936) *Dietrich v. Patti*, 2016 WL 3682957 (E.D. Mi. 2016) – 28 USC Section 1915 allows person meeting “pauper status” to file complaint without paying filing fee. However, 28 USC Section 1915(e)(2)(B) requires Court to then review complaint and dismiss the case if Court is satisfied that action is frivolous, malicious, fails to state claim on which relief can be granted, or seeks monetary relief from defendant who is immune for monetary damage awards. Complaint under Civil Rights Act, 42 USC Section 1928, was frivolous as defendant was private attorney representing private party in bankruptcy proceeding. Civil Rights claims can be brought only against government employees or those acting under color of state law. Private attorney is not acting under color of state law merely by acting as attorney in legal proceeding. Action under Civil Rights Act was frivolous and dismissed. Remaining claims were all based entirely on state law causes of action. Court lacked diversity jurisdiction as complaint alleged that plaintiff and defendant were both citizens of Michigan. Without pending Federal cause of action or basis for diversity jurisdiction, court lacked jurisdiction over remaining causes of actions allowing case to be dismissed.
- (6937) *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.

12.147 Disentitlement

- (6938) *Weilert v. Gwartz*, Case No. 15-1144 (9th Cir. BAP 2016) – Disentitlement is equitable doctrine that allows court to dismiss appeal where appellant is willfully disobeying Court Order. State Court had authority to dismiss appeal where defendant suffered adverse judgment and then was ordered by Trial Court not to dispose of or transfer assets, and defendant made at least 47 separate transfers in direct violation of State Court Order.

12.148 Bar to Filing or Refiling

- (6939) *Lnu v. Federal National Mortgage Association*, 2016 WL 4978425 (E.D. Mi. 2016) – Court has inherent authority to impose bar to any subsequent filings without leave of court. Plaintiff had bought 6 separate actions and taken 5 separate appeals against same defendant arising out of mortgage foreclosure. Plaintiff had not prevailed at any stage of any proceedings in both state and federal court. Court would exercise inherent authority to order that plaintiffs were prohibited from filing any further actions without prior leave of court.
- (6940) *Yan Sui v. Marshack*, 2014 WL 5840246 (9th Cir. 2014) – “Pre-filing Orders” that require court permission before seeking access to courts should be rarely used and only if courts ensure that orders do not impermissibly trample a party’s due process rights. However, federal courts can impose a bar to filing to regulate the activities of abusive litigants by imposing carefully tailored restrictions appropriate under the circumstances. Court must first make factual substantive findings as to the frivolous or harassing nature of the litigant’s actions including both the number and content of the claims, and that claims have been meritless. Order that prohibited litigant from commencing adversary proceedings unless court found that initiating documents were “meritorious” exceeded scope of permitted bar order as bankruptcy court cannot properly determine merit in all cases just from the initial document. Order also failed to contain required findings of fact where order referenced “tremendous amount to litigation” and that plaintiffs made same arguments “over and over” and “lost on appeal at every level” but failed to identify any facts to support finding that party’s actions were frivolous or harassing. Party did not initiate proceedings but exercised due process rights by opposing motions filed in bankruptcy action, seeking reconsideration of adverse orders, and initiating appeals and fact that party may have been unsuccessful does not, alone, give rise to necessary factual findings to support bar order.

12.149 Waiver of or Failure to Pay Filing Fee

- (6941) *Williams v. Skelly*, 2018 WL 2337310 (W.D. Ky. 2018) - Where plaintiff request waiver of filing fee to file complaint, Court must review complaint and dismiss case if action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from defendant who is immune from suit. Claim is frivolous when it lacks arguable basis in fact or law such as action based on indisputably meritless legal theory or where factual contentions are clearly baseless. Plaintiff’s complaint seeking damages from Department of Education was frivolous where plaintiff alleged that he sent “contract/bond” seeking to discharged debt to Department of Education and the Department of Education rejected the “contract/bond”. Plaintiff’s complaint based on “sovereign citizen” theory. Complaint was frivolous and lacked any legal merit requiring dismissal of complaint.
- (6942) *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.
- (6943) *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.
- (6944) *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

12.150 Generally

- (6945) *Prime Rate Premium Finance Corp. v. Larson*, 2018 WL 3915551 (E.D. Mi. 2018) – Defendant’s willful refusal to comply with rules and orders of Court resulted in striking of defendant’s answer and entry of default such that all well pleaded allegations of amended complaint were taken as true. While default can allow Court to award of liquidated damages, hearing is required where damages are unliquidated as default results only an admission of liability. Complaint explicitly set forth liquidated damages and request an award of some certain such that Court was not required to hold hearing on damages. However, Court heard testimony from plaintiff’s witnesses and concluded that proofs supported prayer for relief in amended complaint supporting damage award of \$321,510.16.
- (6946) *Westfield National Insurance Company v. Young*, 2018 WL 1219544 (Bankr. N.D. Ohio 2018) – Defendants failure to respond to Complaint does not, standing alone, entitle plaintiff to default judgment as matter of right. Court must accept as true all factual allegations of complaint other than those relating to damages and afford plaintiff all reasonable inferences, but Court must still decide whether unchallenged fax constitute a legitimate cause of action. Where complaint is not detailed enough to enable Court to find that plaintiff had established cause of action, Court can consider additional facts provided to Court in form of affidavit as well as State caps Court Judgment in favor of plaintiff and against Debtor.
- (6947) *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.
- (6948) *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.

- (6949) *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.
- (6950) *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.
- (6951) *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.
- (6952) *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.
- (6953) *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.
- (6954) *Harmon Autoglass Intellectual Property, LLC v. Leitferman*, 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.

12.151 Jurisdiction

- (6955) *Citizens Bank v. DeCena*, Case No. 16-1918 (E.D. N.Y. 2016) – Rule 7004(h)(1) requires service on Federally Insured Depository Institution by certified mail addressed to officer of institution unless institution has appeared in case through attorney, in which case service can be made on the attorney by first class mail. Summons and complaint served on institution by First Class mail was insufficient to constitute service. Lender had no obligation to respond to complaint that had not been properly served. Default Judgment entered against Bank must be set aside as court lacked personal jurisdiction over institution at time default judgment entered rendering judgment void as matter of law.
- (6956) *Salamy v. Compo*, 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court must first determine whether court has jurisdiction before entering default, even where defendants failed to respond or to raise jurisdictional objection. Court lacked jurisdiction in action against two non-Debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-Debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that Debtor was member of LLC, there was no nexus between causes of action and bankruptcy court. Plaintiff sought only money judgment against non-Debtor and entry of judgment would have on effect on bankruptcy estate.

12.152 Entry – Discretion of Court

- (6957) *Prime Rate Premium Finance Corp. v. Larson*, 2018 WL 3915551 (E.D. Mi. 2018) – Court has discretion to enter default judgment where defendant does not appear for the trial and does not present good faith explanation for lack of appearance. Court can deny request to adjourn unless denial is unreasonable and arbitrary insistence on expeditious this in face of justifiable request. Defendant did not present valid basis for adjourning trial where defendant sent letter to Court with handwritten note allegedly from Medical Center. Note lacked identifiable signature, was drafted by at least 2 individuals with different handwriting, was dated and contain phraseology that would not likely be used

by Medical Office, accompanying letter allegedly signed by Doctor was typed on letterhead of Medical Center using different spelling of name and made reference to police report but no police report was presented to the Court. Court had good reason to question authenticity based on facial inconsistencies and content and underlying action was based on defendant allegedly forging premium finance applications, leading Court to believe that letter and note were not genuine but were another product of defendants invention. Defendants 11th-hour request for trial in German was also part of pattern of delay including multiple Chapter 13 bankruptcy filings and repeated adjournments of trial based on defendant's alleged medical condition as well as withdrawal of at least 2 sets of lawyers. Whether failure to appear once entry of default judgment depends on evidence of willfulness or bad faith; prejudice to adversary; whether violating party had notice of potential sanctions; and whether less drastic sanctions have been imposed. Defendant's failure to appear at trial and refusal to cooperate with plaintiff in preparation of trial documents was willful. Defendant made no attempt to prepare for OB present at trial and evidenced pattern of delay and avoidance suggesting intention to interfere with order rescheduling of disposition. Plaintiff had expended considerable effort and resources preparing for trial on at least 5 separate occasions and had brought witnesses from out of state to testify. Defendant was well aware of that refusal to comply with Court orders could result in default judgment as Court had explicitly warned defendant that failure to abide by Court orders were pure in Court as directed would be met with severe sanctions including entry of default judgment. Lesser sanctions had been considered in past when defendants had not here to rules and orders, leaving Court to conclude that no sanction short of case dispositive order would compel defendant to comply.

- (6958) *Cream Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Whether to enter judgment of default is vested in discretion of court and requires court to examine merits of claim before entering judgment. Default establishes well pled factual allegations of complaint but court must consider whether unchallenged facts support legitimate cause of action.
- (6959) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Court cannot enter default judgment where record shows that defendant was not properly served with complaint as required by Rule 7004. Court also will deny request for default judgment where well pled allegations of complaint fail to state claim on which relief can be granted. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale.
- (6960) *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.
- (6961) *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.

12.153 Setting Aside

- (6962) *Church of God v. Carter*, 2018 WL 4201747 (Bankr. E.D. Tn. 2018) – Federal Rule 55 creates distinction between setting aside default and setting aside default judgment. Only default has been docketed, Court may set aside default for good cause. Once default ripens into judgment, Court's discretion is circumscribed by public policy favoring finality of judgments as reflected in Rule 60. Clerk is not required to enter Final Judgment after Default merely on plaintiff's allegation that there is no need for a final hearing. When considering setting aside of default, Court has considerable latitude and is to be extremely forgiving to defaulted party in favor resolving cases on merits, and fighting about setting aside a default against defendant who clearly intended to oppose complaint is generally "fruitless undertaking". Court will consider whether default was willful; will whether plaintiff will be prejudiced; and whether defendant has meritorious defense; with prejudice and presence of meritorious defense being 2 most important considerations. Defendant's failure to respond was not willful or culpable where defendant attempted to employ counsel before deadline to file response ran; defendant filed answer prior to hearing on plaintiff's motion for default judgment; and defendant's counsel appeared at hearing and opposed entry of judgment. Evidence did not support finding of bad faith or reckless disregard or intent to thwart judicial proceedings. Plaintiff did not indicate prejudice that would result if default is set aside. Delay alone is not prejudice. Plaintiff must show that delay caused loss of evidence, increased difficulties in discovery, or greater opportunity for fraud or collusion. Although plaintiff may have been delayed in obtaining full garnishment and have to incur expensive litigation, these do not constitute prejudice, particularly where Court is granting plaintiff nondischargeable default judgment for significant portion of total debt claimed and plaintiff will be able to proceed with garnishment based on that judgment. Defendant presented meritorious defense, defined as some possibility that outcome of suit after full trial will be contrary to result achieved by default. Defenses meritorious if it is good at law, regardless of whether defense is actually likely to succeed and will be found meritorious if it contains even hint of suggestion which, if proven, would constitute a complete defense. Plaintiff's complaint sought nondischargeable judgment under 3 distinct theories. As to

criminal restitution, Debtor admitted that this amount was nondischargeable and defendant admitted that defendant had no defense. Court would not set aside default as to nondischargeability based on restitution. Second basis for plaintiff's complaint was based on state Court default judgment awarding damages for embezzlement, larceny, fraud and transportation of securities and found that Debtor had acted in position of trust with plaintiff that he violated. Third basis of complaint also relied on Circuit Court default judgment based on alleged willful and malicious injury. Defendant asserted that he was incarcerated at time judgment was awarded against him and unable to defend himself and that state Court judgment did not establish that Debtor acted willfully and maliciously or that Debtor violated pre-existing fiduciary relationship sufficient to potentially allege meritorious defense warranting setting aside of default.

- (6963) *Stone v. Minix*, 2018 WL 3689181 (Bankr. E.D. Ky. 2018) – Court can vacate default before entry of final judgment in Court's discretion on showing of good cause taking into account whether (1) default was willful; (2) setting aside default would prejudice plaintiff; and (3) defendant has alleged defenses which may be meritorious. Good cause existed where service of complaint did not comply with Rule 7004 requirement that service on Debtor be accompanied by mailing copy of summons and complaint to Debtor's counsel raising potential meritorious defense. Debtor timely filed Motion to Vacate default accompanied by proposed Answer to Complaint. Only "prejudice" to plaintiff would be that plaintiff must now litigate case on merits which does not constitute "undue prejudice". Court vacated default but, Court would not dismiss adversary for lack of service where Debtor admitted that he received copy of complaint and summons as service met minimum standards for due process and Debtor was not prejudiced by lack of service on attorney.
- (6964) *Langeland v. Tru Die Cast Corp.*, 2018 WL 910143 (Bankr. W.D. Mi. 2018) - Court sua sponte vacated Clerk's default as Defendant, having never been served, had no duty to respond and could not be in default.
- (6965) *Citizens Bank v. DeCena*, Case No. 16-1918 (E.D. N.Y. 2016) – Rule 7004(h)(1) requires service on Federally Insured Depository Institution by certified mail addressed to officer of institution unless institution has appeared in case through attorney, in which case service can be made on the attorney by first class mail. Summons and complaint served on institution by First Class mail was insufficient to constitute service. Lender had no obligation to respond to complaint that had not been properly served. Default Judgment entered against Bank must be set aside as court lacked personal jurisdiction over institution at time default judgment entered rendering judgment void as matter of law.
- (6966) *Johnson v. Rye*, 2016 WL 6835373 (Bankr. W.D. Mi. 2016) – Court has strong preference to decide cases on merits rather than by default and will set aside default on showing of "cause" which is extremely forgiving standard. Court must consider whether defendant's culpable conduct led to entry of default; whether defendant has meritorious defense; and whether plaintiff would be prejudiced. Motion demonstrated that default was not product of defendant's culpable conduct. On receipt of complaint, defendants promptly contacted their bankruptcy attorney who stated that he would take care of it, but then suffered serious car accident that required hospitalization. Defendants then began earnest search to find replacement counsel and attempted to file an answer that while late, was good faith response that explained defendants' version of events, which differed markedly from those alleged in the complaint. Facts in answer effectively admitted liability under Michigan Builders Trust Fund statute but raised a defense to amount of damages constituting a meritorious defense. Given defendants' admission of liability, setting aside default would not prejudice plaintiff and defendants' ultimate retention of new counsel would assure that matter moved smoothly from that point forward.
- (6967) *Reed v. Blount*, 2016 WL 6211691 (E.D. Mi. 2016) – Court lacks jurisdiction over adversary proceeding to deny discharge where plaintiff holds claims that are entirely non-dischargeable as a matter of law, such that denial of discharge would not benefit pecuniary or other interests of plaintiff. Absent a concrete and definite interest in the outcome of the litigation, there is no "case or controversy" over which Bankruptcy Court or District Court could assert jurisdiction. Default judgement denying discharge in adversary proceeding brought by holder of non-dischargeable Domestic Support Obligation vacated as Court was without jurisdiction to enter order, rendering order void.
- (6968) *Continental Casualty Company v. Harsha*, 2016 WL 3743132 (E.D. Mi. 2016) – In ruling on motion to set aside clerk's default, court must weigh: 1) whether other parties will be prejudiced; 2) whether defaulted defendant has articulated a meritorious defense or claim; and 3) whether the defaulted defendant's culpable conduct led to the default. Motions to set aside where there has only been an entry of default is governed by more lenient standard of Rule 55 while, than to Rule 60(b) standards apply where judgment has been entered. Court would not vacate clerks default where other parties would be severely prejudiced. Prejudice requires more than just delay and must relate to tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion. Case had been pending for more than one year and had been stayed for a number of months while parties engaged in settlement discussions. No discovery occurred and plaintiff had been prevented from filing motions for default judgments or for summary judgments. Parties would have to reinitiate discovery after a considerable amount of time during which some witnesses may no longer be available to testify at trial. All other parties participated in complex settlement negotiations in good faith extending more than 6 months including seven-hour settlement conference following which negotiations continued for weeks until term sheets were drafted and signed. Setting aside default would undo the settlement agreement to which the other parties have agreed. Defendant could have participated in these negotiations, even on a pro se basis, but she chose not to do so. Moving party failed to demonstrate meritorious defense where movant set out a possible defense as to one of the counts of the complaint but did not make any attempt to set out defense as to second, independent cause of action against movant. Movant, at best, acted in careless and inexcusable manner by not responding to complaint despite repeated notices from court that matter was proceeding. Even after entry of clerk's default, defendant took no steps to participate in action or to set aside default for more than 6 months while case proceeded through settlement discussions. Although movant is not an attorney, she has legal knowledge beyond that of most pro se parties as she spent 38 years working for law firm as legal secretary or legal assistant and served as office manager for 15 years. While mere negligence is not basis to deny motion to set aside default, defendant's conduct was reckless and evidenced a willful disregard of effect that the dilatory conduct would have.
- (6969) *Blevins v. Herzog*, 2015 WL 6459994 (Bankr. W.D. Ky. 2015) – Standard for vacating clerk's default for failure to file responsive pleading is different than standard for vacating default judgment. Vacating clerk's default requires showing of "good cause" while vacating a final judgment uses standards set under Rule 60(b). Whether good cause exists depends on (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. Additional litigation

expense if default is vacated is not prejudice as plaintiff must assume when filing action that litigation will take time and cost money. Demonstration of meritorious defense is a very low standard, requiring little more than a hint of a suggestion of a good defense. Court must find only that there is a reason for a decision on the merits. Motion asserted that defendant had a defense and requested opportunity to assert that defense. While Motion did not itself state the precise defense, Motion was filed by experienced bankruptcy counsel who represented that a defense would be forthcoming sufficient to meet “meritorious defense” standard. Whether default is result of culpable conduct of Debtor is far lower standard than “excusable neglect” under Rule 60(b) and requires only some demonstration that defendant is deserving of equitable relief. Although Debtor should perhaps have known of time constraints, Debtor was not litigation attorney and Debtor did not unduly delay in retaining counsel to handle the case, only to have that attorney later deny the representation, following which Debtor quickly obtained new counsel who immediately filed motion to vacate default. Entire process from filing complaint to Motion to Vacate was less than 2 months.

- (6970) *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.
- (6971) *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.
- (6972) *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).
- (6973) *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.
- (6974) *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.
- (6975) *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
- (6976) *PNC Mortgage v. Rhiehl*, 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.
- (6977) *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.

- (6978) *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.
- (6979) *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.
- (6980) *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).
- (6981) *Deutsche 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.
- (6982) *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.
- (6983) *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.
- (6984) *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.

- (6985) *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.

12.154 Final Judgment After Default

- (6986) *Hand v. Wholesale Suto Shop, LLC*, 2018 WL 4291792 (E.D. Tn. 2018) - plaintiff seeking entry of final judgment after default must comply with both procedural and substantive requirements. Procedurally, plaintiff must properly serve defendant; and must first seek entry of default by demonstrating that opposing party has failed to answer. Substantively, plaintiff must demonstrate that injury is legally compensable and whether pleadings allege viable cause of action and provide sufficient legal and factual basis for entry of judgment. If complaint fails to state cause of action, default judgment will be denied. Where claim is for sum certain, default judgment may be entered by clerk; if damages are uncertain or other relief is sought, plaintiff must apply to Court for default judgment. Proof of damages ordinarily requires evidentiary hearing but hearing is not necessary if moving party submits uncontested sworn affidavits sufficient to establish amount of damages.
- (6987) *Nyman v. Montfort*, 2017 WL 4582171 (Bankr. N.D. Ohio 2017) – Debtor's failure to answer the Complaint does not Plaintiff to default judgment. Court should accept as true all well pled factual allegations except those relating to damages and give Plaintiff benefit of all reasonable inferences but must decide whether the unchallenged facts constitute legitimate cause of action. Court may conduct hearing requiring proof to establish defendant's liability. Where claim sounds in fraud, Court must evaluate the evidence presented to assure that the plaintiff has presented a prima facie case. Evidence presented at hearing supported finding as to Plaintiff-Husband that Debtor's debt was excepted from discharge under Section 523(a)(2)(A), but did not support judgment in favor of Plaintiff-Wife as evidence did not indicate that Wife was ever aware of representations made by Defendant or that Wife ever relied on any representations as only Husband executed contract with Debtor's company.
- (6988) *Citizens Bank v. DeCena*, Case No. 16-1918 (E.D. N.Y. 2016) – Rule 7004(h)(1) requires service on Federally Insured Depository Institution by certified mail addressed to officer of institution unless institution has appeared in case through attorney, in which case service can be made on the attorney by first class mail. Summons and complaint served on institution by First Class mail was insufficient to constitute service. Lender had no obligation to respond to complaint that had not been properly served. Default Judgment entered against Bank must be set aside as court lacked personal jurisdiction over institution at time default judgment entered rendering judgment void as matter of law.
- (6989) *Edwards v. Arledge*, 2016 WL 6837024 (Bankr. E.D. Tn. 2016) – Default judgment entered against Trust for receipt of fraudulent transfers. Transferor had actual intent to hinder, delay and defraud creditors by transferring real estate and equipment to Trust. Trust failed to respond to complaint and facts alleged were sufficient to avoid transfers under State Law.
- (6990) *In re Sharkey*, 2016 WL 6573997 (Bankr. E.D. Mi. 2016) – Setting aside judgment after default is vested in discretion of bankruptcy judge. Moving party must demonstrate that default was product of mistake, inadvertence, surprise, or excusable neglect. If so, Court will consider whether moving party has meritorious defense; and whether non-moving party would be prejudiced by relief from judgment. Whether neglect is excusable is equitable determination taking into account all relevant circumstances including prejudice to non-moving party, length of delay and impact on judicial proceedings, reason for delay including whether it was in control of moving party, and whether moving party acted in good faith. Debtor's counsel's failure to respond to objection to exemptions was excusable where there was genuine and understandable confusion regarding timeliness of objections to exemptions, there had been substantial proceedings including a timely response to same objections to exemptions and briefing of the issues while the case was pending under Chapter 7 and before conversion to Chapter 13, the hearing on the objection to exemptions filed before conversion remained pending on the court docket even after conversion. Debtor and Debtor's attorney acted in good faith; the length of delay caused by the failure to file a timely response to the Creditor's Objection, and its impact on the judicial proceedings in this Chapter 13 case, are not significant; and there was little or no danger of prejudice being suffered by the Creditor or by any other party in interest because of the delay. Debtor demonstrated potential meritorious defense. Meritorious defense does not required proof that Debtor would prevail but only that there is "hint of suggestion" of a possible defense and there was some possibility that the outcome would be contrary to result achieved by default.
- (6991) *MC Financial, NA v. Sneed*, 2016 WL 4594734 (S.D. Ohio 2016) – After entry of default, all factual allegations in the complaint are deemed true other than those related to damages. If damages are unascertained, court may, but is not required to, conduct evidentiary hearing, if court can determine amount of damages by computation from records before it. Pleadings and affidavits filed by plaintiff established damages plus attorney fees and costs with sufficient certainty to allow court to enter judgment without further proceedings.
- (6992) *Toler v. Global College of Natural Medicine, Inc.*, 2016 WL 67529 (E.D. Mi. 2016) – When complaint requests damages for sum certain, clerk, and supported by affidavit, must enter judgment against a defendant who has been defaulted for not appearing. If complaint does not request sum certain, plaintiff must filed Motion for default judgment. Court must then determine if court has jurisdiction based on allegations of complaint; that there are no significant choice of law issues. Entry of judgment is then vested in discretion of court based on possible prejudice to plaintiff if default judgment is denied; merits of plaintiff's claim; sufficiency of complaint; amount of money at stake; possibility of dispute regarding material facts; whether default was due to excusable neglect; and strong policy favoring resolution of dispute on merits.

Default judgment warranted where plaintiff would be substantially prejudiced if defendant were allowed to file answer after three years of pending litigation and defendant has consistently failed to respond to any filings in case unnecessarily prolonging litigation. Merits of claim also warranted judgment where defendant refused to refund pre-paid tuition after closing school before providing classes. Total judgment amount was substantial but given number of members in plaintiff class amount owed to each was minimal. Defendant has more than three years to mount a defense and made no effort to raise any issues about amount of damages claimed. Defendant's failure to answer was not excusable neglect where defendant had three years to file response and appeared in court at various hearings. While policy supports resolution on merits, defendant's refusal to participate in litigation presented no reason to require full trial on merits.

- (6993) *Salamy v. Compo*, 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court must first determine whether court has jurisdiction before entering default, even where defendants failed to respond or to raise jurisdictional objection. Court lacked jurisdiction in action against two non-Debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-Debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that Debtor was member of LLC, there was no nexus between causes of action and bankruptcy court. Plaintiff sought only money judgment against non-Debtor and entry of judgment would have no effect on bankruptcy estate.
- (6994) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Whether to enter judgment of default is vested in discretion of court and requires court to examine merits of claim before entering judgment. Default establishes well pled factual allegations of complaint but court must consider whether unchallenged facts support legitimate cause of action. Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(2), (4) or (6) where complaint did not plead sufficient facts to demonstrate fraudulent intent as required by Section 523(a)(2), where complaint alleged only that plaintiff loaned money and that defendant materially misrepresented intention and ability to repay, but did not allege any facts to support allegations. Mere failure to repay loan is not misrepresentation. Complaint failed to state cause of action under Section 523(a)(4) for fraud or defalcation while acting in fiduciary capacity as complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff; and there was no evidence that plaintiff entrusted funds to Debtor for specific purpose but that Debtor fraudulently used funds for Debtor's own purposes as necessary to establish embezzlement; and complaint admitted that plaintiff willingly gave money to Debtor precluding finding of larceny. Rather, complaint alleged only that plaintiff made loan to Debtor to enable Debtor to purchase truck, and that Debtor thereafter failed to repay loan. Complaint also failed to state cause of action under Section 523(a)(6) where complaint failed to allege that Debtor borrowed money from plaintiff with intent to cause willful and malicious injury to plaintiff and there was no evidence of any intent to cause harm.
- (6995) *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

12.155 Approval by Court Required

- (6996) *Estes v. Vanderpool Construction and Roofing, Inc.*, 2018 WL 3910999 (E.D. Tn. 2018) - parties are not permitted to settle Fair Labor Standards Act lawsuit other than agreements that are supervised by Department of Labor or settlements that are approved as part of lawsuit brought in Federal District Court.
- (6997) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Bankruptcy trustee has authority to seek to settle claims available to Debtor, but any proposed settlement is subject to approval of bankruptcy court within court's "significant discretion".
- (6998) *In re 3D Resorts-Bluegrass, LLC*, 2013 WL 6019117 (Bankr. W.D. Ky. 2013) – Bankruptcy Court has authority to consider proposed settlement of claims between Chapter 11 Trustee and governmental entities for alleged violations of state law and consumer protection regulations.
- (6999) *In re Fodale*, 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee has authority, subject to court approval, to settle claims available to Debtor.
- (7000) *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.
- (7001) *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.
- (7002) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Court has discretion to approve proposed 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.
- (7003) *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.

12.156 Approval by Court Not Required

12.157 Limits on Jurisdiction

- (7004) *In re Junk*, 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Bankruptcy Court has both constitutional and statutory authority to enter final approval of Trustee’s Motion to Settle Claims held by estate. Bankruptcy Trustee has authority to seek compromise or settlement of claims available to Debtors on motion and after notice and hearing, to allow Trustee and creditors to avoid expense and burdens associated with litigation.
- (7005) *In re Reis Borough Building, LLC*, 2014 WL 5529604 (Bankr. W.D. Mi. 2014) – Court would not reopen case to enforce a stipulation between Debtor and creditor where the stipulation was signed before dismissal but not approved by Court as of date of dismissal. Court would be reluctant to exercise post-dismissal jurisdiction particularly where parties have adequate remedies in State Court.
- (7006) *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.
- (7007) *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.

12.158 Enforcement of Settlement

- (7008) *U.S. v. \$1,264,000 in US Currency*, 2018 WL 146825 (N.D. Ohio 2018) - Court has broad, inherent authority and equitable power to enforce settlement agreement of litigation pending before Court even if agreement has not been reduced to writing. Court must conclude that agreement has been reached on all material terms. Where parties have agreed on essential terms and all that remains is to memorialize agreement, parties are bound by terms of oral agreement.

12.159 Service of Motion

- (7009) *In re Frankovich*, 2017 WL 2334319 (Bankr. W.D. Mi. 2017) - Federal Rule of Bankruptcy Procedure 5005 requires service on United States Trustee by mail or delivery to an office of the United States Trustee. Electronic transmittal of documents to United States Trustee through Court’s ECF program is not equivalent to “service”. ECF notice may be in addition to service under national rules, but does not supplant requirement for service. ECF service is sufficient on represented entities who have appeared in a case or proceeding. However, where United States Trustee has not appeared in the case, ECF service is not sufficient to comply with Rule 5005. Motion to Approve Settlement denied where there was no evidence that motion was served on Office of United States Trustee.

12.160 Standards for Approval

- (7010) *Estes v. Vanderpool Construction and Roofing, Inc.*, 2018 WL 3910999 (E.D. Tn. 2018) - parties are not permitted to settle Fair Labor Standards Act lawsuit other than agreements that are supervised by Department of Labor or settlements that are approved as part of lawsuit brought in Federal District Court. Court must scrutinize potential settlement for fairness and determine whether settlement is fair and reasonable resolution of bona fide dispute to ensure that parties have not manipulated settlement process to permit employer to avoid obligations under FLSA. Court must consider risk of fraud or collusion; complexity, expense and likely duration of litigation; amount of discovery completed; likelihood of success on merits; and public interest. Record indicated that matter had been actively litigated with extensive discovery; plaintiff presented significant issues of proof creating risk of adverse determination; plaintiff’s counsel advised that settlement is fair and reasonable and plaintiff was under no duress, coercion or threat; claim accounted for and proposed settlement was substantially more than plaintiff would receive if case were dismissed or if defendant filed bankruptcy; plaintiff’s attorney’s fees would be paid by defendant as part of proposed settlement; and defendant agrees that proposed agreement is fair and reasonable. Bona fide dispute

existed as to whether FLSA applied to individual defendant calling into question whether plaintiff had valid claims. Settlement discussions were held at arms length with all parties being represented by experienced counsel. Settlement was fair and reasonable compromise of bona fide dispute taking into account each party's interest, benefits and rights.

- (7011) *Cox v. Sitel Operating Corporation*, 2018 WL 4102838 (E.D. Tn. 2018) - In considering whether to approve settlement, Court must ensure that proposed settlement is fair and reasonable resolution of bona fide dispute. Compromise should reflect reasonable compromise and where compromise proposes award of attorney fees, attorney fees must be reasonable. Proposed settlement agreement was fair and reasonable where there were substantial factual and legal disputes regarding both liability and damages. Proposed settlement provided fair compensation to plaintiff while sparing plaintiff burden of proving claims and damages to jury. Record indicated that settlement was reached through arm's-length negotiations using services of independent mediator. Parties conducted extensive discovery and exchange damage calculations based on wide variety of potential outcomes and exchange offers and counter offers, offered competing interpretations of case law, and actively debated numerous issues presented. Complexity, expense and likely duration of litigation favored approving settlement agreement as case and ball significant legal and factual issues such that finding of liability would not guarantee large recovery and continuing costs of litigating lawsuit would be significant given potential attorney fees, number of witnesses and depositions, and experts needed to analyze data. Parties estimated potential range of recovery from zero dollars to \$140,000 and proposed to settle for \$85,000 of which plaintiff would receive approximately \$50,000 with balance being paid for attorney's fees and costs, representing fair compensation to plaintiff for alleged lost wages. Further, plaintiff's bankruptcy filing during the pendency of litigation transferred litigation to bankruptcy estate and Bankruptcy Trustee approved settlement and retained counsel with Bankruptcy Court approval and settlement would infuse significant funds into Chapter 7 estate for payment of creditors.
- (7012) *Rosen v. Schwebel Baking Company*, 2017 WL 4759032 (N.D. Ohio 2017) – In evaluating proposed settlement, Court should consider: risk of fraud or collusion; complexity, expense, and likely duration of litigation; amount of discovery completed; likelihood of success on merits, and public interest in settlement. Where settlement agreement proposes an award of attorney's fees, such fees must be reasonable. Proposed settlement was fair and reasonable resolution to bona fide dispute. Settlement was result of arms-length negotiations between parties that were represented by able counsel and presented no risk of fraud or collusion. Plaintiffs' counsel believes that settlement is fair, reasonable, and adequate and in best interests of plaintiffs. Award of attorney's fees to plaintiff's counsel were reasonable, taking into consideration complexity of case and settlement was reached early in litigation. While the Court was not able to assess likelihood of success on the merits as case was still in early stages when settlement was reached, other relevant factors weighed in favor of approving the settlement.
- (7013) *BR North 223 LLC v. Taunt*, 2017 WL 4681805 (E.D. Mi. 2017) – Before approving settlement. Bankruptcy Court must apprise itself of all facts necessary to evaluate settlement and make informed and independent judgment as to whether compromise is fair and equitable, based on (1) probability of success on merits; (2) difficulty, if any, in collecting any judgment that may result; (3) complexity of litigation involved and expense, inconvenience and delay necessarily attendant; and (4) paramount interests of creditors. Fundamental objective is to determine whether terms of settlement between interested parties are fair and equitable and in best interests of estate. Court abused discretion by approving settlement over objection of largest creditor without affording creditor opportunity to discover "secret documents" used by parties in negotiating settlement. Bankruptcy Court's refusal to afford Creditor opportunity to discover information coupled with Trustee's prior refusal to provide documents to Creditor that were used to reach proposed settlement required reversal of Order approving compromise and remand to Bankruptcy Court. Proposed settlement called for payment to Trustee of \$125,000 to settle fraudulent transfer actions. Documents relied on by Court included Balance Sheet for Debtor's company showing assets in excess of \$2.6 million; appraisal of ski resort owned by Debtor's company valued at \$385,000 and alter appraisal on same company for \$410,000; Summary of Accountant for Debtor showing assets in excess of \$2.87 million and net worth of \$1.5 million; and preliminary market study showing that value of business exceeded \$2 million. Trustee's arguments in favor of settlement conflated debts and misstated net worth of entities and could not be reconciled with documents that were known and Trustee's arguments conceded that Trustee lacked necessary facts and that obtaining new appraisal to more accurately determine current value of assets would not result in "extensive litigation", and Trustee's refusal to provide documents that were used by Trustee in reaching compromise was "danger sign" in case involving multiple alleged fraudulent transfers. Objecting creditor held majority of debt and while this does not afford creditor a veto right or overrule presumptive deference to Trustee's business judgment, creditor's interests are paramount and Court must give deference to Creditor's views.
- (7014) *In re Boddie*, 569 BR 297 (Bankr. S.D. Ohio 2017) – Court must evaluate proposed settlement to ensure that settlement is fair and equitable, based on probability of success on merits; difficulties, if any, in collection of judgment; complexity of litigation including expense, inconvenience and delay that would result from continued litigation; and paramount interest of creditors with proper deference to their views. Trustee's proposed settlement of \$50,000 based on Debtor's claim that Bank wrongfully refused to honor check based on racially discriminatory basis was fair and equitable where there were significant hurdles to Trustee's cause of action and Defendant had presented evidence of racially neutral basis for not making deposit immediately available; and there was no evidence of any defamatory statements by Bank representatives where only statement were made to police in response to Debtor's abusive conduct and refusal to leave Bank premises, and statements to Police are entitled to qualified immunity. Given size of Bank, there were no issues regarding collectability of any judgment but litigation would be complex and produce significant delay, while settlement would avoid risks of trail and would produce immediate recovery by creditors of as much as 70% of allowed claims. Further, Debtor's claimed damages were difficult to prove as Debtor admitted that she could not say that any emotional distress suffered resulted from Bank's conduct. Bankruptcy case had been pending 10 years and resolution of action against Bank was last asset in estate, such that settlement would allow efficient and expeditious closing of estate.
- (7015) *In re Pugsley*, 2017 WL 2960209 (Bankr. N.D. Ohio 2017) – In considering Motion to Approve Settlement of Adversary Proceeding, Court is to determine whether settlement is fair and equitable, taking into account all facts necessary for an intelligent and objective opinion including potential benefits and detriments to estate, probability of success if claim s litigated, complexity of issues, expense and likely duration of ,litigation, possible difficulties of collecting, and any other factor relevant to full and fair assessment. More than 5 years pre-petition, Debtor assigned right to significant portion of future annuity payments to third party. Trustee brought action to contest validity of assignment. Proposed settlement would recognize validity of assignment, with assignee to receive its assigned proceeds and unassigned

proceeds would remain property of estate. Settlement was fair and equitable,, notwithstanding offer by third party to purchase Trustee's rights for \$1,500 where third party's offer was unclear what would happen to portion of proceeds the estate would receive under settlement, and additional \$1,500 would produce nominal additional distribution to creditors, particularly where offering party was largest unsecured creditor and would effectively receive most of the payment. Likelihood of success was minimal as original assignment had been approved by State Court Probate Judge when made, consistent with State Law requirements for assignment of structured settlements, and Bankruptcy Court could not reconsider prior state court order under *Rooper-Feldman*.

- (7016) *In re Junk*, 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Court has independent duty to ensure that settlement is fair and equitable even in absence of any objection. Bankruptcy judge not required to conduct mini-trial, but must determine (1) probability of success in litigation to be settled; (2) difficulties, if any, to be encountered in collecting from defendants; (3) complexity, expense and delay that would be involved if the litigation continued; and (4) paramount interest of creditors, giving proper deference to their reasonable views. Trustees proposed settlement of litigation with the state receiving lump-sum payment of \$65,000 was fair and equitable where claims against lender encompassed by settlement or highly unlikely to produce a recovery for the estate as prior State Court litigation had already ruled against most of Debtor's arguments and expressed considerable doubt as to the remaining arguments. Although there would be no difficulty in collecting should the Court enter a judgment against the mortgage company, the complexity of the litigation and likely substantial delay further supported settlement, where litigation was highly fact intensive and the resolution would necessarily be time-consuming. Creditors would also be benefited by settlement where creditors would receive immediate distribution from Chapter 7 estate and no creditor has filed any objection to the motion to approve settlement.
- (7017) *In re Dinoto*, 2016 WL 7655140 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.
- (7018) *In re Clements Manufacturing Liquidation Company*, 2016 WL 6155907 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.
- (7019) *Rich Dad Operating Company, LLC v. Zubrod*, 2016 WL 3397685 (10th Cir. 2016) – Appeal is moot and no longer presents "case or controversy" where issues presented are no longer live or parties lack legally cognizable interest in outcome. Appeal is constitutionally moot if court can fashion no meaningful relief. If court can fashion some sort of meaningful relief, even if relief only partially addresses grievances of appealing party, appeal is not moot. Appeal of settlement not moot where appeal cannot unwind settlement or avoid transfers of property that resulted, but would restore to Debtor ability to challenge claims of appellee in bankruptcy case. In light of possible relief, action was not constitutionally moot. Section 363(m) did not apply where bankruptcy court did not make finding under Section 363(m) that purchaser was "good faith" purchase as required. Sale of assets under Section 363 can be approved by Court using same standards as settlement of claims, and appellate court will leave to bankruptcy court the sale procedures based on dynamics of particular situation. Court not required to apply Section 363 procedures to sale of Trustee's interest in litigation between Debtor and largest creditor, with creditor purchasing estate's interest for \$100,000, trustee to dismiss appeal filed by Debtor, and credit to dismiss cross-appeal. Court no required to use formal procedures under Section 363 where claims being sold were defensive claims only, no other person appeared who indicated interest in submitting higher bid, and parties were unable to proceed with prior auction as procedures could not be agreed upon. Court adequately reviewed litigation involved on appeal and supporting documents submitted by parties. Court was not required to actually decide issues presented on appeal or conduct detailed analysis of underlying law or do risk-adjustment for continued litigation and Bankruptcy Court did not ignore either non-bankruptcy court's assessment of litigation or creditor's offer of indemnity for any legal expenses incurred in settlement procedures.
- (7020) *In re CS Dip, LLC*, 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In evaluating proposed settlement under Rule 9019, court must apprise itself of all facts necessary to evaluate the settlement and make an informed and independent judgment as to whether the compromise is fair and equitable, based on (a) probability of success in the litigation; (b) difficulties, if any, to be encountered in the matter of collection; (c) complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) paramount interest of the creditors and a proper deference to their reasonable views in the premises. Bankruptcy judge need not hold mini-trial or write an extensive opinion and need only apprise itself of the relevant facts and law to allow an informed and intelligent decision may be made, with the reasons for decision. Underlying action was hotly contested, with Debtor seeking coverage for claims exceeding \$40 million while insurer alleged no duty to cover based on alleged massive failure by insured to disclose material information during policy procurement process. There was no dispute that if Debtors prevailed, defendant, a large national insurer, would be able to answer for the judgment. However, litigation was massive and complex and there was real risk that Debtor's liquidating trustee may run out of money before case is completed. Proposed settlement amount of \$39 million was reasonable. However, settlement was not fair to third parties whose claims directly against insurer for bad faith or violation of consumer protection statutes would be barred as settlement did not propose to compensate those third parties for loss of right of direction action against insurer.
- (7021) *In re Myers*, 2015 WL 5175021, amended, 2015 WL 5254954 (Bankr. N.D. Ohio 2015) – Court must determine if proposed settlement is

fair and equitable. Bankruptcy judge has duty to apprise himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and should from an educated estimate of the complexity, expense, and likely duration of such litigation, the possibilities of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Sixth Circuit adopted a four-part inquiry for compromises, requiring a court to consider (1) the probability of success if litigated, (2) the complexity, expense, delay, etc. of litigation, (3) collectability concerns, and (4) the interest of creditors, including their reasonable views on the compromise. Where proposal is settlement of Section 727 action, court must also consider public interest. Bankruptcy Trustee is afforded some deference to decision based on business judgment rule, also referred to as a rebuttable presumption rule, that protects disinterested trustee so long as decision is within range of what an informed businessman would rationally decide under the circumstances. Collectability supported compromise where trustee spent 4 years combing through Debtor's financial affairs including pre-petition and post-petition financials and concluded that Debtors had very little income and were living on withdrawals from IRA and loans from friends and family. Business was operating at a loss and Debtors had no non-exempt assets. After years of litigation, trustee was unable to come up with convincing evidence that Debtor should be denied discharge, particularly where Debtor has been cooperative and provided numerous documents to trustee. Allegation that Debtor concealed interest in corporation was weak where trustee found no flow of income suggesting ownership, no wire transfers, no W-2 forms, and no checks or cancelled checks, and there were no stock certificates, subscriptions, options or "sweat equity" deals. While there may have been suggestions of ownership, there was no evidence of any actual ownership.

- (7022) *In re LPN Healthcare Facility, Inc.*, 2015 WL 3648672 (Bankr. S.D. Ohio 2015) – Approval of settlement is based on probability of success of litigation; difficulties to be encountered in collection; complexity of litigation including expense, inconvenience and delay; and paramount interests of creditors. Settlement approved where substantial time had passed between events leading to cause of action resulting in difficulty with witness recollections and the death of one key witness. Future success by trustee fairly debatable given evidentiary issues. Further litigation would be long and expensive given need for significant number of expert witnesses and complexity of records. Although deal may not be perfect, approval requires only that deal yield benefits to all while extracting relatively equal measures of pain.
- (7023) *In re Horvath*, 2015 WL 1000284 (Bankr. N.D. Ohio 2015) – Motion to approve settlement of State Court litigation partially denied where evidence did not indicate that settlement was in best interest of estate. Court will consider probability of success in litigation; difficulty if any in collection judgments that may be rendered; complexity of litigation and expense, inconvenience and delay; and paramount interest of creditors. Settlement of "whistleblower" case for \$1,000 approved as trustee presented evidence that there was little or no probability of success. Settlement of additional undisclosed claim against Bank approved in exchange for \$25,000 where Debtor placed no value on the claim and Trustee lacked funds to otherwise pursue recovery. Trustee's proposed settlement of appeal approved where only remedy if successful would be unwinding of receivership which would not put funds in hands of estate, and continued prosecution of appeal would be lengthy and expensive and settlement would result in lender's claims being satisfied and would release \$30,500 in garnished funds being held by lender. However, proposed settlement agreement with bank was ambiguous as to what assets and money would be paid to estate and what amounts would be owed to lender before lender satisfied its claim and released the garnished funds; and certain inconsistencies made further litigation likely. Although structure of settlement was reasonable, ambiguities and uncertainty in settlement agreement precluded approval of that portion of the overall settlement.
- (7024) *In re Seebach*, Case No. 14-0036 (Bankr. W.D. Mi. 2014) – Motion to Approve Settlement must clearly set out matters to be resolved. Motion to Approve Settlement denied where Motion stated that it intended to approve settlement of one matter but also included order allowing trustee to sell automobile free and clear of liens. Caption of Motion did not disclose additional relief beyond settlement of dispute with Debtor and body of motion did not discuss sale of automobile beyond oblique reference. Motion did not provide adequate notice to lienholder or any other party in interest.
- (7025) *In re Myers*, 2015 WL 400545 (Bankr. N.D. Ohio 2015) – Party seeking court approval of compromise bears burden to show that compromise is fair and equitable, based on (1) the probability of success if litigated, (2) the complexity, expense, delay, etc. of litigation, (3) collectability concerns, and (4) the interest of creditors, including their reasonable views on the compromise. Proposal to compromise claim over disputed funds of \$1.9 million with estate to receive \$1.5 million not unreasonable given complexity of case and difficulty for either Trustee to prove cause of action or defendant to prove defenses. Continued litigation could generate attorney fees in excess of \$500,000 further depleting the assets available for creditors. Court was unable to determine collectability as trustee failed to present any evidence beyond conclusion that he looked into it and thought the defendant to be uncollectable, which is not sufficient for court to evaluate settlement. Settlement would also require dismissal of Section 727 action against Debtor which is not in the best interests of creditors absent more proof concerning likelihood of success in that proceeding. Although Debtor was not contributing funds to the settlement, his spouse was contributing meaningful amounts of money to the settlement as well as a release of claims, sufficient to constitute a valid attempt by Debtor to reach reasonable resolution. Ultimately, trustee's failure to produce evidence on probability of success and collectability left court unable to determine that settlement was reasonable.
- (7026) *In re Nicole Gas Production, Ltd.*, 2014 WL 4855005 (Bankr. S.D. Ohio 2014) – Court must determine whether settlement is fair and equitable, taking into account all of the facts and circumstances to determine whether proposed settlement is in range of reasonableness. Proposed settlement of causes of action brought by estate for \$250,000 was within range where low end of possible recovery if litigation proceeded as \$80,000 and high end was \$680,000.
- (7027) *In re McInerney*, 2014 WL 4258302 (Bankr. E.D. Mi. 2014) – Proposed settlement is fair and reasonable. Settlement would produce \$1 million for estate which would pay all administrative and priority claims in full and provide substantial dividend to unsecured creditors. Trustee's ability to prevail was questionable as case turned on testimony of Debtor which was not likely to be found credible. Although settlement amount is far less than Debtor's estimate of potential claim value, and is less than trustee's estimate of claim value, risks of litigation were substantial and settlement was in best interests of creditors who would receive substantial payment in far shorter time than if claim is litigated to conclusion.

- (7028) *Baker v. Residential Funding Company, LLC*, 2014 WL 3767843 (E.D. Mi. 2014) – Court must determine whether proposed settlement is fair and equitable, taking into account likelihood of success on merits, delay and expense of continuing litigation, difficulties that may be encountered in collection of any judgment, and paramount interest of creditors with a proper deference to their views. Court approved settlement of case against mortgage company for alleged mortgage fraud. Debtors initially failed to disclose cause of action and did not bring action until after entry of discharge. Trustee later discovered pending litigation and reached proposed settlement with lender. Debtors claim for wrongful foreclosure was very weak where redemption had already expired and state law requires fraud in foreclosure process itself. Further, even fraud in foreclosure process renders sale voidable, not void, and Debtors failed to demonstrate any prejudice in alleged error in mortgage assignment. Litigating would postpone recovery for creditors and result in lost time value of money and value of finality. Debtors' claim that the amount of the settlement was inadequate where Debtors presented no evidence that creditor might face substantial liability. Debtors' mere speculation that litigation may have significant value is not sufficient to reject settlement.
- (7029) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Bankruptcy court must apprise itself of all facts necessary to evaluate settlement and make informed and independent judgment as to whether compromise is fair and equitable, taking into account probability of success in litigation, difficulties if any in collection, complexity of the litigation and expense, inconvenience and delay, and paramount interest of creditors with proper deference to their reasonable views. Court did not abuse discretion where creditor's argument that settlement would impair creditor's rights to indemnification where creditor could present no evidence that settlement would in any way complicate enforcement of indemnity. Creditor's allegation that asset involved was worth more than trustee's asserted valuation insufficient where creditor did not present any evidence of value and only offer to purchase submitted to trustee supported value asserted by trustee. Complexity of issues illustrated by three separate but intertwined adversary proceedings and extensive factual and legal issues that were hotly disputed amply supported court's conclusion that probability of success and recovery were debatable.
- (7030) *Baker v. Residential Funding Company, LLC*, 2014 WL 1600358 (E.D. Mi. 2014) – Court can approve settlement that is "fair and equitable", based on probability of success in litigation; difficulties, if any, to be encountered in collection; complexity of litigation and expense, inconvenience and delay paramount interest of creditors with proper deference to their reasonable views. Approval of compromise is in discretion of court and appeared to be fair and equitable as there was substantial risk that absent a settlement, the action would be decided adverse to the estate; and that even if the appeal were successful, the amount of the debt far exceeded value of property such that there was no benefit to estate. Settlement allowed estate to recover \$20,000 from mortgage holder and avoided litigation, with attendant costs, that most likely would have been unsuccessful. Party seeking stay could not demonstrate anything more than a "mere possibility" of success on appeal, far less than the "likelihood" required for stay.
- (7031) *In re 3D Resorts-Bluegrass, LLC*, 2013 WL 6019117 (Bankr. W.D. Ky. 2013) – Court must form educated estimate of complexity, expense and likely duration of litigation, possible difficulties of collecting on any judgment that may be obtained, and other factors relevant to a full and fair assessment of the wisdom of proposed settlement. Factors include probability of success, difficulties to be encountered in collection, complexity of litigation and expense, inconvenience and delay necessarily attending it, and paramount interests of creditors with due deference to creditors' reasonable views. Action against Trustee was brought by multiple governmental and consumer protection agencies, and prevailing would require prevailing in at least three separate proceedings. Settlement would extract estate from disputes while allowing individual property purchasers to pursue actions against mortgage holder if they chose to do so; and would put \$300,000 into estate for benefit of creditors. Trustee was defendant in actions such that continued litigation did not present any opportunity to recover funds for benefit of estate separate from settlement itself.
- (7032) *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.
- (7033) *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.
- (7034) *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.

- (7035) *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.
- (7036) *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.
- (7037) *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.
- (7038) *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 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.
- (7039) *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 recover 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.
- (7040) *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 from 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.

- (7041) *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 from 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.
- (7042) *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.
- (7043) *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.
- (7044) *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.
- (7045) *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.
- (7046) *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.

- (7047) *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.

12.161 Standards for Approval – Competing Offer

- (7048) *In re Clements Manufacturing Liquidation Company, LLC*, 2018 WL 672525 (Bankr. E.D. Mi. 2018) - Bankruptcy Court has affirmative obligation to apprise itself of underlying facts and to make independent judgment as to whether compromise is fair and equitable. Bankruptcy Judge need not conduct mini-trial as long as Judge is apprised of relevant facts and law to make informed and intelligent decision and set out reasons for decision. Four factors that generally consider in evaluating whether compromise is “fair and equitable” are: (a) probability of success; (b) difficulties, if any, to be encountered in collection; (c) complexity of litigation involved, and expense, inconvenience and delay necessarily attending it; and (d) paramount interest of creditors and proper deference to their reasonable views. Trustee proposed to settle avoidable transfer litigating by dismissing action while receiving 20% of recovery in separate litigation not to exceed \$300,000. Creditor proposed settlement that would escrow \$300,000 to provide for maximum recovery in avoidance actions, paying estate immediate sum of \$132,000 as to which offering creditor claimed interest, and releasing claims against estate aggregating more than \$7 million. Competing offer was more favorable as it provided immediate cash payment and release of claims against estate amounting to 29% of total claims filed, while leaving estate with possible recovery under related litigation. While Trustee’s proposed settlement was also reasonable and superior to alternatives other than Creditor competing offer, and likely would have been acceptable absent competing offer given complexity of litigation, anticipated costs including attorney fees, and risk of unsuccessful result, Court would accept competing, better offer.

12.162 Standing to Object

- (7049) *In re Horvath*, 2015 WL 1000284 (Bankr. N.D. Ohio 2015) – Debtors generally lack standing to object to proposed settlement of pre-petition litigation by trustee as Debtor normally has no pecuniary interest in outcome, as outcome will not produce funds for Debtor. However, Debtor had standing where outcome of settlement would impact amount of funds available to pay non-dischargeable tax liabilities and would therefore impact Debtor’s post-bankruptcy financial condition.
- (7050) *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.

12.163 Burden of Proof

- (7051) *In re Frankovich*, 2017 WL 2334319 (Bankr. W.D. Mi. 2017) - Motion for Approval of Settlement must provide sufficient detail to permit the Court to determine whether the settlement is fair. Motion that stated only that the Trustee regards the settlement as fair did not contain any facts to inform Court or other interested parties about nature of claims and defenses to be resolved or any other factors regarding appropriateness of settlement denied without prejudice. Motion contained perfunctory, boilerplate language that would prevent Court from performing an independent, informative review of the proposed settlement.
- (7052) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - Court will enforce settlement agreement if parties have agreed on all material terms sufficient to constitute enforceable contract under state law. Michigan law requires meeting of minds or mutual assent with regard to all essential terms, as determined by an object of standard based on the express words and visible acts of the parties. Court cannot enforce settlement if there is dispute or ambiguity as to either entry into or terms of agreement. Email from lenders counsel to Debtor indicating that lender “may be open to a settlement” is not an offer and does not contain any material terms. Plaintiff’s response “accepting” the proposal was not sufficient to constitute meeting of minds on all material terms.
- (7053) *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.

12.164 Setting Aside Settlement

- (7054) *Cory v. Leasure*, 2015 WL 4354330 (W.D. Ky. 2015) – To set aside settlement based on fraud, party must establish by clear and convincing evidence: (a) material representation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury. Allegations of fraud unrelated to execution of settlement agreement cannot be used to void settlement. Settlement can be set aside for undue influence that is of sufficient force to destroy the free agency of the grantor and to constrain him to do, against his will, that which he would otherwise have refused to do and requires more than a bare showing that the opportunity for its imposition existed. Financial difficulties may make one more susceptible to duress but that alone is not sufficient to

constitute undue influence. Duress must involve actual or threatened violation or restraint on person contrary to law to compel person to execute agreement.

- (7055) *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.

12.165 Interpretation of Settlement Agreement

- (7056) *Deshikachar v. Collins*, Case No. 16-1332 (6th Cir. 2017) – Settlement agreement must include all material terms to be enforceable, and requires meeting of minds on all essential terms. “Meeting of minds” is objective standard looking to expressed words of parties and visible acts, not subjective state of mind. Parties signed term sheet that expressed necessary terms including amount of settlement, payment schedule, default provision, and requirement for dismissal of adversary proceeding was enforceable contract. Fact that agreement used “non-standard terms” that were not understandable to non-lawyer does not render agreement ambiguous or unenforceable where contract could only be interpreted one way. Although Debtor alleged that agreement had been reached under duress, Debtor did not present any evidence of any duress, undue influence, misrepresentation or mistake.
- (7057) *In re Great Lakes Comnet, Inc.*, 2017 WL 2416893 (Bankr. W.D. Mi. 2017) - Agreement reached during course of Bankruptcy Proceeding and incorporated into Bankruptcy Court Order is considered to be binding contract between Parties and Court will apply general principles of Contract Interpretation to determine meaning. Parties intent will be determined first by examining plain language of Order for clear manifestations of intent and will construe each provision consistently with the entire document, relative positions and purposes of the parties, as well as Court’s own understanding of history of case and intention of parties when parties presented agreed order. Settlement agreement is ambiguous where it is susceptible to more than one reasonable interpretation, at which point Court must admitted extrinsic evidence to clarify parties intent. Settlement agreement that provided for secured creditor to receive proceeds of sale and permitting creditor to file general unsecured deficiency claim did not permit creditor to instead file secured claim and administrative priority claim. Although settlement agreement did not expressly prohibit filing those claims, plain meaning of settlement agreement including statement that creditor shall hold an allowed unsecured deficiency claim led to only one reasonable conclusion, that creditors post-sale claim was limited to general unsecured deficiency claim. Attempt to preserve right to file secured claim or administrative claim was unduly complicated and inconsistent with plain meaning of agreement. Terms of settlement indicated intent to make settlement global covering all claims that creditor had against Debtor and to provide mechanism for resolving those claims.
- (7058) *Wilhoite v. Wilhoite*, 2016 WL 2865089 (Bankr. M.D. Tn. 2016) – Settlement agreement in action to dissolve marriage that included release “any claim, existing as of the date of this Agreement, of liability of any type-contractual, tortious, equitable or otherwise—against the other party, the other party’s attorney or agent in this matter, or any related or unrelated matter” sufficiently broad to include alleged violation of automatic stay that occurred prior to execution of settlement agreement and there was no dispute that all of the events occurred prior to execution of settlement agreement.
- (7059) *Deshikachar v. Collins*, 2016 WL 826053 (E.D. Mi. 2016) – Settlement achieved during mediation was enforceable where parties signed settlement agreement at mediation and agreement contained all essential terms. While terms of mediation are not normally admissible, where mediation produces settlement agreement, agreement is admissible in evidence on motion to enforce. Settlement agreement is interpreted using normal state law regarding interpretation of contract generally. While “agreement to agree” may not be enforceable, writing that evidences meeting of minds and includes all essential terms constitutes an enforceable agreement, not merely an agreement to engage in further negotiations.
- (7060) *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.
- (7061) *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.

12.166 Settlement Agreement – Injunctions Against Non-Debtor

- (7062) *In re Grove Instruments, Inc.*, Case No. 15-40733 (Bankr. C.D. Mass. 2017) – Court raised, but did not decide, whether Court has subject-matter jurisdiction to enter “bar order” in connection with proposed settlement of Chapter 7 Trustee’s adversary proceeding to recovery preferential payments to creditors where Section 524(e) specifically provides that discharge of Debtor does not discharge liability of any third party. Whether Court would approve Settlement of litigation between Chapter 7 Trustee and Debtor corporation that included “bar order” against third parties raising independent claims depends on factors including relatedness of claims sought to be enjoined and identity of interests between Debtor and parties who would benefit from bar order; whether bar order would be fair and equitable to non-Debtor parties including whether barred parties would be paid all or substantial amount of claims; benefit to estate; whether parties to be barred support settlement; consideration being paid by or on behalf of non-Debtor party that benefits from bar order; and whether effect of bar order would be consistent with distribution scheme under Code. Bar order in settlement would not be approved where claims to be barred, while

complicated, involved limited number of investors, officers and directors and would not involve global settlement that serves “common good”. Insurance company that would benefit from bar order had up to \$7 million in exposure under D&O policy but was proposing to settle for only \$500,000.00, which would produce relatively small dividend to barred creditors and produces uncertain, and possibly modest, recovery in relation to potential recovery if allowed to pursue recovery against D&O policy. Claims to be barred were independent claims by investors against Directors and Officers for breach of fiduciary duties arising from Securities violations in connection with issuance of convertible notes. While settlement would provide benefit to Chapter 7 estate, settlement rejected given relative benefits and burdens of requested bar order, lack of relatedness of claims to be enjoined with claims asserted by Trustee, lack of support by any party who would be barred, and lack of fairness of proposed settlement on barred claimants.

- (7063) *In re Junk*, 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Section 105 of the Bankruptcy Code allows the Court to enjoin suits in State Court if the failure to enjoin suits would adversely affect bankruptcy estate. Court would approve injunction against Debtor’s continuing to pursue State Court relief against mortgage company where any continued action by Debtors would interfere with a settlement of claims reached between Chapter 7 Trustee and mortgage company and approved by Bankruptcy Court.
- (7064) *In re CS Dip, LLC*, 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In considering settlement that involves injunction against actions by third parties, court must first determine whether it has jurisdiction to enjoin claims that would fall within injunction. If so, court must then determine if it has authority to enter injunction. Third, court must closely review scope of bar order. Court has “related to” jurisdiction where action could conceivably have any effect on estate being administered, or could alter Debtor’s rights, liabilities, options or freedom of action. “Related to” jurisdiction requires some nexus between the related civil proceeding and the title 11 case, such as a dispute over property of estate or because outcome of dispute will have impact on estate. Claims against Debtor’s insurance company were part of bankruptcy estate and became assets of liquidating trust through confirmed plan such that resolution of dispute with insurance company regarding scope of insurance liability was within core jurisdiction of bankruptcy court. However, proposed settlement that would enjoin all actions against insurer where injured party may have independent state law claims directly against insurer for “bad faith” refusal to settle, which would entail only rights of insurer and injured party and would not have impact on estate or on post-confirmation assets. Court otherwise has constitutional jurisdiction to review settlement as rights of third parties being settled are incidental to valuation and liquidation of asset of estate and incidental to adjustment to claims against Debtor. Bar order must be carefully tailored to extinguish only claims by non-settling defendants against settling defendants where injury to non-settling defendants is liability to underlying plaintiffs, for damages such as indemnity or contribution, such that damages are measured by defendant’s liability to plaintiff. There is no legal basis to bar claims where the injured party has independent damages beyond those of any liability of settling defendants to plaintiff. Settlement agreement was overbroad as proposed bar order would bar actions directly against insurer for bad faith or violation of consumer protection statutes by injured third parties which are damages not measured by claims against Debtor directly.
- (7065) *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.
- (7066) *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.

12.167 Sanctions

- (7067) *In re Harbaugh*, 2014 WL 3378577 (Bankr. S.D. Ohio 2014) – Party who fails to complete settlement without just cause is subject to sanctions. Court should consider whether failure to complete settlement was meritless; whether party knew or should have known that there was no basis to fail; and motive was for improper purpose such as harassment. Creditor’s failure to complete settlement warranted sanctions where creditor admitted that she was capable of communicating with counsel and understood and agreed to settlement terms. Creditor’s assertion that creditor was under treatment for depression and illness did not excuse compliance where creditor did not consult with medical providers or seek treatment for depression and was not incapable of caring for herself and managing personal affairs.

12.168 Release – Setting Aside

- (7068) *Talmer Bank & Trust v. Malek*, 2016 WL 3182766 (6th Cir. 2016) – Party seeking to set aside release must first tender back all consideration received in exchange for the release. Tender must occur before filing action or counterclaim to contest validity of release, and tender is essential element of cause of action. Defendant’s counterclaim seeking to avoid release based on alleged fraud failed to state cause of action and was fatally defective where defendant filed counterclaim *before* making tender. Defendant could not cure defect by tendering funds to opposing party after counterclaims were filed. Counterclaims attempting to set aside release dismissed.

R. Collateral Estoppel and Res Judicata

12.169 Elements Generally

- (7069) *Launder v. Doll*, 2018 WL 1189171 (Bankr. N.D. Ohio 2018) – Collateral estoppel, also known as issue preclusion, requires final judgment on merits in previous case after full and fair opportunity to litigate; issue must have been actually and directly litigated in prior suit and resolution necessary to final judgment; issue in present suit must be identical to issue in prior suit; and party against whom estoppel is asserted was party to or was in privity with party to prior action. Plaintiff and defendant in current action or same parties to state Court action that gave rise to default judgment. Defendant had full and fair opportunity to litigate where defendant was properly apprised of pendency of action but chose not to defend, resulting in default judgment. Issue in action to except debt from discharge under Section 523(a)(2)(A) was not identical to issue presented in state Court litigation where judgment issued by state Court did not require a finding of wrongful intent. State statute required only proof that defendant did or said something with likelihood of inducing in mind of consumer belief that is not in accord with facts. State Court judgment recited only that defendant had been served with complaint and that defendant had not responded to complaint and, therefore, final judgment was granted after default. Neither state Court complaint nor state Court judgment contained any findings of material misrepresentation or fraud where complaint listed variety of acts and practices declared to be unfair and deceptive under state law but does not allege or deal with any fraudulent intent or intent to deceive. State Court judgment under state consumer protection act did not amount to “actually litigated” regarding issue of Debtor’s intent and neither complaint nor state Court judgment contained enough information to determine whether State Court directly litigated issue of intent or whether issue of intent was necessary to state Court judgment. State Court judgment was not collateral estoppel under Section 523(a)(6) where state Court judgment did not contain sufficiently specific findings of fact and conclusions of law to determine that Debtor’s actions were both willful and malicious. Record did not indicate that state Court had made any express adjudication as to Debtor’s state of mind such that claims adjudicated by state Court did not satisfy identical issue or actually litigated elements.
- (7070) *Watermark Senior Living v. Morrison Management Specialists, Inc.*, Case No. 17-2129 (6th Cir. 2018) – Issue preclusion applies where question of fact essential to judgment was actually litigated and determined; same parties had full and fair opportunity to litigate issue; and there is mutuality of estoppel, except that mutuality is not required where party asserts issue preclusion defensively. Although generally judgment that is vacated or set aside or judgments that are reversed or vacated by appellate Court is without preclusive effect, judgment that is set aside as part of settlement remains final judgment that adjudicated issue in prior action and will be given preclusive effect. Prior judgment which held that plaintiff negligently failed to secure dangerous chemicals which resulted in death when individual consumed those chemicals precluded later action by plaintiff seeking contractual indemnity from third-party management company where contractual indemnity was limited to circumstances where injuries were not result of plaintiff’s own negligence. Jury in prior case determined that damages were result of plaintiff’s negligence and determination of negligence was essential to prior verdict and final judgment. Plaintiff estopped from attempting to assert that damages were not result of plaintiff’s negligence. However, prior judgment was not preclusive as to breach of contract claim which did not rely on indemnity provision but instead required defendant to use ordinary care in maintaining facility in reasonably safe condition. Prior judgment did not determine whether contractor used ordinary care in carrying out contractual duties as there were no specific factual findings whether contractor acted with reasonable care or otherwise determined, or had to determine, whether contractor was “free of blame”.
- (7071) *Brown Jordan International, Inc. v. Carmicle*, 2018 WL 3583054 (Bankr. W.D. Ky. 2018) – Where case involves prior judgment of United States District Court, elements of federal collateral estoppel apply, requiring that issue sought to be precluded was same as issue involved in prior action; issue was actually litigated; issue is determined by valid final judgment; and determination was essential to prior judgment.
- (7072) *Hake v. Simpson*, 2018 WL 3973098 (S.D. Ohio 2018), *Notice of Appeal filed*, (6th Cir. 2018) – Federal Court required to afford decision of State Court full Faith and credit. Court determines preclusive effect of decision under state law. Estoppel can result from either claim preclusion defined as valid final judgment on merits barring all subsequent actions based on any claim arising out of transaction or occurrence that were subject matter previous action and includes all claims that could have been brought as part and that arise out of same nucleus of facts; or issue preclusion which bars relitigating issues actually and necessarily considered in prior action. Res judicata precludes challenge that judgment was allegedly obtained by fraud as state Court entering judgment by necessity determined that judgment was properly entered. Plaintiff acknowledged that all of the issues raised in complaint had already been litigated in state Court and plaintiff did not allege any reason why plaintiff could not have vindicated federal rights as part of State Court litigation.
- (7073) *Hubbard v. Nationwide Lending Corp.*, 2018 WL 3359099 (E.D. Mi. 2018) – Action is barred by res judicata where there has been final decision on merits by Court of competent jurisdiction in prior case; subsequent case is between same parties or privies; issue in subsequent litigation was or should have been litigated in prior action; and there is identity of causes of action. Plaintiff’s first suit either alleged that purported assignments of mortgage were invalid or reasonably should have raised those arguments. 2nd case raises different cause of action seeking “quiet title” but 2nd action was based on same facts and transactions as initial cause of action. Although complaint alleged different cause of action, suits or materially identical both in factual and legal terms such that prior dismissal for failure to state cause of action was res judicata as to plaintiff’s 2nd case.
- (7074) *Owens v. Coffey*, 2018 WL 1162535 (Bankr. W.D. Ky. 2018) – Res judicata, also known as claim preclusion, bars party from relitigating previously adjudicated cause of action. Collateral estoppel, also known as issue preclusion, bars parties from relitigating any issue actually litigated and finally decided in prior action. Confirmation of Chapter 13 Plan is not res judicata or collateral estoppel as to discharge ability of claim. Plan’s treatment of claim as general unsecured dischargeable claim did not specifically identify discharge ability of claim as issue to be determined as part of confirmation of Plan and creditor was not put on notice that Plan would terminate right to pursue nondischargeability action. Creditor timely filed objection to discharge ability of debt through proper mechanism and properly presented issue for determination. Had Plan included provision calling for nondischargeable debt to be discharged, Plan should have raised objection and Plan could not have been confirmed.

- (7075) *Lloyd's Acceptance Corp. v. Carroll Property Management LLC*, 2018 WL 3132621(W.D. Tn. 2018) - Tennessee bars race to all claims that were actually litigated or could have been litigated in first suit. Underlying judgment must have been rendered by Court of competent jurisdiction; same parties or parties with "identity of interest" were involved in both suits; same cause of action was involved; and underlying judgment was on merits. Privity requirement relates to subject matter of litigation, not simply relationship between parties such that party in first action effectively represents the same legal rights as party in second action. Mere existence of principal-agent relationship does not demonstrate sufficient identity of interest to warrant application of res judicata.
- (7076) *Lloyd's Acceptance Corp. v. Carroll Property Management LLC*, 2018 WL 3132621(W.D. Tn. 2018) - Collateral estoppel requires that issue to be precluded be identical to the issue decided earlier proceeding; issue to be included was actually raised, litigated and decided that merits; judgment earlier proceeding has become final; party against whom collateral estoppel is asserted was party to Court is in privity with party to earlier proceeding; and the party against whom estoppel is asserted in full and fair opportunity to contest issue in early receipt. Is not necessary that party asserting estoppel at the party to or in privity with parties in original. Final judgment in first action determined that plaintiff in second action lacked standing to bring the first action or negligent misrepresentation as plaintiff did not suffer any damages. Second action which sought to bring negligent misrepresentation action against other defendants barred by estoppel issue of standing at already been conclusively determined after full fair opportunity to litigate.
- (7077) *Porter v. GMAC Mortgage, LLC*, 2018 WL 3056692 (W.D. Tn. 2018) -Under federal law, final judgment on merits of action precludes parties or privies from relitigating issues that was or could have been raised. Res judicata requires that first action result in final judgment on merits by Court of competent jurisdiction; 2nd action involves same parties or privies; 2nd action raises issue actually litigated or which should have been litigated in first action; and identity of causes of action. Order confirming Chapter 11 Plan constitutes final judgment and Bankruptcy Court is Court of competent jurisdiction. Defendant was party to Chapter 11 proceedings and plaintiff had actual knowledge of proceedings where Debtor filed notice of bankruptcy case in pending District Court litigation brought by plaintiff against Debtor which resulted in stay of litigation for almost 4 years. Creditor's claim raises identity of cause of action where claims sought to be brought are "related to" bankruptcy proceeding. Claim is related to bankruptcy proceeding if outcome has effect on bankruptcy estate or impacts Debtors liabilities. Plaintiff brought action alleging predatory lending and deceptive practices seeking monetary damages, which would have impact on both bankruptcy estate and Debtor's liabilities and claims could have been raised in bankruptcy proceedings.
- (7078) *Elam v. Aurora Commercial Corporation*, 2018 WL 3059625 (W.D. Tn. 2018) – Where res judicata is based on prior State Court judgment, Court will apply law of state in which judgment was entered to determine res judicata effect. Under Tennessee law, res judicata requires that underlying judgment be rendered by Court of competent jurisdiction; same parties or privies were involved in both suits; same claim or cause of action was asserted; and underlying judgment is final on merits. Plaintiffs action against lender for alleged violation of Truth in Lending and RICO that alleged invalidity of mortgage and damages barred by res judicata. State Court foreclosure judgment determining that lender had valid and enforceable lien on property was rendered by Court of competent jurisdiction, involve same parties, and underlying judgment was final on merits. Action involves "same claim or action" where both cases arise out of same transaction or series of connected transactions. Although plaintiff's complaint in this case asserted violation of Truth in Lending and RICO that were not asserted in prior case, causes of action arose out of same transaction that gave rise to mortgage foreclosed in State Court action. Plaintiffs could have raised Truth in Lending and RICO claims as part of foreclosure action. State Court foreclosure judgment entitled to res judicata effect in subsequent action for alleged violation of Truth in Lending and RICO.
- (7079) *In re Indiana Hotel Equities, LLC*, 2018 WL 3025293 (Bankr. E.D. Mi. 2018) - Collateral estoppel, also known as issue preclusion, applies to issues necessarily decided in prior State Court litigation. Where collateral estoppel is predicated on State Court judgment, law of State in which judgment was rendered determines preclusive effect. Under Indiana law, party asserting estoppel must prove final judgment on merits in prior action; identity of issue; and a party to be estopped was party in or was in privity with party in prior action. Once collateral estoppel is established, parties may not relitigate same factor issue even if causes of action in first case differ from causes of action and second case. State Court entered final judgment in eviction action determining that landlord had properly terminated lease based on lessee's default. Both parties had full and fair opportunity to litigate issues in case and State Court decision constituted final judgment. State Court decision has preclusive effect even while on appeal unless and until it is reversed or modified on appeal. Bankruptcy Court required to take "as a given" that lease was validly terminated prior to bankruptcy petition and that as of date of bankruptcy petition Debtor had no right to possession of property.
- (7080) *Headley v. Marcinek*, 2018 WL 2392146 (Bankr. N.D. Ohio 2018) – Collateral estoppel, also known as issue preclusion, applies in non-dischargeability actions where precise issue in current action was raised, actually litigated, and necessarily determined in prior litigation involving same parties. Bankruptcy Court can consider not only prior judgment, but also entire record of case, and may infer finding a fraud where Court orders punitive damages. State law defined fraud as false representation or knowing concealment of fact where there was duty to disclose; representation or concealment was material; representation or concealment made with intent of misleading plaintiff into relying on it; plaintiff was justified in relying on representation or concealment and did rely; and plaintiff's injury was proximately caused by representation or concealment. State law allowed jury to award punitive damages based on clear and convincing evidence of malice or fraud. Jury verdict found for plaintiff on both breach of contract and fraud. State Court entered judgment in favor of plaintiff on breach of contract count and for Debtor on fraud count, but also awarded punitive damages and attorney's fees. For jury to award punitive damages, jury had to have found that defendant acted with malice and committing theft of goods or services or with fraud which was defined consistent with the requirements of Section 523. Although ultimate State Court judgment was for breach of contract, entire record demonstrated that jury verdict and resulting judgment resolved all issues required under Section 523 for finding a fraud rendering judgment nondischargeable as a matter of collateral estoppel.
- (7081) *Ramani v. Romo*, Case No. 17-2107 (Bankr. E.D. Mi. 2018) – Collateral estoppel applies in dischargeability proceedings and bars relitigation of issue where new action is between same parties or privies; earlier proceeding led to valid final judgment; issue in question was actually and necessarily determined in prior proceeding; and parties had full and fair opportunity to litigate issues. Prior State Court judgment in

favor of plaintiffs and against defendant conclusively determined that obligation from defendant to Plaintiffs arose out of Plaintiff's refinancing defendant's student loan indebtedness. State Court judgment resulted from action between same parties. Complaint in State Court action alleged all facts necessary to establish judgment as well as all elements under Section 523(a)(8) and 26 USC Section 2221(d)(1). Defendant had full and fair opportunity to litigate issues but failed to do so resulting in default judgment.

- (7082) *Elam v. Aurora Services Loan, LLC*, 2018 WL 2074202 (W.D. Tn. 2018) – *Res Judicata*, also known as issue preclusion, bars consideration of claim that was definitely settled by prior judicial decision and requires that issue of fact or lobby actually litigated and determined and that determination was essential to judgment, and is conclusive in subsequent action between parties, whether on same or different claim. Claim Preclusion, also known as Collateral Estoppel, forecloses litigation of matters that were not litigated but should have been advanced in prior litigation. Parties previously litigated State Court validity of mortgage and reformed plaintiffs title to reflect that interest was conveyed subject to mortgage. Plaintiffs occur in action raised Truth in Lending, RICO and “fraudulent concealment” claims again challenging validity of mortgage. Both claim and issue preclusion barred plaintiff's claims where issue of validity of mortgage was directly addressed and necessarily resolved in prior proceedings. Burden was on plaintiff in prior case to plead any possible claims or theories relating to mortgage validity and cannot now avail itself of defenses it may have interposed in first case. Plaintiffs claim for violation of Truth in Lending similarly barred as action under Truth in Lending would constitute direct challenge to the validity of mortgage which had already been determined in first action.
- (7083) *Pinnacle Surety Services, Inc. v. Stigger*, 2018 WL 1522698 (W.D. Ky. 2018) – Federal res judicata requires (1) final decision on merits by court of competent jurisdiction; (2) subsequent action between same parties or privies; (3) issue in subsequent action was litigated or should have been litigated in prior action; and (4) identity of causes of action.
- (7084) *Schulz Brau Brewing, LLC, v. Evans*, 2018 WL 1577716 (Bankr. E.D. Tn. 2018) – To except debt from discharge for false pretenses, false representations, or actual fraud, Plaintiffs must prove that Defendant obtained money from or belonging to Plaintiffs through material misrepresentations that Defendant knew were false or made with gross recklessness, Defendant intended to deceive Plaintiff, Plaintiffs justifiably relied, and that reliance was proximate cause of losses. Prior State Court judgment can have collateral estoppel effect where (1) the issue sought to be precluded is identical to issue decided in an earlier proceeding; (2) the issue sought to be precluded was actually raised, litigated, and decided on merits in earlier proceeding; (3) judgment in earlier proceeding has become final; (4) party against whom collateral estoppel is asserted was party or in privity with party to earlier proceeding; and (5) party against whom collateral estoppel is asserted had full and fair opportunity in the earlier proceeding to contest issue now sought to be precluded. Prior State Court judgment afforded preclusive effect resulting in determination that debt was excepted from discharge based on fraudulent misrepresentation where Judgment contained findings of fact that Defendants fraudulently, knowingly and willfully misrepresented to Plaintiffs that they were properly licensed in Tennessee and qualified to perform work for which they contracted; Defendants did not perform work required; Defendants did not pay subcontractors even though the Defendants were paid; that Defendants' employment of unfair and deceptive acts were willful and knowing violation of Contractors Licensing Act and the Tennessee Consumer Protection Act; and Plaintiffs relied upon the Defendants' fraudulent representations and would never have hired Defendants but for fraudulent misrepresentations.
- (7085) *Morris v. Charron*, 2015 WL 7739233 (Bankr. W.D. Mi. 2015), *rehearing denied*, 2015 WL 7709308 (Bankr. W.D. Mi. 2015), *aff'd*, 2017 WL 6946642 (W.D. Mi. 2017) – In applying collateral estoppel, either State Court made requisite findings or it did not and in either case there is no genuine issue of material fact. Parties cannot relitigate factual findings or legal conclusions of State Court. Court applying collateral estoppel will consider only what State Court determined law to be, not whether State Court correctly interpreted State law. Section 523(a)(6) requires proof that Debtor intended to cause injury or acted in such a way as to believe that injury is substantially certain to result. Mere intentional act that causes injury is insufficient, although injury that results does not need to be exact injury intended. Action is malicious when taken without just cause or excuse or in conscious disregard of duties, but does not require ill will or spite. Examples of debts that are non-dischargeable include intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberate vandalizing of property, as well as contempt penalty imposed by court. Principles of collateral estoppel apply if issues in dischargeability action were actually raised and litigated in prior court in action involving same parties and prior court entered judgment based on those issues with party to be estopped having had a full and fair opportunity to litigate the issues. Fact that state law would have permitted court to enter contempt sanctions without proof that conduct was willful or malicious did not deprive judgment of collateral estoppel effect where findings in judgment went well beyond minimal standards imposed by state law and amply demonstrated that conduct met higher standard of willful and malicious. State Court Order finding Debtor to be in contempt of court amply supported finding that debt was non-dischargeable. Debtor had full knowledge of entry of Court Order enjoining corporate defendant from transferring assets and knowingly and intentionally engaged in scheme to cause corporation to transfer assets in direct violation of Court Order. Court made extensive findings regarding Debtor's knowledge of the existence, terms and duration of the injunction and described Debtor's conduct as “textbook” example of contempt of court. State Court award to Plaintiff of attorney fees and costs incurred as a result of Debtor's violation of injunction constituted damages for purposes of Section 523(a)(6). Actual injury to person or physical property is not required where conduct led directly to actual loss with contempt award designed to indemnify the injured party from harm resulting from contemptuous conduct.
- (7086) *Sullen v. Bray*, 2017 WL 4777056 (N.D. Ohio 2017) – Unsuccessful party in one action cannot file new case in federal court to litigate matters that were or could have been raised and addressed in prior action. Claim preclusion, provides that valid final judgment rendered upon merits bars all subsequent actions based upon any claim arising out of transaction or occurrence that was subject matter of previous action and encompasses all claims which were or might have been litigated in prior action. Issue preclusion also known as collateral estoppel precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action. All of Plaintiff's claims relate to foreclosure proceedings that had been completed in State Court and were either actually raised or could have been raised as defenses to foreclosure proceedings. Plaintiff's current action seeking to set aside foreclosure sale barred by *res judicata*.
- (7087) *Samulak v. Carrington Mortgage Services, LLC*, 2017 WL 4054175 (E.D. Mi. 2017) – Under federal law, res judicata applies when (1) there

a final decision on merits of first action by court of competent jurisdiction; (2) second action involves same parties, or their privies, as first; (3) second action raises issue actually litigated or which should have been litigated in first action; and (4) there is identity of claims. Res judicata extinguishes all rights of plaintiff to remedies against defendant with respect to all or any part of transaction, or series of connected transactions, out of which action arose. Res Judicata barred borrower's action in Federal Court to invalidate mortgage based on RICO, Dodd-Frank, and Michigan Court Rule 2.112. Borrower previously filed Adversary Proceeding in Bankruptcy Case challenging validity of note, mortgage and foreclosure action, resulting in Bankruptcy Court Order dismissing complaint in its entirety and with prejudice. Adversary Proceeding involved same parties and actually litigated Defendant's right to enforce the promissory note and to foreclose as well as validity of underlying loan. Claims in Bankruptcy case had sufficient identity with claims in current case where facts and events creating right of action and evidence necessary to sustain each claim was same, as action involved same note, same mortgage, same property and same foreclosure.

- (7088) *In re Hellgrath*, 2017 WL 3173969 (Bankr. S.D. Ohio 2017) – Bankruptcy Code controls over State Law for determining priority of distribution. State Court Order that appointed receiver and directed that receiver be paid fees and costs first from the property did not control priority of distribution in Bankruptcy. Receiver was unsecured creditor and would be treated as such in bankruptcy notwithstanding State Court Judgment. Using Bankruptcy Code does not violate Full Faith and Credit clause and State Court Order is not res judicata on issue of priority in bankruptcy. Further, even if res judicata could apply, issue of priority in bankruptcy is not issue that was actually and necessarily litigated or determined as part of proceeding to appoint receiver.
- (7089) *Jones v. US Bank*, 2017 WL 2191629 (S.D. Ohio 2017) – Issue preclusion (collateral estoppel) require (1) precise issue has previously been raised an actually litigated; (2) determination of issue was necessary to outcome of prior action; (3) prior proceeding resulted in judgment on merits; and (4) party against whom estoppel is asserted had full and fair opportunity to litigate issue in prior action. Where defendant is invoking issue preclusion as defense, mutuality of parties between prior action and current action is not required as long as plaintiff had full and fair opportunity to litigate contested issue in prior proceeding. Complaint alleging that party seeking to foreclose did not hold valid assignment of mortgage and lacked standing to foreclose and violated FDCPA by asserting that foreclosing party had right to foreclose, barred by collateral estoppel where State Court previously entered final judgment specifically stating that assignment of mortgage was valid and lender had right to foreclose. Determination of standing issue and validity of assignment were necessary to outcome of foreclosure proceeding and resulted in State Court Final Judgment. Plaintiff had full and fair opportunity to litigate issue in State Court as Plaintiff raised arguments concerning validity of assignment in multiple filings considered by State Court in entering Final Judgment. Although defendant asserting collateral estoppel was not party to prior action, privity is not required because collateral estoppel was asserted solely in defensive posture.
- (7090) *Pidcock v. Schwab*, 2017 WL 1155555 (E.D. Ohio 2017) – *Res judicata* bars subsequent litigation of any action that could have been brought in prior action. Goal is to compel litigants to bring all related claims in single lawsuit, and focus is not whether claim is compulsory, but whether claim should have been considered during prior action where 2 causes of action arise from same transaction or series of transactions. Creditors Committee barred by *res judicata* from bringing action against Debtor's principles for alleged self-dealing in connection with sale transaction. Committee had full and fair opportunity to raise issues as part of objection to sale transaction. *Res judicata* does not apply where party is denied full and fair opportunity to bring claims because of affirmative concealment by opposing party. Affirmative concealment requires more than mere silence, and requires that party asserting res judicata have wrongfully concealed the cause of action such that the plaintiff failed to discover the operative facts until after conclusion of the prior litigation under circumstances where plaintiff used due diligence to discover operative facts. Committee was fully aware of defendants attempts to negotiate corporate sale of assets while simultaneously attempting to obtain employment agreement and equity interest in purchaser, effectively reducing potential sale value of assets. Committee had sufficient knowledge of potential wrongful dealings between defendants and potential purchasers yet failed to pursue additional discovery. There was no trick or contrivance that prevented committee from discovering nature of discussions between defendant and asset purchaser. Breach of fiduciary duty claims in which Committee alleged that assets were sold below value because of insider's pre-sale self-dealing could have and should have been brought during sale procedure. Further, there was sufficient identity of claims for purposes of res judicata where all of the factual allegations pertained to the sale of the assets and the involvement of defendant in that sale. Current action raised the same transactions and facts as were present in sales order and relies on transaction and facts that were known and raised by Committee during bankruptcy case. Committee's later adversary proceeding to recover damages based on diminished value of assets barred by res judicata.
- (7091) *Irons v. Maginnis*, 2017 WL 2889657 (Bankr. N.D. Ohio 2017) – Claim is barred by res judicata where there has been final decision on merits by Court of competent jurisdiction; subsequent action is between same parties or their privies; issue in subsequent action was or should have been litigated in prior action; and there is identity between causes of action. Plaintiff's complaint seeking declaration that plaintiff has right to reside in property barred by res judicata where plaintiff had previously sold all of his rights under the trust agreement including the "right to reside". Issues concerning whether "right to reside" was transferable could have been raised in connection with previous Sale Motion, Sale Order and Sale Confirmation Order, yet Debtor never raised any objection to or appealed any of these orders. Court had previously determined that Debtor's interest in the property constituted property of bankruptcy estate. Accordingly, Debtor's complaint seeking to declare that Debtor retained "right of residency" barred by res judicata.
- (7092) *Dardinger v. Dardinger*, 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – Collateral Estoppel requires prior Final Judgment that establishes all elements of subsequent action. Ohio law gives preclusive effect to default judgment if plaintiff actually submits to State Court admissible evidence apart from pleadings and State Court, from evidence submitted, actually makes findings of fact and conclusions of law which are sufficiently detailed to support application of collateral estoppel. Judgment entitled to collateral estoppel where judgment did not rest on mere unanswered complaint. Defendant answered complaint and engaged in active litigation over issues involved. State Court issued summary judgment based on multiple affidavits including affidavit of Police Department accompanied by forensic report from criminal investigation. State Court reviewed and considered all pertinent documents and materials submitted and made it detailed findings of fact and conclusions of law running 7 pages in length that more than sufficiently detailed evidence to support application of collateral estoppel. Issues

addressed in State Court were sufficiently identical to issues regarding nondischargeability where factual findings made in State Court proceeding would have been sufficient to sustain finding that actions were willful and malicious within meaning of Section 523(a)(6). Willful and malicious injury requires that the actor either desire to cause consequences of action or believe that consequences were substantially certain to result; and that Debtor acted in conscious disregard of duties or without just cause. State Court findings of fact sufficiently established assault, intentional invasion of privacy, and intention to cause serious emotional distress, all of which were done with specific intent to cause harm or were known or reasonably should have been known to cause harm. Factual findings were sufficient to demonstrate that Debtor lacked any justification, holding that conduct was extreme and outrageous, intentional and went beyond all bounds of decency and demonstrate state of mind characterized by hatred, ill will or spirit of revenge with conscious disregard for rights and safety of plaintiff. Award of punitive damages is further evidence that conduct was willful and malicious as Ohio law allows for punitive damages only up on finding of actual malice

- (7093) *Tucker v. US Bank, NA*, 2017 WL 1434404 (N.D. Ohio 2017) – Federal Courts must give same preclusive effect to State-Court judgment as state would give that judgment. Ohio law of *res judicata* precludes bringing of claims in subsequent actions by same parties or their privies based on any claim arising out of the transaction that was subject matter of previous action including claims that could have been litigated in prior suit, and prevents relitigation of any fact or point that was determined by Court of competent jurisdiction in prior action even if causes of action differ. *Res judicata* precluded claims by plaintiff alleging invalidity of note and mortgage where prior State Court judgment of foreclosure necessarily determined validity of mortgage and note.
- (7094) *Underwood v. Silent*, 2017 WL 955130 (E.D. Mi. 2017) - Full Faith and Credit Act requires Federal Court to give same preclusive effect to State Court Judgment as would be given by another Court of that State. Federal Court bound by doctrines of collateral estoppel and *res judicata* arising from State Court judgments. *Res judicata* bars subsequent action between same parties when evidence or essential facts are identical in includes not only claims already litigated, but every claim arising from same transaction that parties, exercising reasonable diligence, could have raised but did not. *Res judicata* requires (1) earlier action decided on merits; (2) both actions involve same parties or privies; and (3) matter in second action was, or could have been, resolved in first action. Collateral estoppel is a subset of *res judicata*, and bars relitigation of an issue in a new action between same parties or privies where earlier proceeding resulted in valid Final Judgment and issue in question was actually and necessarily determined in that proceeding. Collateral estoppel requires (1) parties in both proceedings are the same or are in privity; (2) valid Final Judgment in first proceeding; (3) same issue was actually litigated in first proceeding; (4) issue was necessary to judgment; and (5) party against whom preclusion is asserted had full and fair opportunity to litigate issue. Plaintiff's attack on validity of State Court Judgment had been fully litigated in multiple State Court proceedings in which to plaintiff had full and fair opportunity to litigate issues, and plaintiff had been unsuccessful both at state trial Court and Michigan appellate courts. Plaintiffs Federal Court attack on validity of State Court, Judgment barred by *res judicata* in light of multiple earlier decisions on merits involving same parties and raising issues which were, or could have been, resolved in earlier proceedings.
- (7095) *Nguyen v. City of Cleveland*, 2017 WL 1345293 (N.D. Ohio 2017) – Claim preclusion bars a second lawsuit when (1) the first lawsuit ends in a final judgment on the merits, (2) both suits involve the same parties or their privies, (3) an issue in the second suit was raised or should have been raised in the first, and (4) both suits arose from the same transaction. Action barred where court previously determined that plaintiff lacked standing to bring claims and second action sought to raise identical or similar claims based on same events and issues. Issue preclusion bars a party from relitigating an issue of law necessary to a judgment, which has been previously decided by a court of competent jurisdiction, even if the new case is based on a different cause of action. Four criteria must be met for issue preclusion to apply: (1) the identical issue was raised and actually litigated in a prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior proceeding. Action barred where plaintiff previously brought action raising identical issues and court entered judgment finding that plaintiff lacked standing. Plaintiff had full and fair opportunity to litigate issue of standing and determination of standing was necessary to outcome of prior proceeding.
- (7096) *Panther Petroleum v. Couch*, 2017 WL 444644 (6th Cir. BAP 2017), *aff'd*, 2017 WL 5127656 (6th Cir. 2017) - Collateral estoppel bars relitigation by same parties of legal or factual issues actually raised and determined in earlier proceeding where Court has entered decision against parties in subsequent proceedings. Collateral estoppel requires (1) that issue sought to be precluded is identical to issue decided in earlier proceeding; (2) that issue sought to be precluded was actually raised, litigated and decided on merits; (3) that judgment in earlier proceeding has become final; (4) that party against whom collateral estoppel is asserted was party or is in privity with party to earlier proceeding; (5) that party against whom collateral estoppel is asserted had full and fair opportunity in earlier proceeding to contest issue now sought to be precluded; and (6) resolution of issue must have been necessary to the judgment. Issue is "actually litigated if it was properly raised by pleadings or otherwise and submitted for determination and determined, and party has "full and fair opportunity to litigate" where party had notice of claim and opportunity to be heard. "True default" judgment in which defendant failed to answer constitutes full and fair opportunity to litigate issue and is afforded collateral estoppel effect. State Court Judgment finding that defendant had engaged in intentional, willful and malicious conduct and was intentionally, willfully and maliciously causing injury and damage to plaintiffs given collateral estoppel effect in later adversary proceeding to deny discharge under Section 523(a)(6); and findings that Debtor committed fraud using state law standards that were virtually identical to Section 523 (a) (2) (A) given collateral estoppel effect in later adversary proceeding to deny discharge under Sections 523(a)(2)(A) and (a)(6). State Court record indicated that Debtor had ample opportunity to participate in litigation where Debtor appeared and filed answer to State Court complaint and also filed counterclaim. After Debtor's State Court Counsel withdrew, Debtor did not submit responses to discovery nor take any actions to pursue counterclaims leading State Court to enter default judgment which included specific factual findings to support both fraud and willful and malicious conduct. Debtor also failed to appear at subsequent hearing to determine damages although Debtor had been given proper notice of those proceedings. Debtor's failure to monitor proceedings or take steps to participate in litigation after withdrawal of State Court Counsel does not indicate that Debtor was deprived of opportunity to participate in case. Plaintiffs service on Debtor of pleadings that Debtor's last known address used in State Court filings was appropriate Notwithstanding Debtor's vague assertion that plaintiff "new" Debtor had moved and should have served Debtor at a different address. Service on a party is appropriate if delivered or mailed to the persons last known address. Debtor's failure to apprise State Court of

change of address did not require plaintiff to search for Debtor to determine correct service address.

- (7097) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – Res judicata operates to bar repetitious suits involving same cause of action and prevents party from relitigating previously adjudicated cause of action in new lawsuit based on same cause of action including every matter belonging to the subject of the litigation which could have been as well as those which were brought in initial case. Party asserting res judicata must demonstrate identity of parties, identity of causes of action and resolution on merits. Whether second lawsuit concerns the same controversy depends on whether both arise from same transactional nucleus of facts. Federal Court action challenging validity of note and mortgage barred by res judicata where same parties were previously involved in State Court foreclosure action and current action seeks to litigate validity of note and mortgage as well as lender's right to enforce terms of note and mortgage, all of which were resolved on merits by State Court. State Court specifically found that lender was entitled to enforce note attached to complaint, that note was properly signed by plaintiffs and secured by a mortgage on plaintiff's residence. Any counterclaims or causes of action based on TELA, Regulation C, 12 CFR section 226.1 should have been brought as compulsory counterclaims in State Court action and failure to do so forecloses subsequent litigation.
- (7098) *In re Ferguson*, Case No. 14-30604 (Bankr. W.D. Mo. 2017) - State Court judgment entered by consent between creditor and Debtor does not prohibit Trustee from later objecting to claim. *Rooker-Feldman* which prohibits party to State Court, Judgment from seeking Federal Court review of correctness of judgment does not apply as Trustee was not a party to State Court lawsuit. Collateral estoppel applies only when a judgment is rendered on merits. Under Missouri law, consent judgment is not judgment on the merits as issues were not "actually litigated". Res judicata requires that parties be identical or in privity. Bankruptcy Trustee owes duty to estate and is not in privity with either Debtor or creditor, such that res judicata did not preclude Trustee's objection to claim. Trustee entitled to present evidence in support of objection to claim to show that claims should be disallowed in whole or in part.
- (7099) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - Michigan law applies res judicata if there was prior and final decision on merits; parties in both lawsuits are the same; and matter in second case was, or could have been, resolved in first lawsuit. Plaintiff's complaint alleging that defendant violated State Court Order staying foreclosure proceeding barred by res judicata where State Court that had initially imposed a stay order subsequently granted default judgment in post-foreclosure proceeding to obtain possession of property. Later judgment was "tacit recognition" by Court that lender did not violate stay and constituted final decision on merits. Whether there was a violation of stay order was resolved in first case, precluding relitigation.
- (7100) *Brown v. Florida Coastal Partners, LLC*, 2017 WL 76940 (S.D. Ohio 2017) – Collateral estoppel requires (1) process issue raised in present case must have been raised and actually litigated in prior case; (2) determination of issue must have been necessary to outcome up prior case; (3) prior proceeding must have resulted in final judgment on the merits; and (4) party against whom estoppel is sought must have had full and fair opportunity to litigate issue in prior case. Plaintiffs' claims against the lender were based on defendant's assertion that defendant was proper party plaintiff in foreclosure action. All issues regarding ownership of mortgage and standing to foreclose were raised and resulted final judgment of State Court and order of foreclosure. Judgment decree and order of foreclosure specifically found that defendant was holder of note and mortgage and party in interest; that defendant had performed all conditions precedent prior to acceleration of mortgage; that defendant did not violate Truth in Lending Act and provided all proper terms of mortgage and did not violate any federal law or regulation; defendant did not engage in any unfair or deceptive practices or engage in any willful or wanton misconduct; and did not violate any state consumer protection act. Determination of those issues were necessary to State Court Judgment and order of foreclosure as the State Court could not have better judgment had there been in proper debt collection practices, fraud or other improper assignments. Plaintiff had full and fair opportunity to litigate those issues in State Court.
- (7101) *Brantley v. CitiMortgage*, 2016 WL 6092709 (S.D. Ohio 2016) – Res judicata bars relitigation of issues that were or could have been raised in prior action, while collateral estoppel precludes relitigation of same fact issues on different cause of action between same parties. Res judicata requires (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action. A transaction is one that arises out of common nucleus of facts. Action under TILA barred by *res judicata* where claims at issue had been or could have been brought in any of four separate State Court lawsuits, all of which were resolved in lender's favor and that resulted in entry of final judgment of foreclosure. Plaintiff's current action sought to enjoin foreclosure sale on the basis that lender failed to respond to demand of rescission and therefore plaintiff was no longer indebted to defendant. Complaint related to the Property and loan at issue in the State Court litigation and involves the same parties and claims that either were litigated in State Court or could have been litigated in those lawsuits.
- (7102) *Parker v. Horvath*, 2016 WL 5887316 (Bankr. N.D. Ohio 2016) – Under Ohio law, the doctrine of res judicata encompasses the related concepts of "issue preclusion" and "claim preclusion." Claim preclusion provides that final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them and includes any claim or defense that was brought or could have been brought in prior action. Issue preclusion, or collateral estoppel, prevents relitigation of any fact or point that was actually and necessarily determined by a court of competent jurisdiction in a previous action between the same parties or their privies even if the causes of action differ. However, Judgment entered by Court that lacked jurisdiction over prior action is of no preclusive effect. State Court Order Appointing Receiver and determining that certain assets, ownership of which was in dispute between the same parties to this action, were owned by Debtor was res judicata on issue of ownership. Although Notice of Appeal filed after subsequent order permitting Receiver to sell assets superseded State Court jurisdiction to either order or approve sale, that did not interrupt court's jurisdiction as to prior order entered before appeal taken, and which was not itself appealed, determining ownership of assets. State Court Receivership Order which determined ownership of assets was valid final judgment; issues of ownership of assets argued in State Court were identical to issues raised in bankruptcy case; proceedings brought same actions and defenses that were, or could have been brought, in State Court action as State Court did, or could have, adjudicated all issues of ownership; and parties to bankruptcy court action were sufficiently in privity with parties to State Court action such that mutuality

of interest including identity of desired result was present and party to bankruptcy case was successor in interest to interests of party at State Court level. Further, even if later parties lacked privity, where judgment is *in rem*, including Receivership proceedings, determining title to assets, that judgment is binding on all subsequent interest holders and cannot be collaterally attacked by party who allegedly subsequently acquires interest in property.

- (7103) *Lnu v. Federal National Mortgage Association*, 2016 WL 4978425 (E.D. Mi. 2016) – Res judicata in Michigan requires that (1) the first action be decided on its merits, (2) the matter being litigated in the second case was or could have been resolved in the first case, and (3) both actions involved the same parties or their privies. Test is whether the same facts or evidence are essential to the maintenance of the two claims not whether the grounds asserted for relief are the same. Federal res judicata uses similar standard: 1) a final judgment on the merits of the earlier action; (2) the claims asserted in both suits are sufficiently related and founded upon the same transaction, arise out of the same nucleus of operative facts, and seek redress for essentially the same basic wrong; and (3) both actions involve the same parties or their privies. Plaintiffs had previously brought suit in both State Court and in federal court contesting foreclosure of mortgage, sale and eviction, and each action resulted in judgment in favor of defendant, fulfilling first prong of res judicata test. All issues raised in current action either were or could have been raised in prior actions including issue of whether Plaintiff's "notice of Lien" was unenforceable against mortgage companies. All actions involved same parties or privies. Current action barred by res judicata. Action also barred by collateral estoppel which requires 1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) same parties had a full and fair opportunity to litigate the issue; and (3) there is mutuality of estoppel. "Issues raised in current case were litigated and determined and Plaintiffs have been given full and fair opportunities to litigate the current issues, the claims are subject to dismissal pursuant to collateral estoppel.
- (7104) *In re Parsons*, 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Collateral estoppel requires 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. First mortgage holder was properly named party in County tax foreclosure action that resulted in final judgment removing mortgagee's interest from property. Judgment was final and addressed all of creditor's rights and responsibilities and declared priority of interests. However, judgment was "true default" in which creditor did not participate or take action in foreclosure proceeding. As such, there was no "actual and direct" resolution of issues raised. Judgment of State Court in foreclosing tax lien not entitled to preclusive effect absent actual and direct litigation of issues of priority of claims and interests.
- (7105) *Georgia Department of Human Services v. Oberg*, 2016 WL 5376186 (E.D. Tn. 2016) –Collateral estoppel requires 1) identity of parties between the two cases; 2) identity of issues between the two cases; 3) actual and final litigation of the issue occurred in the first proceeding; 4) the determination of the issue was essential to the first proceeding; and 5) the party who is being precluded had a full and fair opportunity to litigate the issue in the first proceeding. Under Georgia law, administrative decisions are entitled to collateral estoppel effect to same extent as Court Orders. Administrative proceeding involved same parties, involved same issue of whether Debtor made false statements, and whether those false statements allowed Debtor to receive benefits to which she was not entitled. However administrative agency finding did not determine, and was not required to determine, whether State reasonably relied on false statements in first instance or whether Debtor intended to deceive State. Where prior order is based on two alternative theories, order is not collateral estoppel unless both theories would produce finding of non-dischargeability. Administrative agency decision was unclear as to whether determination was made based on false statements about income or false statements about household composition. Statement about household composition is not statement in writing concerning Debtor's financial condition and would not be excepted under Section 523(a)(2)(B).
- (7106) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016), *aff'd*, 2017 WL 2351972 (E.D. Mi. 2017), *aff'd*, 2018 WL 300438 (6th Cir. 2018) – Movant did not demonstrate any mistake in Bankruptcy Court's Order dismissing adversary proceeding based on res judicata. Res judicata prevents re-litigation of an issue previously resolved by final judgement in action between same parties or their privies. Res Judicata requires (1) final decision on merits by court of competent jurisdiction; (2) subsequent action between same parties or their privies; (3) issue in second action was or should have been litigated in first action; and (4) identity of causes of action. Privity is not element of res judicata when brought on defensive basis. As long as party seeking relief is the same party in both cases, defendant can assert res judicata as a defense even if defendant was not involved in, and was not in privity with, any party in the first action. Privity is defined as one party holding an interest that is so identified with interests of litigant in first case that sale legal right was represented the first case as in the second case, and generally requires a working functional relationship in which the interests of the non-party would be presented and protected in first action. Defendants were in privity where plaintiff's first action was brought against mortgage holder and that case was subsequently dismissed. After dismissal, defendant assigned the mortgage to a related entity and plaintiffs brought same action against mortgage assignee. Interests of original mortgage holder and those of assignee were identical for purposes of res judicata.
- (7107) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Equitable estoppel applies when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment as necessary to prevent actual or constructive fraud and to promote the ends of justice. Debtor's assertion in State Court litigation to set aside fraudulent transfer that Debtor was not true owner of property did not constitute grounds to deny later claimed bankruptcy exemption based on equitable estoppel. Creditor did not change position in reliance on claim, but instead pursued claim asserting that Debtor was owner of property and asking court to set aside transfers. Based on State Court judgment, Debtor now has no choice but to claim ownership interest in property and to claim property exempt pursuant to bankruptcy exemptions.
- (7108) *GMAC Mortgage, LLC v. McKeever*, 2016 WL 3090330 (6th Cir. 2016) – *Res judicata* applies when there has been a final judgment on merits by court of competent jurisdiction; subsequent action is between same parties or their privies; issue in subsequent litigation either was or should have been litigated in prior action; and there is an identity of causes of action. Prior District Court judgment conclusively determined that Plaintiff's letters to lender did not effect a valid rescission of loan under TILA. Causes of action were identical as both prior

case and current action involved challenge to validity of plaintiff's mortgage. Privity between parties exists where party in second case was adequately represented by party in prior case who had same interests, interests of parties are aligned, and party in first suit either understood to be acting in representative capacity or took care to protect interests of non-party. Plaintiff's previous action against loan servicer for violation of TILA bound plaintiff in later action against mortgage holder as mortgage holder and servicer had same interest in property – to protect mortgage and foreclosure on property, and Plaintiff acknowledged that servicer was acting in prior case as representative of lender.

- (7109) *Giese v. Community Trust Bank*, 2016 WL 1573498, 549 BR 469 (Bankr. E.D. Ky. 2016) – Claim is barred by res judicata if there is a final judgment by a court of competent jurisdiction; there is a subsequent action between same parties or privies; issue in subsequent action was litigated or should have been litigated in prior action; and an identity of causes of action. Bankruptcy Court Order approving sale of assets and confirming plan is final order that causes assets to be sold and no further relitigation can be brought with regard to those assets without requiring court to undo the sale, the very action which res judicata prohibits. Plaintiff was predecessor-in-interest to owners at time of sale and as such was in privity with owners sufficient to constitute identity of interests. Arguments that prior owners and plaintiff held interest in assets were identical to issues raised and determined in bankruptcy sale, as court necessarily had to determine ownership of property to determine that property was property of estate subject to sale. World was on notice of proposed sale and both sale and confirmation process were advertised both nationally and locally to give notice to all potentially interested persons. Notice was sufficient for due process purposes because notice was reasonably calculated to provide notice to all interested parties and to provide parties opportunity to appear and object. Identity of causes of action does not require identity of particular legal theories, only that causes of action in second case arise from same set of facts as in prior action and same evidence would be necessary in second action as was presented in first. Claim that property was not property of estate was same issue that was raised in bankruptcy court and relied on same facts and evidence.
- (7110) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – A claim is barred by res judicata if the following elements are satisfied “(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. Summary judgment entered by Bankruptcy Court in Plaintiff's prior Chapter 13 case is final order entitled to preclusive effect. Debtor was the same person who was the plaintiff in this case and against whom summary judgment had been entered, and moving party in Bankruptcy Court was servicer for the lender named as the defendant in this case, sufficient to establish privity between servicer and lender. Case presented identity of causes of action as Plaintiff's allegations arise out of the actions taken by lender and servicer with regard to her bankruptcy case, and plaintiff's arguments mirrored arguments made in Bankruptcy Court in objection to lender's proof of claim and opposition to lender's motion for summary judgment including claims that payments were not properly credited and that lender and servicer filed false documents with the County Recorder, plus violations of TCPA and FDCPA, all of which were addressed by Bankruptcy Court in granting summary judgment to lender. Plaintiff's claim that lender and servicer breached fiduciary duty by misapplying payments was specifically rejected by Bankruptcy Court, and claim also failed to state cause of action as there was no factual basis alleged that would create fiduciary relationship between lender and servicer on one side and plaintiff on the other, and mere Debtor/creditor relationship does not rise to level of fiduciary. Cause of action for breach of implied covenant of good faith was also considered and rejected by bankruptcy court and could not survive absent concurrent action for breach of express contract. Allegations of violation of FDCPA were also barred as Plaintiff raised those issues in Bankruptcy Court and issues were resolved by Bankruptcy Court Judgment. Plaintiff also failed to state FDCPA violation as all actions were taken by creditor, and FDCPA does not apply to creditor collecting debt in its own name. Further, alleged confusion regarding foreclosure sale date did not cause harm to Plaintiff as Plaintiff was fully aware of, and attended, foreclosure sale itself.
- (7111) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016), *aff'd*, 2017 WL 1017731 (S.D. Ohio 2017), *aff'd*, Case No. 17-3323 (6th Cir. 2017) - State Court judgment can have claim preclusive effect if (1) there is final decision on merits by court of competent jurisdiction; (2) subsequent action is between same parties or privies; (3) issue in subsequent action was or should have been decided in prior action and (4) identity of causes of action. State Court Order in post-foreclosure action to determine entitlement to surplus proceeds that Debtor had waived exemption and that surplus proceeds belonged to trustee was not collateral estoppel in later action in bankruptcy court to determine whether proceeds were property of estate. State Court did not make specific finding that proceeds were property of estate and did not provide any legal basis for awarding proceeds to Trustee. State Court also lacked jurisdiction to determine whether proceeds were property of estate as jurisdiction to determine whether property is property of estates is vested exclusively in bankruptcy court. Issue of Debtor's right to claim homestead exemption was not actually or necessarily decided. Legal proceeding before State Court was foreclosure action that lacked any identity of causes of action with matters pending in Bankruptcy Court.
- (7112) *Casab v. Grand Sky Enterprise Co., Ltd.*, Case No. 15-1378 (6th Cir. 2016) – Collateral estoppel applies in dischargeability actions where (1) same parties were involved in prior action; (2) issue was litigated and resolved in State Court proceeding; (3) party to be estopped had full and fair opportunity to litigate; and (4) state law judgment is clear, definite and unequivocal. Plaintiff and Debtor were parties to State Court action, for fraud, and action was based on same elements as elements necessary to except debt from discharge. Damages in adversary to determine debt to be non-dischargeable include all damages that flow from fraudulent conduct. Bankruptcy Court correctly held entire State Court judgment to be excepted from discharge where State Court determined that but for Debtor's fraud, plaintiff would not have entered into contractual relationship, and that measure of damages is amount necessary to compensate plaintiff plus attorney fees, other expenditures, and exemplary damages. All of plaintiff's damages flowed from the fraud and so all were excepted from discharge.
- (7113) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) – Section 523(a)(3) discharges unscheduled debt unless creditor did not have actual notice of proceeding in time to file proof of claim and claim is one that would be non-dischargeable under Section 523(a)(2), (4) or (6). Debtor did not dispute that Debtor did not schedule creditor or contest creditor's assertion that creditor lacked notice. Claim was non-dischargeable where issues that would be dispositive under Sections 523(a)(2), (4) and (6) were fully determined in pre-bankruptcy State Court judgment. State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared

through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. Issues in State Court action were same as issues in dischargeability action where State Court made specific finding that Debtor engaged in actual fraud and false pretenses and state law requirements for fraud and false pretenses were virtually identical to elements necessary for non-dischargeability under Section 523(a)(2). State Court judgment also demonstrated that debt was not dischargeable under Section 523(a)(6) which requires showing that Debtor intended his actions and that Debtor either intended to cause harm or knew that injury to creditor was substantially certain, and that Debtor acted without just cause or excuse. State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff's customers. Findings of State Court were necessary to resolution of State Court action where findings were central to plaintiff's causes of action and were based on same facts as alleged in adversary proceeding, and award of treble damages and attorney fees were dependent on specific finding of intentional, willful and malicious conduct. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff for embezzlement, or that Debtor's conduct rose to level of embezzlement or larceny.

- (7114) *Kearns v. Havlovic*, 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof of deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts necessary for finding of non-dischargeability. Collateral estoppel applies where (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. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor's conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff's favor; and (4) seizure of plaintiff's person or property during the course of the prior proceedings. Proceedings differ as abuse of process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor's intentional conduct.
- (7115) *Spradlin v. Khouri*, 2016 WL 868889 (Bankr. E.D. Ky. 2016) – *Res judicata* requires the Defendants to establish four elements: (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. Prior action between trustee and recipient of voluntary post-petition transfer for turnover involved same parties as later action to recover transfer under Section 549 and issue of whether transfer was avoidable either was or could have been raised in prior action. Final Order in turnover action is "final judgment" for purposes of subsequent avoidance action. Fact that turnover order was pending on appeal did not affect *res judicata* effect of order as long as order remained undisturbed by appellate court. Issues presented were identical where although different legal theories were espoused in turnover action than those espoused in later avoidance action, all of the facts and evidence were the same and were fully and completely presented at prior hearing. Trustee did not allege any new facts to support adversary proceeding. Where facts and evidence are the same, there is "identity" of causes of action.
- (7116) *Brown v. Florida Coastal Partners, LLC*, 2016 WL 498904 (S.D. Ohio 2016) – Party claiming preclusion must demonstrate: (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. Judgment against Husband in action brought by Husband and Wife in State Court jointly but rendered against Husband alone after Wife filed Chapter 11 was binding on Wife once Trustee abandoned cause of action. Wife's continued prosecution was mere attempt to collaterally attach State Court judgment. Proper course of action, if parties believed that State Court committed error, was to appeal State Court judgment, not file separate federal court action.
- (7117) *Taleb v. Kramer*, 2015 WL 9474251 (Bankr. E.D. Mi. 2015) – Under Michigan law, the primary difference between *res judicata* and collateral estoppel is that "res judicata" bars a second action on the same claim or cause of action, including all matters that were raised or could have been raised in the first action, while "collateral estoppel" precludes relitigation of only such issues as were actually raised, litigated, and determined in the first action and the decision of which were necessary to the judgment rendered.
- (7118) *Pidcock v. Schwab*, 2016 WL 197570 (Bankr. N.D. Ohio 2016) – Later action is barred by *res judicata* where there is final judgment in prior action between same parties or their privies, involving action which was or should have been litigated with an identity of cause of action. Later action by Creditor Trustee after confirmation of Plan against principals of Debtor for self-dealing and violation of fiduciary duty while

acting as Debtor in possession barred by res judicata. Action alleged that principals manipulated sale of Debtor's principal asset to seller who entered into secret negotiations with principals for employment and equity interests in purchaser if sale completed. Order approving sale was final order as sale necessarily and conclusively disposed of Debtor's assets and disposed of defendants' equity interests; and defendants were privies to the Debtor for purposes of res judicata as defendants were the decision makers for the Debtor and were personally affected by sale. The cause of action for breach of fiduciary duty in negotiating sale arose from same transaction as sale itself and claim of breach of fiduciary duty could have been brought during sale process. Affirmative concealment can bar application of res judicata where (i) the party asserting res judicata wrongfully concealed cause of action; (ii) party against whom res judicata is asserted did not discover operative facts; and (iii) party exercised due diligence. While plaintiff was not aware of full scope of negotiations, all parties knew that some discussions were going on and nobody used due diligence to pursue information or press issue. Plaintiff could have brought issue in response to motion to approve sale. Action for breach of fiduciary duty arising out of sale of assets barred by res judicata effect of Order approving sale of assets.

- (7119) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – Later action is barred by collateral estoppel where there was a prior action in which the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; determination of the issue must have been necessary to the outcome of the prior proceeding; prior proceeding must have resulted in a final decision on the merits; and party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. Prior action would include any claim that was, or could have been, brought. Plaintiff brought prior action in 2012 alleging that lender violated RESPA requirements in 2011. Plaintiff's prior suit was dismissed as plaintiff was also a Debtor in bankruptcy and lacked standing to pursue actions as claims belonged to estate. Plaintiff's later suit raised identical issues to those already decided by dismissal of prior case and so were barred by collateral estoppel.
- (7120) *Veasley v. Federal National Mortgage Association*, 2015 WL 5729537 (6th Cir. 2015) – Michigan law bars an action under *res judicata* when (1) prior action was decided on merits, (2) both actions involve same parties or their privies, and (3) matter in the second case was, or could have been, resolved in first. *Res judicata* bars every claim arising from same transaction that the parties, exercising reasonable diligence, could have raised but did not. Michigan Compiled Laws Section 600.5750 limits res judicata effect of provides that a judgment in summary proceedings for possession, providing that the judgment bars only issues that were actually litigated in the summary proceedings. Judgment of possession is conclusive on the narrow issue of whether the eviction was proper. Complaint alleging that foreclosing party lacked standing because of defect in assignment of mortgage barred by res judicata as State Court had already issued writ of possession which necessarily determined that lender was entitled to possession.
- (7121) *CMCO Mortgage, LLC v. Hill*, 2015 WL 6685347 (Bankr. W.D. Ky. 2015) – Collateral estoppel applies in nondischargeability action where State Court judgment establishes that issue in bankruptcy case is same as issue in prior State Court action; issues were actually litigated and actually decided; and were necessary to court's judgment. State Court judgment established that Debtor misappropriated trade secrets and that Debtor's action were willful, intentional, in bad faith, egregious, and done with malice; that Debtor's actions caused a willful and malicious injury to plaintiff; that Debtor's actions also constituted fraud and defalcation while acting in a fiduciary capacity given Debtor's intentional misrepresentations made to conceal his wrongful actions from plaintiff, and Debtor's failure to meet fiduciary obligations to plaintiff; and that Debtor intended the consequences of actions, including the destruction of plaintiff's internet division and actions were done in reckless disregard of plaintiff's economic interests and expectancies. Issues were actually litigated where, although judgment was ultimately entered by default, Debtor had substantially participated in underlying action but then decide to abandon his defense. Judgment established that all issues were actually decided and that decisions were necessary in order to hold Debtor liable under asserted theories. Debtor's alleged lack of notice of State Court's intention to enter default did not obviate collateral estoppel effect of Judgment as Debtor's remedy would lie in State Court. As long as State Court judgment remained valid, judgment entitled to preclusive effect.
- (7122) *In re Spittler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Collateral estoppel applies in objections to claims if claim has been subject to prior litigation that culminated in a valid final judgment and issues were actually litigated and necessarily determined. Issue is actually litigated if it is put into issue by pleadings, submitted to trier of fact, and determined by trier of fact, although a full trial is not necessarily required. Issue is necessarily determined if resolution is essential to judgment. Default judgment in State Court suit by creditor against Debtor collaterally estops Debtor from contesting validity or amount of debt in subsequent objection to proof of claim.
- (7123) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Issue preclusion applies in dischargeability actions and prevents re-litigation of issues that were already fully and fairly litigated in another forum. Estoppel requires (1) party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) issue must have been identical to the issue involved in the prior suit. State Court judgment established that plaintiff was the owner of steel beams that were wrongfully cut up and taken by Debtor. Issue of ownership and Debtor's actions in cutting up and removing beams were specifically litigated in State Court action that resulted in damage award to plaintiff. However, State Court judgment did not establish that Debtor acted willfully and maliciously.
- (7124) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. State Court judgment was collateral estoppel in action to except debt from discharge where State Court action was based on breach of fiduciary duty by assisting a former employee in competing with Plaintiff in violation of fiduciary duties owed by the Debtor to Plaintiff as a former officer of the corporation.
- (7125) *Jennings v. Bodrick*, 2015 WL 4437559 (Bankr. S.D. Ohio 2015) – Collateral estoppel and res judicata are related concepts that constitute doctrine of issue preclusion and prevent the re-litigation of issues determined by valid final judgment entered by another court. Collateral estoppel, also known as issue preclusion, prohibits re-litigating an issue that was also an issue in the prior case, was actually litigated, and the

determination of which was necessary to the outcome in the prior action. Res judicata, also known as claims preclusion, bars assertion of claim if there has been a final decision by court of competent jurisdiction in a prior proceeding between same parties or their privies, where the issue in the later case was or should have been litigated in the prior action and there is an identity of the causes of action. Prior judgment in favor of Debtor in action brought in first bankruptcy case denying plaintiff's objection to dischargeability under Section 523(a)(2) against Debtor precluded action in later bankruptcy case to except same debt from discharge. Action was brought by same party seeking same relief under complaint that was virtually identical to complaint in earlier case that produced final judgment in favor of Debtor, and matter was actually litigated in the prior case. Fact that the prior bankruptcy case was dismissed after entry of final judgment did not deprive final judgment of its validity or enforceability. However, prior action did not preclude complaint under Section 523(a)(6) where, although issues were raised in the prior case, the Order in the prior case made no findings but instead dismissed complaint for failure to state cause of action where prior case was Chapter 13 and there was no basis under Section 1328 to except debt from discharge. Current case is Chapter 7 and issue is properly brought in this case as debt could be excepted from discharge in Chapter 7.

- (7126) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Party claiming issue preclusion under either res judicata or collateral estoppel must show (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. If party seeks to use issue preclusion offensively, then either party or his privy must have been party to litigation. Complaint seeking damages for alleged violation of Fair Debt Collection Practices Act barred as issues were same as issues that were, or could have been, raised in State Court in foreclosure action which had already produced final judgment, as were issues about allegedly fraudulent back-dating of assignments, slander of title, and contests as to validity of mortgage assignments. All of the issues were actually presented to State Court and were actually decided by State Court in entering final judgment of foreclosure.
- (7127) *In re City of Detroit, Michigan*, 2015 WL 2165018 (Bankr. E.D. Mi. 2015) – Debtor's objection to claim sustained where multiple prior orders in multiple other courts had determined that City was not liable to creditor. Res judicata effect of prior federal Court Orders is determined by federal common law, which requires (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. Creditor had previously sued City and Court entered Summary Judgment in favor of City, which constituted final decision on merits. Parties were identical in earlier cause of action and claim in bankruptcy case arose out of same conduct of City concerning alleged wrongful seizure of personal property and demolition of structures on real property. Although bankruptcy claim included alleged damages to other items of personal property not specifically alleged in prior complaint, res judicata includes items which were raised or which could have been and should have been included.
- (7128) *Landis v. Baker*, 2015 WL 1568377 (Bankr. W.D. Ohio 2015) – Ohio law of collateral estoppel requires (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. Final Judgment in State Court that awarded punitive damages did not establish non-dischargeability of underlying claim. Ohio law allows award of punitive damages only on finding that defendant acted with actual malice, defined as hatred, ill will or spirit of revenge, or conscious disregard for rights and safety of third person that has great possibility of causing substantial harm. Complaint failed to plead sufficient facts to warrant collateral estoppel effect, where complaint did not allege whether judgment was by default or after litigation; nature and types of causes of action underlying complaint; and failed to specify amount of damages; and did not attach copy of judgment itself.
- (7129) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Claim can be barred by doctrine of collateral estoppels only if claim was fully mature at time underlying litigation was filed. Where defendant's right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant's later action against third party, predicated on same transaction and same facts, was not barred by issue preclusion.
- (7130) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect.
- (7131) *Jarbou v. JP Morgan Chase Bank*, 2014 WL 5361983 (E.D. Mi. 2014), *aff'd* 2015 WL 4604181 (6th Cir. 2015) – Res judicata requires (1) (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; (4) an identity of the causes of action. Borrower's action to contest validity of foreclosure proceeding was barred by res judicata where prior actions in both State Court and federal court established that foreclosure was proper; proceedings were between same parties; there was no allegation of new evidence; and claims were all identical in substance to claims previously brought and adjudicated adverse to borrower. Current claims were either identical to prior claims or were based on same transaction or core proceedings and could have been brought in prior proceedings. Party's simple displeasure with outcome of judicial process is not sufficient reason to permit them to re-litigate same issues over and over again.
- (7132) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Res judicata encompasses claim preclusion, which prevents party from raising in later litigation claims based on same facts as prior litigation and that were, or could have been, asserted in prior litigation; and issue preclusion, also called collateral estoppel, which prevents party from attempting to litigate claims that were actually decided in the prior case. Issue preclusion requires that precise issue raised was raised and actually litigated in prior action; determination of issue must have been necessary to outcome of prior proceeding; prior proceeding must have resulted in final judgment; and party against whom estoppel is asserted must have had full and fair opportunity to litigate the issue in prior proceedings.
- (7133) *MarketGraphics Research Group, Inc. v. Berge*, 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Where prior judgment is from federal court

and involves federal question, federal issue preclusion law applies. Where prior judgment is from federal court applying state law, state law where the court sits applies.

- (7134) *Bell v. Countrywide Home Loans*, 2014 WL 2618618 (W.D. Ky. 2014) – Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical, with inquiry focusing on whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action. Preclusion includes not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included with those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time. Plaintiff's complaint that contested lender's standing to foreclose barred by both issue preclusion and claim preclusion where plaintiff asserted lack of standing in State Court foreclosure action and State Court expressly found that lender had standing, and final judgment affirmed on appeal with appellate court also finding that lender had standing.
- (7135) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – *Res judicata* requires (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. *Res judicata* does not apply where order that is allegedly *res judicata* is reversed or rendered moot by subsequent developments. Confirmation Order in chapter 13 would not have *res judicata* effect where appellate court determined that Debtor was ineligible for Chapter 13 relief, rendering appeal of remainder of confirmation order moot.
- (7136) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Claim preclusion forecloses successive litigation of same claim regardless of whether new litigation raises same issues as were raised in prior action. Issue preclusion bars successive litigation of issues of fact or law that were actually litigated and resolved, even if the issues arise in context of different claim. State Court Judgment of foreclosure precluded later litigation concerning validity of alleged assignment to foreclosing lender. Conduct occurring prior to entry of foreclosure judgment necessarily included in and resolved by judgment, either because claims were actually litigated or because new action sought to assert same issues in context of different claims.
- (7137) *Butts v. Deutsche Bank National Trust Co.*, 2013 WL 5923216 (N.D. Ohio 2013) – Four elements of claim preclusion are: (1) prior final, valid decision on the merits by a court of competent jurisdiction; (2) second action involving the same parties, or their privies, as the first; (3) second action raises claims that were or could have been litigated in the first action; and (4) second action arises out of the transaction or occurrence that was the subject matter of the previous action. State Court foreclosure judgment precluded later action by owner contesting validity of promissory note and mortgage. Parties were identical; validity of note and mortgage was or could have been raised in State Court litigation; State Court judgment of foreclosure was final judgment by court of competent jurisdiction; and there was sufficient identity of actions as foreclosure action and current prosecution both arose out of the same transaction or series of transactions and arose out of the same core of operative facts.
- (7138) *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.
- (7139) *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.
- (7140) *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.
- (7141) *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.
- (7142) *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.

- (7143) *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.
- (7144) *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.
- (7145) *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.
- (7146) *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.
- (7147) *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.
- (7148) *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 or 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 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. 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.
- (7149) *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.
- (7150) *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.

- (7151) *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 privies. 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.
- (7152) *Tweedie v. Semenik*, 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.
- (7153) *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.
- (7154) *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.
- (7155) *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.
- (7156) *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.
- (7157) *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.
- (7158) *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.

- (7159) *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.
- (7160) *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.
- (7161) *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.
- (7162) *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.
- (7163) *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 estoppels judgment in adversary under Section 523(a)(4).
- (7164) *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.
- (7165) *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.
- (7166) *Old Republic National Title Insurance Co. v. Licavoli*, Case No. 08-4065 (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.
- (7167) *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.
- (7168) *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.

- (7169) *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.
- (7170) *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.
- (7171) *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.
- (7172) *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.
- (7173) *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.
- (7174) *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.
- (7175) *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.
- (7176) *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.
- (7177) *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.

- (7178) *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, were State Court needed to find that Debtor converted Plaintiff's property with intent to deprive Plaintiff of rightful possession.
- (7179) *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*.
- (7180) *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.
- (7181) *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.
- (7182) *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. If trial court rests judgment on two grounds, each of which is independently adequate to support it, judgment is conclusive as to both; but if appellate court affirms on one ground without passing on other, the second ground is no longer conclusively established under collateral estoppel doctrine. Issue must be identical to that determined in prior action to have been actually litigated. Court will look beyond pleadings to consider both "factual focus" of prior proceedings and whether party against whom collateral estoppel is asserted had full and fair opportunity to litigate the issue. Issue is "necessarily determined," if it was essential to 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), creditor must prove: (1) Debtor obtained money through material misrepresentation that Debtor knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false misrepresentation; and (4) reliance was proximate cause of loss. Intent requires actual or positive fraud, not merely fraud implied by law, requiring that Debtor acted maliciously and in bad faith. Under Michigan law, actionable fraud requires: (1) defendant made a material representation; (2) that was false; (3) that defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made it with intention that it should be acted upon by plaintiff; (5) plaintiff acted in reliance upon it; and (6) plaintiff suffered injury. Under Michigan law, fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. Elements of fraud claim under Michigan law are identical to those necessary to determine non-dischargeability under 11 U.S.C. §523(a)(2)(A). Michigan Court of Appeals repeatedly invoked Debtors' knowledge of their misrepresentations including 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 financial obligations; Debtor-wife's purposeful ignorance of terms of documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding documents she was signing; and Debtor-wife retained 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”.

- (7183) *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 tortiously 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.
- (7184) *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.
- (7185) *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.
- (7186) *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.
- (7187) *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.
- (7188) *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.
- (7189) *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.
- (7190) *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.

- (7191) *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).
- (7192) *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 of 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.
- (7193) *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.
- (7194) *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”. Re-litigating same issues in the context of a non-discharge ability action would be inconsistent with federal policy in favor of arbitration and would be waste of judicial resources. Collateral estoppel may be invoked where (one) issue precluded is same one involved in prior proceeding; (two) issue was actually litigated in prior proceeding; (three) determination of issue was a critical and necessary part of decision in the prior proceeding; and (four) prior forum provided party against whom estoppel is asserted full and fair opportunity to litigate 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.
- (7195) *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.
- (7196) *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.
- (7197) *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.
- (7198) *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.
- (7199) *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.

- (7200) *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.
- (7201) *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.
- (7202) *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.

12.170 Choice of Laws

- (7203) *Porter v. GMAC Mortgage, LLC*, 2018 WL 3056692 (W.D. Tn. 2018) - Where original adjudication occurred in Federal Bankruptcy Court, federal law governs preclusive effect.
- (7204) *Pinnacle Surety Services, Inc. v. Stigger*, 2018 WL 1522698 (W.D. Ky. 2018) – When res judicata is raised in federal diversity case based on prior judgment in federal diversity case, federal res judicata principals apply.

12.171 Same Parties

- (7205) *Gannett v. Erkelens*, 2018 WL 4355889 (11th Cir. 2018) – Privity requirement met plaintiff in second action was assignee from plaintiff in first action and had been plaintiff’s attorney in first action.
- (7206) *Leaf v. Refn*, 2018 WL 3409659 (6th Cir. 2018) – Res judicata requires that party in second action was either party in initial action or was in privity with party to first action and honors Constitutional requirement that person is not bound by outcome of litigation to which person was not party. Privity requires identity of legal interests such that first litigant represented same legal right that later litigant is trying to assert and requires both substantial identity of interest and working functional relationship such that interests of nonparty are presented and protected by party in first litigation. Party and second action was attorney representing unsuccessful plaintiff in first action. Attorney-client relationship does not establish requisite level of privity as attorney in first case was acting as representative of interests of client and was obligated to abide by client’s decisions concerning strategy and issues presented. Attorney-client relationship does not establish privity unless “client” in first action is “mere puppet” of attorney. Party asserting res judicata did not present any evidence that plaintiff in first case was “agent” of attorney or was “mere puppet” of attorney. Second action not barred by res judicata.
- (7207) *Lloyd’s Acceptance Corp. v. Carroll Property Management LLC*, 2018 WL 3132621 (W.D. Tn. 2018) - Tennessee bars race to all claims that were actually litigated or could have been litigated in first suit. Underlying judgment must have been rendered by Court of competent jurisdiction; same parties were parties with “identity of interest” were involved in both suits; same cause of action was involved; and underlying judgment was on merits. Privity requirement relates to subject matter of litigation, not simply relationship between parties such that person in first action shares person effectively represents the same legal rights. Mere existence of principal agent relationship does not demonstrate sufficient interest to warrant application of res judicata.
- (7208) *Manson v. Nathan*, 2018 WL 705154 (E.D. Mi. 2018) – Collateral estoppel applies only where prior court judgment is in action between same parties or their privies. Privity requires that party’s interest is so identified with interests of third party that litigation represents same legal right that third party seeks to assert. Final Judgment of Divorce in Debtor’s State Court divorce action that concluded that Debtor was owner of certain assets not binding in later turnover action brought by Trustee against third party as Defendant in adversary was not party to divorce and Debtor in divorce was not attempting to assert any rights of third parties but was instead asserting ownership in Debtor’s own right.
- (7209) *The Brothers Grimm Grass Company v. Weidaw*, 2017 WL 6754136 (Bankr. N.D. Ohio 2017) – Debtor not collaterally estopped by Guilty Plea in criminal case where under State law, criminal convictions do not bar re-litigation in later civil case. Collateral estoppel requires mutuality of parties. Criminal case was brought by State of Ohio and Creditor was not party to nor in privity with any party to criminal proceeding. Further, conviction and indictment itself were dismissed where Debtor completed diversionary program, and Court was not aware of any basis to determine that dismissed indictment could be considered conviction.
- (7210) *In re Ferguson*, Case No. 14-30604 (Bankr. W.D. Mo. 2017) - State Court judgment entered by consent between creditor and Debtor does not prohibit Trustee from later objecting to claim. *Rooker-Feldman* which prohibits party to State Court, Judgment from seeking Federal Court review of correctness of judgment does not apply as Trustee was not a party to State Court lawsuit. Collateral estoppel applies only when a judgment is rendered on merits. Under Missouri law, consent judgment is not judgment on the merits as issues were not “actually litigated”. Res judicata requires that parties be identical or in privity. Bankruptcy Trustee owes duty to estate and is not in privity with either Debtor or creditor, such that res judicata did not preclude Trustee’s objection to claim. Trustee entitled to present evidence in support of objection to claim to show that claims should be disallowed in whole or in part.

- (7211) *Estate of Jackson v. Hardaway*, 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Criminal conviction for voluntary manslaughter following Debtor’s shooting and killing of Plaintiff was not entitled to collateral estoppel effect. Collateral estoppel requires a final judgment in action between same parties where issue was actually litigated and necessarily determined. Mutuality of parties is essential as there must be mutuality of estoppel effect. Criminal conviction was undoubtedly a final judgment but did not involve same parties as dischargeability action. Parties to criminal conviction were Debtor and the State of Michigan, while parties to the adversary are Debtor and the Estate of the decedent. Absent mutuality of estoppel, conviction lacked any collateral estoppel effect in favor of either Debtor or plaintiff.
- (7212) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016), *aff’d*, 2017 WL 2351972 (E.D. Mi. 2017), *aff’d*, 2018 WL 300438 (6th Cir. 2018) – Privity is not element of res judicata when brought on defensive basis. As long as party seeking relief is the same party in both cases, defendant can assert res judicata even if defendant was not involved in, and was not in privity with, any party in the first action. Privity is defined as one party holding an interest that is so identified with interests of litigant in first case that sale legal right was represented the first case as in the second case, and generally requires a working functional relationship in which the interests of the non-party would be presented and protected in first action. Defendants were in privity where plaintiff’s first action was brought against mortgage holder and that case was subsequently dismissed. After dismissal, defendant assigned the mortgage to a related entity and plaintiffs brought same action against mortgage assignee. Interests of original mortgage holder and those of assignee were identical for purposes of res judicata.
- (7213) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – A claim is barred by res judicata if the following elements are satisfied “(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. Summary judgment entered by Bankruptcy Court in Plaintiff’s prior Chapter 13 case is final order entitled to preclusive effect. Debtor was the same person who was the plaintiff in this case and against whom summary judgment had been entered, and moving party in Bankruptcy Court was servicer for the lender named as the defendant in this case, sufficient to establish privity between servicer and lender.
- (7214) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Debtor had full and fair opportunity to litigate issues where Debtor actively participates in litigation until court entered sanction order striking pleadings and entering default judgment. Debtor had full notice that if Debtor failed to comply with orders of court, the result would be an order striking pleadings and entering default, yet Debtor continued to defy orders of court.
- (7215) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E. D. Mi. 2014) – Chapter 7 Trustee could not use State Court judgment that found that transfer of assets by Debtor to third party was fraudulent transfer where Chapter 7 Trustee was not party to that action and was not in privity with any party to that action. Collateral estoppel requires mutuality of estoppel. As Chapter 7 Trustee would not be estopped as he was not a party to State Court action, Trustee cannot rely on estopped effect of judgment against third party.
- (7216) *KFC Corporation v. Kazi*, 2014 WL 4914427 (W.D. Ky. 2014) – Sole shareholder of corporation is “privity” of corporation for purposes of res judicata. Principal precluded from asserting defenses to action to enforce guarantee of corporate guaranty where corporation unsuccessfully asserted defenses in prior action brought by lender.
- (7217) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Chapter 7 Trustee is bound by pre-petition judgment adverse to Debtor to same extent that Debtor itself is bound. Chapter 7 Trustee stands in shoes of Debtor and is bound by terms of pre-petition Judgment for purposes of res judicata and collateral estoppel.
- (7218) *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.
- (7219) *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.
- (7220) *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 privy with trustee and Debtor’s later action against mortgage company was barred.
- (7221) *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.

12.172 Claims Actually and Necessarily Litigated

- (7222) *Hake v. Simpson*, 2018 WL 3973098 (S.D. Ohio 2018), *Notice of Appeal filed*, (6th Cir. 2018) – Claim preclusion defined as valid final judgment on merits barring all subsequent actions includes any claim arising out of transaction or occurrence that was subject matter previous action and includes all claims that could have been brought as part and that arise out of same nucleus of facts. ; Or Issue preclusion

bars relitigating issues actually and necessarily considered in prior action and applies even if prior causes of action differed. Issue preclusion requires that party against whom estoppel is sought was party or was in privity with party and prior action; Court entered final judgment on merits of previous action after full and fair opportunity to litigate issues; issue was actually and directly litigated and was necessary to file judgment; and issue and present action is identical to issue in prior action. Complaint contesting validity of foreclosure action barred by res judicata where all issues alleged in complaint had already been fully and completely litigated in state Court.

- (7223) *In re Locke*, Case No. 15-31022 (Bankr. E.D. Mi. 2018) – “Student loan” includes amounts received by University from United States Department of Education where University is later required to refund money to DOE after student withdraws from classes. Fact that University sued Debtor approximately 3 years before bankruptcy filing but did not allege that obligation constituted “student loan” did not prohibit University from raising status of loan in dischargeability proceedings. Res judicata bars claims that were already litigated plus any claim arising from same transaction but does not require University which filed lawsuit 3 years before bankruptcy filing to anticipate potential bankruptcy filing 3 years later. Whether debt owed to University was student loan was not issue in State Court proceedings and University was not obligated to raise status of loan in that proceeding.
- (7224) *Davenport v. Djourabchi*, Case No. 16-2445 (D.D.C. 2018) – Rule 3007(b) effective December 1, 2017, prohibits joining objection to claim with request for additional relief that can be brought only by adversary proceeding. Debtor is not barred by res judicata or collateral estoppel from bringing subsequent adversary proceeding even if issues in adversary proceeding arise out of same transaction as objection to claim. Debtor’s objection to claim asserted that Debtor’s mortgage loan was not in default and that Creditor claimed amount beyond that which was actually owed. After Bankruptcy Court sustained Debtor’s objection, Debtor brought adversary proceeding seeking money damages for misrepresentation and harassment. Debtor could not have brought misrepresentation or harassment claims as part of claims resolution process such that res judicata and collateral estoppel did not bar later suit. First prong of res judicata inquiry examines whether 2nd claim could have been brought in first proceeding. Since claim for damages could not have been brought in contested matter, res judicata did not bar later suit.
- (7225) *Marketgraphics Research Group, Inc. v. Berge*, 2018 WL 3219626 (Bankr. M.D. Tn 2018) - Collateral estoppel applies only where issues in subsequent litigation are identical to issue resolved in earlier litigation. Prior State Court judgment holding that defendant violated Consumer Protection Act was not collateral estoppel in subsequent action under Section 523(a)(6). Section 523(a)(6) requires that injury be willful, such that Debtor desired to cause consequences or that consequences were substantially certain. Action that happens to result in injury is not sufficient. Under Consumer Protection Act, plaintiff was required to prove only that defendant acted with actual awareness of deception but did not require that defendant to cause harm or that harm was substantially certain to result. Action for copyright infringement not collateral estoppel where copyright infringement does not require proof of intent to cause harm and can be based on either intentionally copying prior work or acting with reckless disregard. Reckless disregard is not sufficient to be willful as required by Section 523(a)(6).
- (7226) *Elam v. Aurora Commercial Corporation*, 2018 WL 3059625 (W.D. Tn. 2018) – Action involves “same claim or action” where both cases arise out of same transaction or series of connected transactions. Plaintiffs’ action against lender for alleged violation of Truth in Lending arose out of same transaction that gave rise to mortgage foreclosure in State Court action. Plaintiffs could have raised Truth in Lending claim as part of foreclosure action. State Court foreclosure judgment entitled to res judicata effect in subsequent action for alleged violation of Truth in Lending.
- (7227) *Trost v. Trost*, 2014 WL 1891354 (Bankr. W.D. Mi. 2014), *aff’d*, 2017 WL 2799842 (6th Cir. BAP 2017), *aff’d*, Case No. 17-1877 (6th Cir. 2018) – Collateral estoppel requires that the same issue was actually and necessarily adjudicated in prior proceedings. There was no question that prior litigation determined that Debtor had converted property belonging to plaintiff. Although final judgment did not use phrase “willful and malicious”, factual findings in final judgment sufficiently established factual predicate to mandate finding that Debtor’s conversion of plaintiff’s property was willful. Plaintiff owned the assets in question, and all parties knew that plaintiff owned the assets. Despite that knowledge, Debtor took, and retained the assets following repeated requests by plaintiff to return the assets. Debtor’s actions could not be “unwitting” or “unintentional” and was substantially certain to cause injury, meeting “willful” standard of Section 523(a)(6). Factual findings in prior judgment also established that Debtor took and retained plaintiff’s property without cause or excuse, fulfilling “malicious” requirement. Prior Court Judgment awarding plaintiff \$108,797.06 is non-dischargeable under Section 523(a)(6).
- (7228) *Anderson v. Garman*, 2017 WL 6327061 (Bankr. N.D. Ohio 2017) – To except debt from discharge, Plaintiff must prove debtor obtained money through material misrepresentation that debtor knew was false or made with gross recklessness as to its truth; debtor intended to deceive creditor; creditor justifiably relied on false representation; and reliance was proximate cause of loss. Collateral estoppel effect of prior State Court judgment can form basis to except debt from discharge if State Court actually litigated and resolved issues as necessary part of final judgment. State Court Consent Judgment included statements that Debtor committed unfair and deceptive acts or practices, in violation of the Consumer Sales Practices ... as well as fraudulently misrepresenting ... the standard or quality of the workmanship performed on Plaintiff’s residence, and ... the nature and extent of Defendant’s written ten year warranty” did not establish that Debtor intended to deceive where state consumer protection statute did not require proof of intent to deceive. Consent Order reference to State consumer protection act, without more, did not establish basis to except debt from discharge.
- (7229) *Charon v. Morris*, 2017 WL 6629161 (W.D. Mi. 2017) – Sanctions for Civil Contempt can be willful and malicious injury that is excepted from discharge. Contempt power to reimburse party for costs incurred by contemptuous conduct of adversary including attorney fees is civil in nature but does not require finding of willful disobedience, only that the party disobey a lawful order of Court. Debtor violated Court Order in civil proceedings that prohibited transferring of assets without court permission. Debtor and Debtor’s counsel were aware of Order, yet Debtor embarked on effort to transfer assets to friendly buyer amounting to textbook example of contempt of court. Collateral estoppel effect of State Court ruling precluded Debtor from relitigating factual findings of State Court. Whether Debtor’s conduct constitutes contempt was fully and necessarily determined in State Court proceedings with Debtor having full and fair opportunity to contest issues. Both state trial court and State Court of appeals described Debtor’s knowledge of injunction and intentional conduct in thorough detail and State Court actually determined that Debtor’s conduct was willful, although State Courts did not use that term and State Courts did not identify facts that would have allowed finding of contempt for conduct that was less than willful.

- (7230) *Sullen v. Bray*, 2017 WL 4777056 (N.D. Ohio 2017) – Unsuccessful party in one action cannot file new case in federal court to litigate matters that were or could have been raised and addressed in prior action. Claim preclusion, provides that valid final judgment rendered upon merits bars all subsequent actions based upon any claim arising out of transaction or occurrence that was subject matter of previous action and encompasses all claims which were or might have been litigated in prior action. Issue preclusion also known as collateral estoppel precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action. All of Plaintiff's claims relate to foreclosure proceedings that had been completed in State Court and were either actually raised or could have been raised as defenses to foreclosure proceedings. Plaintiff's current action seeking to set aside foreclosure sale barred by *res judicata*.
- (7231) *In re Helligrath*, 2017 WL 3173969 (Bankr. S.D. Ohio 2017) – Bankruptcy Code controls over State Law for determining priority of distribution. State Court Order that appointed receiver and directed that receiver be paid fees and costs first from the property did not control priority of distribution in Bankruptcy. Receiver was unsecured creditor and would be treated as such in bankruptcy notwithstanding State Court Judgment. Using Bankruptcy Code does not violate Full Faith and Credit clause and State Court Order is not *res judicata* on issue of priority in bankruptcy. Further, even if *res judicata* could apply, issue of priority in bankruptcy is not issue that was actually and necessarily litigated or determined as part of proceeding to appoint receiver.
- (7232) *Jones v. US Bank*, 2017 WL 2191629 (S.D. Ohio 2017) – Complaint alleging that party seeking to foreclose did not hold valid assignment of mortgage and lacked standing to foreclose and violated FDCPA by asserting that foreclosing party had right to foreclose, barred by collateral estoppel where State Court previously entered final judgment specifically stating that assignment of mortgage was valid and lender had right to foreclose. Determination of standing issue and validity of assignment were necessary to outcome of foreclosure proceeding and resulted in State Court Final Judgment. Plaintiff had full and fair opportunity to litigate issue in State Court as Plaintiff raised arguments concerning validity of assignment in multiple filings considered by State Court in entering Final Judgment. Although defendant asserting collateral estoppel was not party to prior action, privity is not required because collateral estoppel was asserted solely in defensive posture.
- (7233) *Trost v. Trost*, 2014 WL 1891354 (Bankr. W.D. Mi. 2014), *aff'd*, 2017 WL 2799842 (6th Cir. BAP 2017), *aff'd*, 735 Fed. Appx. 875 (6th Cir. 2018), *petition for certiorari docketed*, ___ S.Ct. ___ (2018) (6th Cir. 2018) – Collateral estoppel and *res judicata* require that issue in second case has been actually and necessarily decided in first case. Jury finding that Debtor committed conversion did not establish that Debtor had committed fraud within scope of Section 523(a)(2). Although jury instruction stated that conversion required finding that Debtor obtained property by deceit or false representation, state law cause of action for conversion did not require that finding such that the issue of fraud or deceit was not "necessary" to the underlying determination that Debtor committed conversion. However, jury finding that Debtor also did not commit fraud did not collaterally estop plaintiff from pursuing action under Section 523(a)(2) as State Court standard for fraud required proof by clear and convincing evidence while bankruptcy standard was preponderance of evidence. Lower standard of proof in bankruptcy court meant that issue of whether Debtor committed fraud was not actually litigated.
- (7234) *Underwood v. Silent*, 2017 WL 955130 (E.D. Mi. 2017) - Full Faith and Credit Act requires Federal Court to give same preclusive effect to State Court Judgment as would be given by another Court of that State. Federal Court bound by doctrines of collateral estoppel and *res judicata* arising from State Court judgments. Collateral estoppel is 2712596 a subset of *res judicata*, and bars relitigation of an issue in a new action between same parties or privies where earlier proceeding resulted in valid Final Judgment and issue in question was actually and necessarily determined in that proceeding. Collateral estoppel requires (1) parties in both proceedings are the same or are in privity; (2) valid Final Judgment in first proceeding; (3) same issue was actually litigated in first proceeding; (4) issue was necessary to judgment; and (5) party against whom preclusion is asserted had full and fair opportunity to litigate issue. Plaintiff's attack on validity of State Court Judgment had been fully litigated in multiple State Court proceedings in which to plaintiff had full and fair opportunity to litigate issues, and plaintiff had been unsuccessful both at state trial Court and Michigan appellate courts. Plaintiffs Federal Court attack on validity of State Court, Judgment barred by *res judicata* in light of multiple earlier decisions on merits involving same parties and raising issues which were, or could have been, resolved in earlier proceedings.
- (7235) *Townsel v. Recon Management Group, LLC*, 2017 WL 1130094 (E.D. Mi. 2017) - Collateral estoppel warranted determination of debt as nondischargeable where State Court Complaint that gave rise to default judgment incorporated elements of embezzlement referenced in State Court criminal conviction and State law elements of embezzlement for purposes of criminal proceeding were same as definition of embezzlement under bankruptcy code.
- (7236) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – *Res judicata* operates to bar repetitious suits involving same cause of action and prevents party from relitigating previously adjudicated cause of action in new lawsuit based on same cause of action including every matter belonging to the subject of the litigation which could have been as well as those which were brought in initial case. Party asserting *res judicata* must demonstrate identity of parties, identity of causes of action and resolution on merits. Whether second lawsuit concerns the same controversy depends on whether both arise from same transactional nucleus of facts. Federal Court action challenging validity of note and mortgage barred by *res judicata* where same parties were previously involved in State Court foreclosure action and current action seeks to litigate validity of note and mortgage as well as lender's right to enforce terms of note and mortgage, all of which were resolved on merits by State Court. State Court specifically found that lender was entitled to enforce note attached to complaint, that note was properly signed by plaintiffs and secured by a mortgage on plaintiff's residence. Any counterclaims or causes of action based on TELA, Regulation C, 12 CFR section 226.1 should have been brought as compulsory counterclaims in State Court action and failure to do so forecloses subsequent litigation.
- (7237) *Vizachero v. Brazieka*, 2017 WL 816871 (Bankr. E.D. Mi. 2017) – Collateral estoppel bars relitigation of any factual question determined by State Court that applies the same standards as Bankruptcy Court would use. Collateral estoppel prevents issue from being relitigation where issue was actually litigated and necessarily decided in prior action. Collateral estoppel requires identity of parties across proceeding; valid final judgment in first proceeding; same issue actually litigated and necessarily determined in first proceeding; and party against whom doctrine is asserted had full and fair opportunity to litigate in prior proceeding. As general rule, Michigan law does not afford collateral estoppel effect to consent judgments because a consent judgment reflects the agreement of the parties rather than any actual adjudication by

Court of disputed issues. However, where allegations in State Court complaint, facts deemed admitted by defendant in State Court, and consent judgment, taken together, indicate at issue was “actually litigated”, collateral estoppel may apply; or where consent judgment manifests intention of parties that judgment be conclusive with respect to one or more issues, agreement is preclusive as to those issues. Defendants responses to request for admissions in State Court admitted all facts necessary to establish claim based on fraud. Consent judgment, entered based on those admissions, is sufficient to demonstrate that issue is “actually litigated”, such that State Court, Judgment had collateral estoppel effect in later nondischargeability action.

- (7238) *In re Ferguson*, Case No. 14-30604 (Bankr. W.D. Mo. 2017) - State Court judgment entered by consent between creditor and Debtor does not prohibit Trustee from later objecting to claim. *Rooker-Feldman* which prohibits party to State Court, Judgment from seeking Federal Court review of correctness of judgment does not apply as Trustee was not a party to State Court lawsuit. Collateral estoppel applies only when a judgment is rendered on merits. Under Missouri law, consent judgment is not judgment on the merits as issues were not “actually litigated”. Res judicata requires that parties be identical or in privity. Bankruptcy Trustee owes duty to estate and is not in privity with either Debtor or creditor, such that res judicata did not preclude Trustee’s objection to claim. Trustee entitled to present evidence in support of objection to claim to show that claims should be disallowed in whole or in part.
- (7239) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - Michigan law applies res judicata if there was prior and final decision on merits; parties in both lawsuits are the same; and matter in second case was, or could have been, resolved in first lawsuit. Plaintiff’s complaint alleging that defendant violated State Court Order staying foreclosure proceeding barred by res judicata where State Court that had initially imposed a stay order subsequently granted default judgment in post-foreclosure proceeding to obtain possession of property. Later judgment was “tacit recognition” by Court that lender did not violate stay and constituted final decision on merits. Whether there was a violation of stay order was resolved in first case, precluding relitigation.
- (7240) *Jennings v. Bodrick*, 2016 WL 6216099 (Bankr. S.D. Ohio 2016) – Willful and malicious injury required that Debtor take action intending to cause injury or under circumstances where Debtor believed that injury was substantially certain to occur. Focus is on subjective intent of Debtor to cause harm. Deliberate act that causes injury is not sufficient absent evidence that injury was intended. A Debtor must also have acted in conscious disregard of duties or without just cause or excuse. Prior ruling in Adversary proceeding that “Debtors intended to defraud [Plaintiff]” not entitled to preclusive effect where prior adversary to except debt form discharge under Section 523(a)(2) resulted in judgment in favor of Debtor. Finding of final judgment has collateral estoppel effect only if finding was actually litigated and was necessary to outcome in prior case. Judgment in prior case concluded that even if Debtors intended to defraud creditor, creditor did not reasonably or justifiably rely on statements. Finding that Debtor intended to defraud in no way affected court’s determination of dischargeability of debt and, therefore, was not “necessary” to the outcome for purposes of collateral estoppel.
- (7241) *Trentadue v. Zimmerman*, 2016 WL 4163586 (Bankr. N.D. Ohio 2016) – Collateral estoppel requires (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. While State Court action resulted in final judgment and action was indisputably between same parties, fact that plaintiff sought punitive damages but none were awarded is insufficient absent evidence that plaintiff actually sought punitive damages and that court specifically refused to award them coupled with finding of fact that would negate later finding that actions were willful and malicious. Further, denial of punitive damages is not collateral estoppel because State Courts impose higher burden of proof for punitive damages of clear and convincing than the preponderance of evidence required by Section 523 such that issue of willful and malicious was not “actually litigated”.
- (7242) *Georgia Department of Human Services v. Oberg*, 2016 WL 5376186 (E.D. Tn. 2016) –Collateral estoppel requires 1) identity of parties between the two cases; 2) identity of issues between the two cases; 3) actual and final litigation of the issue occurred in the first proceeding; 4) the determination of the issue was essential to the first proceeding; and 5) the party who is being precluded had a full and fair opportunity to litigate the issue in the first proceeding. Under Georgia law, administrative decisions are entitled to collateral estoppel effect to same extent as Court Orders. Administrative proceeding involved same parties, involved same issue of whether Debtor made false statements, and whether those false statements allowed Debtor to receive benefits to which she was not entitled. However administrative agency finding did not determine, and was not required to determine, whether State reasonably relied on false statements in first instance or whether Debtor intended to deceive State. Where prior order is based on two alternative theories, order is not collateral estoppel unless both theories would produce finding of non-dischargeability. Administrative agency decision was unclear as to whether determination was made based on false statements about income or false statements about household composition. Statement about household composition is not statement in writing concerning Debtor’s financial condition and would not be excepted under Section 523(a)(2)(B).
- (7243) *Westbury Village Association v. Zweifel*, 2016 WL 4371828 (Bankr. S.D. Ohio 2016) – Sanctions for contempt for violation of State Court Order are not automatically excepted from discharge. Damages caused by reckless or negligent conduct do not fall within Section 523(a)(6). Section 523(a)(6) requires proof that Debtor either desired to cause consequence of act or believes that injury was substantially certain to occur; and that actions were taken without any legal justification. Inquiry focuses on Debtor’s state of mind. While Court can consider circumstantial evidence that tends to establish what Debtor must have actually intended, fact that Debtor should have known the consequences of actions is not sufficient. Collateral estoppel requires that same issue have been decided in prior litigation. Under State law, finding of civil contempt did not require proof of purposeful, willful or intentional violation of prior order, and “good faith” is not defense. Section 523(a)(6) requires higher burden, to show intentional and willful conduct. As State Court found that Debtor’s actions were intentional but did not make, and was not required to make, finding of intentional or willful in finding of civil contempt, finding of contempt was not collateral estoppel on dischargeability under Section 523.
- (7244) *Willis v. Calvary Investments, LLC*, Case No. 14-227 (S.D. Ga. 2016) – Creditor’s filing of proof of claim in Chapter 13 case to which neither trustee nor Debtor objected did not bar later suit by Debtor alleging that proof of claim filed on stale debt violated Fair Debt Collection Practices Act. Filing proof of claim addresses only whether underlying claim is valid, not whether filing violated FDCPA. FDCPA does not

invalidate debt or otherwise affect amount of debt, which are issues presented in claims process. Claims process did not involve determination as to whether actions of creditor were attempt to use improper means to collect debt. Issues in determining validity of claim for claims purposes did not raise same facts and did not involve same cause of action as later suit for violation of FDCPA.

- (7245) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Equitable estoppel applies when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment as necessary to prevent actual or constructive fraud and to promote the ends of justice. Debtor’s assertion in State Court litigation to set aside fraudulent transfer that Debtor was not true owner of property did not constitute grounds to deny later claimed bankruptcy exemption based on equitable estoppel. Creditor did not change position in reliance on claim, but instead pursued claim asserting that Debtor was owner of property and asking court to set aside transfers. Based on State Court judgment, Debtor now has no choice but to claim ownership interest in property and to claim property exempt pursuant to bankruptcy exemptions.
- (7246) *Hoewischer v. White*, 2016 WL 3517480 (Bankr. S.D. Ohio 2016) – Section 523(a)(6) requires a deliberate and intentional injury, not just intentional conduct that causes injury, such that actor intended consequences of act not merely act itself or there was objective certainty of harm. Focus is on Debtor’s state of mind. Act must also be malicious, lacking just cause or excuse. Debtor’s actions constituted willful and malicious where Debtor intentionally uploaded nude pictures of plaintiff to “revenge porn” webpage. State Court judgment had collateral estoppel effect on issues where State Court determined that (1) Debtor intended to cause emotional distress or knew or should have known that his conduct would result in serious emotional distress to plaintiff; (2) Debtor’s conduct was outrageous and extreme beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; and (3) Debtor’s conduct was the proximate cause of plaintiff’s psychic injury. State Court awarded damages under a claim for invasion of privacy finding that Debtors conduct was “outrageous, intentional, and highly offensive”. State Court concluded that Debtor acted intentionally as act of posting pictures could not be done accidentally and was done where harm was certain to occur and Debtor had no legitimate purpose in posting pictures, but instead possessed subjective intent to cause harm. Collateral estoppel applies where State Court has entered final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; issue was actually and directly litigated in the prior suit and was necessary to the final judgment; issue in the present suit is identical to the issue in the prior suit; and party against whom estoppel is sought was a party or in privity with a party to the prior action. Collateral estoppel applies to default judgment where judgment is based on more than just an unverified complaint, and is supported by admissible evidence apart from pleadings, and State Court, based on evidence submitted, actually makes findings of fact and conclusions of law sufficiently detailed to support application of collateral estoppel such that later court can determine that State Court actually decided merits of the case and later court has reliable way of knowing decision was on merits. Debtor had actual notice of State Court matter inducing hearing on damages constituting full and fair opportunity to participate in litigation; fact that Debtor chose not to appear does not constitute lack of a full and fair opportunity to litigate. State Court action necessarily decided “willful and malicious” as State Court required plaintiff to testify and provide admissible evidence in support of claim and State Court then specifically found that conduct was “outrageous, intentional and offensive” as necessary for state law claims for intentional infliction of emotional distress and for invasion of privacy. Finding of malice was also required as predicate to award of \$100,000 punitive damages. Issues in State Court action were identical to those in adversary proceeding where standards applied by State Court for willfulness were identical to standards required under Section 523.
- (7247) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – A claim is barred by res judicata if the following elements are satisfied “(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. Case presented identity of causes of action as Plaintiff’s allegations arise out of the actions taken by lender and servicer with regard to her bankruptcy case, and plaintiff’s arguments mirrored arguments made in Bankruptcy Court in objection to lender’s proof of claim and opposition to lender’s motion for summary judgment including claims that payments were not properly credited and that lender and servicer filed false documents with the County Recorder, plus violations of TCPA and FDCPA, all of which were addressed by Bankruptcy Court in granting summary judgment to lender. Plaintiff’s claim that lender and servicer breached fiduciary duty by misapplying payments was specifically rejected by Bankruptcy Court, and claim also failed to state cause of action as there was no factual basis alleged that would create fiduciary relationship between lender and servicer on one side and plaintiff on the other, and mere Debtor/creditor relationship does not rise to level of fiduciary. Cause of action for breach of implied covenant of good faith was also considered and rejected by bankruptcy court and could not survive absent concurrent action for breach of express contract. Allegations of violation of FDCPA were also barred as Plaintiff raised those issues in Bankruptcy Court and issues were resolved by Bankruptcy Court Judgment.
- (7248) *Irvin v. Faller*, 2016 WL 1068940 (Bankr. W.D. Ky. 2016) – Willful means that Debtor took intentional act with intent to cause injury, not merely that Debtor took intentional act that caused injury. Malicious means conscious disregard for duties or without just cause, but does not require ill-will or specific intent to do harm. Collateral estoppel applies where same parties or their privies litigated issues in State Court that produced final decision; identity of issues that were actually litigated and determined; that issues were necessarily determined as part of resolution of State Court matter; and the party to be estopped had full and fair opportunity to litigate. State Court judgment holding Debtor liable for defamation lacked preclusive effect where judgment established that Debtor intentionally published statement but there was no evidence of finding that statement was published with intent to cause harm or with knowledge of falsity. Fact that State Court found Debtor liable for libel per se did not, in itself, meet required mental state for willful and malicious, as libel per se did not require knowledge that statement was false when made. Further, there was no evidence that Debtor intended to cause injury, rather than to make intentional statement that incidentally caused injury, and intent to cause injury is not element of state law action for defamation per se. However, State Court judgment for abuse of process required finding of “ulterior motive or purpose” and “willful act in use of process that was not proper in the regular course of the proceeding”. Judgment specifically required finding that defendant acted willfully and maliciously in filing action solely for purpose of harassing and annoying and without any good faith purpose.
- (7249) *Kearns v. Havlovic*, 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof of deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with

reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts necessary for finding of non-dischargeability. Collateral estoppel applies where (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. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor's conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff's favor; and (4) seizure of plaintiff's person or property during the course of the prior proceedings. Proceedings differ as abuse or process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor's intentional conduct.

- (7250) *Spradlin v. Khouri*, 2016 WL 868889 (Bankr. E.D. Ky. 2016) – *Res judicata* requires the Defendants to establish four elements: (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. Prior action between trustee and recipient of voluntary post-petition transfer for turnover involved same parties as later action to recover transfer under Section 549 and issue of whether transfer was avoidable either was or could have been raised in prior action. Issues presented were identical where although different legal theories were espoused in turnover action than those espoused in later avoidance action, all of the facts and evidence were the same and were fully and completely presented at prior hearing. Trustee did not allege any new facts to support adversary proceeding. Where facts and evidence are the same, there is “identity” of causes of action.
- (7251) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – Later action is barred by collateral estoppel where there was a prior action in which the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; determination of the issue must have been necessary to the outcome of the prior proceeding; prior proceeding must have resulted in a final decision on the merits; and party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. Prior action would include any claim that was, or could have been, brought. Plaintiff brought prior action in 2012 alleging that lender violated RESPA requirements in 2011. Plaintiff's prior suit was dismissed as plaintiff was also a Debtor in bankruptcy and lacked standing to pursue actions as claims belonged to estate. Plaintiff's later suit raised identical issues to those already decided by dismissal of prior case and so were barred by collateral estoppel.
- (7252) *Woods v. Bank of New York*, 2016 WL 105928 (Bankr. N.D. Ohio 2016) – Complaint that alleged that lender did not possess note and mortgage and lacked standing to foreclose barred by State Court Order that foreclosed equity of redemption and specifically found that mortgage had been validly assigned to BONY and that BONY was the owner and holder of the note and mortgage.
- (7253) *Gray v. Vinsant*, 2015 WL 5882291 (Bankr. E.D. Tn. 2015) – To except debt from discharge under Section 523(a)(2)(A), plaintiff must prove that Debtor obtained money or property from or belonging to plaintiff through material misrepresentations that Debtor either knew were false when made or were made with gross recklessness, that Debtor intended to deceive plaintiff and that plaintiff justifiably relied on Debtor's representations, and that the false representations were proximate cause of plaintiff's loss. Collateral estoppel can be used to prove elements of action if (1) issue sought to be preclude is identical to issue in earlier proceeding; (2) issue to be precluded was actually raised and litigated and decided on merits in earlier proceeding; (3) judgment in earlier proceeding has become final; (4) party against whom estoppel is asserted was party to, or was in privity with party to, prior action; and (5) party against whom estoppel is asserted had full and fair opportunity to litigate issue. Judgment in State Court was not collateral estoppel where it was not clear that court considered issues in State Court action that were central to Section 523 action as State Court judgment did not indicate whether Debtor's actions amounted to conduct intended to deceive or were instead result of negligent misrepresentation which does not rise to level of fraud for purposes of Section 523. Complaint contained multiple causes of action and judgment did not make any finding of fact, merely stating that judgment was entered in favor of plaintiff and against Debtor. While action potentially fit within scope of Section 523(a)(2)(A), it was not clear that State Court made requisite findings regarding intent.
- (7254) *Yeager v. Wilmers*, 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that Debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that Debtor's conduct be in conscious disregard of one's duties or without just cause. State Court judgment finding Debtor liable for battery was not collateral estoppel in dischargeability action where element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that Debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where Debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that Debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that Debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that Debtor intended to cause some harm,

and it is not required that Debtor intend to cause the precise injury that resulted.

- (7255) *Crawford v. Katz*, 2015 WL 2401643 (S.D. Ohio 2015) – Tenant’s action under Fair Debt Collection Practices Act based on alleged conduct in eviction proceedings barred by res judicata where State Court had already entered final judgment of eviction. Res Judicata includes all claims that were raised or could have been raised in State Court proceeding. Tenant could have raised FDCPA claims either as defense to or as a counterclaim in eviction proceedings. Factual claims and allegations in FDCPA action arose out of same transaction that were the subject of the State Court eviction proceeding and repeat many of the allegations asserted in the State Court counterclaim in the eviction proceeding.
- (7256) *In re City of Detroit, Michigan*, 2015 WL 2165018 (Bankr. E.D. Mi. 2015) – Debtor’s objection to claim sustained where multiple prior orders in multiple other courts had determined that City was not liable to creditor. Res judicata effect of prior federal Court Orders is determined by federal common law, which requires (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. Creditor had previously sued City and Court entered Summary Judgment in favor of City, which constituted final decision on merits. Parties were identical in earlier cause of action and claim in bankruptcy case arose out of same conduct of City concerning alleged wrongful seizure of personal property and demolition of structures on real property. Although bankruptcy claim included alleged damages to other items of personal property not specifically alleged in prior complaint, res judicata includes items which were raised or which could have been and should have been included.
- (7257) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (7258) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Issues are “actually litigated” if Debtor substantially participated in proceedings prior to entry of default as sanction for failure to abide by orders of court. Debtor substantially participated where Debtor engaged several attorneys, served and responded to discovery request, and appeared at the pre-trial conferences. Debtor had full and fair opportunity to litigate issues where Debtor actively participates in litigation until court entered sanction order striking pleadings and entering default judgment. Debtor had full notice that if Debtor failed to comply with orders of court, the result would be an order striking pleadings and entering default, yet Debtor continued to defy orders of court.
- (7259) *Long v. Baah*, 2015 WL 160738 (Bankr. E.D. Tn. 2015) – Collateral estoppels requires identity of legal or factual issues decided in earlier proceedings. Fact that issue as to which preclusion is sought is similar to issues in prior proceeding is not sufficient. Determination of issues that are not necessary to the judgment are in the nature of dicta and are not entitled to preclusive effect, thus ensuring that preclusive effect is not given to determinations that did not receive close judicial attention. State Court final judgment not entitled to preclusive effect in later action under Section 523(a)(2) where complaint sounded in breach of contract, fraudulent misrepresentation and fraudulent inducement. Final judgment awarded damages and attorney fees but did not state the specific claim on which the judgment was based and did not make any findings of fact beyond those related to breach of contract. State Court’s padding reference that defendant obtained property through false representations and “at least a constructive fraud” not sufficient as judgment contained no findings of fact as to actual fraud and “constructive fraud” is not sufficient to support action under Section 523(a)(2) as it does not have an express intent requirement but rather is a breach of duty that could deceive others or injure public interest regardless of intent.
- (7260) *Bank of Kentucky v. Nageleisen*, 2014 WL 7408931 (Bankr. E.D. Ky. 2014) – Final judgment is not res judicata or collateral estoppel where findings of judgment are secondary or alternative findings where judgment is based on alternate ground that is clearly primary. State Court judgment that set aside transfer of property as constructively fraudulent based on lack of consideration not res judicata on issue of whether transfer was also willful and malicious merely because State Court alternatively posited that transferor also had fraudulent intent. Statement regarding fraudulent intent was secondary and made only after court had concluded that transfer was constructively fraudulent.
- (7261) *Grant v. Unifund CCR, LLC*, 2014 WL 2444600 (9th Cir. 2014) – Debtor’s action alleging that debt collector violated Fair Debt Collection Practices Act by failing to provide required written notice barred by res judicata where Debtor previously filed suit alleging exactly same conduct and basis and District Court previously entered final judgment determining that collector did comply with notice requirements. Claims in second case were identical to claims in first case and arose out of same facts and transactions. District Court correctly dismissed second case as barred by res judicata.
- (7262) *MarketGraphics Research Group, Inc. v. Berge*, 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Whether final judgment has preclusive effect depends on whether findings of State Court raise same issues as are raised in subsequent litigation. Prior court judgment for Tennessee Consumer Protection Act is not preclusive under Section 523(a)(6) where state statute required finding that defendant willfully or knowingly violated statute but did not require finding of malice and district Court Order did not include findings of malice. Judgment for copyright violation also was not preclusive in later Section 523(a)(6) action where statute required proof that Debtor copied protectable elements of the work. District Court found that Debtor’s infringement was willful but did not include any finding of malice. Finally, judgment against Debtor for violation of federal Anticybersquatting act was not preclusive where statute did not require finding of either intent to cause harm or malice, instead requiring finding of bad faith intent to profit and there were no findings of fact in district court judgment of either

willfulness or malice.

- (7263) *Gambino v. Koonce*, 757 F.3d 604 (7th Cir. 2014) – State Court judgment for slander of title established requisite fraudulent intent for purposes of Section 523(a)(2)(A). Action for slander of title under state law required proof that Debtor made a false and malicious publication that disparaged plaintiff's title, that plaintiff suffered injury, and that Debtor acted with malice. Malice exists if Debtor knew the statements were false or had serious doubts about truth. State Court made express findings that Debtor recorded false deeds and fraudulent leases in effort to obtain loans from financial institution under circumstances where Debtor admitted that he fabricated documents and only possible explanation for conduct was to perpetrate fraud. Debtor's fraudulent intent was the basis of State Court decision sufficient for issue to have been actually litigated. Although lesser element of recklessness would have been sufficient to find Debtor liable for slander of title, State Court Judgment clearly indicated that court did not use recklessness or gross negligence, but found actual intent to commit fraud.
- (7264) *SunTrust Bank v. Bennett*, 2014 WL 4199092 (Bankr. M.D. Tn. 2014) – Collateral estoppel bars relitigation by the same parties of factual issues actually raised and determined in the prior proceedings. Party asserting estoppel bears burden to show that issue was in fact, determined in the prior suit and that resolution was necessary to the judgment. Issue of fraud was not necessarily litigated in action brought by bank to recover overdrafts where issue of fraud was, at best, incidental to collateral to relief. Cause of action was based on UCC liability and contractual liability for overdrafts, and neither complaint nor judgment contained any facts or findings regarding any alleged fraud. Passing reference by court to "fraud" in last sentence of the order, which merely restates language of code, is not sufficient to establish that fraud was "necessary" to the judgment.
- (7265) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – State Court Order foreclosing first mortgage did not finally determine validity of second mortgage where foreclosure sale had not occurred. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale. While final judgment established that upon completion of foreclosure process, second mortgage would be foreclosed, that event had not occurred.
- (7266) *Brown v. Ausley*, 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – Judgment against Debtor was collateral estoppel for purposes of Section 523(a)(6) if findings of fact in State Court judgment established each element of non-dischargeability action. While State Court judgment established most of the elements of action, State Court did not decide, and did not need to decide under state law, whether Debtor's actions were willful and malicious. State Court judgment that liquidated debt owed by Debtor to tenant would be given collateral estoppel effect.
- (7267) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A "true default judgment" is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest. However, estoppel is not "all or nothing" proposition and does not preclude party from later contesting issues that were not actually and necessarily decided in prior action. State Court default judgment against Debtor for conversion established that Debtor wrongfully asserted dominion and control over property of Debtor, but did not determine all issues presented in complaint under Section 523(a)(2) and (a)(6) where State Court judgment did not make finding that false statement were "material" for purposes of Section 523(a)(2); or that Debtor's conduct was "willful and malicious" as required by Section 523(a)(6).
- (7268) *Cameron v. Thomas*, 2014 WL 509327 (Bankr. E.D. Tn. 2014) – State Court denial of punitive damages in action for breach of fiduciary duty did not collaterally estop finding of breach of fiduciary duty under Section 523(a)(4). Fiduciary capacity requires express or technical trusts, not merely those resulting from wrongful conduct. State law on punitive damages required the "most egregious of wrongs" where defendant acted intentionally, fraudulently, maliciously or recklessly, and must be proved by clear and convincing evidence. For purposes of Section 523(a)(4), defalcation does not require malice or intentional fraud, but only knowledge of or gross recklessness in respect to the improper nature of the fiduciary behavior, and must be proved only by preponderance of evidence. Differing standards of conduct and differing burdens of proof precluded finding that lack of punitive damages prevented finding of breach of fiduciary duty.
- (7269) *Chamberlain v. Messer*, 2013 WL 603738 (Bankr. E.D. Mi. 2013) – Collateral estoppel effect of State Court default judgment does not bind bankruptcy court where complaint alleged not only fraud in inducement, tortious interference with contract and conversion, but also included simple breach of contract, and judgment did not specify which cause or causes of action formed basis of judgment. Issues that would be relevant to action under Section 523(a)(2), (4) and (6) were not "necessarily determined" in final judgment.
- (7270) *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.
- (7271) *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.
- (7272) *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 was 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.

- (7273) *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.
- (7274) *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.
- (7275) *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.

12.173 Valid Final Judgment – Generally

- (7276) *Spradlin v. Khouri*, 2016 WL 868889 (Bankr. E.D. Ky. 2016) – *Res judicata* requires the Defendants to establish four elements: (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. Prior action between trustee and recipient of voluntary post-petition transfer for turnover involved same parties as later action to recover transfer under Section 549 and issue of whether transfer was avoidable either was or could have been raised in prior action. Final Order in turnover action is “final judgment” for purposes of subsequent avoidance action. Fact that turnover order was pending on appeal did not affect res judicata effect of order as long as order remained undisturbed by appellate court.
- (7277) *Burniac v. Wells Fargo Bank*, 2016 WL 146515 (6th Cir. 2016) – Neither clerk’s default nor State Court preliminary injunction are “final judgments” that would bind Federal court after removal of action. On removal, Federal Court takes case as it stands as of moment of removal. Defendant against whom default had been entered but final judgment had not been entered properly requested Federal court to vacate default where record indicated that defendant had never been properly served with complaint or summons and so State Court lacked jurisdiction over defendant when default issued.
- (7278) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E.D. Mi. 2014) – Final Judgment entered by State Court after commencement of bankruptcy case was entered in violation of automatic stay and was at best voidable. Judgment did not constitute valid final judgment for purposes of collateral estoppel.
- (7279) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014), *reconsideration denied*, 2014 WL 5384052 (S.D. Ohio 2014) – State Court foreclosure action that was removed to federal court before final judgment was entered did not present “final judgment on merits” for purposes of collateral estoppel. Although court made interlocutory findings that plaintiff was holder and owner of note and mortgage in connection with motion to substitute party plaintiff, that order did not amount to “final judgment” for purposes of determining that plaintiff was, in fact, proper party plaintiff.
- (7280) *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.
- (7281) *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.

12.174 Valid Final Judgment - Involuntary Dismissal of Complaint

- (7282) *Hubbard v. Nationwide Lending Corp.*, 2018 WL 3359099 (E.D. Mi. 2018) – Court Order dismissing first case for failure to state cause of action that was affirmed on appeal constitutes final judgment for purposes of res judicata where 2nd case arose out of same facts and transaction.
- (7283) *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.

12.175 Dismissal With Prejudice

- (7284) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016), *aff'd*, 2017 WL 2351972 (E.D. Mi. 2017) – Dismissal by court of first action under Rule 41 for failure to prosecute constituted adjudication on merits and is entitled to preclusive effect. Only exception is where federal court dismisses action based on state law, and second action is brought in another state with different law. Exception did not apply where first action and second action were both brought in Courts in Michigan and both relied on same substantive state law.
- (7285) *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.
- (7286) *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.

12.176 Valid Final Judgment – Arbitration Award

- (7287) *Smith-Broughan, Inc. v. SunTrust Bank*, 2015 WL 5885350 (Bankr. N.D. Ohio 2015) – Valid arbitration award is collateral estoppel where issues raised in arbitration are same as issues in bankruptcy proceeding, involving same parties, and actually and necessarily determined. Arbitration award was not collateral estoppel on whether funds held by bank were property of estate where arbitrator decided only that one party did not breach contract with Debtor such that arbitrator never reached issue of whether plaintiff had set off rights against other party, which was lynchpin of Bank's defense.
- (7288) *Bowe v. Kilmartin*, 508 BR 35 (Bankr. W.D. Ky. 2014) – Arbitration award that has been confirmed by State Court is valid final judgment for purposes of collateral estoppel. However, award did not collaterally estop Debtor in action under Section 523(a)(6) where award was based solely on Debtor's guilty plea to a misdemeanor charge of simple assault and did not make specific findings either that Debtor acted with intent to cause harm or that actions were malicious as required by Section 523(a)(6).

12.177 Valid Final Judgment - "True Default Judgment"

- (7289) *Schulz Brau Brewing, LLC, v. Evans*, 2018 WL 1577716 (Bankr. E.D. Tn. 2018) – Prior State Court Default Judgment has collateral estoppel effect where (1) the issue sought to be precluded is identical to issue decided in an earlier proceeding; (2) the issue sought to be precluded was actually raised, litigated, and decided on merits in earlier proceeding; (3) judgment in earlier proceeding has become final; (4) party against whom collateral estoppel is asserted was party or in privity with party to earlier proceeding; and (5) party against whom collateral estoppel is asserted had full and fair opportunity in the earlier proceeding to contest issue now sought to be precluded. Prior State Court judgment afforded preclusive effect resulting in determination that debt was excepted from discharge based on fraudulent misrepresentation where Judgment contained findings of fact that Defendants fraudulently, knowingly and willfully misrepresented to Plaintiffs that they were properly licensed in Tennessee and qualified to perform work for which they contracted; Defendants did not perform work required; Defendants did not pay subcontractors even though Defendants were paid; that Defendants' employment of unfair and deceptive acts were willful and knowing violation of Contractors Licensing Act and the Tennessee Consumer Protection Act; and Plaintiffs relied upon the Defendants' fraudulent representations and would never have hired Defendants but for fraudulent misrepresentations.
- (7290) *Panther Petroleum v. Couch*, 2017 WL 444644 (6th Cir. BAP 2017), *aff'd*, 2017 WL 5127656 (6th Cir. 2017) - Collateral estoppel bars relitigation by same parties of legal or factual issues actually raised and determined in earlier proceeding where Court has entered decision against parties in subsequent proceedings. Collateral estoppel requires (1) that issue sought to be precluded is identical to issue decided in earlier proceeding; (2) that issue sought to be precluded was actually raised, litigated and decided on merits; (3) that judgment in earlier proceeding has become final; (4) that party against whom collateral estoppel is asserted was party or is in privity with party to earlier proceeding; (5) that party against whom collateral estoppel is asserted had full and fair opportunity in earlier proceeding to contest issue now sought to be precluded; and (6) resolution of issue must have been necessary to the judgment. Issue is "actually litigated if it was properly raised by pleadings or otherwise and submitted for determination and determined, and party has "full and fair opportunity to litigate" where party had notice of claim and opportunity to be heard. "True default" judgment in which defendant failed to answer constitutes full and fair opportunity to litigate issue and is afforded collateral estoppel effect. State Court Judgment finding that defendant had engaged in intentional, willful and malicious conduct and was intentionally, willfully and maliciously causing injury and damage to plaintiffs given collateral estoppel effect in later adversary proceeding to deny discharge under Section 523(a)(6); and findings that Debtor committed fraud using state law standards that were virtually identical to Section 523 (a) (2) (A) given collateral estoppel effect in later adversary proceeding to deny discharge under Sections 523(a)(2)(A) and (a)(6). State Court record indicated that Debtor had ample opportunity to participate in litigation where Debtor appeared and filed answer to State Court complaint and also filed counterclaim. After Debtor's State Court Counsel withdrew, Debtor did not submit responses to discovery nor take any actions to pursue counterclaims leading State Court to enter default judgment which included specific factual findings to support both fraud and willful and malicious conduct. Debtor also failed to appear at subsequent hearing to determine damages although Debtor had been given proper notice of those proceedings. Debtor's failure to monitor proceedings or take steps to participate in litigation after withdrawal of State Court Counsel does not indicate that Debtor was deprived of opportunity to participate in case. Plaintiffs service on Debtor of pleadings that Debtor's last known address used in State Court filings was appropriate Notwithstanding Debtor's vague assertion that plaintiff "new" Debtor had moved and should have served Debtor at a different address. Service on a party is appropriate if delivered or mailed to the persons last known address. Debtor's failure to apprise State Court of change of address did not require plaintiff to search for Debtor to determine correct service address.
- (7291) *Townsel v. Recon Management Group, LLC*, 2017 WL 1130094 (E.D. Mi. 2017) - Collateral estoppel bars relitigation of issue a new action between same parties or privies when earlier proceeding resulted in valid final judgment and issue in question was actually and necessarily

determined. Issue is “actually litigated” if it is put into issue by pleadings, submitted to trier of fact for determination and determined. Default judgment in Michigan is just as conclusive and adjudication and binding upon parties as one which is rendered filing answer and contest.

- (7292) *In re Parsons*, 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Collateral estoppel requires 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. First mortgage holder was properly named party in County tax foreclosure action that resulted in final judgment removing mortgagee’s interest from property. Judgment was final and addressed all of creditor’s rights and responsibilities and declared priority of interests. However, judgment was “true default” in which creditor did not participate or take action in foreclosure proceeding. As such, there was no “actual and direct” resolution of issues raised. Judgment of State Court in foreclosing tax lien not entitled to preclusive effect absent actual and direct litigation of issues of priority of claims and interests.
- (7293) *Leonard v. RDLG, LLC*, 2016 WL 1178649 (6th Cir. 2016) – Federal common law does not recognize true default as basis for collateral estoppel. Federal Court Judgments that result from true defaults are not actually litigated.
- (7294) *In re Spittler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Collateral estoppel applies in objections to claims if claim has been subject to prior litigation that culminated in a valid final judgment and issues were actually litigated and necessarily determined. Issue is actually litigated if it is put into issue by pleadings, submitted to trier of fact, and determined by trier of fact, although a full trial is not necessarily required. Issue is necessarily determined if resolution is essential to judgment. Default judgment in State Court suit by creditor against Debtor collaterally estopps Debtor from contesting validity or amount of debt in subsequent objection to proof of claim.
- (7295) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Default judgment is entitled to preclusive effect on issues raised and determined by prior Court Order. However, collateral estoppel does not apply if underlying judgment is product of fraud on court. Bankruptcy court abstained from issue of whether State Court judgment was result of fraud on court as State Court was in better position to determine merits of arguments, and abstention was consistent with interests of justice and comity with State Court.
- (7296) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (7297) *Brown v. Ausley*, 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – State Court default judgment that liquidated debt owed by Debtor to tenant would be given collateral estoppel effect, although State Court judgment was not preclusive as to non-dischargeability where judgment did not contain requisite factual findings and resolution of State Court claims did not require finding of “willful and malicious” for purposes of Section 523(a)(6).
- (7298) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A “true default judgment” is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest.
- (7299) *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.
- (7300) *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.
- (7301) *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*.
- (7302) *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.

12.178 Valid Final Judgment - Separation Agreement and Dissolution of Marriage

- (7303) *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.

- (7304) *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.

12.179 Valid Final Judgment - Default Judgment – Failure to Defend

- (7305) *Hoewischer v. White*, 2016 WL 3517480 (Bankr. S.D. Ohio 2016) – Section 523(a)(6) requires a deliberate and intentional injury, not just intentional conduct that causes injury, such that actor intended consequence s of act not merely act itself or there was objective certainty of harm. Focus is on Debtor’s state of mind. Act must also be malicious, lacking just cause or excuse. Debtor’s actions constituted willful and malicious where Debtor intentionally uploaded nude pictures of plaintiff to “revenge porn” webpage. State Court judgment had collateral estoppel effect on issues where State Court determined that (1) Debtor intended to cause emotional distress or knew or should have known that his conduct would result in serious emotional distress to plaintiff; (2) Debtor’s conduct was outrageous and extreme beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; and (3) Debtor’s conduct was the proximate cause of plaintiff’s psychic injury. State Court awarded damages under a claim for invasion of privacy finding that Debtors conduct was “outrageous, intentional, and highly offensive”. State Court concluded that Debtor acted intentionally as act of posting pictures could not be done accidentally and was done where harm was certain to occur and Debtor had no legitimate purpose in posting pictures, but instead possessed subjective intent to cause harm. Collateral estoppel applies where State Court has entered final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; issue was actually and directly litigated in the prior suit and was necessary to the final judgment; issue in the present suit is identical to the issue in the prior suit; and party against whom estoppel is sought was a party or in privity with a party to the prior action. Collateral estoppel applies to default judgment where judgment is based on more than just an unverified complaint, and is supported by admissible evidence apart from pleadings, and State Court, based on evidence submitted, actually makes findings of fact and conclusions of law sufficiently detailed to support application of collateral estoppel such that later court can determine that State Court actually decided merits of the case and later court has reliable way of knowing decision was on merits. Debtor had actual notice of State Court matter inducing hearing on damages constituting full and fair opportunity to participate in litigation; fact that Debtor chose not to appear does not constitute lack of a full and fair opportunity to litigate. State Court action necessarily decided “willful and malicious” as State Court required plaintiff to testify and provide admissible evidence in support of claim and State Court then specifically found that conduct was “outrageous, intentional and offensive” as necessary for state law claims for intentional infliction of emotional distress and for invasion of privacy. Finding of malice was also required as predicate to award of \$100,000 punitive damages. Issues in State Court action were identical to those in adversary proceeding where standards applied by State Court for willfulness were identical to standards required under Section 523.
- (7306) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) – Section 523(a)(3) discharges unscheduled debt unless creditor did not have actual notice of proceeding in time to file proof of claim and claim is one that would be non-dischargeable under Section 523(a)(2), (4) or (6). Debtor did not dispute that Debtor did not schedule creditor or contest creditor’s assertion that creditor lacked notice. Claim was non-dischargeable where issues that would be dispositive under Sections 23(a)(2), (4) and (6) were fully determined in pre-bankruptcy State Court judgment. State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. Issues in State Court action were same as issues in dischargeability action where State Court made specific finding that Debtor engaged in actual fraud and false pretenses and state law requirements for fraud and false pretenses were virtually identical to elements necessary for non-dischargeability under Section 523(a)(2). State Court judgment also demonstrated that debt was not dischargeable under Section 523(a)(6) which requires showing that Debtor intended his actions and that Debtor either intended to cause harm or knew that injury to creditor was substantially certain, and that Debtor acted without just cause or excuse. State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff’s customers. Findings of State Court were necessary to resolution of State Court action where findings were central to plaintiff’s causes of action and were based on same facts as alleged in adversary proceeding, and award of treble damages and attorney fees were dependent on specific finding of intentional, willful and malicious conduct. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff for embezzlement, or that Debtor’s conduct rose to level of embezzlement or larceny.
- (7307) *CMCO Mortgage, LLC v. Hill*, 2015 WL 6685347 (Bankr. W.D. Ky. 2015) – Collateral estoppel applies in nondischargeability action where State Court judgment establishes that issue in bankruptcy case is same as issue in prior State Court action; issues were actually litigated and actually decided; and were necessary to court’s judgment. State Court judgment established that Debtor misappropriated trade secrets and that Debtor’s action were willful, intentional, in bad faith, egregious, and done with malice; that Debtor’s actions caused a willful and malicious injury to plaintiff; that Debtor’s actions also constituted fraud and defalcation while acting in a fiduciary capacity given Debtor’s intentional misrepresentations made to conceal his wrongful actions from plaintiff, and Debtor’s failure to meet fiduciary obligations to plaintiff; and that Debtor intended the consequences of actions, including the destruction of plaintiff’s internet division and

actions were done in reckless disregard of plaintiff's economic interests and expectancies. Issues were actually litigated where, although judgment was ultimately entered by default, Debtor had substantially participated in underlying action but then decide to abandon his defense. Judgment established that all issues were actually decided and that decisions were necessary in order to hold Debtor liable under asserted theories. Debtor's alleged lack of notice of State Court's intention to enter default did not obviate collateral estoppel effect of Judgment as Debtor's remedy would lie in State Court. As long as State Court judgment remained valid, judgment entitled to preclusive effect.

- (7308) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (7309) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect.
- (7310) *SunTrust Bank v. Bennett*, 2014 WL 4199092 (Bankr. M.D. Tn. 2014) – Collateral estoppel bars relitigation by the same parties of factual issues actually raised and determined in the prior proceedings. Party asserting estoppel bears burden to show that issue was in fact, determined in the prior suit and that resolution was necessary to the judgment. Default judgment is collateral estoppel as to well pled factual allegations in complaint as to all matters other than unliquidated damages. State Court complaint did not contain sufficient factual allegations of fraud for purposes of Section 523(a)(2) where word “fraud” was used only once in the complaint and did so only in echoing the language of the Code. Complaint alleged only that Debtor deposited checks and later withdrew funds, and deposits later bounced leaving overdrafts in Debtor's account.
- (7311) *Forristall v. McCaulley*, 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.
- (7312) *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.
- (7313) *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.
- (7314) *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.

12.180 Valid Final Judgment - Default Judgment – “Penalty Default”

- (7315) *Dardinger v. Dardinger*, 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – Collateral Estoppel requires prior Final Judgment that establishes all elements of subsequent action. State Court Summary Judgment based on pleadings in State Court including affidavit submitted by and on behalf of plaintiff and that included detailed findings of fact and conclusions of law which carefully detailed extent and nature of defendant's misconduct was not merely “default” judgment based on defendant's failure to respond to Motion for Summary Judgment. Judgment entitled to preclusive effect where judgment was based on admissible evidence apart from pleadings and included detailed findings and conclusions.
- (7316) *Panther Petroleum v. Couch*, 2017 WL 444644 (6th Cir. BAP 2017), *aff'd*, 2017 WL 5127656 (6th Cir. 2017) - Collateral estoppel bars relitigation by same parties of legal or factual issues actually raised and determined in earlier proceeding where Court has entered decision against parties in subsequent proceedings. Collateral estoppel requires (1) that issue sought to be precluded is identical to issue decided in earlier proceeding; (2) that issue sought to be precluded was actually raised, litigated and decided on merits; (3) that judgment in earlier proceeding has become final; (4) that party against whom collateral estoppel is asserted was party or is in privity with party to earlier proceeding; (5) that party against whom collateral estoppel is asserted had full and fair opportunity in earlier proceeding to contest issue now sought to be precluded; and (6) resolution of issue must have been necessary to the judgment. Issue is “actually litigated if it was properly raised by pleadings or otherwise and submitted for determination and determined, and party has “full and fair opportunity to litigate” where party had notice of claim and opportunity to be heard. “True default” judgment in which defendant failed to answer constitutes full and fair opportunity to litigate issue and is afforded collateral estoppel effect. State Court Judgment finding that defendant had engaged in intentional,

willful and malicious conduct and was intentionally, willfully and maliciously causing injury and damage to plaintiffs given collateral estoppel effect in later adversary proceeding to deny discharge under Section 523(a)(6); and findings that Debtor committed fraud using state law standards that were virtually identical to Section 523(a)(2)(A) given collateral estoppel effect in later adversary proceeding to deny discharge under Sections 523(a)(2)(A) and (a)(6). State Court record indicated that Debtor had ample opportunity to participate in litigation where Debtor appeared and filed answer to State Court complaint and also filed counterclaim. After Debtor's State Court Counsel withdrew, Debtor did not submit responses to discovery nor take any actions to pursue counterclaims leading State Court to enter default judgment which included specific factual findings to support both fraud and willful and malicious conduct. Debtor also failed to appear at subsequent hearing to determine damages although Debtor had been given proper notice of those proceedings. Debtor's failure to monitor proceedings or take steps to participate in litigation after withdrawal of State Court Counsel does not indicate that Debtor was deprived of opportunity to participate in case. Plaintiffs service on Debtor of pleadings that Debtor's last known address used in State Court filings was appropriate Notwithstanding Debtor's vague assertion that plaintiff "new" Debtor had moved and should have served Debtor at a different address. Service on a party is appropriate if delivered or mailed to the persons last known address. Debtor's failure to apprise State Court of change of address did not require plaintiff to search for Debtor to determine correct service address.

- (7317) *Leonard v. RDLG, LLC*, 2016 WL 1178649 (6th Cir. 2016) – Default judgment entered as sanction for failure to participate in litigation is collateral estoppel on matters that are actually and necessarily determined. Defendant had full and fair opportunity to litigate issues. Defendant actively participated in lawsuit, engaged multiple attorneys, filed an answer and affirmative defenses, served and responded to discovery, and personally appeared at pre-trial conference. On eve of trial, defendant ignored pretrial order and case-management order, and attempted to continue trial. Court imposed monetary sanctions and advised Debtor that further non-compliance would result in additional sanctions including default judgment, yet defendant continued to refuse to participate in process. Applying issue preclusion would protect prevailing party from expense and vexation that would attend multiple actions.
- (7318) *Chudzinski v. Hanif*, 2015 WL 1981518 (Bankr. E.D. Mi. 2015) – Whether default judgment entered as sanction is entitled to preclusive effect depends on the degree of participation of the defaulted party prior to the default; whether the causes of action are pled with sufficient specificity such that the allegations, if deemed admitted, would support finding of non-dischargeability; whether default was entered against one or multiple defendants; whether damages awarded in default judgment are linked to specific cause of action or whether amount is lump sum not allocated to particular claim; if damages are awarded in lump sum and causes of action pled include both dischargeable and non-dischargeable actions, whether total amount of damages for non-dischargeability count have been actually and necessarily determined. If the defendant participated in action and allegations, if deemed admitted, would support finding of non-dischargeability, court can conclude that liability is conclusively presumed and leave issue of damages for further litigation. Judgment entitled to preclusive effect where Debtor actively participated and had full opportunity to litigate defenses, and default entered only after Debtor repeatedly failed to comply with discovery requests, with Debtor preferring to stall and avoid discovery than litigate.
- (7319) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Issues are "actually litigated" if Debtor substantially participated in proceedings prior to entry of default.
- (7320) *Anderson v. Fisher*, 2014 WL 4494869 (6th Cir. BAP 2014) – Default judgment entered based on defendant's refusal to comply with Court Orders compelling discovery is valid final judgment for collateral estoppel and res judicata purposes. Final Judgment specifically found, based on well pled allegations in complaint, that Debtors committed negligence, fraud, conversion, negligent and intentional infliction of emotional distress, outrageous conduct and deceit, reserving jurisdiction to award compensatory and punitive damages.

12.181 Valid Final Judgment – Criminal Proceedings

- (7321) *The Brothers Grimm Grass Company v. Weidaw*, 2017 WL 6754136 (Bankr. N.D. Ohio 2017) – Debtor not collaterally estopped by Guilty Plea in criminal case where under State law, criminal convictions do not bar re-litigation in later civil case. Collateral estoppel requires mutuality of parties. Criminal case was brought by State of Ohio and Creditor was not party to nor in privity with any party to criminal proceeding. Further, conviction and indictment itself were dismissed where Debtor completed diversionary program, and Court was not aware of any basis to determine that dismissed indictment could be considered conviction.
- (7322) *Estate of Jackson v. Hardaway*, 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Criminal conviction for voluntary manslaughter following Debtor's shooting and killing of Plaintiff was not entitled to collateral estoppel effect. Collateral estoppel requires a final judgment in action between same parties where issue was actually litigated and necessarily determined. Mutuality of parties is essential as there must be mutuality of estoppel effect. Criminal conviction was undoubtedly a final judgment but did not involve same parties as dischargeability action. Parties to criminal conviction were Debtor and the State of Michigan, while parties to the adversary are Debtor and the Estate of the decedent. Absent mutuality of estoppel, conviction lacked any collateral estoppel effect in favor of either Debtor or plaintiff.
- (7323) *All American Insurance Company v. Taylor*, 2016 WL 828335 (Bankr. N.D. Ohio 2016) – Courts will not ordinarily give preclusive effect to criminal proceedings in subsequent civil matters. Qualitative differences between civil and criminal proceedings may affect litigant's willingness and ability to contest claim, and procedures use different standards of proof, rules of discovery, and rules of evidence. Debtor's guilty plea to charge of criminal vandalism was not res judicata as to whether damages were non-dischargeable under Section 523(a)(6).
- (7324) *Juett v. Casciano*, 2016 WL 105926 (6th Cir. BAP 2016) – Under Federal Rule of Evidence 410, plea of no contest is not admissible in subsequent civil proceeding against party who entered plea either as direct evidence or for purposes of impeachment. Plea of no contest does not constitute guilty plea.
- (7325) *Yeager v. Wilmers*, 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that Debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that Debtor's conduct be in conscious disregard of one's duties or without just cause. State Court judgment finding Debtor liable for battery was not collateral estoppel in dischargeability action where

element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that Debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where Debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that Debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that Debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that Debtor intended to cause some harm, and it is not required that Debtor intend to cause the precise injury that resulted.

- (7326) *Bowe v. Kilmartin*, 2014 WL 1281488 (Bankr. W.D. Ky. 2014) – Under New Jersey law, guilty plea cannot be used for collateral estoppel purposes. Plea may be evidence in subsequent civil action as admission but is not conclusive proof of the facts of the underlying offense.

12.182 Valid Final Judgment – Pending Appeal

- (7327) *In re Indiana Hotel Equities, LLC*, Case No. 18-45185 (Bankr. E.D. Mi. 2018) – “Cause” exists for relief from on a Mac stay to allow landlord to complete eviction proceedings where prior to commencement of bankruptcy case, state Court had entered judgment declaring lease to have been validly terminated nine months prior to the bankruptcy filing and as of bankruptcy petition date, Debtor had no right to possession of property. State Court decision is binding on subsequent bankruptcy Court under Full Faith and Credit statute as well as collateral estoppel. Fact that earlier State Court judgment was on appeal did not suspend effect or enforceability of judgment or impair collateral estoppel effect where Debtor had not obtained stay of judgment pending appeal.
- (7328) *In re Indiana Hotel Equities, LLC*, 2018 WL 3025293 (Bankr. E.D. Mi. 2018) - Under Indiana law, State Court decision has preclusive effect even while on appeal unless and until it is reversed or modified on appeal.
- (7329) *Spradlin v. Khouri*, 2016 WL 868889 (Bankr. E.D. Ky. 2016) – *Res judicata* requires the Defendants to establish four elements: (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. Final Order in turnover action is “final judgment” for purposes of subsequent avoidance action. Fact that turnover order was pending on appeal did not affect res judicata effect of order as long as order remained undisturbed by appellate court.
- (7330) *Taleb v. Kramer*, 2015 WL 9474251 (Bankr. E.D. Mi. 2015) – Under Michigan law, collateral estoppel and issue preclusion apply to final judgment even where judgment is pending on appeal or where time to take appeal has not expired.
- (7331) *Jackson v. Spencer*, 2015 WL 6162945 (Bankr. W.D. Mi. 2015) – Collateral estoppel does not apply where underlying judgment is on appeal but lower court findings of fact are still binding as res judicata unless underlying judgment is reversed. State Court judgment established facts to find that debt was not dischargeable.
- (7332) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from relitigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. Fact that order is on appeal does not deprive judgment of res judicata effect.
- (7333) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Fact that underlying judgment is on appeal does not divest judgment of estoppel effect.

12.183 Valid Final Judgment – Consent Judgment

- (7334) *Anderson v. Garman*, 2017 WL 6327061 (Bankr. N.D. Ohio 2017) – To except debt from discharge, Plaintiff must prove debtor obtained money through material misrepresentation that debtor knew was false or made with gross recklessness as to its truth; debtor intended to deceive creditor; creditor justifiably relied on false representation; and reliance was proximate cause of loss. Collateral estoppel effect of prior State Court judgment can form basis to except debt from discharge if State Court actually litigated and resolved issues as necessary part of final judgment. State Court Consent Judgment included statements that Debtor committed unfair and deceptive acts or practices, in violation of the Consumer Sales Practices ... as well as fraudulently misrepresenting ... the standard or quality of the workmanship performed on Plaintiff's residence, and ... the nature and extent of Defendant's written ten year warranty” did not establish that Debtor intended to deceive where state consumer protection statute did not require proof of intent to deceive. Consent Order reference to State consumer protection act, without more, did not establish basis to except debt from discharge.
- (7335) *Vizachero v. Brazieka*, 2017 WL 816871 (Bankr. E.D. Mi. 2017) – Section 523(a)(2)(A) excepts from discharge any debt obtained through material representation that Debtor knew was false or made with reckless disregard for truth where Debtor intended to deceive the creditor, the creditor justifiably relied on the false representation, and creditor's reliance was the proximate cause of the loss. State Court judgment against the Debtor has same res judicata effect that judgment would be given under law of state in which judgment was rendered. Under Michigan law, res judicata bars all claims that were or might have been presented and all defenses that war might have been presented as though issues had been actually litigated. Res judicata requires that first action be decided on merits; matter contested in second action was or could have been resolved in first action, and both actions involve same parties or privies. Consent judgments have same res judicata effect under Michigan law. Whether prior judgment is res judicata in nondischargeability litigation depends on whether factual findings of State Court were sufficient to meet the bankruptcy code standards for deceit, fraud or malicious actions. Fact that nondischargeability action is based on same cause of action does not automatically result in res judicata if elements of cause of action in State Court did from elements of cause of action under Bankruptcy Code. To establish claim of fraud under Michigan law, plaintiff would have to establish that defendant maiden material misrepresentation that was false and was known to be false or was made recklessly and without any knowledge for truth, and that representation was made with intention that it should be acted on by plaintiff, the plaintiff acted in reliance, and suffered injury as a result. Judgment against Debtor for fraud under Michigan law was sufficient to constitute res judicata in subsequent action under Section 523 as elements of state law cause of action or identical to and overlapped issues presented by Bankruptcy Code.

- (7336) *Vizachero v. Brazieka*, 2017 WL 816871 (Bankr. E.D. Mi. 2017) – Collateral estoppel bars relitigation of any factual question determined by State Court that applies the same standards as Bankruptcy Court would use. Collateral estoppel prevents issue from being relitigation where issue was actually litigated and necessarily decided in prior action. Collateral estoppel requires identity of parties across proceeding; valid final judgment in first proceeding; same issue actually litigated and necessarily determined in first proceeding; and party against whom doctrine is asserted had full and fair opportunity to litigate in prior proceeding. As general rule, Michigan law does not afford collateral estoppel effect to consent judgments because a consent judgment reflects the agreement of the parties rather than any actual adjudication by Court of disputed issues. However, where allegations in State Court complaint, faxed deemed admitted by defendant in State Court, and consent judgment, taken together, indicate at issue was “actually litigated”, collateral estoppel may apply; or where consent judgment manifests intention of parties that judgment be conclusive with respect to one or more issues, agreement is preclusive as to those issues. Defendants responses to request for admissions in State Court admitted all facts necessary to establish claim based on fraud. Consent judgment, entered based on those admissions, is sufficient to demonstrate that issue is “actually litigated”, such that State Court, Judgment had collateral estoppel effect in later nondischargeability action.

12.184 Valid Final Judgment – Sale Order

- (7337) *Pidcock v. Schwab*, 2017 WL 1155555 (E.D. Ohio 2017) – *Res judicata* bars subsequent litigation of any action that could have been brought in prior action. Goal is to compel litigants to bring all related claims in single lawsuit, and focus is not whether claim is compulsory, but whether claim should have been considered during prior action where 2 causes of action arise from same transaction or series of transactions. Creditors Committee barred by *res judicata* from bringing action against Debtor’s principles for alleged self-dealing in connection with sale transaction. Committee had full and fair opportunity to raise issues as part of objection to sale transaction. *Res judicata* does not apply where party is denied full and fair opportunity to bring claims because of affirmative concealment by opposing party. Affirmative concealment requires more than mere silence, and requires that party asserting *res judicata* have wrongfully concealed the cause of action such that the plaintiff failed to discover the operative facts until after conclusion of the prior litigation under circumstances where plaintiff used due diligence to discover operative facts. Committee was fully aware of defendants attempts to negotiate corporate sale of assets while simultaneously attempting to obtain employment agreement and equity interest in purchaser, effectively reducing potential sale value of assets. Committee had sufficient knowledge of potential wrongful dealings between defendants and potential purchasers yet failed to pursue additional discovery. There was no trek or contrivance that prevented committee from discovering nature of discussions between defendant and asset purchaser. Breach of fiduciary duty claims in which Committee alleged that assets were sold below value because of insider’s pre-sale self-dealing could have and should have been brought during sale procedure. Further, there was sufficient identity of claims for purposes of *res judicata* where all of the factual allegations pertained to the sale of the assets and the involvement of defendant in that sale. Current action raised the same transactions and facts as were present in sales order and relies on transaction and facts that were known and raised by Committee during bankruptcy case. Committee’s later adversary proceeding to recover damages based on diminished value of assets barred by *res judicata*.
- (7338) *Irons v. Maginnis*, 2017 WL 2889657 (Bankr. N.D. Ohio 2017) – Claim is barred by *res judicata* where there has been final decision on merits by Court of competent jurisdiction; subsequent action is between same parties or their privies; issue in subsequent action was or should have been litigated in prior action; and there is identity between causes of action. Plaintiff’s complaint seeking declaration that plaintiff has right to reside in property barred by *res judicata* where plaintiff had previously sold all of his rights under the trust agreement including the “right to reside”. Issues concerning whether “right to reside” was transferable could have been raised in connection with previous Sale Motion, Sale Order and Sale Confirmation Order, yet Debtor never raised any objection to or appealed any of these orders. Court had previously determined that Debtor’s interest in the property constituted property of bankruptcy estate. Accordingly, Debtor’s complaint seeking to declare that Debtor retained “right of residency” barred by *res judicata*

12.185 Valid Final Judgment – Failure to Prosecute – Rule 41(b)

- (7339) *Gannett v. Erkelens*, 2018 WL 4355889 (11th Cir. 2018) – *Res judicata*, also known as claim preclusion, precludes successive litigation of same claim regardless of whether claim raises same issues as earlier suit. Collateral estoppel, also known as issue preclusion, bars successive litigation of issue of fact or law actually litigated and essential to valid final judgment, even if issue recurs in context of different claim. Final Judgment in adversary objecting to dischargeability of debt where Plaintiff did not appear for trial and Court involuntarily dismissed complaint under Rule 41 operates as adjudication on merits of claim. Plaintiff’s attempt to assert non-dischargeability when Debtor filed for bankruptcy a second time some years later barred as Court had already determined in prior Bankruptcy action that debt was not excepted from discharge. Bankruptcy Court in first action had jurisdiction over debtor’s case; dismissal operated as final judgment on merits; parties were identical as plaintiff in second action was assignee from plaintiff in first action and had been plaintiff’s attorney in first action satisfying privity requirement; and same cause of action was asserted.

12.186 Judgment Set Aside On Settlement

- (7340) *Watermark Senior Living v. Morrison Management Specialists, Inc.*, Case No. 17-2129 (6th Cir. 2018) – Judgment later set aside as part of settlement constitutes final judgement that can be used for collateral estoppel purposes.

12.187 Void Judgment

- (7341) *Gray v. Nussbeck*, 2017 WL 2484824 (Bankr. D. Kan. 2017) – Judgment entered in violation of Discharge Injunction is void ab initio and unenforceable. Void judgment is not entitled to collateral estoppel or *res judicata* or Full Faith and Credit.

12.188 Orders - Prior Administrative Determinations

- (7342) *Georgia Department of Human Services v. Oberg*, 2016 WL 5376186 (E.D. Tn. 2016) – Collateral estoppel requires 1) identity of parties between the two cases; 2) identity of issues between the two cases; 3) actual and final litigation of the issue occurred in the first proceeding;

4) the determination of the issue was essential to the first proceeding; and 5) the party who is being precluded had a full and fair opportunity to litigate the issue in the first proceeding. Under Georgia law, administrative decisions are entitled to collateral estoppel effect to same extent as Court Orders. Administrative proceeding involved same parties, involved same issue of whether Debtor made false statements, and whether those false statements allowed Debtor to receive benefits to which she was not entitled. However administrative agency finding did not determine, and was not required to determine, whether State reasonably relied on false statements in first instance or whether Debtor intended to deceive State. Where prior order is based on two alternative theories, order is not collateral estoppel unless both theories would produce finding of non-dischargeability. Administrative agency decision was unclear as to whether determination was made based on false statements about income or false statements about household composition. Statement about household composition is not statement in writing concerning Debtor's financial condition and would not be excepted under Section 523(a)(2)(B).

- (7343) *State of Michigan Unemployment Insurance Agency v. Green*, 2016 WL 4750137 (Bankr. E.D. Mi. 2016) – UIA administrative proceedings are not collateral estoppel and have no preclusive effect as proceedings are not “adjudicatory” in nature. Parties are not bound by agency findings in subsequent adversary proceeding. Agency administrative determination can have preclusive effect under collateral estoppel if agency process is acting in judicial capacity to resolve disputed issues of fact properly before it where parties had adequate opportunity to litigate, parties are given opportunity brief and argue facts, and parties have opportunity to seek judicial review, and where legislature intended to make determination final in absence of appeal. UIA determination is not collateral estoppel on issues decided. Although claimant has right of appeal from findings and Legislature indicated intent to make determinations of UIA final in absence of appeal, administrative process is not adjudicatory in nature and does not amount to agency acting in judicial capacity. While UIA sent inquiries to claimant during investigation, there was no hearing, Debtor was not provided opportunity to present evidence, there were no facts to identify examiner or provide qualifications. There was no indication of what standard of proof was used and no evidence that agency proceeding had any characteristic of a quasi-judicial process.

12.189 Orders – Prior Bankruptcy Proceedings

- (7344) *Porter v. GMAC Mortgage, LLC*, 2018 WL 3056692 (W.D. Tn. 2018) Order confirming Chapter 11 Plan constitutes final judgment and Bankruptcy Court is Court of competent jurisdiction. Defendant was party to Chapter 11 proceedings and plaintiff had actual knowledge of proceedings where Debtor filed notice of bankruptcy case in pending District Court litigation brought by plaintiff against Debtor which resulted in stay of litigation for almost 4 years. Creditor's claim raises identity of cause of action where claims sought to be brought are “related to” bankruptcy proceeding. Claim is related to bankruptcy proceeding if outcome has effect on bankruptcy estate or impacts Debtors liabilities. Plaintiff brought action alleging predatory lending and deceptive practices seeking monetary damages, which would have impact on both bankruptcy estate and Debtor's liabilities and claims could have been raised in bankruptcy proceedings.
- (7345) *Lewis v. Pennsylvania Higher Education Assistance Agency*, 2017 WL 814247 (E.D. Ky. 2017) -Debtor's claim that student loans were discharged in Chapter 7 proceeding barred by res judicata where after receiving discharge under Chapter 7, Debtor filed Petition under Chapter 13 and objected to student loan creditor's claim as discharged in Chapter 7. Judge in Chapter 13 case made specific finding that Debtor did not file adversary proceeding in Chapter 7 case and pursuant to Section 523 student loan debt was not discharged by Chapter 7 discharge. Later action brought in District Court seeking damages for alleged wrongful collection barred by res judicata as Court in Chapter 13 case already considered and specifically ruled against Debtor on same issues raised in District Court.
- (7346) *Jennings v. Bodrick*, 2016 WL 6216099 (Bankr. S.D. Ohio 2016) – Final judgment entered in adversary proceeding in connection with earlier bankruptcy case has collateral estoppel effect in later filed case if all other elements of collateral estoppel are met. Final Judgment in prior case holding that debt was not incurred as result of fraud was preclusive in adversary proceeding brought in later case to except debt from discharge under Sections 523(a)(2)(A) and (B).
- (7347) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – A claim is barred by res judicata if the following elements are satisfied “(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. Summary judgment entered by Bankruptcy Court in Plaintiff's prior Chapter 13 case is final order entitled to preclusive effect. Debtor was the same person who was the plaintiff in this case and against whom summary judgment had been entered, and moving party in Bankruptcy Court was servicer for the lender named as the defendant in this case, sufficient to establish privity between servicer and lender.
- (7348) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Borrower's contention that alleged holder of mortgage was not, in fact, holder based on allegedly defective assignment of mortgage was not barred by collateral estoppel, where lender had previously sought relief from stay to foreclose mortgage and issue of status of movant as the party holding the note and mortgage was actually raised and litigated in stay lift proceeding. Stay lift order does not constitute a final judgment on merits of underlying claim, but is only procedural matter allowing parties to proceed in different forum.
- (7349) *Jennings v. Bodrick*, 2015 WL 4437559 (Bankr. S.D. Ohio 2015) – Collateral estoppel and res judicata are related concepts that constitute doctrine of issue preclusion and prevent the relitigation of issues determined by valid final judgment entered by another court. Collateral estoppel, also known as issue preclusion, prohibits relitigating an issue that was also an issue in the prior case, was actually litigated, and the determination of which was necessary to the outcome in the prior action. Res judicata, also known as claims preclusion, bars assertion of claim if there has been a final decision by court of competent jurisdiction in a prior proceeding between same parties or their privies, where the issue in the later case was or should have been litigated in the prior action and there is an identity of the causes of action. Prior judgment in favor of Debtor in action brought in first bankruptcy case denying plaintiff's objection to dischargeability under Section 523(a)(2) against Debtor precluded action in later bankruptcy case to except same debt from discharge. Action was brought by same party seeking same relief under complaint that was virtually identical to complaint in earlier case that produced final judgment in favor of Debtor, and matter was actually litigated in the prior case. Fact that the prior bankruptcy case was dismissed after entry of final judgment did not deprive final

judgment of its validity or enforceability. However, prior action did not preclude complaint under Section 523(a)(6) where, although issues were raised in the prior case, the Order in the prior case made no findings but instead dismissed complaint for failure to state cause of action where prior case was Chapter 13 and there was no basis under Section 1328 to except debt from discharge. Current case is Chapter 7 and issue is properly brought in this case as debt could be excepted from discharge in Chapter 7.

12.190 Subsequent Change in Law

- (7350) *GMAC Mortgage, LLC v. McKeever*, 2016 WL 3090330 (6th Cir. 2016) – *Res judicata* applies when there has been a final judgment on merits by court of competent jurisdiction; subsequent action is between same parties or their privies; issue in subsequent litigation either was or should have been litigated in prior action; and there is an identity of causes of action. *Res judicata* applies even where, after issuance of first judgment, there is intervening decision that effects a change in the law that directly bears on legal theory advanced in second suit. Erroneous conclusion by court in first suit does not deprive judgment of *res judicata* effect.

12.191 Particular Claims Barred

- (7351) *Jacobs v. JPMorgan Chase Bank*, 2017 WL 1399851 N.D. Ohio 2017) - *Res Judicata* precludes attempt by plaintiff to contest the validity of a mortgage where the validity of the mortgage was necessarily decided by State Court in granting judgment of foreclosure in favor of defendants. Plaintiffs cannot file a case in Federal Court to relitigate issues or claims already decided in State Court.
- (7352) *Lewis v. Pennsylvania Higher Education Assistance Agency*, 2017 WL 814247(E.D. Ky. 2017) -Debtor's claim that student loans were discharged in Chapter 7 proceeding barred by *res judicata* where after receiving discharge under Chapter 7, Debtor filed Petition under Chapter 13 and objected to student loan creditor's claim as discharged in Chapter 7. Judge in Chapter 13 case made specific finding that Debtor did not file adversary proceeding in Chapter 7 case and pursuant to Section 523 student loan debt was not discharged by Chapter 7 discharge. Later action brought in District Court seeking damages for alleged wrongful collection barred by *res judicata* as Court in Chapter 13 case already considered and specifically ruled against Debtor on same issues raised in District Court.
- (7353) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - Michigan law applies *res judicata* if there was prior and final decision on merits; parties in both lawsuits are the same; and matter in second case was, or could have been, resolved in first lawsuit. Plaintiff's complaint alleging that defendant violated State Court Order staying foreclosure proceeding barred by *res judicata* where State Court that had initially imposed a stay order subsequently granted default judgment in post-foreclosure proceeding to obtain possession of property. Later judgment was "tacit recognition" by Court that lender did not violate stay and constituted final decision on merits. Whether there was a violation of stay order was resolved in first case, precluding relitigation.
- (7354) *Brown v. Florida Coastal Partners, LLC*, 2017 WL 76940 (S.D. Ohio 2017) – Collateral estoppel requires (1) process issue raised in present case must have been raised and actually litigated in prior case; (2) determination of issue must have been necessary to outcome up prior case; (3) prior proceeding must have resulted in final judgment on the merits; and (4) party against whom estoppel is sought must have had full and fair opportunity to litigate issue in prior case. Plaintiff's claims against the lender were based on defendant's assertion that defendant was proper party plaintiff in foreclosure action. All issues regarding ownership of mortgage and standing to foreclose were raised and resulted final judgment of State Court and order of foreclosure. Judgment decree and order of foreclosure specifically found that defendant was holder of note and mortgage and party in interest; that defendant had performed all conditions precedent prior to acceleration of mortgage; that defendant did not violate Truth in Lending Act and provided all proper terms of mortgage and did not violate any federal law or regulation; defendant did not engage in any unfair or deceptive practices or engage in any willful or wanton misconduct; and did not violate any state consumer protection act. Determination of those issues were necessary to State Court Judgment and order of foreclosure as the State Court could not have better judgment had there been in proper debt collection practices, fraud or other improper assignments. Plaintiff had full and fair opportunity to litigate those issues in State Court.
- (7355) *Irvin v. Faller*, 2016 WL 1068940 (Bankr. W.D. Ky. 2016) – Willful means that Debtor took intentional act with intent to cause injury, not merely that Debtor took intentional act that caused injury. Malicious means conscious disregard for duties or without just cause, but does not require ill-will or specific intent to do harm. Collateral estoppel applies where same parties or their privies litigated issues in State Court that produced final decision; identity of issues that were actually litigated and determined; that issues were necessarily determined as part of resolution of State Court matter; and the party to be estopped had full and fair opportunity to litigate. State Court judgment holding Debtor liable for defamation lacked preclusive effect where judgment established that Debtor intentionally published statement but there was no evidence of finding that statement was published with intent to cause harm or with knowledge of falsity. Fact that State Court found Debtor liable for libel per se did not, in itself, meet required mental state for willful and malicious, as libel per se did not require knowledge that statement was false when made. Further, there was no evidence that Debtor intended to cause injury, rather than to make intentional statement that incidentally caused injury, and intent to cause injury is not element of state law action for defamation per se. However, State Court judgment for abuse of process required finding of "ulterior motive or purpose" and "willful act in use of process that was not proper in the regular course of the proceeding". Judgment specifically required finding that defendant acted willfully and maliciously in filing action solely for purpose of harassing and annoying and without any good faith purpose.
- (7356) *PRN Funding, LLC v. Cole*, 2015 WL 6122078 (Bankr. N.D. Ohio 2015) – Non-dischargeability of debt can be based on collateral estoppel effect of pre-bankruptcy State Court judgment. Collateral estoppel requires that the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and the issue in the present action is identical to the issue involved in the previous action. Whether State Court judgment is sufficient requires comparison of elements found by State Court with elements of subsection of Section 523 under which action is brought. State Court judgment found Debtor liable on three separate theories, fraud, breach of contract and conversion. Elements of fraud action were identical to elements under Section 523(a)(2), although neither breach of contract nor conversion met the identity of causes of action requirements. Findings of

State Court sufficiently stated to allow court to determine that elements of fraud were found, but were not sufficiently stated to allow court to apportion damages between various causes of action. Collateral estoppel applied to State Court judgment to extent judgment was based on fraud, but Court could not determine on summary judgment the proper apportionment of damages between the non-dischargeable fraud claim and the dischargeable claims for conversion and breach of contract.

- (7357) *Casab v. Grand Sky Enterprise Co., Ltd.*, 2015 WL 753365 (E.D. Mi. 2015) – Plaintiff must prove: (1) the Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor's reliance was the proximate cause of loss. Elements of cause of action can be proven by collateral estoppel where State Court gives preclusive effect on issues presented. State Court judgment established non-dischargeability of debt where judgment specifically found that statements were false when made, that Debtor knew statements were false, statement were made with intent that plaintiff would rely, and plaintiff did rely and lacked any reason to doubt Debtor's representations. Judgment established each and every element of action under Section 523(a)(2). Entire State Court judgment was predicated on State Court fraud action and all damages found by State Court flowed from fraudulent conduct, leaving entire State Court judgment excepted from discharge.
- (7358) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 5561347 (Bankr. N.D. Ohio 2015) – Order approving counsel's compensation was res judicata on potential claim of Debtor against counsel for post-petition malpractice. Claims either were or could have been litigated in context of fee application process and resolution of process constituted final judgment for res judicata purposes.
- (7359) *Crawford v. Katz*, 2015 WL 2401643 (S.D. Ohio 2015) – Tenant's action under Fair Debt Collection Practices Act based on alleged conduct in eviction proceedings barred by res judicata where State Court had already entered final judgment of eviction. Res Judicata includes all claims that were raised or could have been raised in State Court proceeding. Tenant could have raised FDCPA claims either as defense to or as a counterclaim in eviction proceedings. Factual claims and allegations in FDCPA action arose out of same transaction that were the subject of the State Court eviction proceeding and repeat many of the allegations asserted in the State Court counterclaim in the eviction proceeding.
- (7360) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015), *aff'd*, 2016 WL 4269803 (6th Cir. 2016) – Borrower's RICO action based on allegedly fraudulent assignment of mortgage barred by res judicata where State Court had previously entered final judgment foreclosing mortgage and indicating that lender was the real party in interest.
- (7361) *Mission Compound, LLC v. Keisler*, 2015 WL 1775155 (Bankr. E.D. Tn. 2015) – Plaintiff's adversary arising out of alleged fraud in Debtor's pledge of stock interests barred by res judicata and collateral estoppel. While in Chapter 11, Debtors asserted that plaintiff did not hold pledge of stock as stock was held as tenants by entireties and only Debtor-husband signed pledge agreement. In course of Chapter 11, Court held hearing and concluded that stock had been properly pledged by both husband and wife and creditor held perfected security interest in entirety of stock. Case later converted to Chapter 7 and plaintiff brought action alleging that husband committed fraud by representing that he held all of the stock of the corporation and that he was pledging all of the stock to secure plaintiff's lien, when in fact husband only owned half interest in stock; and had plaintiff known of true state of affairs, plaintiff would not have entered into loan in first instance. Prior judgment determined that stock was validly pledged in full, precluding any element of reliance on representations of Debtor, as Debtor represented that plaintiff would receive pledge of 100% interest in stock and plaintiff, in fact, received that pledge. Even if husband misrepresented actual status of ownership of stock, plaintiff received what he bargained for.
- (7362) *Richardson v. Caswell*, 2015 WL 1403015 (Bankr. W.D. Ky. 2015) – State Court judgment is entitled to preclusive effect in adversary proceeding to same extent judgment would be afforded preclusive effect under applicable state law. Issue preclusion prevents parties from re-litigating issues that were actually litigated and decided in prior proceeding, and requires that prior proceeding involve same issue; issue was actually litigated, issue was actually decided. And resolution was necessary component of prior decision. State Court judgment against Debtor for fraud raised identical issue where State Court judgment expressly determined that Debtor obtained money through material misrepresentation that Debtor knew was false when made, Debtor intended to deceive creditor, creditor justifiably relied on representation, and reliance was proximate cause of loss. Debtor falsely stated that corporation was profitable, inducing creditor to invest, when Debtor knew that corporation was losing money and on verge of failing, and had creditor known of true state of corporation, creditor would not have invested. Jury refusal of award of punitive damages did not conflict with finding that Debtor acted intentionally and did not establish that debt would be dischargeable.
- (7363) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Complaint alleging irregularities in mortgage origination including role of MERS as nominee and originator's role in initial loan dismissed where cause of action raised same issues as were raised as defenses in prior judicial foreclosure proceeding that produced final judgment in favor of lender determining loan to be enforceable.
- (7364) *Simmons v. BAC Home Loan Servicing, LLC*, 2014 WL 3844788 (M.D. Tn. 2014) – Plaintiff's complaint alleging wrongful foreclosure dismissed based on res judicata where plaintiff had filed at least four prior federal lawsuits contesting validity of note and mortgage and of foreclosure and each of the four prior cases were dismissed on merits and dismissals were affirmed on appeal. While new lawsuit alleged new or different theories and statutes, action was based on same nucleus of facts that were at issue in prior cases and prior cases involved either same defendants or their privies. All of the claims in the current lawsuit either were, or could have been, raised in any of the prior actions.
- (7365) *In re Kelley*, Case No. 11-90559 (Bankr. W.D. Mi. 2014) – Trustee's objection to secured claim sustained where prior Court Order allowing sale of property determined that the only interest in the property was that of the mortgage company. Creditor filed a secured claim based on a State Court Order imposing a constructive trust. Thereafter, the Trustee, proposed to sell the property free and clear of liens, noting that the only secured claim shown in the chain of title was that of the mortgage company. The Trustee served the motion on creditors who did not file any opposition to the relief requested. The Order approving the sale determined that the only interest in the property other than Debtors' was that of the mortgage company and ordered distribution of the proceeds accordingly. The Trustee then objected to the creditor's secured claim, asserting that based on the court's prior order, the claim was unsecured. The Court sustained the objection, noting that the

creditor had full knowledge of the Trustee's Motion and assertions in the motion that there were no other parties holding an interest in the property but failed to object and so were bound by the Order allowing the Section 363 sale. While the court likely would not have approved the Section 363 sale (or at least retained jurisdiction to determine entitlement to proceeds and the validity of creditor's claim) had the creditor opposed the sale or at least filed a response to the sale asserting an interest, creditor's failure to do so left creditor bound by the terms of the order approving sale, effectively extinguishing any interest which creditor had or claimed to have had in the property. Objection sustained to extent of secured status with claim allowed as unsecured only.

- (7366) *Dunn v. Campbell*, 2014 WL 2722755 (Bankr. W.D. Ky. 2014) – State Court judgment was res judicata on issues relating to willful and malicious conduct of Debtor. State Court jury expressly found that Debtor committed conversion when Debtor sold motorcycle for \$18,000 but then refused to transfer the title to the purchaser. Issue of conversion was actually and necessarily litigated and decided by State Court. State Court judgment established that Debtor violated a restraining order and that Debtor acted in willful and malicious manner. Debtor cannot use Section 523(a)(6) adversary to relitigate issues of liability and damages that were previously considered and ruled upon by State Court.
- (7367) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Debtor's attempt to contest validity of foreclosure sale precluded by res judicata where State Court had previously rejected Debtor's challenges to foreclosure process and had issued writ of possession.
- (7368) *Ohio Valley Wholesale Distributors, Inc. v. Nasir*, 2014 WL 708898 (Bankr. E.D. Ky. 2014) – State Court final judgment was collateral estoppel in action under Section 523 where final judgment expressly found that Debtor committed fraud with intent to defraud, which are same issues as are presented in action under Section 523(a)(2). Standard of proof at state law was clear and convincing evidence, which is greater burden than preponderance of evidence used in Bankruptcy cases.
- (7369) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – State Court judgment that awarded title to assets to party and entered eviction order against Debtor pre-petition was res judicata on issue of ownership of assets. Chapter 7 Trustee precluded from bringing action to contest title to assets. Lawsuit was pre-petition action that ended with valid and non-appealable final judgment. Chapter 7 Trustee, as successor to Debtor, is bound by the terms of that Judgment to same extent as Debtor. The final judgment expressly adjudicated title to the assets in dispute in this adversary proceeding and necessarily determined ownership of those assets.
- (7370) *General Motors, LLC v. Gunner*, 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – State Court Judgment in favor of Plaintiff against Defendant precluded later claim in Section 523 action that Plaintiff was not the holder of the claim. Ownership of and standing to pursue recovery of claim necessarily determined by State Court.
- (7371) *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.
- (7372) *Her, Inc. v. Barlow*, 2012 WL 1165503 (Bankr. S.D. Ohio 2012), *aff'd*, Case No. 13-8018 (6th Cir. BAP 2013) – 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.
- (7373) *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.
- (7374) *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.

- (7375) *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.
- (7376) *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.
- (7377) *Tweedie v. Hermoyan*, 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.
- (7378) *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.
- (7379) *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.
- (7380) *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.
- (7381) *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.
- (7382) *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".

- (7383) *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 From 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.
- (7384) *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.
- (7385) *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.
- (7386) *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.
- (7387) *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".
- (7388) *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.
- (7389) *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.
- (7390) *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.
- (7391) *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.
- (7392) *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.

12.192 Particular Claims Not Barred

- (7393) *Irvin v. Faller*, 2016 WL 1068940 (Bankr. W.D. Ky. 2016) – Willful means that Debtor took intentional act with intent to cause injury, not merely that Debtor took intentional act that caused injury. Malicious means conscious disregard for duties or without just cause, but does not require ill-will or specific intent to do harm. Collateral estoppel applies where same parties or their privies litigated issues in State Court that produced final decision; identity of issues that were actually litigated and determined; that issues were necessarily determined as part of resolution of State Court matter; and the party to be estopped had full and fair opportunity to litigate. State Court judgment holding Debtor liable for defamation lacked preclusive effect where judgment established that Debtor intentionally published statement but there was no evidence of finding that statement was published with intent to cause harm or with knowledge of falsity. Fact that State Court found Debtor liable for libel per se did not, in itself, meet required mental state for willful and malicious, as libel per se did not require knowledge that statement was false when made. Further, there was no evidence that Debtor intended to cause injury, rather than to make intentional statement that incidentally caused injury, and intent to cause injury is not element of state law action for defamation

per se. However, State Court judgment for abuse of process required finding of “ulterior motive or purpose” and “willful act in use of process that was not proper in the regular course of the proceeding”. Judgment specifically required finding that defendant acted willfully and maliciously in filing action solely for purpose of harassing and annoying and without any good faith purpose.

- (7394) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor’s proposed modification of confirmed plan to allow Debtor to avoid unrecorded mortgage not barred by collateral estoppel or res judicata. Res judicata applies only where issue in new proceeding was previously litigated. Confirmation of chapter 13 plan did not litigate rights of Debtor to avoid lien as part of plan modification.
- (7395) *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 actions were intended to cause injury, or whether Debtor intended the act that led to injury.
- (7396) *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.
- (7397) *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.
- (7398) *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.
- (7399) *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.
- (7400) *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.

- (7401) *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.
- (7402) *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.
- (7403) *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.
- (7404) *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.
- (7405) *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.
- (7406) *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.
- (7407) *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.
- (7408) *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.

12.193 Defensive Collateral Estoppel

- (7409) *Jones v. US Bank*, 2017 WL 2191629 (S.D. Ohio 2017) – Issue preclusion (collateral estoppel) require (1) precise issue has previously been raised an actually litigated; (2) determination of issue was necessary to outcome of prior action; (3) prior proceeding resulted in judgment on merits; and (4) party against whom estoppel is asserted had full and fair opportunity to litigate issue in prior action. Where defendant is invoking issue preclusion as defense, mutuality of parties between prior action and current action is not required as long as plaintiff had full and fair opportunity to litigate contested issue in prior proceeding. Complaint alleging that party seeking to foreclose did not hold valid assignment of mortgage and lacked standing to foreclose and violated FDCPA by asserting that foreclosing party had right to foreclose, barred by collateral estoppel where State Court previously entered final judgment specifically stating that assignment of mortgage was valid and lender had right to foreclose. Determination of standing issue and validity of assignment were necessary to outcome of foreclosure proceeding and resulted in State Court Final Judgment. Plaintiff had full and fair opportunity to litigate issue in State Court as Plaintiff raised arguments concerning validity of assignment in multiple filings considered by State Court in entering Final Judgment. Although defendant asserting collateral estoppel was not party to prior action, privity is not required because collateral estoppel was asserted solely in defensive posture.
- (7410) *In re Otworth*, 2015 WL 5781512 (Bankr. W.D. Mi. 2015) – Collateral estoppel requires that (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. Doctrine of “defensive collateral estoppel” allows lender to raise prior judgment as defense where plaintiff had full and fair opportunity to litigate issue in prior proceeding. Debtor's allegation that taxes were illegal was unsupported. Federal Court had previously determined in action between Debtor and governmental

entities that entities were lawfully created and had power to levy taxes under State law. Although lender was not party to separate federal action Debtor would not be allowed to raise same challenges in context of claim litigation.

- (7411) *Tankersley v. Lynch*, 2014 WL 1096307 (Bankr. E.D. Mi. 2014) – Defensive collateral estoppel is where defendant seeks to prevent plaintiff from relitigating an issue that the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Defensive collateral estoppel applies in non-dischargeability case and requires that the precise issue have been actually litigated and was determinative of the outcome of the prior proceeding; the prior proceeding must have resulted in a final judgment on merits; and person to be estopped must have had opportunity to fully and fairly litigate. Defensive estoppel does not require mutuality between parties as long as plaintiff had opportunity to litigate same issue in prior action. Company of which Debtor was officer as found by arbitrator to have committed breaches of statutes in connection with sale of assets, but specifically found that company did not commit fraud, which defendant contended prevented plaintiff from prevailing in action to have debt owed by Debtor held non-dischargeable as incurred by fraud. Arbitrator finding not collateral estoppel as burden of proof for fraud under state law was clear and convincing evidence, while burden under Section 523 is preponderance of evidence. Further, it was unclear whether plaintiff had opportunity to litigate issues of fraud by Debtor as arbitration was specifically limited to conduct of company and excluded any evidence regarding personal fraud of Debtor. Fact that plaintiff was compelled to arbitrate rather than to litigate also mitigated against estoppel effect, as plaintiff in arbitration proceedings did not have the full procedural opportunities that would be available in bankruptcy adversary proceeding.

12.194 Reversal of Underlying Judgment

- (7412) *Schaller v. Paulsen*, Case No. 12-80166 (Bankr. W.D. Mi. 2015) – Adversary Judgment predicated on collateral estoppel effect of State Court judgment would be vacated under Rule 60(b)(5) where State Court judgment was later reversed on appeal. Given extensive litigation that had already occurred in State Court, Bankruptcy Court would hold adversary proceeding in abeyance pending final determination by State Court.

12.195 Wrongful Concealment

- (7413) *Jodway v. Fifth Third Bank*, 2018 WL 300438 (6th Cir. 2018) – Wrongful concealment exception to res judicata requires that adversary engaged in affirmative concealment. Document signed by Plaintiff at outset of lending relationship could not have been “wrongfully concealed” as Plaintiff was fully aware of document including contents well before litigation ensued.

S. Stare Decisis and Administrative Preclusion

12.196 Binding Effect of Supreme Court Decisions

- (7414) *In re Lynn*, 2017 WL 4676245 (Bankr. W.D. Ky. 2017) – Bankruptcy Courts are required to follow decisions of United States Supreme Court including dicta in those decisions. Supreme Court holding in *Law v. Siegel* stated in dicta that Debtor’s bad faith is not basis to overrule exemptions. Bankruptcy Court bound by that dicta overruling Trustee’s objections based on Debtor’s bad faith in not disclosing assets and then asserting exemptions once assets were discovered.
- (7415) *Ellmann v. Baker*, 791 F.3d 677 (6th Cir. 2015) – Bankruptcy Courts are obligated to follow Supreme Court dicta, where there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.

12.197 Binding Effect of District Court Decisions

- (7416) *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.

12.198 Binding Effect of Federal Court Decisions on State Court

- (7417) *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.

12.199 Administrative Preclusion

- (7418) *Westbrooks v. Board of Trustees of East Cleveland Public Library*, 2016 WL 4577715 (N.D. Ohio 2016) - State agency determinations that have been reviewed by a State Court are entitled to statutory full faith and credit. Federal court may give preclusive effect to the determination of an un-reviewed state agency determination, if a State Court would similarly give the agency determination preclusive effect. However, administrative decisions are not entitled to preclusive effect where Congress specifically excepts those decisions from preclusive effect. Title VII of the Civil Rights Act specifically states that agency determinations concerning right to sue and outcome of agency proceedings are not entitled to preclusive effect. Defendant cannot have action dismissed based solely on prior determination by EEOC that dismissed claims in their entirety.

T. Claim Preclusion

12.200 Defined

- (7419) *Sullen v. Bray*, 2017 WL 4777056 (N.D. Ohio 2017) – Unsuccessful party in one action cannot file new case in federal court to litigate matters that were or could have been raised and addressed in prior action. Claim preclusion provides that valid final judgment rendered upon merits bars all subsequent actions based upon any claim arising out of transaction or occurrence that was subject matter of previous action and encompasses all claims which were or might have been litigated in prior action. Issue preclusion also known as collateral estoppel precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action. All of Plaintiff’s claims

relate to foreclosure proceedings that had been completed in State Court and were either actually raised or could have been raised as defenses to foreclosure proceedings. Plaintiff's current action seeking to set aside foreclosure sale barred by *res judicata*.

- (7420) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Claim can be barred by doctrine of collateral estoppel only if claim was fully mature at time underlying litigation was filed. Where defendant's right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant's later action against third party, predicated on same transaction and same facts, was not barred by issue preclusion.
- (7421) *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

12.201 Elements

- (7422) *Davis v. Fiat Chrysler Automobiles U.S., LLC*, 2018 WL 4026445 (6th Cir. 2018) – Judicial estoppel is equitable doctrine designed to protect integrity of Court by preventing party from abusing judicial process through cynical gamesmanship. Doctrine generally prevents party from prevailing in one phase of a case on an argument than relying on contradictory arguments prevail and another phase. Estoppel requires that party assumed position in current action that was contrary to one asserted under oath in bankruptcy proceedings; Bankruptcy Court adopted contrary position; and omission did not result from mistake or inadvertence. Failure to disclose cause of action is equivalent to statement that there are no such claims. Debtor's Chapter 13 Plan was confirmed in December 2008 and expired in December 2013. Debtor did not disclose potential cause of action for employment discrimination during Chapter 13 proceeding and Court relied on Debtor's affirmative statement that Debtor did not have any cause of action in allowing Debtor's Chapter 13 case to proceed. Debtor potentially new of potential employment discrimination claim as early as March, 2013, but did not make any effort to amend schedules to disclose cause of action. Debtor made complaints with employer's human resource department in March and April 2013 but did not pursue EEOC complaint of discrimination until March 2015. However, prior to expiration of Debtor's Chapter 13 Plan Debtor had enough information to know she had possible claim for racial discrimination. In determining whether nondisclosure was result of mistake or inadvertence, Court considers Debtor's knowledge of factual basis of undisclosed claims, motive for concealment, and evidence of lack of bad faith with particular focus on attempt to advise Court of omitted claim. Debtor did not make any disclosures about potential claim and Debtor would have motive to conceal assets to preserve asset for Debtor's own benefit. Although Debtor may not have known exact legal basis on which Debtor could pursue recovery, Debtor had knowledge of factual basis of potential hostile work environment prior to expiration of Debtor's Chapter 13 Plan such that omission was not result of mistake or inadvertence.
- (7423) *Weakley v. Eagle Logistics*, 894 F.3d 1244 (11th Cir. 2018) - Judicial estoppel applies where Debtor takes position under oath in bankruptcy proceeding that is inconsistent with plaintiff's pursuit of civil lawsuits and inconsistent positions were calculated to make mockery of judicial system. Debtor took inconsistent position by failing to disclose in bankruptcy schedules to pending lawsuits. Nondisclosure alone does not amount to intent to make mockery of judicial system. Court must consider plaintiff's level of sophistication, whether and under what circumstances plaintiff corrected disclosures, whether Debtor told bankruptcy attorney about civil claims, whether Trustee where creditors were aware of lawsuits or claims, whether Debtor amended disclosures, whether Debtor identified other lawsuits to which Debtor was party, and any findings or actions by Bankruptcy Court after omission is disclosed. Court may also consider Debtor's explanation for omission although Court is not required to credit that explanation. Debtor intended to mislead Bankruptcy Court where Debtor did not disclose to lawsuits in original schedules or in any of 6 separate amendments made to schedules during various points of bankruptcy case. Debtor did not disclose lawsuits until defendant in both lawsuits filed motions to dismiss based on judicial estoppel. Debtor's nondisclosure would benefit Debtor financially and creditors expense and Debtor had disclosed to other lawsuits that he had filed, both of which were of much lower potential value than nondisclosed lawsuits which saw damages in excess of \$14 million. Failure to disclose to hire claim lawsuits while disclosing to lesser claims indicated motive to exclude potentially more lucrative non-exempt lawsuits from bankruptcy proceedings. District Court did not infer intent to mislead but instead made determination based on analysis of facts and circumstances related to particular case and to particular Debtor. Fact that Debtor subsequently voluntarily dismissed Chapter 13 bankruptcy petition does not render judicial estoppel issue moot as judicial estoppel occurred when bankruptcy nondisclosures occurred in first instance and could not be corrected by subsequent dismissal. Duplicate is Debtor cannot be assured of ability to avoid judicial estoppel by dismissing bankruptcy petition after duplicity is discovered.
- (7424) *Silva v. Pro Transport, Inc.*, 2018 WL 3801663 (11th Cir. 2018) - Judicial estoppel applies when party takes inconsistent position under oath in separate proceeding and inconsistent position was calculated to make a mockery of judicial system. Prior to commencement of Chapter 13 case, Debtor consulted with attorney regarding potential Fair Labor Standards Act violations but did not pursue recovery and attorney withdrew. Debtor did not list claim in bankruptcy schedules. After confirmation of Plan, Debtor consulted new attorney about potential claim for unpaid wages. Debtor did not advise new Council of pending bankruptcy case because Debtor did not think it was relevant. Debtor then filed complaint to recover for violation of FLSA and defendant moved to dismiss for judicial estoppel arguing that Debtor acted with intent to manipulate judicial process. District Court dismissed case based on judicial estoppel finding that Debtor had acted intentionally and had motive to conceal FLSA claim and rejecting Debtors assertion that nondisclosure was inadvertent and that Debtor had attempted to correct nondisclosure by amending schedules. 11th circuit reversed, rejecting argument that failure to disclose civil claim constituted intent to make mockery of judicial system and instead concluded that failure to disclose civil action permits District Court to infer intent to misuse Court but that Court must consider all facts and circumstances including plaintiff's level of sophistication, whether and under what circumstances plaintiff corrected disclosures, whether plaintiff told bankruptcy attorney about claims before filing bankruptcy, whether Trustee where

creditors were aware of civil lawsuit or claims before plaintiff amended disclosures, whether plaintiff identified other lawsuits to which he was party, and any findings or actions by Bankruptcy Court after omission was discovered. Court would no longer infer in all cases that Debtor who fails to disclose lawsuit intends to make mockery of judicial system because last sophisticated Debtors may not realize that pending lawsuit must be disclosed. Court is not required to apply judicial estoppel merely because Debtor fails to disclose civil claim unless all facts and circumstances of case indicate that Debtor intended to make mockery of judicial system.

- (7425) *Slater v. U.S. Steel Corp.*, 891 F.3d 1329 (11th Cir. 2018) – Judicial estoppel requires that Debtor’s failure to disclose pending cause of action, based on all factors including Debtor’s level of sophistication, explanation of omissions, whether Debtor subsequently corrected disclosures, and any action taken by Bankruptcy Court concerning non-disclosures, evidences Debtor’s intent to “make a mockery” of judicial system. Mere non-disclosure, even if Debtor knew of action at time Debtor completed bankruptcy schedules, does not automatically constitute “calculated attempt to undermine” judicial process or establish any inference of intent to misuse courts without consideration of individual Debtor and circumstances surrounding non-disclosure.
- (7426) *Howard v. Wells Fargo Home Mortgage, Inc.*, 2018 WL 3743976 (S.D. Ohio 2018), *report and recommendation adopted*, 2018 WL 4182007 (S.D. Ohio 2018) – Judicial estoppel prevents party from prevailing in one phase of case on an argument and then relying on contradictory argument to prevail in another phase. In context of bankruptcy proceeding, judicial estoppel bars party from asserting position that is contrary to one party asserted under oath in prior proceeding where prior Court adopted contrary position, but is not appropriate where conduct amounts to mistake or inadvertence. Debtor did not list pending litigation in Debtor’s Chapter 13 bankruptcy petition even though Debtor had filed prior litigation two years earlier. Debtor received discharge in Chapter 13. If Debtor prevailed in current litigation, Debtor would not be required to share damages recovered with creditors. Debtor’s omission of litigation constitute statement under oath under penalty of perjury and is tantamount to representation that claims do not exist. Debtor gained advantage of silence by nondisclosure of pending litigation in bankruptcy case, barring Debtor from continuing prosecution of litigation.
- (7427) *Bowling v. Ryder Logistics, Inc.*, 2018 WL 1157549 (E.D. Ky. 2018) - Judicial estoppel prohibits party from filing a lawsuit to recover pre-petition claim where Debtor does not disclose existence of claim in bankruptcy papers. Fact that bankruptcy case was ultimately dismissed after confirmation of Chapter 13 Plan but prior to entry of discharge did not relieve Debtor of consequences of non-disclosure in first instance. Bankruptcy case remained pending for over 2 years and required significant resources from Court and Trustee, during which Debtor did not disclose pending litigation. Further, based on Debtor’s non-disclosure, claim remained property of bankruptcy estate and Debtor lacked standing to pursue claim.
- (7428) *Toledo v. CSX Transportation, Inc.*, 2018 WL 1525073 (E.D. Tn. 2018) – Judicial estoppel rests on principle that where party assumes a position in legal proceeding and succeeds in maintaining that position, he may not thereafter assume contrary position. Debtors have duty to truthfully answer questions presented in the various schedules and filings carefully, completely and accurately and duty of disclosure is continuing one requiring disclosure of all potential causes of action whether or not debtor has yet filed or will ever file lawsuit. Plaintiff is judicially estopped from asserting any claims against defendants that she failed to disclose in her case. Plaintiff asserted in her bankruptcy case that she had no viable claims. After Petition filed but before discharge entered, Debtor filed suit but did not amend to disclose. Bankruptcy Court adopted position that Debtor had no claims by discharging her debts and closing her case. Omission was not the product of mere mistake or inadvertence as plaintiff knew of factual basis for claims at time bankruptcy case began as harms plaintiff allegedly suffered occurred at least six months before she filed for bankruptcy; and consumer debtors have motive to conceal income and assets. Plaintiff did not ward off suspicion of bad faith by attempting to inform Bankruptcy Court of her claims against defendants where Plaintiff did not make any effort to apprise bankruptcy trustee of claims until after defendants moved for summary judgment on grounds of judicial estoppel and there was no evidence of any constant affirmative actions to clearly establish desire to apprise court of pending claim. Plaintiff did not discuss the possible inclusion of claims with counsel, the bankruptcy trustee, or the U.S. Trustee, did not attempt to have trustee prosecute her claims on the estate’s behalf, and did not amend her schedules. Bankruptcy Court reopening case and permitting bankruptcy trustee to hire counsel to represent estate’s interests in litigation does not make application of judicial estoppel moot as allowing disclosure only after omission has been challenged suggests that debtor should consider disclosing potential assets only if caught concealing them. Mere fact that plaintiff lacks formal legal training or post-high school education does not mean that omission was inadvertent where plaintiff was represented by counsel at the time she filed her bankruptcy petition. To extent plaintiff’s omission was due to ignorance or carelessness of counsel rather than Debtor’s own gamesmanship, Debtor is still estopped from asserting claims she failed to disclose in bankruptcy case.
- (7429) *Mullins v. Jake Sweeney Automotive*, 2018 WL 1565605 (S.D. Ohio 2018) – Judicial estoppel generally prevents party from prevailing in one phase of case and then relying on contradictory argument to prevail in another phase and is routinely applied to bar employment related claims not disclosed in prior bankruptcy proceedings. Estoppel requires that (1) debtor assumed position in current litigation contrary to one asserted under oath while in bankruptcy; (2) bankruptcy court adopted contrary position; and (3) the debtor’s omission did not result from mistake or inadvertence. Court accepted Debtor’s representation that Debtor did not have any undisclosed causes of action by confirming Chapter 13 Plan. Although Debtor may have advised Bankruptcy Counsel, Debtor did not notify Court or Trustee of pending claim until after Defendant filed Motion for Summary Judgment based on judicial estoppel. Estoppel effect occurs when plan confirmed. Later dismissal of Chapter 13 case without discharge does not avoid or prevent application of judicial estoppel.
- (7430) *Sizemore v. Nationstar Mortgage, LLC*, 2017 WL 7805585 (E.D. Ky. 2017) - Judicial estoppel prevents party from prevailing in one phase of case on argument and then relying on contradictory argument in another phase. Judicial estoppel applies where party’s later position is clearly inconsistent with earlier position; party succeeded in persuading Court to accept earlier position such that acceptance of later position creates perception that either first or second Court was misled; and party asserting inconsistent position would derive unfair advantage. Plaintiff judicially estopped from bringing cause of action where party did not disclose the existence of cause of action in bankruptcy filing. Plaintiff had initiated lawsuit more than year prior Chapter 7 bankruptcy filing but did not disclose existence of claim or pending litigation in bankruptcy filing. Bankruptcy Court accepted representations in schedules that Debtor had no causes of action as true in granting Debtor

discharge under Chapter 7. Case dismissed.

- (7431) *Coleman v. Parallon Enterprises, Inc.*, 2017 WL 4349161 (M.D. Tn. 2017) – Judicial estoppel precludes assertion of later claim where party does not disclose cause of action in bankruptcy case and receives relief based on representation through reduction of debts to creditors or entry of discharge. Although Plaintiff had clear duty to disclose in bankruptcy filing Plaintiff's pending claim for employment discrimination yet failed to do so, Plaintiff did not obtain any relief based on that omission where Bankruptcy case was dismissed prior to entry of discharge or confirmation of Plan.
- (7432) *Paul v. Hewlett Packard Enterprise Co.*, 2017 WL 3668497 (E.D. Mi. 2017) - Judicial estoppel is equitable doctrine designed to protect integrity of court and prevent abuse of process. Judicial estoppel requires that party assert position that is contrary to one asserted under oath in prior proceeding where prior court adopted contrary position either as preliminary matter or part of final disposition. Judicial estoppel is inapplicable where conduct amounts to nothing more than mistake or inadvertence, evidenced where debtor lacks knowledge of factual basis for claim or where debtor has not motive for concealment and lack of bad faith. Plaintiff's failure to disclose cause of action that arose during Chapter 13 case constituted assertion of contrary position that plaintiff had no claims, and bankruptcy court relied on proposition for at least some time during pendency of Chapter 13 case. Plaintiff also had motive to conceal because Chapter 13 Debtor always has interest in minimizing income and assets. However, evidence indicated that Plaintiff repeatedly advised bankruptcy counsel of claim and bankruptcy counsel repeatedly advised Plaintiff that it was not necessary to amend or disclose. Only after Plaintiff discharged prior counsel and hired new bankruptcy counsel was Plaintiff informed of need to amend and Plaintiff timely amended to disclose cause of action. Prompt amendment on being advised of need coupled with prior reliance on advice of counsel demonstrated absence of bad faith preventing application of judicial estoppel in this case.
- (7433) *Wilson v. Primesource Health Care of Ohio*, 2017 WL 2869341 (N.D. Ohio 2017) - Judicial Estoppel bars Debtor from bringing post-petition cause of action against a third-party where Debtor does not disclose existence of claim in bankruptcy schedules. Judicial estoppel applies where (1) Debtor asserts position that is contrary to one that Debtor asserted under oath in prior proceeding; and (2) prior Court adopted contrary position either as preliminary matter or as part of final disposition. Judicial estoppel does not apply when Debtors omission might be inadvertent such as where Debtor lacks knowledge of the factual basis of undisclosed claim or where Debtor has no motive for concealment. Debtor did not have knowledge of possible claim as of date of bankruptcy petition. Although Debtor suspected that employer may owe money for unpaid overtime, employer repeatedly asserted that Debtor was salaried and in eligible for overtime. Debtor reasonably believed she was salaried and Debtor's general frustration with earning so little for so much work was insufficient to show that Debtor knew factual basis for claim.
- (7434) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Judicial Estoppel precluded attempt by plaintiff to bring action under RESPA for claims surrounding origination of mortgage as plaintiff failed to disclose those causes of action in her prior chapter 7 bankruptcy case. Judicial estoppel applies where Debtor is asserting position that is contrary to one that Debtor asserted under oath in bankruptcy proceeding; the Bankruptcy Court adopted the contrary position; and the omission did not result from mistake or inadvertence. Debtor has affirmative obligation to schedule known claims and causes of action and failure to list a claim operates as representation a claim does not exist. Plaintiff filed bankruptcy more than one year after obtaining loan which is now subject to RESPA dispute. Debtor knew or should have known of existence of any dispute or claim concerning origination of mortgage at time of bankruptcy filing yet did not disclose any dispute regarding origination of mortgage in bankruptcy filing and Debtor obtained discharge based on statements and schedules filed with Court, judicially stopping Debtor from now asserting challenges related to origination of mortgage.
- (7435) *Owens v. Arvato Digital Services, Inc.*, 2016 WL 7173793 (W.D. Ky. 2016) - Judicial Estoppel precludes party from asserting position in litigation where (1) party asserts position that is contrary to one party has asserted under oath in prior proceeding; (2) prior Court adopted contrary position either preliminarily or as part of final disposition; and (3) omission was not due to mistake or inadvertence. Debtor must disclose all causes of action that exists when bankruptcy petition is filed, and has duty of continuing disclosure of any potential causes of action that arises post-petition until the case is closed. Plaintiffs action barred by judicial estoppel where plaintiff was pursuing cause of action which was not disclosed in previous bankruptcy filing and plaintiff did not amend Chapter 13 case after she lost job to reflect claims resulting from termination. Debtor also omitted claims on subsequent chapter 7 bankruptcy petition filed almost one year after termination and one month after letter threatening litigation was sent to former employer. Bankruptcy Court adopted contrary position created by failure to disclose by confirming Chapter 13 Plan and subsequent discharging debts in Chapter 7 case. Confirmation of plan and entry of order of discharge "adopted" contrary position that no claims existed. Omission will be inadvertent if (one) Debtor lack knowledge of the factual basis of the claim; (two) Debtor had no motive for concealment; and (three) evidence indicates lack of bad faith. Debtor knew of factual basis for claims on day she was terminated from employment. Debtor knew that she was the only woman and eldest in her unit and that her termination was not based on poor job performance. Although not required, Debtor also knew legal basis of claim as her attorney sent letter threatening litigation to Debtor's employer one month before Debtor file Chapter 7 petition. While Debtor did not have notice of action when Debtor commenced chapter 13 case because she had not been terminated, Debtor had continuing duty to update petition to disclose accrual of cause of action. Court presumes in Chapter 13 proceeding that failure to disclose litigation's effort to minimize income and assets resulting in motive to conceal. Motive to conceal can be inferred from fact that Debtor knew of a claim and did not disclose it. Debtor's conclusory statement that she had no motive to conceal lacked any factual basis to rebut presumption of motive to conceal. Evidence indicated lack of good faith as Debtor did not take any steps to advise Court or Trustee of wrongful termination and eve as of date of hearing on Motion for Summary Judgment still had not taken any steps to advise Bankruptcy Court of cause of action. Fact that Debtor could reopen case did not make up for fact that Debtor had not done so
- (7436) *Neidenbach v. Amica Mutual Insurance Company*, 2016 WL 6775961 (8th Cir. 2016) – Insured's claim against insurer for loss of personal property in fire judicially estopped to deny value of assets listed I Bankruptcy schedules filed one year earlier. Claim for loss of property in excess of \$260,000 amounted to fraud allowing insurer to void policy. Although Debtors testified that bankruptcy schedules reflected "garage sale value" while policy covered replacement cost, disparity between values was too great to result from mistake or inadvertence.

- (7437) *Green v. Liberty Insurance Corporation*, 2016 WL 6777848 (E.D. Mi. 2016) – Judicial estoppel prevents party from asserting a position in one proceeding prevailing on that position, and then asserting contrary position in later proceeding merely because his interests have changed. Judicial estoppel requires that party's current position be clearly inconsistent with prior position; party must have succeeded in persuading court to accept earlier position so that acceptance of later position would create perception that court was misled; and party would gain an unfair advantage if allowed to assert inconsistent position. Debtor barred by judicial estoppel from asserting claim against homeowner's insurance for alleged theft of property. Insurance policy allowed insurer to void policy if Debtor engaged in fraudulent conduct or makes false statements. Debtor filed claim for theft of property exceeding \$100,000.00. In Debtor's prior bankruptcy case filed 5 years earlier, he disclosed only \$4,150 in total household goods. Discovery in insurance litigation revealed the Debtor at time of bankruptcy, owned three guitars which Debtor contended were worth thousands of dollars each; a workstation valued at over \$2,500; a \$2,800 keyboard; other assets including video games that Debtor had been collecting since he was 12 years old valued at \$250 each; and a diamond ring purchased for \$2,700.00 and a sax worth at least \$3,000.00. Assertions in insurance claim were clearly inconsistent with prior bankruptcy pleadings and Debtor received benefit of discharge based on those assertions, such that allowing Debtor to make contrary assertions now would be judicially estopped.
- (7438) *Marr v. Wygul*, 2016 WL 4126583 (E.D. Tn. 2016) – Judicial estoppel prevents party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Doctrine bars claims not disclosed in prior bankruptcy proceedings where: (1) 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) Debtor's omission did not result from mistake or inadvertence. Mistake or inadvertence considers whether (1) Debtor lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) evidence indicates an absence of bad faith evidenced by affirmative actions taken by Debtor to notify the trustee or bankruptcy court of an omitted claim. Debtor did not include the present claim against Defendant in her bankruptcy filing, despite filing for bankruptcy after she filed her administrative claim. Debtor took numerous affirmative actions to rectify the omission including informing her bankruptcy attorney's paralegal about the fair housing complaint that she filed prior to filing bankruptcy; Debtor did not understand requirement to disclose administrative proceedings, contingent claims, and unliquidated claim as none of the terms were explained to her; once Plaintiff was informed by her attorneys in the present case that she was obligated to list the claim in her bankruptcy petition, she contacted her bankruptcy attorney and when attorney did not take any action, she promptly employed new counsel, who helped reopen her bankruptcy case and disclose HUD complaint and the current proceeding were then listed and filed to substitute the Bankruptcy Trustee as the real party in interest. All steps were taken before Defendant brought the issue to the Court's attention. Plaintiff's corrective actions rendered judicial estoppel inappropriate.
- (7439) *Westbrooks v. Board of Trustees of East Cleveland Public Library*, 2016 WL 4577715 (N.D. Ohio 2016) - Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position "either as a preliminary matter or as part of a final disposition. Judicial estoppel does not apply when a Debtor's omission might be inadvertent—such as where a Debtor lacks the knowledge of the factual basis of the undisclosed claim or where the Debtor has no motive for concealment. Cause of action is an asset that must be scheduled under and Debtor has continuing duty of disclosure such that Debtor is required to disclose all potential causes of action including those that arise during pendency of bankruptcy proceedings, and Judicial estoppel may bar claims that are not disclosed to the bankruptcy court. Judicial estoppel does not apply to post-petition causes of action where Chapter 13 plan is confirmed but case is dismissed without discharge. Bankruptcy Court did not adopt contrary position as parties on dismissal, were returned to their pre-petition positions and plaintiff did not gain any advantage by virtue of failure to report. Automatic stay may have benefited plaintiff is not sufficient unless defendant shows that plaintiff gained some advantage as result of stay. Non-disclosure appeared to be inadvertent where claim did not arise until 5 years after Debtor filed Chapter 13 and there was little, if any, activity in Chapter 13 case other than Debtor making payments. While Debtor had duty to amend to disclose, there was no evidence that Debtor purposefully hid claims, and omission appears to be more of an error by omitting asset rather than affirmative misrepresentation to court.
- (7440) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016) , *aff'd*, 2017 WL 2351972 (E.D. Mi. 2017), *aff'd*, 2018 WL 300438 (6th Cir. 2018) – Judicial estoppel prevents party from prevailing in one phase of a case based on an argument and then relying on contradictory argument to prevail in another phase. Party's later position must be clearly inconsistent with earlier position; party must have been successful in persuading court to accept earlier position; and allowing party to assert inconsistent position would produce unfair advantage or impose unfair detriment on other party. Positions taken by one party in first action did not judicially estop different defendant in second action brought by plaintiff. Further, evidence did not demonstrate any inconsistent position where defendant in second action asserted that it was essentially the same party as the defendant in the first action, and that assertion was not inconsistent with any assertion in the first action. Further, assertion of allegedly inconsistent position would only have affected finding that defendant in first action was in privity with defendant in second action for purposes of res judicata, but res judicata on when asserted on defensive basis does not require privity so even if court rejected argument that defendant in first case was same as or in privity with defendant in second case, that would not have changed outcome of case which was dismissed based on res judicata grounds.
- (7441) *In re Jones*, Case No. 15-32931 (Bankr. E.D. Mi. 2016) – Section 707(b) allows a court to dismiss a case for abuse only where the Debtor's debts are primarily consumer debts. "Consumer debts" are defined as those incurred primarily for personal, family or household purpose. Whether debt is consumer depends on the purpose for which the debt was incurred and, if incurred for more than one purpose, the primary purpose. Student loans may be non-consumer debts if Debtor demonstrates that loan was incurred purely or primarily as business investment; but will be consumer loans if incurred for purposes of supporting one personally or one's family. Debtor judicially estopped from asserting that student loans were non-consumer debts. Debtor's initial bankruptcy petition indicated that Debtor's debts were primarily consumer debts. Debtor's initial Means Test included required calculations assuming that debts were consumer, and Debtor did not file a Statement of Exemption from Presumption of Abuse on which Debtor would have indicated that debts were non-consumer. After the UT Trustee filed a Motion to Dismiss under Section 707(b)(3), Debtor amended the petition and means test, and filed the Statement of Exemption all of which asserted for the first time that the student loans were not consumer debts. Judicial estoppel applies where party takes contrary position under

oath earlier in the proceeding and that position was accepted by the court. Debtor can avoid effect of judicial estoppel by showing that conduct was nothing more than inadvertent or mistake. Inadvertence requires that the Debtor lacked knowledge of factual basis of unasserted claim; Debtor has no motive for concealment; and there is no evidence of bad faith. Debtor's initial filings, under oath, asserted that Debtor's debts were not primarily non-consumer. The Court and the US Trustee relied on those assertions in the first instance, causing the US Trustee to file the Section 707 Motion. Debtor did not change assertions until after the US Trustee file the Motion to Dismiss. Debtor failed to provide any explanation for the late amendments and did not present any evidence of inadvertence. Debtor's actions in amending were done with the clear motive of avoiding the consequences of Debtor's prior assertions that the debts were primarily consumer debts.

- (7442) *Hawkins v. Michigan Department of Corrections*, 2016 WL 3230663 (E.D. Mi. 2016) – Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition. Judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence looking to whether: (i) Debtor lacked knowledge of factual basis of undisclosed claims; (ii) Debtor had a motive for concealment; and (iii) the evidence indicates an absence of bad faith. Debtor filed EEOC complaint in 2014 and filed suit against employer in January, 2015. Debtor filed Chapter 13 in May, 2015, but did not disclose cause of action. Debtor's Plan was confirmed by the Court based on omission from schedules, amounting to judicial adoption of Debtor's representation that no causes of action existed. After defendant filed Motion for Summary Judgment in District Court action, Debtor voluntarily dismissed the Chapter 13 case. Debtor's action against MDOC barred by judicial estoppel. Debtor possessed knowledge of factual basis of the claims well before she filed for bankruptcy. Debtor had motive for concealment, because if harassment claim became part of bankruptcy estate, then the proceeds from it could go towards paying creditors. Debtor failed to demonstrate lack of bad faith. Although Debtor claimed that she told bankruptcy attorney about this lawsuit, Debtor did not file an affidavit from her bankruptcy attorney to that effect. Debtor's own affidavit merely stated that Debtor told her bankruptcy attorney about lawsuit and Debtor did not realize that the lawsuit was left off petition.
- (7443) *In re Bourgeois*, Case No. 15-14 (M.D. La. 2016) – Chapter 13 Debtor who fails to disclose cause of action is not barred by judicial estoppel from asserting claim where cause of action arose during case but Chapter 13 case is dismissed before discharge. Bankruptcy Court did not enter discharge and so did not "accept" Debtor's representation that no causes of action existed. Although Debtor had continuing duty to disclose causes of action that arose during case, failure to disclose did not result in any judicial determination and Debtor did not obtain tangible benefit from non-disclosure.
- (7444) *Henry v. Abbott Laboratories*, 2016 WL 3209498 (6th Cir. 2016) – Judicial estoppel is equitable doctrine that applies when Debtor assumes position in later litigation that is contrary to one asserted in bankruptcy proceeding; bankruptcy court adopted the contrary position either as preliminary matter or as part of final disposition; and Debtor's omission was not result of inadvertence or mistake. Debtor's action against employer for wrongful termination and employment discrimination not judicially estopped where cause of action arose one year after to the date on which Debtor filed bankruptcy. Debtor did not make contrary representation in bankruptcy petition and there was no order of the bankruptcy court that could have relied on any representation.
- (7445) *Jenkins v. Davidson Transit Organization*, 2016 WL 2939910 (M.D. Tn. 2016) – Judicial estoppel protects integrity of courts by preventing party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Court must find: (1) Debtor assumed a position that was contrary to the one asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) omission did not result from mistake or inadvertence. Debtor estopped from post-discharge pursuit of employment discrimination charge where Debtor failed to disclose cause of action in bankruptcy case and bankruptcy court entered discharge. Lawsuit asserted contrary position to bankruptcy schedules that indicated that Debtor did not have any contingent or unliquidated claims. Failure to disclose based on inadvertence or mistake, to avoid preclusive effect, requires that (1) Debtor lack knowledge of the factual basis of the undisclosed claims; (2) Debtor lacked motive for concealment; and (3) evidence indicates an absence of bad faith. Debtor does not need to know exact nature of action or be aware of right to sue, as long as Debtor is in possession of sufficient facts to suggest a possible cause of action. Prior to bankruptcy filing, Debtor believed he was discriminated against on the basis of his age because he saw his significantly younger replacement driving his route a couple of weeks after his termination, and Debtor believed he was discriminated against on the basis of disability because he was assigned to work in difficult conditions while he was on light duty recovering from surgery. Debtor had motive to conceal his claims because a Debtor has an interest in minimizing income and assets. Fact that Debtor had not filed complaint with EEOC or received right to sue letter was not justification for failure to disclose, as Debtor considered right to sue as contingent, distant and remote but bankruptcy schedules specifically required disclosure of contingent claims. Debtor could also not escape by arguing reliance on counsel, as Debtor has duty to complete and sign petition accurately.
- (7446) *Sherman v. Wal-Mart Associates, Inc.*, Case No. 14-4201 (N.D. Tx. 2016) – Debtor's cause of action for wrongful termination that arose during Chapter 13 but Debtor did not amend Schedules during Chapter 13 was not judicially estopped from pursuing cause of action after conversion of case to Chapter 7. Had Debtor filed Chapter 7 in the first instance, cause of action would not have existed at commencement and post-petition cause of action would not have been asset of Chapter 7 estate, so Debtor did not gain unfair advantage and creditors were not unfairly prejudiced if Debtor was allowed to pursue action. Had Debtor remained in Chapter 13, judicial estoppel would have precluded prosecution of action, but conversion of case to Chapter 7 avoided estoppel effect.
- (7447) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Debtor is insolvent where, s of date of transfer, Debtor's liabilities exceed value of property at fair value, excluding value of property transferred, concealed or removed with intent to hinder, delay or defraud creditors; and property that may be exempted under Section 522. Debtor's petition and schedules indicated that all of Debtor's assets were exempted and that he was retired and had no income. Debtor had same assets on date of transfer of promissory note to wife as Debtor had as of date of petition. Debtor had stated in State Court marriage dissolution proceedings that Debtor had no assets and sole income was SSI and Air Force retirement benefits and any requirement that he pay spousal support would result in hardship. State Court refused to increase amount of spousal support based on this testimony. Debtor now judicially estopped to assert additional assets. Debtor's statement in divorce proceeding

(1) asserted position inconsistent with position being currently asserted and (2) State Court adopted contrary position as part of disposition of divorce proceeding. Although issue was now being raised by Debtor's current wife, issues raised related directly to husband's financial condition supporting preclusive effect against wife as well as Debtor. Neither Debtor nor his new wife would be permitted to argue Debtor's financial condition was different than what Debtor asserted in State Court divorce proceeding. Non-disclosure was not inadvertent where Debtor's schedules listed various lawsuits that would diminish assets of estate but did not disclose causes of action that would enhance estate. Statement of Financial Affairs is clear in requiring disclosure of all suits and administrative proceedings and Debtor knew that pending employment discrimination claims were "administrative proceedings" pending before EEOC.

- (7448) *Marshall v. Honeywell Technology Systems Inc.*, Case No. 14-7190 (D.C. App. 2015) – Standard of review of Court Order dismissing case based on judicial estoppel is abuse of discretion. Judicial estoppel prohibits Debtor from pursuing cause of action that Debtor deliberately did not disclose in bankruptcy case. Debtor's actions precluded by judicial estoppel where Debtor, filing pro se, failed to disclose suit in schedules advised Trustee of cause of action at the Section 341 meeting and her attorney later advised the trustee of causes of action. Failure to disclose cause of action caused Trustee to issue no asset report and close case. Debtor did not amend schedules to disclose cause of action until well after case closed at which point Trustee was unable to pursue cause of action for benefit estate as estate had no assets and no attorney was willing to take case that had been pending for long period of time, causing Trustee to once again abandon action and close estate. Oral disclosure at 341 meeting does not provide proper notice to creditors as disclosure does not appear on PACER, depriving creditors or opportunity to evaluate Debtor's financial condition.
- (7449) *Manning v. JPMorgan Chase Bank*, 2015 WL E.D. Tn. 2015) – Stay does not apply to or prevent foreclosure of property in which Debtor has no interest. Lender did not violate stay by instituting foreclosure proceedings where title to property was solely in wife's name where husband filed bankruptcy. Husband and wife judicially estopped from asserting that husband had interest in property sufficient to stay foreclosure sale where Husband's bankruptcy schedules affirmatively stated that Husband did not own any interest in any real property and did not have any equitable or future interest, life estate or power exercisable for the benefit of any third party. Court accepted this representation and acted in reliance on it when Court confirmed Husband's Chapter 13 Plan. Parties were stopped from now asserting that husband held some undisclosed interest such that foreclosure process did not involve property of estate and was not stayed.
- (7450) *Harper-Cox v. Gateway-Detroit East*, 2015 WL 3652750 (E.D. Mi. 2015) – Judicial estoppel is discretionary equitable doctrine used to preserve integrity of judicial process by preventing party from engaging in cynical gamesmanship. Judicial estoppel generally requires that a party assert a later position that was inconsistent with prior position; that party succeeded in persuading court to accept earlier position such that acceptance of the later position would create impression that either first court or second court was misled; and the party seeking to assert the position would derive an unfair advantage or impose an unfair detriment on opposing party or that omission was result of mistake or inadvertence. Detrimental reliance by opposing party is not required. Although Debtor had filed three separate EEOC complaints at time of filing Chapter 13, Debtor did not disclose actions to bankruptcy court until after Debtor had received EEOC determinations, instituted suit in District Court, and for an additional two months after defendant filed motion to dismiss based on judicial estoppel. However, action would not be barred where Debtor, albeit belatedly, did disclose actions to bankruptcy court and bankruptcy court approved Debtor's continued prosecution of action with condition that all proceeds be paid to Chapter 13 case.
- (7451) *Brown v. Allstate Property and Casualty Insurance Co.*, 2015 WL 1646684 (E.D. Mi. 2015) – Judicial estoppel forbids party from taking position inconsistent with one successfully and unequivocally asserted by same party in prior proceeding. Judicial estoppel does not apply to cases of conduct amounting to nothing more than mistake or inadvertence. Failure to disclose claim in bankruptcy is inadvertent where Debtor lacks knowledge of factual basis for undisclosed claims or where Debtor lacks any motive for concealment. Judicial estoppel does not bar Debtor's later claim against insurance company when property is later destroyed by fire. Debtor's valuation of property in bankruptcy schedules, while markedly lower than amount asserted in insurance claim, did not amount to fraud where purposes and timing of valuations were inherently different and not necessarily equivalent valuation. Further, valuation in bankruptcy case was value available to repay creditors while value for insurance purposes was replacement value which is inherently different. If there are specific assets that Debtor now claims lost but which were not disclosed to bankruptcy court in first instance, estoppel would prevent Debtor from recovering on insurance policy, but for assets that were listed (even in cumulative line item) in schedules but at lower values, estoppel does not apply.
- (7452) *Pruitt v. McLaren Regional Medical Center*, 2015 WL 1729612 (E.D. Mi. 2015) – Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as a part of a final disposition. Debtor's failure to disclose pending employment discrimination claim in Bankruptcy schedules constitutes an assertion of a position in the bankruptcy case that is contrary to the one now being advanced in the District Court litigation. Debtor has continuing duty to disclose all potential causes of action and disclosure is at the very core of the bankruptcy process. Evidence did not support finding of inadvertence as Debtor had full knowledge where litigation had been filed and was pending for four months prior to bankruptcy petition; and Debtor had interest in concealing as Debtor has motivation to minimize income and assets in bankruptcy case. Debtor never took any steps to advise bankruptcy court of the litigation, further evidencing that Debtor's failure to disclose was not inadvertent.
- (7453) *Pavelka v. Allstate Property and Casualty Co.*, 2015 WL 1221393 (E.D. Mi. 2015) – Judicial estoppel is equitable doctrine that prevents party from prevailing in one phase of case on an argument and then relying on a contradictory theory at another phase of the litigation. Prior position must be inconsistent with later position and assertion must lead to unfair advantage. Debtor's value of assets in bankruptcy case was not inconsistent with later assertion of value in insurance claim that arose when Debtor's home burned down post-discharge. Debtor's valuation in bankruptcy case was predicated on liquidation value, while values in insurance claim were based on replacement value. Section 506(a)(2) requires Debtor to use replacement cost if the item stands as collateral for loan but does not mandate use of replacement cost for other personal property. Debtor's personal property was no collateral for loan – as such, Debtor justified in valuing property at lower, liquidation amount. Debtor did not obtain unfair advantage by valuation differential because in Bankruptcy the trustee would be concerned with liquidation value of assets in determining whether to administer assets, and there was no indication that trustee would have administered

assets even if Debtor listed them at “replacement” value as trustee would have made own determination of liquidation value.

- (7454) *Orkies v. Midland Funding, LLC*, 2015 WL 796360 (W.D. Ky. 2015) – Debtor’s failure to disclose potential cause of action bars Debtor from bringing or maintaining action post discharge. Debtor can avoid estoppel only by showing that Debtor lacked knowledge of potential claim and lacked any motivation for concealment. Debtor has knowledge of potential claim if Debtor has enough information to suggest that Debtor may have possible action, even if Debtor does not know specific legal basis. Debtor’s post-discharge reopening of case to disclose cause of action did not avoid estoppel effect where Debtor did so only after defendant asserted estoppel as defense. After the fact effort to disclose is not sufficient to show lack of bad faith.
- (7455) *Vehicle Market Research, Inc. v. Mitchell International, Inc.*, 2014 WL 4627852 (10th Cir. 2014) – Judicial estoppel applies where (1) a party takes a position clearly inconsistent with an earlier-taken position; (2) adopting the later, inconsistent, position would create an impression that either the earlier or the later court was misled; and (3) allowing the party to change their position would give them an unfair advantage. Court will be cautious in applying doctrine to prevent party from being able to vindicate rights, while at the same time keeping inconsistent statements in check. Court can use lesser weapons such as allowing party to be impeached with prior inconsistent statements, and should invoke judicial estoppel only where other less forceful remedies are inadequate to protect integrity of judicial system.
- (7456) *In re Asplund*, 2014 WL 5017833 (Bankr. E.D. Mi. 2014) – Judicial estoppel requires that party to be estopped have previously asserted inconsistent position and received relief based on that assertion. Debtor not estopped from denying that obligation is child support notwithstanding that Debtor previously asserted in State Court that obligation was child support, where State Court expressly rejected Debtor’s position.
- (7457) *Trimas Corp. v. Meyers*, 2014 WL 3376958 (6th Cir 2014) – Judicial estoppel prevents party who has asserted position in prior litigation and prevailed based on that assertion from later asserting inconsistent position in subsequent litigation. Where plaintiff previously sued under Supplemental Executive Retirement Plan and was unsuccessful, plaintiff not judicially estopped from bringing new action under original Executive Retirement Plan.
- (7458) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Judicial estoppel prevents party from asserting position in litigation and obtaining relief based on that assertion from making contrary assertion in later proceedings. Debtor repeatedly disavowed ownership of real property in State Court. When Debtor later filed bankruptcy, Debtor listed property in Schedule A and claimed property as exempt in Schedule C. While Debtor clearly made prior inconsistent representations, there was no evidence that State Court ever accepted representations or that Debtor obtained any relief predicated on those representations, where court set aside alleged transfers from Debtor to third parties in first instance.
- (7459) *Geller v. American Insurance Co.*, 2014 WL 920740 (E.D. Mi. 2014) – Judicial estoppel prevents party who assumed certain position in legal proceeding, and succeeds in maintaining that position, from asserting a contrary position merely because his interests have changed. First, party’s later position must be ‘clearly inconsistent’ with its earlier position. Second, Judicial acceptance of an inconsistent position in a later proceeding would create perception that either the first or the second court was misled. Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations and poses little threat to judicial integrity. Third, 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. Debtor estopped from recovering on personal property insurance policy. Policy provided that policy was void if insured made any false statements relating to insurance or presentation of claim. Debtor made numerous false statements in prior bankruptcy proceeding by failing to disclose ownership of multiple valuable items of personal property, for which Debtor later made a claim against insurance after alleged theft. Bankruptcy schedules listed the total value of his personal property as \$2,550.00 including “furs and jewelry”, valued at \$50.00.” Plaintiff subsequently submitted an insurance claim seeking \$90,225 including \$69,975 for jewelry that he owned prior to bankruptcy filing, including a 14 carat gold ring with a 1.78 carat diamond, 18 carat gold chain (weight of 149 grams), 14 carat bracelet (weight of 38 grams), 14 carat gold ring with 6 diamonds, and stud earring with a 1.25 carat diamond. Insurance policy voided in its entirety based on fraudulent statements in connection with claim.
- (7460) *Kemp v. Thi of Michigan at Detroit, LLC*, 2014 WL 793651 (E.D. Mi. 2014) – The doctrine of judicial estoppel prevents a party from asserting a position contrary to one that the party asserted under oath in a prior judicial proceeding if the prior court adopted the contrary position in a preliminary or final disposition. Doctrine is to protect the integrity of the judicial process by preventing parties from abusing the process through gamesmanship. Judicial estoppel does not applicable where the prior inconsistent position amounted to no more than mistake or inadvertence. Doctrine applies where party asserts inconsistent position in other action and obtains relief based on that assertion, and then asserts contrary position in later action.
- (7461) *Javery v. Lucent Technologies, Inc., Long Term Disability Plan*, 741 F.3d 686 (6th Cir. 2014) – Judicial estoppel prevents Debtor from later asserting a cause of action that was not disclosed in bankruptcy schedules and obtains relief based on that omission. Debtor can avoid effect of judicial estoppel where non-disclosure was the result of mistake or inadvertence, does not act in bad faith, and lacks a motive to conceal the claim. Debtor not judicially estopped from pursuing disability claim where Debtor disclosed claim to bankruptcy attorney in writing and failure to disclose was fault of attorney, not Debtor. There was no evidence of bad faith or intent to conceal by Debtor. Further, disability claim would have been exempt had it been disclosed, such that Debtor had no motive to conceal the action.
- (7462) *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.

- (7463) *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.
- (7464) *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.
- (7465) *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.
- (7466) *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.
- (7467) *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.
- (7468) *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.
- (7469) *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.

- (7470) *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.
- (7471) *Lubber, Inc. v. Optari, LLC*, 2013 WL 1245679 (M.D. Tn. 2013) – Judicial estoppel is equitable doctrine that prevents party from assuming a certain position in judicial proceedings 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.
- (7472) *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.
- (7473) *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.
- (7474) *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.
- (7475) *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.
- (7476) *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.
- (7477) *Mark A. Goldman & Assoc. P.C. v. Kattouah*, 2011 WL 2533657 (E.D. Mi. 2011) – Isolated and contradictory statement in answer to complaint 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.
- (7478) *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.

- (7479) *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.
- (7480) *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.
- (7481) *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.
- (7482) *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.
- (7483) *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".
- (7484) *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.

- (7485) *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.
- (7486) *In re Blose*, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – Judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Judicial estoppel “preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” The three considerations that are typically relevant in determining whether judicial estoppel should apply: (1) “a party’s later position must be clearly inconsistent with its earlier position”; (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceedings would create the perception that either the first or the second court was misled”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Judicial estoppel does not apply where the prior inconsistent position occurred because of “mistake or inadvertence.” Failure to disclose a cause of action may be deemed inadvertent where (1) the Debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the Debtor has no motive for concealment of the claim.

12.202 Parties Estopped

- (7487) *Wilkey v. Management & Training Corporation*, 2017 WL 1015857 (W.D. Ky. 2017) – Judicial estoppel does not prevent trustee from pursuing recovery of cause of action that was initially not disclosed. Debtor’s failure to disclose pre-petition cause of action for wrongful termination would have barred Debtor from pursuing recovery but once Trustee substitutes in as party plaintiff, trustee has full right to pursue recovery for benefit of estate. Trustee does not stand in shoes of Debtor for purposes of judicial estoppel.
- (7488) *Slater v. U.S. Steel Corp.*, 891 F.3d 1329 (11th Cir. 2018) – Reversing prior panel decision, Court concluded that Bankruptcy Trustee is not barred from pursuing action based on Debtor’s failure to disclose and assertion of judicial estoppel.
- (7489) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Debtor is insolvent where, as of date of transfer, Debtor’s liabilities exceed value of property at fair value, excluding value of property transferred, concealed or removed with intent to hinder, delay or defraud creditors; and property that may be exempted under Section 522. Debtor’s petition and schedules indicated that all of Debtor’s assets were exempted and that he was retired and had no income. Debtor had same assets on date of transfer of promissory note to wife as Debtor had as of date of petition. Debtor had stated in State Court marriage dissolution proceedings that Debtor had no assets and sole income was SSI and Air Force retirement benefits and any requirement that he pay spousal support would result in hardship. State Court refused to increase amount of spousal support based on this testimony. Debtor now judicially estopped to assert additional assets. Debtor’s statement in divorce proceeding (1) asserted position inconsistent with position being currently asserted and (2) State Court adopted contrary position as part of disposition of divorce proceeding. Although issue was now being raised by Debtor’s current wife, issues raised related directly to husband’s financial condition supporting preclusive effect against wife as well as Debtor. Neither Debtor nor his new wife would be permitted to argue Debtor’s financial condition was different than what Debtor asserted in State Court divorce proceeding.
- (7490) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Judicial estoppel precludes Debtor from pursuing causes of action that were not disclosed as assets. Husband had previously filed bankruptcy but failed to list alleged causes of action arising out of foreclosure of home owned by Debtor and non-Debtor spouse. Fact that non-Debtor spouse would not be judicially estopped from pursuing action does not give Debtor the right to pursue that action in his name.
- (7491) *Mowder v. Permanent General Assurance Corp. of Ohio*, 2013 WL 5923766 (N.D. Ohio 2013) – Debtor’s failure to disclose asset in initial bankruptcy case does not estop Chapter 7 Trustee from pursuing recovery of asset. Debtor failed to list an alleged copyright in bankruptcy schedules. Defendant later allegedly used the copyrighted material without permission and Debtor brought suit. Defendant sought to dismiss based on judicial estoppel. Debtor reopened his bankruptcy case and the Chapter 7 trustee intervened in the litigation. As the Debtor was no longer the real party in interest, the trustee would not be estopped from pursuing recovery. Fact that Debtor might receive a portion of any award that the trustee wins does not mean that case should be dismissed.
- (7492) *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.
- (7493) *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.
- (7494) *Stevenson v. Haddad*, 2013 WL 3214981 (6th Cir. 2013) – Debtor’s errors or omissions are not attributable to Trustee for purposes of judicial estoppel.
- (7495) *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.

12.203 Particular Claims Barred

- (7496) *Mullins v. Jake Sweeney Automotive*, 2018 WL 1565605 (S.D. Ohio 2018) – Judicial estoppel generally prevents party from prevailing in one phase of case and then relying on contradictory argument to prevail in another phase and is routinely applied to bar employment related claims not disclosed in prior bankruptcy proceedings. Estoppel requires that (1) debtor assumed position in current litigation contrary to one asserted under oath while in bankruptcy; (2) bankruptcy court adopted contrary position; and (3) the debtor's omission did not result from mistake or inadvertence. Court accepted Debtor's representation that Debtor did not have any undisclosed causes of action by confirming Chapter 13 Plan. Although Debtor may have advised Bankruptcy Counsel, Debtor did not notify Court or Trustee of pending claim until after Defendant filed Motion for Summary Judgment based on judicial estoppel. Estoppel effect occurs when plan confirmed. Later dismissal of Chapter 13 case without discharge does not avoid or prevent application of judicial estoppel.
- (7497) *Hermann v. Hartford Casualty Co.*, 2017 WL 117118 (10th Cir. 2017) – Debtor judicially estopped from pursuing lawsuit against automobile insurance carrier for bad faith denial of coverage where Debtor's Schedule B listed only "Potential Personal Injury Award". Although disclosure would have been sufficient to notify Chapter 7 Trustee of pending personal injury action, disclosure did not notify Trustee of separate "bad faith" action against insurer itself.
- (7498) *Rizka v. State Farm Fire & Casualty Co.*, 2017 WL 1363891 (6th Cir. 2017) – Debtor judicially estopped from claiming damages against homeowner's insurance for \$250,000 damage to Debtor's home and over \$200,000 of personal property. Debtor filed bankruptcy approximately one year previously, attesting that Debtor owned only \$1800 in personal property and Debtor did not own any real property at all. Debtor obtained discharge based on representation to Bankruptcy Court that Debtor owed nothing but then sought almost \$500,000 in real and personal property loss from insurance company. Positions were contrary and did not result from mistake or inadvertence where Debtor was aware of what she was doing, did it in bad faith, and could not blame it on her bankruptcy attorney. Debtor's argument that homeownership is "too confusing for a layperson to understand" did not constitute a mistake or inadvertence.
- (7499) *Cruse v. Sun Products Corp.*, 2016 WL 6892795 (W.D. Tn. 2016) – Judicial estoppel precludes later employment related claims not disclosed in prior bankruptcy proceedings, where (1) Debtor assumed position contrary to the one asserted under oath in bankruptcy; (2) bankruptcy court adopted contrary position; and (3) Debtor's omission did not result from mistake or inadvertence. Debtor has ongoing and affirmative duty to disclose assets, including unliquidated litigation interests. Whether nondisclosure is result of mistake depends on whether Debtor had knowledge of factual basis of underlying claim, whether Debtor had motive to conceal, and whether Debtor acted in bad faith. Debtor asserted in bankruptcy schedules that he had no pending litigation or any contingent or unliquidated claims, tantamount to assertion that no such claims exist. Debtor knew of facts regarding claim and had already filed complaint with EEOC before filing case. Fact that Debtor did not receive EEOC right to sue letter until post-petition did not excuse failure to disclose action in first instance. Bankruptcy Court adopted contrary position by confirming Chapter 13 plan based on information contained in schedules including representation that Debtor had no contingent or unliquidated claims. Non-disclosure was not result of error or mistake where Debtor had full knowledge of factual basis for claim and had already filed EEOC complaint; and Debtor had motive to conceal as Debtor's interest is to minimize assets and to retain proceeds rather than use proceeds to pay creditors. Debtor made no effort to inform Bankruptcy court of action even after receiving "right to sue" letter from EEOC and instituting litigation against employer. Debtor did not amend schedules or make any effort to disclose until after defendant had filed Motion for Summary Judgment based on judicial estoppel. Even when Debtor made disclosure, it only described "potential EEOC settlement" when litigation had been pending for 10 months; he did not include case number, current status, causes of action asserted, or any other details regarding case, or even attach copy of complaint to amended schedule; and Debtor valued cause of action in amended schedules at \$10,000 while complaint sought damages of \$300,000.00.
- (7500) *Jenkins v. Davidson Transit Organization*, 2016 WL 2939910 (M.D. Tn. 2016) – Judicial estoppel protects integrity of courts by preventing party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Court must find: (1) Debtor assumed a position that was contrary to the one asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) omission did not result from mistake or inadvertence. Debtor estopped from post-discharge pursuit of employment discrimination charge where Debtor failed to disclose cause of action in bankruptcy case and bankruptcy court entered discharge. Lawsuit asserted contrary position to bankruptcy schedules that indicated that Debtor did not have any contingent or unliquidated claims. Failure to disclose based on inadvertence or mistake, to avoid preclusive effect, requires that (1) Debtor lack knowledge of the factual basis of the undisclosed claims; (2) Debtor lacked motive for concealment; and (3) evidence indicates an absence of bad faith. Debtor does not need to know exact nature of action or be aware of right to sue, as long as Debtor is in possession of sufficient facts to suggest a possible cause of action. Prior to bankruptcy filing, Debtor believed he was discriminated against on the basis of his age because he saw his significantly younger replacement driving his route a couple of weeks after his termination, and Debtor believed he was discriminated against on the basis of disability because he was assigned to work in difficult conditions while he was on light duty recovering from surgery. Debtor had motive to conceal his claims because a Debtor has an interest in minimizing income and assets. Fact that Debtor had not filed complaint with EEOC or received right to sue letter was not justification for failure to disclose, as Debtor considered right to sue as contingent, distant and remote but bankruptcy schedules specifically required disclosure of contingent claims. Debtor could also not escape by arguing reliance on counsel, as Debtor has duty to complete and sign petition accurately.
- (7501) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Upon filing of bankruptcy, causes of action become property of estate and Debtor loses standing to pursue claims. Undisclosed assets are not abandoned at completion of case and remain property of estate. Debtor failed to list causes of action in schedules and failed to amend schedules at any time during bankruptcy case. Debtor judicially estopped from pursuing cause of action for alleged wrongful foreclosure and for violations of Truth in Lending, RESPA, negligence and breach of contract where all facts underlying causes of action arose pre-petition.

- (7502) *Manning v. JPMorgan Chase Bank*, 2015 WL E.D. Tn. 2015) – Stay does not apply to or prevent foreclosure of property in which Debtor has no interest. Lender did not violate stay by instituting foreclosure proceedings where title to property was solely in wife’s name where husband filed bankruptcy. Husband and wife judicially estopped from asserting that husband had interest in property sufficient to stay foreclosure sale where Husband’s bankruptcy schedules affirmatively stated that Husband did not own any interest in any real property and did not have any equitable or future interest, life estate or power exercisable for the benefit of any third party. Court accepted this representation and acted in reliance on it when Court confirmed Husband’s Chapter 13 Plan. Parties were stopped from now asserting that husband held some undisclosed interest such that foreclosure process did not involve property of estate and was not stayed.
- (7503) *Vehicle Market Research, Inc. v. Mitchell International, Inc.*, 2014 WL 4627852 (10th Cir. 2014) – Debtor not estopped from bringing action to pierce corporate veil based on Debtor’s position as shareholder in allegedly injured corporation merely because Debtor valued stock interest at \$0.00 in prior bankruptcy filing. While Debtor may have had hope that stock could be worth something if future litigation was successful, that did not establish that Debtor knew of actual valuation.
- (7504) *Haddad v. Randal S. Miller Associates, PC*, 2014 WL 5303001 (6th Cir. 2014) – Debtors were judicially estopped from alleging that husband forged wife’s signature on mortgage rendering mortgage void. After lender commenced foreclosure, Debtors filed bankruptcy. Schedule A listed property subject to mortgage; Schedule D listed the mortgage without indicating that the debt was in any way disputed; and Debtors’ Statement of Intentions stated that Debtors intended to retain the property and reaffirm the debt. All of the documents were signed by both Debtor husband and Debtor wife under penalty of perjury. Debtors’ statements constitute affirmative representations that would be inconsistent with Debtors’ new assertion that the mortgage was void. Debtors knew at time of bankruptcy filing of factual basis to dispute the mortgage as the issue had been raised in a counterclaim filed in a pre-petition lawsuit; and had clear motive to conceal the claim because if they did not reaffirm the mortgage the trustee could sell the home to pay creditors.
- (7505) *Kemp v. Thi of Michigan at Detroit, LLC*, 2014 WL 793651 (E.D. Mi. 2014) – Debtor’s claim for employment discrimination barred by judicial estoppel. Debtors did not disclose in bankruptcy schedules a claim for employment discrimination in schedules or in Statement of Financial Affairs. Bankruptcy petition was filed after Debtor had been terminated and after she filed charges with EEOC alleging wrongful termination and discrimination. Debtor failed to amend schedules or SOFA after commencement of case to disclose, although Debtor id damned SOFA for other reasons, and did so after she filed second charge with EEOC and received at least one of two right-to-sue notices. Debtor had actual knowledge of claims as evidenced by charges filed by Debtor with EEOC. Further, Debtor commenced litigation while bankruptcy was still pending yet failed to amend schedules or SOFA or otherwise inform either Bankruptcy Court or Chapter 7 Trustee. Debtor had motive to conceal as Debtor would have personally gained at expense of creditors had she been allowed to prevail in litigation. Debtor’s utter failure to take even minimal steps to correct the omissions for an extended period of time, and even then allegedly only informed Trustee by amending Schedule C to claim asset as exempt, but the amended Schedule C did not set forth any basis for the exemption and did not estimate the value of the claim. Debtor did not amend Schedule B or SOFA to disclose pending litigation. Debtor allegedly left voice mail for trustee but did not follow up on that message. Debtor can overcome presumption of bad faith only by showing repeated affirmative attempts to inform Court and Trustee. Debtor’s vague amendment to Schedule C and one alleged telephone message were not sufficient constitute “repeated attempts” to ensure that court and trustee were aware. Further, one day after the bankruptcy case was closed, Debtor served her initial disclosure in discrimination lawsuit alleging damages in excess of \$300,000, yet Debtor never informed court or trustee that Debtor believed that action had substantial value.
- (7506) *Sinkfield v. State Farm Insurance Co.*, 2013 WL 5954540 (E.D. Mi. 2013) – Debtor estopped to recover on homeowner’s insurance policy where evidence indicated that claim was fraudulently inflated. Debtor filed Chapter 7 and listed total personal property of \$4,000 and valued her home at \$27,000, and Debtor received a discharge in that case. Eighteen months later, Debtor’s home was destroyed by fire and Debtor submitted claim for damage to the home of \$143,000 and lost personal property valued at \$170,000.00. Claim was fraudulent where Debtor had listed minimal assets in Chapter 7 and would be estopped from denying those values, and Debtor did not demonstrate any ability to have amassed \$166,000 in additional personal property after bankruptcy where Debtor’s income was minimal.
- (7507) *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.
- (7508) *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.
- (7509) *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.

- (7510) *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.
- (7511) *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.
- (7512) *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.
- (7513) *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.

- (7514) *Kimberlin v. Dollar General Corp.*, 2013 WL 1136563 (6th Cir. 2013) – Debtor has ongoing duty to disclose assets throughout pendency of case. 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.
- (7515) *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.
- (7516) *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 reconstitute asset in Debtor at closing. Debtor must strictly comply with obligations to schedule asset in order to earn the return. However, Trustee also failed to take steps to administer the receivable before filing "no asset" notice and notice to close case. Trustee would be judicially estopped from now administering receivable. Trustee took position that receivable was fully administered in response to pressure from UST to close cases, thereby inducing Court to close case. Trustee then sat quietly for several years with no contact with ex-wife and no effort to collect receivable. Unique circumstances of case indicated that trustee was engaged in "cynical gamesmanship" by failing to administer asset of which trustee was well aware. Evidence also indicated that ex-wife relied on trustee's inaction in making financial decisions over years since closing of bankruptcy case including substantial expenditures for family needs and efforts to renegotiate mortgage.
- (7517) *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.
- (7518) *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.
- (7519) *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.
- (7520) *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.
- (7521) *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.

- (7522) *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.
- (7523) *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.
- (7524) *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.
- (7525) *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.
- (7526) *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.
- (7527) *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.
- (7528) *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”.
- (7529) *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.

- (7530) *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.

12.204 Particular Claims Not Barred

- (7531) *Jones v. DTE Energy Corporate Services, LLC*, Case No. 16-11112 (Wayne County Cir. Ct. 2018) – Debtor's initial failure to disclose pending employment discrimination lawsuit in bankruptcy schedules warranted dismissal based on judicial estoppel. However, surely after Court dismissed case, Debtor filed motion to reopen bankruptcy case and properly disclosed pendency of cause of action. Court granted rehearing in set aside prior Order of dismissal to provide Debtor and bankruptcy Trustee with opportunity to prosecute cause of action.
- (7532) *Jones v. University of Phoenix*, 2017 WL 3334020 (E.D. Mi. 2017) – Debtor permitted to amend complaint to add Bankruptcy Trustee as party plaintiff for cause of action that arose pre-petition where Debtor initially commenced litigation Debtor's own name without joining Trustee. Although Debtor may have lacked standing to institute litigation in first instance as claim belonged to estate, Debtor not prevented by judicial estoppel from adding Trustee who would have standing to pursue claim.
- (7533) *Fraze v. Metropolitan Property & Casualty Insurance Co.*, 2017 WL 1193063 (W.D. Ky. 2017) – Judicial Estoppel prohibits party from asserting position in legal proceeding that is contrary to position successfully taken by party in earlier legal proceeding. Estoppel requires that party's later position be clearly inconsistent with earlier position; position to be estopped must be one of fact rather than law; party must have succeeded in persuading Court to accept party's earlier position so that judicial acceptance of inconsistent position would create perception that either first or second Court was misled; and party seeking to assert inconsistent position would receive unfair advantage or impose unfair detriment on opposing party. Debtor's statements in bankruptcy schedules filed in February, 2012, did not judicially estop Debtor from making insurance claim for property destroyed in November, 2013. Although properly allegedly destroyed was not disclosed in any of Debtor's bankruptcy schedules, there was no indication that assets destroyed in fire in 2013 were owned by Debtor in 2012 or that Debtor's bankruptcy statements contained any material contrary assertions.
- (7534) *Sherman v. Wal-Mart Associates, Inc.*, Case No. 14-4201 (N.D. Tx. 2016) – Debtor's cause of action for wrongful termination that arose during Chapter 13 but Debtor did not amend Schedules during Chapter 13 was not judicially estopped from pursuing cause of action after conversion of case to Chapter 7. Had Debtor filed Chapter 7 in the first instance, cause of action would not have existed at commencement and post-petition cause of action would not have been asset of Chapter 7 estate, so Debtor did not gain unfair advantage and creditors were not unfairly prejudiced if Debtor was allowed to pursue action. Had Debtor remained in Chapter 13, judicial estoppel would have precluded prosecution of action, but conversion of case to Chapter 7 avoided estoppel effect.
- (7535) *Flynn v. Deutsche Bank National Trust Co.*, 2016 WL 537484 (W.D. Mi. 2016) – Michigan Compiled Laws Section 558.1 creates a right in favor of a widow a 1/3 interest in all land in which the husband had an interest at any time during the marriage. Wife that voluntarily resides outside of state of Michigan has no dower interest in any real estate in Michigan prior to death of spouse, and is bound by all conveyances made by husband. However, non-residency does not defeat dower interest in property owned by Husband on date of death. Husband owned property at time of death although husband had previously executed mortgage on property, as mortgage operates only as lien and not as conveyance. Husband owned property prior to marriage but executed mortgage in his individual name during marriage and mortgage was not "purchase money" mortgage. Mortgage is subordinate to dower interest of widow. Wife is not judicially estopped from asserting dower interest in her prior bankruptcy case where her husband was still alive as of the petition date. The dower interest does not come into effect until the death of the husband. Further, at time of bankruptcy filing, Wife lived outside of State of Michigan and so no dower right existed.
- (7536) *Thompson v. Cunningham*, 2015 WL 4610193 (W.D. Ky. 2015) – Judicial estoppel prevents a party from playing fast and loose with court by taking one position and obtaining relief based on that position and then later changing positions to obtain additional relief. Plaintiff made affirmative representation that plaintiff did not have any causes of action when plaintiff filed for bankruptcy and received a discharge based on those representations. However, omission on schedules was inadvertent and there was no evidence of intent to mislead the court. Further, defendant continued with conduct that allegedly violated consumer protection act for two years after commencement of the bankruptcy case.
- (7537) *Garcimonde-Fisher v. Area203 Marketing, LLC*, 2015 WL 1912679 (E.D. Tn. 2015) – Judicial estoppel applies only where plaintiff had duty to disclose and failed to do so. Debtor had no duty to disclose in bankruptcy schedules a claim for employment discrimination or wrongful termination where Debtor did not have claim as of date of filing for relief under Chapter 7. Debtor was not fired and did not suffer any adverse employment event until 4 months after filing. Cause of action would not have constituted property of estate and Debtor was not required to disclose causes of action that accrued, for the first time, post-petition.
- (7538) *Ambros v. PNC Bank*, 2015 WL 3407596 (W.D. Mi. 2015) – Debtor not estopped from bringing action against former employer for wrongful termination based on judicial estoppel, where Debtor did not suffer any adverse employment event until well after Debtor filed for Chapter 7 relief. At time of bankruptcy filing, Debtor was employed in good standing and did not have a termination claim that would have been property of bankruptcy estate. Debtor, not the estate, suffered the post-petition harm and cause of action was not property of the estate. Under circumstances, Debtor had no duty to disclose post-petition cause of action.
- (7539) *Boodram v. Coomes*, 2015 WL 1248809 (W.D. Ky. 2015) – To extent pre-petition causes of action exist in favor of Debtor, those causes of action become property of bankruptcy estate and only Trustee has standing to pursue recovery. Debtor's Amended Schedule B listed "potential damages from the civil Suit" and contained case name and case number. Disclosure was sufficient even though it did not specifically identify causes of action or specific claims, as disclosure provided sufficient information to Trustee to allow Trustee to

investigate matter further.

- (7540) *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.
- (7541) *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.
- (7542) *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.
- (7543) *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.
- (7544) *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.
- (7545) *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.
- (7546) *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.
- (7547) *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.
- (7548) *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.
- (7549) *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.

- (7550) *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

12.205 Elements

- (7551) *In re Zenga*, 2017 WL 3951705 (Bankr. M.D. Tn. 2017) – Debtor equitably estopped from claiming that Debtor had 12 or more creditors where Debtor, in pre-petition litigation, asserted in responses to interrogatories that Debtor had only 11 creditors. Equitable estoppel requires misrepresentation by party against whom estoppel is asserted; reasonable reliance on misrepresentation by party asserting estoppel; and detriment to party asserting estoppel. Detrimental reliance requires some loss, damage or disadvantage or change in position suffered by party asserting estoppel, and reliance must be actual and substantial. Debtor had every opportunity disclose information that Debtor chose to hide regarding number and identity of creditors. Petitioning Creditor was adversely affected by filing involuntary petition, during which time Creditor was precluded from pursuing collection; amount of debt increased from \$2.5 million to \$4.4 million as result of passage of time; and Creditor's ability to collect debt from non-bankruptcy remedies were stalled by Debtor's actions both before and during bankruptcy case. Had Debtor correctly disclosed number and identity of creditors, Creditor would have been able to seek out additional petitioning creditors and would not solely have incurred attorney fees and costs incurred in filing bankruptcy petition as well as costs associated with appeals; or he could have pursued collection in state court.

- (7552) *In re Zenga*, 2017 WL 167908 (6th Cir. BAP 2017) - 11 USC Section 303 requires that involuntary petition be signed by three or more partitioning creditors when potential Debtor has 12 or more creditors in total. However, number of petitioning creditors is not jurisdictional and Court may apply equitable doctrines such as estoppel to supplant statutory requirement of three petitioning creditors. Supreme Court's ruling in *Law v. Siegel*, which prohibits use of Section 105 to override express provisions of rules and Code in context of amendment to exemptions does not apply to Section 303 requirement for three or more partitioning creditors as issue under Section 303 does not involve use of Section 105. Debtor not equitably estopped from asserting that involuntary petition lacked sufficient petitioning creditors. Debtor filed responses to interrogatories in State Court action asserting that Debtor had fewer than 12 creditors. However, statements in answers to interrogatories, while filed under oath, are not "judicial determinations" for purposes of judicial estoppel. Equitable estoppel requires (1) misrepresentation by party against whom estoppel is asserted; (2) reasonable reliance on misrepresentation by party asserting estoppel; and (3) detriment to party asserting estoppel. "Detriment" must be "actual and substantial" such as loss of opportunity to improve one's position or loss of evidence. While there was no dispute that Debtor misrepresented number of creditors and that petitioning creditor relied on that representation, there was no evidence to demonstrate that creditor suffered detriment due to his reliance. Creditor was unable to articulate any specific detriment other than loss of time, and creditor failed to avail himself of remedy under Section 303 to obtain joinder of additional creditors to meet three creditor requirement.

- (7553) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Equitable estoppel applies when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment as necessary to prevent actual or constructive fraud and to promote the ends of justice. Debtor's assertion in State Court litigation to set aside fraudulent transfer that Debtor was not true owner of property did not constitute grounds to deny later claimed bankruptcy exemption based on equitable estoppel. Creditor did not change position in reliance on claim, but instead pursued claim asserting that Debtor was owner of property and asking court to set aside transfers. Based on State Court judgment, Debtor now has no choice but to claim ownership interest in property and to claim property exempt pursuant to bankruptcy exemptions.

- (7554) *Brainger v. JAO Distributors, Inc.*, 2015 WL 4910970 (S.D. Ohio 2015) – Equitable estoppel requires that party to be estopped has through words or conduct caused other party to believe certain set of facts existed and must have been aware of falsity. PACA trust claimant not estopped from asserting PACA trust where, although trust license had expired, all parties believed that license had been properly renewed at time of transaction. Fact that parties later discovered that USDA had erroneously failed to renew license did not create any estoppel as there were no knowingly false representations at time of transaction.

- (7555) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Equitable estoppel is an equitable doctrine invoked to avoid injustice in particular cases to thwart a litigant from achieving an advantage by misleading another into action or inaction. Party asserting equitable estoppel must establish: (1) the party to be estopped must have used conduct or language amounting to a misrepresentation of material fact; (2) that party must have been aware of the true facts; (3) that party must have had an intention that the representation be acted on; (4) the party asserting estoppel must have been unaware of the true facts; and (5) the party asserting estoppel must have detrimentally and justifiably relied on the representation. Defendant offered no evidence that it was induced to purchase equipment and assets from Debtor in violation of Section 363 and Section 549, where party was fully aware of Debtor's pending bankruptcy and fully aware of all facts and circumstances of transaction and proceeded with transaction notwithstanding.

12.206 Governmental Action

- (7556) *O'Rourke v. United States*, 587 F.3d 537 (2d Cir. 2009) – Governmental agency will not be equitably estopped 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.

12.207 Elements – Fraudulent Transfer

- (7557) *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 from 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 from basis for estoppel by Trustee where Debtor did not commence bankruptcy proceeding until 2009.

W. Promissory Estoppel

12.208 Elements

- (7558) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Promissory estoppel requires a promise made with the expectation that party to whom promise is made will rely on it, and that person does in fact rely to their detriment. Detriment must be substantial in economic sense; must have been foreseeable to the promisor; and promisee must have reasonably relied. Borrower failed to present any evidence of reasonable reliance on alleged promise to cancel foreclosure sale. The only allegation of “reliance” is statement that had borrowers known that foreclosure sale was not cancelled, they would have “done something” without any allegation as to what they would have done or how that would have changed outcome.
- (7559) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action against lender for alleged breach of agreement to modify loan where the lender never signed loan modification. Borrower's action for promissory estoppel against lender was predicated on unsigned loan modification agreement. Under Michigan law, the Statute of Frauds precludes enforcement against any financial institution of any promise or commitment to make, renew, modify or extend loan unless the agreement is in writing and signed by financial institution. Where lender did not sign, statute of frauds precluded action against lender for promissory estoppel. Lender's acceptance of payments on terms of trial loan mod did not waive requirement that loan modification be signed.
- (7560) *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.
- (7561) *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 party 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.
- (7562) *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

12.209 Elements

- (7563) *In re Beiter*, 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Law of Case doctrine provides that when Court decides rule of law, decision continues to govern same issues in subsequent stages of same case. Exceptional circumstances permit Court to deviate from law of case where substantially different evidence raised at subsequent trial; where subsequent contrary view of law is decided by controlling authority; or where decision is clearly erroneous and would work manifest injustice. Court's prior holding that Debtor could seek relief for violation of discharge injunction through class action adversary proceeding rather than through Motion for Contempt did not fall within any exception to Law of Case doctrine. Defendant's continuing argument that Debtors prosecution of adversary proceeding was procedurally incorrect did not warrant departure from law of case where there was no new evidence that would warrant deviation from prior decision; there was no new controlling legal authority; and reconsideration was not necessary to prevent manifest injustice where Court could allow plaintiff's class action adversary proceeding to be maintained instead as class action contested matter, raising defendant's objection to matter of form over substance.

- (7564) *McNally v. Stallman*, 2018 WL 3816779 (Bankr. W.D. Mi. 2018) – Law of Case provides that once Court determines issue at one state of proceedings, Court determination controls subsequent proceedings in same case. Court previously determined that Debtor potentially qualified as fiduciary under MBTFA, precluding Debtor from later arguing on Summary Judgment that Debtor is not fiduciary as matter of law.
- (7565) *Bash v. Textron Financial Corp.*, 2017 WL 2349601 (N.D. Ohio 2017) – Law of the Case provides that Court should not reconsider matter once the issue is resolved in continuing proceeding. Purpose is to ensure that same issue presented second time in same case in same court should lead to same result. Court must have actually decided issue, and position that is assumed without a decision for purposes of resolving another issue is not law of the case, and law of the case does not apply to issues that could have been raised but were not. Law of the Case will not control where there are (1) substantially different evidence raised at the subsequent trial; (2) subsequent contrary view of the law is decided by controlling authority; or (3) decision is clearly erroneous and would work manifest injustice. Prior Circuit Court Order not “law of the case” on whether Trustee’s complaint adequately alleged civil conspiracy as Circuit Court did not address whether complaint sufficiently alleged “malicious combination”.
- (7566) *Holland v. FCA US, LLC*, 2016 WL 4363158 (6th Cir. 2016) – Law of the case hold that when Court determines an issue, that determination is binding for the remainder of the proceeding. Law of the Case applies only with respect to issues previously determined. Court’s denial of Summary Judgment without prejudice based on incomplete discovery did not determine any issue in the case and so did not preclude later entry of judgment on pleadings.
- (7567) *Cyber Solutions International, LLC v. Priva Security Corporation*, 2016 WL 3514322 (W.D. Mi. 2016) – Law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. On remand from appeal, trial court is required to implement both the letter and spirit of the appellate court’s mandate, taking into account the appellate court’s opinion and the circumstances it embraces. Doctrine did not apply where prior decision did not consider, much less adjudicate, specific issue in case. Although prior adjudication determined as between plaintiff and third party certain property rights, decision did not decide or even consider relative rights between plaintiff and defendant.
- (7568) *GMAC Mortgage, LLC v. McKeever*, 2016 WL 3090330 (6th Cir. 2016) – Law of the case doctrine provides that courts should not reconsider matter once resolved in a proceeding and court will reconsider prior rulings only where there are extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice. Law-of-the-case doctrine is not used to prevent relitigation of the same issues in different cases; law-of-the-case ensures that the same issue presented a second time in the same case in the same court should lead to the same result. Consolidation of multiple actions does not make all actions a “single” case, but is done solely for convenience and economy in administration. However, law of case will bar relitigation in one consolidated case of an issue that was raised and adjudicated in separate, consolidated action, where party against whom estoppel is raised is party who had full and fair opportunity to litigate issue in first case. District Court erred in holding that plaintiff’s action was barred by law of case based on result in separate, now consolidated case where consolidated case involved same plaintiff but different defendant and consolidation did not make rulings in prior case rulings in current case.
- (7569) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Law of case applies where court makes ruling in case that either is not appealed or that is affirmed on appeal. Bankruptcy Court previously dismissed adversary proceeding holding that plaintiffs lacked standing. Plaintiffs did not appeal that order and order became law of case. Plaintiffs could not later contest that ruling under Rule 60 as holding was law of case. Rule 60 is not intended as substitute for appeal of orders when those orders are entered. Motion for Rule 60 relief also did not contest conclusion of lack of standing but only asked court to reinstate adversary and allow plaintiff to obtain assignment of cause of action from Trustee which would then create standing. Because plaintiff lacked standing to bring action in first instance as determined by earlier court decision, plaintiff also lacked standing to seek relief under Rule 60.
- (7570) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Law of the case applies where the court has made prior rulings in case, which become controlling for subsequent states of that same litigation. Reversal of order confirming Chapter 13 Plan does not eliminate law of case application for issues and findings that were not basis for reversal on appeal.
- (7571) *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.
- (7572) *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.
- (7573) *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.
- (7574) *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.

- (7575) *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.

12.210 Particular Claims Barred

- (7576) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Law of the case precluded plaintiff from amending complaint to state cause of action contesting defendant's standing to foreclose mortgage. Plaintiff brought initial complaint contesting standing. On Motion to Dismiss, court concluded that defendant was the owner and holder of the note and mortgage and was entitled to foreclose. Standing of defendant was established and plaintiff would not be permitted to amend complaint to re-assert issue of lack of standing.
- (7577) *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.
- (7578) *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".

12.211 Particular Claims Not Barred

12.212 Mandate After Appeal

- (7579) *Sunshine Heifers, LLC v. Citizens First Bank*, 2017 WL 3747194 (6th Cir. 2017) – Mandate rule requires that after superior court has determined law of case and issued mandate, lower court is not free to depart from that finding. In determining whether issue is subject to mandate rule, Court must determine whether issue was expressly or impliedly decided by superior court and whether mandate was so narrow in scope as to preclude lower court from reconsidering issue. Prior appeal may resolve issue implicitly where resolution of issue was necessary step in resolving earlier appeal; resolution of issue would abrogate prior decision and so must have been considered in prior appeal; or issue is so closely related to earlier appeal its resolution requires no additional consideration and so was resolved even if unstated. Exceptions apply where evidence in subsequent trial is substantially different; controlling authority since made contrary decision applicable; or decision was so clearly erroneous and would work substantial justice. If appellate court issues general remand, Lower Court is free to consider all issues subject to law of case. If appellate court issues limited remand that expressly outlines issues to be addressed, framework within which lower court acts is narrow and limited. Prior opinion that determined that Interest in cattle was not "disguised security interest" did not address or even attempt to address title to cattle where debtor leased some cattle and owned others subject to security interest. Bankruptcy Court concluded that debtor had sold all of the leased cattle before filing such that cattle in possession of debtor must be owned by debtor subject to security interests. Further, to extent cattle were leased using funds that were subject to Lender's security interest, Lender had superior interest in funds and in proceeds and products acquired by funds such that security interest would have attached to leased cattle superior to rights of lessor. Bankruptcy Court's later ruling did not violate mandate rule as issues in remand were distinct and not involved in prior appeal.
- (7580) *In re Holley*, Case No. 12-33873 (Bankr. E.D. Mi. 2017) – On remand, Court is bound by terms of opinion and mandate issued by appellate Court. Where appellate Court conclusively determined that Debtors had properly claimed exemptions using Michigan's tenants by entirety Exemption, Bankruptcy Court would not revisit issue of whether exemptions were properly claimed or extent of exemptions claimed.
- (7581) *JPMorgan Chase Bank. v. Winget*, 2017 WL 477960 (6th Cir. 2017) - "Mandate Rule" limits District Court on remand from Circuit Court to implementing Circuit Court decision as specified in remand. Mandate Rule instructs that District Court is without authority to expand inquiry beyond matters forming basis of appellate court's remand. Circuit Court remand with instructions to enter judgment on behalf of lender precluded defendants from asserting additional defenses or raising additional arguments in opposition to entry of judgment. Mandate left no leeway for District Court to conduct any further proceedings or consider any additional arguments.
- (7582) *Sunshine Heifers, LLC v. Purdy*, 2016 WL 4392815 (W.D. Ky. 2016) – "Mandate Rule" is specific application of law of the case. Once appellate court has decided issue and issued mandate, lower court is prohibited from departing from mandate. Appellate Court did not decide ownership of cattle but only whether cattle were leased or were purchased subject to a disguised security interest. Holding was not determinative on later issue of how many cattle were sold at auction and whether any of the cattle sold were owned by Debtor.

Y. Evidentiary Issues

12.213 Generally

- (7583) *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.

12.214 Authentication of Documents

- (7584) *Fish v. Stone, Higgs & Drexler, PC*, 2017 WL 6757575 (W.D. Tn. 2017) – To authenticate printouts for screenshots from website requires statement or affidavit from someone with knowledge of the website such as web master or someone else with personal knowledge. Plaintiff’s own statement that he printed the copy of the web page was not sufficient to authenticate printout.
- (7585) *United States v. Bertram*, 2017 WL 1375184 (E.D. Ky. 2017) - Federal Rule of Evidence 901 requires that proponent of record must produce evidence sufficient to support finding that item is what proponent claims it is. Record may be authenticated by introduction of testimony regarding unique characteristics such as appearance, contents, substance, internal patterns or other distinctive characteristics taken together with all circumstances. Emails can be authenticated by party who was neither the sender nor recipient if the witness can speak to emails unique characteristics, contents and appearance. Witness sufficiently able to authenticate emails between 2 defendants, despite witnesses lack of personal participation in communications, where witness could verify email address of both defendants is addresses used by defendants in prior communications with witness; email addresses themselves contained identifying information including specific words in email addresses; emails contained auto signatures including lowercase initials which witness indicated defendant typically used to sign emails.

12.215 Privilege – Time for Asserting Generally

- (7586) *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.
- (7587) *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.

12.216 Fifth Amendment Privilege

- (7588) *In re HJH Consulting Group, Inc.*, Case No. 18-50788 (Bankr. W.D. Tx. 2018) - Fifth Amendment privilege ordinarily protects witness from being compelled to produce modes documentation other than tax returns, required records and authenticated documents already known to exist. Witness who was under criminal investigation answered questions regarding name and address but asserted Fifth Amendment privilege, refusing to produce any documents and declining to answer virtually all other questions. Court concluded that Fifth Amendment resolved witness of duty to produce communications and records related to bank accounts but required witness to produce tax returns and W-2s under “required documents” doctrine. It is not necessary that documents themselves be incriminating as long as witness believes that there is real and substantial risk that information may tend to incriminate. “Foregone conclusion” doctrine requires production when control and authenticity of documents are not at issue and witnesses only being asked to surrender documents; and “required records” doctrine that requires production of documents required by law to be kept such as records required to be kept under Treasury Department regulations. By implication, records not required to be kept by law such as ordinary business records are protected from production.
- (7589) *McNally v. Stallman*, 2018 WL 3816779 (Bankr. W.D. Mi. 2018) – Party who asserts Fifth Amendment in response to deposition questions is not permitted to answer questions at Trial that party refused to answer at deposition. However, assertion of Fifth Amendment does not permit court to draw any adverse inference or to establish any fact based on any adverse inference. Consequence of Fifth Amendment assertion is limited to preclusion of testimony at trial. Even if Court is permitted to draw negative inferences, Court would not do so in context of Summary Judgment.
- (7590) *Hazelrigg v. U.S. Trustee*, Case No. 13-1230 (9th Cir. BAP 2013) – Although Debtor is permitted to assert fifth amendment privilege in bankruptcy proceedings, Debtor must do so on a question-by-question basis and cannot merely assert blanket refusal to testify or provide documents based on fifth amendment. If Debtor properly invokes fifth amendment, court cannot compel Debtor to answer but court can include negative implications of assertion of privilege in resolving the issues involved.
- (7591) *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.

12.217 Attorney-Client Privilege

- (7592) *In re Dawson*, 2018 WL 3201844 (Bankr. W.D. Mi. 2018) - Attorney Client privilege applies only to communications between client and counsel. Request for production of documents seeking communications between Debtor and Debtor’s counsel on the one hand and representative of credit union credit unions counsel on other hand was seeking only documents shared with were originating from entities

other than client. Motion to Compel Production granted.

- (7593) *Meggitt v. Neema, LLC*, 2018 WL 1121585 (Bankr. N.D. Ohio 2018) – To extent objection to discovery is based on attorney-client privilege or as work-product, objection must expressly assert that basis and must describe nature of documents, communication and tangible things not produced, generally through privilege log.
- (7594) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – “Common interest privilege” is not independent privilege, but is exception to general rule that attorney-client privilege is waived when privileged information is disclosed to third parties. Common interest privilege applies where parties undertake joint effort with respect to common legal interest and allows parties whose legal interests coincide to share privilege materials with one another to more effectively prosecute or defend claims.
- (7595) *Fuchs v. Selene Finance, LP*, 2017 WL 1295389 (S.D. Ohio 2017) – Attorney-client privilege, if not waived, protects communication between counsel and clients relating to securing a legal opinion or assistance in a legal proceeding. The privilege applies to natural persons as well as corporate entities. Court would not compel production of documents by Defendant claimed as privileged based solely on speculation by Plaintiff that some items may not be privileged. Parties directed to prepare acceptable confidentiality order to allow production of non-privileged but otherwise confidential matters.
- (7596) *In re Van Solkema*, 2016 WL 2604731 (Bankr. W.D. MI. 2016) – Privilege belongs to client and only client can waive. However, waiver can result from conduct that implies waiver of privilege. When attorney testifies about attorney’s intentions in taking actions, privileged is waived to extent warranted to allow opposing party to challenge the “advice of counsel” defense and to determine extent to which clients were involved in decision making process that was the basis for attorney’s testimony.
- (7597) *Ford Motor Company v. Michigan Consolidated Gas Co.*, 2015 WL 6470830 (E.D. MI. 2015) – The attorney-client privilege applies where legal advice is sought from a legal advisor where the communication was made for the purpose of obtaining legal advice from a lawyer. Privilege can also apply to communications between consultant and attorney when the communication is made to assist the attorney in giving legal advice to the client. Party asserting the attorney-client privilege must identify the withheld documents with sufficient particularity to enable opposing counsel to intelligently argue that the privilege ought not be applied and must include an index of the documents purportedly protected by attorney-client privilege and must include a particularized description of the contents of each document.
- (7598) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of Debtor’s attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting “reliance on counsel” defense. Debtor did not waive privilege or assert reliance of counsel where Debtor’s motion to convert case from Chapter 11 to Chapter 7 merely stated, “after consultation with counsel” that Debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and Debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and Debtor.
- (7599) *In re Horvath*, 2015 WL 2195060 (Bankr. N.D. Ohio 2015) – Relationship of attorney and client for purposes of privilege arises when a person manifests an intention to obtain legal services from attorney and attorney either consents or fails to negate consent when person reasonably believes relationship to exist. Test is whether the putative client reasonably believes that the relationship exists and that attorney will advance interests of client. Attorneys did represent Debtor in unrelated State Court litigation, giving rise to attorney-client privilege. Privilege protects only communication between Debtor and attorney and does not preclude discovery of underlying facts known to Debtor and communicated to attorney. Similarly, when attorney learns facts from third parties and conveys that information to the client, the client’s knowledge of the facts is not privileged, only the content of the communication. Facts underlying causes of action listed in Debtor’s Schedules and the valuation of those causes of action were not privileged in discovery to be taken of Debtor because information to be gained consisted of facts underlying claims, not communications with attorneys regarding claims. Even if confidences existed, Chapter 7 trustee, as successor to causes of action, had standing to waive privilege when, on balance, trustee’s duty to maximize estate and represent interests of estate outweighs policies underlying privilege. Discovery sought information concerning claims being asserted by trustee against third parties, claims that Debtor wanted the trustee to pursue. Sole purpose was to augment estate for creditors and trustee’s interests coincided with policy encouraging clients to make full disclosure to counsel, which outweighs any harm to Debtor which was virtually non-existent in light of limited waiver sought.
- (7600) *In re Behr Dayton Thermal Products, LLC*, 2014 WL 1424970 (S.D. Ohio 2014) – When client is solvent corporation, attorney-client privilege is controlled by officers and directors who must act in conformance with fiduciary obligations to corporation. When control of corporation passes to new management, whether through takeover, merger or normal succession, new managers control privilege and can waive it as to communications by former managers. Former managers have no control over privilege even as to communication in which former managers were involved because privilege belongs to the corporate client controlled by current management. When corporation enters bankruptcy, the trustee in bankruptcy assumes control of the right to waive the privilege. Once corporation was closed and liquidated in bankruptcy by liquidating trustee, only trustee held power to assert or waive privilege. Management and officers of now-defunct corporation lack standing to assert privilege on behalf of corporation.
- (7601) *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.

- (7602) *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.
- (7603) *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.
- (7604) *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.
- (7605) *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.
- (7606) *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.
- (7607) *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.

12.218 Common Interest Doctrine

- (7608) *Ford Motor Company v. Michigan Consolidated Gas Co.*, 2015 WL 6470830 (E.D. Mi. 2015) – Common-interest doctrine protects from discovery otherwise privileged communications that are shared with party with "common interest" where, absent the common interest, disclosure would eviscerate the privilege. Common interest doctrine applies where the parties are represented by separate attorneys but share a common legal interest, allowing privileged communication to be exchanged without waiving privilege. Parties must have an identical legal interest with respect to the subject matter of the communication and the underlying shared communication must be privileged. Designating document as both attorney-client privilege and protected under common-interest is appropriate as, for the common-interest doctrine to apply, the underlying communication must first be privileged.
- (7609) *In re Cardinal Fastener & Specialty Co.*, 2012 WL 425858 (Bankr. N.D. Ohio 2013) –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.

12.219 Work Product Privilege

- (7610) *Meggitt v. Neema, LLC*, 2018 WL 1121585 (Bankr. N.D. Ohio 2018) – To extent objection to discovery is based on attorney-client privilege or as work-product, objection must expressly assert that basis and must describe nature of documents, communication and tangible things not produced, generally through privilege log.
- (7611) *In re Horvath*, 2015 WL 2195060 (Bankr. N.D. Ohio 2015) – Work product privilege is distinct from attorney-client privilege and protects the tangible and intangible material which reflects the attorney’s efforts in preparing a case, including patterns of investigation, assembling information, determination of relevant facts, and preparation of legal theories and strategies. Doctrine shields materials sought by adversary of the attorney’s client where there is actual adversarial relationship or materials were created in anticipation of litigation where that was objectively reasonable. Trustee could obtain materials as Trustee was not adversary of Debtor with regard to pre-petition claims that trustee sought to bring against third parties. Debtor wanted trustee to pursue claims and work product does not allow attorney to withhold from trustee work product prepared for Debtor pre-petition as long as the trustee and the Debtor are not adversarial.
- (7612) *In re Black Diamond Mining Co., LLC*, 507 BR 209 (E.D. Ky. 2014) – Counsel for Chapter 11 Debtor had obligation to turn over client file to liquidating trustee who was seeking to pursue actions against Debtor’s former officers. Client file is property of client. Trustee, as representative of Debtor, had right to client file. File subject to turnover under Section 542 as property of estate. Attorneys cannot invoke work product privilege against its own clients. Work product protects attorney litigation materials from discovery to prevent opposing counsel from “free riding” on counsel’s trial preparation. Work product is limited to materials sought by an adversary of client and does not protect documents where client itself seeks access. Firm does not have right to withhold “internal” documents. Presumption is that documents must be turned over to client.
- (7613) *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.
- (7614) *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.
- (7615) *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.

12.220 Accountant-Client Privilege

- (7616) *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.
- (7617) *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.

12.221 Membership Lists

- (7618) *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.

12.222 Valuation - Rule 701

- (7619) *Pennymac Loan Services, LLC v. Crocker*, 2016 WL 6134008 (N.D. Ohio 2016) – Where Court is faced with conflicting appraisal testimony, Court must necessarily assign weight to the testimony based on Court’s view of qualifications and credibility of expert witnesses. The weight to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony including the appraiser’s education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. Court is more likely

to be persuaded by consistency of the appraiser's conclusions measured against all of the admissible evidence bearing on the issue considered in the light of the direct and cross-examinations conducted in the proceeding. Bankruptcy Judge's finding that Debtor's appraisal was "a little sloppier" did not require Court to disregard or discount appraisal. Court's statement on record that Court was familiar with area where property was located which might affect his opinion was not improper where Court based ruling on evidence in record including both appraiser's education, experience, familiarity with the subject of the appraisal, manner of conducting appraisal, and testimony in court. Court also properly considered owner's opinion of value as owner's opinions on value are admissible, although opinion did not add much to the overall weight of the expert testimony other than statements about condition of properties and neighborhood and prior efforts to sell the property. Bankruptcy Court Judge did not err nor abuse his discretion when he valued the Property at \$55,000, because although he was admittedly familiar with the area, the Judge's decision was rationally supported by all the evidence on the record.

- (7620) *Pennymac Loan Services, LLC v. Crocker*, 2016 WL 6134009 (N.D. Ohio 2016) – Where Court is faced with conflicting appraisal testimony, Court must necessarily assign weight to the testimony based on Court's view of qualifications and credibility of expert witnesses. the weight to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony including the appraiser's education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. Court is more likely to be persuaded by consistency of the appraiser's conclusions measured against all of the admissible evidence bearing on the issue considered in the light of the direct and cross-examinations conducted in the proceeding. Bankruptcy Judge's finding that Debtor's appraisal was "a little sloppier" did not require Court to disregard or discount appraisal. Court's statement on record that Court was familiar with area where property was located which might affect his opinion was not improper where Court based ruling on evidence in record including both appraiser's education, experience, familiarity with the subject of the appraisal, manner of conducting appraisal, and testimony in court. Court also properly considered owner's opinion of value as owner's opinions on value are admissible, although opinion did not add much to the overall weight of the expert testimony other than statements about condition of properties and neighborhood and prior efforts to sell the property. Bankruptcy Court Judge did not err nor abuse his discretion when he valued the Property at \$55,000, because although he was admittedly familiar with the area, the Judge's decision was rationally supported by all the evidence on the record.
- (7621) *McDuffie v. West*, 2016 WL 4186853 (E.D. N.C. 2016) – Judicial lien is avoidable to extent that value of property is less than superior, unavoidable liens and exemptions. If value exceeds liens and exemptions, then judicial lien attaches only to excess value. Debtor can testify as to value of property under Rule 701 as long as testimony is opinion rationally based on Debtor's own perceptions. Debtor's testimony as to value not permitted where Debtor merely parroted value assigned by tax assessor in property tax bills. Testimony did not present any opinion of Debtor or any basis for an opinion, as Debtor merely repeated value assigned by taxing authority. And took that value at face value without actually considering whether it was correct. Homeowner can offer opinion as long as it is his opinion, and is afforded long leash when it comes to basis of that opinion, and almost any basis within the perception of the homeowner is sufficient including information provided by third parties as to value, and familiarity with land and its productivity. Any discrepancies or miscalculations go to weight, not admissibility. But at end, testimony must be that of the Owner, not merely the conclusion reached by third party and repeated by Owner.

12.223 Expert Witnesses

- (7622) *In re Caudill*, 2018 WL 3601834 (Bankr. E.D. Ky. 2018) - Expert witness is permitted to rely on information received from third-party as basis for forming expert opinion. Rule 703 allows expert to consider hearsay or other inadmissible evidence to form basis of expert opinion and expert can testify as to basis of opinion even if basis is otherwise inadmissible evidence. Expert witness could rely on information provided by manufacturer of manufactured home to establish model year of the home for purposes of valuation under Section 506.
- (7623) *Johnson v. Cheney*, 2018 WL 2186766 (Bankr. N.D. Ohio 2018) - Court struck Plaintiffs affidavits that acknowledged that plaintiffs had no experience in construction industry to extend affidavits offered testimony regarding construction measurement standards and building codes as plaintiffs did not establish any expertise sufficient to support opinions.
- (7624) *Babcock Power, Inc. v. Kapsalis*, 2016 WL 7183219 (W.D. Ky. 2016) - Rule 26(a) requires that expert witness disclosure be accompanied by report that contains facts or data considered by expert in forming opinions including all documents and information provided to the expert. Litigants are no longer able to argue that materials furnished to experts to be used in forming opinions, whether or not ultimately relied on by the expert, are privileged or otherwise protected from disclosure.
- (7625) *Pennymac Loan Services, LLC v. Crocker*, 2016 WL 6134008 (N.D. Ohio 2016) – Where Court is faced with conflicting appraisal testimony, Court must necessarily assign weight to the testimony based on Court's view of qualifications and credibility of expert witnesses. the weight to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony including the appraiser's education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. Court is more likely to be persuaded by consistency of the appraiser's conclusions measured against all of the admissible evidence bearing on the issue considered in the light of the direct and cross-examinations conducted in the proceeding. Bankruptcy Judge's finding that Debtor's appraisal was "a little sloppier" did not require Court to disregard or discount appraisal. Court's statement on record that Court was familiar with area where property was located which might affect his opinion was not improper where Court based ruling on evidence in record including both appraiser's education, experience, familiarity with the subject of the appraisal, manner of conducting appraisal, and testimony in court. Court also properly considered owner's opinion of value as owner's opinions on value are admissible, although opinion did not add much to the overall weight of the expert testimony other than statements about condition of properties and neighborhood and prior efforts to sell the property. Bankruptcy Court Judge did not err nor abuse his discretion when he valued the Property at \$55,000, because although he was admittedly familiar with the area, the Judge's decision was rationally supported by all the evidence on the record.
- (7626) *Pennymac Loan Services, LLC v. Crocker*, 2016 WL 6134009 (N.D. Ohio 2016) – Where Court is faced with conflicting appraisal testimony, Court must necessarily assign weight to the testimony based on Court's view of qualifications and credibility of expert witnesses. the weight

to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony including the appraiser's education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. Court is more likely to be persuaded by consistency of the appraiser's conclusions measured against all of the admissible evidence bearing on the issue considered in the light of the direct and cross-examinations conducted in the proceeding. Bankruptcy Judge's finding that Debtor's appraisal was "a little sloppier" did not require Court to disregard or discount appraisal. Court's statement on record that Court was familiar with area where property was located which might affect his opinion was not improper where Court based ruling on evidence in record including both appraiser's education, experience, familiarity with the subject of the appraisal, manner of conducting appraisal, and testimony in court. Court also properly considered owner's opinion of value as owner's opinions on value are admissible, although opinion did not add much to the overall weight of the expert testimony other than statements about condition of properties and neighborhood and prior efforts to sell the property. Bankruptcy Court Judge did not err nor abuse his discretion when he valued the Property at \$55,000, because although he was admittedly familiar with the area, the Judge's decision was rationally supported by all the evidence on the record.

- (7627) *Parker v. Horvath*, 2016 WL 5879598 (Bankr. N.D. Ohio 2016) – Rule 702 allows witness who is qualified as expert by knowledge, skill, experience, training or education may offer opinions if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Attorney not permitted to testify as to disposition of assets by decedent where ownership of assets by decedent in first instance was sole issue in case. Attorney's skill as probate attorney did not qualify him to render opinion on intestate distribution of assets where opinion lacked any factual basis until ownership by decedent is determined. Attorney's conclusory statement that "spendthrift trust is legally enforceable" inadmissible as there was no evidence that attorney had any specialized experience in handling spendthrift trusts and affidavit set forth no principals or facts on which opinion was based. Attorney not qualified to render opinion as to value of assets where there was no evidence of any skill or training on valuation, and status as attorney is not sufficient to qualify attorney as valuation expert. Opinion that is simple interpretation of Ohio state statute which is straightforward and does not require interpretation by expert is inadmissible, as trial court was capable of interpreting statute without expert assistance. Attorney's testimony why in this particular case, he did not believe it necessary to open probate estate was explanation for attorney's own reasoning and was not opinion on dealing with probate assets in general and was admissible.
- (7628) *Ezra v. DCC Litigation Facility, Inc.*, 2016 WL 4046899 (6th Cir. 2016) – Expert testimony must be product of reliable principals and methods. Expert reports from two doctors who offered no identifiable methodology and simply "announced" that Plaintiff's medical conditions were linked to exposure to silicon did not meet evidentiary threshold for admission. Plaintiff's platitudes about reliability of doctors' opinion in general does not create exception to Rule 702 standards. Third expert excluded because, while he had extensive knowledge of medical implants and their effect on human tissue, expert could not offer any opinion as to cause of Plaintiff's health problems, merely summarizing history of implants and problems associated with chemicals used. Doctor admitted that he lacks expertise in diagnosing patients. While expert may be permitted to offer testimony about chemical properties of silicon, he would not offer opinion on whether silicon caused Plaintiff's medical issues.
- (7629) *Halpin v. Hardy*, 2016 WL 3766064 (Bankr. E.D. Ky. 2016) – Court has broad discretion and must use flexibility and liberality to determine whether witness is "expert" and whether witness has sufficient knowledge to address proposed areas. Lack of knowledge of one specific area does not disqualify witness who otherwise had general knowledge of field. Lack of strong qualifications goes to weight, not admissibility, of testimony. Expert witness testimony must also be reliable and can be based on information generally relied upon by other experts in field, but the underlying items may not themselves be admitted as substantive evidence. Expert opinion based on standards put out by professional body does not support opinion where witness has no knowledge of organization or why its pronouncements are relevant. Expert permitted to offer opinion testimony but would be afforded limited weight.
- (7630) *In re Jude*, 2016 WL 3582133 (Bankr. E.D. Ky. 2016) – Expert witness may rely on otherwise inadmissible facts or data in support of opinion if other experts in field would reasonably rely on those kinds of facts or data in forming opinion. Appraiser of mobile home contacted mobile home manufacturer to confirm the manufacturer and model of the home which is essential to any appraisal and is required to provide accurate NADA Book value. Appraiser then relied on calls to mobile home sellers in the area to confirm sales of comparable homes and worked with an internet marketplace for mobile home sales, which are data sources on which appraisers routinely rely. Opinion not inadmissible merely because opinion based on otherwise inadmissible hearsay.
- (7631) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Appraisal of Debtor's principal asset was not admissible as appraisal and affidavit in support of appraisal stated only that the person doing the valuation was licensed auctioneer and owner of an auction company but did not set forth any facts to show that he is competent to appraise asset in question, and failed to state the effective date on which the valuation is based or to allow conclusion that stated value reflected value as of date of transfer as appraisal was dated 2 years after date of transfer in question.
- (7632) *DiGirolamo v. McIntosh Oil Co.*, 2015 WL 4555579 (Bankr. N.D. Ohio 2015) – Expert witness may present opinion testimony if grounded in his expertise and a proper evidentiary basis if: (1) the expert is qualified as such by knowledge, skill, experience, training, or education; (2) the testimony is relevant, meaning it will assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) the testimony is reliable, meaning it is based on sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. Court must make preliminary assessment of whether reasoning and methodology is valid and applies to the facts of the case. Witness permitted to testify where witness has extensive personal experience in industry based on over 10 years in business with significant volume. Testimony of pricing trends and terms of particular transactions that were out of the norm was relevant to issue of whether defendant acted in good faith. Testimony based on information learned from other sources was sufficiently reliable as information was of a type reasonably and normally used in the industry on a day-to-day basis, and

opposing party could cross examine witness and challenge the weight that should be afforded testimony.

- (7633) *Satija v. Permanent General Assurance Corp. of Ohio*, 2014 WL 1664557 (N.D. Ohio 2014) – Federal Rule of Evidence 702 allows expert testimony where witness has specialized knowledge that will help trier of fact to understand evidence or determine fact in issue. Testimony must be based on sufficient facts or data and use reliable principles and methods, and be product of application of the principles and methods to the facts of the case.
- (7634) *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.
- (7635) *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.
- (7636) *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.
- (7637) *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.
- (7638) *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.
- (7639) *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.

- (7640) *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*.
- (7641) *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.

12.224 Trade Secrets

- (7642) *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.
- (7643) *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.

12.225 11 USC Section 107(b)

- (7644) *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.

12.226 Constitutional Limitations on Discovery

- (7645) *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.

12.227 Hearsay – Generally

- (7646) *Maplethorpe v. CitiMortgage, Inc.*, 2017 WL 2712596 (Bankr. E.D. Mi. 2017) – Stripping of junior lien requires proof that value of property is less than amount owed on superior liens and encumbrances. Debtor, as party proposing to strip lien, bears burden of proof. Although Debtor presented appraisal testimony to establish value of property, Debtor did not present evidence of balance owed on mortgage. Only testimony on alleged debt was that of Debtor's to which Court sustained objection based on hearsay. Debtor did not testify that he had any personal knowledge of balance owed and was merely parroting amount shown on account statement

12.228 Government Report

- (7647) *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.

12.229 Hearsay – Business Records Exception

- (7648) *Holland v. LVNV Funding, LLC*, 2016 WL 6156187 (W.D. Ky. 2016) – Business record exception to hearsay rule requires witness or custodian to attest that he proffered document: (A) was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Credit Card Cardholder Agreement admissible where Credit Card issuer’s Vice President of Collections testified that she had personal knowledge of records maintained by Card Issuer and that the Credit Cardholder Agreement met requirements of Rule 803(6), meeting first 4 requirements of admissibility, and Plaintiff did not present any evidence that proffered Agreement lacked trustworthiness.
- (7649) *Hudson v. Martingale Investments, LLC*, 504 BR 569 (9th Cir. BAP 2014) – Rule 803 does not require evidence custodian to testify that person has knowledge of facts set out in records to be authenticated. Business record exception requires foundation for admission that documents are kept in regular course of business, if the document was kept in normal course and regularly relied on the document. Record not admissible where witness did not testify that record was kept in regular course of business or that business regularly relied on document.

12.230 Subsequent Remedial Measures

- (7650) *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.

12.231 Parole Evidence Rule

- (7651) *Ramco-Remodel America Corp. v. Wallis*, 2015 WL 5098639 (W.D. Tn. 2015) – Parole evidence cannot be used to interpret contract that is unambiguous on its face. If a term of a contract is ambiguous or requires explanation, parole evidence can be admitted to supplement terms of contract. Consent Order entered by Court was brief and unambiguous and interpretation argued by defendant was not the result conveyed by the express and objective terms of the Order. Although defendant contended that Order was intended to release third party liability, nothing in the order mentions any release of any third party and parole evidence could not be used to contradict or add to terms of Order.
- (7652) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – Parole evidence rule precludes introduction of extrinsic documents or testimony where contract or agreement itself is unambiguous. Debtor failed to demonstrate any ambiguity in loan modification where Debtor testified that Debtor understood terms of modification, agreed to it, and began performance under modification. Debtor could not use subsequent communications with lender to create ambiguity where no ambiguity existed in the modification in the first instance.
- (7653) *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 parole evidence of meaning of agreement inadmissible.
- (7654) *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 parole 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 parole 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.

12.232 Judicial Notice

- (7655) *Beair v. Ohio Department of Rehabilitation*, 2016 WL 229403 (N.D. Ohio 2016) – Court can take judicial notice of fact that pleadings were filed in related case but may not accept the allegations in the pleading as true. Court cannot assume truth of allegations in separate case.
- (7656) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Court can take judicial notice of Debtor’s bankruptcy schedules and contents of court docket in adversary proceeding to recover fraudulent transfer.
- (7657) *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.

12.233 Waiver – Inadvertent Disclosure

- (7658) *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.

12.234 Video Testimony

- (7659) *In re Mikolajczyk*, 2015 WL 3505135 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 43, applicable in bankruptcy through Rule 9017, allows the Court to receive testimony by video conference for good cause in compelling circumstances. Strict requirements of Rule highlights importance or presenting live testimony to impress on witnesses importance of the undertaking and to assist fact finder in evaluating credibility and demeanor of witness. Alleged expense in transporting three witnesses from Kalamazoo to Marquette for hearing is not “compelling circumstance” but is a routine and ordinary inconvenience.

12.235 Settlement Discussions

- (7660) *In re Lane*, 2018 WL 3738617 (Bankr. W.D. Ky. 2018) – Rule 408 bars parties from admitting evidence of offers to settle and prohibits parties from admitting evidence of conduct or statements made in compromise negotiations. Rule 408 is designed to promote settlements and exclude irrelevant or unreliable evidence. Plaintiffs violated rule 408 by filing with Court copy of letter from defendants to plaintiff. Letter specifically stated that it was written pursuant to Rule 408 and was not admissible by any party. Plaintiffs did not present any evidence of any permissible use and Court concluded that letter was not filed in connection with any pleading and had no bearing on issues in Chapter 13 case. Filing of letter served no evidentiary value and amounted to frivolous litigation tactic, continuing series of harassing, baseless and inflammatory litigation tactics by plaintiffs. Defendant’s attorney complied with safe harbor provision of Rule 11 by making demand that plaintiffs withdraw letter if plaintiffs did not take any steps to do so. Sanctions warranted in the amount sufficient to deter repetition of conduct. Sanctions awarded in the amount of \$5000 is penalty to be paid to Court to deter plaintiffs from further improper tactics and Court would award defendant attorney fees and costs incurred.
- (7661) *Deshikachar v. Collins*, Case No. 16-1332 (6th Cir. 2017) – Settlement discussions, including all proceedings and writings incidental to mediation, during mediation cannot be later used at trial. However, written settlement term sheet reflecting agreements reached at mediation and signed by all parties is not “writing incidental to mediation” and Local Rule 7016-2(a)(5) requires settlement agreement to be reduced to writing. Term sheet admissible in subsequent proceedings to enforce terms of settlement.
- (7662) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – Federal Courts recognize discovery privilege with respect to documents created for purposes of settlement negotiations.
- (7663) *In re Van Solkema*, 2016 WL 2604731 (Bankr. W.D. Mi. 2016) – Rule 408 precludes introduction of evidence of settlement negotiations or offers where purpose of introduction is to either prove or disprove amount of disputed claim, but does not preclude introduction for other purposes. Counsel’s e-mail to Debtor’s counsel after entry of discharge in which creditor’s counsel attempted to suggest that Debtors should pay discharged debt and offering payment schedule was not offered for purposes of proving or disproving validity of any debt owed from Debtors to creditor, but was offered for purposes of proving that creditor violated discharge injunction through these communications. Documents proved that creditor’s counsel was aware of discharge and nonetheless attempted to collect obligations from Debtors resulting in action by Debtors to recover for violation of discharge injunction. The proposed settlement would relate to the validity and amount of the claim held by creditor against Debtor, but there was on dispute as to either of those elements.
- (7664) *Ramco-Remodel America Corp. v. Wallis*, 2015 WL 5098639 (W.D. Tn. 2015) – Federal Rule of Evidence 408, made applicable in Bankruptcy by virtue of Federal Rule of Bankruptcy Procedure 9017, prohibits introduction of conduct or statements made during compromise negotiations about a claim. Underlying claim was clearly disputed as parties disagreed about whether there was any claim at all. Evidence of settlement discussions would necessarily be used to prove the validity of the claim in violation of Rule 408. Negotiations ultimately produced Consent Order. Any discussions during settlement negotiations could have effect of nullifying Order as drafted and could have chilling effect on future communications, supporting exclusion of testimony under Rule 408.

Z. Discovery

12.236 Generally

- (7665) *Sutter v. Saxon Mortgage Services, Inc.*, Case no. 06-3150 (Bankr. E.D. Mi. 2015) – Bankruptcy Court would not authorize discovery where parties were also litigating in State Court and parties could seek discovery as part of State Court proceeding without bankruptcy court involvement.
- (7666) *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.

12.237 Motion for Leave to Take Discovery

- (7667) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 2004 allows court to authorize discovery and issuance of subpoena in court's discretion. Subpoena issued by creditor in case directed to Trustee quashed where creditor did not first file Motion for Rule 2004 exam.
- (7668) *In re Cotter*, Case No. 14-51270 (Bankr. E.D. Mi. 2015) – Motion for leave to take discovery denied where there was no pending contested matter and motion failed to demonstrate good cause for allowing discovery.
- (7669) *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.

12.238 Scope of Discovery

- (7670) *Smith v. Stellar Recovery, Inc.*, 2016 WL 3072251 (E.D. Mi. 2016) – Rule 26 traditionally defines scope of discovery broadly to allow discovery of relevant evidence, and proportional to needs of case considering importance of issues, amount in controversy, parties' relative access to relevant information, parties' resources, importance of information sought, and whether burden or expense of discovery outweighs likely benefit. Scope is not unlimited and Court can limit discovery where appropriate. Court would order production of contract between Comcast and debt collector where issues of agency and control were highly relevant and parties had already entered into, and court approved, confidentiality agreement to limit disclosure.

12.239 Subpoenas – Rule 26

- (7671) *Reid v. Wolf*, 2017 WL 4570703 (Bankr. W.D. Mi. 2017) – Subpoena directed to non-party located in district other than district in which case is pending is issued by Court in which case is pending but party to whom subpoena is directed can file Motion to Quash or Motion to Modify in Court for district where compliance is required. Subpoena issued by Bankruptcy Court in Illinois directed to non-party located in the Western District of Michigan subject to Motion to Quash filed in Western District of Michigan. However Court can transfer discovery matter back to issuing Court where issuing Court is in best position to evaluate relevancy objections while considering whether subpoena is overbroad or burdensome. Controversy has been pending for over two years and additional discovery hearings, including hearings related to subpoenas served on non-party's employer have already been held or are already set for hearing before issuing Court. Transfer warranted to avoid disrupting management of complicated and tentacled case and avoids risk of inconsistent results. However, transfer to issuing Court is conditioned on issuing party's agreement that non-party may appear at hearing by telephone to minimize hardship on non-party and allowing non-party's current attorney to appear before issuing Court to avoid expense of non-party hiring new attorney and incurring expense of bringing attorney up to speed.
- (7672) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 26 allows discovery under certain circumstances, but does not permit discovery where no claim has been asserted against party seeking discovery. Request for subpoena by potential target of possible avoidable transfer action seeking information and documents in possession of the Trustee was premature where no claim has been asserted against party seeking subpoena or any other party.

12.240 Duty to Cooperate

- (7673) *New Products Corporation v. Tibble*, Case No. 13-80252 (Bankr. W.D. Mi. 2015), *aff'd sub nom, New Products Corp. v. Dickinson Wright, PLLC*, 2017 WL 4216079 (W.D. Mi. 2017), *aff'd*, 2018 WL 1959536 (6th Cir. 2018) – Counsel owes duty to third parties from whom discovery is sought to avoid saddling recipients of requests from undue burden or expense. Subpoenas sought 36 categories of documents dating back 10 years with no effort to tailor or narrow scope to avoid unnecessary efforts by recipient. Counsel refused to respond to requests from attorney for recipients requesting additional time to respond or to assess enormous breadth and scope of the request or amount of work necessary to assess the demands, and effort to gather and produce potentially responsive materials and that request includes items that counsel must have known constituted privileged communications. Rather than responding to recipient's concerns, plaintiff served another round of subpoenas directed to another third party, this one seeking 58 categories of documents dating back 10 years, where target of subpoena was company that did not exercise option to purchase Debtor's property. Plaintiff repeatedly refused to meet with attorneys for the recipients to discuss ways to narrow and target the discovery and to reduce costs and burden of responding. Plaintiff also refused to consider protective order that would preserve privileges in event of inadvertent disclosure and instead responded with third set of subpoenas directed to another recipient that was equally overbroad in both scope and time. Unable to obtain cooperation from Plaintiff, recipients engaged in efforts to produce documents in response to subpoenas. Initial computer search by firm that specializes in electronic discovery turned up more than 2.8 million pages of potentially responsive documents that through further efforts of company and attorneys for recipients narrowed scope to 15,500 potentially relevant files. Recipient advised that it would look to plaintiff to cover cost of discovery which was approaching \$150,000, but plaintiff continued to refuse to attempt to narrow scope and refused to sign or even comment on protective order. With full knowledge that recipients were attempting to comply, plaintiff filed motions to compel discovery that was unnecessary. Rule 45 allows court to impose costs of discovery where subpoena imposes expenses on non-party that are significant. Court awarded costs in excess of \$165,000 jointly and severally against Plaintiff and counsel.

12.241 Depositions

- (7674) *Murillo v. Dillard*, 2017 WL 471570 (W.D. Ky.), *R&R adopted*, 2017 WL 2417953 (W.D. Ky. 2017) – Federal Rule of Civil Procedure 30 normally limits depositions to no more than 10 per party absent leave of Court. However, Rule is limited to depositions taken for discovery

purposes. Rule does not apply to depositions taken to preserve testimony for use at trial. Even if rule applied, plaintiff demonstrated good cause to allowed plaintiff to take 24 depositions in Mexico or the parties to be deposed were the 24 plaintiffs in the case, none of home would have the ability to attend trial and defendant had not agreed to use of representative testimony notwithstanding defendant's contention that testimony from all 24 plaintiffs will be substantially similar. Each of the potential deponents was in different situation and suffered different damages such that depositions would not be unreasonably cumulative or duplicative and evidence could not be obtained from some other source that is more convenient, less burdensome or less expensive.

- (7675) *Hadfield v. Newpage Corp.*, 2016 WL 427924 (W.D. Ky. 2016) – Rule 30 limits to 10 the number of depositions that any party can take absent either order of court or stipulation of the parties. Court must weigh discretionary factors stated in Rule 30 in determining whether to approve additional depositions. Burden is on party seeking additional depositions to demonstrate need.
- (7676) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of Debtor's attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting "reliance on counsel" defense. Debtor did not waive privilege or assert reliance of counsel where Debtor's motion to convert case from Chapter 11 to Chapter 7 merely stated, "after consultation with counsel" that Debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and Debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and Debtor.
- (7677) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Motion to exclude parties from depositions denied. Rules of civil procedure do not contemplate exclusion of party from discovery process. Federal Rule of Evidence 615, allows a court to exclude witnesses from court proceedings, does not apply in discovery matters pursuant to Rule 30(c)(1).
- (7678) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Notice of deposition served by mail only 4 days before scheduled deposition (and using 3 days for mailing, received one day before scheduled date) did not provide reasonable notice as required by Rule 30 and court would not compel deponent to appear.
- (7679) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 345 normally prevent subpoena that would require person to appear at location more than 100 miles from home. However, geographic limitation does not apply where subpoena allows for production of documents that excuses appearance if documents are provided. Production of documents alone does not require personal appearance.
- (7680) *PRN Funding, LLC v. Cole*, 2013 WL 5964010 (Bankr. N.D. Ohio 2013) – Depositions of parties are governed by Rule 7030, which incorporates Federal Rule 30. Attendance by a party does not require issuance of a subpoena. Debtor's failure to appear after being properly noticed for deposition would be subject to sanctions under Rule 7037.
- (7681) *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.

12.242 Depositions - Perpetuation of Testimony

- (7682) *Pegasync Technologies, Inc. v. Patros*, 2014 WL 2763620 (E.D. Mi. 2014) – Federal Rule of Civil Procedure 27(a) allows a party to perpetuate testimony before commencing legal proceedings where party expects to be a party to an action but cannot presently bring it or cause it to be brought; party can demonstrate subject matter of action and petitioner's interest in that; fact that petitioner wants to establish the testimony and reasons to perpetuate it; names or descriptions of the persons whom are expected to be adverse parties when the action is filed; and names, addresses and anticipated testimony of each proposed deponent. Purpose is to protect against possible loss of testimony if party has to wait, such as where witness may be unavailable at a future date, either because of age or infirmity, or some imminent risk of immediate death. Petitioner anticipated litigation against Patros in possible bankruptcy case regarding non-dischargeability of debts, alleging that perpetuation was necessary because of Debtor's health, age, memory and possible retention of and deletion of documents. Petitioner sought to perpetuate testimony of the potential Debtor, the Petitioner's president; and a third party loan consultant for the loan between Petitioner and the potential Debtor. Petitioner could not presently bring action as potential Debtor had not yet filed bankruptcy. However, petitioner failed to demonstrate any need to protect against a loss of the desired testimony. Deposition allowed of witness who was age 72 and suffered from serious health problems including two recent heart surgeries, and chronic anemia. However, there was no particularized danger of loss of testimony from either of the two remaining proposed witnesses which would support deposition to perpetuate testimony.

12.243 Request for Admissions

- (7683) *Allen v. Hardrock HDD, Inc.*, 2018 WL 2363924 (E.D. Mi. 2018) – Court has considerable discretion over whether to permit withdrawal or amendment of responses to request for admissions where doing so would promote presentation of merits of action and would not prejudice requesting party. Withdrawal promotes presentation of merits when upholding admissions would practically eliminate any presentation on merits. Prejudice results if party requesting admissions would have special difficulties in obtaining necessary evidence after admission was withdrawn or amended. Prejudice is not established merely because party will be required to convince fact finder of additional fact. Admissions concerned factual disputes at heart of defendants answer and plaintiff based summary judgment exclusively on admissions. If defendant is not permitted to withdraw admissions, case is resolved based on discovery deadline rather than merits. Plaintiff did not establish prejudice merely because plaintiff will now be required to take additional depositions where plaintiff would have had to take those depositions but for request for admissions. Delay and aggravation alone does not rise to the level of "special difficulties". Withdrawal of

admissions further supported by fact that defendant found himself *pro se* due to circumstances beyond defendant's control at exact moment admissions were sent to him, explaining at least in part defendant's failure to respond to admissions. However, plaintiff can recover reasonable expenses including attorney fees caused by defendant's failure to answer interrogatories or respond to request for admissions including costs in preparation of motion for summary judgment that heavily relied on defendant's admissions.

- (7684) *Meggitt v. Neema, LLC*, 2018 WL 1121585 (Bankr. N.D. Ohio 2018) – Federal Rule of Bankruptcy Procedure 7036 requires a response to Request for Admissions within 30 days of service unless extended by Order of Court or agreement of parties. If party does not respond timely, the requests are deemed admitted without motion or other Court intervention. Party against whom admissions have been deemed admitted can seek to amend or withdraw admissions, and withdrawal can be imputed from later conduct including filing belated denial or oral statements at later hearing. Court has considerable discretion over whether to permit withdrawal or amendment of admissions to promote presentation of merits of action and prejudice suffered by requesting party in maintaining or defending action on merits. Prejudice is not simply that party who initially obtained admission will now have to convince fact finder of truth but relates to special difficulties party may face caused by sudden need to obtain evidence upon withdrawal or amendment of admission. Requests directed at issues set to be tried, and other parties and claims that are part of proceeding, supported accurate responses for presentation of merits of the action. Trial date was 2 and 1/2 months and discovery cutoff 2 months down road, and no depositions had occurred. Plaintiff was not faced with sudden need to obtain evidence for trial that he did not otherwise need if admissions were deemed admitted and that cannot reasonably be addressed in ordinary course of this action going forward. Absent prejudice, Court would allow withdrawal of deemed admissions.
- (7685) *Meggitt v. Neema, LLC*, 2018 WL 1121585 (Bankr. N.D. Ohio 2018) – Responses to Request for Admissions must fairly meet substance of item to be admitted; and objections to Request for Admissions must state grounds for objection. Response can include qualifying statement in good faith if answer specifies part admitted and party qualified or denied. Generalized boilerplate objections are improper and useless. To extent objection is based on attorney-client privilege or as work-product, objection must expressly assert that basis and must describe nature of documents, communication and tangible things not produced, generally through privilege log. Responses that state only “Admit” or “Deny” are sufficient under Rule 7036. Proper qualification is one that deals with matters such as timing of information. “Qualification” that is merely factual assertion that adds reasons why request is being denied is merely argumentative without any attempt to list the part of the request that is admitted and the part denied and merely clouded rather than clarified accuracy of denial.
- (7686) *Wheatley v. Oklahoma Tower & Energy Services, LLC*, 2018 WL 524569 (Bankr. W.D. Ky. 2018) – Failure to serve responses to Request for Admissions within 30 days deems matters admitted. Plaintiff entitled to summary judgment where deemed admissions established each element of cause of action and disproved each element of any pled affirmative defense.
- (7687) *Lanton v. Ocwen Loan Servicing, LLC*, 2017 WL 1386375 (S.D. Ohio 2017) – Federal Rule 36 provides that the subject matter of the request for admissions is deemed admitted unless, within 30 days after service, the party to whom the request is directed serve as a written answer or objection. A matter admitted under Rule 36 is conclusively established unless Court permits admission to be withdrawn or amended requiring proof that withdrawal or amendment would promote presentation of the merits of the action and withdrawal or modification would not prejudice the requesting party. Party must show that upholding admission would practically eliminate any presentation on merits of case before Court will consider potential prejudice. Cause existed for delay in serving responses to Request for Admissions where plaintiff's counsel was out of state tending to health conditions of family member such that familial situation coupled with fundamental human decency compelled Court to conclude that could cause existed. Subject matter of Request for Admissions, if deemed admitted, would go to heart of plaintiff's complaint, such that allowing amendments would preserve plaintiff's ability to litigate merits of both liability and damages. Defendant could not show prejudice where Court would issue new scheduling order with new discovery cutoff date, allowing defendant to pursue appropriate discovery as to merits of action.
- (7688) *Fuchs v. Selene Finance, LP*, 2017 WL 680495 (S.D. Ohio 2017) - Federal Rule of Civil Procedure 36 authorizes Court to permit withdrawal or amendment of responses to Request for Admissions where doing so would promote presentation of merits and would not prejudice requesting party in maintaining or defending action on merits, based on factors including (1) whether admission is contrary to record; (2) whether admission is no longer true because of changed circumstances; (3) whether, through honest error, party made improvident admission; and (4) whether effect of upholding admission would practically eliminate presentation on merits. Withdrawal of Response will promote presentation of merits where upholding admission would practically eliminate any presentation on merits of case. Prejudice requires not simply that party who initially obtained admission will have to convince factfinder of truth, rather relates to special difficulties party may face caused by sudden need to obtain evidence. Courts should also consider whether admission goes to heart of case and whether person who made admissions will be prevented, absent withdrawal, from presenting case on merits. Record indicated that admissions previously made were now contrary to record in case and there was no indication that erroneous admissions were made in bad faith. Plaintiff would not be unfairly prejudiced allowing the amendment of the admissions to conform to record where plaintiff was aware of issue was sufficient time to conduct depositions. Allowing amendment to response to request for admissions would further presentation of merits and would not result in unfair prejudice.
- (7689) *Tobin v. Florida Bar*, 2014 WL 4233368 (11th Cir. 2014) – Request for admissions cannot be used to establish legal conclusion. Florida Bar admission that Bar is not governmental unit did not preclude Court from concluding to the contrary. Admission of a legal conclusion is not proper under Rule 36. Party may not request an admission of a legal conclusion but only facts, application of law to facts, or opinions about either.
- (7690) *Ferguson v. Clark*, 2014 WL 4109794 (E.D. Mi. 2014) – Failure to timely respond to request for admissions deems matters admitted. Where matters admitted conclusively establish defense to action, defendant entitled to summary judgment.
- (7691) *Bank of America v. Killgrove*, 2013 WL 7018546 (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.

- (7692) *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.
- (7693) *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.
- (7694) *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.

12.244 Interrogatories

- (7695) *Bank of America v. Killgrove*, 2013 WL 7018546 (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).
- (7696) *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.
- (7697) *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 not privileged. 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.

12.245 Production of Documents

- (7698) *Warrior Sports, Inc. v. Healy*, 2017 WL 2389967 (E.D. Mi. 2017) – Failure to timely object to discovery requests generally results in waiver of objections. However, courts may allow late compliance based on circumstances of case including reason for late compliance, prejudice to opposing party, and facial propriety of discovery requests. Defendant failed to respond to Request for Production of Documents within 30 days as required by Rule 34 and defendant continued to fail to respond to discovery request for more than 6 months after service of request. Accordingly, Debtor waived any objections to any and all of the discovery propounded. Further, fact that Debtor corporation was out of business and Debtor’s principal lacked funds to answer discovery was not basis to object to discovery. Lack of funds is not same as lack of authority or lack of legal obligation.
- (7699) *Fuchs v. Selene Finance, LP*, 2017 WL 1295389 (E.D. Ohio 2017) – Rule 34 only requires that party to whom request for production is directed to make documents available to inspect and copy. Absent showing of prejudice or undue hardship, Court cannot compel party to produce documents in the manner most convenient to requesting party. Plaintiff requested production of original promissory note at plaintiff’s counsel’s office. Defendant produced a copy of the note with an affidavit attesting to authenticity, and offered to allow plaintiff the opportunity to inspect note at Defendant’s counsel’s office. Defendant’s response met requirements of Rule 34.
- (7700) *Smith v. Stellar Recovery, Inc.*, 2016 WL 3072251 (E.D. Mi. 2016) – Rule 26 traditionally defines scope of discovery broadly to allow discovery of relevant evidence, and proportional to needs of case considering importance of issues, amount in controversy, parties’ relative access to relevant information, parties’ resources, importance of information sought, and whether burden or expense of discovery outweighs likely benefit. Scope is not unlimited and Court can limit discovery where appropriate. Court would order production of contract between Comcast and debt collector where issues of agency and control were highly relevant and parties had already entered into, and court approved, confidentiality agreement to limit disclosure.
- (7701) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Party not required to respond to request for production of documents that is not timely served as required by court’s scheduling order. Where request for production served less than 30 days prior to discovery cutoff, request was untimely as party to whom request directed is allowed 30 days to respond, which would be beyond discovery cutoff.
- (7702) *In re Stambaugh*, 2015 WL 2437906 (Bankr. S.D. Ohio 2015) – Rule 2004 allows examination of any entity relating to acts, conduct or property or to the liabilities and financial condition of the Debtor or to any matter which may affect administration of estate. Examinations

are broad in scope and geared to determine whether litigation should be commenced, but examination must not be unduly disruptive or costly and far outweigh benefits of the information. United States Trustee request for documents from Debtor's mortgage company not unreasonable or over burdensome where request related to multiple collection notices from lender after lender acquired the loan and relation to stay provisions of Section 362. Creditors are obligated to structure internal systems and mechanisms to minimize opportunity for even inadvertent stay violations that require Debtors to spend time and expense to return to bankruptcy court. Further, discovery was necessary to discover why Debtor received four separate collection notices, two of which were posted after Debtor's counsel contacted lender, and discovery of loan transfer processing process and procedures would clarify issues. Stay violations are common and systemic problems that involve many Debtors and many cases, placing UST in unique position to act.

- (7703) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 34 normally prevent subpoena that would require person to appear at location more than 100 miles from home. However, geographic limitation does not apply where subpoena allows for production of documents that excuses appearance if documents are provided. Production of documents alone does not require personal appearance.
- (7704) *Reese v. CNH America, LLC*, 2014 WL 354254 (E.D. Mi. 2014) – Party responding to subpoena for documents must either produce documents as they are kept in the ordinary course of business, or organize and label them to correspond to categories of documents listed in subpoena. Court can order supplement to production of documents to require producing party to identify the production numbers of documents to correspond to the subpoena.

12.246 Objections – Timing

- (7705) *In re Haynes*, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party objecting to discovery must file detailed objections within time permitted and any objection not raised is waived. Defendant failed to respond to interrogatories within time permitted and neither sought consent of opposing party or permission of Court to file late objections or demonstrate good cause for an extension of time. However, Court would permit late filed objections where objections raised in amended response were virtually identical to those raised earlier in proceeding and opposing party did not present any evidence of any prejudice by short delay.

12.247 Objections – Boilerplate

- (7706) *In re Haynes*, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party objecting to discovery must file detailed objections within time permitted. Objections must be sufficiently specific to allow Court and opposing party to determine what is being objected to and legal basis for the objection. Boilerplate objections that are generalized and merely state legal basis for objection without specifying how discovery is deficient or how objecting party would be harmed if it were forced to respond to the request are tantamount to no objection at all and court can disregard objections. Objection that states only that request is irrelevant or overbroad without explaining why is tagline, devoid of any factual analysis. Court would not deem objections waived where party finally provided detail in response filed on eve of third hearing to compel discovery where this was first discovery related issue in the case and the party ultimately, if belatedly, provided needed information.

12.248 Objections – Proportionality

- (7707) *In re Haynes*, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party seeking to compel discovery bears burden of demonstrating relevance of material sought. Once relevance is demonstrated, burden shifts to party opposing discovery to demonstrate why request is unduly burdensome or otherwise not discoverable. Factors to consider in determining proportionality of discovery request include significance of substantive issues as measured in philosophic, social or institutional terms; amount in controversy; parties' relative access to information; parties' relative resources; importance of discovery in resolving issues; and whether burden or expense of discovery outweighs likely benefit.

12.249 Objections – Privilege

- (7708) *In re Haynes*, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party objecting to discovery on basis of attorney-client privilege must show that legal advice was sought; from professional legal adviser in capacity as such; communication related to that purpose; was made in confidence; by the client; at his insistence are permanently protected; form disclosure by the legal adviser; unless waived by client. Work product privilege requires objecting party to show that document was prepared because of party's subjective anticipation of litigation rather than ordinary business purposes and that the subjective anticipation was objectively reasonable. Court must then determine whether work product is "fact work" or "opinion work", with opinion work being absolutely protected while fact work can be discovered if party demonstrates substantial need and inability to obtain information otherwise without undue hardship. Party asserting privilege as defense to discovery must provide "privilege logs" at same time as party responds to discovery, and must describe nature of documents or information, enables other parties to assess claim. At a minimum, privilege log should describe document by type (memorandum, letter, e-mail, etc.); the date prepared; date on the document if different than date prepared; identity of the person(s) who prepared the document; identity of the person(s) for whom the document was prepared as well as identities of those to whom document or copies of the document were directed and including evidence that document was created under supervision of attorney; purpose of preparing document including information to support that document was created in anticipation of litigation that was real and imminent or that document related to seeking or giving legal advice, and that documents do not also contain non-privileged information; number of pages in document; and specific basis for objection. Court will not substitute *in camera* review for proper disclosure necessary to "adversarial testing" of alleged privilege, and Court, as fact-finder, would have difficulty "un-seeing" privileged information that may be contained in documents. Party's failure to provide adequate privilege logs notwithstanding multiple opportunities to do so constituted waiver of any privilege objection to discovery requests.

12.250 Protective Orders

- (7709) *Reid v. Wolf*, 2017 WL 4570703 (Bankr. W.D. Mi. 2017) – Subpoena directed to non-party located in district other than district in which case is pending is issued by Court in which case is pending but party to whom subpoena is directed can file Motion to Quash or Motion to Modify in Court for district where compliance is required. Subpoena issued by Bankruptcy Court in Illinois directed to non-party located in

the Western District of Michigan subject to Motion to Quash filed in Western District of Michigan. However Court can transfer discovery matter back to issuing Court where issuing Court is in best position to evaluate relevancy objections while considering whether subpoena is overbroad or burdensome. Controversy has been pending for over two years and additional discovery hearings, including hearings related to subpoenas served on non-party's employer have already been held or are already set for hearing before issuing Court. Transfer warranted to avoid disrupting management of complicated and tentacled case and avoids risk of inconsistent results. However, transfer to issuing Court is conditioned on issuing party's agreement that non-party may appear at hearing by telephone to minimize hardship on non-party and allowing non-party's current attorney to appear before issuing Court to avoid expense of non-party hiring new attorney and incurring expense of bringing attorney up to speed.

- (7710) *Warrior Sports, Inc. v. Healy*, 2017 WL 2389967 (E.D. Mi. 2017) – Failure to timely object to discovery requests generally results in waiver of objections. However, courts may allow late compliance based on circumstances of case including reason for late compliance, prejudice to opposing party, and facial propriety of discovery requests. Defendant failed to respond to Request for Production of Documents within 30 days as required by Rule 34 and defendant continued to fail to respond to discovery request for more than 6 months after service of request. Accordingly, Debtor waived any objections to any and all of the discovery propounded. Further, fact that Debtor corporation was out of business and Debtor's principal lacked funds to answer discovery was not basis to object to discovery. Lack of funds is not same as lack of authority or lack of legal obligation.
- (7711) *Murillo v. Dillard*, 2017 WL 471570 W.D. Ky. 2017) - Party opposing discovery or seeking protective order bears burden to prove good cause to limit discovery. Defendants Motion seeking to preclude plaintiff from taking trial depositions of witnesses located in Mexico did not support granting of relief. Motion made at best broad allegations of undue burden or expense, although it would be relatively simple for defendants counsel to conduct depositions in Mexico as counsel will not need a visa to make trip. Plaintiffs needed to take 24 depositions of individuals who resided in Mexico and who could not travel to the United States without obtaining visas. Differential costs between airfare and accommodation for three attorneys to travel to Mexico versus time and expense required to bring 24 individuals to United States weighed in favor of scheduling depositions in Mexico. Depositions were highly relevant on issues in the case including total amount in controversy, plaintiff's inability to access relevant information from other sources, plaintiff's limited resources (as impoverished residents of Mexico), the testimony was important and resolving issues, and burden or expense of proposed depositions did not outweigh likely benefit given importance of testimony to case.
- (7712) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of Debtor's attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting "reliance on counsel" defense. Debtor did not waive privilege or assert reliance of counsel where Debtor's motion to convert case from Chapter 11 to Chapter 7 merely stated, "after consultation with counsel" that Debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and Debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and Debtor.
- (7713) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 45 requires party issuing subpoena to mitigate burden to the responding party. Court can limit discovery that is unduly burdensome, considering needs of case, amount in controversy, parties resources and importance of discovery in resolving issues. Court would limit discovery directed to non-party where non-party would suffer burden of production and documents are equally available from the opposing party.
- (7714) *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.
- (7715) *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.
- (7716) *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.

12.251 Time for Taking Discovery

- (7717) *In re Dawson*, Case No. 16-4923 (Bankr. W.D. Mi. 2018) – Fact that documents sought to be obtained by Trustee may potentially be useful in subsequent, as yet unfiled litigation is not defense to production of documents. Pre-suit discovery is not anathema in bankruptcy proceedings and Section 542 necessarily contemplates pre-suit discovery to some extent.
- (7718) *Fuchs v. Selene Finance, LP*, 2017 WL 1295389 (S.D. Ohio 2017) – Court would hold hearing on Motion to Compel Discovery after

expiration of discovery cut off where request for discovery was timely served and Motion to Compel was served before expiration of cut off. Plaintiff entitled to production of requested documents subject to parties' negotiation of acceptable protective order.

- (7719) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Court would not extend discovery cutoff under pretrial order where record lacked any showing of good cause for an extension. Scheduling order had been entered more than 4 months prior and plaintiff had filed a plethora of other pleadings, yet failed to offer any explanation as to why plaintiff was not able to promulgate discovery request in timely manner.
- (7720) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Document request not served until after discovery cutoff date in pretrial order was untimely. Party receiving request not required to respond and court would not compel production. Notice of deposition served by mail only 4 days before scheduled deposition (and using 3 days for mailing, received one day before scheduled date) did not provide reasonable notice as required by Rule 30 and court would not compel deponent to appear.

12.252 United States Trustee

- (7721) *Buck v. Caudill*, 2016 WL 3881133 (S.D. Ohio 2016) – 28 CFR Section 16.21 prohibits party may not seek production of documents from Office of United States Trustee without prior written permission from Department of Justice. Request must set forth in an affidavit a summary of the specific information sought and its relevance to the proceeding.

12.253 Expert Witness Opinion

- (7722) *Bash v. Textron Financial Corp.*, 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – Rule 702 of the Federal Rules of Evidence governs admissibility of expert testimony. Witness qualified as expert by knowledge, skill, experience, training, or education may testify in form of an opinion or otherwise if expert's scientific, technical, or other specialized knowledge will help trier of fact to understand evidence or to determine fact in issue; testimony is based on sufficient facts or data; testimony is the product of reliable principles and methods; and expert has reliably applied principles and methods to facts of case. Trial judge serves as a "gatekeeper" to determine whether expert's testimony is reliable and relevant and has considerable leeway in deciding how to determine whether particular expert testimony is reliable. Court would not decide admissibility on *Motion in Limine* but would schedule the matter for evidentiary hearing prior to commencement of trial.
- (7723) *Babcock Power, Inc. v. Kapsalis*, 2016 WL 7183219 (W.D. Ky. 2016) – Rule 26(a) requires that expert witness disclosure be accompanied by report that contains facts or data considered by expert in forming opinions including all documents and information provided to the expert. Litigants are no longer able to argue that materials furnished to experts to be used in forming opinions, whether or not ultimately relied on by the expert, are privileged or otherwise protected from disclosure.

12.254 Motion to Compel

- (7724) *Watrobski v. FCA US, LLC*, 2017 WL 4073955 (E.D. Mi. 2017) – Party seeking to compel discovery must specifically identify discovery request for which compulsion is sought and must provide explanation and legal authority for argument why discovery responses are deficient or why objections to discovery should be overruled. Defendant's answer to Interrogatory that identified one person and providing information for answer was not wholly unresponsive but did not clearly indicate whether others were also involved, and Court would grant Motion to Compel to extent necessary to identify other employees who provided information for answering interrogatories. Interrogatory must be clear and sufficient to allow party responding to fashion answer. Request that sought information on value of "fringe benefits" was too ambiguous as it was not clear what the interrogatory defined as "fringe benefit" or how that would be valued. Interrogatory that had no time limit and would conceivably require information over Defendant's 93 year history was overbroad and vague.
- (7725) *In re Haynes*, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party seeking to compel discovery bears burden of demonstrating relevance of material sought. Once relevance is demonstrated, burden shifts to party opposing discovery to demonstrate why request is unduly burdensome or otherwise not discoverable.
- (7726) *Fuchs v. Selene Finance, LP*, 2017 WL 1295389 (S.D. Ohio 2017) – Court can compel production of documents only to extent party has documents in its possession. Defendant could not be required to produce documents that it did not have, particularly where documents (monthly mortgage account statements) were mailed to Plaintiff and Plaintiff would have received those in normal course of business.
- (7727) *Liberty Mutual Insurance Co. v. Devere Construction Co.*, 2016 WL 4800796 (E.D. Mi. 2016) – Court can enter sanctions for failure to comply with Court Order compelling party to produce bank statements. Party offered no reason why statements had not been produced and have only belatedly offered to make records available at warehouse in Alpena. Although documents were located in warehouse owned by third party, documents were still in possession and control of party where the party has the legal right to obtain documents on demand. Party ordered to immediately produce documents and moving party awarded sanctions including attorney fees and expenses incurred while attempting to obtain statements.
- (7728) *In re Hart*, 2014 WL 505356 (Bankr. E.D. Tn. 2014) – Federal Rule 69, incorporated in adversary proceedings in Rule 7069, allows court to obtain discovery from any person including the Debtor. Rule 37, incorporated through Rule 7037, allows court to compel discovery when party fails to respond. Defendant suffered judgment that was not stayed pending appeal, allowing Judgment Creditor to take discovery for purposes of collection. Court would compel Judgment Debtor to respond to discovery requests. Court reserved jurisdiction on issue of attorney fees for motion to compel, to give Judgment Debtor an opportunity to present evidence that failure to respond to discovery requests was substantially justified, or that award of attorney fees would otherwise be unjust.
- (7729) *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.

- (7730) *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 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.
- (7731) *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.
- (7732) *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.
- (7733) *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.

12.255 Sanctions – Rule 37 and 7037

- (7734) *Kidd v. Itron, Inc.*, 2018 WL 3134300 (E.D. Ky. 2018) – Rule 37 allows Court to impose sanctions where party refuses to obey Court order or fails to comply with discovery requirements. Sanctions can include directing that matters be taken as established; prohibiting disobeying party from supporting or opposing claims; striking pleadings; staying proceedings until orders are complied with; dismissing pending action; entering default judgment against disobedient party; or treating conduct as contempt of Court. Dismissal is appropriate where party's failure to cooperate is due to willfulness, established by conscious intentional failure to comply with Court order, taking into account whether adversary was prejudiced; whether party had been warned that continued disobedience could lead to dismissal; and whether less drastic sanctions may be effective. Dismissal warranted where plaintiff had consistently been unwilling to participate in discovery and did not appear at Court scheduled discovery conferences. Plaintiff had previously been warned that case could be dismissed for failure to participate in discovery. Defendant incurred significant legal expenses and costs in continuing effort to engage in discovery and forced to waste time, energy and expense preparing for multiple telephone conversations and attempts to engage in discovery. Court already employed other sanctions in effort to induce compliance with no success. Under circumstances, dismissal of case appropriate.
- (7735) *Garmin Wurzburg GMBH v. Aroney*, 2018 WL 2966880 (Bankr. W.D. Mi. 2018) - Rule 37 allows Court to impose sanctions for failure to comply with discovery requirements. Court must consider lowest possible sanction that would induce compliance. Court can impose default judgment as discovery sanction where disobedient party had ability to comply with discovery; failure to cooperate in discovery amounts to willfulness, bad faith or fault; opposing party suffers prejudice; party had notice or was warned that failure to cooperate could lead to default judgment; and lack of less drastic sanctions. Party who fails to participate in discovery bears burden of proving that failure resulted from inability to comply rather than willfulness or bad faith and Court will presume bad faith absent credible explanation. Defendant's failure to participate in discovery warranted sanctions where defendant did not indicate inability to comply. Defendant acknowledged that he discussed document production with then-counsel and reviewed some documents with counsel but did not leave documents with counsel to produce to plaintiff. Defendant's testimony was indefinite and evasive, leading to conclusion that defendant had capacity to produce documents. Defendant offered no reason for failing to answer interrogatories. Defendant's noncompliance with discovery prejudiced plaintiff. While delay by itself does not establish prejudice, delay coupled with tight time deadlines imposed by Court for completion of discovery required parties to act diligently and plaintiff promptly pursue discovery. Deadline for discovery had now passed, foreclosing plaintiff from obtaining information necessary to establish claim. Plaintiff should not be required to seek extension of discovery deadline to protect defendant who willfully thwarted discovery process, and plaintiff had already filed motion to compel discovery in addition to motion for sanctions in effort to obtain requested documentation. Less draconian sanctions did not appear to be effective where defendant's demeanor and testimony indicated that sanction less than judgment by default would not be effective.
- (7736) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Bankruptcy Court appropriately dismissed adversary proceeding where Plaintiff repeatedly failed to comply with Orders compelling discovery and had been repeatedly warned that further failure to comply would lead to additional sanctions which could include dismissal of Adversary Proceeding with prejudice. Court issued Order Compelling Plaintiff to Respond to discovery that included specific warning that "[f]ailure to comply with this order may result in sanctions, including an award of attorneys' fees and expenses and/or striking pleadings". When Plaintiff failed respond to discovery, Court entered second Order Compelling Discovery that again stated, "[t]he parties are warned that failure to comply with the court's discovery order may result in the court issuing sanctions included but not limited to contempt of court, striking the pleadings, directing that certain facts be taken as established, prohibiting

the introduction of certain evidence at trial, or dismissing the action” and Ordered Plaintiff to pay Defendant’s Attorney Fees of \$2,425.28 not later than specific date. Plaintiff did not pay sanction amount and Court found Plaintiff in Contempt of Court and dismissed action with prejudice. Record of case indicated theme of repeated, willful, and blatant disregard for instructions and Orders of the Bankruptcy Court by Plaintiff. Record indicated repeated and explicit warnings by Bankruptcy Court that failure to obey Orders could result in sanctions, including striking the pleadings and dismissal of the case in its entirety. Record also demonstrated multiple instances where Bankruptcy Court could have sanctioned Plaintiff for his failure to obey Orders, yet declined to impose sanctions until absolutely necessary and initial award of sanctions was only award of attorney’s fees for Defendant’s reasonable expenses, not an entire dismissal of the case. Failure of Plaintiff to follow this Order for sanctions that drew “the last straw”.

- (7737) *Selective Insurance Company v. Gariby*, 2017 WL 2637746 (Bankr. E.D. Tn. 2017) – Rule 37, made applicable in adversary proceedings through Bankruptcy Rule 7037, permits Court to compel production of documents where adverse party is “uncooperative”. Sanctions may include striking pleadings, entry of default judgment, or treating failure to produce as contempt of court. Court will consider several factors including whether failure to cooperate in discovery is willful; whether failure to cooperate prejudiced opposing party; whether party against whom sanctions are sought has previously been warned that failure to cooperate in discovery may result in dismissal or default judgment; an whether less drastic sanctions were imposed before consideration of dismissal or default judgment was contemplated. Party who is consistently uncooperative will be presumed to act in bad faith add willfully. Debtor had previously been warned multiple times that failure to cooperate may be considered a basis to dismiss. Defendant failed to provide Court Ordered Rule 26 disclosures until 3 months late, and on eve of hearing to compel. Defendant then failed to respond to discovery requests and Court entered Order Compelling Discovery. When defendant failed to comply with that Order, Court dismissed case. Defendant had repeatedly been advised that further failure to cooperate will lead to default judgment, defendant’s delays prejudiced plaintiff, and given history of dilatory conduct, less drastic sanctions would be futile.
- (7738) *Liberty Mutual Insurance Co. v. Devere Construction Co.*, 2016 WL 4800796 (E.D. Mi. 2016) – Court can enter sanctions for failure to comply with Court Order compelling party to produce bank statements. Party offered no reason why statements had not been produced and have only belatedly offered to make records available at warehouse in Alpena. Although documents were located in warehouse owned by third party, documents were still in possession and control of party where the party has the legal right to obtain documents on demand. Party ordered to immediately produce documents and moving party awarded sanctions including attorney fees and expenses incurred while attempting to obtain statements.
- (7739) *Marsh v. Rhodes*, 2016 WL 3563561 (R.D. Mi. 2016) – Magistrate’s R&R correctly denied defendant’s request for dismissal of pro se plaintiff’s complaint based on alleged failure to comply with discovery where pro se party had not previously been warned that further violations would result in dismissal and there were less drastic sanctions available.
- (7740) *Smith v. Stellar Recovery, Inc.*, 2016 WL 3072251 (E.D. Mi. 2016) – If a court rules on a motion to compel discovery, court must award attorney fees and costs to prevailing party unless the successful party did not confer in good faith, the opposing party’s position was substantially justified, or other circumstances would make award unjust. Sanctions not appropriate where parties had significantly agreed outstanding issues, reducing number of categories in dispute from 31 interrogatories and 44 requests for production to a single dispute. Award of costs would be inappropriate where parties demonstrated ability to work together to resolve discovery issues.
- (7741) *Lucas v. Liu*, 2016 WL 1019504 (Bankr. E.D. Tn. 2016) – Neither Rule 59 nor Rule 60 provide basis for court to reconsider interlocutory order. However, Court has authority under Rule 54(b) as well as common law to reconsider interlocutory orders at any time prior to entry of final judgment. Motion must allege a change in controlling law or newly discovered evidence. Motion alleged only that Court applied incorrect legal standard in awarding attorney fees in discovery dispute because party did not act intentionally or in bad faith or in any effort to mislead court. Rule 37, applicable to Bankruptcy Cases through Rule 7037, mandates entry of costs and attorney fees for failure to comply with discovery order unless failure is substantially justified or other circumstances make award unjust. Action is “substantially justified” if reasonable people could differ as to correct outcome. Motion did not deny that party failed to comply and did not provide any substantial justification for failing to do so. Court entered two separate orders requiring complete and fully responsive answers to interrogatories and warned party of possible sanctions. Plaintiff continued to provide unresponsive, evasive answers, failed to produce documents as required, and failed to explain with specificity which documents he provided corresponded to which request. Plaintiff had no explanation for failures.
- (7742) *Cart v. Investment Retrievers, Inc.*, 2015 WL 6742079 (N.D. Ohio 2015) – Court has authority under Rule 37 to impose sanctions where party fails or refuses to comply with discovery requirements. Sanctions appropriate where plaintiff demonstrated a pattern of willful misconduct during discovery in this case by refusing to comply with the magistrate judge’s orders, and providing vague, inaccurate and incredulous responses to discovery requests and deposition questions.” Misconduct essentially precluded defendant from obtaining the information it requires to defend itself without engaging in an unreasonably expensive and widespread hunt for evidence. Sanctions included deeming factual matters admitted, precluding plaintiff from offering evidence that is inconsistent with admissions or with deposition testimony, and awarding defendant attorney fees and costs incurred in pursuing discovery and motions to compel.
- (7743) *Ford Motor Company v. Michigan Consolidated Gas Company*, 2015 WL 6470830 (E.D. Mi. 2015) – Federal Rule 37 allows court to impose costs where one party succeeds on Motion to Compel Discovery unless the party against whom costs are sought asserted a position that was substantially justified. Motion to Compel that was granted in part and denied in part, where non-producing party had made reasonable assertions of privilege and issues were complex, did not warrant imposition of costs.
- (7744) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 7407590 (Bankr. N.D. Ohio 2014) – Rule 7037 requires court to award reasonable expenses incurred in motion to compel discovery unless motion to compel was filed before movant attempted in good faith to obtain discovery without resort to court; opposing party’s failure to respond was substantially justified; or other circumstances make award of sanctions unjust. Generally, if party fails to provide evidence explaining failure to comply, sanctions should be awarded. Defendant entitled to sanctions including attorney fees where plaintiff repeatedly failed to provide discovery even after having been given and extension, and

plaintiff failed to produce any evidence to support an adequate explanation,

- (7745) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 2547711 (Bankr. N.D. Ohio 2014) – Rule 37, adopted by reference in Rule 7037, allows court to award costs and fees to party who obtains Order to Compel opposing party to provide discovery. Sanctions can include reasonable expenses and fees against party or deponent whose conduct necessitated the motion to compel. Court cannot grant fees for time expended prior to making the motion itself or time related to scheduling and rescheduling the depositions. While depositions had to be postponed because documents had not been produced, it did not make sense to schedule depositions prior to receipt of documents so time expended in scheduling and rescheduling was not reasonable.
- (7746) *PRN Funding, LLC v. Cole*, 2013 WL 5964010 (Bankr. N.D. Ohio 2013) – Debtor's failure to appear at deposition notwithstanding proper notice under Rule 7030 and issuance of a subpoena to attend warranted sanctions under Rule 7037. Possible sanctions range from dismissing action to entering default judgment to entering order to compel attendance. Debtor's failure to appear at two duly noticed depositions; Debtor's refusal to attend for reasons unsupported by law; Debtor's failure to seek protective order; and Debtor's cessation of communications with Debtor's counsel warranted entry of default judgment excepting debt from discharge.
- (7747) *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.
- (7748) *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.
- (7749) *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.
- (7750) *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 of 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.
- (7751) *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.
- (7752) *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.

- (7753) *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.
- (7754) *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.
- (7755) *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.

12.256 Sanctions – Contempt

- (7756) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Bankruptcy Court appropriately dismissed adversary proceeding where Plaintiff repeatedly failed to comply with Orders compelling discovery and had been repeatedly warned that further failure to comply would lead to additional sanctions which could include dismissal of Adversary Proceeding with prejudice. Court issued Order Compelling Plaintiff to Respond to discovery that included specific warning that "[f]ailure to comply with this order may result in sanctions, including an award of attorneys' fees and expenses and/or striking pleadings". When Plaintiff failed to respond to discovery, Court entered second Order Compelling Discovery that again stated, "[t]he parties are warned that failure to comply with the court's discovery order may result in the court issuing sanctions included but not limited to contempt of court, striking the pleadings, directing that certain facts be taken as established, prohibiting the introduction of certain evidence at trial, or dismissing the action" and Ordered Plaintiff to pay Defendant's Attorney Fees of \$2,425.28 not later than specific date. Plaintiff did not pay sanction amount and Court found Plaintiff in Contempt of Court and dismissed action with prejudice. Record of case indicated theme of repeated, willful, and blatant disregard for instructions and Orders of the Bankruptcy Court by Plaintiff. Record indicated repeated and explicit warnings by Bankruptcy Court that failure to obey Orders could result in sanctions, including striking the pleadings and dismissal of the case in its entirety. Record also demonstrated multiple instances where Bankruptcy Court could have sanctioned Plaintiff for his failure to obey Orders, yet declined to impose sanctions until absolutely necessary and initial award of sanctions was only award of attorney's fees for Defendant's reasonable expenses, not an entire dismissal of the case. Failure of Plaintiff to follow this Order for sanctions that drew "the last straw".
- (7757) *Glieberman v. BR North 223, LLC*, 2017 WL 1365409 (E.D. Mi. 2017) – Finding of contempt lies within sound discretion of Court and is reviewed for abuse of discretion. Contempt requires evidence of a violation of a definite and specific order of Court requiring party to perform or refrain from performing particular act with knowledge of the Court order. Once the moving party establishes prima facie case, alleged contempt nor may defend by coming forward with evidence showing that he is unable to comply with Court order. Party had adequate notice and opportunity to respond to requests for contempt where Court order setting hearing provided party with opportunity to file response to contempt motion and provided opportunity to present evidence at hearing on contempt motion. Contemnor never sought dissolution of order shortening time for the hearing, never requested an adjournment of the hearing, never requested more time to prepare a response, never complained about lack of due process, and did not offer any evidence to Bankruptcy Court to rebut movements prima facie case of contempt. Moving party presented substantial competent evidence that Debtor was in control of at least 24 entities yet failed to provide requested documentation from any of those entities. Debtor failed to come forth with any evidence showing that he is unable to comply with Court order. Contempt order for failure to produce requested documentation affirmed

12.257 Sanctions – Spoliation of Evidence

- (7758) *US v. Harold*, Case No. 16-5041 (Bankr. E.D. Mi. 2018) – Court would not draw adverse inference from fact that IRS did not maintain tax returns for year in question. Adverse interest arises only when party having control of document has obligation to preserve it at time it was destroyed; records were destroyed with culpable state of mind; and destroyed evidence was relevant to claim or defense. Debtor did not provide any evidence that IRS was required to preserve returns filed in 2009 and destruction of documents was not due to culpable state of mind but would have been due to ordinary document purge procedures of IRS.
- (7759) *McKinstry v. Genser*, 2014 WL 3611329 (E.D. Ky. 2014) – In considering claim of spoliation of evidence, court must determine whether party had duty to preserve documents at the time when the party with control of the documents destroyed them; whether the party destroyed the documents with a culpable state of mind; and whether a reasonable trier of fact would have found the lost documents to be relevant to claim or defense. If warranted, court can use discretion to fashion an appropriate penalty limited only by goals of fairness and punishing wrongdoers. Party knew of obligation to preserve evidence when advised by corporate general counsel of likely litigation and two other parties knew of obligation when litigation actually commenced. Each party thereafter destroyed documents under circumstances that indicated intent to conceal evidence or otherwise acted with culpable state of mind. Documents were relevant to issues in litigation including notes of telephone conversations that could have included discussions of efforts to seize and divert lucrative opportunities. Sanctions warranted included instruction to jury to assume that documents would have exposed facts unfavorable to the party destroying the documents but did not warrant dismissal where there was no evidence of bad faith.

AA. Pre-trial Disclosures

12.258 Generally

- (7760) *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.

12.259 Failure to Make

- (7761) *EQT Production Company v. Magnum Hunger Production, Inc.*, 2017 WL 2295906 (E.D. Ky. 2017) - Rule 26 requires a party to provide computation of each category of damages claimed and make available documents or other evidentiary materials on which computation is based. Party who is made disclosure under Rule 26 must supplement or correct its disclosure if the party learns that in some material respect to the disclosure is incomplete or incorrect. Party who fails to provide information is not permitted to use information as evidence on a motion, hearing or at trial, unless failure was substantially justified, and may face additional sanctions under Rule 37. Sanctions under Rule 37 are mandatory unless there is a reasonable explanation why Rule 26 was not complied with. Mistake is “substantially justified or harmless” based on (1) surprised to party against whom evidence would be offered; (2) ability of that party to cure surprise; (3) extent to which allowing evidence would disrupt trial; (4) importance of evidence; and (5) nondisclosing party’s explanation for failure to disclose. Where sanctions are warranted, Rule 37 allows less draconian sanction than exclusion in appropriate circumstances. Court suppressed evidence concerning plaintiff’s calculation of damages where initial Rule 26 disclosure provided damage figures but did not detail computation and plaintiff did not make available any underlying documentation or spreadsheets generated as backup for calculations. Plaintiff did not list data or spreadsheets as documents in plaintiff’s possession that it may use to support its claim. Notwithstanding multiple document production request by defendant, did not produce all evidence relating to her supporting damage claim including plaintiff’s internal records and spreadsheets. Plaintiff designated witness to testify at deposition regarding damages but continued to fail to provide to defendant necessary records, spreadsheets and work papers and otherwise ignored records until plaintiff’s witness testified, well after close a formal discovery, that documents existed. Failure to disclose or turnover documents until after discovery deadline produced unfair surprise to defendant as defendant was unable to effectively depose plaintiff’s witness. Belated production, post deposition and post discovery close, was not sufficient to cure any surprise and allowing documents to be introduced would disrupt trial. Evidence was vitally important as it went to basis of damage claim. Plaintiff lacked any justification for failing to disclose evidence. Plaintiff could not now be allowed to introduce documents which plaintiff had failed to produce as required by Rule 26 on multiple occasions.

- (7762) *In re Mik*, 2016 WL 889631 (Bankr. W.D. Ky. 2016) – Debtor’s failure to file list of trial exhibits by date specified in pre-trial order did not require striking of exhibits where all of the exhibits offered by Debtor were also attached to initial Rule 26 disclosure. Creditor could not have been prejudiced by late filing as creditor had all documents and late filing of exhibit list did not produce any unfair surprise.

- (7763) *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.

- (7764) *In re McLnerney*, 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 from 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

12.260 Timing of Motion

- (7765) *Swanigam v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court.

- (7766) *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.

- (7767) *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.

- (7768) *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.

- (7769) *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.
- (7770) *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.

12.261 Sua Sponte Grant In Favor of Non-Moving Party

- (7771) *Nelson v. Fifth Third Bank*, 2016 WL 3194191 (6th Cir. BAP 2016) – There is no prohibition against *sua sponte* grant of summary judgment as long as losing party was on notice that it had to come forward with all of its evidence and had a reasonable opportunity to respond to issues considered by court, and that grant *sua sponte* did not prejudice losing party. Summary judgment in favor of party where other party has sought summary judgment may not be detrimental to losing party as that party is aware that issues have been raised and moving party has opportunity to come forward with all of its evidence as part of its summary judgment motion. Lender who filed motion for summary judgment as to validity and enforceability of liens had notice that issue of title to aircraft was *prima facie* element to be determined and so was on notice that ownership had to be established before summary judgment could be entered. While court would have been better served to advise parties that it was considering summary judgment for non-moving party, losing party did not allege that notice would have given opportunity to present more evidence or that losing party was somehow prejudiced by grant of summary judgment to opposing party. However, Court erred in granting summary judgment based on what documents were not in the record and assumptions about whether that documentation even existed. Record that was presented did not contain sufficient evidence to affirmatively establish ownership of aircraft in question, requiring reversal of judgment.
- (7772) *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.
- (7773) *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.
- (7774) *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.

12.262 Burden of Proof

- (7775) *Manson v. Nathan*, 2018 WL 705154 (E.D. Mi. 2018) – Court cannot resolve disputed factual issues on summary judgment. Defendant's affidavit asserting that Defendant, not Debtor, owned assets. Although Defendant's explanation lacked credibility and could not pass the "laugh test", nonetheless affidavit raised factual issues that could not be determined on review of "cold record". On Summary Judgment Court is required to accept sworn statement as true and construe inconsistencies in favor of party opposing summary judgment.
- (7776) *Jawara v. SunTrust Bank*, 2016 WL 1244717 (M.D. Tn. 2016) – Local rule requires any motion for summary judgment to be accompanied by separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial; each fact shall be set forth in a separate, numbered paragraph; and each fact shall be supported by a specific citation for the record. Movant's failure to comply with rule requirements results in denial of motion.
- (7777) *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.
- (7778) *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.
- (7779) *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.

- (7780) *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.
- (7781) *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.
- (7782) *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.
- (7783) *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.
- (7784) *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.
- (7785) *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.
- (7786) *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.
- (7787) *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.

- (7788) *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.
- (7789) *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.
- (7790) *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.
- (7791) *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.
- (7792) *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.
- (7793) *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.
- (7794) *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."

- (7795) *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.

- (7796) *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.

12.263 Failure to Respond to Motion

- (7797) *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.

12.264 Affidavits – Requirements

- (7798) *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.

- (7799) *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.

12.265 Affidavits – Motion to Strike

- (7800) *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.

- (7801) *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.

12.266 Presentation of Record

- (7802) *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.

12.267 Particular Cases – Summary Judgment Granted

- (7803) *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.
- (7804) *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.

12.268 Particular Cases – Summary Judgment Denied

- (7805) *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.
- (7806) *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.
- (7807) *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.
- (7808) *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

12.269 Time for Filing

- (7809) *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. Report and Recommendations

12.270 Objections

- (7810) *Milford Housing, LLC v. Village of Milford*, 2017 WL 1100944 (E.D. Mi. 2017) - Rule 9033 requires District Judge to make a *de novo* review of the Bankruptcy Judge's findings of fact and conclusions of law to which specific written objections have been made. District Judge may accept, reject or modify proposed findings of fact or conclusions of law, or receive further evidence, or remand matter to Bankruptcy Judge with instructions. Objections trigger *de novo* review only if they are specific. Objections which summarily disagreed with Bankruptcy Judge's findings of fact were not specific and constituted nothing more than conclusory allegations that Bankruptcy Judge incorrectly weighed evidence.
- (7811) *Garner v. Select Portfolio Servicing, Inc.*, 2017 WL 661002 (E.D. Mi. 2017) – Deadline to file objections to Magistrate's Report and Recommendations is 14 days from service. Party who fails to respond by deadline waives right to further judicial review and permits District Court to accept recommendation absent clear error on face of R&R itself. Response filed 22 days after service of R&R was untimely and would not require District Court review before approving R&R.

- (7812) *Kuczma v. Colvin*, 2017 WL 366281 (N.D. Ohio 2017) - Objections to Report & Recommendation of Magistrate Judge must be filed within 14 days after service. Party who fails to file objections waives right to have District Court conduct de novo review. Any further review by Court would be duplicative and inefficient use of courts limited resources.
- (7813) *Collins v. Deshikachar*, 2017 WL 227953 (E.D. Mi. 2017) – District Court is not required to conduct de novo review of R&R absent objections filed by parties. Parties who fail to object waive right to have District Court review R&R. Absent objection from any party, district Court review limited to “clear error”.
- (7814) *Wilcoxson v. Lehman Brothers*, 2016 WL 4119802 (E.D. Mi. 2016) – Objections to magistrate’s R&R must be clear enough to enable district court to discern those issues that re dispositive and contentious. Response that expresses general disagreement with correctness of Magistrate’s R&R but fails to specify any issue of contention is not sufficient and will be overruled. Plaintiff’s objection to findings of fact denied where Plaintiff claimed that she never signed the note and mortgage but evidence in record amply supported conclusion that both the note and mortgage reflected Plaintiff’s signature and plaintiff did not offer any evidence to contradict that finding.
- (7815) *Monge v. Rojas*, Case No. 15-50180 (5th Cir. 2016) – Fact that party fails to respond to R&R does not require Court to adopt it. District Court is not “rubber stamp” and no rule or statute prohibits district court from considering an ruling on merits of an unopposed motion merely because it is unopposed. However, party who fails to file objection to R&R waives any right to appeal proposed findings of fact or to present any legal issues in opposition to those findings.
- (7816) *Marsh v. Rhodes*, 2016 WL 3563561 (R.D. Mi. 2016) – 28 USC Section 636 sets deadline to file response to R&R within 14 days after service of copy. For party represented by counsel, 14 days begins to run when the R&R is issued. For pro se parties, 14 days runs from date of receipt by party of report in the mail, usually established by sworn affidavit if party. 14 days then runs when the pro se party puts the response in the mail, not when it is received by the clerk.
- (7817) *Cart v. Investment Retrievers, Inc.*, 2015 WL 6742079 (N.D. Ohio 2015) – Objections to Report and Recommendations must be filed within 14 days of issuance of Report. Failure to file objections within time permitted allows court to adopt R&R without *de novo* review.
- (7818) *Armstrong v. Commissioner of Social Security*, 2015 WL 1476398 (E.D. Mi. 2015) – Party’s failure to file objections to Magistrate’s Report and Recommendations within time permitted waives any right to further appeal and releases Court from duty to independently review matters.

12.271 Standard of Review

- (7819) *Milford Housing, LLC v. Village of Milford*, 2017 WL 1100944 (E.D. Mi. 2017) - Rule 9033 requires District Judge to make a *de novo* review of the Bankruptcy Judge’s findings of fact and conclusions of law to which specific written objections have been made. District Judge may accept, reject or modify proposed findings of fact or conclusions of law, or receive further evidence, or remand matter to Bankruptcy Judge with instructions. Objections trigger *de novo* review only if they are specific. Objections which summarily disagreed with Bankruptcy Judge’s findings of fact were not specific and constituted nothing more than conclusory allegations that Bankruptcy Judge incorrectly weighed evidence.
- (7820) *Collins v. Deshikachar*, 2017 WL 227953 (E.D. Mi. 2017) – District Court is not required to conduct de novo review of R&R absent objections filed by parties. Parties who fail to object waive right to have District Court review R&R. Absent objection from any party, district Court review limited to “clear error”.
- (7821) *Cart v. Investment Retrievers, Inc.*, 2015 WL 6742079 (N.D. Ohio 2015) – If party files objection to Report and Recommendation, reviewing court will conduct *de novo* review of matters presented. Where party fails to timely file objection, reviewing court need only satisfy itself that there is no clear error on the face of the record to accept the recommendations. Plaintiff’s objections to R&R finding that plaintiff had violated rules regarding discovery was filed 4 days after the deadline, excusing court from performing full *de novo* review.

EE. Jury Trial

12.272 Actions Subject to Jury Trial

- (7822) *Metlife Securities, Inc. v. Holt*, 2016 WL 6127138 (E.D. Tn. 2016) – Party opposing arbitration has right to jury trial on issue of whether dispute is subject to arbitration. Under Federal Rule 38, any demand for Jury Trial must be made before date on which opposition to motion to compel arbitration is due. Court not required to empanel jury to determine whether genuine issue of material fact exists as to validity and scope of arbitration agreement. If court determines a genuine issue of material fact exists, court will then empanel jury to resolve that issue only.
- (7823) *Reed v. Nathan*, 2016 WL 5844579 (E.D. Mi. 2016) – Defendant in turnover action does not have a right to Jury trial under the 7th Amendment where action did not rely on any fraudulent transfer theory or any argument other than property belonged at all times to Debtor.
- (7824) *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.
- (7825) *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.

- (7826) *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.
- (7827) *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.

12.273 Bankruptcy Court Power to Conduct Jury Trial

- (7828) *Seror v. Daley CPA, Inc.*, Case No. 15-1037 (Bankr. C.D. Ca. 2018) – 28 USC Section 157(e) authorizes Bankruptcy Court to conduct jury trial if authorized by District Court; timely demand made under Federal Rule of Civil Procedure 38; and parties jointly or severally file statement of consent within time specified by Local rule. Defendant timely made demand for jury trial, although demand did not specify jury trial “in Bankruptcy Court” as required by Local Rule. Bankruptcy Court concluded that defendant timely request to jury trial. Fact that demand did not specifically reference “Bankruptcy Court” would not operate as waiver of right to jury trial where party otherwise timely made proper demand.

12.274 Waiver of Right to Jury Trial

- (7829) *Harpole Construction, Inc. v. Medallion Midstream, LLC*, Case No. 16-1058 (Bankr. D.N.M. 2017) - Creditor forfeits right to jury trial by filing counterclaim in adversary proceeding even where adversary proceeding is based on post-petition contract between Debtor and Creditor. Seventh Amendment normally protects right to jury trial where cause of action is legal in nature and involves matter of private rights. Cause of action for breach of contract is “unquestionably” an action in law, not equity which normally confers right to jury trial. However, party may lose right to jury trial by filing claim against bankruptcy estate. Filing claim triggers claims allowance process which is within Bankruptcy Court's equitable jurisdiction and, therefore, no longer supports right to jury trial. Loss of right to jury trial includes any claims against creditor that requires determination of allowed amount of creditors claim. Filing counterclaim in adversary proceeding seeking to recover money damages from Debtor triggers claims allowance process, thereby excluding action from seventh amendment right to jury trial.
- (7830) *Metlife Securities, Inc. v. Holt*, 2016 WL 6127138 (E.D. Tn. 2016) – Party opposing arbitration has right to jury trial on issue of whether dispute is subject to arbitration. Under Federal Rule 38, any demand for Jury Trial must be made before date on which opposition to motion to compel arbitration is due. Court not required to empanel jury to determine whether genuine issue of material fact exists as to validity and scope of arbitration agreement. If court determines a genuine issue of material fact exists, court will then empanel jury to resolve that issue only.
- (7831) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Contractual term that waives right to jury trial is enforceable absent proof that waiver was not knowing or voluntary. Borrower failed to overcome presumption of validity where waiver was in bold lettering and was clear and unambiguous and applied to any action, proceeding or counterclaim brought by any party against any other party.
- (7832) *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.
- (7833) *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.

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

12.275 Jurisdiction

- (7834) *In re Thomas*, Case No. 14-57578 (Bankr. E.D. Mi. 2016) – Voluntary dismissal of Chapter 13 case deprives Court of jurisdiction to reconsider claim where initial order did not reserve jurisdiction. Section 349 terminates all actions of the bankruptcy court unless court has expressly reserved jurisdiction over administration of estate. Neither prior order disallowing claim nor order dismissing case retained jurisdiction, leaving parties to remedies in State Court only.

12.276 Grounds

- (7835) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 1168979 (E.D. Mi. 2018) - Motion for Rehearing must be brought within 14 days of entry of judgment and must do more than merely present same issues ruled upon by Court. Moving party must demonstrate palpable defect by which Court was misled and show that correcting defect will result in different disposition of case. Motion for reconsideration filed more than 21 days after entry of order untimely. Further, motion did not raise new issues or arguments and did not demonstrate that correction of errors would produce different outcome. Motions reference to various Sections of Rule 60 without any attempt to explain applicable standards under Rule 60 or how standards apply to case did not warrant granting relief.
- (7836) *EQT Production Company v. Magnum Hunter Production Company*, 2018 WL 1217155 (E.D. Ky. 2018) – Rule 59 Allows Court to correct own errors, sparing parties and appellate courts burden of unnecessary appellate proceedings. Rule 59 is not opportunity to re-argue case or to relitigate all matters. Motion should be granted only if there is clear error of law; newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice.
- (7837) *Edmonton State Bank v. Smith*, 2017 WL 6372471 (Bankr. W.D. Ky. 2017), *Motion to Amend or Make Additional Findings denied*, 2018 WL 1466080 (Bankr. W.D. Ky. 2018) – Motion for Additional Findings denied where requested findings would not alter Court’s conclusion that improvements located on property were permanent fixtures and would not alter distribution of proceeds of liquidation of property or produce recovery to moving party.
- (7838) *Turk v. Bayview Loan Servicing, LLC*, Case No. 17-4562 (Bankr. E.D. Mi. 2018) – Rule 9023 allows Court to take additional testimony, amend judgment to make additional findings of fact and conclusions of law. However, Motion cannot be used to expand on relief sought in action in first instance. Adversary proceeding requested determination of whether property had equity to support second lien. Adversary proceeding did not request, and Court was not required to determine, specific valuation of property, only whether property was worth more or less than balance owed on first lien. Motion did not allege any error by court, any newly discovered evidence, or any manifest injustice, but sought new form of relief not initially requested. Court would not issue advisory opinion on issue not raised in adversary.
- (7839) *In re Fuller*, 2018 WL 345943 (Bankr. W.D. Mi. 2018) – When a party seeks to alter or amend judgment within fourteen days of entry, more liberal standard under Bankruptcy Rule 9023 allows court to alter or amend judgment if movant can establish: (i) clear error law, (ii) newly discovered evidence, (iii) intervening change in controlling law, or (iv) manifest injustice. Evidence is “newly discovered” only if it could not, in the exercise of reasonable diligence, have been submitted before Court entered Order. Manifest injustice requires lack of equity or some form of unfairness and that altering or amending judgment would produce outcome in moving party’s favor. Poor strategic decisions are not “manifest injustice”. Debtor’s Motion for Relief from Order Dismissing Case where case was initially dismissed because Debtor did not file Schedules, then reinstated when Debtor filed Schedules and Plan but re-dismissed where Schedules indicated that debtor’s debts exceeded debt limits and Debtor had not made any payments under his Chapter 13 plan. Debtor’s post-second-dismissal filing of amended schedules to bring debts below debt limits did not constitute newly discovered evidence as all information in Schedules and Plan were fully available to debtor before case was dismissed. Dismissal was not manifest injustice where Debtor was provided with numerous opportunities to address various deficiencies yet Debtor did not amend schedules until after Court dismissed case. Debtor’s claim that former attorney committed a fraud by including debts that had previously been forgiven and that Debtor did not sign the schedules contradicted Debtor’s amended schedules that included same liabilities that were on schedules Debtor filed pro se at outset of case; and Debtor’s signature appears on the top of each page making it difficult to accept Debtor’s allegation that he did not sign the amended schedules.
- (7840) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Rule 59, incorporated through Rule 9023, allows Court to alter or amend judgment based on clear error law; newly discovered evidence; intervening change in controlling law; or to prevent manifest injustice. Party must also show palpable defect by which Bankruptcy Court was misled. Motion under Rule 59 allows Court to also consider grounds under Rule 60. While Motion did not show grounds for relief under Rule 59, Motion did establish grounds for relief under Rule 60(b)(3) and 60(b)(6).
- (7841) *Jahn v. Candler*, 2017 WL 3732012 (Bankr. E.D. Tn. 2017) – Rule 59(e) of the Federal Rules of Civil Procedure, made applicable by Federal Rule of Bankruptcy Procedure 9023, allows court to consider “motion to alter or amend a judgment” only if there is clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Rule does not give unhappy litigant opportunity to relitigate matters already decided, or as substitute for appeal. Motion denied where moving party did not produce any newly discovered evidence or allege any intervening change in controlling law and did not dispute Court’s factual findings. Motion merely disagreed with conclusion reached by Court, which is not basis for relief under Rule 9023.
- (7842) *HIJ Industries, Inc. v. Roy*, 2017 WL 377930 (Bankr. E.D. Ky. 2017) - Federal Rule of Bankruptcy Procedure 9023 allows Court to open judgment and take additional testimony, amend findings of fact and conclusions of law, and direct entry of a new judgment. Court has discretion in deciding motion to reopen, taking into account burden placed on parties and witnesses; undue prejudice which may result of the new evidence is not admitted; and consideration of judicial economy. Creditor failed to establish basis to reopen judgment to submit additional documents where adversary proceeding had been pending for over one year before trial and parties had ample opportunity to conduct discovery over extended time. Creditor did not explain its own delay in pursuing evidence before close of discovery and never filed Motion

to Compel Debtor to provide financial records or other documents which Creditor claimed constituted “newly discovered” evidence. Evidence is not “newly discovered” solely because creditor did not successfully obtain evidence during discovery period.

- (7843) *Initial Investments, Inc. v. Woodford*, 2016 WL 7191534, *rehg denied*, ___ WL ___ (Bankr. E.D. Mi. 2016) – Motion to Amend Judgment under Rule 59 denied where Motion did not allege any intervening change in controlling law; newly discovered evidence; clear error law; or prevent manifest injustice. Motion did not demonstrate clear error where cases cited in Motion were not from controlling jurisdiction, had already been considered by Court in reaching decision, and cited cases were factually distinguishable. Motion at best disagreed with Court’s application of law to facts, but conclusions based on facts as determined do not amount to clear error or palpable defect.
- (7844) *ECP Commercial II, LLC v. Town Center Flats, LLC*, Case No. 15-11881 (E.D. Mi. 2016) – Motion for Reconsideration under Rule 59 must do more than merely present same issue ruled on by court. Moving party must also demonstrate palpable defect but which the court and parties and other person have been misled, correction of which would result in different disposition. Motion was not sufficient where Motion challenged Bankruptcy Court’s statements that the facts were not in dispute, where Motion alleged only that facts were in dispute without identifying any particular fact or how that dispute would have been material to the outcome of the case. Debtor did not present any issues to court regarding factual disputes in briefs submitted to District Court on appeal of Bankruptcy Court Order and did not raise issues that could not have been raised earlier.
- (7845) *Reed v. Blount*, 2016 WL 3625602 (E.D. Mi. 2016), *aff’d*, 2017 WL 3597425 (6th Cir. 2017) – A motion for reconsideration may not present information readily available during the prior proceedings and is not to be used to introduce new evidence that could have been adduced prior to entry of Order. Appellants Motion for Rehearing properly denied where Appellant attached, for the first time, documents that purported to show that claim at issue had been paid in full. Documents and information was fully available to and in the possession of appellant during initial prosecution of objection to claim. Appellant’s failure to present that evidence as part of claim objection was not basis to grant rehearing to allow the belated submission of those documents.
- (7846) *Lucas v. Liu*, 2016 WL 1019504 (Bankr. E.D. Tn. 2016) – Neither Rule 59 nor Rule 60 provide basis for court to reconsider interlocutory order. However, Court has authority under Rule 54(b) as well as common law to reconsider interlocutory orders at any time prior to entry of final judgment. Motion must allege a change in controlling law or newly discovered evidence. Motion alleged only that Court applied incorrect legal standard in awarding attorney fees in discovery dispute because party did not act intentionally or in bad faith or in any effort to mislead court. Rule 37, applicable to Bankruptcy Cases through Rule 7037, mandates entry of costs and attorney fees for failure to comply with discovery order unless failure is substantially justified or other circumstances make award unjust. Action is “substantially justified” if reasonable people could differ as to correct outcome. Motion did not deny that party failed to comply and did not provide any substantial justification for failing to do so. Court entered two separate orders requiring complete and fully responsive answers to interrogatories and warned party of possible sanctions. Plaintiff continued to provide unresponsive, evasive answers, failed to produce documents as required, and failed to explain with specificity which documents he provided corresponded to which request. Plaintiff had no explanation for failures.
- (7847) *Dymarkowski v. Savage*, 2015 WL 7455630, 541 BR 829 (Bankr. W.D. Ohio 2015), *aff’d*, 2016 WL 7383965 (6th Cir. BAP 2016) – Rule 59, incorporated through Bankruptcy Rule 9023, allows court to alter or amend judgment (1) to accommodate intervening changes in controlling law; (2) to account for new evidence not previously available; or (3) to correct a clear error of law or prevent manifest injustice. Rule 59 Motion is not opportunity to re-argue case and cannot be employed as vehicle to introduce new evidence that could have been adduced prior to entry of judgment. Motion did not allege any basis for reconsideration. Motion merely disagreed with Court’s interpretation of State Court case and argued that Court should have given more weight to separate case. However, cases raised were not basis for court’s decision and were not determinative of overall disposition. Balance of Motion merely reargued issues that were raised and argued prior to entry of judgment which is not basis for amending judgment.
- (7848) *In re Houser*, 2015 WL 359073 (Bankr. E.D. Tn. 2015) – Court has authority to reconsider order to avoid liens pursuant to Section 522 if order fails to accurately reflect relief awarded. Court would deny reconsideration where request was to add sentence that provided that liens were released where Court Order specifically stated that liens were avoided. Additional language requested by plaintiff would add nothing to the relief already granted. However, court would grant rehearing to extent necessary to correct erroneous reference to amount of claim being avoided, where order inadvertently stated that the amount of the lien was \$3,200 where lien was actually \$21,592.00. Error significantly changed extent to which lien was avoided and resulted from clerical error under Rule 80(a).
- (7849) *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.
- (7850) *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.
- (7851) *King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 59 is not intended to provide parties opportunity it 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.
- (7852) *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).

- (7853) *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.

12.277 Time for Filing

- (7854) *In re Kiriazis*, 2016 WL 386586 (6th Cir. BAP 2016) – Motion to reopen case denied where reopening would serve no purpose. Creditor sought to reopen case to file Motion to set aside Order. Creditor did not seek to reconsider order under Rule 9023 within 14 days permitted, and Motion did not allege either that motion was brought within a reasonable time or any basis for granting relief under Rule 9024. Order that was subject to dispute was agreed order after creditor's counsel acknowledged that creditor had issued incorrect billing statements in violation of discharge, leaving no basis to set aside order.
- (7855) *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.

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

12.278 Grounds Generally

- (7856) *In re Mercury Data Systems, Inc.*, 2018 WL 2970720 (Bankr. E.D. Ky. 2018) – Setting aside Order under Rule 60 requires clear and convincing evidence of exceptional or extraordinary circumstances. Party cannot use Rule 60 to relitigate issues that should have been raised during initial hearing and relief will be granted only where consistent with principles of equity. Debtor did not timely respond to involuntary Petition lead to entry of Order for Relief. Debtor's principal had reason to believe that petitioning creditor was not acting in good faith prior to entry of Order for Relief but did not assert defense to involuntary petition. Further, Debtor did not act with reasonable diligence to timely raise disputed issue due to principal's own lack of attention and negligence. Principal was ignoring Debtor's financial leads and was not maintaining accurate financial data and completely abrogated financial duty to deal with financial needs of Corporation before creditor filed involuntary petition.
- (7857) *Simon v. Short*, 2018 WL 3004641 (Bankr. E.D. Mi. 2018) - Relief under Rule 9024 and Local Rule 9024-1 requires a palpable defect by which Court and parties were misled, the correction of which would result in a different disposition. Palpable defect is clear error of law; newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice.
- (7858) *Scott v. Trott Law, PC*, 2017 WL 6450888 (E.D. Mi. 2017) – District Court Local Rule requires proof that Court's order resulted from palpable defect by which court and parties were misled, the correction of which necessarily requires different disposition of case. Plaintiff's complaint alleged that Trott violated FDCPA by representing that it had been retained by Lender when Trott had not in fact been retained. Plaintiff's Motion for Rehearing did not demonstrate any palpable defect. Debtor's allegation that Lender never retained Trott to foreclose mortgage belied by Plaintiff's own admission that Lender did refer matter to Trott. Trott's alleged failure to produce documents in response to discovery request was subject to Trott's assertion of privilege and Trott intended to call witnesses to confirm that Trott had been properly retained. Plaintiff's allegation that loan was not in default did not bear on issue of whether Trott was properly retained, which was gravamen of complaint.
- (7859) *In re Packard Square, LLC*, 2017 WL 4573736, rehearing denied, 2017 WL 6539509 (Bankr. E.D. Mi. 2017) – Motion for Rehearing denied as Motion did not demonstrate any palpable defect by which the Court was misled; did not demonstrate any valid grounds for relief from Order; and merely presented same arguments as were before Court initially. To extent Motion sought to assert newly discovered evidence, Debtor was aware of information before Court conducted prior hearing and cannot use known information as "newly discovered". Debtor's new assertion of an ability to pay monthly adequate protection payments was not newly discovered where Debtor's original Motion did not propose any adequate protection payments at all and relied solely on equity cushion arguing that Debtor had no cash and no ability to make monthly adequate protection payments.
- (7860) *Mason v. Gentry*, 2016 WL 9046676 (E.D. Mi. 2017) - Local Rules of the District Court in the Eastern District of Michigan requires that any Motion for Reconsideration be filed within 14 days after entry of the judgment or order. A Motion for Rehearing or Reconsideration must do more than merely present same issues ruled upon by Court and must demonstrate a palpable defect by which the Court and the parties and other persons entitled to be heard on the motion have been misled such that correcting the defect will result in a different disposition. Motion for Rehearing of Order Denying Leave to Appeal Interlocutory Order did not demonstrate that Court was misled by any palpable defect. Leave to appeal from interlocutory order is granted only in exceptional circumstances. Underlying bankruptcy action had already generated 4 separate actions or appeals filed in District Court, resulting in piecemeal litigation, which is precisely reason why interlocutory appeals are granted only in exceptional circumstances. Court's exercise of discretion to deny motion is not "palpable defect".
- (7861) *In re Peoples*, 2017 WL 377938 (Bankr. E.D. Tn. 2017) - Motion for Rehearing of Order Confirming Plan in Chapter 13 case must establish grounds for relief by clear and convincing evidence and is not to be used as a substitute for appeal or technique to avoid consequences of decisions deliberately made. Rule 60(b)(6) is applicable only in exceptional circumstances which are not addressed by any other provision of Rule 60(b). Creditor's argument that Chapter 13 Plan did not meet liquidation value requirement of Section 1325(a)(4) was fully argued

before Bankruptcy Court at the hearing to consider confirmation of Plan. Court did not find persuasive creditor's evidence that real estate had value in excess of amount listed by Debtors. Case had been previously filed as Chapter 7 and later converted to Chapter 13. While in Chapter 7, Trustee estimated value of property in amount even less than amount listed by Debtor and best offer received by Trustee was lower than value placed on property by Chapter 7 Trustee. Although creditor at confirmation hearing made oral offer to purchase property for slightly greater price than Debtor's value, creditor never made a written offer; oral statements were not based on any independent analysis of the property; and creditor's statement that the purchase offer was noncontingent was contradicted by creditor's later statement that it would want to inspect the property to determine structural soundness. Chapter 7 Trustee testified at hearing that she believed that Debtor's value was greater than the actual value of the property based on Trustee's attempts to sell the property' and Debtor presented an appraiser's assessment at an even lower value. Given conflicting evidence, Court did not err in giving more weight to Debtor's assessment of value as represented in Plan. Motion for Rehearing was little more than attempt to reargue issues fully argued in the first instance.

- (7862) *ECP Commercial II, LLC v. Town Center Flats, LLC*, Case No. 15-11881 (E.D. Mi. 2016) – Motion under Rule 60 must do more than merely present same issue ruled on by court. Moving party must also demonstrate palpable defect but which the court and parties and other person have been misled, correction of which would result in different disposition. Motion was not sufficient where Motion challenged Bankruptcy Court's statements that the facts were not in dispute, where Motion alleged only that facts were in dispute without identifying any particular fact or how that dispute would have been material to the outcome of the case. Debtor did not present any issues to court regarding factual disputes in briefs submitted to District Court on appeal of Bankruptcy Court Order and did not raise issues that could not have been raised earlier.
- (7863) *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.

12.279 Grounds – Fraud, Misrepresentation or Misconduct

- (7864) *King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 60(b)(1) allows court to grant relief from judgment (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. Moving party must demonstrate (1) that the party seeking relief lacks culpability due to mistake, inadvertence, surprise, or excusable neglect; (2) the party opposing relief will not be prejudiced; and (3) the party seeking relief has 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.
- (7865) *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.
- (7866) *Fallowell 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.

12.280 Grounds – Mistake, Inadvertence or Surprise

- (7867) *In re Sharkey*, 2016 WL 6573997 (Bankr. E.D. Mi. 2016) – Setting aside judgment after default is vested in discretion of bankruptcy judge. Moving party must demonstrate that default was product of mistake, inadvertence, surprise, or excusable neglect. If so, Court will consider whether moving party has meritorious defense; and whether non-moving party would be prejudiced by relief from judgment. Whether neglect is excusable is equitable determination taking into account all relevant circumstances including prejudice to non-moving party, length of delay and impact on judicial proceedings, reason for delay including whether it was in control of moving party, and whether moving party acted in good faith. Debtor's counsel's failure to respond to objection to exemptions was excusable where there was genuine and understandable confusion regarding timeliness of objections to exemptions, there had been substantial proceedings including a timely response to same objections to exemptions and briefing of the issues while the case was pending under Chapter 7 and before conversion to Chapter 13, the hearing on the objection to exemptions filed before conversion remained pending on the court docket even after conversion. Debtor and Debtor's attorney acted in good faith; the length of delay caused by the failure to file a timely response to the Creditor's Objection, and its impact on the judicial proceedings in this Chapter 13 case, are not significant; and there was little or no danger of prejudice being suffered by the Creditor or by any other party in interest because of the delay. Debtor demonstrated potential meritorious defense. Meritorious defense does not required proof that Debtor would prevail but only that there is "hint of suggestion" of a possible defense and

there was some possibility that the outcome would be contrary to result achieved by default.

- (7868) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016), *aff'd*, 2017 WL 2351972 (E.D. Mi. 2017) – Relief from Order under Rule 60(b)(1) for mistake, inadvertence, surprise or excusable neglect required either (1) party made an excusable mistake or attorney acted without authority; or (2) court made substantive mistake of law or fact in the order. Movant failed to demonstrate any mistake in Bankruptcy Court’s Order dismissing adversary proceeding based on res judicata. Res judicata prevents re-litigation of an issue previously resolved by final judgement in action between same parties or their privies. Res Judicata requires (1) final decision on merits by court of competent jurisdiction; (2) subsequent action between same parties or their privies; (3) issue in second action was or should have been litigated in first action; and (4) identity of causes of action. Dismissal by court of first action under Rule 41 for failure to prosecute constituted adjudication on merits and is entitled to preclusive effect. Only exception is where federal court dismisses action based on state law, and second action is brought in another state with different law. Exception did not apply where first action and second action were both brought in Courts in Michigan and both relied on same substantive state law. Privy is not element of res judicata when brought on defensive basis. As long as party seeking relief is the same party in both cases, defendant can assert res judicata as a defense even if defendant was not involved in, and was not in privity with, any party in the first action. Privy is defined as one party holding an interest that is so identified with interests of litigant in first case that sale legal right was represented the first case as in the second case, and generally requires a working functional relationship in which the interests of the non-party would be presented and protected in first action. Defendants were in privity where plaintiff’s first action was brought against mortgage holder and that case was subsequently dismissed. After dismissal, defendant assigned the mortgage to a related entity and plaintiffs brought same action against mortgage assignee. Interests of original mortgage holder and those of assignee were identical for purposes of res judicata.
- (7869) *In re Houser*, 2015 WL 359073 (Bankr. E.D. Tn. 2015) – Court has authority to reconsider order to avoid liens pursuant to Section 522 if order fails to accurately reflect relief awarded. Court would deny reconsideration where request was to add sentence that provided that liens were released where Court Order specifically stated that liens were avoided. Additional language requested by plaintiff would add nothing to the relief already granted. However, court would grant rehearing to extent necessary to correct erroneous reference to amount of claim being avoided, where order inadvertently stated that the amount of the lien was \$3,200 where lien was actually \$21,592.00. Error significantly changed extent to which lien was avoided and resulted from clerical error under Rule 80(a).
- (7870) *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.
- (7871) *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, surprise 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.
- (7872) *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 neglect. 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.

12.281 Grounds – Excusable Neglect

- (7873) *In re Sharkey*, 2016 WL 6573997 (Bankr. E.D. Mi. 2016) – Setting aside judgment after default is vested in discretion of bankruptcy judge. Moving party must demonstrate that default was product of mistake, inadvertence, surprise, or excusable neglect. If so, Court will consider whether moving party has meritorious defense; and whether non-moving party would be prejudiced by relief from judgment. Whether neglect is excusable is equitable determination taking into account all relevant circumstances including prejudice to non-moving party, length of delay and impact on judicial proceedings, reason for delay including whether it was in control of moving party, and whether moving party acted in good faith. Debtor’s counsel’s failure to respond to objection to exemptions was excusable where there was genuine and understandable confusion regarding timeliness of objections to exemptions, there had been substantial proceedings including a timely response to same objections to exemptions and briefing of the issues while the case was pending under Chapter 7 and before conversion to Chapter 13, the hearing on the objection to exemptions filed before conversion remained pending on the court docket even after conversion. Debtor and Debtor’s attorney acted in good faith; the length of delay caused by the failure to file a timely response to the Creditor’s Objection, and its impact on the judicial proceedings in this Chapter 13 case, are not significant; and there was little or no danger of prejudice being suffered by the Creditor or by any other party in interest because of the delay. Debtor demonstrated potential meritorious defense. Meritorious defense does not require proof that Debtor would prevail but only that there is “hint of suggestion” of a possible defense and there was some possibility that the outcome would be contrary to result achieved by default.
- (7874) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60(b)(1). Motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other

party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor's motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor's failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney's office and failure of attorney's staff member to properly calendar hearings. Court had issued scheduling order well before assistant's absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor's motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel's action was neglect, it was not excusable for purposes of Rule 60 relief.

- (7875) *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.
- (7876) *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.
- (7877) *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.
- (7878) *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 Relief is not excusable neglect. Failure to recognize potential misstatement of fact or incorrect legal conclusion does not amount to "excusable neglect" and should have been dealt with by way of timely objection or response to motion.

12.282 Newly Discovered Evidence

- (7879) *HLJ Industries, Inc. v. Roy*, 2017 WL 377930 (Bankr. E.D. Ky. 2017) - Federal Rule of Bankruptcy Procedure 9023 allows Court to open judgment and take additional testimony, amend findings of fact and conclusions of law, and direct entry of a new judgment. Court has discretion in deciding motion to reopen, taking into account burden placed on parties and witnesses; undue prejudice which may result of the new evidence is not admitted; and consideration of judicial economy. Creditor failed to establish basis to reopen judgment to submit additional documents where adversary proceeding had been pending for over one year before trial and parties had ample opportunity to conduct discovery over extended time. Creditor did not explain its own delay in pursuing evidence before close of discovery and never filed Motion to Compel Debtor to provide financial records or other documents which Creditor claimed constituted "newly discovered" evidence. Evidence is not "newly discovered" solely because creditor did not successfully obtain evidence during discovery period.
- (7880) *Jodway v. Fifth Third Mortgage Co.*, 2016 WL 4500882 (E.D. Mi. 2016), *aff'd*, 2017 WL 2351972 (E.D. Mi. 2017) - Relief from Order under Rule 60(b)(2) based on newly discovered evidence requires movant to show (1) due diligence in obtaining information; and (2) that evidence is material and controlling and would have produced different result. Evidence cannot be merely impeaching or cumulative. Evidence did not support relief from Order dismissing case under Rule 41 for failure to prosecute. Alleged later discovery of evidence involved whether mortgage holder had assigned mortgage to third party prior to commencement of first action. However, first action was dismissed because Plaintiff failed to prosecute action because parties were going through a marital separation, plaintiffs were working two jobs including running a law office; and parties suffered deep depression that kept them from participating in litigation. Even if plaintiffs had access to allegedly new information concerning ownership of the mortgage, that would not have changed dismissal for failure to prosecute.
- (7881) *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.

12.283 Void Judgment

- (7882) *Haffey v. Crocker*, 2017 WL 5710561 (6th Cir. BAP 2017) – Due process is required to prevent, to extent possible, erroneous deprivation of property. Party allegedly aggrieved by denial of procedural due process must show that prejudice resulted. Bankruptcy court did not afford Debtor due process when Court cancelled hearing on Motion to Dismiss and then expedited hearing on Motion for Sanctions that did not request dismissal, but Court dismissed case at expedited hearing date. Order setting hearing entered only four days before the scheduled sanctions hearing was not sufficient notice of issues to be presented or that Court would consider dismissal. Although Moving Party included expedited hearing date in Notice attached to Motion, Court did not enter Order shortening time for notice nor inform debtor that Court would take up issue of dismissal at earlier hearing. Notice was not given that clearly identified issues to be addressed nor to provide reasonable opportunity to be heard. However, denial of notice was harmless where Bankruptcy Court correctly concluded that Chapter 12 should be dismissed as Debtor had not filed confirmable plan; Debtor had unreasonably delayed in the prosecution of the case by evading discovery including failing to appear for scheduled deposition and failing to cooperate in efforts to schedule or reschedule deposition at Debtor’s request; and Estate was suffering and would continue to suffer losses as Debtor’s operating reports indicated that Debtor had lost over \$9,000 in 12 months preceding the hearing. Even if Debtor had full notice and opportunity to be heard at dismissal hearing, evidence in record established cause for dismissal, such that lack of notice was harmless under circumstances of case.
- (7883) *In re Roby*, 2017 WL 112519 (Bankr. N.D. Ohio 2017) - Motion to reconsider order avoiding liens that impaired exemptions granted where motion to avoid liens was not properly served rendering order avoiding liens void for lack of jurisdiction. Motion to Avoid Liens is contested matter that must be served according to Rule 7004, which allows service by first class mail on a governmental organization as prescribed by state law. Ohio state law requires that any service on the state or any department must be made by serving the officer responsible for administration of the department. Service of the motion on a Postcard Office box in Columbus did not qualify, as motion was not served on tax Commissioner or Attorney General and was not served at address used by tax Commissioner or Attorney General. Proper service is not “inconsequential factor” and rule 7004 require strict compliance. Even if state treasurer department may actually have received motions, actual receipt does not eliminate need for proper service.
- (7884) *Reed v. Blount*, 2016 WL 6211691 (E.D. Mi. 2016) – Court lacks jurisdiction over adversary proceeding to deny discharge where plaintiff holds claims that are entirely non-dischargeable as a matter of law, such that denial of discharge would not benefit pecuniary or other interests of plaintiff. Absent a concrete and definite interest in the outcome of the litigation, there is no “case or controversy” over which Bankruptcy Court or District Court could assert jurisdiction. Default judgement denying discharge in adversary proceeding brought by holder of non-dischargeable Domestic Support Obligation vacated as Court was without jurisdiction to enter order, rendering order void.
- (7885) *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.

12.284 Satisfaction, Release or Discharge

12.285 Other Grounds

- (7886) *Real Good Technologies, LLC v. Victory Solutions, LLC*, 2018 WL 1621163 (N.D. Ohio 2018) – Rule 60 allows Court to set aside orders for any reason that justifies relief. Garnishee entitled to relief from order requiring garnishee to appear for deposition in aid of execution where garnishee was not served with writ of garnishment in first instance. Service of process is necessary for enforcement of subsequent orders. Party not serviced with Writ of Garnishment entitled to have Writ quashed and Orders requiring appearance at depositions in aid of execution quashed. Fact that garnishee may have been aware of proceedings does not excuse requirement of proper service.
- (7887) *In re Peoples*, 2017 WL 377938 (Bankr. E.D. Tn. 2017) - Motion for Rehearing of Order Confirming Plan in Chapter 13 case must establish grounds for relief by clear and convincing evidence and is not to be used as a substitute for appeal or technique to avoid consequences of decisions deliberately made. Rule 60(b)(6) is applicable only in exceptional circumstances which are not addressed by any other provision of Rule 60(b). Creditor’s argument that Chapter 13 Plan did not meet liquidation value requirement of Section 1325(a)(4) was fully argued before Bankruptcy Court at the hearing to consider confirmation of Plan. Court did not find persuasive creditor’s evidence that real estate had value in excess of amount listed by Debtors. Case had been previously filed as Chapter 7 and later converted to Chapter 13. While in Chapter 7, Trustee estimated value of property in amount even less than amount listed by Debtor and best offer received by Trustee was lower than value placed on property by Chapter 7 Trustee. Although creditor at confirmation hearing made oral offer to purchase property for slightly greater price than Debtor’s value, creditor never made a written offer; oral statements were not based on any independent analysis

of the property; and creditor's statement that the purchase offer was noncontingent was contradicted by creditor's later statement that it would want to inspect the property to determine structural soundness. Chapter 7 Trustee testified at hearing that she believed that Debtor's value was greater than the actual value of the property based on Trustee's attempts to sell the property' and Debtor presented an appraiser's assessment at an even lower value. Given conflicting evidence, Court did not err in giving more weight to Debtor's assessment of value as represented in Plan. Motion for Rehearing was little more than attempt to reargue issues fully argued in the first instance.

- (7888) *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.

12.286 Time for Bringing Motion

- (7889) *G&H Customs, LLC v. Carter*, Case No. 17-4706 (Bankr. E.D. Mi. 2018) – Court would grant Debtor's Motion to Reopen Adversary to allow Debtor to set aside judgment determining debt to be nondischargeable and awarding monetary damages where Debtor asserted state law basis to relieve Debtor from monetary portion of adversary judgment. Motion to set aside judgment must be presented by motion pursuant to Rule 60. Motion to Reopen asserted good cause to reopen but did not, itself, seek relief under Rule 60. Court would allow Debtor 30 days to file Rule 60 Motion.
- (7890) *In re Kiriazis*, 2016 WL 386586 (6th Cir. BAP 2016) – Motion to reopen case denied where reopening would serve no purpose. Creditor sought to reopen case to file Motion to set aside Order. Creditor did not seek to reconsider order under Rule 9023 within 14 days permitted, and Motion did not allege either that motion was brought within a reasonable time or any basis for granting relief under Rule 9024. Order that was subject to dispute was agreed order after creditor's counsel acknowledged that creditor had issued incorrect billing statements in violation of discharge, leaving no basis to set aside order.
- (7891) *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.

HH. Enforcement of Judgment

12.287 Taxable Costs

- (7892) *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.

12.288 Expert Witness Fees

- (7893) *Clark v. Shop24 Global, LLC*, 2016 WL 3639893 (S.D. Ohio 2016) – Expert witness fees incurred in litigation are not taxable as costs against opposing party. Neither 28 USC Section 1920 nor 29 USC Section 216 (Fair Labor Standards Act) provide for award of expert witness fees in favor of prevailing party.

12.289 Pre-Judgment Interest Rate

- (7894) *Ryan v. Morris*, 2018 WL 1940382 (Bankr. W.D. Ky. 2018) – Award of pre-judgment interest is within discretion of Court State law governs pre-judgment interest rate while Federal law governs post-judgment rate. Kentucky statute provided that parties may agree in writing for payment of interest in excess of statutory rate for money due under contract or obligation in writing. Pre-judgment interest at the contract rate consistent with the agreement of parties and made Plaintiffs whole and compensated for the time value of the money. Rate applied up

to date on which judgment entered. Plaintiff did not request award of Post-Judgment interest and Court would award to pre-judgment interest only.

- (7895) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Court has broad discretion to award prejudgment interest. Prejudgment interest is not automatically applied but may be used to make estate whole. Trustee failed to present any evidence regarding recoverability of prejudgment interest and costs incurred in prosecution. Court denied Trustees request for prejudgment interest and costs without prejudice.
- (7896) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – Prejudgment interest in action to avoid transfer under Section 548 is federal post-judgment rate set forth in 28 USC Section 1961.

12.290 Rate of Interest on Judgment

- (7897) *Campbell v. Butz*, 2018 WL 1895689 (Bankr. W.D. Ky. 2018) – Motion to Alter, Amend or Vacate Judgment granted to correct post-judgment interest rate from 15% contact rate of interest to 1.8% federal judgment rate.
- (7898) *Fountain Leasing, LLC v. Kloeber*, 2015 WL 1191484 (E.D. Tn. 2015) – Prejudgment interest is calculated at applicable state law rate. Post-judgment interest is calculated at federal judgment rate.
- (7899) *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.

12.291 Executions

- (7900) *Irwin v. O'Bryan*, 2018 WL 3973535 (W.D. Ky. 2018) – Statute of Limitations on judgment can be tolled by “execution” which requires active enforcing, carrying out or putting into a fact judgment. Mere issuance and holding of writ of execution does not constitute “execution” absent objective efforts to realize on writ. Issuance of Subpoena Duces Tecum to entity which may have knowledge of judgment Debtor’s assets does not constitute “execution”. Although subpoena may lead to active enforcing judgment, subpoena is not, itself, an attempt to collect on judgment.
- (7901) *Reid v. McNeil*, 2017 WL 2992725 (Bankr. E.D. Mi. 2017) – Bankruptcy Court lacks jurisdiction to order state sheriff or other state court officer to collect judgment of Bankruptcy Court. 28 USC Section 566 allows only a U.S. Marshall to execute federal writ of execution and levy on and sell property.
- (7902) *Meoli v. Christian*, 2015 WL 1869452 (Bankr. W.D. Mi. 2015) – Bankruptcy Court has authority to issue writs of execution authorizing but not directing state officials or other appointees to execute court’s writs, *disagreeing with In re Valdivia*.
- (7903) *Trustees for the Bricklayers and Allied Craftworkers’ Pension Fund v. Yacks*, Case No. 04-88984 (Bankr. W.D. Mi. 2015) – Only US Marshal may execute on Federal Judgment. Federal Court lacks jurisdiction to authorize or direct State Law Enforcement officers to execute on judgments.
- (7904) *Hauk v. Valdivia*, Case No. 14-14429 (E.D. Mi. 2015) - Only US Marshal may execute on Federal Judgment. Federal Court lacks jurisdiction to authorize or direct State Law Enforcement officers to execute on judgments. Bankruptcy Court altered Judgment Holder’s Request for Writ of Execution to limit scope to Federal Marshall and striking any reference to State Court officers authorized to execute to collect judgment.

12.292 Garnishment

- (7905) *Bryant v. Meade & Associates*, 2017 WL 1151092 (E.D. Mi. 2017) – Garnishment is mechanism that allows judgment creditor to collect on judgment by recovering funds held by third-party for judgment Debtor’s behalf. Defendant can raise objections based on (A) that defendants income is exempt from garnishment; (B) that defendant has pending bankruptcy proceeding; (C) maximum amount withheld exceeds amount allowed by law; (D) that judgment has been paid in full; or (E) garnishment was not properly issued or is otherwise invalid. Judgment defendant’s objection alleging that funds in defendant’s bank account were “earmarked for clients” failed to contain any factual basis to assert exemption from garnishment as “client funds” is not exclude among examples of exempt income and defendant did not provide any proof that funds were earmarked for clients such as client ledgers, statements of account, agreements, affidavits of 3rd parties with interest in the funds or some other financial records.
- (7906) *In re Williamson*, Case No. 15-40035 (Bankr. E.D. Mi. 2015) – Bankruptcy court lacked jurisdiction to enter writ of garnishment where Bankruptcy Court did not enter money judgment. Court’s Order determining debt to be excepted from discharge merely reflected that State Court divorce judgment was not dischargeable.
- (7907) *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.

12.293 Statute of Limitations

- (7908) *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.

12.294 Renewal of Judgment

- (7909) *Irwin v. O'Bryan*, 2018 WL 3973535 (W.D. Ky. 2018) – Statute of Limitations on judgment renders judgment unenforceable after expiration of limitations. Unless judgment is renewed or extended before expiration of statute of limitations. Writ of *Scire Facias* is order that requires defendant to show cause why dormant judgment should not be revived and lien continued. Gorman judgment is one which has not been satisfied or extinguished by passage of time but which has remained so long unexecuted that execution cannot be issued without first reviving judgment. However, revival cannot occur after time limit provided in statute of limitations. Complaint seeking issuance of writ dismissed failure to state cause of action.
- (7910) *In re Szymanski*, Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Neither Michigan law nor Bankruptcy law toll time for re-recording judgment lien. Lien recorded in 2009 expired in 2014 where judgment holder did not renew recording.
- (7911) *Trustees for the Bricklayers and Allied Craftworkers' Pension Fund v. Yacks*, Case No. 04-88984 (Bankr. W.D. Mi. 2015) – Federal Courts follow State Court procedures in renewing Federal Court judgment before expiration of Michigan's 10 year limitation period on collection of judgment. Absent timely renewal, judgment lapses and becomes unenforceable 10 years after entry. Motion is timely as long as motion filed before expiration of judgment. Court can renew judgment on motion without a hearing as renewal is mere continuant of original judgment and is not opportunity to revisit the court's decision on the merits.
- (7912) *Lampe v. Kash*, 2014 WL 1232418 (S.D. Ohio 2014) – Under Ohio law, only grounds to avoid revival of judgment is proof that judgment has been paid or satisfied, or is barred by statute of limitations. Judgment becomes dormant 5 years after entry, and action to revive must be brought within 10 years of date on which judgment first became dormant. Judgment creditor's failure to take steps to collect judgment before it became dormant and delay in seeking to revive judgment are not grounds to deny request to revive.
- (7913) *Alexander v. Comdata Corp.*, 2014 WL 993322 *report and recommendation accepted* 2014 WL 1775590 (M.D. Tn. 2014) – Bankruptcy court properly renewed judgment that resulted from adversary proceeding concluded ten years earlier. Renewal of judgment did not amount to double recovery as amount of renewed judgment would be reduced by amount of any criminal restitution payments made by Debtor since date of original judgment. Defendant's allegations that original judgment was "wrong" were raised far too late as those issues should have been raised in initial proceedings that gave rise to initial judgment. Alleged defects in underlying judgment that is long final and non-appealable are not a basis to deny renewal of judgment.

XIII. Appeals

A. Parties

13.1 Standing to Appeal

- (7457) *Carl F. Schier PLLC v. Nathan*, 2018 WL 4492240 (E.D. Mi. 2018) – Pre-bankruptcy counsel for Debtor lacked standing to appeal Bankruptcy Court Order overruling Counsel’s objection to Final Report. Counsel had withdrawn Proof of Claim, thereby abdicating any direct pecuniary interest in outcome, well before filing of final report. Appellate standing requires that parties be directly and adversely affected pecuniarily by order. Interests that are remote and consequential are insufficient to confer standing. Debtor’s alleged interest and potential outcome of appeal from State Court judgment in which counsel represented Debtor did not give counsel direct or immediate interest in bankruptcy proceeding. At best, counsel held contingent, remote and consequential interest in State Court litigation which is insufficient to support standing.
- (7458) *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC*, Case No. 17-2268 (4th Cir. 2018) – Appellant must have actual pecuniary interest in outcome of appeal to have standing. Party who would not receive any additional money if it were to prevail on appeal does not have standing even if issues to be argued are central to integrity of bankruptcy system.
- (7459) *Furlough v. Cage*, Case No. 17-20603 (5th Cir. 2018) - Party must have pecuniary interest in outcome to have standing on appeal. Party who did not have standing at commencement of appeal cannot acquire standing by purchasing claim. Standing is determined at commencement of action and appellant was not creditor at time creditor opposed Trustee’s request to employ counsel.
- (7460) *Spittler Strategic Services, LLC v. Can IV Packard Square, LLC*, 2018 WL 2184356 (E.D. Mi. 2018) - Appellate standing requires that appellant be directly and adversely affected pecuniarily by order being appealed. Appellant standing is more limited than Article III standing or Prudential requirements associated there with. Interests that are remote or consequential rather than direct and immediate are not sufficient to confer standing. Appellants lacked standing to appeal order dismissing Chapter 11 case where appellants only connection to bankruptcy proceedings was filing joint concurrence in support of Debtor’s Motion for Reconsideration. Response was stricken by Bankruptcy Court as filed in violation of Local Bankruptcy Rule leaving appellants with no interest in bankruptcy proceedings. Appellant’s contention that dismissal with bar to refiling would prohibit appellants from potentially filing in voluntary petition. To the extent that bar may someday prohibit appellants from filing in voluntary petition, there is no evidence that bar has direct and immediate pecuniary impact on appellants at best, bar prevents appellants from potentially taking some action at some undetermined date in the future, which is not sufficient to confer standing.
- (7461) *White v. Corcoran*, 2016 WL 6962754 (E.D. Mi. 2016) – Debtor-husband lacked standing to appeal on behalf of deceased wife where husband had not been appointed Personal Representative. Death of Debtor in pending Chapter 7 case does not abate liquidation and estate can be administered to same extent as if death had not occurred. However, only duly appointed personal representative has standing to represent interests of decedent. Fact that Debtor’s husband “is likely to be appointed” is not sufficient to allow husband to act for Debtor. Personal Representative’s powers do not commence until appointment, which had not yet occurred. Further, even duly appointed PR cannot appear on behalf of the decedent, but must retain counsel to act for decedent. Appeal filed by husband on behalf of himself and his deceased wife dismissed as to wife as husband had not been appointed PR and was attempting to represent the interests of his wife without retention of counsel.
- (7462) *White v. Corcoran*, 2016 WL 6962754 (E.D. Mi. 2016) – Standing in bankruptcy depends on whether party requesting relief has pecuniary interest in outcome of bankruptcy proceeding. Trustee is party in interest for purposes for appeals filed by Debtor where property in estate was insufficient to pay administrative expenses. Attorney for Trustee had separate, personal standing to appear in appeal that would impact estate’s ability to pay attorney fees awarded by bankruptcy court as appeal will directly impact attorney’s personal pecuniary interests. Death of Debtor in pending Chapter 7 case does not abate liquidation and estate can be administered to same extent as if death had not occurred. However, only duly appointed personal representative has standing to represent interests of decedent. Fact that Debtor’s husband “is likely to be appointed” is not sufficient to allow husband to act for Debtor. Personal Representative’s powers do not commence until appointment, which had not yet occurred. Further, even duly appointed PR cannot appear on behalf of the decedent, but must retain counsel to act for decedent. Appeal filed by husband on behalf of himself and his deceased wife dismissed as to wife as husband had not been appointed PR and was attempting to represent the interests of his wife without retention of counsel.
- (7463) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Standing is jurisdictional requirement and requires that appellant be directly and adversely affected pecuniarily by the order through diminishment of their property, increased burdens or impaired rights. Appeal of Bankruptcy Court Order concluding that Debtor’s interest in Trust was not property of estate, and that “probate exception” to Federal Jurisdiction precluded Bankruptcy Court from deciding issues regarding administration of Trust assets and possible surcharges by Trust against prior trustee directly affected Successor Trustee of Trust sufficient to support Trustee’s standing to participate in appeal.
- (7464) *Arlington Capital, LLC v. Bainton McCarthy, LLC*, Case No. 15-2543 (7th Cir. 2016) - Constitutional standing requires that party suffered injury in fact which is fairly traceable to the challenged action and that likely would be redressed by favorable decision. Injury must be more than speculative. Appellant lacks standing where no matter how the estate’s assets are disbursed, the appellant will not receive any distribution. General unsecured creditor lacked standing to appeal order awarding Trustee’s Attorney’s fees where amount of administrative expenses dwarfs total assets of estate, such that even if Attorney Fee Award was reversed in its entirety, there still would be insufficient assets to pay administrative claims, leaving no chance that unsecured creditors would receive payment. As outcome of appeal would not have any effect on position of unsecured creditors who will not receive any distribution either way, appellant lacked standing for purposes of appeal.
- (7465) *Cotter v. Stevenson*, 2016 WL 1084686 (E.D. Mi. 2016), *aff’d*, 2017 WL 8236168 (6th Cir. 2017) – Debtor lacks standing to appeal order approving trustee’s proposed resolution of claims where estate is insolvent and even if disputed claim were disallowed entirely, estate would not have surplus above amounts owed to creditors. Debtor lacked any direct pecuniary interest that would be adversely affected by settlement.

Appeal of order resolving claims dismissed for lack of standing.

- (7466) *Mandel v. Mastrogiovanni, Schorsch & Mersky*, Case No. 15-40864 (5th Cir. 2016) – Debtor in Chapter 7 normally lacks standing to object to proofs of claim or to appeal from orders allowing claims. However, where claim is also subject of adversary proceeding to except debt from discharge, and claim allowance would be binding on Debtor in any post-bankruptcy action if debt is excepted from discharge, Debtor is sufficiently “person aggrieved” for purposes of standing. “Person aggrieved” standard requires that person show direct and adverse impact of decision on person’s pecuniary interest. Debtor’s possible exposure if debt is excepted from discharge constitutes direct and adverse impact.
- (7467) *Simon v. Miller*, 2015 WL 4459368 (Bankr. E.D. Mi. 2015) – Party lacks standing to appeal order unless party is directly and pecuniarily affected by order. Creditor can appeal order allowing or disallowing claim if order impacts distribution to creditor. Party cannot appeal allowance or disallowance where party did not have direct claim against Debtor. Outcome of claim would, at most, tangentially impact rights of party where allowance of claim may produce distributions to third parties that would then reduce potential claims by third parties against party seeking to appeal.
- (7468) *Herrmann v. Corcoran*, Case No. 14-13688 (E.D. Mi. 2015) – Party who did not file proof of claim lacks standing to appeal distributions by Trustee to creditors.
- (7469) *In re O&S Trucking, Inc.*, Case No. 14-6036 (8th Cir. 2015) – Standing to appeal requires that appellant be person aggrieved by order being appealed. Party cannot appeal from judgment in its favor merely for purpose of obtaining review of finding she deems erroneous where findings are not necessary to support the decree. Debtor lacks standing to appeal confirmation of Debtor’s Chapter 11 plan. If Debtor wants to preserve right of appeal, Debtor must present plan, and after confirmation is denied promulgate a different plan, object to that plan, and appeal the confirmation order.
- (7470) *Land & Mining Company, Ltd. V. Hooker*, 2014 WL 7399050 (6th Cir. 2014) – Chapter 7 trustee holds exclusive right to assert Debtor’s position on appeal. Parties to pending appeal must file motion for substitution to insert Chapter 7 trustee as party to appeal.
- (7471) *LorCon LLC #1 v. Heyl*, 2014 WL 5354040 (8th Cir. 2014) – Appellate standing requires that party be directly and adversely affected pecuniarily by outcome of appeal. Principal of LLC lacked standing to appeal decision of Bankruptcy Court that obligation owed by Debtor to LLC was dischargeable. LLC was not party to appeal. Further, appellant was not an attorney and could not represent interest of LLC in appeal even if LLC remained party.
- (7472) *Willess v. U.S.*, Case No. 13-6159 (10th Cir. 2014) – Debtor lacked standing to appeal dismissal of personal injury action where Debtor filed bankruptcy after date on which injury occurred and cause of action became property of estate. Only the Chapter 7 Trustee has standing to pursue recovery of cause of action that accrued prior to commencement of case where cause of action has not been abandoned.
- (7473) *In re Brown*, Case No. 13-8037 (6th Cir. BAP 2014) – Standing requires that person be aggrieved by the bankruptcy Court Order, limiting standing to those who are directly and adversely affected pecuniarily or where order diminishes a person’s property, increases his burdens, or impairs his rights. Insolvent Debtor does not have standing to appeal order granting relief from stay, as any property interest would be that solely of estate and not Debtor. Property remained property of estate and had not been abandoned either by abandonment or by closing of case. Even if appeal were successful, it would not produce any surplus proceeds beyond those necessary to pay claims and would not generate any income or proceeds for Debtor.
- (7474) *In re Meridian Venture Partners, LLC*, Case No. 13-8021 (6th Cir. BAP 2013) – Appellate standing requires that appellant be “person aggrieved” meaning that outcome of appeal will impact appellants pecuniary interest. Appellant lacked standing where connection to Debtor was solely as attorney for Debtor and managing agent, but appellant admittedly was not an owner or any equity interest, where the only equity holder in the Debtor was a trust. To extent dismissal order may have been erroneous, only the Debtor was aggrieved party. Role of appellant as attorney, managing agent or beneficiary of trust that was the owner of the Debtor did not result in injury to appellant. Debtor was lawfully formed LLC that had existence independent of the interests of the equity holders, such that equity holders, while they may have been indirectly affected by dismissal, had at most an indirect interest in the appeal insufficient to convey standing.
- (7475) *Kahn v. Regions Bank*, 2013 WL 5942052 (6th Cir. 2013) – Standing to appeal requires that party seeking to appeal have a pecuniary interest in outcome of appeal. Debtor lacked pecuniary interest in appeal overruling an objection to claim where estate was insolvent such that regardless of whether objection to claim was sustained, Debtor would not receive any distributions from estate.
- (7476) *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.
- (7477) *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.
- (7478) *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.
- (7479) *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.

- (7480) *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.
- (7481) *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.
- (7482) *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.
- (7483) *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.
- (7484) *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.
- (7485) *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.
- (7486) *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.
- (7487) *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.
- (7488) *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.
- (7489) *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.
- (7490) *Wilhelm v. Urich* – 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.
- (7491) *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.
- (7492) *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.

- (7493) *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.
- (7494) *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.
- (7495) *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.
- (7496) *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.
- (7497) *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 Standing-Failure to Appear or Object

- (7498) *Reed & Hellyer APC v. Laski* Case No. 16-56856 (9th Cir. 2018) – Administrative Creditor forfeits right to appeal where creditor does not lodge objection to structured dismissal and proposed sale that left estate with no assets to pay administrative expenses. Proposed dismissal presented unusual legal issue as creditor’s committee would benefit from structured dismissal that set aside funds for partial payments on unsecured claims but left no money for payment of committee counsel’s attorney fees. Committee counsel did not withdraw as counsel for committee or object (which would have placed counsel in conflict situation by opposing settlement that would benefit committee).
- (7499) *Harkey v. Grobstein*, Case No. 16-56321 (9th Cir. 2018) - Appellate standing depends on whether person is “aggrieved” not whether one attends hearing or objects to request for relief. Appellant had pecuniary interest in contract which Chapter 7 Trustee sought to assume but did not file objections or appear in Court. Appellants had standing to appeal, although appellants may have waived issues on appeal or forfeited objections which could have been made. District Court directed to determine whether appellant forfeited opposition to assumption motion and whether Bankruptcy Courts Order allowing assumption of the lease would be reversed for “plain error”.

13.3 In Forma Pauperis

- (7500) *Rowan v. U.S. Bankruptcy Court*, 2016 WL 1181790 (W.D. Tn. 2016) – Appellant can proceed *in forma pauperis* without paying filing fee if court whose order is to be reviewed certifies that appeal is taken in good faith and is not frivolous. District court that dismissed complaint as frivolous in first instance would not certify matter for appeal, as it would be inconsistent to dismiss action as frivolous but then certify that action has sufficient merit to warrant appeal.
- (7501) *Edwards v. Lasky*, 2016 WL 880020 (S.D. Ohio 2016) – Court has authority in appeal filed *in forma pauperis* to sua sponte review documents to determine if action must be dismissed as frivolous or malicious, fail to state claim, or seek monetary relief against immune defendant. Plaintiff’s “complaint” appeared to be appeal of order dismissing Chapter 13 petition but did not state any factual basis for any alleged error or bias of Bankruptcy Court. Plaintiff also requested that opposing attorneys be disbarred but failed to allege any factual basis for that relief. Complaint did not raise any plausible claim or advance any basis to support finding that appeal was taken in good faith.
- (7502) *Byers v. Byers*, 2015 WL 3917281 (S.D. Ohio 2015) – Request to proceed *in forma pauperis* denied without prejudice where Debtor failed to file affidavit demonstrating inability to pay filing fees. While party is not required to be absolutely destitute or to contribute the last dollar the party has or can get, party is required to demonstrate that because of poverty party cannot both pay the fee and maintain basic necessities.
- (7503) *McDermott v. Taylor*, Case No. 14-4124 (Bankr. E.D. Mi. 2015) – Court can waive filing fee on appeal only where appeal is taken in good faith. Good faith is objective standard and requires that appeal not be frivolous or that appeal presents substantial question of law or fact. Appeal based on argument that “there is no lawful currency in the United States” is frivolous and lacks good faith.
- (7504) *In re Byers*, 2014 WL 5302971 (Bankr. S.D. Ohio 2014) – Court can waive payment of filing fee for appeal where appellant files affidavit that describes all assets of the person and states that the person is unable to pay the filing fee. Courts will consider factors such as accuracy

of information provided by movant and discrepancies in that information; collateral resources such as family or friends who may be called on to provide assistance; and movant's expenses including whether any of them could be redirected to pay the filing fee. Party with assets sufficient to serve as resource for payment of fees not entitled to waiver. Movant's affidavit was materially misleading as it stated that movant was paying various expenses that movant was not, in fact, paying. Further movant had means to pay filing fee where movant recently received substantial insurance proceeds from a car accident; movant spends money on golf outings and dining out; her budget for food and clothing are higher than normally found for one person; and movant had substantial assets including a boat and trailer and "highly valuable" household goods including furniture and antiques that movant had given to her children. Although movant was currently employed and working 12-20 hours per week at \$10 per hour, there was no reason why she could not obtain more gainful employment where she had 14 years of education and possessed, at least, a realtor license. Appeal would also appear frivolous where movant sought to appeal from order dismissing adversary complaint objecting to discharge yet movant never caused the complaint or the summons to be served on Debtor or Debtor's counsel.

- (7505) *In re Jackson*, 2014 WL 3579294 (Bankr. W.D. Mi. 2014) – Court has authority under Judicial Conference Rules to waive filing fees for appeals where appellant establishes income is less than 150% of the official poverty line and that appellant otherwise lacks assets from which filing fee can be paid. Court could not waive \$5.00 fee for the notice of appeal as that fee is imposed by statute and court lacks authority to waive fees imposed by statute versus those imposed by the Judicial Conference.
- (7506) *In re McClendon*, 2014 WL 1646957 (Bankr. E.D. Mi. 2014) – To obtain leave to file appeal without payment of filing fee, proposed appellant must demonstrate that request is filed in good faith, meaning that appeal is not frivolous or that it presents a substantial question. Order denying Debtor's motion to waive filing fee to start bankruptcy case proper and not subject to good faith dispute where Debtor's own schedules showed that Debtor had more than \$7,300 in non-exempt assets in from of tax refund that could be used to pay filing fee, yet Debtor did not pay filing fee notwithstanding multiple opportunities provided to do so.
- (7507) *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.
- (7508) *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.
- (7509) *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.
- (7510) *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.
- (7511) *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.
- (7512) *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.

13.4 Waiver of Right to Appeal

- (7513) *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".

13.5 Cross-Appeal

- (7514) *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.

13.6 Certification of Direct Appeal to Circuit Court

- (7515) *In re Adkins*, 2014 WL 4446271 (Bankr. N.D. Tx. 2014) – Bankruptcy court could certify matter for direct appeal to circuit court where issue is question of law on which there is no controlling decision by the circuit court or the Supreme Court; the matter is one of great public importance; the issue is one where there are conflicting decisions; or circumstances exist such that immediate appeal will materially advance progress of case. If any of the four conditions are met, 28 USC Section 158 requires certification. Issue of whether adversary defendant violated stay by bringing third party action against a Debtor in a related case in the same court as that in which the third-party defendant’s own bankruptcy case is filed is violation of stay is issue on which there is no controlling decision. Case raised substantial questions as to whether actions taken within bankruptcy case can themselves be stay violations

B. Appellate Jurisdiction

13.7 Generally

- (7516) *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.

13.8 Bankruptcy Appellate Panel

- (7517) *Samulak v. Carrington Mortgage Services, LLC*, 2018 WL 827807 (E.D. Mi. 2018) – Party may elect to have appeal proceed before BAP only in districts that have authorized appeals by BAP. Party’s request to have appeal heard by BAP of no effect where Eastern District of Michigan does not participate in BAP.

13.9 Exceptions

- (7518) *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.

13.10 Content of Notice of Appeal

- (7519) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 6158963 (E.D. Mi. 2016) – Motion for rehearing of appellate court must demonstrate palpable error by which the court and other parties were misled such that correction of the defect will result in different disposition; and must not be mere presentation of same issues ruled on by Court either expressly or by implication. Court did not err in concluding that Appellant failed to demonstrate the Bankruptcy Court’s Order Denying Rehearing was error. Notice of appeal designated Order to be reviewed as Order Denying Rehearing, and did not designate the underlying Order Granting Summary Judgment. Brief to appellate court was directed entirely to correctness of underlying order and did not address any argument about whether Bankruptcy Court erred in denying Motion for Reconsideration or even present correct standard of review when considering appeal of Order Denying Reconsideration. Motion demonstrated neither point of law that was overlooked or any other defect in appellate court’s affirmance of Bankruptcy Court Order Denying Rehearing. Bankruptcy Court also did not err in refusing to consider affidavit of Debtor that was not filed until after summary judgment was granted.
- (7520) *McKinstry v. Richard Holmes Enterprises, LLC*, 2016 WL 3448287 (E.D. Ky. 2016) – Notice of Appeal must attach copy of order being appealed. However, order appealed necessarily includes all prior non-final rulings and orders. Appeal of Order dismissing case as sanction for failure to comply with prior sanctions order necessarily involved correctness of prior sanctions order which was not- itself- a final order. Court had appellate jurisdiction over propriety of sanctions order as adjunct to appeal of Order Dismissing Case.
- (7521) *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.
- (7522) *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.
- (7523) *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.
- (7524) *Matthews v. Educational Credit Management Corp.*, 2011 WL 197835 (E.D. Ky. 2011), *aff’d* Case No. 11-6218 (6th Cir. 2013) – From of notice of appeal is jurisdictional. From 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.

13.11 Certification for Direct Appeal

- (7525) *Lynch v. Jackson*, Case No. 16-1358 (4th Cir. 2017) – 28 USC Section 158 allows for Bankruptcy Court to certify direct appeal to Circuit Court where all parties jointly certify that the order involves a controlling question of law as to which there is no controlling decision of the Court of Appeals or the Supreme Court or involves a matter of great public importance; question requires resolution of conflicting decisions; or immediate appeal may materially advance progress of case. Parties certified that there was no controlling authority and there was split of decisions within bankruptcy courts in Eastern District of North Carolina creating grounds for direct certification. Delay in filing Request for Direct Certification with Circuit Court was not grounds to deny certification or dismiss appeal where notice of appeal was timely and certification were timely filed, although certification was filed in Bankruptcy Court rather than Circuit Court.
- (7526) *Rogers v. United States Bankruptcy Court*, 2016 WL 3549484 (E.D. MI. 2016) – Court would not certify for appeal an Order summarily dismissing plaintiff's complaint. 28 USC Section 1915 allows court to permit commencement of civil action without payment of fees if applicant submits an affidavit demonstrating that he or she is unable to pay the fees or give security for payment of fees. Plaintiff's affidavit which provides that he is not employed, receives no income, and has no savings or checking account; and has debts totaling \$65,000 sufficient to allow Court to waive filing fees. Plaintiff's Application to Proceed without Prepayment of Fees or Costs. 28 USC Section 1915 requires in any case where the filing fee is waived that the Court, dismiss the complaint if it is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. Complaint sought to contest validity of Bankruptcy Court Order that barred Plaintiff from acting as a Bankruptcy Petition Preparer. District Court lacks authority to review or disturb bankruptcy Court Order other than through appeal of that order. Plaintiff previously appealed Bankruptcy Court Order to District Court and Order was affirmed. Plaintiff failed to state cause of action in this collateral attack on validity of bankruptcy court judgment.
- (7527) *Buchwald Capital Advisors, LLC v. Papas*, Case No. 15-14289 (E.D. Mi. 2016) – Bankruptcy Rule 8006 requires that request for certification for direct appeal must be brought in court in which matter is pending. Where notice of appeal is filed either before request for certification or after request but before bankruptcy court issues order, action is "pending" before district court and is proper court to which request is presented. Certification is warranted only where the order involves a controlling issue of law without significant factual issues, there are questions of law with conflicting decisions, or immediate appeal may materially advance progress of litigation. Direct appeal is not favored as doing so circumvents the percolation of the issues through the District Court process. Request denied where outcome required resolution of far more than just issues of law as outcome was highly factual dependent and there were substantial issues of fact underlying legal conclusions as evidenced by 1900-page record on appeal. Request did not point to any split among bankruptcy courts on a controlling issue of law or matter of public importance. Only argument was that given contentious nature of litigation, issue was likely going to end up at circuit court anyway, was not basis for direct appeal.
- (7528) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – 28 USC Section 158 allows for Bankruptcy Court to certify appeal directly to Circuit Court where the judgment or order involves a question of law as to which there are no controlling decisions of the Supreme Court or the circuit courts of appeals; or where the appeal involves matter of public interest. Motion denied where motion failed to allege any basis for direct appeal.

13.12 Jurisdiction of Lower Court Pending Appeal

- (7529) *Akers v. Hildebrand*, 2018 WL 2363976 (M.D. Tn. 2018) - Notice of Appeal divests Lower Court of jurisdiction to enter orders that affect or modify decision being appealed. However, Lower Court is not completely divested of jurisdiction to enter Orders unrelated to Order being appealed. Appeal of Order Denying Confirmation of Chapter 13 Plan did not preclude Bankruptcy Court from granting stay relief after case converted to Chapter 7. Stay Relief Order addressed issues that Bankruptcy Court did not rule on in denying confirmation.
- (7530) *Town Center Flats, LLC v. ECP Commercial II, LLC*, Case No. 16- 14474 (E.D. Mi. 2017) - Court has jurisdiction over final Orders. Earlier Bankruptcy Court Order which determined ownership of rents was final, appealable Order currently on appeal to Sixth Circuit. Bankruptcy Court's subsequent Order directing Debtor to separate rents from bankruptcy estate was nonfinal and non-appealable, as jurisdiction over prior Order and all attendant matters had been transferred to Sixth Circuit.
- (7531) *Cox v. Nostaw, Inc.*, Case No. 16-1389 (7th Cir. 2017) - Settlement of bankruptcy dispute while matter is on appeal at Circuit Court requires approval of three separate courts. Federal Rule of Appellate Procedure 12.1 allows the Circuit Court to remand the proceeding to the District Court if the District Court indicates that it would grant the motion to approve the settlement if the Circuit Court remands for further proceedings. Rule 12.1 then requires similar order from Bankruptcy Court. Proper procedure for winning remand to District Court to approve settlement is to obtain indicative ruling from both Bankruptcy Court and District Court and then to file motion in Circuit Court for Remand under Rule 12.
- (7532) *In re Jackson*, 2017 WL 383346 (Bankr. W.D. Mi. 2017) – Bankruptcy Court will normally keep the case is open during pendency of any appeals but neither statute nor rules require Court do so. Court would close Chapter 7 case notwithstanding appeal by Debtor regarding Debtor's adversary proceeding against Wells Fargo where appeal was frivolous, over two years had passed since Chapter 7 Trustee filed "no asset report" and requested to be discharged as Trustee, and the Chapter 7 estate had been fully administered. There was no reason not to discharge Trustee based on status of case as case was long overdue to be closed.

(7533) *McKinstry v. Richard Holmes Enterprises, LLC*, 2016 WL 3448287 (E.D. Ky. 2016) – If order is final order and one party seeks reconsideration under Rule 9023, notice of appeal filed during pendency of Rule 9023 motion does not take effect and does not divest lower court of jurisdiction to alter or amend order. If Order is non-final order, 28 USC Section 158 provides that appellate court does not assume jurisdiction until court grants leave to appeal. During gap between notice of appeal and court's grant of leave to appeal, jurisdiction remains vested in lower court and lower court has authority to modify, alter or amend order.

(7534) *In re Licking River Mining, LLC*, 2015 WL 5001009 (Bankr. E.D. Ky. 2015) – In general, filing notice of appeal divests lower court of jurisdiction over aspects of case involved in appeal. Purpose is to avoid two courts adjudicating same issue at same time. Bankruptcy court lacks jurisdiction to vacate or modify an order which is the subject of a pending appeal and cannot reconsider that issue even in the context of another Order. Bankruptcy court retains jurisdiction to enforce, implement, and otherwise treat as valid judgments and orders that are the subject of pending appeals, as long as that enforcement and implementation does not require re-deciding issues that are on appeal. Court previously determined that carve out for Chapter 11 professional fees allowed fees to be paid from both pre-petition and post-petition collateral of lender and lender appealed. During pendency of appeal, Court determined amount of fees and ordered fees to be paid from the carve out collateral. Bankruptcy court retained jurisdiction to award fees and direct payment from carve out as order was mere implementation of prior order and did not require court to re-determine any issue that was pending at the appellate court.

13.13 Jurisdiction of Lower Court Pending Appeal – Rule 8008

(7535) *In re Minor*, 2016 WL 3462068 (Bankr. N.D. Ohio 2016) – Court lacks authority to set aside or alter order after appeal has been taken. However, under Bankruptcy Rule 8008, Court may make an indicative ruling on pending motion to vacate order. Rule 8008 allows Court to enter order on a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending. Court may: (1) defer considering the motion; (2) deny the motion; or (3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue. Court would grant Motion and enter order stating that Court would vacate order approving sale of property if appellate court remands for that purpose, where plan as confirmed surrendered property “to” secured creditor and Debtor thereafter filed motion to sell property to third party. Time for Filing Appeal

13.14 Bar to Filing

(7536) *In re Chaban*, 2017 WL 2544334 (E.D. Mi. 2017) – Court has constitutional duty to protect jurisdiction from conduct that impairs ability to carry out judicial functions. Court can impose carefully tailored restrictions on filing to curb abusive behaviors but cannot absolutely foreclose party from initiating action in court. Instead, court can require one who has abused process to make showing that tendered lawsuit is not frivolous or vexatious before permitting it to be filed. Factors to consider include litigant's history of vexations, harassing or duplicative lawsuits; whether litigant has objective, good-faith expectation of prevailing; whether litigant is represented by counsel; whether litigant has caused needless expenses to other parties or imposed unreasonable burden on court and whether other sanctions would be adequate to protect court and other parties. Court would grant leave to appeal notwithstanding prior order requiring Debtor to obtain court permission where although Debtor had filed four prior appeals, all of which were unsuccessful, Debtor had not yet become the kind of serial filer for whom appeals would be enjoined, and court had not considered lesser sanctions that may be adequate to curb Debtor's abuse of process.

13.15 Filing Before Order Entered

(7537) *Miller v. Deutsche Bank National Trust Co.*, 2014 WL 4251612 (10th Cir. 2014) – Where notice of appeal is filed while Motion for Rehearing is pending, appeal is held in abeyance until Motion for Rehearing is decided. If appellant fails to file new or amended notice of appeal following order on reconsideration, appellate court lacks jurisdiction to review order on reconsideration and is limited to issues arising out of initial final judgment.

(7538) *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.

(7539) *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.

(7540) *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.

13.16 “Separate Document” Rule

(7541) *Potter v. Barton*, Case No. 14-80091 (Bankr. W.D. Mi. 2014) – Federal Rule of Civil Procedure 58, incorporated by reference in Rule 7058, requires that any final judgment be set out in separate document. Judgment is deemed entered when separate document is entered on the court docket. Time to file notice of appeal is 14 days if separate document is entered. If no separate document is entered on the docket, then the time to appeal is 150 days from court's ruling.

13.17 Deadline for Notice of Appeal

(7542) *In re Jackson*, 2018 WL 2172693 (6th Cir. BAP 2018) – 28 USC Section 158 requires notice of appeal to be filed within time specified in Federal Rule of Bankruptcy Procedure 8002. Time limits specified in rules are generally non-jurisdictional as only Congress may determine Federal Court jurisdiction. However, statute that incorporates rule that has deadline affirmatively sets time limit is evidence of congressional intent to limit court's jurisdiction. 28 USC Section 158's incorporation of Rule 8002 affirmatively sets time limit on ability of District Court

or bankruptcy appellate panel to hear appeals. Notice of appeal filed 28 days after entry of order appealed is untimely requiring appeal to be dismissed.

- (7543) *In re Smith*, 2018 WL 1942176 (N.D. Ohio 2018) – Rule 8002 sets deadline for notice of appeal as 14 days after entry of order appealed. Order Vacating Discharge was final order for appellate purposes. Notice of Appeal filed 104 days after entry of Order was untimely, depriving appellate court of jurisdiction and requiring dismissal of appeal.
- (7544) *Samulak v. Carrington Mortgage Services, LLC*, 2018 WL 827806 (E.D. Mi. 2018), *reh'g denied*, Case No. 17-13771 (E.D. Mi. 2018) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order was correctly served where Court Docket indicated that Order was served both by ECF and by United States Mail, such that even if Appellant did not receive electronic copy because of computer issues, he still received hard copy in time to file either Notice of Appeal or Motion to Extend Time but did neither. Court lacks jurisdiction over appeal that is not timely filed, requiring dismissal of appeal.
- (7545) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order becomes final on entry or, if Motion for Reconsideration is filed within 14 days of entry of Order, upon disposition of Motion of Reconsideration. Once initial Motion for Reconsideration denied, successive Motions do not further toll time for filing Notice of Appeal. Absent timely Notice of Appeal, Appellate Court lacks jurisdiction to consider matter and Lower Court Order becomes final. Plaintiff's Notice of Appeal untimely where Order Denying Plaintiff's Motion for Judgment on Pleadings, Order Granting Sections against Plaintiff for Discovery Violations; and Order Dismissing Case were all entered more than 14 days before Notice of Appeal filed. Although Plaintiff timely filed Motion for Rehearing of Order Dismissing Case, that Motion was disposed of on September 13, and Plaintiff filed Notice of Appeal on October 14.
- (7546) *Schwab Industries v. Huntington National Bank*, 679 Fed. Appx. 397 (6th Cir. 2017) – Rule 8002 requires notice of appeal to be filed within 14 days after entry of the order being appealed. Notice of appeal filed 16 days after entry of order dismissing case was untimely resulting in dismissal of appeal. Appellant's contention that Bankruptcy Court lacked jurisdiction to enter final order in *Stern* claim did not prevent dismissal order from constituting "final" order under Rule 8002 or convert dismissal order into interlocutory order for which Rule 8002 deadline does not apply. Pendency of Motion for Sanctions does not prevent dismissal order from being "final" as dismissal order terminated all proceedings in adversary proceeding and sanctions motion was collateral to proceedings.
- (7547) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Order is appealable when it ends litigation and leaves nothing for court to do but execute on judgment. Notice of appeal from District Court to Circuit Court must be filed within 30 days after entry of Order or judgment. Post-judgment motions under rules 52 and 59 suspend deadline to file notice of appeal until 30 days after those motions are disposed of. Bankruptcy Court issued opinion on November 30, 2015; and issued Order Entering Relief based on the Opinion on January 22, 2016. Defendant filed a Motion to vacate the Order under Rule 54 and 59 that was denied by Bankruptcy Court on March 10, 2016. At that point, the appealed order became final as all post-judgment motions had been disposed of, and March 10, 2016, stated the 30 day deadline to file a notice of appeal. Notices of appeal filed before March 10 became effective on March 10 pursuant to Rule 4(a).
- (7548) *Underwood v. Selent*, Case no. 15-10155 (E.D. Mi. 2015) – Appeal dismissed where Debtor failed to timely file Notice of Appeal and Bankruptcy Court denied Motion to Extend Time to file Notice of Appeal as motion failed to demonstrate excusable neglect. District Court lacked jurisdiction over appeal.
- (7549) *Montedonico v. Blasingame*, 2015 WL 249495 (6th Cir. BAP 2015) – Federal Rule of Civil Procedure 58, incorporated by reference in Bankruptcy Rule 7058, requires entry of a separate judgment in adversary proceeding or other contested matter, other than specific matters listed in the rule. To qualify under Rule 58, document apart from the memorandum or opinion must be entered which does not cite legal authority or any other language beyond the award of the judgment itself. Thirty page Order that explained legal reasoning and factual basis for award of sanctions, and later shorter orders that imposed sanctions and contained procedural history for basis of award did not meet requirements of "separate document". Where court did not enter separate order, order becomes final and appealable 150 days from entry of the order in the court docket. Deadline for filing notice of appeal 14 days after running of time, or 164 days total from entry of order that is not "separate document". Notice of appeal filed 45 days after entry of later orders that were not "separate documents" was timely.
- (7550) *Hamid v. Deutsche Bank National Trust Co.*, 2014 WL 2937798 (4th Cir. 2014) – Timely filing of notice of appeal is jurisdictional. Where Debtor failed to file notice of appeal by deadline, Court correctly dismissed appeal.
- (7551) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation order under Section 506 is a final order that is immediately appealable. However, where valuation is made in connection with plan confirmation process, appeal can also be taken after entry of order confirming or denying confirmation, even where that order is entered more than 14 days after entry of the valuation order.
- (7552) *In re Visteon Corp.*, 2014 WL 4244022 (3d Cir. 2014) – Party must file notice of appeal within time permitted. Court will not relieve party of consequences of decision not to appeal even if decision later proves to be improvident and court will not later set aside unappealed judgment because the judgment may have been wrong or rested on legal grounds subsequently overruled. Only exception is judgment that where the court lacked subject matter jurisdiction or where court acted inconsistent with due process of law.
- (7553) *Nielsen v. Iowa Student Loan Liquidity Corp.*, Case no. 13-2518 (8th Cir. 2014) – Rule 7058, which incorporates Rule 58 in adversary proceedings, requires entry of separate written judgment. Written order is not deemed entered until separate judgment is entered. Where written judgment is required but not filed, order becomes final and appealable 150 days after entry of the order. Notice of appeal filed 16 days after entry of Order was timely where Court did not enter separate final judgment and Notice of Appeal was filed within 150 days of entry of Order.
- (7554) *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.

- (7555) *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.
- (7556) *Hills v. McDermott*, Case No. 12-13697 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of entry or order being appealed if order is final. Court's Order imposing sanctions is final order.
- (7557) *Lim v. DiMercurio*, 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.
- (7558) *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.
- (7559) *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.
- (7560) *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.
- (7561) *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.
- (7562) *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.
- (7563) *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.
- (7564) *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.
- (7565) *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.
- (7566) *Hann v. Michigan*, 2009 WL 2496666 (E.D. Mi. 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. A Motion for Rehearing filed within 10 days of rendition of order under Federal Rule of Bankruptcy Procedure 9023 extends the time for filing a Notice of Appeal until 10 days after entry of an Order on that Motion. An untimely Motion for Rehearing does not extend the time for filing a Notice of Appeal. Debtor's Motion for Rehearing filed 14 days after entry of the order and Notice of Appeal filed 15 days from rendition of order left Appellate Court with no jurisdiction. Debtor's appeal dismissed as jurisdictionally barred.
- (7567) *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.
- (7568) *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.

- (7569) *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.

13.18 Effect of Motion for New Trial or Amendment of Judgment

- (7570) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order becomes final on entry or, if Motion for Reconsideration is filed within 14 days of entry of Order, upon disposition of Motion of Reconsideration. Once initial Motion for Reconsideration denied, successive Motions do not further toll time for filing Notice of Appeal. Absent timely Notice of Appeal, Appellate Court lacks jurisdiction to consider matter and Lower Court Order becomes final. Plaintiff's Notice of Appeal untimely where Order Dismissing Case was entered in August. Although Plaintiff timely filed Motion for Rehearing of Order Dismissing Case, that Motion was disposed of on September 13, and Plaintiff filed Notice of Appeal on October 14.
- (7571) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Order is appealable when it ends litigation and leaves nothing for court to do but execute on judgment. Notice of appeal must be filed within 30 days after entry of Order or judgment. Post-judgment motions under rules 52 and 59 suspend deadline to file notice of appeal until 30 days after those motions are disposed of. Bankruptcy Court issued opinion on November 30, 2015; and issued Order Entering Relief based on the Opinion on January 22, 2016. Defendant filed a Motion to vacate the Order under Rule 54 and 59 that was denied by Bankruptcy Court on March 10, 2016. At that point, the appealed order became final as all post-judgment motions had been disposed of, and March 10, 2016, stated the 30 day deadline to file a notice of appeal. Notices of appeal filed before March 10 became effective on March 10 pursuant to Rule 4(a).
- (7572) *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.
- (7573) *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.
- (7574) *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.
- (7575) *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.

13.19 Motion for Leave to File Untimely Notice of Appeal

- (7576) *Community Financial Services Bank v. Edwards*, 2018 WL 2717237 (6th Cir. BAP 2018) – Rule 8002 (d)(1) allows Court to extend the time for filing Notice of Appeal on Motion filed within deadline to file Notice of appeal; or within 21 days after deadline to file Notice of Appeal if party shows excusable neglect. Excusable neglect is strict standard met only in extraordinary cases and does not include ignorance or mistakes in construing the rules; attorneys busy work schedule; or clerical errors. Order to be appealed was entered July 17, 2017. 14 day deadline to file Notice of Appeal expired July 31, 2017. Moving did not file Motion requesting extension of time until August 16, 2017, 30 days after judgment was entered and 16 days after original deadline. Motion to Extend Deadline to file Notice of Appeal is vested in Bankruptcy Court's discretion and is reviewed for abuse of discretion. Moving party must demonstrate excusable neglect for failing to file Notice of Appeal in timely manner, considering danger of precedents to non-movement; length of delay and potential impact on judicial proceedings; reason for delay including whether it was within reasonable control of movement; and whether movement acted in good faith. No one factor is dispositive and Court must consider all 4 factors, although reason for delay is given greatest import. Bankruptcy Court did not air in denying motion even where granting motion would not materially prejudice other party; delay was not substantial as Motion was filed within 16 days of passage of appeal deadline; and appeal was taken in good faith when sincere desire to seek review of judgment. However, delay was entirely within movants control where movement had timely notice of entry of Order to be appealed and only explanation was difficulty in finding attorney to prosecute appeal. Moving party could have requested extension before running of deadline and movants allegation that he had busy work schedule did not constitute excusable neglect or otherwise prevent movement from acting within time allowed under rules.
- (7577) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Rule 8002 requires motion to extend time to file appeal be filed within 14 days after entry of order; or an additional 21 days if party shows excusable neglect. Appellant filed Motion 26 days after entry of order and appellant failed to demonstrate any excusable neglect in failing to file either the Notice of Appeal or the Motion to Extend within the initial 14 day period.
- (7578) *Hobbs v. County of Summit*, 2014 WL 3735149 (N.D. Ohio 2014) – Court can extend deadline for filing notice of appeal under Federal Rule of Appellate Procedure 4 if the appellant files a motion to extend time within 30 days after expiration of initial deadline and shows excusable neglect or good cause. Appellant showed good cause where appellant missed initial filing deadline by one day based on erroneous information provided by the Court as to the last day to file the notice. Appellant acted diligently in immediately filing Motion to Extend upon being advised that initial date provided by court was incorrect and notice was untimely. It is not "unreasonable" neglect to rely on Court Orders and representations, and is excusable where reliance on court's clear statements resulted in missing deadline by one day.

Granting motion would not prejudice other parties to action as issues are purely ones of law, such that there is no danger that witnesses may be unavailable or evidence lost if Appellant prevails in the now-delayed appeal.

- (7579) *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.
- (7580) *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.
- (7581) *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.
- (7582) *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.
- (7583) *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.

13.20 Deadline – Direct Appeal to Circuit Court

- (7584) *Lynch v. Jackson*, Case No. 16-1358 (4th Cir. 2017) – 28 USC Section 158 allows for Bankruptcy Court to certify direct appeal to Circuit Court where all parties jointly certify that the order involves a controlling question of law as to which there is no controlling decision of the Court of Appeals or the Supreme Court or involves a matter of great public importance; question requires resolution of conflicting decisions; or immediate appeal may materially advance progress of case. Parties certified that there was no controlling authority and there was split of decisions within bankruptcy courts in Eastern District of North Carolina creating grounds for direct certification. Delay in filing Request for Direct Certification with Circuit Court was not grounds to deny certification or dismiss appeal where notice of appeal was timely and certification were timely filed, although certification was filed in Bankruptcy Court rather than Circuit Court.

C. Time for Filing Appeal

13.21 Bar to Filing

- (7585) *In re Chaban*, 2017 WL 2544334 (E.D. Mi. 2017) – Court has constitutional duty to protect jurisdiction from conduct that impairs ability to carry out judicial functions. Court can impose carefully tailored restrictions on filing to curb abusive behaviors but cannot absolutely foreclose party from initiating action in court. Instead, court can require one who has abused process to make showing that tendered lawsuit is not frivolous or vexatious before permitting it to be filed. Factors to consider include litigant’s history of vexations, harassing or duplicative lawsuits; whether litigant has objective, good-faith expectation of prevailing; whether litigant is represented by counsel; whether litigant has caused needless expenses to other parties or imposed unreasonable burden on court and whether other sanctions would be adequate to protect court and other parties. Court would grant leave to appeal notwithstanding prior order requiring Debtor to obtain court permission where although Debtor had filed four prior appeals, all of which were unsuccessful, Debtor had not yet become the kind of serial

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filer for whom appeals would be enjoined, and court had not considered lesser sanctions that may be adequate to curb Debtor's abuse of process.

13.22 Filing Before Order Entered

- (7586) *Miller v. Deutsche Bank National Trust Co.*, 2014 WL 4251612 (10th Cir. 2014) – Where notice of appeal is filed while Motion for Rehearing is pending, appeal is held in abeyance until Motion for Rehearing is decided. If appellant fails to file new or amended notice of appeal following order on reconsideration, appellate court lacks jurisdiction to review order on reconsideration and is limited to issues arising out of initial final judgment.
- (7587) *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.
- (7588) *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.
- (7589) *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.

13.23 "Separate Document" Rule

- (7590) *Potter v. Barton*, Case No. 14-80091 (Bankr. W.D. Mi. 2014) – Federal Rule of Civil Procedure 58, incorporated by reference in Rule 7058, requires that any final judgment be set out in separate document. Judgment is deemed entered when separate document is entered on the court docket. Time to file notice of appeal is 14 days if separate document is entered. If no separate document is entered on the docket, then the time to appeal is 150 days from court's ruling.

13.24 Deadline for Notice of Appeal

- (7591) *Legacy v. Nathan*, 2018 WL 3770057 (E.D. Mi. 2018) – 11 USC Section 158(c)2 requires notice of appeal to be filed within time specified by Rule 8002. Oh 8002 requires notice of appeal be filed within 14 days after entry of judgment being appealed. Notice of appeal filed 61 days after entry of order is untimely and must be dismissed. Appellant did not present any basis to toll time for filing appeal where appellant argued that he did not receive notice of entry of order but appellant had substantial information concerning and involvement in proceedings related to entry of order.
- (7592) *In re Jackson*, 2018 WL 2172693 (6th Cir. BAP 2018) – 28 USC Section 158 requires notice of appeal to be filed within time specified in Federal Rule of Bankruptcy Procedure 8002. Time limits specified in rules are generally non-jurisdictional as only Congress may determine Federal Court jurisdiction. However, statute that incorporates rule that has deadline affirmatively sets time limit is evidence of congressional intent to limit court's jurisdiction. 28 USC Section 158's incorporation of Rule 8002 affirmatively sets time limit on ability of District Court or bankruptcy appellate panel to hear appeals. Notice of appeal filed 28 days after entry of order appealed is untimely requiring appeal to be dismissed.
- (7593) *In re Smith*, 2018 WL 1942176 (N.D. Ohio 2018) – Rule 8002 sets deadline for notice of appeal as 14 days after entry of order appealed. Order Vacating Discharge was final order for appellate purposes. Notice of Appeal filed 104 days after entry of Order was untimely, depriving appellate court of jurisdiction and requiring dismissal of appeal.
- (7594) *Samulak v. Carrington Mortgage Services, LLC*, 2018 WL 827806 (E.D. Mi. 2018), *reh'g denied*, Case No. 17-13771 (E.D. Mi. 2018) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order was correctly served where Court Docket indicated that Order was served both by ECF and by United States Mail, such that even if Appellant did not receive electronic copy because of computer issues, he still received hard copy in time to file either Notice of Appeal or Motion to Extend Time but did neither. Court lacks jurisdiction over appeal that is not timely filed, requiring dismissal of appeal.
- (7595) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order becomes final on entry or, if Motion for Reconsideration is filed within 14 days of entry of Order, upon disposition of Motion of Reconsideration. Once initial Motion for Reconsideration denied, successive Motions do not further toll time for filing Notice of Appeal. Absent timely Notice of Appeal, Appellate Court lacks jurisdiction to consider matter and Lower Court Order becomes final. Plaintiff's Notice of Appeal untimely where Order Denying Plaintiff's Motion for Judgment on Pleadings, Order Granting Sections against Plaintiff for Discovery Violations; and Order Dismissing Case were all entered more than 14 days before Notice of Appeal filed. Although Plaintiff timely filed Motion for Rehearing of Order Dismissing Case, that Motion was disposed of on September 13, and Plaintiff filed Notice of Appeal on October 14.
- (7596) *Schwab Industries v. Huntington National Bank*, 679 Fed. Appx. 397 (6th Cir. 2017) – Rule 8002 requires notice of appeal to be filed within 14 days after entry of the order being appealed. Notice of appeal filed 16 days after entry of order dismissing case was untimely resulting in dismissal of appeal. Appellant's contention that Bankruptcy Court lacked jurisdiction to enter final order in *Stern* claim did not prevent dismissal order from constituting "final" order under Rule 8002 or convert dismissal order into interlocutory order for which Rule 8002 deadline does not apply. Pendency of Motion for Sanctions does not prevent dismissal order from being "final" as dismissal order terminated all proceedings in adversary proceeding and sanctions motion was collateral to proceedings.
- (7597) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Order is appealable when it ends litigation and leaves nothing for court to do but execute on judgment. Notice of appeal from District Court to Circuit Court must be filed within 30 days after entry of Order or judgment.

Post-judgment motions under rules 52 and 59 suspend deadline to file notice of appeal until 30 days after those motions are disposed of. Bankruptcy Court issued opinion on November 30, 2015; and issued Order Entering Relief based on the Opinion on January 22, 2016. Defendant filed a Motion to vacate the Order under Rule 54 and 59 that was denied by Bankruptcy Court on March 10, 2016. At that point, the appealed order became final as all post-judgment motions had been disposed of; and March 10, 2016, stated the 30 day deadline to file a notice of appeal. Notices of appeal filed before March 10 became effective on March 10 pursuant to Rule 4(a).

- (7598) *Underwood v. Selent*, Case no. 15-10155 (E.D. Mi. 2015) – Appeal dismissed where Debtor failed to timely file Notice of Appeal and Bankruptcy Court denied Motion to Extend Time to file Notice of Appeal as motion failed to demonstrate excusable neglect. District Court lacked jurisdiction over appeal.
- (7599) *Montedonico v. Blasingame*, 2015 WL 249495 (6th Cir. BAP 2015) – Federal Rule of Civil Procedure 58, incorporated by reference in Bankruptcy Rule 7058, requires entry of a separate judgment in adversary proceeding or other contested matter, other than specific matters listed in the rule. To qualify under Rule 58, document apart from the memorandum or opinion must be entered which does not cite legal authority or any other language beyond the award of the judgment itself. Thirty page Order that explained legal reasoning and factual basis for award of sanctions, and later shorter orders that imposed sanctions and contained procedural history for basis of award did not meet requirements of “separate document”. Where court did not enter separate order, order becomes final and appealable 150 days from entry of the order in the court docket. Deadline for filing notice of appeal 14 days after running of time, or 164 days total from entry of order that is not “separate document”. Notice of appeal filed 45 days after entry of later orders that were not “separate documents” was timely.
- (7600) *Hamid v. Deutsche Bank National Trust Co.*, 2014 WL 2937798 (4th Cir. 2014) – Timely filing of notice of appeal is jurisdictional. Where Debtor failed to file notice of appeal by deadline, Court correctly dismissed appeal.
- (7601) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation order under Section 506 is a final order that is immediately appealable. However, where valuation is made in connection with plan confirmation process, appeal can also be taken after entry of order confirming or denying confirmation, even where that order is entered more than 14 days after entry of the valuation order.
- (7602) *In re Visteon Corp.*, 2014 WL 4244022 (3d Cir. 2014) – Party must file notice of appeal within time permitted. Court will not relieve party of consequences of decision not to appeal even if decision later proves to be improvident and court will not later set aside unappealed judgment because the judgment may have been wrong or rested on legal grounds subsequently overruled. Only exception is judgment that where the court lacked subject matter jurisdiction or where court acted inconsistent with due process of law.
- (7603) *Nielsen v. Iowa Student Loan Liquidity Corp.*, Case no. 13-2518 (8th Cir. 2014) – Rule 7058, which incorporates Rule 58 in adversary proceedings, requires entry of separate written judgment. Written order is not deemed entered until separate judgment is entered. Where written judgment is required but not filed, order becomes final and appealable 150 days after entry of the order. Notice of appeal filed 16 days after entry of Order was timely where Court did not enter separate final judgment and Notice of Appeal was filed within 150 days of entry of Order.
- (7604) *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.
- (7605) *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.
- (7606) *Hills v. McDermott*, Case No. 12-13697 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of entry or order being appealed if order is final. Court’s Order imposing sanctions is final order.
- (7607) *Lim v. DiMercuro*, 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.
- (7608) *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.
- (7609) *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.

- (7610) *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.
- (7611) *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.
- (7612) *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.
- (7613) *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.
- (7614) *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.
- (7615) *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.
- (7616) *Hann v. Michigan*, 2009 WL 2496666 (E.D. Mi. 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. A Motion for Rehearing filed within 10 days of rendition of order under Federal Rule of Bankruptcy Procedure 9023 extends the time for filing a Notice of Appeal until 10 days after entry of an Order on that Motion. An untimely Motion for Rehearing does not extend the time for filing a Notice of Appeal. Debtor’s Motion for Rehearing filed 14 days after entry of the order and Notice of Appeal filed 15 days from rendition of order left Appellate Court with no jurisdiction. Debtor’s appeal dismissed as jurisdictionally barred.
- (7617) *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.
- (7618) *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.
- (7619) *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.

13.25 Effect of Motion for New Trial or Amendment of Judgment

- (7620) *Lucas v. Liu*, 2017 WL 4018850 (E.D. Tn. 2017) – Deadline for filing Notice of Appeal is 14 days after Order appealed becomes final. Order becomes final on entry or, if Motion for Reconsideration is filed within 14 days of entry of Order, upon disposition of Motion of Reconsideration. Once initial Motion for Reconsideration denied, successive Motions do not further toll time for filing Notice of Appeal. Absent timely Notice of Appeal, Appellate Court lacks jurisdiction to consider matter and Lower Court Order becomes final. Plaintiff’s Notice of Appeal untimely where Order Dismissing Case was entered in August. Although Plaintiff timely filed Motion for Rehearing of Order Dismissing Case, that Motion was disposed of on September 13, and Plaintiff filed Notice of Appeal on October 14.
- (7621) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Order is appealable when it ends litigation and leaves nothing for court to do but execute on judgment. Notice of appeal must be filed within 30 days after entry of Order or judgment. Post-judgment motions under rules 52 and 59 suspend deadline to file notice of appeal until 30 days after those motions are disposed of. Bankruptcy Court issued opinion on November 30, 2015; and issued Order Entering Relief based on the Opinion on January 22, 2016. Defendant filed a Motion to vacate the Order under Rule 54 and 59 that was denied by Bankruptcy Court on March 10, 2016. At that point, the appealed order became final as all post-judgment motions had been disposed of, and March 10, 2016, stated the 30 day deadline to file a notice of appeal. Notices of appeal filed before March 10 became effective on March 10 pursuant to Rule 4(a).
- (7622) *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.
- (7623) *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.

- (7624) *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.
- (7625) *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.

13.26 Motion for Leave to File Untimely Notice of Appeal

- (7626) *Community Financial Services Bank v. Edwards*, 2018 WL 2717237 (6th Cir. BAP 2018) – Rule 8002 (d)(1) allows Court to extend the time for filing Notice of Appeal on Motion filed within deadline to file Notice of appeal; or within 21 days after deadline to file Notice of Appeal if party shows excusable neglect. Excusable neglect is strict standard met only in extraordinary cases and does not include ignorance or mistakes in construing the rules; attorneys busy work schedule; or clerical errors. Order to be appealed was entered July 17, 2017. 14 day deadline to file Notice of Appeal expired July 31, 2017. Moving did not file Motion requesting extension of time until August 16, 2017, 30 days after judgment was entered and 16 days after original deadline. Motion to Extend Deadline to file Notice of Appeal is vested in Bankruptcy Court's discretion and is reviewed for abuse of discretion. Moving party must demonstrate excusable neglect for failing to file Notice of Appeal in timely manner, considering danger of presidents to non-movement; length of delay and potential impact on judicial proceedings; reason for delay including whether it was within reasonable control of movement; and whether movement acted in good faith. No one factor is dispositive and Court must consider all 4 factors, although reason for delay is given greatest import. Bankruptcy Court did not air in denying motion even where granting motion would not materially prejudice other party; delay was not substantial as Motion was filed within 16 days of passage of appeal deadline; and appeal was taken in good faith when sincere desire to seek review of judgment. However, delay was entirely within movants control where movement had timely notice of entry of Order to be appealed and only explanation was difficulty in finding attorney to prosecute appeal. Moving party could have requested extension before running of deadline and movants allegation that he had busy work schedule did not constitute excusable neglect or otherwise prevent movement from acting within time allowed under rules.
- (7627) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Rule 8002 requires motion to extend time to file appeal be filed within 14 days after entry of order; or an additional 21 days if party shows excusable neglect. Appellant filed Motion 26 days after entry of order and appellant failed to demonstrate any excusable neglect in failing to file either the Notice of Appeal or the Motion to Extend within the initial 14 day period.
- (7628) *Hobbs v. County of Summit*, 2014 WL 3735149 (N.D. Ohio 2014) – Court can extend deadline for filing notice of appeal under Federal Rule of Appellate Procedure 4 if the appellant files a motion to extend time within 30 days after expiration of initial deadline and shows excusable neglect or good cause. Appellant showed good cause where appellant missed initial filing deadline by one day based on erroneous information provided by the Court as to the last day to file the notice. Appellant acted diligently in immediately filing Motion to Extend upon being advised that initial date provided by court was incorrect and notice was untimely. It is not "unreasonable" neglect to rely on Court Orders and representations, and is excusable where reliance on court's clear statements resulted in missing deadline by one day. Granting motion would not prejudice other parties to action as issues are purely ones of law, such that there is no danger that witnesses may be unavailable or evidence lost if Appellant prevails in the now-delayed appeal.
- (7629) *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.
- (7630) *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.
- (7631) *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.
- (7632) *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.

- (7633) *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.

13.27 Deadline – Direct Appeal to Circuit Court

- (7634) *Lynch v. Jackson*, Case No. 16-1358 (4th Cir. 2017) – 28 USC Section 158 allows for Bankruptcy Court to certify direct appeal to Circuit Court where all parties jointly certify that the order involves a controlling question of law as to which there is no controlling decision of the Court of Appeals or the Supreme Court or involves a matter of great public importance; question requires resolution of conflicting decisions; or immediate appeal may materially advance progress of case. Parties certified that there was no controlling authority and there was split of decisions within bankruptcy courts in Eastern District of North Carolina creating grounds for direct certification. Delay in filing Request for Direct Certification with Circuit Court was not grounds to deny certification or dismiss appeal where notice of appeal was timely and certification were timely filed, although certification was filed in Bankruptcy Court rather than Circuit Court.

- (7635) *In re Schwartz*, Case No. 15-1416 (7th Cir. 2015) – Deadline for taking appeal of bankruptcy order to district court is 21 days. However, Rule 8002 has no time limit for direct appeal to the Circuit Court under 28 USC Section 158 provided that all parties certify that the case satisfied one of the three conditions for direct appeal.

D. Appealable Orders

13.28 Finality of Order

- (7636) *Shoup v. McDermott*, 2018 WL 3328861 (N.D. Ohio 2018) – Bankruptcy Court Order is “final” for purposes of appeal only where order completes judicial labor on issue raised. Accuracy Court order finding Debtors Chapter 7 filing to be “abuse” stated that Court would dismiss case unless Debtor filed a motion to convert within 30 days. Order expressly contemplated further “separate order” of dismissal to dispose of issue if Debtor did not convert case. Upon entry of subsequent order either converting case to Chapter 13 or dismissing Case, judicial labor related to Chapter 7 proceeding would be completed and Court’s Order of dismissal or conversion would then constitute final Order for purposes of appeal.
- (7637) *Perkins v. Oppenheimer & Co.*, Case No. 18-10890 (11th Cir. 2018) – Order reversing Bankruptcy Court Order granting summary judgment is not final and not appealable where District Court directed Bankruptcy Court to conduct substantial amount of judicial proceedings on remand. Order reversing grant of summary judgment can be final, appealable order if District Court opinion resolves all issues leaving nothing for Bankruptcy Court to do except declare parties rights. District Court Order that does not resolve any claims but only determined that genuine issues of material fact exists is not final.
- (7638) *Aspen Skiing Co. v. Cherrett*, Case No. 14-60079 (9th Cir. 2017) – Order denying Motion to Dismiss under Section 707 based on finding that debts were not consumer debts is final and appealable. While orders denying Motions to Dismiss are normally non-final, Order Denying Motion in this case resolved discrete issue and affected substantive rights.
- (7639) *Feiger & Feiger, PC v. Nathan*, 2017 WL 395289 (E.D. Mi. 2017) - 28 USC Section 158(a)(1) provides for appeal as a matter of right from any final judgment of Bankruptcy Court. 28 USC Section 1334(d) does not provide for appeal as a matter of right from a Bankruptcy Court Order denying motion for abstention. Although Section 1334 indicates that decision not to abstain is reviewable, Section 1334 does not supersede general requirement that Order appealed be “final”. Order is “final” if Order finally dispose of discrete dispute within adversary proceeding or fixes rights of parties. Order denying abstention does not fix rights of parties, resolve any claim, or alter status quo. Merits of adversary proceeding have not been assessed or ended in judgment that could be executed. Order denying abstention lacks finality and is not appealable as matter of right.
- (7640) *Jinks v. Deweiler*, 2016 WL 7407637 (N.D. Ohio 2016) – 28 USC Section 159(a)(1) hear appeals of final judgments, orders and decrees of bankruptcy court. “Final order” is one that ends litigation merits, leaving nothing for court to do but execute judgment. Grant of partial summary judgment is order that does not dispose of all parties and claims it is generally not immediately appealable absent Rule 54 Certificate. When all remaining claims and parties are disposed of, partial summary judgment becomes final judgment for purposes of appeal. Disposition of Motion for Reconsideration under Rule 59 is not itself a final judgment or an order from which an appeal lies. Disposition of Rule 59 motion is order or ruling that reinstates the finality of the original entry of judgment and makes the underlying judgment appealable.
- (7641) *Daake v. C.D. Jones & Co.*, Case No. 16-11923 (11th Cir. 2016) – Order is final for purposes of appeal when Order ends litigation on merits and leave nothing for court to do but execute judgment. Order approving settlement of adversary proceeding was final order for purposes of appeal. Although order left issue of attorney fees to be determined, attorney fees are collateral issues that do not affect finality of order. Order is immediately appealable notwithstanding reservation of jurisdiction to award attorney fees.

- (7642) *In re Ferguson*, Case No. 15-3093 (7th Cir. 2016) – Order is final for purposes of appeal only when the order resolves the entire dispute, not merely pivotal issue with a dispute. Bankruptcy Court Ordered marshaling of assets where secured lenders held liens on different but sometimes overlapping packages of collateral. Order would result in sale of assets with secured lenders paid in full but leaving less for general unsecured creditors. On appeal, District Court reversed and remanded for the bankruptcy court to consider how sale proceeds would be applied without marshaling. Parties then appealed District Court decision to Seventh Circuit who dismissed appeal. While Bankruptcy Court was final in first instance, District Court reversal and remand was not final as matter was remanded to bankruptcy court for further proceedings. Although the District Court barred marshaling, thereby disposing of one issue, Bankruptcy court still had to determine how to distribute proceeds from sale. District Court did not decide who gets the money resulting in District Court’s Order being non-final and not appealable.
- (7643) *Church Joint Venture, LP v. Blasingame*, 2016 WL 3162970 (6th Cir. 2016) – Court lacks jurisdiction to consider appeal of non-final order. Orders are final and appealable if they finally dispose of a discrete dispute within the larger case. Order that does not alter status quo or fix rights and obligations does not dispose of discrete dispute. Order denying motion to approve proposed settlement of cause of action is not final as order did not resolve any of the parties’ rights or obligations. Trustee remained free to pursue cause of action or to propose another settlement. Order denying motion to approve settlement changed nothing and lacked finality for appellate purposes. While approval of the settlement would be final and appealable, that does not make denial of motion a final order.
- (7644) *Parker v. CSFB 2005-3*, Case No. 15-2108 (D. Az. 2016) – Order conditioning grant of stay relief that provided that stay would lift if Debtor did not confirm plan by date certain is non-final, non-appealable order. Prospective stay relief is by definition interlocutory and non-appealable. Although Debtor did not confirm plan by deadline, Debtor did ultimately confirm plan and convinced court to extend deadline to date on which plan was confirmed. Seemingly final order granting stay relief was not final and thus non-appealable because Bankruptcy Judge repeatedly extended deadline for compliance.
- (7645) *Bank of New York v. Wolfe*, 2016 WL 879999 (S.D. Ohio 2016) – 28 USC Section 158 allows appellate court to hear appeals from final orders, judgments and decrees, and to hear interlocutory appeals at court’s discretion. Finality is functional concept, requiring final disposition of all issues pertaining to discrete dispute. If order terminates discrete dispute that, but for bankruptcy, would be stand-alone suit or action, order is final and appealable. Motion for relief from stay is discrete dispute, but Bankruptcy Court Order that required Debtors to file additional documents following which the court would issue order, or to file amended Chapter 13 plan with loan commitment for sufficient funds to pay off moving party, and provided that if Debtor failed to do either by stated date, court would enter order lifting stay, was not final as order did not finally resolve all issues. While order may have resolved some issues including creditor’s standing as secured creditor, it did not contemplate disposing of all issues related to stay relief and order did not leave parties with “nothing more to do”.
- (7646) *Shagun v. Landmark Fence Co., Inc.*, Case No. 13-55509 (9th Cir. 2015) – District Court Opinion remanding matter to Bankruptcy Court for further findings of fact is not “final Order” and so is not immediately appealable. While both parties urged court to decide appeal, there is no authority for proposition that parties can by consent confer jurisdiction on court to hear case. Where appeal is one from district court in its capacity as appellate court, Circuit court has jurisdiction only if district court’s order is, itself, final.
- (7647) *Buchwald Capital Advisors, Ltd. v. Papas*, Case No. 14-14271 (E.D. Mi. 2015) – Order denying motion for summary judgment is not final judgment and so is not appealable as a matter of right. Final order is one that ends judicial labor. While Bankruptcy Court Orders may be appealable if the order ends some discrete issue, that does not apply to order denying summary judgment that does not resolve any discrete issue or end any phase of the litigation.
- (7648) *Montedonico v. Blasingame*, Case No. 14-8046 (6th Cir. BAP 2015) – Final order from which appeal can be taken as matter of right is one that ends the litigation on the merits and leaves the court with nothing to do but execute the judgment. Orders limited to liability where assessment of damages remains pending are non-final, non-appealable orders. Order awarding sanctions that required counsel to attend continuing legal education program but left for another day the imposition of sanctions was non-final order. When court entered later order awarding monetary sanctions, the later order and the initial order became “final” and appealable.
- (7649) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Order Denying Rule 60 Motion for Relief From Judgment is final, appealable order.
- (7650) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation order under Section 506 is a final order that is immediately appealable. However, where valuation is made in connection with plan confirmation process, appeal can also be taken after entry of order confirming or denying confirmation, even where that order is entered more than 14 days after entry of the valuation order.
- (7651) *Knaub v. Rollison*, 2014 WL 1853020 (10th Cir. 2014) – Bankruptcy Appellate Panel decision affirming bankruptcy court finding of non-dischargeability but reversing award of damages and remanding for further proceedings using correct legal standard was not final order and was not subject to appeal. BAP held that bankruptcy court used incorrect legal standard for calculating damages and remanded case to bankruptcy court to take further testimony and receive additional evidence under correct standard. Remand was for further substantive proceedings and not for mere ministerial task. Remand did not involve mere ministerial task of recalculating or re-computing based on evidence already presented, but required bankruptcy court to conduct new de novo proceedings and make additional findings of fact.
- (7652) *Mitchell v. Weinman*, Case no. 13-1013 (10th Cir. 2014) – Order denying Motion to Intervene is final, appealable order if order prevents applicant from becoming party to action. Appeal of order denying Motion must be filed timely. Appeal not filed until conclusion of underlying matter was untimely would be dismissed.
- (7653) *In re Ivens Properties, Inc.*, 2014 WL 349479 (Bankr. E.D. Tn. 2014) – Order conditionally granting stay relief is final order for purposes of appeal. Where neither party filed appeal, order became final, non-appealable and non-modifiable.
- (7654) *Sapere Wealth Management LLC v. MF Global Holdings, Ltd.*, Case No. 12-4254 (2d Cir. 2013) – Only orders that are final are appealable as matter of right. Order is final if it concludes any further judicial activity. Order denying joint administration was not appealable order

where order specifically stated it was without prejudice to movant's right to assert priority rights to distributions from the various Chapter 11 estates. Order clearly contemplated further judicial involvement as movant retained full authority to make all substantive claims that formed basis of movant's request for consolidation in the first instance.

- (7655) *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.
- (7656) *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.
- (7657) *Heavrin v. Schilling*, 2013 WL 3166175 (W.D. Ky. 2013) – Order extending deadlines to object to discharge is non-final, non-appealable order.
- (7658) *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.
- (7659) *Lim v. DiMercurio*, 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.
- (7660) *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.
- (7661) *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.
- (7662) *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.
- (7663) *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.
- (7664) *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.
- (7665) *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.
- (7666) *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.
- (7667) *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).

- (7668) *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.
- (7669) *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.
- (7670) *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.
- (7671) *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.
- (7672) *American Express Bank v. Askenazier*, 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.
- (7673) *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.
- (7674) *Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.
- (7675) *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.
- (7676) *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.
- (7677) *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.
- (7678) *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.
- (7679) *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.”
- (7680) *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.

13.29 “Collateral Order” Doctrine

- (7681) *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.

13.30 Interlocutory Appeal

- (7682) *Lancaster v. Educational Finance Services*, 2017 WL 7310273 (W.D. Mi. 2017) – Order denying Motion to dismiss is interlocutory order not appealable as matter of right. Court can exercise discretion to hear interlocutory order where (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. Review under § 1292(b) is granted sparingly and only in exceptional cases. Debtor's action alleging that Creditor violated discharge injunction by seeking entry of judgment in state court not barred by Rooker-Feldman. Appeal based on alleged violation Rooker-Feldman did not state any substantial ground for difference of opinion for purposes of interlocutory appeal.
- (7683) *Nathan v. Feiger & Feiger, PC*, 2017 WL 3484495 (E.D. Mi. 2017) – Court can grant leave to appeal otherwise non-final order if order involves controlling question of law; substantial grounds exist for difference of opinion regarding correctness of decision; and immediate appeal may materially advance ultimate termination of action. Order denying Motion for Summary Judgment in turnover action not appealable as Bankruptcy Court's Order did not involve controlling issue of law and there was no substantial grounds for difference of opinion where the record demonstrated factual disputes and no formal discovery had commenced. While reversal would bring about earlier termination of litigation, that factor standing alone does not warrant granting leave to appeal.
- (7684) *White v. Corcoran*, 2017 WL 2818725 (6th Cir. 2017) – Order granting Motion for Sanctions but not imposing sanctions themselves is non-final, non-appealable order. Interlocutory appeal allowed only on certification of Court from which appeal is taken. District Court did not certify case for appeal of non-final Order, such that Appellate court lacked subject matter jurisdiction to consider appeal. Appeal dismissed.
- (7685) *Bank of New York v. Watt*, 2015 WL 1879680, 2015 U.S. Dist. LEXIS 54041 (D. Ore. 2015), *appeal dismissed*, Case No. 15-35484 (9th Cir. 2015) – District Court Order reversing Order Confirming Chapter 13 Plan is non-final and not appealable under *Bullard v. Blue Hills Bank*. Court did not address issue of forced vesting of property in Chapter 13 Plan. Debtor must either confirm plan without provision at issue and then appeal confirmation of its own plan; or must refuse to amend plan and allow case to be dismissed and appeal dismissal.
- (7686) *Tronox, Inc. v. Kerr-McGee Corp.*, Case No. 16-343 (2d Cir. 2017) – Order of Court that merely interprets pre-existing injunction is not final, appealable order. Order did not find party to be in contempt or impose sanctions and constituted interlocutor A, nonappealable order. 28 USC Section 1292 allows appeals from orders granting, modifying, refusing or dissolving injunctions, but District Court Order that was “merely interpretive” but merely indicated that injunction applied to certain actions being taken by plaintiff was nonappealable.
- (7687) *Mason v. Gentry*, 2016 WL 9046676 (E.D. Mi. 2017) - Local Rules of the District Court in the Eastern District of Michigan requires that any Motion for Reconsideration be filed within 14 days after entry of the judgment or order. A Motion for Rehearing or Reconsideration must do more than merely present same issues ruled upon by Court and must demonstrate a palpable defect by which the Court and the parties and other persons entitled to be heard on the motion have been misled such that correcting the defect will result in a different disposition. Motion for Rehearing of Order Denying Leave to Appeal Interlocutory Order did not demonstrate that Court was misled by any palpable defect. Leave to appeal from interlocutory order is granted only in exceptional circumstances. Underlying bankruptcy action had already generated 4 separate actions or appeals filed in District Court, resulting in piecemeal litigation, which is precisely reason why interlocutory appeals are granted only in exceptional circumstances. Court's exercise of discretion to deny motion is not “palpable defect”.
- (7688) *Feiger & Feiger, PC v. Nathan*, 2017 WL 395289 (E.D. Mi. 2017) - 28 USC Section 158(a)(3) allows party to request review of interlocutory order. 28 USC Section 1292(b) allows District Court to hear interlocutory appeal if order involves a controlling question of law; substantial ground for difference of opinion exists regarding correctness of decision; and immediate appeal may materially advance ultimate determination of litigation. Interlocutory appeals are sparingly granted and only in exceptional cases. Appeal of order denying motion to abstain does not raise issue of controlling law, much less one where there is substantial ground for difference of opinion. Allowing interlocutory appeal would not materially advance determination of litigation. Case did not present any exceptional circumstance warranting interlocutory appeal.
- (7689) *Jinks v. Detweiler*, 2016 WL 7407637 (N.D. Ohio 2016) – Rule 54 allows the court in an action presenting more than one claim for relief or involving multiple parties to direct entry of the final judgment as to one or more, but fewer than all, claims or parties if the court determines there is no reason for delay, and Bankruptcy Court issues certification under Rule 54(b) for immediate appeal. Bankruptcy court's order granting partial summary judgment and denying Motion for Reconsideration was not final judgment and appellant failed to demonstrate “no reason for delay”. Further, Bankruptcy Court did not issue certification under Rule 54. Neither the Court Order granting partial summary judgment nor order denying reconsideration are properly appealable orders. While partial summary judgment may have been dispositive of all claims to which Appellant was party, that did not render judgment “final” for purposes of appeal where there were multiple parties remaining in the case and multiple claims remaining to be adjudicated, and Bankruptcy Court did not expressly determine that there is no just reason for delay. 28 USC Section 158(a)(3) allows Court to consider a notice of appeal of an interlocutory order as a motion for leave. In evaluating motion for leave, court will consider (1) question involved must be one of law; (2) issues presented must be “controlling”; (3) there must be substantial ground for difference of opinion; and (4) immediate appeal must advance ultimate determination of litigation. Leave will be granted sparingly and only in exceptional cases. Case presents “question of law” if issue presented is pure question of law, and not just an issue that is free from factual disputes; and is controlling when reversal of the order would terminate the action or materially affect the outcome of the litigation. Substantial grounds for difference of opinion exists when issue is a difficult issue of first impression. Appellant's Notice of Appeal did not present any arguments which would support granting of a Motion for Leave to Appeal under Section 158.
- (7690) *White v. Corcoran*, 2016 WL 6962754 (E.D. Mi. 2016) – Appeal is interlocutory where Order does not fully resolve matter before court. Court had entered Order partly addressing trustee's objection to claimed exemptions but setting matter for further hearing. Order did not resolve any issue in the bankruptcy case and was not appealable. Rule 8004 allows court to consider appeal of interlocutory order on filing of Motion. Court considered Notice of Appeal as Motion for Interlocutory Relief under Rule 8004 and denied Motion as Notice did not contain any statement which would make interlocutory appeal appropriate.

- (7691) *Segal v. O'Connell*, Case No. 15-1525 (E.D.N.Y. 2016) – Denial of Debtor's Motion to Dismiss Chapter 7 Case is not final or appealable order. Even if initial filing was improperly signed by attorney rather than Debtor, Debtor ratified filing by signing amended petition; and Debtor acted in bad faith by using bankruptcy to forestall foreclosure suit. Although denial of motion to dismiss would result in liquidation of estate by trustee, leaving Debtor unable to recover property if appellate court reverses denial of dismissal, that does not create right of appeal by Debtor.
- (7692) *Bank of New York v. Wolfe*, 2016 WL 879999 (S.D. Ohio 2016) – 28 USC Section 158 allows appellate court to hear appeals interlocutory appeals at court's discretion where question involved is one of law, question is controlling, there is substantial grounds for difference of opinion regarding correctness of bankruptcy court ruling, and immediate appeal would materially advance ultimate termination of litigation. Questions of law contemplated by statute are "pure" questions of law that court could determine without trial transcript or record. Questions presented by Bankruptcy Court's conditional grant of stay relief were not controlling issues of law as order left substantial factual issues to be determined including amount of debt owed to creditor and Debtor's opportunity to amend chapter 13 plan to provide for payment of secured claim. Issues could be more efficiently handled by Bankruptcy Court as part of final order resolving stay relief after expiration or occurrence of conditions set out in initial order.
- (7693) *Marketgraphics Research Group, Inc., v. Berge*, 2015 WL 738052 (M.D. Tn. 2015) – Court can hear interlocutory appeal where appeal involves controlling issue of law; there is substantial grounds for difference of opinion; and immediate appeal will materially advance ultimate termination of litigation. Whether State Court judgment established that debt was willful and malicious for purposes of res judicata is controlling question of law that could materially affect the outcome of the case. However, contention that bankruptcy court erred in finding a genuine issue of fact for trial is not legal question that can be entertained on interlocutory basis. Question presents substantial grounds for difference of opinion if the issue is difficult and of first impression; a difference of opinion exists within the controlling circuit; or circuits are split on the issue. Appeal that raised issue of whether conduct was willful and malicious raised issues of factual sufficiency and did not dispute applicable law or appropriate legal standards or requirements. Issues were better addressed on final appeal after conclusion of litigation.
- (7694) *Shagun v. Landmark Fence Co., Inc.*, Case No. 13-55509 (9th Cir. 2015) – District Court Opinion remanding matter to Bankruptcy Court for further findings of fact is not "final Order" and so is not immediately appealable. While both parties urged court to decide appeal, there is no authority for proposition that parties can by consent confer jurisdiction on court to hear case. Where appeal is one from district court in its capacity as appellate court, Circuit court has jurisdiction only if district court's order is, itself, final. Court will entertain interlocutory appeal based on four factors: the need to avoid piecemeal litigation; judicial efficiency; the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm.
- (7695) *Mason v. Gentry*, Case No. 15-11531 (E.D. Mi. 2015) – Denial of Motion for Summary Judgment is non-final, non-appealable order. Court can authorize appeal if 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. Appellant failed to provide transcript of lower court hearing leaving reviewing court unable to determine if leave to appeal should be granted.
- (7696) *GATX Corporation v. Addington*, 2015 WL 4887101 (E.D. Ky. 2015) – Order dismissing all claims against 2 defendants was not final or appealable where additional causes of action remained against other defendants that could obviate need for appeal of dismissal order. Relationship between the adjudicated and unadjudicated claims; possibility that the need for review might or might not be mooted by future developments in the district court; possibility that the reviewing court might be obliged to consider the same issue a second time; presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like, weighed against immediate appeal. Suit against dismissed defendants sought to impose liability for fraudulent transfer on non-transferees. After dismissal, issue remaining was whether transfer was fraudulent as to the direct transferee, which did not implicate the same issue regarding non-transferee liability so there was no danger of the court being asked to decide the issue twice. Which supported certification of appeal. There were no counterclaims by dismissed defendants against plaintiff, which also supported certification. Appellant had already suffered serious delay as it has been three years since dismissal order none of which were appellant's fault, which strongly supports certification. However, issue to be appealed bore strong factual and legal relationship to remaining claims, as the issue remaining was whether underlying transfer was fraudulent in first instance, and a judgment against plaintiff on that basis would eliminate any possible liability of the dismissed defendants which weighed strongly against certification. Need for appellate review would be eliminated if court concludes that underlying transfer was not fraudulent, which also weighs against certification. Given strong factual and legal relationship between dismissed defendants and the remaining claims and the potential for what could prove to be an advisory opinion, court denied certification.
- (7697) *Mason v. Wyman*, 2015 WL 4617502 (E.D. Mi. 2015) – Denial of Motion for Summary Judgment is non-final, non-appealable order. Court can authorize appeal if 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. Appellant failed to provide transcript of lower court hearing leaving reviewing court unable to determine if leave to appeal should be granted.
- (7698) *Fernanders v. Wells Fargo Dealer Services*, 2015 WL 4430224 (E.D. Mi. 2015) – In evaluating request for interlocutory appeal, court will consider whether the order implicates a question of law on which there is no controlling authority; matter involves one of public importance; order raises legal question requiring resolution of conflicting decisions; or immediate appeal will materially advance the case. Appeal of order denying sanctions against creditor for alleged violation of stay did not present any question of law on which there was no controlling authority as law regarding stay is clear. Motion for sanctions lacked evidentiary support as motion was response to creditor's request for relief from stay which was granted by Bankruptcy Court. Grant of leave to appeal would only unnecessarily delay bankruptcy case and would unnecessarily duplicate proceedings.

- (7699) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 2412317 (N.D. Ohio 2015) – Bankruptcy Court Order denying Motion to Withdraw Reference and to Remand to State Court is non-final non-appealable order. Court would not authorize interlocutory appeal. Interlocutory appeal appropriate only where case presents controlling question of law as to which there is a substantial ground for difference of opinion such that immediate appeal may materially advance the ultimate termination of litigation. Question of law is controlling if it materially affects outcome of case, but factual determinations and determination with court discretion are not controlling questions of law. Bankruptcy Court Order denying Motion to Withdraw Reference did not present any controlling question of law. Although court jurisdiction is controlling issue of law, whether Bankruptcy Court has “related to” jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Appeal also would not materially advance case as only issue was whether action would proceed in Bankruptcy Court or State Court, neither of which would “terminate” the action.
- (7700) *Bullard v. Blue Hills Bank*, ____ U.S. ____, ____ S.Ct. ____ (2015) – Order denying confirmation of Chapter 13 Plan is interlocutory appeal that is not appealable as a matter of right as long as Debtor has opportunity to propose another plan. Any appeal would be subject to rules governing interlocutory appeal requiring motion for leave to appeal to district court or motion for certification directly to circuit court.
- (7701) *MarketGraphics Research Group, Inc. v. Berge*, 2015 WL 1731219 (M.D. Tn. 2015) – District Court can allow interlocutory appeal by certifying that the judgment involves a question of law on which there is no controlling decision of the Supreme Court or Circuit Court of appeals, or that the matter involves an issue of public importance; the judgment or order involves question of law requiring resolution of conflicting decisions; or immediate appeal would materially advance progress of case. If any of these circumstances exists, District Court is required to certify the case to the Circuit Court for immediate appeal. Denial of summary judgment met standard as resolution of issue regarding res judicata effect of State Court judgment on finding of malice would materially advance the ultimate resolution of the litigation.
- (7702) *Rhiel v. Central Mortgage Co.*, 2014 WL 8276561 (Bankr. S.D. Ohio 2014) – Bankruptcy Court can direct entry of final judgment as to one or more, but fewer than all, counts where doing so would allow for immediate appeal of discrete issue. Factors to consider relationship between adjudicated and unadjudicated claims; possibility that review may be mooted by further developments in bankruptcy court; possibility that reviewing court may have to consider issue a second time; presence of absence of claim that could result in set-off against order sought to be appealed; and other considerations such as delay, economic and solvency considerations, shortening of time of trial, frivolity of competing claims, expense. Order denying Trustee’s motion to sell interest free and clear of claims of non-Debtor was expressly relevant to, and in fact was a condition of, the remaining counts for damages against mortgage holder. There were no claims pending that could result in second appeal of order denying motion for sale, and there was no possibility of any later order allowing set-off against trustee related to property. Appeal of final judgment would remove impediment resulting from uncertainty as to whether trustee could sell property fee and clear and would also free non-Debtor to cure mortgage arrears and resume mortgage payments.
- (7703) *Buchwald Capital Advisors, Ltd. v. Papas*, Case No. 14-14271 (E.D. Mi. 2015) – Court would decline to exercise discretion to allow appeal of order denying summary judgment. Interlocutory appeals are not favored and discretion to hear interlocutory appeal should be used sparingly. Court may consider interlocutory appeal where order involves controlling question of law, substantial grounds exist for difference of opinion on correctness of decision, and immediate appeal may materially advance the termination of litigation. Defendants failed to establish cause for appeal of order denying summary judgment. Defendants failed to demonstrate any real dispute about standards to be used or that lower court used incorrect standard. Defendant’s disagreement with lower court decision is not grounds to find substantial difference of opinion where defendants did not cite any legal precedent that was not considered by lower court.
- (7704) *Phillips v. Gilman*, 2014 WL 2211710 (9th Cir. 2014) – Order Denying Motion to Strike Affirmative Defenses is non-final, non-appealable order.
- (7705) *Council on Occupational Education v. Keats*, 2014 WL 4376037 (6th Cir. 2014) – Circuit Court ordinarily lacks jurisdiction to consider interlocutory appeal. Bankruptcy Court entered partial findings of fact and district court entertained interlocutory appeal, but remanded for further proceedings based on district court opinion. District court decision did not terminate any aspect of the case or bring any aspect of case to conclusion. Circuit Court can consider interlocutory appeal only where the district court certifies the matter for further appeal on request of party filed pursuant to Rule 54; or party seeks permissive interlocutory appeal under 28 USC Section 1292. Party did not file request for certification with district court and did not file application for permissive interlocutory appeal with Circuit Court pursuant to Section 1292. Thus, Circuit Court lacked jurisdiction.
- (7706) *Richardson v. Checker Acquisition Corporation*, 2014 WL 1117858 (W.D. Mi. 2014) – Order concerning whether potential liability for withdrawal from multi-employer retirement plan is properly considered in determining insolvency is non-final, interlocutory order, as order does not terminate any stage of the litigation. Court will allow interlocutory appeal where question involved is one of law; question is controlling on outcome of litigation; there is substantial grounds for disagreement regarding correctness of order to be appealed; and immediate appeal would materially advance ultimate termination of litigation. Interlocutory appeals are not favored and should be granted only sparingly and in exceptional cases. While issue presented is one of law and is novel and one of first impression in Sixth circuit, resolution would not immediately terminate litigation as bankruptcy case will continue regardless of outcome of decision, as issue was only one of multiple grounds for actions against defendants for alleged fraudulent transfers, and even if appellate court reversed bankruptcy court, plaintiff would still proceed to trial on the first count and second count of the complaint. While reversal may spare the parties one aspect of a trial, that does not amount to the appeal bringing the litigation to a close.
- (7707) *MidFirst Bank v. Johnston*, 2014 WL 694943 (N.D. Ohio 2014) – Orders resolving discovery disputes are interlocutory orders that are not immediately appealable. In considering Motion for Leave to Appeal, Appellate Court will consider whether the appeal presents (1) a question of law; (2) that is controlling; (3) as to which there is substantial ground for difference of opinion; and (4) an immediate appeal of which would materially advance the ultimate termination of the litigation. A question of law for purposes of a Motion for Interlocutory Appeal is one that is a pure question of law, not just an issue of fact that is free from dispute. Discovery orders that required lender to turnover 1) policies and procedures of appellants related to servicing mortgages; (2) deposition of a non-party; and (3) compensation information

involved issues of mixed law and fact as order depended on the facts unique to the case. The appeal did not present any controlling question of law, as reversal of the order would not terminate the action or materially affect the outcome of the litigation. Questions of fact vested in the discretion of the trial court are not controlling issues of law. Appeal did not present issue on which there was substantial ground for difference of opinion as most of the issues presented were not new or novel and there was substantial established body of law on discovery under Rule 26. Disagreement with correctness of order by one party does not elevate issue to substantial ground for difference of opinion. Appeal materially advances termination of litigation if outcome relieves parties of significant burden of proof and alters the course of the litigation and, at the very least, simplifies the remaining issues. Appeal of discovery order does not materially advance litigation as all issues remain and outcome of appeal would have minimal, if any, impact on future proceedings.

- (7708) *DeGirolamo v. McIntosh Oil Co.*, 2013 WL 6840362 (N.D. Ohio 2013) – Partial summary judgment that does not dispose of all claims against one defendant is not final, appealable order. Court will consider interlocutory appeal under 28 USC Section 1292(b) only when the order involves a controlling issue of law; there are substantial grounds for differences of opinion; and an immediate appeal would materially advance ultimate termination of litigation. Order granting partial summary judgment based on “forward contracts” safe harbor defense to action to recover fraudulent and preferential transfers presented appeal of controlling issue of law, the effect of the safe harbor. There was no evidence of substantial grounds for differences of opinion where defendant in adversary proceeding cited a number of cases supporting Bankruptcy Court holding and Plaintiff failed to cite even a single case to support his position. Further, given issues remaining in Bankruptcy Court, allowing immediate appeal would merely delay, not advance, resolution of litigation where only one, narrow factual issue remained to be decided. Remand for trial would occur regardless of how appellate court resolved pending issues. Court resources would be better served by allowing Bankruptcy Court to complete litigation and have one consolidated appeal rather than multiple, piecemeal appeals.
- (7709) *Heitman 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.
- (7710) *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.
- (7711) *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.
- (7712) *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.
- (7713) *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.
- (7714) *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.

- (7715) *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 adjudicated 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.
- (7716) *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 adjudicated 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.
- (7717) *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.
- (7718) *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 eh appellate court, then the appellate 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.
- (7719) *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.

- (7720) *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.
- (7721) *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.
- (7722) *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.
- (7723) *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.
- (7724) *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.
- (7725) *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.
- (7726) *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 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.
- (7727) *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 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.
- (7728) *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.
- (7729) *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 if 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.

- (7730) *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.
- (7731) *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.
- (7732) *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.

13.31 Default Judgment

- (7733) *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.

13.32 Particular Orders Appealable – Order Denying Confirmation

- (7734) *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.

13.33 Particular Orders Appealable – Order Confirming Plan

- (7735) *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.
- (7736) *Bosch v. First National Bank*, Case No. 12-20135 (5th Cir. 2012) – Order Confirming Plan is 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.

13.34 Particular Orders Appealable – Order Denying Modification of Plan

- (7737) *McKinney v. Russell*, Case No. 16-522 (N.D. Ala. 2017) – Order denying Trustee's Motion to Modify Plan is final, appealable order under 28 USC Section 158. Although Supreme Court held that denial of confirmation of Plan is not final order, denial of Plan modification renders Debtor's obligations “settled” for purposes of appellate review.
- (7738) *Germeraad v. Powers*, 826 F.3d 962 (7th Cir. 2016) – Order Denying Plan Modification is appealable order if modification is denied on substantive grounds rather than technical defects. Denial on substantive grounds effectively terminates any further effort to modify plan on same basis. Denial on technical grounds is not final as technical defect can be cured and same substantive modification can be resubmitted to court. Order denying modification based on incorrect interpretation so Section 1329 is appealable as order terminated any effort to modify plan on substantive grounds presented.

13.35 Particular Orders Appealable – Order Granting Stay Relief

- (7739) *Bosch v. Frost National Bank*, Fed. Appx. 463 (5th Cir. 2012) – Order Modifying Stay is 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.
- (7740) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – In Sixth Circuit, it is well settled that lifting of stay by bankruptcy court is final order for appellate review.
- (7741) *Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

13.36 Particular Orders Appealable – Orders Denying Stay Relief

- (7742) *Citizen Group, Inc. v. Jackson Masonry, LLC*, 2018 WL 558837 (M.D. Th. 2018) – Order Denying Motion for Relief From Stay is final and appealable order. Appeal must be filed within 14 days of Order. Appeal filed after expiration of 14 days from entry of Order is untimely requiring dismissal of appeal.

13.37 Particular Orders Appealable – Order Dismissing Adversary Proceeding

- (7743) *Daake v. C.D. Jones & Co.*, Case No. 16-11923 (11th Cir. 2016) – Order is final for purposes of appeal when Order ends litigation on merits and leave nothing for court to do but execute judgment. Order approving settlement of adversary proceeding was final order for purposes of appeal. Although order left issue of attorney fees to be determined, attorney fees are collateral issues that do not affect finality of order. Order is immediately appealable notwithstanding reservation of jurisdiction to award attorney fees.
- (7744) *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.

13.38 Particular Orders Appealable – Order Vacating Discharge

- (7745) *In re Smith*, 2018 WL 1942176 (N.D. Ohio 2018) – Rule 8002 sets deadline for notice of appeal as 14 days after entry of order appealed. Order Vacating Discharge was final order for appellate purposes. Notice of Appeal filed 104 days after entry of Order was untimely, depriving appellate court of jurisdiction and requiring dismissal of appeal.

13.39 Particular Orders Appealable – Claims Resolutions

- (7746) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Order that approves settlement that disposes of claims by largest creditors is final appealable order.
- (7747) *American Express Bank v. Askenazer*, 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.

13.40 Particular Orders Appealable – Sanctions

- (7748) *Ayoub v. Firstmerit Bank, NA*, 2017 WL 7000266 (6th Cir. 2017) – Order determining that conduct is sanctionable is not appealable prior to determination and imposition of sanctions.
- (7749) *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.
- (7750) *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.

13.41 Particular Orders Not Appealable – Sanctions

- (7751) *Fernanders v. Wells Fargo Dealer Services*, 2015 WL 4430224 (E.D. Mi. 2015) – Order denying Debtor’s motion for sanctions for alleged misrepresentation by creditor of value of collateral for purposes of obtaining stay relief was non-final, non-appealable order. Order did not end any portion of case on merits.

13.42 Order Reversing Prior Order

- (7752) *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.
- (7753) *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.

- (7754) *Kraus Anderson Capital, Inc. v. Bradley*, 2014 WL 6919580 (6th Cir. 2014) – BAP Order reversing Bankruptcy Court finding that debt is not excepted from discharge is not reviewable as it is non-final. BAP concluded that debts were excepted from discharge and remanded case to bankruptcy court “for a determination of the amount of damages that Lender suffered ... and for entry of judgment in favor of Lender.” Order remanding case required bankruptcy court to undertake substantive actions after remand beyond actions that would be purely ministerial in nature, such that order is not final or appealable.
- (7755) *Clear Sky Properties, LLC v. Roussell*, 769 F.3d 574 (8th Cir. 2014) – District Court Order reversing bankruptcy court’s determination of dischargeability of State Court damage award is not appealable where District Court remanded case for further proceedings on whether attorney fees awarded were non-dischargeable. Bankruptcy court concluded that attorney fees were dischargeable as based on contract. District Court reversed, noting that attorney fees incurred in connection with debt determined to be non-dischargeable may themselves be non-dischargeable and remanded for further proceedings to allow Bankruptcy Court to determine whether attorney fees fell within provision of contract sufficient to make fees non-dischargeable. Further proceedings were not merely ministerial but involved substantive issues of law and fact and required additional hearings, such that District Court Order is non-final and non-appealable.
- (7756) *Ernst v. Michigan Educational Credit Union*, 2014 WL 1246368 (E.D. Mi. 2014) – Order vacating prior order disallowing claim is not final, reviewable order. Order was not “final” as order merely reinstated claim subject to Debtor’s right to raise objections to allowance, and did not actually allow the claim.
- (7757) *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.
- (7758) *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.”

13.43 Particular Orders Not Appealable – Order Denying Motion to Dismiss

- (7759) *In re Carter*, Case No. 18-10069, *reversed on rehearing*, (E.D. Mi. 2018) – Court dismissed appeal where Notice of Appeal attached only copy of Order Denying Motion to Dismiss which is non-final order. Order denying Motion to Dismiss does not end litigation on merits and is not final, appealable order. Appeal dismissed for lack of jurisdiction where Bankruptcy Court did not approve interlocutory appeal. On rehearing, Appellant supplemented record with Order Confirming Chapter 13 Plan which is final Order for purposes of appeal, rendering previous Order Denying Motion to Dismiss immediately appealable. Order Dismissing Appeal set aside and Appeal reinstated.
- (7760) *Aspen Skiing Co. v. Cherrett*, Case No. 14-60079 (9th Cir. 2017) – Order denying Motion to Dismiss under Section 707 based on finding that debts were not consumer debts is final and appealable. While orders denying Motions to Dismiss are normally non-final, Order Denying Motion in this case resolved discrete issue and affected substantive rights.
- (7761) Whether debts are “primarily consumer” depends on primary purpose for which debt was incurred. Residential mortgages are normally, but not exclusively, consumer debts. Debtor’s multiple motives in incurring debt required Court to engage in factual, rather than legal, inquiry. Standard of review of Bankruptcy Court decision is clear error, not *de novo*.
- (7762) *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.
- (7763) *Gold v. Bandman*, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order.

13.44 Particular Orders Not Appealable – Order Denying Motion to Withdraw Reference

- (7764) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 2412317 (N.D. Ohio 2015) – Bankruptcy Court Order denying Motion to Withdraw Reference and to Remand to State Court is non-final non-appealable order. Court would not authorize interlocutory appeal. Interlocutory appeal appropriate only where case presents controlling question of law as to which there is a substantial ground for difference of opinion such that immediate appeal may materially advance the ultimate termination of litigation. Question of law is controlling if it materially affects outcome of case, but factual determinations and determination with court discretion are not controlling questions of law. Bankruptcy Court Order denying Motion to Withdraw Reference did not present any controlling question of law. Although court jurisdiction is controlling issue of law, whether Bankruptcy Court has “related to” jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Appeal also would not materially advance case as only issue was whether action would proceed in Bankruptcy Court or State Court, neither of which would “terminate” the action.
- (7765) *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.

13.45 Particular Orders Not Appealable – Order Denying Motion for Abstention

- (7766) *Feiger & Feiger, PC v. Nathan*, 2017 WL 1130092, *reh'g denied*, 2017 WL 1130091 (E.D. Mi. 2017) – Order denying Motion for Abstention is nonfinal order appealable only with leave of Court. 28 USC Section 1334(d) does not authorize appeal of order denying motion for discretionary abstention. 28 USC Section 1334(d) authorizes appeal of order denying mandatory abstention, but does not make order final” for purposes of immediate appeal. Party seeking to appeal order denying mandatory abstention must either wait until entry of final order in case or file motion for leave to appeal under 28 USC Section 158(a)(3). Appellate Court lacks jurisdiction to consider merits of appeal absent properly filed motion for leave to file appeal.
- (7767) *Feiger & Feiger, PC v. Nathan*, 2017 WL 395289 (E.D. Mi. 2017) - 28 USC Section 158(a)(1) provides for appeal as a matter of right from any final judgment of Bankruptcy Court. 28 USC Section 1334(d) does not provide for appeal as a matter of right from a Bankruptcy Court Order denying motion for abstention. Although Section 1334 indicates that decision not to abstain is reviewable, Section 1334 does not supersede general requirement that Order appealed be “final”. Order is “final” if Order finally dispose of discrete dispute within adversary proceeding or fixes rights of parties. Order denying abstention does not fix rights of parties, resolve any claim, or alter status quo. Merits of adversary proceeding have not been assessed or ended in judgment that could be executed. Order denying abstention lacks finality and is not appealable as matter of right. 28 USC Section 158(a)(3) allows party to request review of interlocutory order. 28 USC Section 1292(b) allows District Court to hear interlocutory appeal if order involves a controlling question of law; substantial ground for difference of opinion exists regarding correctness of decision; and immediate appeal may materially advance ultimate determination of litigation. Interlocutory appeals are sparingly granted and only in exceptional cases. Appeal of order denying motion to abstain does not raise issue of controlling law, much less one where there is substantial ground for difference of opinion. Allowing interlocutory appeal would not materially advance determination of litigation. Case did not present any exceptional circumstance warranting interlocutory appeal.

13.46 Particular Orders Not Appealable – Order Setting Aside Default

- (7768) *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.

13.47 Particular Orders Not Appealable – Order Determining Liability Only

- (7769) *LaBoy v. Doral Mortgage Corp.*, 2011 WL 2119316 (1st Cir. 2011) – Summary Judgment which determined liability but did reach issue of damages is not final judgment for appeal purposes.
- (7770) *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.
- (7771) *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.
- (7772) *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.

13.48 Particular Orders Not Appealable – Order Denying Confirmation of Plan

- (7773) *Bank of New York v. Watt*, 2015 WL 1879680, 2015 U.S. Dist. LEXIS 54041(D. Ore. 2015), *appeal dismissed*, Case No. 15-35484 (9th Cir. 2015) – District Court Order reversing Order Confirming Chapter 13 Plan is non-final and not appealable under *Bullard v. Blue Hills Bank*. Court did not address issue of forced vesting of property in Chapter 13 Plan. Debtor must either confirm plan without provision at issue and then appeal confirmation of its own plan; or must refuse to amend plan and allow case to be dismissed and appeal dismissal.
- (7774) *Bullard v. Blue Hills Bank*, ____ U.S. ____, ____ S.Ct. ____ (2015) – Order denying confirmation of Chapter 13 Plan is interlocutory appeal that is not appealable as a matter of right as long as Debtor has opportunity to propose another plan. Any appeal would be subject to rules governing interlocutory appeal requiring motion for leave to appeal to district court or motion for certification directly to circuit court.
- (7775) *Bullard v. Hyde Park Savings Bank*, 2014 WL 1910868 (1st Cir. 2014) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order as long as Debtor has opportunity to file amended plan. Order that denied confirmation and allowed 30 days to file amended plan was not final determination of any issues in the case.
- (7776) *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.

13.49 Particular Orders Not Appealable – Partial Default Judgment

- (7777) *Pichler v. Mason*, Case No. 14-13451 (E.D. Mi. 2015) – Default judgment is not final or appealable where appellant timely filed motion in lower court to set aside judgment and judgment resolved only part, not all, of the matters in the adversary proceeding.

13.50 Particular Orders Not Appealable – Conditional Stay Relief

- (7778) *Parker v. CSFB 2005-3*, Case No. 15-2108 (D. Az. 2016) – Order conditioning grant of stay relief that provided that stay would lift if Debtor did not confirm plan by date certain is non-final, non-appealable order. Prospective stay relief is by definition interlocutory and non-appealable. Although Debtor did not confirm plan by deadline, Debtor did ultimately confirm plan and convinced court to extend deadline to date on which plan was confirmed. Seemingly final order granting stay relief was not final and thus non-appealable because Bankruptcy Judge repeatedly extended deadline for compliance.

13.51 Particular Orders Not Appealable – Temporary Injunctions

- (7779) *Gilman v. Goldberg*, Case No. 16-6993 (N.D. Ill. 2016) – Temporary injunction entered by Bankruptcy Court is not appealable as a matter of right. 28 USC Section 158 allows appeals of final orders as a matter of right, and allows appeals of non-final orders only with leave of court. Preliminary injunction is by definition not final order as it is preliminary and does not conclude judicial labor. Preliminary injunction does not meet test for appeal of non-final order as appeal did not raise controlling issue of law whose resolution would speed up the litigation but merely contested the validity of the injunction.

13.52 Particular Orders Not Appealable – Arbitration

- (7780) *Preferred Care of Delaware, Inc. v. Hopkins*, 2017 WL 104830 (6th Cir. 2017) - Federal Arbitration act prohibits appeals from District Court Orders compelling arbitration. Federal Arbitration Act policy favors agreements to arbitrate disputes and prohibits appeals from orders granting a stay of any action; directing arbitration; compelling arbitration; and refusing to enjoin arbitration. Federal Arbitration Act allows appeals only from a orders that interfere with arbitration. Litigant may not appeal until final decision has been rendered in arbitration. Where order does nothing more than compel arbitration, Circuit Court lacks jurisdiction to consider appeal of that order.

13.53 Other Orders

- (7781) *Community Financial Services Bank v. Edwards*, Case No. 17-8028 (6th Cir. BAP 2018) - Order denying motion for extension of time to file Notice of Appeal is final, appealable order.
- (7782) *Nathan v. Feiger & Feiger, PC*, 2017 WL 3484495 (E.D. Mi. 2017) – Order Denying Summary Judgment is not appealable as Order does not dispose of action or any discrete part of action.
- (7783) *Town Center Flats, LLC v. ECP Commercial II, LLC*, Case No. 16- 14474 (E.D. Mi. 2017) – Appellate Court has jurisdiction over Final Orders. Earlier Bankruptcy Court Order which determined ownership of rents was final, appealable Order currently on appeal to Sixth Circuit. Bankruptcy Court’s subsequent Order directing Debtor to separate rents from bankruptcy estate was nonfinal and nonappealable, as jurisdiction over prior Order and all attendant matters had been transferred to Sixth Circuit.
- (7784) *Tronox, Inc. v. Kerr-McGee Corp.*, Case No. 16-343 (2d Cir. 2017) – Order of Court that merely interprets pre-existing injunction is not final, appealable order. Order did not find party to be in contempt or impose sanctions and constituted interlocutor A, nonappealable order. 28 USC Section 1292 allows appeals from orders granting, modifying, refusing or dissolving injunctions, but District Court Order that was “merely interpretive” but merely indicated that injunction applied to certain actions being taken by plaintiff was nonappealable.
- (7785) *Mason v. Gentry*, Case No. 15-11531 (E.D. Mi. 2015) – Order denying motion for summary judgment is non-final, non-appealable order.
- (7786) *In re Gilbert*, Case No. 15-11738 (E.D. Mi. 2015) – Bankruptcy Court Order conditionally dissolving order to show cause was non-final and non-appealable where bankruptcy case was still pending, although deadline by which Debtor was to pay filing fee or case would be dismissed had passed. Order did not end any particular phase of bankruptcy case as order was, by its terms, conditional. Dispute regarding payment of fees was not finally resolved where case had not been dismissed and Debtor could still pay filing fee and court could not predict how Debtor would proceed.
- (7787) *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.
- (7788) *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.
- (7789) *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.
- (7790) *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

13.54 Jurisdiction to Enter Stay

- (7791) *Ritzen Group v. Jackson Masonry, LLC*, 2018 WL 2194015 (M.D. Tn. 2018) - District Court reviewing bankruptcy courts final judgment does not lose jurisdiction to consider motion for stay when party files notice of appeal to Circuit Court. Although Rule 8025 contemplates that stay be requested before notice of appeal to Court of Appeals is filed, nothing in Rule 8025 prohibits issuance of stay after notice of appeal is filed.
- (7792) *Murray v. Williams*, 2017 WL 2469162(E.D. Tn. 2017) – Request for Stay must be brought in Court that issued Order being appealed.
- (7793) *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.
- (7794) *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.
- (7795) *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.
- (7796) *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.

13.55 Elements of Stay

- (7797) *In re Hackney*, 2018 WL 2715054 (Bankr. N.D. Ohio 2018) – Party seeking stay pending appeal must prove likelihood of success on merits; irreparable harm absent stay; whether others will be harmed if Court grants stay, and public interest in granting stay. Attorney not entitled to stay of disgorgement order where attorney did not respond to United States Trustee's Motion to Dismiss or appear at hearing on Motion, rendering it unlikely that attorney would be able to successfully appeal sanctions order. Attorney also did not demonstrate irreparable harm. Injuries in terms of money, time or energy are not irreparable. Absent stay, attorney will be required to disgorge \$652 to Debtor. However, if disgorgement is reversed on appeal, attorney would have right to recover funds from Debtor which would provide adequate compensation and corrective relief. Stay would not unduly prejudice Debtor and issues involved did not present any substantial public interest.
- (7798) *Akers v. Gregory Funding, LLC*, 2018 WL 2363976 (M.D. Tn.), *report and recommendation adopted*, 2018 WL 2363976 (M.D. Tn. 2018) - Proper way to obtain stay pending appeal is to seek stay under Rule 8007 which requires that Motion initially be filed with Bankruptcy Court unless moving first in Bankruptcy Court is impracticable; motion must include reasons for granting relief requested and facts relied upon; and must contain affidavits or other sworn statements supporting facts in dispute. Court treated Debtor's Motion for Preliminary Injunction of foreclosure sale pending appeal of Bankruptcy Courts order denying confirmation and lifting automatic stay as Motion for Stay. Debtor did not include any information showing that Debtor first filed for stay in Bankruptcy Court or that moving first in Bankruptcy Court would be impracticable. Debtor provided only conclusory statements regarding foreclosures potential harm but did not provide any factual basis for those statements. Debtor did not file affidavit or other sworn statement supporting any contentions regarding potential harm. Motion also substantively defective. Whether to grant stay pending appeal is based on Court's evaluation of (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed absent stay; (3) prospect that others will be harmed if Court grants stay; and (4) public interest in granting stay. Factors must be balanced and no one factor is controlling, but likelihood of success and irreparable harm hold most weight. Appellant had little chance to succeed on merits of appeal of Bankruptcy Court Order denying confirmation of Chapter 13 Plan and converting case and Order Granting Relief Automatic Stay. Appellant did not allege any bias or improper motive by Chapter 13 Trustee and complained-of actions were all undertaken by Chapter 13 Trustee in furtherance statutory obligations. Bankruptcy Court did not exclude evidence or prevent movant from testifying at hearing. Primary argument was that mortgage holder lacked standing to enforce lien based on alleged defects in assignments. However, Debtor lacks standing to challenge the validity of assignment of note. Debtor did not demonstrate irreparable harm. Court will consider substantiality of injury alleged; likelihood of occurrence; and adequacy of proof; an effort to determine whether damage would be irreparable. Injuries in terms of money, time and energy are not "irreparable" where adequate compensatory or other corrective relief would be available at later date. Risk of foreclosure during pendency of appeal does not constitute irreparable harm. Granting of stay would harm mortgage company which had not received payment of debt for over 18 months while expending significant time and resources to enforce legal rights. Motion for stay pending appeal denied.
- (7799) *Ritzen Group v. Jackson Masonry, LLC*, 2018 WL 2194015 (M.D. Tn. 2018) – Courts have recognized three types of stay that may be applied to intermediate appeal: fully secured by supersede his bond; unsecured and discretionary stay; and combination of discretionary and supersedeas bond. Discretionary stay requires consideration of likelihood of success on merits; irreparable injury to movant if stay is not granted; no substantial harm to opposing party of stay is granted; and stay would serve public interest. Hybrid approach involves supersedeas bond sufficient to secure some portion of Bankruptcy Court judgment but not sufficient to secure entire potential award and Court concludes that good cause warrants stay pending appeal. Parties previously agreed on appeal to District Court to amount of supersedeas bond. Court would not condition stay on new or increased bond amount where prior agreed order contemplated possibility of continued appeal and included mechanism to request increase of bond in certain limited circumstances. Appeal did not involve non-monetary relief where agreed order regarding supersedeas bond provided that Appellee would not attempt to sell property during pendency of appeal, where Appellee was not considering sale of property and agreed not to market or sell property without prior notice to Appellant; and if property is sold, Appellant's claim for specific performance would be converted to claim for money damages. Appeal did not involve

“quieting title” or absolutely bar Appellee from selling or marketing property and created alternate remedies in the event Appellee attempted to sell property.

- (7800) *In re Shoup*, 2018 WL 1896305 (Bankr. N.D. Ohio 2018) – Request for stay pending appeal under Rule 8005 is extraordinary remedy based on (1) likelihood that party seeking stay will prevail on merits of appeal; (2) likelihood that moving party will be irreparably harmed absent stay; (3) prospect that others will be harmed if court grants stay; and (4) public interest in granting the stay. Finding that there is no likelihood of success on merits is usually fatal. Motion that alleged only that Trustee would not be adversely impacted by Stay but Debtors would be harmed absent stay did not identify any issue going to merits of Order being appealed and Debtors had not yet filed briefs in appellate court leaving Bankruptcy Court without basis to determine whether Debtors had likelihood of success on merits.
- (7801) *Baker v. Wayne County Treasurer*, 2017 WL 6015380 – Stay pending appeal requires Court to balance (1) likelihood that party seeking stay will prevail on merits; (2) likelihood that moving party will be irreparably harmed; (3) prospect that others will be harmed by stay; and (4) public interest. First two factors are most important and if those two factors are decisive, Court need not consider remaining factors. Factors 1 and 2 require more than mere possibility of success or harm. Debtor did not demonstrate likelihood of success on merits of appeal lifting stay for cause. Although Debtor had equity in property and stay relief may not have been appropriate under Section 362(d)(2), Section 362(d)(1) and (d)(2) are not mutually exclusive and Court can grant relief from stay for cause under (d)(1). Failure to make plan payments, standing alone, is not cause where lack of payments is caused by circumstances beyond Debtor’s control, failure to pay post-petition obligations such as post-petition property taxes can be “cause” where Debtor did not provide any method of paying post-petition taxes and Debtor had extensive history of non-payment of property taxes. Debtor also did not demonstrate irreparable harm. Threat that property will be lost to tax sales of non-residential properties, if wrongful, can be compensated by monetary award, mitigating against irreparable harm, and tax sales would not occur before March, 2018, such that any potential harm is far from imminent.
- (7802) *Murray v. Williams*, 2017 WL 2469162 (E.D. Tn. 2017) – Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8 provide that upon posting of supersedeas bond, the action is stayed automatically pending appeal. Court may grant stay without posting bond on consideration of (1) protection offered by the bond to the prevailing party; (2) whether posting bond would pose undue financial hardship on appellant; (3) risk that appellee’s interests will be irreparably harmed; and (4) burden on appellee to enforce judgment in foreign jurisdiction. Court can also impose stay where appellant’s financial circumstances demonstrate ability to pay judgment is so plain that bond would be waste of money, or that requiring bond would place appellant’s other creditors in jeopardy. Motion for stay denied where evidence indicated that Appellants were disabled and had little or no income such that denial of bond would effectively leave appeal with no possibility of collecting judgment if successful on appeal. Bond would provide substantial protection to appellee who otherwise faced significant risk of irreparable harm as well as difficulties in collecting judgment following appeal.
- (7803) *In re Thomas*, 2017 WL 1134581 (Bankr. W.D. Tn. 2017) – Rule 8007(a)(1) allows Court to stay effectiveness of Bankruptcy Court order pending appeal based on likelihood that party appealing will ultimately prevail on merits of appeal; likelihood that moving party will be irreparably harmed absent a stay; prospect that others will be harmed if Court grants stay; and public interest in granting stay. Court must balance factors to determine whether stay is appropriate. Likelihood of success on merits requires more than mere possibility of success and must include stronger substantial likelihood of success or, at a minimum, that there is a serious question going to merits of order based on something more than assertion or expectation of success on merits. Appeal of order granting relief from stay to allow State Court litigation to proceed did not present any substantial likelihood of success on merits where motion alleged only that Court essentially misconstrued applicable state law. Moving party also failed to demonstrate that irreparable harm was both certain and immediate rather than speculative or theoretical merely because Debtor had raise constitutional defenses to State Court litigation and parallel action pending in District Court may ultimately determine state statute to be unconstitutional. There was no indication that outcome of State Court litigation would affect judgment of District Court and State Court action was rooted more in state tort and contract law rather than constitutional law such that allowing actions to proceed in both District Court and State Court would not produce any irreparable harm. Allowing State Court plaintiff to liquidate claims as a practical matter benefited those parties and also would produce certainty and finality regarding amounts of claims, allowing Debtor to more efficiently promulgate Chapter 11 plan. Public interest did not appear to have significant role where State Court litigation involved tort and contractual liability between 3 private parties, the outcome of which did not have any impact on public whatsoever.
- (7804) *Underwood v. Selent*, 2016 WL 5539779 (E.D. Mi. 2016) – In evaluating request for 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. Factors are to be balanced, but at a minimum party seeking stay must show serious questions going to merits of appeal; and moving party must address each of the four factors regardless of relative strength, showing specific facts and affidavits supporting asserts that factors exists. Motion denied where Debtor had virtually no chance of prevailing on appeal. Appeal resulted from allowance of claims where creditor had previously litigated and obtained judgment against Debtor and claim was for amount of judgment. Debtor had already exhausted appeals of judgment leaving judgment res judicata, and bankruptcy case was mere attempt to collaterally attack State Court judgment.
- (7805) *In re Gilbert*, 2015 WL 7084658 (Bankr. E.D. Mi. 2015) – Rule 8007 requires party to first apply for stay in court that issued order being appealed. Factors that court will consider 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. These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together. Probability of success is measured as an inverse proportion to amount of irreparable injury, such as injury increases, showing of likelihood of success can be lower, but no one factor cancels out the others. Irreparable harm is determined by (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided; and must more than just injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, and will not generally be found if there is possibility that adequate compensatory or other corrective relief will be available at a later date. Harm must be both certain

and immediate, rather than speculative or theoretical and generally requires proof that harm has occurred in the past and is likely to occur again. Appellant failed to demonstrate any likelihood of success on appeal of order dismissing case with bar to refiling unless Debtor first pays outstanding filing fees from prior cases. Motion alleged only that appeal was presented in good faith and based on case law, practice and statutes appeal would be successful, but failed to cite any applicable law that would support finding of error by the lower court. Appellant also failed to demonstrate irreparable harm as only alleged injury would be that Debtor would be subjected to continued collection efforts, which does not rise to level of irreparable harm. Stay would not be consistent with public interests and would unduly harm creditors who are attempting to exercise valid state law collection rights and Debtor has already had benefit of automatic stay in four separate cases including two prior cases where Debtor failed to pay filing fees.

- (7806) *In re Mauro*, 2015 WL 5304109 (E.D. Mi. 2015) – Bankruptcy Court correctly denied motion for stay where appellant failed to demonstrate any reasonable likelihood of success on merits. Provision of Member Agreement of LLC regarding transfer of Debtor’s membership interest did not apply where provision applied where member sought to retire, withdraw or leave. Trustee in bankruptcy acquired Debtor’s interest by stepping into shoes of Debtor not involving retirement, withdrawal or leaving. Where Trustee then proposed sale of member interest, neither of remaining members attempted to exercise right of first refusal or to make any effort to determine whether Debtor’s bankruptcy filing, standing alone, triggered any rights under Membership Agreement.
- (7807) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Stay pending appeal requires moving party to establish (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. Appellant failed to demonstrate any likelihood of success on appeal of order shifting discovery costs to party requesting discovery pursuant to Rule 45. Movant also failed to demonstrate any irreparable harm. Order required to pay non-party costs of production. If order is reversed, Movant would be entitled to recover any funds paid to third party, an international banking giant that would easily be able to answer. Third party had already suffered great harm as a result of the breadth of the subpoenas and granting stay would only perpetuate that harm, and granting stay was not consistent with public interests.
- (7808) *Nurses’ Registry and Home Health Corp. v. Burwell*, 2015 WL 4254002 (Bankr. E.D. Ky. 2015) – In deciding whether to grant a stay pending appeal, courts must consider four factors: (1) the likelihood that the party moving for stay will prevail on merits of appeal; (2) the likelihood that moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if court grants stay; and (4) the public interest in grant of stay. Federal government not entitled to stay of order enjoining government from suspending Medicare payments and permitting Debtor to use cash collateral where government failed to demonstrate any likelihood of success on merits of appeal on government’s contention that Bankruptcy court lacked jurisdiction over unexhausted Medicare Act dispute. Court is not required to defer to exhaustion of agency remedies where delay would mean that there would be no meaningful opportunity for judicial review. Had court waited for Medicare process to play out while Medicare continued to suspend payments, Debtor would have become defunct and Debtor never would have had opportunity to argue for turnover. Government also failed to demonstrate likelihood of success on merits of turnover action based on government’s claim that section 542 cannot be used to compel turnover of disputed property. Section 542 requires any entity in possession of property that Debtor can use, sell or lease to turnover property to the Debtor, and nothing in Section 542 excludes “disputed” property. Any stay would irreparably harm not only the Debtor but also the third parties to whom Debtor provides medical services which are compensated through Medicare. Stay would cause Debtor’s business to fail immediately and would result in 1348 Medicare patients being immediately left with no medical care or other services provided by caregivers. Any harm to Debtor and third parties far outweighed any potential harm to government which, at worst, would be out the amount of money that it could not later recover if government prevailed in underlying False Claim action. Public interest also would not be served by stay as doing so would not only jeopardize health of patients but would also cause Debtor to close with attendant loss of more than 200 jobs.
- (7809) *Taylor v. McDermott*, 2015 WL 4041355 (E.D. Mi. 2015) – Grant of stay pending appeal depends on (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed if no stay is imposed; (3) prospect that others will be injured if a stay is imposed; and (4) public interest in granting stay. Appellant contended that she had properly tendered payment as ordered by court by delivering to opposing party a piece of paper that purported to be “legal tender” issued by appellant as a “private bank” and contending that there was no such thing as “lawful money”. Appellant presented no chance of success on merits of appeal. Court did not err in imposing sanctions against appellant for failure to comply with Court Order.
- (7810) *Brown v. Ellmann*, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff’d*, 2016 WL 3055618 (E.D. Mi. 2016), *appeal pending*, 2016 WL _____ (6th Cir. 2016) – Party seeking stay pending appeal must first apply to Bankruptcy Court and must show that appellant has likelihood of prevailing on merits; that moving party will be irreparably harmed absent stay; degree to which others may be harmed if a stay is granted; and that stay is consistent with public interest. Debtor lacked equity in property to which exemption could apply where value of property was substantially less than amount of secured claims. Fact that Chapter 7 Trustee later proposed to short-sell property with “carve out” of some of the proceeds for the benefit of the estate did not allow Debtor to claim exemption in carve out as carve out did not exist on date of petition. Debtor’s appeal of order disallowing amended exemption in proceeds did not evidence any likelihood of success on merits given Debtor’s admitted lack of equity in property. Carve out does not transform into equity simply because it is paid to the estate, where the secured lenders were entitled to receipt of all proceeds of sale but agreed to carve out for trustee’s sale. Debtor also failed to prove inadequate remedy, as monetary damages do not rise to irreparable harm. Grant of stay would harm both the estate and the second mortgage holder as first mortgage holder would likely foreclose and eliminate any payment to either the second mortgage or the estate.
- (7811) *McDermott v. Taylor*, Case No. 14-4124 (Bankr. E.D. Mi. 2015) – Court must consider likelihood that party seeking stay will prevail on appeal; likelihood that moving party will suffer irreparable harm if a stay is denied; prospect that others will be harmed if stay is imposed; and whether stay is consistent with public interest. Movant must show more than mere likelihood of prevailing on merits, and irreparable harm is that which is substantial, certain and immediate and is more than just money, time or energy necessary if stay is denied or that is theoretical or speculative. Appellant’s argument is premised on position that there is no lawful currency of the United States, a position that

is frivolous and presents zero chance of success on appeal. Appellant's argument that absent a stay, appellant will have to pay Debtor \$2,000 is not irreparable harm but is merely the payment of money for which adequate remedies exist. Granting stay would further prejudice Debtor who has already been waiting for payment for five months. Sanctions order was entered to protect public interest, and granting stay of that order pending appeal would be adverse to public interest.

- (7812) *In re Michigan Produce Haulers, Inc.*, 2015 WL 1275387 (Bankr. W.D. Mi. 2015) – Stay pending appeal under Rule 807 requires evidence that party seeking stay has likelihood of prevailing on appeal; that moving party will be irreparably harmed if a stay is not imposed; that imposing a stay will not unduly harm others; and that public interest supports imposing stay. Motion for stay pending appeal denied. Appeal was of Order of Court extending exclusivity for Debtor to file plan. Debtor filed plan within initial exclusivity period and court extended only exclusivity for purposes of having confirmation hearing. Debtor requested extension within time permitted under Section 1112. Fact that Debtor may seek to modify proposed plan to address objections does not cause modifications to be new plan filed outside exclusivity period. Movant failed to prove a likelihood of success. Creditor also could not prove irreparable harm, which is certain and immediate, not speculative or theoretical, such that harm has occurred in past and will occur again if no stay is imposed. Creditor's argument that Debtor's plan could be confirmed without creditor having the opportunity to file competing plan was speculative and theoretical where court has not even begun to consider confirmation of plan and confirmation was far from foregone conclusion. Granting stay was unlikely to adversely affect third parties as stay would expire under extended exclusivity in less than 60 days, so granting of stay would not result in material harm as granting stay would cause exclusivity to end now rather than in 60 days. Public interest supports Debtor's right to file plan and to have that plan considered for confirmation as long as Debtor acts in reasonable manner and reasonably diligently. Denying stay more consistent with public policy as doing so gives Debtor opportunity to present and confirm plan.
- (7813) *Kentucky Employees Retirement Systems, v. Seven Counties Services, Inc.*, 2015 WL 474311 (W.D. Ky. 2015) – Motion for stay pending appeal is balancing test consists of four factors: (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. Appellant failed to demonstrate any likelihood of success on merits of appeal of order confirming plan where appeal raised question as to whether agreement between KERS and Debtor was executory and subject to rejection where agreement was within scope of statutory framework and imposed significant duties on both parties. Appellant also failed to show irreparable harm, determined by the substantiality of the injury alleged; the likelihood of its occurrence; and adequacy of proof. Harm must be both certain and immediate, not speculative of theoretical. Where only injury is monetary loss, injury is not irreparable. Possibility that Debtor will argue that confirmed plan is equitably moot not real or present where there has been no indication by Debtor that intends to argue that and Debtor has, in fact, acknowledged that equitable mootness would not apply in this case. Debtor would be harmed by stay as Debtor would lose ability to retain employees and obtain necessary credit to fund operations that fund plan. Public interest also did not weigh in favor of stay, where appellant argued only a broad public interest in having statutes enforced, and evidence indicated that staying order would impede Debtor's ability to provide services to more than 30,000 individuals with disabilities.
- (7814) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Court has authority to enter stay pending appeal when there is likelihood that party seeking stay will prevail on appeal; that moving party will be irreparably harmed if no stay is entered; whether others will be harmed if a stay is entered; and whether there is public interest in granting stay. Appellant failed to meet burden where (a) order being appealed was non-final, non-appealable interlocutory order; appellant did not file motion for leave to seek interlocutory appellate relief; and notice of appeal was filed after deadline for doing. District Court was almost certain to dismiss appeal precluding any finding by appellant of any likelihood of success.
- (7815) *Spirit SPE Portfolio 2007-1, LLC v. Paxos*, 2014 WL 5306666 (Bankr. N.D. Ohio 2014) – In evaluating motion for stay pending appeal, 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. Motion for stay is moot where, during pendency of motion, Appellate Court dismissed appeal, as moving party could no longer show any likelihood of success on merits.
- (7816) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Stay pending appeal requires court to consider likelihood of success on merits; whether stay will prevent irreparable harm to the party seeking the stay; whether the injunction would harm others; and whether the public interest would be served. Where appellate court already determined that Debtor could not prevail in merits of appeal of Bankruptcy Court valuation order, request for stay pending appeal of that order would be denied.
- (7817) *Goldstein, Bershad & Fried v. Ruskin*, 2014 WL 3565651 (E.D. Mi. 2014) – Party seeking stay pending appeal must show (1) likelihood of success on merits; (2) party may suffer irreparable harm absent a stay; (3) other interested parties will not suffer substantial harm if a stay is imposed; and (4) no harm would be done to the public interests if a stay is imposed. Likelihood of success does not require overwhelming probability of success but must be more than "mere possibility". Appellant failed to show any likelihood of prevailing on appeal of order denying compensation to counsel given discretion afforded to bankruptcy court and bankruptcy court's conclusion that the underlying petition itself was "extremely problematic". Appellant also failed to show irreparable harm where only possible injury would be that Chapter 13 trustee will disburse funds on hand. Money damages, standing alone are not irreparable harm. Further, Trustee has already been instructed by bankruptcy court to hold funds pending further order of that court and there was no reason to believe trustee would violate this order.
- (7818) *Village Green I, LP v. Federal National Mortgage Assn*, 2014 WL 2589444 (W.D. Tn. 2014) – Motion for stay pending appeal requires balancing likelihood that party seeking stay will prevail on appeal; likelihood that moving party would be irreparably harmed absent a stay; prospect that others will be harmed if court grants stay; and public interest in granting stay. Irreparable harm requires court to evaluate substance of injury, likelihood of its occurrence, and adequacy of proof provided. Mere injuries in terms of money, time and energy are not enough, and possibility of adequate compensation or other corrective relief weighs against irreparable harm. Debtor demonstrated that order lifting stay and dismissing Chapter 11 case would cause irreparable harm, as only asset of Debtor was apartment complex that had

been noticed for foreclosure and loss of Debtor's single asset would deny Debtor any meaningful opportunity for appellate review, and injury was certain and immediate given impending foreclosure sale. Creditor would not suffer any meaningful injury from delay as stay would only maintain status quo and Court can condition stay on terms including requirement that Debtor continue to pay lender the principal and interest payments due under the note, so that the only impact of stay would be to delay foreclosure sale. Appeal presented real and unsettled questions about good faith and artificial impairment that were not previously addressed by Circuit court. Public interest did not weigh in favor of or against stay. Given uncertain issues involved, and importance of reorganizing when possible, public interest may be better served with orderly administration of Chapter 11 case.

- (7819) *Silagy v. Protz*, 2014 WL 1652426 (Bankr. N.D. Ohio 2014) – Movant must demonstrate likelihood of success on appeal; irreparable harm is stay is denied; that stay would not have disproportionate impact on other parties; and whether stay is in public interest. Likelihood of success on merits requires that court be convinced that court's prior decision was erroneous and that appeal will result in different outcome. Court's prior opinion explaining reasoning for decision did not evidence any reason to believe that prior decision was incorrect or that appellant had any meaningful chance on appeal. Movant could not demonstrate irreparable harm. Order required creditor to turn over to estate the Debtor's interest in retirement accounts. If decision is stayed, funds will be paid to Debtor and subject to dissipation, while allowing order to remain in effect will preserve funds for estate if order is affirmed. Granting of stay would impose substantial risk on estate that funds may never be recoverable, while denying stay will only delay payment to Debtor, such that Debtor will not suffer irreparable harm if stay is denied and imposition of stay would cause substantial harm to the estate and creditors. Stay also not consistent with public interest, as public has interest in timely enforcement of Court Orders and in seeing that funds are paid to estate to pay creditors. Stay would only delay these important public policies. Motion for stay denied unless Debtor posts Supersedeas bond representing value of Debtor's interest in retirement plan.
- (7820) *Baker v. Residential Funding Company, LLC*, 2014 WL 1600358 (E.D. Mi. 2014) – Stay of proceedings pending appeal requires movant to show that there is a likelihood of success on the merits of the appeal; that the moving party will suffer irreparable harm absent a stay; that the stay would not harm others; and that a stay is in the public interest. Court denied request for stay of order approving compromise. Approval of compromise is in discretion of court and appeared to be fair and equitable as there was substantial risk absent a settlement, the action would be decided adverse to the estate; and that even if the appeal were successful, the amount of the debt far exceeded value of property such that there was no benefit to estate. Settlement allowed estate to recover \$20,000 from mortgage holder and avoided litigation, with attendant costs, that most likely would have been unsuccessful. Party seeking stay could not demonstrate anything more than a "mere possibility" of success on appeal, far less than the "likelihood" required for stay.
- (7821) *In re Medlar*, 2014 WL 504782 (Bankr. N.D. Ohio 2014) – Factors to be considered in evaluating stay pending appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; likelihood that the party seeking the stay will be irreparably harmed absent a stay; the prospect that the other parties to the proceeding will be harmed if the court grants the stay; and the public interest in granting the stay. Motion for stay pending appeal of order lifting stay denied where it was unlikely that Debtor could prevail on appeal. Bankruptcy court lifted stay to allow parties to litigate title to property in State Court based on cause, including (1) Ohio law governed parties' rights as to the property; (2) the Condominium Association already has a State Court foreclosure judgment; and (3) the Debtor's challenges to the foreclosure judgment are outside of the court's jurisdiction and are best addressed by the State Court.
- (7822) *Michigan First Credit Union v. Smith*, 2013 WL 6139720 (Bankr. E.D. Mi. 2013) – Rule 8005 allows Bankruptcy Court to grant or deny stay pending appeal based on likelihood of appellant's success on merits of appeal; likelihood that moving party will be irreparably harmed if stay is not granted; prospect that others will be harmed if stay is granted; and public interest in granting stay. Probability of success required is proportionate to harm that moving will suffer if stay is denied. In determining harm, court will look to substantiality of injury alleged, likelihood of its occurrence, and adequacy of proof provided. Injury must be irreparable, not merely an injury in terms of money, time and energy necessarily expended if the stay is denied. Stay denied where it was very unlikely that district court would reverse; only injury alleged by movant is that without stay, plaintiff may attempt to execute on judgment, which does not constitute irreparable harm; stay would disproportionately harm plaintiff where plaintiff would be further delayed in collecting judgment that had already been long delayed by Chapter 7 filing and adversary proceedings; and the public interest did not support a Debtor using the bankruptcy process to unduly delay creditors from collecting on non-dischargeable judgments.
- (7823) *Glassman, Edwards, Wyatt, Tuttle and Cox, P.C. v. Wade*, 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – Court can enter stay pending appeal only if there is a valid appeal pending. Appeal of Order denying abstention and remand is non-final appeal over which appellate court lacks jurisdiction unless appellant seeks leave to appeal and leave is granted by the appellate court. As district court had not yet acted on request for interlocutory appeal, there was no valid appeal pending on which further proceedings could be stayed. Appellant must also prove likelihood that the party seeking the stay will prevail on the merits of the appeal; likelihood that the moving party will be irreparably harmed absent a stay; prospect that others will be harmed if the court grants the stay; and public interest will be advanced by granting the stay. Mere possibility of success is not sufficient. Appellant did not demonstrate likelihood of success on merits where actions based on Sections 523 and 727 were "overwhelmingly" core proceedings that are not subject to mandatory or discretionary abstention that there was virtually no chance that district court would reverse. Appellant could not demonstrate irreparable harm if stay is denied, as merits of case will have to be determined at some point in some court, and litigation against appellant would not end even if appellant prevails on appeal, as the only change will be the forum in which the matter is adjudicated. Stay may adversely affect Chapter 7 Trustee's ability to administer estate or do review and object to claims. Appeal presented no significant public interest as appeal was forum dispute.
- (7824) *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.

- (7825) *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.
- (7826) *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.
- (7827) *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.
- (7828) *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.
- (7829) *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.
- (7830) *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.
- (7831) *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 of letter and spirit of Bankruptcy Code which exempts non-profit corporations from involuntary petitions.

- (7832) *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.
- (7833) *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.
- (7834) *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 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.
- (7835) *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.
- (7836) *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.
- (7837) *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.
- (7838) *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.

- (7839) *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".
- (7840) *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.
- (7841) *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.

13.56 Scope of Stay

- (7842) *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.

13.57 Effect of Failure to Obtain Stay – Generally

- (7843) *In re Roberson*, 2018 WL 1276729 (E.D. Mi. 2018) – Order of Court is fully enforceable while on appeal unless appellant has obtained stay pending appeal. Order required Creditor to pay Debtor's attorney fees as sanction. Although Creditor appealed Sanctions Order, Creditor did not obtain stay of order. Debtor's Motion for Contempt based on Creditor's failure to pay amount by specified deadline granted and additional fees awarded at rate of \$100 per day until awarded amount paid.
- (7844) *Glassman, Edwards, Wyatt, Tuttle and Cox, P.C. v. Wade*, 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – General rule that properly filed notice of appeal deprives trial court of jurisdiction to proceed further does not apply in bankruptcy matters. Filing notice of appeal does not divest lower court of jurisdiction over proceedings unless issue on appeal is so closely related to remaining matters that adjudication of remaining matters would effectively divest appellate court of ability to enter effective relief. Appeal of order denying abstention and denying remand disposition was not so closely related to merits of remaining matters that proceedings in bankruptcy court would be stayed.

13.58 Effect of Failure to Obtain Stay – Mootness

- (7845) *Underwood v. Selent*, 2017 WL 3499920 (E.D. Mi. 2017) – Appeal is moot where reviewing court cannot grant any effective relief. Section 363(m) codifies mootness in connection with sale of property and requires appellant to obtain stay of sale before sale takes place. Debtor's failure to seek stay of sale pending appeal before sale closed and title transferred rendered appeal moot.
- (7846) *MSCI 2007-IQ Granville Retail, LLC v. UHA Corporation, LLC*, 2016 WL 5724037 (6th Cir. 2016) – Appeal of summary judgment in foreclosure action rendered moot when property was sold at foreclosure sale pursuant to judgment. Appellant did not seek stay or post supersedeas bond and absent stay special master sold property. Where appellee successfully collects on judgment after appellant fails to request stay, appellant is deemed to have satisfied judgment "voluntarily" rendering any pending appeal moot. If appellant seeks stay of

proceedings but did not, for some reason, obtain stay, such as failure to post bond, appeal will not be moot as party may have claim of restitution if judgment is reversed. Where appellant failed to seek stay in first instance, restitution claim is not available as matter of law.

- (7847) *Rich Dad Operating Company, LLC v. Zubrod*, 2016 WL 3397685 (10th Cir. 2016) – Appeal is moot and no longer presents “case or controversy” where issues presented are no longer live or parties lack legally cognizable interest in outcome. Appeal is constitutionally moot if court can fashion no meaningful relief. If court can fashion some sort of meaningful relief, even if relief only partially addresses grievances of appealing party, appeal is not moot. Appeal of settlement not moot where appeal cannot unwind settlement or avoid transfers of property that resulted, but would restore to Debtor ability to challenge claims of appellee in bankruptcy case. In light of possible relief, action was not constitutionally moot. Section 363(m) did not apply where bankruptcy court did not make finding under Section 363(m) that purchaser was “good faith” purchase as required.
- (7848) *White v. Corcoran*, Case No. 15-12354 (E.D. Mi. 2016) – Appeal of order permitting sale under Section 363 is moot where appellant fails to obtain stay of order and property is sold pursuant to that order. Appeal of order permitting sale is not warranted where order allowing sale has been entered but no sale has actually taken place. Proper remedy in either circumstance is to obtain stay of sale order as any later sale would moot appeal. Only exception is to prove that buyer acted in bad faith, which requires showing of fraud or collusion or that purchaser’s actions were effort to take gross advantage of other bidders. Allegation that bidder and auctioneer colluded to drive up purchase price by negotiating higher price after termination of auction did not evidence good faith as efforts increased the price, ultimate purchaser was successful bidder at sale, and there was no evidence that trustee and purchaser colluded to produce artificially low successful bid.
- (7849) *White v. Corcoran*, Case No. 15-11310 (E.D. Mi. 2016) – Appeal of order permitting sale under Section 363 is moot where appellant fails to obtain stay of order and property is sold pursuant to that order. Only exception is to prove that buyer acted in bad faith, which requires showing of fraud or collusion or that purchaser’s actions were effort to take gross advantage of other bidders. Allegation that bidder and auctioneer colluded to drive up purchase price by negotiating higher price after termination of auction did not evidence good faith as efforts increased the price, ultimate purchaser was successful bidder at sale, and there was no evidence that trustee and purchaser colluded to produce artificially low successful bid.
- (7850) *Illinois Dept. of Revenue v. Naperville Theater, LLC*, Case No. 15-3697 (N.D. Ill. 2015) – Party who does not obtain stay of sale under Section 363(m) cannot appeal order permitting sale. However, party can appeal portion of sale order that directs distribution of proceeds as appeal does not seek to set aside or disturb the sale itself, and distribution of the proceeds of sale is outside scope of Section 363(m).
- (7851) *Village at Knapp’s Crossing, LLC v. Pioneer Ventures, LLC*, 2016 WL 98160 (6th Cir. 2016) – Appeal of order converting case from Chapter 11 to Chapter 7 rendered moot when Chapter 7 sold Debtor’s only asset at section 363 sale. There was no basis to set aside 363 sale even if case was returned to Chapter 11 and Debtor lacked any ability or business to reorganize after sale of property. Appellate court lacked any ability to grant effective relief, resulting in dismissal of appeal.
- (7852) *Peffinders, LLC v. Sherman*, Case No. 13-10120 (5th Cir. 2015) – Court had authority to order sale of domain name notwithstanding Debtor’s contention that domain name was owned by separate company but failed to produce any evidence to support proposition. Proposed sale was negotiated in good faith and at arm’s length, and proposed purchaser had no affiliation with Debtor. Debtor failed to obtain stay of sale prior to consummation rendering appeal moot. Section 363(m) prevents appellate court from granting effective relief in challenge to sale of assets under Section 363 where the sale is to a good faith purchaser, regardless of whether purchaser had notice of appeal at time sale closed. Debtor did not contest purchaser’s status as good faith purchaser before bankruptcy court and would not be permitted to raise issue on appeal. Bankruptcy court made express finding that purchaser was good faith purchaser entitled to protections of Section 363(m).
- (7853) *Rev Op Group v. ML Manager, LLC*, 2014 WL 5859300 (9th Cir. 2014) – Party can move to dismiss appeal as equitably moot where a great change in the status quo occurred after the district court rendered the orders appealed from, even if that party did not seek to dismiss the appeal as moot at the district court level. Appeal is constitutionally moot when there is no longer case or controversy to be resolved. Appeal from plan confirmation is not constitutionally moot even after plan is substantially consummated because court could still reverse confirmation order. Appeal is equitably moot where there remains a live case or controversy but change of circumstances makes review of merits inequitable. While failure to obtain a stay is not itself a fatal defect, failure to obtain stay coupled with substantial consummation such that court could not fashion effective relief without “knocking the props out from under the plan”.
- (7854) *Wells Fargo Bank v. Mariposa Road Self-Storage Associates, LLC*, 2014 WL 5139140 (9th Cir. 2014) – Appeal is not moot where appellate court could fashion effective relief. Appeal of order confirming Plan of Reorganization is not moot merely because Debtor is performing under confirmed plan where appeal could result in Debtor being ordered to pay additional money under the plan as it reads or through a modification. Possibility of resolution through money damages is sufficient to present live case or controversy.
- (7855) *Kahn v. Aurora Loan Services, LLC*, 2014 WL 3529445 (E.D. Mi. 2014) – Appeal becomes moot when issues presented are no longer live or events occur during pendency of appeal that make it impossible for court to grant effective relief. Where Debtor appeals order allowing sale of assets or lifting stay to permit lender to complete foreclosure process and Debtor does not obtain stay, then upon completion of sale process court lacks ability to grant relief and appeal of order becomes moot. Appeal moot where Debtor did not seek stay of Court Order allowing issuance of writ of possession, creditor served writ and obtained possession and bankruptcy case had been dismissed and closed.
- (7856) *Prentice v. GMAC Mortgage Client Branded Solutions*, 2014 WL 961364 (E.D. Mi. 2014) – Appeal of Order Lifting Stay to allow lender to proceed with eviction rendered moot when eviction completed during pendency of appeal. Court can adjudicate only actual, ongoing cases or controversies and cannot decide issues that, because of intervening events, are no longer susceptible to effective relief.
- (7857) *R.T.R. Bldg. Co., Inc. v. The Privatebank*, 2014 WL 824209 (E.D. Mi. 2014) – Case is moot where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Where the appellant fails to obtain a stay of an order that permits a sale of the Debtor’s assets, the subsequent sale renders the appeal moot. Debtor’s appeal of order lifting stay and order dismissing case rendered moot

when lender subsequently foreclosed and sold property at foreclosure sale. At that point, bankruptcy court lost ability to enter effective relief as to property, rendering appeal moot. Appeal of dismissal order also moot as, following foreclosure sale, Debtor had no assets and had no ability to reorganize.

- (7858) *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.
- (7859) *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.
- (7860) *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.
- (7861) *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.
- (7862) *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.
- (7863) *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.
- (7864) *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.
- (7865) *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.
- (7866) *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.
- (7867) *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.
- (7868) *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.

- (7869) *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.
- (7870) *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.
- (7871) *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.
- (7872) *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.

13.59 Effect of Stay

- (7873) *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.
- (7874) *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.
- (7875) *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.

13.60 Stay of Other Proceedings

- (7876) *McDermott v. Junk*, 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – Rule 8007 allows court to stay proceedings other than matters involved on appeal where party demonstrates likelihood of success on appeal; party would be irreparably harmed absent a stay; party against who stay sought would not suffer extraordinary harm; and stay is consistent with public interest. Debtor’s appeal of order converting case from Chapter 11 to Chapter 7 did not warrant stay of adversary proceeding commenced by UST to deny discharge under Section 727. Debtors presented no evidence of any likelihood of success where appeal was based on denial of extension of time to find new counsel. Court provided ample time and by the time Debtors’ counsel had withdrawn, counsel had not been paid in some time and Debtors had substantial advance notice of counsel’s request to withdraw. Court issued show cause order when prior counsel withdrew, setting hearing for 78 days later, giving Debtors more than ample time to secure new counsel. Conversion more than warranted where Debtors had negative income during Chapter 11; Debtors’ Chapter 11 Operating Reports mischaracterized certain funds received during Chapter 11; and Debtors failed to maintain insurance or to pay property taxes on primary asset.

13.61 Supersedeas Bond

- (7877) *Continental Casualty Co. v. Indian Head Industries, Inc.*, 2016 WL 1573259 (E.D. Mi. 2016) – Rule 62(d) provides that party who files satisfactory supersedeas bond is entitled to stay of money judgment as matter of right. Rule allows, but does not require, bond as condition of stay. Court has discretion to impose stay pending on appeal on conditions where record indicates that losing party has sufficient resources to satisfy judgment, such that cost of bond would be waste of money, or when party proposes alternative collateral such as cash accounts receivable or other assets as security. Party proposal to deposit cash in Clerk of Court in amount equal to full amount of judgment plus two years interest constituted sufficient assurance of payment if plaintiff prevailed on appeal. Plaintiff’s argument that if defendant filed for bankruptcy, cash may be deemed property of bankruptcy estate was not ripe where defendant had not indicated any inability to pay judgment or and concerns about defendant’s financial condition.

(7878) *Silagy v. Protz*, 2014 WL 1652426 (Bankr. N.D. Ohio 2014) – Motion for stay of Court Order that directed turnover to estate of value of Debtor’s interest in former spouse’s retirement account denied unless Debtor posts Supersedeas bond representing value of Debtor’s interest in retirement plan.

(7879) *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.

13.62 Bond – Alternative Security

(7880) *Allied Erecting & Dismantling Co., Inc. v. United States Steel Corp.*, 2016 WL 1084136 (N.D. Ohio 2016) – Stay pending appeal normally requires posting of supersedeas bond. Where bond is not available, court can enter stay based on alternative security where there are extraordinary circumstances as long as value of alternative security is sufficient to satisfy judgment. Alleged ability to satisfy judgment out of assets, appellant’s limited cash position, and appellant’s inability to obtain surety to issue bond are not “extraordinary circumstances”. Appellant’s statement that absent stay, it will be forced into bankruptcy is not “extraordinary circumstance”. Appellant failed to prove that proposed alternative collateral was sufficient in value to cover judgment where expert testimony established that appellant’s valuation of items was unsupported and overstated, and some of the items were subject to superior liens. Further, three independent surety companies refused to accept same items as collateral for issuance of bond providing further evidence that value was insufficient. Appellant had also engaged in several post-judgment transfers and granted several post-judgment security interests causing court to question appellant’s statements that it would secure assets for eventual execution post-appeal. Further, appellant was not performing any work and had no contracts in place and that appellant’s financial condition continued to deteriorate and lacked any signs of financially healthy company.

F. Appeal Costs

13.63 Filing Fee - In Forma Pauperis

(7881) *In re Blanding*, Case No. 18-44848 (Bankr. E.D. Mi. 2018) – Bankruptcy fees are governed by 28 USC Section 1930. Section 1930(f)(1) allows Court to weigh filing fee to commence case under Chapter 7 if Debtor has income less than 150% of official poverty line. Section 1930(f)(2) authorizes Bankruptcy Court to waive other fees for such Debtors. Filing fee for appeal is waivable only for *in forma pauperis* litigant who files affidavit that includes statement of all assets and that person is unable to pay filing fee and identifies nature of action, defense or appeal and in states that appeal is taken in good faith and that person is entitled to redress. 28 USC Section 1915 provides that *In forma pauperis* status may be denied if trial court certifies writing that appeal is not taken in good faith. Motion correctly indicated that Court previously waived filing fee for Chapter 7 and stated that Debtor had total income of \$967 per month. Although motion was not accompanied by affidavit, Court previously waived filing fee based on schedules of assets, liabilities, income and expenses, all signed under oath by Debtor and filed a Chapter 7 bankruptcy case, which was sufficient to satisfy that Debtor attested under oath to all required information with respect to assets and ability to pay. However, motion did not indicate why Debtor believed she would be entitled to redress from order granting relief from automatic stay or indicate what grounds Debtor believes exist to appeal the order where order granting relief from stay was entered without opposition. Where Debtor did not oppose relief granted and motion offered no explanation for appeal, it is difficult to understand what possible grounds Debtor could assert on appeal leaving Court with no way of knowing whether appeal is taken in good faith.

(7882) *Wells Fargo Bank, NA v. Smith*, 2016 WL 1271028 (E.D. Ky. 2016) – Normally, when party is granted *forma pauperis* status at district court, party will also be afforded status for appeal. However, authorization does not apply where district court certifies that appeal is not taken in good faith. Any attempt by defendant to appeal denial of removal petition would lack good faith as decisions to remand case to State Court is not reviewable on appeal including circumstances where district court determines that removal was not proper in first instance. Further, there was no objective basis for appeal where attempt to remove was clearly untimely and any asserted federal question was initially raised by defendant who then sought to remove.

(7883) *Fernanders v. Daughtrey*, 2016 WL 612759-8 (E.D. Mi. 2016) – 28 USC Section 1915(a)(3) does not permit *in forma pauperis* filing of appeal in lieu of payment of filing fee if the lower court certifies that the appeal is not taken in good faith. Whether appeal would be in good faith is objective standard. Plaintiff’s complaint brought same causes of action that plaintiff had previously brought on multiple occasions, all of which were decided adverse to plaintiff, with the dispositions being upheld on appeal. Current action essentially asked District Court to set aside earlier mandate of 6th Circuit in one of the prior appeals, relief which is beyond the scope of the District Court’s authority. If plaintiff had issues with 6th Circuit decision, plaintiff needed to file Motion for Rehearing or seek further appeal of the 6th Circuit’s decision, not ask a District Court to ignore or disregard or change prior 6th Circuit decision.

(7884) *Cory v. Bennett*, 2015 WL 5105178 (W.D. Ky. 2015) – 28 USC Section 1915 allows an appeal to proceed without payment of fees where appellant demonstrates indigence. Court can deny *in forma pauperis* status where appeal is frivolous on its face. However, court should not deny status where appeal was a “longshot”, where appellant presented arguments that were clear and logical and contained citations to authorities. While appeal may not have been particularly persuasive, dismissal based on *in forma pauperis* status is not warranted.

13.64 Appeal Bond

(7885) *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.

13.65 Taxable Costs

- (7886) *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.

13.66 Attorney Fees

- (7887) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 6600040 (E.D. Mi. 2016) – Rule 8020 allows Court to award sanctions against appellant where appeal is frivolous. Appeal is frivolous where result is obvious or where appellant's argument is wholly without merit. Although appellant did not prevail on appeal, appeal raised issues that were not wholly without merit. Motion for sanctions denied.
- (7888) *Wallace v. Rosales*, Case No. 13-1518 (9th Cir. BAP 2014) – Bankruptcy Court has jurisdiction to award attorney fees to Debtor for proceedings in bankruptcy court to remedy violation of discharge injunction. However, Bankruptcy Court lacks jurisdiction to award attorney fees for Debtor's successful defense of the contempt award on appeal. Under Federal Rule of Appellate Procedure 38, only the appellate court has jurisdiction to award attorney fees for services in the appeal.

13.67 Sanctions – Frivolous Appeal

- (7889) *Deshikachar v. Collins*, 2016 WL 826053 (E.D. Mi. 2016) – Court has authority under Rule 8020 to award sanctions including attorney fees for frivolous appeal. However, request for attorney fees must be made by separate motion and properly briefed. Court denied request for attorney fees where only mention was in Report and Recommendation by Magistrate, without prejudice to prevailing party to file appropriate motion.
- (7890) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Bankruptcy Rule 8020 is materially identical to Rule 38 which allows sanctions for appeals that are raised for improper purpose such as harassment or delay, or when the appeal consists of baseless or improperly raised arguments or are otherwise wholly without merit or any reasonable expectation of altering lower court judgment. Appellant's failure to file initial brief within time set in briefing schedule does not demonstrate that appeal is frivolous or that appeal was taken to harass or delay appellee. Absent briefs being filed, court could not determine that appeal was wholly without merit or lacked any reasonable expectancy of altering lower Court Order.
- (7891) *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.
- (7892) *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.
- (7893) *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

13.68 Voluntary Dismissal

13.69 Mootness

- (7894) *In re Johnson*, 2018 WL 1798228 (6th Cir. BAP 2018) – Constitutional Mootness derives from Article III that limits court jurisdiction to actual cases of controversies and applies where events occurred during appeal that make it impossible for court to grant effective relief. Availability of partial relief is sufficient to avoid constitution mootness. Equitable mootness is applied to protect parties relying on successful confirmation of plan from drastic change after appeal. Equitable mootness is not grounded in Article III and is not concerned with ability to grant relief, but focuses on protecting good faith reliance created by implementation of plan. Factors to be considered are (1) whether stay was obtained; (2) whether plan has been substantially consummated; and (3) whether relief requested would affect rights of parties not before Court or success of plan. Lack of stay is relevant but not necessarily fatal to appeal. Plan is substantially consummated where there has been transfer of all or substantially as property proposed by plan to be transferred; debtor or successor has assumed business or management of all or substantially all property dealt with by plan; and distributions under plan have commenced. Most important factor is impact on rights of parties not before court or the success of plan. Where appeal would require piecemeal revisions rather than wholesale annihilation or substantial upset of plan, appeal is not moot. Creditor did not obtain stay of confirmation order pending appeal. Creditor seeking to appeal did not request or obtain stay. Plan was substantially consummated as property was transferred, Creditor Trust established to handle distributions, and Creditor Trustee has been appointed and assumed control over Trust and been substituted as party plaintiff in pending

litigation and made distributions to creditors. While Plan called for long term distributions from Debtor's future income, any property to be transferred as of Effective Date of Plan has been transferred. Only issue on appeal was whether Court erred in confirming plan as not meeting feasibility requirement. Relief could not be narrowly tailored as granting relief on appeal necessarily requires setting aside entire plan and requiring rewriting of entire plan.

- (7895) *Banks v. Wells Fargo Bank, NA*, 2018 WL 1088072 (E.D. Mi. 2018) – Mootness implicates federal court's jurisdiction. Mootness the requirement of Article III of the Constitution that there be live case or controversy. Mootness depends on whether relief sought would make difference to legal interest of parties and whether implementation of relief would be inequitable. Automatic Stay does not survive dismissal of bankruptcy case. Once case is dismissed, any challenge to Order Lifting Stay is moot. Debtor can appeal stay relief only if Debtor also appeals dismissal itself.
- (7896) *In re Odell*, 2018 WL 624884 (6th Cir. BAP 2018) – Automatic Stay terminates automatically upon entry of discharge as to property that is not property of estate. Debtor's claimed homestead exemption which exceeded value of property, when final, removed homestead from property of estate. Appeal of Order Lifting Stay rendered moot by subsequent entry of discharge as stay would have terminated in any event, leaving appellate court with no effective remedy.
- (7897) *JGMM Realty, LLC v. LNR Partners, LLC*, 2017 WL 2992511 (6th Cir. 2017) – Appeal is moot where Court cannot grant effective relief. Appeal of Order Denying Temporary Injunction is moot where action to be enjoined has already occurred. Appellate Court cannot "turn back the clock" and enjoin an action that already occurred.
- (7898) *Brantley v. CitiMortgage, Inc.*, 2017 WL 521549 (S.D. Ohio 2017) – Appeal is moot where issues presented are no longer live or parties lack legally cognizable interest in outcome. Test for Mootness is whether relief sought would make difference to legal interests of parties. Appeal from Bankruptcy Court Order denying motion for preliminary injunction rendered moot when underlying bankruptcy case was dismissed and Debtor did not appeal that dismissal. Preliminary injunction was based on automatic stay which existed only so long as bankruptcy case was pending. Remand to Bankruptcy Court would be useless as Court cannot Order Bankruptcy Court to reopen bankruptcy proceeding or otherwise afford any relief.
- (7899) *MSCI 2007-IQ Granville Retail, LLC v. UHA Corporation, LLC*, 2016 WL 5724037 (6th Cir. 2016) – Appeal of summary judgment in foreclosure action rendered moot when property was sold at foreclosure sale pursuant to judgment. Appellant did not seek stay or post supersedeas bond and absent stay special master sold property. Where appellee successfully collects on judgment after appellant fails to request stay, appellant is deemed to have satisfied judgment "voluntarily" rendering any pending appeal moot. If appellant seeks stay of proceedings but did not, for some reason, obtain stay, such as failure to post bond, appeal will not be moot as party may have claim of restitution if judgment is reversed. Where appellant failed to seek stay in first instance, restitution claim is not available as matter of law.
- (7900) *Rich Dad Operating Company, LLC v. Zubrod*, 2016 WL 3397685 (10th Cir. 2016) – Appeal is moot and no longer presents "case or controversy" where issues presented are no longer live or parties lack legally cognizable interest in outcome. Appeal is constitutionally moot if court can fashion no meaningful relief. If court can fashion some sort of meaningful relief, even if relief only partially addresses grievances of appealing party, appeal is not moot. Appeal of settlement not moot where appeal cannot unwind settlement or avoid transfers of property that resulted, but would restore to Debtor ability to challenge claims of appellee in bankruptcy case. In light of possible relief, action was not constitutionally moot. Section 363(m) did not apply where bankruptcy court did not make finding under Section 363(m) that purchaser was "good faith" purchase as required.
- (7901) *In re Castaic Partners II, LLC*, Case No. 14-55281 (9th Cir. 2016) – Appeal of Order Lifting Stay rendered moot when Debtors dismissed underlying bankruptcy case. Appeal becomes constitutionally moot when changes in the status quo during the pendency of the appeal leave the court unable to grant effective relief or where it would be impracticable or inequitable to do so.
- (7902) *Village at Knapp's Crossing, LLC v. Pioneer Ventures, LLC*, 2016 WL 98160 (6th Cir. 2016) – Appeal of order converting case from Chapter 11 to Chapter 7 rendered moot when Chapter 7 sold Debtor's only asset at section 363 sale. There was no basis to set aside 363 sale even if case was returned to Chapter 11 and Debtor lacked any ability or business to reorganize after sale of property. Appellate court lacked any ability to grant effective relief, resulting in dismissal of appeal.
- (7903) *Mwangi v. Wells Fargo Bank*, 2014 WL 5334683 (9th Cir. 2014) – Appeal of order denying sanctions for alleged violation of stay dismissed as moot where court determines that creditor did not violate stay.
- (7904) *Dates v. HSBC Bank*, 2014 WL 4377778 (S.D. Ohio 2014) – Appeal of order resolving objection to proof of claim rendered moot when underlying Chapter 13 case dismissed. Resolution of issues regarding claim could no longer have any effect on rights and liabilities of parties or alter or affect relationship between parties.
- (7905) *Dates v. HSBC Bank*, 2014 WL 4377783 (S.D. Ohio 2014) – Appeal of order lifting stay in Chapter 13 case rendered moot when underlying Chapter 13 case was dismissed. Resolution of issues regarding stay relief could no longer have any effect on rights and liabilities of parties or alter or affect relationship between parties.
- (7906) *Gaskin v. Barstow*, Case no. 12-0694 (9th Cir. BAP 2014) – Appeal of creditor's motion to sell property rendered moot when discharge entered and property was abandoned back to Debtor. At that point, issue became one solely between Debtor and creditor and did not involve property of estate. Appellate court lacked ability to grant any effectual relief as property was no longer property of the estate and there is no statutory authority for a bankruptcy court to administer or sell property that is not property of the estate.
- (7907) *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.

- (7908) *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.
- (7909) *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.
- (7910) *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.
- (7911) *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.
- (7912) *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 could 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.
- (7913) *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.

13.70 Equitable Mootness

- (7914) *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC*, Case No. 17-2268 (4th Cir. 2018) – Equitable Mootness bars appeal of Confirmation Order where reversing Order would unravel web of interrelated settlements and where Court transactions in Plan have already been consummated. Appeal contesting third-party releases and exculpation provisions moot where provisions were integral to confirmed Plan and could not be carved out without upsetting overall Chapter 11 confirmed Plan.
- (7915) *Jefferson County v. Bennett*, Case No. 15-11690 (11th Cir. 2018) – Equitable Mootness applies in Chapter 9 to same extent as Chapter 11. Case is equitably moot where adversely affected party does not seek stay pending appeal and Debtor and others take significant and largely irreversible steps in reliance on un-stayed Plan. Municipal Plan required County to issue new long-term debt to repay prepetition, defaulted sewer bond debt, with new debt having term of 40 years with locked in rate increases. Ratepayers objected to confirmation and appealed confirmation order but did not seek or obtain stay. Municipality issued new bonds and to used proceeds to repay prepetition bonds. Unwinding of confirmed Plan would not be practical as municipality could not unwind issuance of new bonds, compelling dismissal for equitable mootness.
- (7916) *In re Johnson*, 2018 WL 1798228 (6th Cir. BAP 2018) – Constitutional Mootness derives from Article III that limits court jurisdiction to actual cases of controversies and applies where events occurred during appeal that make it impossible for court to grant effective relief. Availability of partial relief is sufficient to avoid constitution mootness. Equitable mootness is applied to protect parties relying on successful confirmation of plan from drastic change after appeal. Equitable mootness is not grounded in Article III and is not concerned with ability to grant relief, but focuses on protecting good faith reliance created by implementation of plan. Factors to be considered are (1) whether stay was obtained; (2) whether plan has been substantially consummated; and (3) whether relief requested would affect rights of parties not before Court or success of plan. Lack of stay is relevant but not necessarily fatal to appeal. Plan is substantially consummated where there has been transfer of all or substantially as property proposed by plan to be transferred; debtor or successor has assumed business or management of all or substantially all property dealt with by plan; and distributions under plan have commenced. Most important factor is impact on rights of parties not before court or the success of plan. Where appeal would require piecemeal revisions rather than wholesale annihilation or substantial upset of plan, appeal is not moot. Creditor did not obtain stay of confirmation order pending appeal. Creditor seeking to appeal did not request or obtain stay. Plan was substantially consummated as property was transferred, Creditor Trust established to handle distributions, and Creditor Trustee has been appointed and assumed control over Trust and been substituted as party plaintiff in pending litigation and made distributions to creditors. While Plan called for long term distributions from Debtor’s future income, any property to be transferred as of Effective Date of Plan has been transferred. Only issue on appeal was whether Court erred in confirming plan as not

meeting feasibility requirement. Relief could not be narrowly tailored as granting relief on appeal necessarily requires setting aside entire plan and requiring rewriting of entire plan.

- (7917) *Ochadlous v. City of Detroit*, Case No. 2016 WL 5682704 (6th Cir. 2016) – Equitable mootness is prudential doctrine that protects need for finality in bankruptcy proceeding and allows third parties to rely on finality by preventing court from unscrambling complex bankruptcy reorganizations when appealing party should have acted before plan became extremely difficult to retract. Equitable mootness is not premised on court ability to grant relief, but on protecting good faith reliance on interests created by bankruptcy plan. Analysis involves three part test: (a) whether stay of Order has been obtained; (b) whether plan has been substantially consummated; and (c) whether relief requested would significantly and irrevocably disrupt implementation of plan or disproportionately harm reliance interests of third parties. Substantial consummation considers extent of Debtor's transfer of property, assumption of responsibilities and distribution of assets as prescribed by plan. Equitable mootness warranted where plan was substantially consummated, and numerous significant actions have occurred, including transfers of assets, issuance of new debt, and substantial payments to creditors at lower amounts as provided in confirmed plan. Although retirement resolution was small part of case, undoing that part would require reversal of Grand Bargain by which City generated money to pay claims, and would likely unravel the entire plan, forcing the City back into bankruptcy and emergency oversight and requiring whole new set of negotiations to try to come up with confirmable plan. Although supreme Court has expressed disfavor for equitable mootness and stressed that federal courts have obligation to decide issues before it, court did not either expressly or impliedly repeal concept of equitable mootness.
- (7918) *In re One2One Communications, LLC*, 805 F.3d 428 (3d Cir. 2016) – Equitable mootness is very limited doctrine that should be applied in complex Chapter 11 cases only. Doctrine limited to cases where reversal on appeal leads to “perverse” outcome and significant injury to third parties, or leaves chaos in bankruptcy case from a plan in tatters. Factors include (1) whether plan has been substantially consummated; (2) whether stay has been obtained; (3) whether relief requested on appeal would affect rights of parties not before the court; (4) whether relief requested would affect success of plan; and (5) public policy regarding finality of bankruptcy judgments. Analysis is two-step process. First, court must determine if plan is substantially consummated. If so then court must determine whether appeal would either fatally unscramble the plan or significantly harm third parties. Court should consider whether relief is available that would allow plan to be modified in manner that does not cause plan to collapse. Factors are interconnected and overlapping and in the end equitable mootness is applied only to prevent court from unscrambling complex bankruptcy reorganizations where confirmation would be extremely difficult to retract. Appeal of plan not equitably moot where plan, although substantially consummated, was not complex. Plan addressed \$200,000 investment by one investor in reorganized Debtor; Debtor had only one secured creditor with blanket lien for less than \$100,000; Debtor had only 17 unsecured creditors including insiders; Plan did not require new financing, merger, dissolution of entities, issuance of stock or bonds, name change, change of business location, change in management or other significant transactions, and case was not sufficiently complex that dismissal on grounds of mootness would be warranted. Concurring opinion raises serious statutory and constitution issues regarding validity of concept of equitable mootness in any context, as Court has appellate jurisdiction as matter of statute and neither statute nor constitution allows Court to decline to exercise jurisdiction.
- (7919) *Germersaad v. Powers*, 826 F.3d 962 (7th Cir. 2016) – Appeal is equitably moot where subsequent events leave appellate court unable to fashion effective remedy. Appeal of order denying modification to increase plan payments did not become equitably moot merely because 60 month maximum plan term has expired. If order is reversed and plan is modified, Debtor would have to pay difference between amount paid under lower plan payment and increased amount under proposed plan modification. While 60 month plan term has expired and court cannot extend term beyond 60 months, this only prohibits court from requiring Debtor to make more than 60 monthly payments, but does not preclude court from allowing more than 60 months to cure defaults that occurred within 60 month plan term.
- (7920) *Ahuja v. Lightsquared, Inc.*, Case No. 15-2480 (2d Cir. 2016) – “Trimming back” on doctrine of equitable mootness, appeal is presumed equitable moot where Debtor's reorganization plan has been substantially consummated, defined as transfer of all or substantially all property proposed by plan to be transferred or assumption by Debtor or successor of all or substantially all of the property dealt with by the plan, or commencement of distribution under the plan. Second Circuit held that equitable mootness can be overcome with proof that (1) court can still order effective relief; (2) relief will not affect re-emergence of Debtor as revitalized entity; (3) relief will not unravel intricate transactions so as to knock the props out from every transaction that has taken place and create an unmanageable, uncontrollable situation for Bankruptcy court; (4) parties would be adversely affected would have right to participate in appeal; and (5) appellate pursued with diligence all available remedies to obtain stay pending appeal resulting in situation where reversal is inequitable. Court could grant relief as appeal is not constitutionally moot; party affected, Debtor, would be able to participate in appeal; and appellant diligently sought stay in bankruptcy court and district court as well as on appeal by seeking expedited appeal. Court could grant some relief, even if nominal, without knocking props out from under completed transactions or affecting emergence of revitalized entity, and appellant signaled willingness to accept some recovery in form of monetary damages that would not disturb plan or affect reorganized business fresh start.
- (7921) *Liggett v. Schwartz*, 2016 WL 323364 (6th Cir. 2016) – Appeal of order confirming plan is equitably moot where it is no longer prudent to upset the plan of reorganization determined by (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect rights of parties not before the court or the success of the plan. Failure to obtain a stay is not per se fatal to the appeal. Whether plan has been substantially consummated depends on (a) transfer of all or substantially all of the property proposed by the plan to be transferred; (b) assumption by the Debtor or successor to the Debtor of the business of the Debtor; (c) commencement of distributions under plan. During pendency of appeal, Debtor made substantial number of payments to creditors for three years, including payment to appellant of full value of her claim. Remand would cause serious adverse effects on other parties as plan would need to be entirely re-proposed. Lower Court incorrectly held that Appellant's claim was not impaired and so disallowed Appellant's vote. Had lower court correctly determined that Appellant was impaired, Appellant's negative vote would have precluded confirmation of plan. However, during appeal, plan became substantially consummated and appeal was equitably moot.
- (7922) *Taubitz v. City of Detroit*, Case no. 14-14917 (Bankr. E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an

order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (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. Where appellant does not obtain stay, Debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) Debtor or by the successor to the Debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.

- (7923) *Davis v. City of Detroit*, Case No. 14-14920 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (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. Where appellant does not obtain stay, Debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) Debtor or by the successor to the Debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (7924) *Brown v. City of Detroit*, Case No. 14-14919 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (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. Where appellant does not obtain stay, Debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) Debtor or by the successor to the Debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (7925) *Darrah v. City of Detroit*, 2015 WL 5697779 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (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. Where appellant does not obtain stay, Debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) Debtor or by the successor to the Debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (7926) *Ochadeleus v. City of Detroit*, 2015 WL 5697702 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (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. Where appellant does not obtain stay, Debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) Debtor or by the successor to the Debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.

credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.

- (7927) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Equitable mootness is equitable doctrine involving balance of equitable and prudential factors. Bankruptcy case is equitably moot, even if not technically moot, where plan of reorganization is substantially consummated such that it is no longer prudent to upset the plan. Court will consider whether stay was obtained; whether plan has been substantially consummated; and whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Appeal from judgment in adversary proceeding that denied Bank’s right to reform mortgage was not equitably moot as there were no third parties that would be impacted by the outcome of the appeal.

13.71 On Motion by Party

- (7928) *Hazel v. Wells Fargo Bank*, 2018 WL 558944 (S.D. Ohio 2018) – Rule 8018 requires appellant to serve and file brief within 30 days of notice that record has been transmitted to appellate court. If appellant does not file and serve brief within 30 days or with any extended time authorized by appellate court, appellee can move to dismiss appeal. Appellant had not filed brief more than 8 months after transmission of record. However, appellant was *pro se* and Court would afford one more opportunity to file brief. Appellant to file brief within 30 days or appeal would be dismissed.
- (7929) *White v. Corcoran*, 2016 WL 6962754 (E.D. Mi. 2016) – Standing in bankruptcy depends on whether party requesting relief has pecuniary interest in outcome of bankruptcy proceeding. Trustee is part in interest for purposes for appeals filed by Debtor where property in estate was insufficient to pay administrative expenses. Attorney for Trustee had separate, personal standing to appear in appeal that would impact estate’s ability to pay attorney fees awarded by bankruptcy court as appeal will directly impact attorney’s personal pecuniary interests.
- (7930) *Weilert v. Gwartz*, Case No. 15-1144 (9th Cir. BAP 2016) – Court can dismiss appeal where party egregiously or intentionally disregards or violates court rules and procedures. Factors include relative culpability of appellant and his attorney and impact of sanctions including ability to formulate penalties consistent with degree of fault. Appellant’s failure to timely file transcript, appendix and certification and later filing of those documents but including in record additional documents that were not included in the record on appeal did not warrant dismissal where Appellant’s counsel immediately recognized errors and took actions to correct those errors including stipulating to striking documents from record. Procedural violations were fault of attorney and not Appellant and did not prejudice Appellee and did not warrant dismissal of appeal.
- (7931) *Spirit SPE Portfolio 2007-1, LLC, v. Paxos*, 2014 WL 5091740 (N.D. Ohio 2014) – Court can dismiss appeal for failure to prosecute appeal where appellant fails to timely file briefs or otherwise comply with rules and time limits imposed by Court. Court should not dismiss appeal based on late filing of brief absent showing of bad faith, negligence or indifference, where appellant has demonstrated a persistent neglect of or indifference to procedural rules. Dismissal warranted where appellant missed at least two (and arguably more) deadlines by failing to timely file a brief and failing to timely file a response to Appellee’s Motion to Dismiss. Considered together, appellant’s actions evidenced a pattern of neglect and indifference. Appellant’s neglect or indifference was further demonstrated by consideration of record before bankruptcy court, where court detailed multiple instances of failure to comply with discovery deadlines or to file responses to motions to point that bankruptcy court ultimately entered judgment for appellee based on failure to respond to discovery including requests for admissions. Public policy favoring disposition on merits is not excuse for party’s failure to adhere to rules of court.
- (7932) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff’d* 2014 WL 3452292 (6th Cir. 2014) - Court 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.
- (7933) *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.
- (7934) *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.
- (7935) *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 of 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.

13.72 Dismissal – Failure to Pay Filing Fee

- (7936) *Rogers v. US Bankruptcy Court*, 2017 WL 3686547 (6th Cir. 2017) – Failure to pay filing fee after having been notified that failure to pay would result in dismissal warranted dismissal of appeal.

13.73 Dismissal – Failure to Prosecute

- (7937) *Rutledge v. Rubicon Realty Group, LLC*, 2018 WL 646844 (E.D. Mi. 2018) – Appeal dismissed where Appellant did not file designation of record for more than 2 months after deadline to do so notwithstanding Show Cause Order issued by Court warning that appeal would be dismissed if Appellant did not file Designation. Appellant’s conduct demonstrated that he was unaware of and had no intention of complying with Appellate Rules. *Pro se* appellant is still required to comply with rules.
- (7938) *Kesto v. George*, Case No. 16-14048 (E.D. Mi. 2017) - Rule 8009 requires party filing notice of appeal to designate items to include in appellate record, specify issues on appeal and order transcript of proceedings within 14 days of filing Notice of Appeal. Rule 8018 requires appellant to file initial brief 30 days after record is docketed with appellate Court. Appellants failure to order complete transcript and failure to file brief more than 3 months after brief was due, without any request by appellant for additional time and no indication that brief might be on the horizon amounts to “negligence or indifference” warranting dismissal of appeal.
- (7939) *In re Ritchie*, 15-14466 (E.D. Mi. 2016) – Court has authority to *sua sponte* dismiss appeal for failure to prosecute. Court scheduling order set deadline for appellant’s brief. Two months after deadline, court issued Order to Show Cause why the case should not be dismissed. Appellant did not file brief but did call Court and advised that ECF issues prevented filing of brief. Court gave another extension with specific warning that failure to file brief would cause case to be dismissed. Appellant still did not file brief but filed “Complaint” that purported to state claims against parties with no connection to current appeal, and did not present any legal or factual basis to support reversal of Bankruptcy Court’s decision. Appellant’s failure to meet any of the deadlines imposed by court to take any action to ensure progress of appeal warranted dismissal of appeal for failure to prosecute.
- (7940) *Pichler v. Mason*, Case No. 14-13451 (E.D. Mi. 2015) – Appellant’s actions indicated intent to abandon appeal where appellant failed to file initial brief notwithstanding multiple orders from court to file brief; and where appellant continued to file motions in the lower court seeking additional relief.
- (7941) *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.
- (7942) *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.
- (7943) *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.
- (7944) *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.
- (7945) *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.
- (7946) *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 litigation in bankruptcy court had and had filed numerous substantive motions in the Bankruptcy case.
- (7947) *French v. Shapiro*, Case No. 10-11333 (E.D. Mi. 2011) – Appeal of Order Dismissing Adversary proceeding without prejudice to refiling 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.

(7948) *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.

(7949) *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.

(7950) *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.

13.74 Disentitlement

(7951) *Weilert v. Gwartz*, Case No. 15-1144 (9th Cir. BAP 2016) – Disentitlement is equitable doctrine that allows court to dismiss appeal where appellant is willfully disobeying Court Order. State Court had authority to dismiss appeal where defendant suffered adverse judgment and then was ordered by Trial Court not to dispose of or transfer assets, and defendant made at least 47 separate transfers in direct violation of State Court Order.

13.75 Reconsideration of Dismissal

(7952) *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.

(7953) *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.

(7954) *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.

13.76 Vacatur

(7955) *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.

13.77 Settlement During Appeal

(7956) *Cox v. Nostaw, Inc.*, Case No. 16-1389 (7th Cir. 2017) - Settlement of bankruptcy dispute while matter is on appeal at Circuit Court requires approval of three separate courts. Federal Rule of Appellate Procedure 12.1 allows the Circuit Court to remand the proceeding to the District Court if the District Court indicates that it would grant the motion to approve the settlement if the Circuit Court remands for further proceedings. Rule 12.1 then requires similar order from Bankruptcy Court. Proper procedure for winning remand to District Court to approve settlement is to obtain indicative ruling from both Bankruptcy Court and District Court and then to file motion in Circuit Court for Remand under Rule 12.

H. Issues on Appeal

13.78 Consideration by Lower Court

(7957) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Good faith is factual question dependent on multiple factors. Appellate court would not consider on appeal factual decisions not decided by bankruptcy court. Bankruptcy Court did not consider good faith of Debtor where court already concluded that proposed plan was not feasible.

(7958) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Party waives issues on appeal at Circuit Court where party did not raise issues during appeal to district court.

(7959) *Lifstedt v. Kendall*, 2014 WL 1706148 (10th Cir. 2014) – Circuit Court will not consider issues on appeal that were not raised at BAP. Failure to raise issues at first appeal is deemed waiver of issues in subsequent appeal to Circuit Court.

(7960) *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.

- (7961) *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.
- (7962) *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.
- (7963) *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.
- (7964) *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.
- (7965) *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.
- (7966) *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.

13.79 Specification of Issues – Generally

- (7967) *Hubbard v. Select Portfolio, Inc.*, Case No. 17-2253 (6th Cir. 2018) – Failure to include issue in Statement of Issues waives issue for appeal.
- (7968) *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.
- (7969) *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.
- (7970) *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.

13.80 Specification of Issues – Failure to File

- (7971) *Elsass v. JPMorgan Chase Bank*, 2018 WL 3142000 (S.D. Ohio 2018) – Statement of issues must be filed within 14 days of Notice of Appeal per Rule 8009. Debtor did not file Notice for almost 6 months warranting dismissal of appeal.
- (7972) *Jawara v. SunTrust Bank*, 2016 WL 2770657 (M.D. Tn. 2016) – Appeal dismissed where *pro se* appellant filed to file statement of undisputed facts, designation of items to be included in record, or statement of issues presented for appeal. *Pro se* litigants are afforded more leeway in prosecution of appeal, that leniency has limits and *pro se* status does not exempt party for application of rules.
- (7973) *In re Chaban*, 2015 WL 10791900 (E.D. Mi. 2015) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 124 days after appeal is docketed. Court can dismiss appeal where party fails to meet deadlines based on bad faith, negligence or indifference. Dismissal warranted where instant appeal was appellant's fourth appeal in less than one year, creating presumption that appellant was familiar with deadlines. Untimeliness reflected vexatious nature of the entire proceeding and overall indifference to judiciary rules, time and resources.
- (7974) *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.

13.81 Waiver of Issues – Generally

- (7975) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 6158963 (E.D. Mi. 2016) – Motion for rehearing of appellate court must demonstrate palpable error by which the court and other parties were misled such that correction of the defect will result in different disposition; and must not be mere presentation of same issues ruled on by Court either expressly or by implication. Court did not err in concluding that Appellant failed to demonstrate the Bankruptcy Court’s Order Denying Rehearing was error. Notice of appeal designated Order to be reviewed as Order Denying Rehearing, and did not designate the underlying Order Granting Summary Judgment. Brief to appellate court was directed entirely to correctness of underlying order and did not address any argument about whether Bankruptcy Court erred in denying Motion for Reconsideration or even present correct standard of review when considering appeal of Order Denying Reconsideration. Motion demonstrated neither point of law that was overlooked or any other defect in appellate court’s affirmance of Bankruptcy Court Order Denying Rehearing.
- (7976) *Watson v. Cartee*, 2016 WL 1084764 (6th Cir. 2016) – Party ordinarily waives any issue that is not presented in initial brief. However, subject matter jurisdiction is not waivable and can be raised at any time by a party or by the court sua sponte.
- (7977) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Party waives issues on appeal where party’s brief does not address those issues. Party waives issues on appeal at Circuit Court where party did not raise issues during appeal to district court.
- (7978) *US Trustee v. Bane*, 2014 WL 1378313 (4th Cir. 2014) – Party waives issue on appeal when party’s initial brief fails to address issue.
- (7979) *Connery v. Norsworthy*, 2014 WL 1651957 (5th Cir. 2014) – Party who fails to address issue in briefs will be deemed to have abandoned issue.

13.82 Standard of Review

- (7980) *Brady v. Firth*, 2017 WL 744244 (E.D. Mi. 2017) – Bankruptcy Court’s factual finding that Debtors false statements were not made with fraudulent intent is reviewed using “clearly erroneous” standard. Bankruptcy Court carefully weighed evidence including conflicting testimony and reach conclusion that Debtor’s statements and conduct were not inconsistent with Debtor’s obligation to testify truthfully where there was no evidence that Debtor’s intent was knowing and fraudulent. There was no evidence of pattern of reckless or cavalier disregard for truth and other than omission of plaintiffs from initial schedules, there were no inaccuracies or errors in Debtor’s Schedules. Bankruptcy Court considered effect of 727(a)(4) false statements on third parties including Court itself, Trustee and other creditors but did not find any errors or omissions were made with fraudulent intent sufficient to deny discharge. Record did not demonstrate that Bankruptcy Court holding was clearly erroneous or leave District Court with “definite and firm conviction that a mistake was committed”.
- (7981) *Comu v. King Louie Mining, LLC*, Case No. 15-10804 (5th Cir. 2016) – Appeal of Bankruptcy Order to Circuit Court is reviewed by Circuit Court *de novo* as to questions of law and clear error for factual conclusions. Circuit Court reviews Bankruptcy Court Order directly and does not review District Court’s decision on intermediate appeal, although Court may consider District Court’s holding in evaluating Bankruptcy Court decision. Circuit Court is not bound by and gives no deferential weight to District Court opinion.

13.83 Certified Questions of State Law

- (7982) *Watson v. Cartee*, 2016 WL 1084764 (6th Cir. 2016) – District Court has authority to certify state law questions to state supreme court. Whether to certify question is within sound discretion of District Court.

I. Briefs

13.84 Deadline for Filing

- (7983) *Elsass v. JPMorgan Chase Bank*, 2018 WL 3142000 (E.D. Ohio 2018) – Appellants’ brief is due 30 days after Bankruptcy clerk transfers file to District Court. Case dismissed where Debtor did not file brief for almost 6 months after file transferred.
- (7984) *Hazel v. Wells Fargo Bank*, 2018 WL 558944 (S.D. Ohio 2018) – Rule 8018 requires appellant to serve and file brief within 30 days of notice that record has been transmitted to appellate court. If appellant does not file and serve brief within 30 days or with any extended time authorized by appellate court, appellee can move to dismiss appeal. Appellant had not filed brief more than 8 months after transmission of record. However, appellant was *pro se* and Court would afford one more opportunity to file brief. Appellant to file brief within 30 days or appeal would be dismissed.
- (7985) *Jawara v. SunTrust Bank*, 2016 WL 1244717 (M.D. Tn. 2016) – Local rule allows for summary affirmance of any bankruptcy appeal where appellant fails to file brief within 14 days after entry of appeal on docket. Appeal summarily affirmed where appeal had been pending for one year yet appellant failed to file designation of record, statement of issues or initial brief.
- (7986) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Briefs are due by date set out in initial briefing order unless deadline is extended on Motion filed under Rule 9006.

13.85 Extension of Time to File

- (7987) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff’d* 2014 WL 3452292 (6th Cir. 2014) – Court properly denied request to extend time to file brief on appeal where District Court concluded that court lacked jurisdiction over cross-claims that were subject of appeal. Once court concluded it lacked jurisdiction, any issues regarding briefing were rendered moot, including whether District Court properly dismissed case for failure to timely file briefs.
- (7988) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Motion for extension of time under Rule 9006 must either be requested before deadline; or can be requested after expiration only on showing that failure to act was due to excusable neglect. Excusable neglect standard

is ultimately equitable one, taking into account relevant circumstances that caused omission, danger of prejudice to opposing party, length of delay and impact on judicial proceedings, reason for delay, whether delay was within control of movant, and whether movant acted in good faith. Delay of less than two months in filing initial brief on appeal was excusable. Appellee would not be prejudiced as appellee has right to file answer brief on appeal. Appellant discovered error and brought it to court's attention by filing motion for extension before appellee had taken any affirmative action. Appeal was in early stages and granting motion would not have any meaningful adverse effect on judicial proceedings. Although cause of error – counsel's mis-calendaring of deadline – was entirely within control of appellant and counsel, considering other factors made this a less important fact.

13.86 Content

(7989) *Hubbard v. Select Portfolio Services, Inc.*, 2018 WL 2753646 (6th Cir. 2018) – Brief must present claims raised, explain how allegations plausibly stated claims, and set forth legal support. Brief that did nothing more than request that Court reverse with nothing for Court to actually analyze is legally deficient and will be rejected as a matter of course.

(7990) *In re Freemont Hospitality Group, LLC*, Case No. 14-8053 (6th Cir. 2015) – Briefs must fairly address issues raised in orders being appealed. Brief that did not include any argument or references to record on appeal that were in any way related to orders being appealed, and that failed to include a statement of issues presented or a standard of review, or any contentions and citations to authorities, that related to issues presented warranted dismissal of appeal.

13.87 Limitations on Length

(7991) *Vining v. Comerica Bank*, Case No. 03-4950 (Bankr. E.D. Mi. 2015) – Scheduling Order limited page length of briefs. Party's brief exceeded 50 page limit where brief ostensibly contained 50 pages, but added 15 page, single spaced "Summary of Evidence" that contained additional facts and argument and should be counted as part of the brief. Second party attempted to circumvent limit by including multiple documents as "exhibits", omitting a statement of facts, and incorporating various pleadings by reference. Third party's brief also exceeded 50 page limit where brief itself was 49 pages but separate Motion for Summary Judgment that contained facts, substantive legal arguments, and citations added another 23 pages for a total of 72 pages. Briefs stricken with leave to file amended briefs that comply with court imposed page limitations.

J. Record on Appeal

13.88 Time for Filing

(7992) *In re Chaban*, 2015 WL 10791900 (E.D. Mi. 2015) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 124 days after appeal is docketed. Court can dismiss appeal where party fails to meet deadlines based on bad faith, negligence or indifference. Dismissal warranted where instant appeal was appellant's fourth appeal in less than one year, creating presumption that appellant was familiar with deadlines. Untimeliness reflected vexatious nature of the entire proceeding and overall indifference to judiciary rules, time and resources.

(7993) *Byers v. Byers*, 2015 WL 3917281 (S.D. Ohio 2015) – Statement of Issues and Designation of Record are ordinarily due 14 days after filing notice of appeal. Court would grant extension of time where Motion was filed on last day on which Designation could be timely filed, where appellant was pro se and appellee would not suffer any prejudice as a result of a short extension.

13.89 Disputes – Jurisdiction to Resolve

(7994) *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.

13.90 Disputes – Generally

(7995) *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.

13.91 Failure to Provide

(7996) *Sheppard v. Love*, Case No. 16-51145 (5th Cir. 2017) – Appellant's failure to provide Court with transcript of Bankruptcy Court's oral ruling prevents appellant from demonstrating factual error requiring affirmance of Lower Court decision.

(7997) *Kesto v. George*, Case No. 16-14048 (E.D. Mi. 2017) - Rule 8009 requires party filing notice of appeal to designate items to include in appellate record, specify issues on appeal and order transcript of proceedings within 14 days of filing Notice of Appeal. Rule 8018 requires appellant to file initial brief 30 days after record is docketed with appellate Court. Appellants failure to order complete transcript and failure to file brief more than 3 months after brief was due, without any request by appellant for additional time and no indication that brief might be on the horizon amounts to "negligence or indifference" warranting dismissal of appeal.

(7998) *Jawara v. SunTrust Bank*, 2016 WL 1244717 (M.D. Tn. 2016) , *report and recommendation approved*, 2016 WL 2770657 (M.D. Tn. 2016) – Appeal dismissed where pro se appellant filed to file statement of undisputed facts, designation of items to be included in record, or statement of issues presented for appeal. Pro se litigants are afforded more leeway in prosecution of appeal, that leniency has limits and pro se status does not exempt party for application of rules.

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- (7999) – Local rule allows for summary affirmance of any bankruptcy appeal where appellant fails to file and serve designation of record or statement of issues on appeal. Appeal summarily affirmed where appeal had been pending for one year yet appellant failed to file designation of record, statement of issues or initial brief.
- (8000) *In re Freemont Hospitality Group, LLC*, Case No. 14-8053 (6th Cir. 2015) – Appellant has duty to provide Appellate Court with record adequate to allow court to consider issues on appeal. Items designated in record were entirely unrelated to the orders that were appealed pursuant to the notice of appeal, and failed to include any relevant order or judgment, any opinion, findings of fact or conclusions of law, any relevant pleadings or any transcripts. Defects in record left appellate court unable to determine that bankruptcy court's findings were erroneous, such that bankruptcy court's presumption that it acted properly compelled affirmance of decision.
- 13.92 Redaction of Transcript
- (8001) *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.
- K. Standards of Review
- 13.93 *De Novo* Review
- (8002) *Waldman v. Stone*, 2015 WL 1245361 (6th Cir. 2015) – *De novo* review of Bankruptcy Court's proposed Findings of Fact and Conclusions of Law does not require District Court to take additional evidence on issues as to which objections have been filed. While rule 9033 allows District Court to take additional evidence, Court is not required to do so. *De novo* review requires district court to review proposed findings and conclusions without affording Bankruptcy court any deference or presumption of correctness. District Court applied correct standard where court expressly stated that it did not afford Bankruptcy court findings and conclusions any presumption of validity.
- 13.94 Question of Law
- 13.95 Question of Fact
- (8003) *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.
- 13.96 Mandate After Appeal
- (8004) *Sunshine Heifers, LLC v. Citizens First Bank*, 2017 WL 3747194 (6th Cir. 2017) – Mandate rule requires that after superior court has determined law of case and issued mandate, lower court is not free to depart from that finding. In determining whether issue is subject to mandate rule, Court must determine whether issue was expressly or impliedly decided by superior court and whether mandate was so narrow in scope as to preclude lower court from reconsidering issue. Prior appeal may resolve issue implicitly where resolution of issue was necessary step in resolving earlier appeal; resolution of issue would abrogate prior decision and so must have been considered in prior appeal; or issue is so closely relate to earlier appeal its resolution requires no additional consideration and so was resolved even if unstated. Exceptions apply where evidence in subsequent trial is substantially different; controlling authority since made contrary decision applicable; or decision was so clearly erroneous and would work substantial justice. If appellate court issues general remand, Lower Court is free to consider all issues subject to law of case. If appellate court issues limited remand that expressly outlines issues to be addressed, framework within which lower court acts is narrow and limited. Prior opinion that determined that Interest in cattle was not “disguised security interest” did not address or even attempt to address title to cattle where debtor leased some cattle and owned others subject to security interest. Bankruptcy Court concluded that debtor had sold all of the leased cattle before filing such that cattle in possession of debtor must be owned by debtor subject to security interests. Further, to extent cattle were leased using funds that were subject to Lender's security interest, Lender had superior interest in funds and in proceeds and products acquired by funds such that security interest would have attached to leased cattle superior to rights of lessor. Bankruptcy Court's later ruling did not violate mandate rule as issues in remand were distinct and not involved in prior appeal.
- (8005) *JPMorgan Chase Bank. v. Winget*, 2017 WL 477960 (6th Cir. 2017) - “Mandate Rule” limits District Court on remand from Circuit Court to implementing Circuit Court decision as specified in remand. Mandate Rule instructs that District Court is without authority to expand inquiry beyond matters forming basis of appellate court's remand. Circuit Court remand with instructions to enter judgment on behalf of lender precluded defendants from asserting additional defenses or raising additional arguments in opposition to entry of judgment. Mandate left no leeway for District Court to conduct any further proceedings or consider any additional arguments.
- (8006) *Sunshine Heifers, LLC v. Purdy*, 2016 WL 4392815 (W.D. Ky. 2016) – “Mandate Rule” is specific application of law of the case. Once appellate court has decided issue and issued mandate, lower court is prohibited from departing from mandate. Appellate Court did not decide ownership of cattle but only whether cattle were leased or were purchased subject to a disguised security interest. Holding was not determinative on later issue of how many cattle were sold at auction and whether any of the cattle sold were owned by Debtor outright versus being cattle leased by Debtor.

XIV. Avoidable Transfers

A. Trustee Strong Arm Power

14.1 Section 544 Generally

- (8007) *Buchwald Capital Advisors, LLC v. Papas*, 2014 WL 4187371 (Bankr. E.D. Mi. 2014), *aff'd*, 2018 WL 509741 (E.D. Mi. 2018) – Section 544(b)(1) allows Trustee to avoid any transfer of interest of Debtor in property to extent transfer is voidable under applicable law. Action brought under State Uniform Fraudulent Transfer Act must fulfill all state law requirements of cause of action.

14.2 Trustee as Judicial Lien Creditor

- (8008) *Harker v. PNC Mortgage Company*, 2017 WL 1169615 (Bankr. S.D. Ohio 2017), *aff'd*, 2018 WL 717953 (6th Cir. BAP 2018) – Section 544 allows trustee to avoid transfers that, under state law, would not bind hypothetical judgment lien creditor. Ohio State statute that provides that defectively executed but properly recorded mortgage constitutes notice prevents trustee from asserting status as bona fide purchaser, but does not impact status as hypothetical judgment lien creditor. Ohio law does not require that judgment creditor have same attributes as bona fide purchaser regarding notice and does not make lack of notice of unrecorded or defective lien a condition to obtain superior judgment lien on Debtor's property. Notice of prior recorded but defectively executed mortgage has no impact on lien priority dispute. Although trustee's complaint failed to state cause of action to extent it relied on bona fide purchaser status, trustee's complaint stated cause of action using trustee's powers as hypothetical judgment lien creditor to challenge priority of trustees "lien" versus creditors defectively recorded mortgage.
- (8009) *In re Dinoto*, 2016 WL 7655140 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.
- (8010) *In re Clements Manufacturing Liquidation Company*, 2016 WL 6155907 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.
- (8011) *Messer v. JPMorgan Chase Bank*, 2016 WL 4750021 (Bankr. S.D. Ohio 2016) – Failure to complete notary section of mortgage does not render recording ineffective to provide constructive notice. Ohio legislature amended law to provide that recorded document constitutes constructive notice up on recording without any reference to notary or other requirements, and states that a person contesting validity or enforceability of transaction is considered to have discovered all matters in the public record as of date of challenged transaction. Constructive notice precludes attempt under Section 544 to invalidate transaction, whether as "bona fide purchaser" or as "hypothetical judgment lien holder".
- (8012) *In re Lozar*, 2014 WL 910352 (Bankr. N.D. Ohio 2014) – Lender's lien was satisfied and lender's interest subordinate to claims of Trustee where lender, prior to commencement of case, received check from Debtor and released lien, noted discharge of lien on title, and returned title to borrower. After check bounced, lender made no effort to reinstate lien on title or to recover certificate of title from Debtor. As of date of commencement of bankruptcy case, record title was in Debtor with no perfected security interest. Trustee, as holder of rights as judicial lien creditor, held interest superior to unrecorded lien.
- (8013) *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.
- (8014) *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.
- (8015) *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.
- (8016) *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.

- (8017) *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.
- (8018) *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.
- (8019) *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.
- (8020) *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.
- (8021) *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.
- (8022) *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.
- (8023) *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.
- (8024) *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.
- (8025) *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.
- (8026) *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.

- (8027) *Westenhoef 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.
- (8028) *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.
- (8029) *Degirolo 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).
- (8030) *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.
- (8031) *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.
- (8032) *Stockton Mortgage Corporation v. Schlarman*, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by Debtor and co-owner that defined “Borrower” only as the co-owner did not constitute a grant of the mortgage against Debtor’s interest in the property. Under Kentucky law, party must be named in the body of the mortgage for the mortgage to be effective as to third parties. Signature by Wife as “Borrower” does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Debtor’s interest in the Property is not encumbered by the Mortgage executed by only Northcutt because the Debtor and Northcutt held the property as joint tenants, and one party could not encumber the Property as a single, indivisible estate. Accordingly, the Trustee holds superior title to the extent of that interest.
- (8033) *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.
- (8034) *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.
- (8035) *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 was as of moment of petition not subject to attack by judicial lien creditor. Subsequent turnover of the funds to the Trustee does not alter the Bank’s secured position.
- (8036) *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.
- (8037) *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).

14.3 Trustee as Holder of Unsatisfied Execution

- (8038) *In re Thompson*, Case no. 13-6389 (Bankr. W.D. Mi. 2014) – Under Michigan law, lien in vehicle is perfected when lienholder delivers to Secretary of State properly completed RD-108. Although SOS erroneously identified incorrect creditor on certificate of title as lien holder, correct lienholder had delivered to SOS the properly completed RD-108 prior to commencement of case, crating in lienholder valid, perfected and unavoidable lien, although certificate of title was not amended to show correct lienholder until after commencement of case.

- (8039) *Rogan v. Litton Loan Servicing, LP*, 2011 WL

14.4 Trustee as Bona Fide Purchaser

- (8040) *Harker v. PNC Mortgage Company*, 2017 WL 1169615 (Bankr. S.D. Ohio 2017), *aff'd*, 2018 WL 718403 (6th Cir. BAP 2018) – Section 544 allows trustee to avoid transfers that, under state law, would not bind bona fide purchasers for value and without notice. Trustee cannot avoid mortgage which, under applicable state law, is deemed to provide constructive notice to hypothetical bona fide purchaser for lean creditor. Ohio law states that defectively executed but recorded mortgage still constitutes notice to hypothetical bona fide purchaser. Fact that mortgage may have been improperly notarized does not defeat effect of recorded mortgage for purposes of providing notice.
- (8041) *Simmons v. Federal Home Loan Mortgage Corp.*, 2016 WL 6608381 (Bankr. S.D. Ohio 2016) – Chapter 13 Debtors may be granted derivative standing to pursue avoidance actions, using trustee's powers under Code Section 544. Separate Motion for Derivative Standing not necessary where Chapter 13 plan as confirmed contained provision granting derivative standing and Confirmation Order specifically provided that Debtor would file adversary post-confirmation. Mortgage signed by Debtor avoided where mortgage was recorded in incorrect county. Person searching property records in county where property located would not find mortgage recorded in different county. As such, mortgage did not provide constructive notice and can be avoided.
- (8042) *Messer v. JPMorgan Chase Bank*, 2016 WL 4750021 (Bankr. S.D. Ohio 2016) – Failure to complete notary section of mortgage does not render recording ineffective to provide constructive notice. Ohio legislature amended law to provide that recorded document constitutes constructive notice up on recording without any reference to notary or other requirements, and states that a person contesting validity or enforceability of transaction is considered to have discovered all matters in the public record as of date of challenged transaction. Constructive notice precludes attempt under Section 544 to invalidate transaction, whether as “bona fide purchaser” or as “hypothetical judgment lien holder”.
- (8043) *In re Tellico Lake Properties, LP*, 2016 WL 1258287, 548 BR 800 (Bankr. E.D. Tn. 2016) – Automobiles were part of estate of bankruptcy corporation where principal of corporation purchased autos in his own name using corporate funds, vehicles were never titled in either individual's name or corporate name, corporate tax returns for 2005 – 2010 listed vehicles as assets of corporation, there was no documentation that corporation gave or transferred interests to principal, and corporation's SOFA listed transfer of vehicles from corporation to “purchaser” as satisfaction of pre-existing loan. Trustee could avoid interests of “purchaser” as purchaser never obtained certificates of title in purchaser's name. Trustee could also avoid “purchaser's” security interest where purchaser also never recorded lien on title leaving liens unperfected under Tennessee law.
- (8044) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor can exercise derivative standing under Section 544 to contest validity of unrecorded mortgage. Although confirmed plan treated mortgage creditor as fully secured and would have precluded any attempt by Debtor to treat debt as unsecured, Debtor later modified plan to make lien retention subject to avoidance powers under Section 544 and lender did not object to that modification. Request to modify plan specifically referenced intent to bring action against lender. Lender is bound by terms of plan as modified including provision allowing Debtor to contest validity of mortgage.
- (8045) *Kellner v. First Ohio Banc & Lending, Inc.*, 2014 WL 1200320 (Bankr. S.D. Ohio 2014) – Trustee cannot use strong arm powers to avoid liens or interest of which trustee has constructive notice in chain of title. Trustee lacked constructive notice of mortgage where legal description in mortgage was wholly inaccurate and because mortgages are indexed by description, was completely outside chain of title. Lender with avoided mortgage was unsecured creditor and could file unsecured claim for debt.
- (8046) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Trustee takes title to real property free and clear of liens to same extent as bona fide purchaser under state law. Under Ohio law, bona fide purchaser who acquires title for consideration and without notice of existing equity takes free and clear of that equity. Bona fide purchaser is bound by encumbrance only if he has actual or constructive notice of the interest. Constructive notice is defined as knowledge of circumstances which ought to have excited apprehension and inquiry in the mind of a prudent and reasonable person. Bankruptcy Trustee will be deemed to have knowledge of any instruments executed by the current owner that are properly recorded, and assumes that the trustee would have searched relevant title indexed and records and examined the deeds in the chain of title. Mortgage that contained street address and also contained more specific but conflicting legal description did not provide constructive notice to defeat status of bona fide purchaser.
- (8047) *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.
- (8048) *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.

- (8049) *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.
- (8050) *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.
- (8051) *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.
- (8052) *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.
- (8053) *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.
- (8054) *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.
- (8055) *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.
- (8056) *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.
- (8057) *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.

(8058) *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.

(8059) *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.

14.5 Trustee as Unsecured Creditor

(8060) *McClarty v. Hatchett*, 2018 WL 1882914 (Bankr. E.D. Mi. 2018) – Fraudulent transfers can be avoided under either Section 548 which creates federal fraudulent transfer law; or by trustee under section 544(b) which gives Trustee power of debtor’s creditors under state law. Section 548 “reach back” is only 2 years, while Section 544 looks back as designated in state law, generally longer than 2 years. Section 106 abrogates Sovereign Immunity under Section 544 even though here may not have been any actual creditor who could have brought action against IRS independent of Bankruptcy Filing. Section 544 only requires existence of actual creditor, not that actual creditor would have had right to pursue action against governmental unit. Fraudulent transfer is substantive cause of action arising under existing law including Section 544. Fact that IRS could assert Immunity as defense against suit outside of bankruptcy does not mean that Immunity applies to case brought inside Bankruptcy. Internal Revenue Code does not preempt state fraudulent transfer law. Preemption requires either that congress expressly preempted state law; or that state conduct regulates field that Congress intended be left to Federal Government exclusively, which may be inferred from scheme of federal regulations so pervasive that Congress left no room for State involvement; or where state law actually conflicts with Federal law. Internal Revenue Code collection and refunds or repayments of amounts collected. Trustee’s action is not seeking to require IRS to issue refund of taxes paid. Debtor was under control of guardian. Guardian sold assets of Debtor and put proceeds into Guardian’s own account and then used proceeds to pay Guardian’s personal tax liability. Debtor did not owe IRS any money and had no outstanding tax issues, and Debtor was not seeking refund of taxes paid by Debtor but was instead effort to recover property given to IRS to pay Guardian’s taxes. 26 USC Section 7422 which requires exhausting of administrative remedies before instituting action to recover erroneously or illegally assessed or collected taxes did not apply where Action was brought to recover property of Debtor that Debtor had no liability to pay and is not seeking refund of alleged overpayment of tax liabilities.

(8061) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Transfer is constructively fraudulent under Michigan Compiled Laws Section 566.35 if Debtor made transfer or incurred obligation without receiving a reasonably equivalent value in exchange for transfer or obligation and Debtor was insolvent at that time or the Debtor became insolvent as result of transfer or obligation. Trustee using “strong arm” power under Section 544 must also prove the existence of a pre-transfer unsecured claim that is allowable under 11 USC Section 502. Whether Debtor received reasonable equivalence is determined from perspective of creditors, comparing what they lost as a result of the transfer and what they gained, if anything. Property while located in the trust would have been subject to claims of individual creditors, while transfer to entitities deprived individual creditors of any remedy against property.

(8062) *Barney v. Bank of America, NA*, Case No. 15-8097 (10th Cir. 2016) – Trustee cannot use strong arm power to avoid obligation incurred by Debtor to avoid mortgage that is properly recorded but as to which assignment of mortgage has not been recorded. Debtor incurred debt when Debtor executed mortgage and mortgage itself was properly recorded. Mortgage does not become invalid or unenforceable merely because later assignment is not recorded, as assignment is not transfer of interest in property that has to be recorded to enforce obligation as to Debtor.

(8063) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Trustee has authority under Section 544 to bring State Court cause of action to recover fraudulent transfers.

(8064) *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.

(8065) *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.

(8066) *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.

- (8067) *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.

14.6 Standing – Chapter 13 Trustee

- (8068) *In re Cecil*, 488 BR 200 (Bankr. M.D. Fl. 2013) – Chapter 13 Trustee has standing under 11 USC Section 1302 and 11 USC Section 103 to pursue avoidance actions. Fact that authority to conduct avoidance actions is not specifically referenced in Section 1302(b)(1) does not deprive Trustee of authority to bring action, as neither Section 1302 nor Section 704 are the source of, or a limitation on, Trustee's power to bring avoidance actions. Power to bring avoidance actions emanates from Section 103 which applies in all cases under Bankruptcy Code.

14.7 Standing – Debtor

- (8069) *Isaacs v. DBI-ASG Coinvestor Fund III, LLC*, Case No. 16-8041 (6th Cir. BAP 2017), *reversed*, 2018 WL 3453360 (6th Cir. 2018) – Debtor has standing to assert strong-arm power under Section 544. Although Debtor had previously filed for relief under Chapter 7 and Trustee in Chapter 7 case did not pursue avoidance, that does not prevent Debtor from seeking avoidance in subsequently filed Chapter 13 case which creates new bankruptcy estate and incorporates strong-arm powers under Section 544. Even if Debtors standing may have been unclear, Bankruptcy Court granted Debtor's oral motion for derivative standing after commencement of avoidance proceeding. Plaintiff not required to obtain derivative standing prior to commencement of case. Courts authority to extend derivative standing is based on courts equitable authority to craft flexible remedies. Adopting bright line rule that Court cannot authorize derivative standing after commencement of adversary proceeding would frustrate flexible equitable power and would deviate from numerous federal courts that have allowed retroactive grant of derivative standing in appropriate circumstances.
- (8070) *Kalesnik v. HSBC Bank USA, NA*, Case No. 16-3027 (Bankr. W.D. Mass. 2017) – Chapter 13 Debtor lacks standing to exercise Trustee's avoidance powers found in Chapter 5 other than in narrow confines of Section 562(h) to augment available exemptions. Congress specifically gave to Chapter 11 and Chapter 12 Debtors authority to exercise Chapter 5 avoidance powers but chose not to include Chapter 13 Debtors in grant of authority. Court cannot ignore plain language of statute, and if Congress intended to give authority to Chapter 13 Debtors, it clearly knew how to do so.
- (8071) *In re Cole*, 2017 WL 61916 (W.D.N.C. 2017) – Debtors lack standing to bring avoidance actions under Sections 544, 547 and 548. Chapter 13 reserves avoidance powers to Trustee. Debtors cannot use Rule 7019 to involuntarily join Trustee who declines to bring avoidance action. Joinder of involuntary plaintiff under Rule 7019 requires movant to demonstrate obligation on part of involuntary plaintiff to permit plaintiff's name or title to be used to protect rights asserted in action, involuntary plaintiff must be beyond court's jurisdiction, and involuntary plaintiff must have refused to voluntarily join in the action. Trustee had no obligation to let the Debtor and her husband use his name or title where sole relief sought was to avoid foreclosure sale, which would not produce any benefit to creditors or the estate; and the trustee was within the court's jurisdiction. Court also rejected concept of "derivative standing" as unsupported in the Code or Rules.
- (8072) *Simmons v. Federal Home Loan Mortgage Corp.*, 2016 WL 6608381 (Bankr. S.D. Ohio 2016) – Chapter 13 Debtors may be granted derivative standing to pursue avoidance actions, using trustee's powers under Code Section 544. Separate Motion for Derivative Standing not necessary where Chapter 13 plan as confirmed contained provision granting derivative standing and Confirmation Order specifically provided that Debtor would file adversary post-confirmation.
- (8073) *Bank of America v. Welsh*, 539 BR 713 (Bankr. D. Del. 2015) – Chapter 13 Debtor has standing to assert trustee's strong-arm powers in response to adversary brought by lender to reinstate erroneously satisfied mortgage. Grant of mortgage in first instance was voluntary act which would deprive Debtor of standing, but action to reinstate mortgage was involuntary within scope of Section 544(g) and (h).
- (8074) *Atkins v. Gelt Properties, LLC*, 2015 WL 846696 (Bankr. E.D. Pa. 2015) – Chapter 13 Debtor is not "Debtor in possession" and so lacks standing to attempt to avoid mortgage using trustee's strong-arm powers under Section 544(a)(3).
- (8075) *In re Neville*, Case No. 14-57535 (Bankr. E.D. Mi. 2015) – Failure to record security interest does not defeat validity of security interest as between Debtor and creditor. Security agreement is valid when (1) value has been given; (2) Debtor has rights in collateral; and (3) Debtor has authenticated a security agreement that provides a description of the collateral. Recording is only necessary to perfect lien as against third parties. Debtor lacks standing to avoid security interest in Chapter 7 under Section 544, which limits Section 544 to the Trustee and limits Debtor's rights to those under Section 522(f)(1), g, and h. Section 522(f)(1) allows Debtor to avoid judicial lien or non-purchase money security interest to extent it impairs exemptions. Lien was not judicial lien and lien was given as purchase money security interest where loan was for purpose of allowing Debtor to purchase automobile and Debtor used the money for that purpose. Section 522(g) allows a Debtor to exempt assets that are recovered by the trustee but does not present an independent basis for the Debtor to recover the asset. Section 522(g) would not apply even if trustee avoided lien as Section 522(g) does not apply to voluntary transfers, and Debtor voluntarily gave lien on automobile. Section 522(h) allows a Debtor to exercise the trustee's rights under Section 544 to the extent that the Debtor would have been able to exempt the property under Section 522(g) if the trustee has pursued recovery, but Debtor would not have been able to assert exemption in automobile even if trustee has avoided lien because transfer by Debtor was voluntary. Lien passes through Chapter 7 unavoids and enforceable where trustee does not pursue avoidance.
- (8076) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor can exercise derivative standing under Section 544 where court approved post-confirmation plan modification to grant that standing and Debtor also filed separate motion for derivative standing. While procedure of approving standing via a plan modification may have been improper, creditor had notice of modification and failed to object and is bound by results.
- (8077) *Weyandt v. Federal Home Loan Mortgage Corp.*, 2013 WL 6052130 (3d Cir. 2013) – Assuming that "derivative standing" is possible,

Debtor lacks standing to pursue lien avoidance under Section 544 here trustee's decision not to pursue avoidance was based on conclusion that there was no equity in property over and above senior, non-avoidable mortgage. Trustee did not violate any duty in declining to prosecute avoidance where action, even if successful would not produce any benefit to estate, precluding Debtor for asserting right to derivative standing.

- (8078) *Smith v. US Bank, NA*, 2014 WL 1404722 (Bankr. W.D. Ky. 2014) – Chapter 13 Debtor can bring action under Section 544 only if they first obtain permission from court to initiate action. Court noted split of authority on whether Debtor can exercise Section 544 powers as section 544 specifically delegates those powers to the Trustee. Court concluded that parties other than the trustee can exercise those powers only by obtaining court permission to proceed in trustee's stead. Motion must be filed in main case and granted before Debtor has authority to institute action. Motion must state that Debtor desires to pursue action; that Debtor has asked Chapter 13 Trustee to pursue recovery; that trustee has declined to pursue recovery; and that claims are "colorable".
- (8079) *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.
- (8080) *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.
- (8081) *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.
- (8082) *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.

14.8 Standing – Third Parties

- (8083) *In re Dinoto*, 2016 WL 7655140 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.
- (8084) *In re Clements Manufacturing Liquidation Company*, 2016 WL 6155907 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548
- (8085) *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.
- (8086) *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.

14.9 Defenses – Earmarking

- (8087) *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).
- (8088) *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

14.10 Defenses – Reasonably Equivalent Value

- (8089) *Wells v. Rybak*, 2018 WL 878859 (Bankr. E.D. Mi. 2018) – There is no precise mathematical formula for reasonably equivalent value but uses common sense considering circumstances of each case, totality of circumstances and specific transfers, and compares value received to transfer to determine whether debtor received roughly value given. Debtor receives reasonably equivalent value through direct or indirect economic benefit including reduction in Debtor's obligations, even if payment does not go directly from debtor to creditor. Debtor received reasonably equivalent value for money turned over to Debtor's son where son was bookkeeper for Debtor's business and used money in account solely for business purposes. While account into which funds were deposited was Son's name only and Son at least legally had unfettered control, all funds in account were entrusted to son for purposes of paying business expenses and all funds were used for that purpose. Debtor received a reasonably equivalent value, as a matter of law, through: (1) dollar-for-dollar reduction of existing debts; (2) Son's uncompensated bookkeeping services; and (3) Son's unreimbursed contribution of \$400 that was used to establish account.
- (8090) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Transfer is constructively fraudulent under Michigan Compiled Laws Section 566.35 if Debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for transfer or obligation and Debtor was insolvent at that time or Debtor became insolvent as result of transfer or obligation. Trustee using "strong arm" power under Section 544 must also prove the existence of a pre-transfer unsecured claim that is allowable under 11 USC Section 502. Whether Debtor received reasonable equivalence is determined from perspective of creditors, comparing what they lost as a result of the transfer and what they gained, if anything. Property while located in the trust would have been subject to claims of individual creditors, while transfer to entireties deprived individual creditors of any remedy against property.
- (8091) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Tennessee Code Annotated Section 66-3-101 provides alternate basis to recover transfers of property resulting from malice, fraud or collusion with intent or purpose to hinder, delay or defraud creditors. Enactment of UFTA did not repeal this previous statute. Section 66-3-101 does not contain independent statute of limitations. General State law provided for Statute of Limitations for any action at law or equity to recover any lands is 7 years from the date of the transfer. Debtors filed bankruptcy in 2013, allowing Trustee to pursue recovery of any transfers of real property made after 2006.
- (8092) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Tennessee Uniform Fraudulent Transfer Act allows avoidance of transfer for less than reasonably equivalent value where Debtor's either were insolvent or became insolvent as a result of the transfer or were engaged in businesses or transactions for which remaining assets were unreasonably small. Court could not determine on summary judgment whether Debtors were insolvent as of date of transfer or whether unwritten understanding between defendants and Debtors that defendant would pay for the property we constitute reasonably equivalent value.
- (8093) *Tow v. Bulmahn*, Case No. 15-3141 (E.D. La. 2017) - Salary and bonuses paid to company's officers in one-year preceding commencement of Chapter 7 are not constructively fraudulent transfers under Section 548(a)(1)(B). There was no evidence that officers' compensation was out of line with peer firms or that officers did not honestly and diligently performed jobs. Officers alleged poor business decisions which ultimately lead to failure of company did not equal finding that services were not reasonably equivalent value.
- (8094) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Salary of corporate officer paid by related company can constitute reasonably equivalent value to corporation making payment where, although that corporation did not pay salary to officer, the corporations were closely related. Defendant worked for corporations for a number of years, worked in the same capacity and the same number of hours, and was paid the same time each month for work performed. Factual issues remained concerning timing and method of payment and whether payments were intended to be substantially contemporaneous or were in fact substantially contemporaneous that precluded summary judgment.
- (8095) *Sweet v. Rumbold & Family, LLC*, Case No 14-3085 (Bankr. E.D. Mi. 2015) – Loan to one corporation but repaid by second, related corporation, is not *per se* without reasonably equivalent value. Although corporation that repaid loan had no legal obligation or liability to do so, both corporations were related and maintained consolidated balance sheets, such that repayment by one conferred at least an indirect benefit on the entity making the payment. Indirect benefit can constitute reasonably equivalent value.
- (8096) *Tibble v. Farmers Grain Express, Inc.*, 510 WL 792 (Bankr. W.D. Mi. 2014) – Subsequent transferee of avoidable transfer is not required or necessary party in avoidance action brought by Trustee. Trustee is not required to again prove avoidability of transfer where trustee has previously challenged initial transfer and prevailed in that action. Subsequent transferee retains right to contest avoidability based on transferee's alleged receipt of property in good faith and for value and without knowledge of avoidability of transfer.
- (8097) *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.
- (8098) *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.

14.11 Defenses – Stockholder Distributions

- (8099) *FTI Consulting, Inc. v. Merit Management Group, LP*, ___ US ___, 2018 WL 1054879 (2018) – Mere fact that funds from LBO of non-public company passed through bank account was not sufficient to invoke safe harbor provision of Section 546(e). Focus is on transfer that Trustee seeks to avoid, not on every entity through whom funds happened to pass. Trustee was attempting to recover funds paid to selling shareholder as part of Leveraged Buyout. Fact that Debtor transferred funds to Seller's bank did not make transfer or to or for benefit of financial institution within scope of Section 546(e) where Trustee did not contend that Bank received any proceeds for its own benefit or was itself liable as recipient of a fraudulent transfer.
- (8100) *Buchwald Capital Advisors, LLC v. Papas*, 2018 WL 509741 (E.D. Mi. 2018) – Section 546(e) precludes trustee's avoidance of transfers that are "settlement payments" made by or to or for benefit of financial institution in connection with securities contract. Section 546(e) applies only to: (1) prevent trustee from avoiding settlement payment made by or to or for benefit of financial institution; or to (2) prevent trustee from avoiding transfer made by or to or for benefit of financial institution in connection with a securities contract. Payments are made to financial institution even where institution is acting as mere conduit or intermediary, without any interest in underlying transaction. Funds wired to bank which then forwarded funds to shareholders brought transfer within safe harbor. Settlement payment is preliminary settlement payment, interim settlement payment, settlement payment on account, final settlement payment, or any other similar payment commonly used in securities trade and is extremely broad and applies to both publicly traded and privately held corporations. Settlement payment must involve an exchange of consideration and cannot be one-way distribution that occurs without commensurate consideration. Dividends are not settlement payments as dividends are paid for no return consideration. In determining whether transfer is within Section 546(e), court will review transaction as a whole and factual realities, without breaking down each individual step in the process. Sole purpose of transaction, while multi-staged, was to satisfy redemption options of two shareholders which constitutes settlement payments made to a financial institution; and also met less onerous standard as transfers in connection with securities contract as payments were made pursuant to shareholder agreement and transferees surrendered redemption rights which constitutes consideration for transfer. Once payment meets requirements of payment in connection with securities contracts, identity of recipient is irrelevant to whether safe harbor applies, and fact that funds passed through various intermediaries before reaching shareholders does not disqualify payments from safe harbor protection.
- (8101) *Christophersen v. Pahel*, Case No. 14-1104 (Bankr. W.D.N.Y. 2016) – Safe Harbor of Section 546(e) applies where securities transaction is made by or to or for the benefit of a financial institution. Private sale of stock is not within safe harbor merely because proceeds are deposited into seller's bank account. Bank had no interest in underlying contract or securities and was mere conduit for transfer of proceeds.
- (8102) *PAH Litigation Trust v. Water Street Healthcare Partners, LP*, Case No. 15-51238 (Bankr. D. Del. 2016) – Rejecting holding in *Tribute Company*, court held that Safe harbor of Section 546(e) protects only against suits by Trustee and does not apply to independent causes of action brought by investors under state law theories. Company noteholders brought suit alleging that company and controlling shareholders intentionally inflated financials to induce LBO purchaser to buy company which contributed to failure of company and losses by noteholders. Noteholders bought suit directly against controlling shareholders under state law theories of constructive fraud. Suit not barred by Section 546(e).
- (8103) *In re Tribune Company Fraudulent Conveyance Litigation*, Case No. 13-3992 (2d Cir. 2016) – Section 546(e) prevents a trustee or any creditor from pursuing recovery for constructive fraudulent transfers under either Federal or State law arising out of failed Leveraged Buyout. While Section 546(e) prohibits action by "the trustee", any right a creditor would have would be derivative of the right of the trustee and so is limited to same extent as action by trustee. Grant of stay relief to creditors to pursue claim that trustee has declined to prosecute does not expand scope of recovery or increase powers of creditors beyond those held by trustee in first instance or avoid defenses that would have been available had trustee brought action.
- (8104) *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).
- (8105) *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.
- (8106) *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 trustee's 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.

14.12 Defenses – Constructive Notice

- (8107) *Harker v. PNC Mortgage Company*, 2017 WL 1169615 (Bankr. S.D. Ohio 2017) – Section 544 allows trustee to avoid transfers that, under state law, would not bind hypothetical judgment lien creditor. Ohio State statute that provides that defectively executed but properly recorded mortgage constitutes notice prevents trustee from asserting status as bona fide purchaser, but does not impact status as hypothetical judgment lien creditor. Ohio law does not require that judgment creditor have same attributes as bona fide purchaser regarding notice in does not make lack of notice of unrecorded or defective lien a condition to obtain superior judgment lien on Debtor's property. Notice of prior recorded but defectively executed mortgage has no impact on lien priority dispute. Although trustee's complaint failed to state cause of action to extent it relied on bona fide purchaser status, trustee's complaint stated cause of action using trustee's powers as hypothetical judgment lien creditor to challenge priority of trustees "lien" versus creditors defectively recorded mortgage.
- (8108) *Simmons v. Federal Home Loan Mortgage Corp.*, 2016 WL 6608381 (Bankr. S.D. Ohio 2016) – Chapter 13 Debtors may be granted derivative standing to pursue avoidance actions, using trustee's powers under Code Section 544. Separate Motion for Derivative Standing not necessary where Chapter 13 plan as confirmed contained provision granting derivative standing and Confirmation Order specifically provided that Debtor would file adversary post-confirmation. Mortgage signed by Debtor avoided where mortgage was recorded in incorrect county. Person searching property records in county where property located would not find mortgage recorded in different county. As such, mortgage did not provide constructive notice and can be avoided.
- (8109) *Taunt v. Central Mortgage Company*, 2015 WL 6605435 (E.D. Mi. 2015) – Defect in acknowledgement resulting from notary's failure to include date on which mortgage was acknowledged did not defeat constructive notice effect of recorded instrument. Michigan Compiled Laws Section 565.604 provides that conveyances of interests in real property made in good faith and for valuable consideration are not void by reason of any defect in any statutory requisite for sealing, signing, attestation, acknowledgement or certificate of acknowledgement. Failure to date acknowledgement is "defect" that is cured by virtue of Section 565.604.
- (8110) *Watson v. Cartee*, 2015 WL 728578 (M.D. Tn. 2015) – Defect in acknowledgement of mortgage does not invalidate mortgage if the mortgage has been accepted by register of deeds for recording. While register had discretion to reject mortgage with defect in acknowledgement, register is not required to reject mortgage and can accept and record it. Upon recording, mortgage is deemed to be validly registered in compliance with all statutory requirements and all parties are on constructive notice of the instrument.
- (8111) *Rogan v. JPMorgan Chase Bank*, 2015 WL 222144 (Bankr. E.D. Ky. 2015) – Mortgage signed under power of attorney that allowed attorney-in-fact to "contract and to bargain, to sell" the property was sufficient to constitute constructive notice. Recorded mortgages that were facially compliant with recording statutes constituted sufficient notice to defeat action under Section 544(a)(1). Mortgage met all requirements of state law for recording (lender's address, note and maturity dates, preparer's statement, and acknowledgement of signature by notary public; and power of attorney was recorded along with mortgage. Mortgage was correctly recorded in proper county. While POA did not specifically grant authority to sign mortgage, Debtor's unquestioned intent was to grant that authority as evidenced by nature of transaction and fact that transaction preceded bankruptcy by more than 8 years during which Debtor paid mortgage, dealt with property as if it was properly encumbered, and otherwise took no steps to contest validity of mortgage or POA. While trustee may have action to contest validity of POA itself, recorded mortgage provides sufficient constructive notice to prevent avoidance under Section 544.
- (8112) *Rogan v. U.S. Bank*, 2014 WL 4629379 (Bankr. E.D. Ky. 2014) – Filing of a document that is not recordable under state law does not provide constructive notice for purposes of Section 544. Mortgage that was defective as matter of state law as it did not include date of execution of underlying promissory note but was nonetheless filed in the proper public record was not "recordable" and so did not provide notice to Trustee of mortgage, allowing Trustee to avoid mortgage a bona fide purchaser for value.
- (8113) *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.
- (8114) *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.
- (8115) *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.
- (8116) *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.

- (8117) *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.
- (8118) *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.
- (8119) *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.
- (8120) *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.
- (8121) *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.
- (8122) *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.
- (8123) *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.
- (8124) *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.
- (8125) *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.
- (8126) *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.

- (8127) *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 construction notice and controls over subsequent purchaser.
- (8128) *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.
- (8129) *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.
- (8130) *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.
- (8131) *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.
- (8132) *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.
- (8133) *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.
- (8134) *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.
- (8135) *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.
- (8136) *Drown v. Konda 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.

- (8137) *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.
- (8138) *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.
- (8139) *Degirolo 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.
- (8140) *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.
- (8141) *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.
- (8142) *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.
- (8143) *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.
- (8144) *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.
- (8145) *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.
- (8146) *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.
- (8147) *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.
- (8148) *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.

- (8149) *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.
- (8150) *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.
- (8151) *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.
- (8152) *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 recording fee be paid when the mortgage is 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.
- (8153) *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).
- (8154) *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.
- (8155) *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.
- (8156) *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.

- (8157) *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.
- (8158) *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.
- (8159) *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, be recorded mortgage provided sufficient notice such that the trustee could not avoid the mortgage using the trustee's strong-arm powers under section 544.
- (8160) *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.

14.13 Defenses – Equitable Subrogation

- (8161) *Ocwen Loan Servicing, LLC v. Summit Bank, NA*, Case No. 13-1615 (8th Cir. 2014) – Equitable subordination allows later recorded mortgage to assume priority over earlier recorded mortgage where lender advances money to pay off encumbrance on realty at request of landowner with understanding that advance will be secured by lien of same priority as was held by prior lender, but only if new lender is not culpable or error is result of inexcusable neglect; and only where remedy can be done without working hardship or injustice to innocent parties. Initial lender held first mortgage on Debtor's property. When Debtor refinanced with Ocwen, mortgage contained incorrect legal description of property adjacent to the Debtor's, and not the property encumbered by the prior first mortgage. Although the error was repeatedly called to Ocwen's attention, Ocwen did nothing to fix the problem. Sometime later, Debtor obtained new mortgage loan from second lender. Debtor informed second lender that Ocwen's mortgage was intended to cover Debtor's property but that Ocwen never fixed the legal description. Second lender extended new mortgage and recorded lien against correct property, creating first lien of record. Ocwen later asserted that it held first mortgage by virtue of equitable subordination. Error was result of lender's own negligence in failing to ensure correct legal description and failing to correct legal description when error was pointed out. Liens now asserted to be superior were not in existence when prior loan was refinanced such that their interests were not "elevated" inadvertently when the prior mortgage was paid off. To allow Ocwen to insert itself as first mortgage holder would work hardship on later mortgagees. Although later lenders may have been aware of error, Ocwen was primarily responsible for mistake in first instance and in failing to correct mistake when advised, such that Ocwen was cause of problem in first instance.
- (8162) *Chase Manhattan Bank, USA, NA v. Taxel*, 594 F.3d 1073 (9th Cir. 2010) – Unrecorded mortgage arising out of refinancing 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.

14.14 Lien Strip of Subordinate Lien

- (8163) *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.

14.15 Defenses - Statute of Limitations

- (8164) *Tow v. Bulman*, Case No. 15-3179 (Bankr. S.D. Tx. 2017) – Statute of Limitations under Section 546 for any action under Section 544, Section 547 and Section 548 must be brought within one year of conversion of case from Chapter 11 to Chapter 7. Although initial complaint was timely filed, amended complaint that sought to identify additional defendants was filed 14 months after limitations period had expired. Motion to Amend Complaint denied as futile where proposed action against additional defendants is barred by statute of limitations. Statute of Limitations under Section 546 is an affirmative defense subject to equitable tolling, estoppel and waiver. Equitable tolling is applied

when a defendant actively or passively conceals facts to prevent Trustee from identifying defendant's identity, or when Trustee is delayed by extraordinary circumstances. Trustee must demonstrate that despite exercising diligence, he could not have discovered identity of defendants prior to expiration of limitation period. Although identity of ultimate recipient of dividend payments from Debtor was difficult to determine where dividend payments passed through at least 3 intermediaries, nothing was extraordinary and legal title to vast majority of equity securities was held by publicly known brokerage company. Alleged delays in responding to discovery by various intermediaries does not constitute extraordinary circumstance where ordinary discovery disputes took place well before statute of limitations expired and plaintiff failed to exercise full extent of discovery rights or to seek any assistance of Court in obtaining discovery. Plaintiff's inability to discover identity of potential defendants was not result of any concealment by proposed defendants or any extraordinary circumstances which would have prevented plaintiff from discovering identity of additional defendants

- (8165) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Section 544(b)(1) allows Trustee to avoid a transfer that is voidable under applicable nonbankruptcy law by a creditor holding an unsecured claim. Trustee stands in shoes of unsecured creditors and is subject to same procedural limitations including whether Statute of Limitations expired prior to filing Bankruptcy Petition. Tennessee State Uniform Fraudulent Transfer Act sets the statute of limitations at 4 years from the date on which the transfer is so far perfected that a good faith purchaser cannot acquire an interest in the asset that is superior to the interest of the transferee. If Statute of Limitations has not expired as of the date of the bankruptcy petition, Trustee is afforded 2 years after entry of the order for relief to commence actions under Section 546(a)(1)(A). Debtors commenced bankruptcy case in 2013 allowing Trustee to recover transfers that occurred in 2009 and later, not transfers that occurred in 2007 and 2008.
- (8166) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Action against depository institution by depositor for alleged failure to enforce two signature requirement on checks is governed by UCC Article 4. Bank can honor any instrument presented in accordance with the agreement between customer and bank. Lender improperly honored checks signed by one individual in violation of depositor agreement. However, depositor must bring action within one year after bank makes statement available to depositor. Bank makes statement “available” when bank mails statement to depositor at address on record with the bank, even if depositor no longer resides at or receives mail at that address. Further, depositor must make specific allegations to bank – mere generalized statement that depositor is suspicious or that embezzlement may have occurred is not sufficient to place bank on notice for purposes of statute of limitations. Discovery rule can be used to extend statute of limitations only where defendant intentionally prevented plaintiff from discovering cause of action. Where plaintiff had information sufficient to allow plaintiff to discover alleged wrongdoing with reasonable diligence, there was no basis to extend statute.
- (8167) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Trustee is not precluded from asserting strong arm powers as affirmative defense after statute of limitations has otherwise expired. Trustee could assert strong arm power as bona fide purchaser to defeat lender's action to reform mortgage that contained fatally defective legal description.
- (8168) *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.
- (8169) *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.

14.16 Defenses – Equitable Defenses

- (8170) *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.

14.17 Defenses – Solvent

14.18 Parties Liable – Transferee

- (8171) *Tibble v. Farmers Grain Express, Inc.*, 510 WL 792 (Bankr. W.D. Mi. 2014) – Subsequent transferee of avoidable transfer is not required or necessary party in avoidance action brought by Trustee. Trustee is not required to again prove avoidability of transfer where trustee has previously challenged initial transfer and prevailed in that action. Subsequent transferee retains right to contest avoidability based on transferee's alleged receipt of property in good faith and for value and without knowledge of avoidability of transfer.
- (8172) *Hoskins v. Citigroup, Inc.*, 2014 WL 3466049 (9th Cir. 2014) – “Transferee” for purposes of liability under Section 550 is one who has legal title to funds and the ability to use them as the recipient sees fit. Bank was not transferee of fraudulently misappropriated funds merely because funds were deposited into account at bank, where there was no evidence that bank had control or dominion over funds in accounts.

14.19 Parties Liable – “Mere Conduit”

- (8173) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as “mere conduit” is not “transferee” for purposes of liability under Section 550. “Mere conduit” is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is “mere conduit” if party shows that they did not have control over asset and

merely served as conduit for assets that were under the actual control of Debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on “pass through” income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal’s personal tax liabilities as constructively fraudulent. Court concluded that IRS was not “transferee” for purposes of Section 550. Although the IRS received the payments, it did so as a “mere conduit”, holding the funds until the principal’s tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually “receive” any payment and did not constitute a “transferee”. The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal ultimately received the money from the IRS.

B. Fraudulent Transfers

14.20 Bankruptcy Court Jurisdiction

- (8174) *Galaz v. Galaz*, 765 F.3d 426 (5th Cir. 2014) – Bankruptcy Court has jurisdiction to rule on Fraudulent transfer action brought under Section 548. Court has jurisdiction where matter is “related to” bankruptcy, such that outcome could conceivably have any effect on case administration, including one that could alter Debtor’s rights, liabilities, options or freedom of action. Courts have no jurisdiction over actions that have no effect on Debtor or administration of estate. Although recovery is ultimately based on state law, recovery would impact estate as it could result in recovery for benefit of creditors. However, Court lacked jurisdiction over third party complaint or counterclaims asserted in response where litigation was solely between non-Debtors and outcome of litigation would affect only the parties involved and would not in any way impact Debtor or estate. Bankruptcy Court should have dismissed counterclaims and third party claims as lacking jurisdiction.

14.21 Fraudulent Transfer Versus Preference

- (8175) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Transfer cannot be both a preferential transfer and a fraudulent transfer. Plaintiff required to amend complaint to state cause of action on which plaintiff intended to proceed at trial.

14.22 State Uniform Fraudulent Transfer Act

- (8176) *McClarty v. Hatchett*, Case No. 17-4700 (Bankr. E.D. Mi. 2018) – Fraudulent transfers can be avoided under either Section 548 which creates federal fraudulent transfer law; or by trustee under section 544(b) which gives Trustee power of debtor’s creditors under state law. Section 548 “reach back” is only 2 years, while Section 544 looks back as designated in state law, generally longer than 2 years. Section 106 abrogates Sovereign Immunity under Section 544 even though here may not have been any actual creditor who could have brought action against IRS independent of Bankruptcy Filing. Section 544 only requires existence of actual creditor, not that actual creditor would have had right to pursue action against governmental unit. Fraudulent transfer is substantive cause of action arising under existing law including Section 544. Fact that IRS could assert Immunity as defense against suit outside of bankruptcy does not mean that Immunity applies to case brought inside Bankruptcy. Internal Revenue Code does not preempt state fraudulent transfer law. Preemption requires either that Congress expressly preempted state law; or that state conduct regulates field that Congress intended be left to Federal Government exclusively, which may be inferred from scheme of federal regulations so pervasive that Congress left no room for State involvement; or where state law actually conflicts with Federal law. Internal Revenue Code collection and refunds or repayments of amounts collected. Trustee’s action is not seeking to require IRS to issue refund of taxes paid. Debtor was under control of guardian. Guardian sold assets of Debtor and put proceeds into Guardian’s own account and then used proceeds to pay Guardian’s personal tax liability. Debtor did not owe IRS any money and had no outstanding tax issues, and Debtor was not seeking refund of taxes paid by Debtor but was instead effort to recover property given to IRS to pay Guardian’s taxes. 26 USC Section 7422 which requires exhausting of administrative remedies before instituting action to recover erroneously or illegally assessed or collected taxes did not apply where Action was brought to recover property of Debtor that Debtor had no liability to pay and is not seeking refund of alleged overpayment of tax liabilities.
- (8177) *Thermo Credit, LLC, v. DCA Services, Inc.*, 2017 WL 5128998 (S.D. Ohio 2017) – Ohio version of UFTA allows avoidance of transfer or assets where transferor receives less than reasonably equivalent value. “Asset” is defined as all property of a debtor but does not include property subject to valid lien. Debtor did not transfer “asset” when Debtor used encumbered cash to pay third party obligations, as cash transferred to pay obligations were not “assets”. Lien held by Plaintiff fully encumbered all assets of Debtor including cash, removing cash from definition of “asset” and from scope of UFTA.
- (8178) *In re Mickens*, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Transfer of property from debtor- spouses as joint tenants to tenants by entireties was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. Although transfer did not have effect on total estate as Debtors both continued to own property, but transfer did adversely affect creditors of one debtor solely, as transfer removed from reach of individual creditors property that would have been available as joint tenancy that would not be available as tenants in the entireties. Whether transfer was for reasonably equivalent value is viewed from standpoint of creditors and issue is whether transfer placed property out of reach of creditors. Transfer of property from joint tenants to tenants in the entireties placed property beyond reach of each debtor’s individual creditors, diminishing the assets that those creditors could reach, constituting fraudulent transfer.
- (8179) *Edwards v. Arledge*, 2016 WL 6837024 (Bankr. E.D. Tn. 2016) – Default judgment entered against Trust for receipt of fraudulent transfers. Transferor had actual intent to hinder, delay and defraud creditors by transferring real estate and equipment to Trust. Trust failed to respond to complaint and facts alleged were sufficient to avoid transfers under State Law.

- (8180) *Edwards v. Arledge*, 2016 WL 6832845 (Bankr. E.D. Tn. 2016) – Tennessee State law mirrors Section 548, allowing transfers to be avoided if made within 4 years pre-petition and are made either with actual intent to hinder, delay or defraud; or are made without receiving reasonably equivalent value and Debtor either was engaged or was about to engage in business for which assets were unreasonably small, or Debtor intended to incur debts beyond Debtor's ability to pay. Whether transfer is made with actual intent depends on factors such as whether the Debtor retained possession or control of the property transferred; before the transfer was made, the Debtor had been sued or threatened with suit; and whether the Debtor received reasonably equivalent value for his assets. Debtor fraudulently transferred assets valued at over \$900,000 plus real property exceeding 280 acres to a trust controlled by Debtor. Debtor transferred personal assets into trust in which Debtor was trustee and close friend was beneficiary; Debtor retained life estate in transferred property and remained in possession; Debtor was aware of pending suit by at least one creditor and Debtor received no consideration for the transfers. Debtor's knowledge or pending suit and transfer of assets to entity that allowed Debtor continued use and access evidenced actual intent to hinder, delay and defraud creditors.
- (8181) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – State Fraudulent Transfer statute require that transfer be made with actual intent to hinder, delay or defraud creditors; or alternatively that transfer lack reasonable equivalent value where Debtor was engaged or was about to engage in business for which remaining assets were unreasonably small, or that transferor intended to incur or believed that he would incur debts beyond ability to pay. Factors for determining intent include (a) transfer to insider; (b) Debtor retained possession or control after transfer; (c) transfer or obligation was not disclosed or was concealed; (d) Debtor had been threatened with or was being sued; (e) transfer was substantially all of transferor's assets; (f) Debtor absconded; (g) Debtor removed or concealed assets; (h) value of consideration received by Debtor was less than reasonably equivalent value for asset transferred or obligation incurred; (i) Debtor was insolvent or became insolvent shortly after transfer made; (j) transfer occurred shortly before or shortly after incurrence of substantial debt; (k) transfer was of essential assets to lienholder who in turn transferred assets to insider of Debtor. Reasonably equivalent value has same meaning as used in Bankruptcy code. Husband's transfer or promissory notes avoidable as actually fraudulent where transferee was the transferor's spouse. Husband retained control because wife testified that all income from notes was deposited into joint account with husband. Transfer allowed Debtor to remove all assets from reach of creditors by transfers to wife and without income from notes Debtor lacked sufficient income to pay expenses.
- (8182) *ADP Commercial Leasing, LLC v. Obeid*, 2016 WL 74880 (E.D. Mi. 2016) – Transfer is fraudulent only if transfer is of Debtor's interest in property. If Debtor has no interest in property transferred, transfer cannot be fraudulent as matter of law. Under Michigan law, property that is encumbered by a valid lien is not an asset within the definition of the Uniform Fraudulent Transfer Act. When secured lender swept Debtor's bank accounts and then used proceeds to pay third party creditors of Debtor as part of global resolution, neither sweep of accounts nor payment to third party was fraudulent transfer, as lender held lien on all assets and amount owed exceeded value of assets, leaving no equity for Debtor and, therefore, no interest in the funds swept and transferred.
- (8183) *Whittaker v. Groves Venture, LLC*, 2015 WL 5781111 (Bankr. S.D. Ohio 2015) – Section 544 allows Chapter 7 Trustee to utilize state fraudulent transfer statute if there is an existing creditor who could have avoided transfer had bankruptcy not been commenced. Complaint failed to state cause of action for alleged fraudulent transfer of assets by LLC where complaint did not allege facts plausibly suggesting that LLC had any creditors. While complaint need not specifically identify any particular creditor, complaint must at least contain something more than a "threadbare recital" and conclusory statements that some creditor may exist. No creditor filed proof of claim and Trustee failed to file claims on behalf of any creditor. Conjecture that IRS, State or local governments may have tax claims insufficient where none of these entities filed claims.
- (8184) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee has authority under Section 544 "strong arm" provisions to step into shoes of creditors in order to nullify transfers voidable under State Fraudulent Transfer law. Michigan version of UFTA avoids transfer of property made with either actual intent to hinder, delay or defraud creditors; or was made for less than reasonably equivalent value where Debtor (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the Debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. Statute defines "badges of fraud" for determining actual intent to include but are not limited to (a) The transfer or obligation was to an insider. (b) The Debtor retained possession or control of the property transferred after the transfer. (c) The transfer or obligation was disclosed or concealed. (d) Before the transfer was made or obligation was incurred, the Debtor had been sued or threatened with suit. (e) The transfer was substantially all of the Debtor's assets. (f) The Debtor absconded. (g) The Debtor removed or concealed assets. (h) 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. (i) The Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. (j) The transfer occurred shortly before or shortly after a substantial debt was incurred. (k) The Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the Debtor. Reasonably equivalent value draws from the bankruptcy definition. Debtor's spouse is "insider" for purposes of State law.
- (8185) *Brown v. Raygoza*, 2015 WL 3404505 (Bankr. E.D. Ky. 2015) – Kentucky version of UFTA requires proof of existence of at least one actual pre-petition unsecured creditor who could have brought action to recover transfer. Trustee presented sufficient evidence of actual creditor, consisting of IRS for taxes for 2001 based on Debtor's failure to file tax return.
- (8186) *Kohut v. Wayne County Treasurer*, 2015 WL 1598083 (Bankr. E.D. Mi. 2015) – Trustee has authority under Section 544 to bring fraudulent transfer action under Michigan state law. Uniform Fraudulent Transfer Act has 6-year statute to limitations but requires trustee to prove existence of actual pre-petition creditor who could have brought action under Michigan law had bankruptcy not occurred. Although Sovereign Immunity would have precluded any State Court action against Wayne County to recover tax payments made after Debtor was insolvent, Trustee not prohibited from bringing action as Section 106 abrogated sovereign immunity for purposes of Section 544. Although no actual State Court creditor could bring action, that did not preclude Trustee from bringing action where Trustee could otherwise prove existence of actual unsecured creditor and other elements of fraudulent transfer.
- (8187) *Meoli v. Cooper*, 521 BR 613 (Bankr. W.D. Mi. 2014) – Section 544 allows Trustee to exercise State Court remedies to avoid fraudulent

transfers. Michigan adoption of UFTA requires the existence of an actual creditor who could bring action to avoid transfer. Where trustee could not identify any actual “triggering creditor”, trustee’s complaint failed to state cause of action.

- (8188) *Spradlin v. Beads & Steeds Inns, LLC*, 2014 WL 4199637, *aff’d*, 2016 WL 3176649 (Bankr. E.D. Ky. 2014), *aff’d*, 2017 WL 24750 (6th Cir. 2017) – State uniform transfer act is incorporated through Section 544. Action must comply with all State Court requirements. Action to recover fraudulent transfer dismissed where property transferred was not Debtor’s but was property of wholly owned LLC. Reverse veil piercing” allows a third-party creditor to reach assets of corporation to satisfy debts of insider; or shareholder of corporation to disregard corporate of which he is a part for his own benefit. Trustee in shoes of Debtor could use “insider” piercing to reach assets of shareholders; and stands in shoes of creditors under Section 544 for purposes of “outsider” piercing. There is no State Court basis to “reverse pierce” the corporate veil and allow assets of LLC to be considered property of Debtor. Even if State law allowed for reverse piercing, it would be as a remedy for a creditor who has prevailed against a corporation to collect assets, not as independent cause of action.
- (8189) *Buchwald Capital Advisors, LLC, v. Papas*, 2014 WL 4187371 (Bankr. E.D. Mi. 2014) – Section 544(b)(1) allows trustee to avoid any transfer of an interest of the Debtor in property to extent that transfer is voidable under applicable law. Action brought under State Uniform Fraudulent Transfer Act must fulfill all state law requirements for such a cause of action. Michigan UFTA requires that as to a plaintiff who was an actual creditor at the time of the transfer, the transfer be made with actual intent to hinder, delay or defraud creditors; or that transfer is without reasonably equivalent value and either Debtor was engaged in or was about to engage in business or transaction for which remaining assets were unreasonably small; or that Debtor intended to incur or reasonably believed he would incur debts beyond ability to repay. If the creditor was not an actual creditor at the time of the transfer, then plaintiff must prove that Debtor did not receive reasonably equivalent value and that Debtor was insolvent at time of transfer or became insolvent as a result of the transfer; or that the transfer was to an insider and that Debtor was insolvent or became insolvent as a result of the transfer and that the insider had reasonable cause to believe Debtor was insolvent.

14.23 Standing

- (8190) *In re Rothenbush*, 2017 WL 933019 (Bankr. M.D. Fl. 2017) – Debtor can exercise derivative standing to avoid transfer only if Trustee is unwilling to bring action. Code is clear that Chapter 13 Trustees are granted avoiding powers in first instance and debtor does not have concurrent right to pursue avoidance actions.
- (8191) *Kalesnik v. HSBC Bank USA, NA*, Case No. 16-3027 (Bankr. W.D. Mass. 2017) – Chapter 13 Debtor lacks standing to exercise Trustee’s avoidance powers found in Chapter 5 other than in narrow confines of Section 522(h) to augment available exemptions. Congress specifically gave to Chapter 11 and Chapter 12 Debtors authority to exercise Chapter 5 avoidance powers but chose not to include Chapter 13 Debtors in grant of authority. Court cannot ignore plain language of statute, and if Congress intended to give authority to Chapter 13 Debtors, it clearly knew how to do so.
- (8192) *Church Joint Venture v. Blasingame*, 2016 WL 3248044 (W.D. Tn. 2016) – Creditor of individual lacked standing to assert that transfers between corporations and trusts were fraudulent where creditor did not have claim against trusts and corporations. Although individual Debtor was principal in both trusts and corporations, State law did not recognize piercing of corporate veil to allow creditor of shareholder or trust beneficiary to assert claims of one entity against another.
- (8193) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Only actual creditor of person could bring action against person for fraudulently transferring property or assets. Claims on which plaintiff alleged would create claims were dismissed by court, leaving no potential Debtor-creditor relationship between parties mandating dismissal of fraudulent transfer action.
- (8194) *In re Dzierzawski*, Case No. 13-47986 (Bankr. E.D. Mi. 2014) – Creditor seeking derivative standing to pursue fraudulent transfer must demonstrate that creditor has alleged a colorable claim that would benefit estate based on cost-benefit analysis; creditor has made demand on trustee to pursue action; demand has been refused; and refusal is unjustified in light of statutory obligations and duties of trustee. Motion does not require proof of motive or reason for inaction and meets burden by pleadings facts sufficient to demonstrate existence of unpursued claim. Creditor demonstrated colorable claim by alleging facts that, if proven, would support recovery of fraudulent transfer. Defendant’s statement that the complaint will be vigorously defended and that defendant believes cause of action will not be successful does not defeat prima facie appearance of colorable possibility of success. Cost-benefit analysis supported derivative standing where recovery would produce substantial value for the estate and recovery of valuable property that could be liquidated for benefit of estate, and creditor agreed to bear costs of litigation subject to creditor’s right to seek administrative expense claim if action is successful, such that estate has no exposure for attorney fees and costs. Trustee’s refusal to prosecute action was unjustified as estate lacked sufficient funds to prosecute action.
- (8195) *Larson v. Foster*, Case No. 14-06007 (8th Cir. BAP 2014) – Individual creditor lacks standing to pursue recovery of alleged fraudulent transfer under Section 548. Section 548 allows the trustee to bring cause of action, but does not extend standing to individual creditors. Court can allow creditor to exercise derivative standing where creditor demonstrates that trustee is unable or unwilling to pursue action, if creditor has petitioned trustee to pursue recovery and trustee refused; claim is colorable; permission is sought from bankruptcy court before adversary proceeding is filed; and trustee unjustifiably refused to prosecute claim. Claim was colorable where allegations of complaint stated cause of action under Section 548. Although creditor did not seek court permission before filing adversary, court would entertain request on retroactive basis where doing so would not prejudice any party. However, evidence indicated that trustee had not refused to prosecute action but had merely asked for additional information. Trustee neither refused to prosecute nor did so in unjustifiable manner, precluding grant of derivative standing.

14.24 Standing – Chapter 13 Trustee

- (8196) *In re Rothenbush*, 2017 WL 933019 (Bankr. M.D. Fl. 2017) – Debtor can exercise derivative standing to avoid transfer only if Trustee is unwilling to bring action. Code is clear that Chapter 13 Trustees are granted avoiding powers in first instance and debtor does not have

concurrent right to pursue avoidance actions.

- (8197) *In re Cecil*, 488 BR 200 (Bankr. M.D. Fl. 2013) – Chapter 13 Trustee has standing under 11 USC Section 1302 and 11 USC Section 103 to pursue avoidance actions. Fact that authority to conduct avoidance actions is not specifically referenced in Section 1302(b)(1) does not deprive Trustee of authority to bring action, as neither Section 1302 nor Section 704 are the source of, or a limitation on, Trustee's power to bring avoidance actions. Power to bring avoidance actions emanates from Section 103 which applies in all cases under Bankruptcy Code.

14.25 Actual Intent to Hinder, Delay, Defraud

- (8198) *Kravitz v. Local Exchange Carriers of Michigan, Inc.*, 2018 WL 3031101 (Bankr. W.D. Mi. 2018) – Complaint seeking to recover transfers based on actual intent to hinder, delay or defraud must include specific information with respect to each transfer including date and amount of transfer, identity of transferor and initial transferee, and consideration paid. Allegation that Debtor's made aggregate amounts or series of transfers over period of time to unidentified transferee without further detail did not satisfy heightened pleading standards under Federal Rule 9.
- (8199) *Bash v. Textron Financial Corp.*, 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – Trustee can avoid under State UFTA transfer made or obligation incurred if debtor made transfer with actual intent to hinder, delay or defraud. Intent must be shown by clear and convincing evidence. Remaining elements require only preponderance of evidence. Assets encumbered by valid lien are not subject to fraudulent transfers. Plaintiff seeking to recover payments to allegedly secured creditor must prove that assets were not encumbered by enforceable security agreement. Novation results when parties enter into agreement to extinguish prior obligations and replace them with new undertakings, supported by valid consideration. Novation can never be presumed but must be evinced by a clear and definite intent on the part of all the parties to the original contract to completely negate the original contract and enter into the second. Second agreement constituted novation where lender had previously advised borrower that lender would not extend earlier agreement; creditor acknowledge that security agreement in second Agreement was intended to replace security agreement in First; Second Agreement was result of Borrower's application using credit approval form used by lender for new loans; Parties exchanged commitment fees for both first and second agreement but did not do so for later amendments to second agreement; Borrower issued corporate resolution authorizing grant of security interest under Second Agreement; both agreements were signed in person while other amendments to Second agreement were done by mail; Creditor's notices to other parties of security agreement referenced only Second Agreement; and Second Agreement did not contain any express language preserving prior liens. Trustee's complaint alleging payments under Second Agreement stated cause of action where it appeared Second Agreement replaced and did not merely amend prior Agreement.
- (8200) *Wheatley v. Johnson*, 2017 WL 6550499 (Bankr. W.D. Ky. 2017) – Actual fraud test of Section 548 requires proof of (1) a transfer of Debtor's interest in property or incurring of obligation; (2) made on or within two years of the petition date; and (3) with actual fraudulent intent. Actual intent to defraud requires preponderance of evidence and may be proven by circumstances surrounding the transfer including such things as lack of or inadequate consideration, family or close relationship between parties, retention of possession, benefit or use of property in question, financial condition of the party sought to be charged both before and after the transaction, existence or cumulative effect of pattern or series of transactions or course of conduct after incurring debt and onset of financial difficulties or pending or threatened lawsuits by creditors, as well as general chronology of events and transaction. Evidence supported finding that Debtor's transfer of money to Debtor's son within 90 days of bankruptcy filing was done with actual fraudulent intent. The Debtor transferred funds to her son, a family member and "insider" leaving Debtor with a balance of \$3.56 in her bank account. Transfer was not disclosed on Debtor's Statement of Financial Affairs. Debtor was insolvent at the time of the transfer, as her prior Chapter 13 case had been dismissed one month before she transferred the refund due to her failure to make Plan payments.
- (8201) *Russell v. Harper*, 2017 WL 4220396 (Bankr. E.D. Tn. 2017) – Party seeking to avoid transfer based on actual fraud may use badges of fraud including lack or inadequacy of consideration; family, friendship or other close relationship between parties; retention of possession, benefit or use of property by transferor; financial condition of party to be charged both before and date of transaction; existence or cumulative effect of pattern or series of transactions or course of conduct after transferor incurred debt or had onset of financial difficulties; and general chronology of events. Once badges cast suspicion, defendant must explain transaction and show that it was fairly made and not to accomplish fraudulent purpose. Debtor's transfers to his soon-to-be-wife of interest in three LLCs were fraudulent. Debtor made transfers to transferee on eve of marriage to transferee. Debtor was in financial distress at time of transfers as debtor had been sued and owed substantial liabilities at time of transfer and net worth as of dates of transfers was nominal. Transfers were done in haste. Debtor continued to maintain primary control over properties where properties were transferred to trusts in which Debtor was trustee with power to manage and invest property. Debtor, as trustee, later sold the property interests in violation of terms of trust agreements. Debtor received inadequate consideration for transfers where Debtor transferred one property valued at \$150,000 for only \$90,000, and Debtor testified that he charged recipient \$90,000 because that was all she could afford rather than seeking sale that would generate true market value. Transferee paid nominal amount for second transfer where assets were sold only few months later for 10 times the amount allegedly paid by transferee. Third transfer was to fiancée in consideration of marriage, and transfer for "love and affection" is not reasonably equivalent value as matter of law. Transferee's alleged good faith was not defense to actual fraudulent transfer where focus is on intent of debtor, not transferee.
- (8202) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 548 (a) (1) (A) requires complaint to allege (1) transfer of interest of Debtor's property or incurring obligation; (2) made on or within 2 years of the petition date; and (3) made with actual fraudulent intent. Complaint must allege facts to support allegation that Debtors made transfers with intent to hinder, delay or defraud creditors. Complaint failed to state cause of action where complaint did not detail any transfers from Debtor to any defendant. Trustee failed to allege any factual basis to support any "badge of fraud" where complaint failed to allege facts to support allegation that defendants were "insiders" of transferor.
- (8203) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Action to recover transfers under "actual fraud" prong of Section 548 requires that complaint allege, as to each transfer, the date of the transfer; the amount of the transfer; the name of the transferor; the name of the transferee; in the consideration paid, if any, for the transfer. Complaint that failed to identify date or amount of any transfer

failed to state cause of action under Federal Rule of Civil Procedure 9(b). Complaint must also allege that transfers were made with intent to hinder, delay or defraud creditors and that transfers occur within two years before the date of the filing of the petition. Although fraud may be inferred from “badges of fraud”, complaint must allege facts supporting alleged badges of fraud with reasonable specificity. Bare allegation that payments were made in anticipation of potential involuntary bankruptcy proceeding lacked specificity and asserted matters which had occurred two years prior to corporation’s payments to defendant. There was no allegation that payments made were done in anticipation of potential litigation where there had been no litigation contemplated for at least two years. Allegation that Corporation may have been insolvent lacked factual support and was insufficient to constitute badger fraud. Further, insolvency requires that Debtor transfer all or appreciable part of property while it is insolvent and complaint failed to allege amount of any transfers or that transfers constituted all or appreciable part of Debtor’s property. Transfer on account of pre-existing debt can be fraudulent if complaint alleges that challenge transfer was done for purposes of hindering, delaying or defrauding other legitimate creditors. Complaint that merely allege that defendant paid outstanding obligation did not raise payment to level of “actual fraud”.

- (8204) *Silagy v. Schroeder*, 2017 WL 598495 (Bankr. N.D. Ohio 2017) - Section 548 allows Trustee to avoid transfer made within two years before filing of bankruptcy petition if Debtor made transfer with actual intent to hinder, delay or defraud creditors. Analysis focuses on three core elements: transfer; timing; and intent. “Transfer” includes any mode, direct or indirect, of parting with property or an interest in property. Where direct evidence of fraudulent intent is not available, Court can rely on badges of fraud including (1) whether transferee was “insider”; (2) whether Debtor retained possession or control of property transferred; (3) whether transfer was disclosed or concealed; (4) whether Debtor had been sued or threatened with suit prior to transfer; (5) whether transfer was of substantially all assets of Debtor; (6) whether Debtor of scone did; (7) whether Debtor removed or concealed assets; (8) whether value of consideration received by Debtor was reasonably equivalent to value of asset transferred; (9) whether Debtor was solvent or became insolvent shortly after transfer was made; (10) whether transfer occurred shortly before or shortly after substantial debt was incurred; and (11) whether Debtor transferred essential assets of business to lien holder who then transferred assets to insider of Debtor. Debtor’s actions in moving money from Debtor’s individual account and from parties’ joint account to defendant’s individual account altered nature of Debtor’s interest in funds, which qualifies as transfer. Defendant admitted that Debtor’s attorney advised Debtor to move funds out of Debtor’s account to keep funds away from Debtor’s creditors, constituting direct evidence of Debtors fraudulent intent. Prior to transfers, defendant did not have individual or separate accounts to segregate her assets. Defendant opened individual account in face of advancing threat of collection and funds transferred to defendant’s account work product of Debtor’s earnings and did not include any funds directly traceable to defendant. Although Trustee did not have direct evidence of fraudulent intent with regard to two other transfers, Trustee demonstrated sufficient badges of fraud where Debtor made transfers after entry of substantial judgment against him, all transfers were made within 122 days of bankruptcy filing, and Debtor was insolvent when transfers were made.
- (8205) *Kirshner v. Fitzsimons*, 2017 WL 82391 (S.D.N.Y. 2017) – Cause of action to set aside fraudulent transfer based on allegations that the Debtor had actual intent to hinder delay or defraud creditors depends on intent of transferor (Debtor) and not intent of transferee. When evaluating intent of corporation, Court focuses on intent of corporate actors who effectuated transaction on behalf of the corporation. Actual intent of Debtor’s shareholders is irrelevant to whether Debtor’s transfers to shareholders as part of Leverage By Out was fraudulent. Shareholder approval of LBO does not amount to causing Debtor to make a transfer with actual intent actual intent to hinder, delay or defraud. For Directors decision to merge rain gauge in LBO is not relevant where board and delegate decision-making authority to Independent Directors who were convened as special committee for express purpose of assessing desirability of LBO. Independent directors were in position to control all, or boat and supplied the necessary votes to approve LBO. To extend that complaint alleges that independent directors possessed actual intent to hinder, delay or defraud Debtor’s creditors, that intent may be imputed to corporation. However, the intent of the Board of Directors, excluding independent directors, is not relevant. Intent of corporate officers may be imputed to corporation if officers were in position to control disposition of Debtor’s property. Are you who does not own the majority of corporation’s shares may have sufficient control to impute intent to corporation if person has formidable voting and managerial power such that he, as practical matter, it is no differently situation than if he held controlling interest. Allegation and stockholder help 13% of stock without allegations that shareholder effectively controlled voting power of corporation was not sufficient to impute shareholders intent to corporation. Officer and majority shareholder did not have right to appoint directors, right to veto board action or power to exact retribution and otherwise lacked any attributes of control. Further, there was no allegation that officers inappropriately pressured independent directors or that officers dominated or imposed an intrusive style of management. Record indicated that Independent Directors and other board members reviewed management projections on several occasions, considered legal and accounting opinions before voting to approve LBO, evaluated LBO against two separate “downside” test cases, and reviewed valuation research and solvency opinions when voting to approve LBO. Neither corporate officers nor Board of Directors were in position to control Independent Directors for purposes of imputation of fraudulent intent. Allegations were also insufficient to demonstrate actual fraudulent intent as there was no evidence of badges of fraud which typically give rise to an inference of intent.
- (8206) *Edwards v. Arledge*, 2016 WL 6832845 (Bankr. E.D. Tn. 2016) – Tennessee State law mirrors Section 548, allowing transfers to be avoided if made within 4 years pre-petition and are made either with actual intent to hinder, delay or defraud; or are made without receiving reasonably equivalent value and Debtor either was engaged or was about to engage in business for which assets were unreasonably small, or Debtor intended to incur debts beyond Debtor’s ability to pay. Whether transfer is made with actual intend depends on factors such as whether the Debtor retained possession or control of the property transferred; before the transfer was made, the Debtor had been sued or threatened with suit; and whether the Debtor received reasonably equivalent value for his assets. Debtor fraudulently transferred assets valued at over \$900,000 plus real property exceeding 280 acres to a trust controlled by Debtor. Debtor transferred personal assets into trust in which Debtor was trustee and close friend was beneficiary; Debtor retained life estate in transferred property and remained in possession; Debtor was aware of pending suit by at least one creditor and Debtor received no consideration for the transfers. Debtor’s knowledge or pending suit and transfer or assets to entity that allowed Debtor continued use and access evidenced actual intent to hinder, delay and defraud creditors.
- (8207) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Actual intent can be proven through objective indicia of fraud, referred to as “badges of fraud”. Badges include any fact that thro suspicion on the transaction and require and explanation. While only

one badge rarely raises inference of fraudulent intent, confluence of several badges can be conclusive evidence of fraudulent intent. Common badges of fraud include (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 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 obligation incurred; (9) Whether the Debtor was solvent 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; and (11) Whether the Debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the Debtor. Trustee established sufficient badges of fraud regarding transfer by Debtor to his mother of \$30,000 in cash less than 2 years pre-petition. Debtor's mother, the transferee, has a close family relationship. Debtor and his mother had a history of secret transactions, including the transfer of title in a car from Debtor to mother without transferring possession, and failing to disclose transfer in prior bankruptcy proceeding. Debtor had other transactions not involving mother that also raised issues of potential fraud including withdrawing \$77,000 in cash from a personal bank account to conceal them from his soon-to-be ex-wife. The \$30,000 transfer to mom was also concealed. Debtor engaged in larger pattern of transactions designed to keep assets out of his name including creating a trust with the Debtor as a beneficiary and purchasing home in name of trust. Debt that supposedly was owed by the Debtor to mom was not consideration for the \$30,000 transfer where debt had been discharged in the Debtor's prior Chapter 13 case; and evidence was not sufficient to establish that a debt ever existed as the parties did not introduce a loan agreement or other written document establishing the obligation, and any payments on the "loan" payments ceased years earlier. Debtor also engaged in pattern designed to dissipate of assets shortly before divorce that supports inference of fraud. \$30,000 transferred to mom largest part of the Debtor's assets; marital residence was facing foreclosure; Debtor had few other substantial assets; and Debtor had other outstanding creditors who had not been paid.

- (8208) *Bash v. Textron Financial Corporation*, 2016 WL 4437606 (6th Cir. 2016) – Security Agreement made at time when lender knew or reasonably should have known that borrower was operating Ponzi scheme is transfer made with actual intent to hinder, delay and defraud creditors and is avoidable under Section 548. Lender entered into initial loan relationship with borrower who was operating legitimate, long standing business, and loan document contained security agreement. After entering into loan relationship, borrower began to operate as Ponzi scheme, obtaining additional loans from private parties and using the proceeds to repay other investors while the principals siphoned off funds for personal expenses. Lender's audits produced ample notice that borrower's finances were questionable including substantial balances shown on corporate records as "insider loans". Two years later, parties entered into new loan transaction including new promissory note and new security agreement. Fact question remained as to whether second loan transaction was continuation of first, such that security agreement would not be fraudulent, or whether second transaction was novation that replaced first security agreement with new agreement.
- (8209) *Weisfelner v. Hoffman*, Case No. 16-518 (S.D.N.Y. 2016) – Actual intent of president of corporation to cause corporation to enter into transaction that was designed to hinder, delay or defraud creditors, would be imputed to Corporation for purposes of Section 548. After President provided inflated projections to Corporation's Board and to potential purchaser, purchaser eventually purchased assets of corporation in LBO in which corporation took on additional debt that corporation as unable to pay and resulted in bankruptcy. Trustee of Litigation Trust created by Chapter 11 plan brought suit to recover payments made to President as part of LBO. President alleged that his fraudulent knowledge would not be imputed to corporation where Board of Directors did not know of fraud and imputation required knowledge of Board, not just officer. Court rejected contention, holding that Board's lack of knowledge did not prevent imputation to corporation of fraudulent intent of President, allowing Trustee to recover funds as transfer with intent to hinder, delay or defraud creditors of corporation including creditors who provided loans to facilitate LBO.
- (8210) *Kentucky Petroleum Operating, Ltd. V. Golden*, 2015 WL 927258 (E.D. Ky. 2015) – Where party contesting transfer as fraudulent presents evidence of "badges of fraud", burden shifts to defendant to show that transfers were made in good faith. Plaintiff established badge of fraud where Debtor, after entry of arbitration award but before entry of judgment confirming award, executed security agreements to related companies encumbering all of Debtor's assets. Transfer effected by security agreement came during pendency of litigation sufficient to raise presumption and shift burden. Defendant can rebut presumption by showing of good faith. Defendants failed to do so. Defendants' allegation that they did not consider plaintiff to be a creditor of Debtor at time of transfer irrelevant to whether plaintiff was creditor and defendants' mental state would not alter that status. Defendants presented no evidence that they lacked intent to defraud. Even if security agreements were given to secure pre-existing debt and therefore were for adequate consideration, that does not mean that transfers were in good faith where there was no evidence that security agreements were issued for any purpose other than to effectively transfer assets from Debtor to related entities at expense of judgment creditor.
- (8211) *The First State Bank and Trust Company v., Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Factors giving rise to presumption of fraudulent intent include (1) The transfer or obligation was to an insider; (2) The Debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the Debtor had been sued or threatened with suit; (5) The transfer was of substantially all the Debtor's assets; (6) The Debtor absconded; (7) The Debtor removed or concealed assets; (8) 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) The Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the Debtor. Less than one year prior to filing, Debtors sold their business to their son. After filing, bank contested sale as fraudulent. First badge of fraud was present as sale was to Debtors' son, considered insider for fraudulent transfer purposes. There was no evidence that Debtors maintained any control over the transferred assets as evidence was uncontroverted that after acquiring business, son operated business with no involvement from parents. Debtors knew that they were in financial distress when property sold, as Debtors' primary business (unrelated to the business sold) filed bankruptcy only 6 weeks after sale to son. Transfer was not substantially all of Debtors' assets. While sale

encompassed all assets of the particular business sold, evidence was that Debtors had significant business interests other than the business sold. However, business sold accounted for more of Debtors income than all other businesses combined and was the most profitable and stable of the businesses. Insolvency is presumed if the sum of the transferor's assets after the transfer is less than the total amount of Debtors' debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in Debtors' assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets. Question then became whether son paid reasonable equivalent value, defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where Debtors' own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but Debtors' financial statements valued property at no less than \$390,000.00. However, taken as a whole, evidence did not support finding of actual intent. Undisputed evidence indicated that for years prior to the sale the buyer had been running the business, which had been started at his request as a teenager. The values attributed to the assets in the Sale Agreement were based on their book value and the transfer was not done in secret, with the secured creditors of the business being informed and the buyer affirmatively assuming the business' secured liabilities. From all respects, it appears that the parties sought to handle the transfer legally and above-board. While the sellers were undeniably experiencing financial difficulties at the time of the transfer, it was not their only income-producing company. Their main business continued for more than one year until converting to chapter 7; and sellers themselves did not file for bankruptcy relief until more than a year after the sale.

- (8212) *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014) – Under Uniform Fraudulent Transfer Act, transfer made with actual intent to hinder, delay or defraud creditors can be avoided by either an actual creditor at the time of the transfer or any creditor whose claim arose later.
- (8213) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, 515 BR 532 (6th Cir. BAP 2014) – Actual fraud requires proof that transfer of Debtor's property occurred within two years of petition date and that transfer was made with actual intent to hinder, delay or defraud creditors. Fraud is determined by badges of fraud such as whether transferor is in precarious financial condition; whether transferor knew there was or soon would be large judgment rendered against him; adequacy of consideration for transfer; secrecy or haste of transaction; any family or friendship relationship between transferor and transferee; whether transfer included all of substantially all of transferor's non-exempt assets; whether transferor retained life estate or other interest in property; transferor's ability to produce evidence to rebut suspicious transfer; lack of any innocent purpose or use for the transfer. Presence of one or more badges creates presumption of fraudulent intent. Debtor's transfer of property to mother triggered several badges, including (1) Debtor knew of his precarious financial condition and knew that debts exceeded assets at time of transfer and that property was in danger of foreclosure; (2) Debtor received inadequate consideration where quit claim deed from Debtor to mother expressed \$0 – love and affection as consideration; (3) while mom gave Debtor money to purchase property in first instance, that was 8 years prior to transfer from Debtor to mother which could not constitute consideration for transfer; (4) Debtor and mother had family relationship; (5) transfer was of virtually all of Debtor's property including the non-exempt value of the property transferred; and (6) there was no innocent purpose for the transfer, as it appears that the only reason for the transfer was to keep property out of hands of creditors.
- (8214) *Wland v. Lee*, 2014 WL 2446084 (11th Cir. 2014) – Payments made in furtherance of Ponzi scheme are actually fraudulent without need to resort to badges of fraud. State Uniform Fraudulent Transfer Act allowed receiver to recover payments to investors paid within the relevant time period.
- (8215) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Actual fraud for purposes of Section 548(a)(1)(A) requires proof of Debtor's actual intent to hinder, delay or defraud creditors. Granting of line to secure antecedent debt, without more, is not evidence of actual fraud.
- (8216) *Newton v. McKay*, 2014 WL 1612356 (Bankr. E.D. Tn. 2014) – “Badges of fraud” are circumstances so frequently attending fraudulent transfers that an inference of fraud arises, and include inadequacy of consideration, secure or hurried transactions, or use of fictitious parties; close relationship between parties, transfer for little or no consideration, transferor's continued relations with property such as ongoing mortgage, tax and insurance payments on real property, and whether each party was aware of transferor's financial difficulty. Transfer of real property from Debtor to mother as ordered in divorce decree between Debtor and ex-husband constituted transfer to person in close personal relationship to Debtor and for which Debtor received no consideration, and was done at a time when Debtor was suffering financial distress. Defendant successfully rebutted presumption of fraud. Debtor had originally purchased property with funds advanced by mother and at all times the property was considered to belong to mother for investment. It was not until Debtor divorced spouse that mother realized property was not in her name and asked for it to be returned to her. Parties were not sophisticated business people well versed in purchase and sale of real estate. Property was initially titled in Debtor's name only because Debtor, not mother, attended foreclosure sale at which property was purchased and seller would issue deed only in name of person who physically placed successful bid. Absent any evidence of collusion or fraudulent intent, transfer was not avoidable as actually fraudulent.
- (8217) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Actual fraud for purposes of Section 548 focuses on intent of the Debtor, not intent of the creditor. While Chapter 7 trustee presented evidence that may have supported finding of fraudulent intent by creditor, Trustee did not present any evidence of any fraudulent intent of Debtor. Further, fraudulent transfer must be of property of the Debtor. Debtor had no interest in assets where pre-petition State Court judgment determined that Debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor.
- (8218) *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 to 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.

- (8219) *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.
- (8220) *Degirolo 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.
- (8221) *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.
- (8222) *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.
- (8223) *U.S. v. Krause*, 2011 WL 1206178 (10th Cir. 2011) – Debtor's transfer or 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.
- (8224) *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.
- (8225) *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.
- (8226) *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.

- (8227) *Bash v. Textron Financial Corp.*, 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – Transfers made in furtherance of *Ponzi* scheme are presumed to be made with intent to defraud. *Ponzi* scheme will eventually collapse and intent is presumed because debtor undeniably knows that future investors will not be paid, evidencing intent to defraud creditors. *Ponzi* scheme is any fraudulent arrangement that uses later acquired funds or products to pay off previous investors. Factors to consider include (1) deposits made by investors; (2) Debtor conducted little or no legitimate business operations; (3) purported business operations of Debtor produced little or no profits or earnings; and (4) source of payments to investors was from cash infused by new investors. Other factors include collapse of business upon loss of investors and lavish lifestyle of individuals operating scheme. Plaintiff made compelling case where Principals were removing cash at exorbitant speeds to fund lavish lifestyles and related-party loans; Company dramatically increased the amount of investor notes sold over time, while lulling investors into holding onto investments with rate increases; and (3) Company could only pay all of interest and principal owed by using the proceeds from the sale of new Notes to new Noteholders Principals' criminal convictions provide additional evidence of the *Ponzi* scheme and fraudulent intent.

14.27 Constructive Fraud

- (8228) *Hagan v. Mickens*, 2018 WL 3913760 (W.D. Mi. 2018) – Transfer is avoidable under Section 544 to extent that transfer is avoidable under applicable state law. Michigan Uniform Fraudulent Transfer Act, Section 566.35, allows avoidance of transfer by creditor whose claim arose before transfer was made if Debtor made transfer without receiving reasonably equivalent value and Debtor was insolvent or became insolvent as a result of transfer. Debtor's conveyance of Homestead from joint tenants to tenants by entireties constituted voluntary transfer of property by Debtors when Debtors were insolvent. From standpoint of individual creditors, there was no reasonably equivalent value given as transfer had effect of cutting creditors out of potential recovery that would have been available but for transfer to entireties. Whether transfer was for "value" is determined from perspective of creditors in light of purpose to protect estate from being depleted to prejudice of unsecured creditors. Consideration that has no utility from creditors viewpoint does not satisfy statutory definition. Transfer had effective showing property for proximally \$37,000 in debts owed to non-joint creditors that would otherwise have been recovered by obtaining judgment and levying on joint tenancy interests.
- (8229) *Kravitz v. Local Exchange Carriers of Michigan, Inc.*, 2018 WL 3031101 (Bankr. W.D. Mi. 2018) – Complaint seeking to avoid constructively fraudulent transfer is not required to be Plan with particularity. Constructive fraudulent transfers do not require proof of fraud or wrongdoing but are instead based on Debtor's financial condition. Pleading must still set forth sufficient facts to put defendant on notice of claim and should contain fax to demonstrate transfer within requisite time period, lack of reasonably equivalent value, and Debtor's insolvency. Complaint set forth sufficient facts by alleging transfers between Debtor and defendant within applicable timeframe; that Debtor did not receive reasonably equivalent value; and that Debtor was insolvent or became insolvent as result of transfers.
- (8230) *R&G Nursing Care, Inc. v. Hrivnak*, 2018 WL 1115204 (Bankr. N.D. Ohio 2018) – Debtor liable for fraudulent transfer of assets by third party where fraudulent transfer results in third party's inability to pay debts. Transfer to debtor can be either actually fraudulent or constructively fraudulent. Actual fraud requires proof of intent based on factors including whether transfer was to insider; whether transfer was of substantially all assets of debtor; whether consideration received by debtor was reasonably equivalent to value of asset transferred or the amount of the obligation incurred; whether debtor was insolvent or became insolvent shortly after transfer; and whether transfer occurred shortly before or shortly after substantial debt was incurred. Constructive fraudulent transfer does not require intent but focuses on transfer without transferor receiving reasonably equivalent value and transferee reasonably believes that transferor will incur debts beyond ability to pay. Debtor diverted portion of Mother's Social Security Income to Debtor's personal use, leaving Mother unable to pay charges owed to Nursing Home. Transfers from Mother to Debtor were transfers to "insider", and were made when Debtor knew that transfers would not leave Mother with sufficient assets to pay Nursing Home expenses. Debtor gave no consideration for funds received from Mother where only asserted consideration was that Debtor used funds to pay his mortgage and Mother "would appreciate Debtor being able to keep his house." Consideration must be tangible; non-economic, intangible, or psychological benefits are insufficient to constitute reasonably equivalent value for constructive fraudulent transfer purposes, consideration which is neither concrete nor quantifiable.
- (8231) *Wheatley v. Johnson*, 2017 WL 6550499 (Bankr. W.D. Ky. 2017) – To avoid transfer as constructively fraudulent Trustee must prove that (1) Debtor transferred interest in property; (2) transfer took place within two years before the bankruptcy was filed; (3) debtor was insolvent on the date transfer was made or became insolvent as a result of transfer; and (4) the debtor received less than reasonably equivalent value. Debtor's payment to son of Debtor's Federal Tax Refund constituted transfer of Debtor's interest in funds. Transfer occurred less than 90 days pre-petition and left debtor with less than \$4.00 in the bank. Although debtor allegedly used money to pay Son's medical bills, Debtor did not present any evidence of what bills were paid or that Debtor paid bills in exchange for any consideration paid to her by Son. Although Debtor contended that payments were in exchange for allowing debtor to reside with Son, Debtor's address on Petition was different than son's address and Debtor's testimony at trial conflicted with Debtor's testimony at 341 meeting that Debtor's son resided at completely different address than did Debtor.
- (8232) *Nathan v. Minardi*, 2017 WL 5903457 (E.D. Mi. 2017) – Constructively fraudulent transfer requires proof of transfer by debtor of interest in property; within 2 years pre-petition; for which Debtor received less than reasonably equivalent value; and Debtor was insolvent when transfer was made. Landlord's acquisition of improvements constructed by Debtor at end of lease did not constitute transfer by Debtor of interest in improvements. Lease provisions stated that any improvements constructed by Debtor become part of the premises and remain thereon at termination of lease. Improvements remained property of Debtor on construction as lease provided for improvements to "become" part of premises at termination of lease, not at any earlier date. Rights remaining in parties at termination of lease do not constitute "transfer" of any interest in property, but rather a termination of any possessory right. One lease terminated, Debtor had no rights left to transfer because right to use and possess property expired leaving Debtor with nothing to convey.
- (8233) *Boscarino v. Board of Trustees of Connecticut State University System*, 2017 WL 4410455 (Bankr. D. Conn. 2017) – Payment of college tuition for adult dependent is avoidable fraudulent transfer. While parents may reasonably assume that investment in child's college education will enhance child's financial well-being, and that child may someday reimburse parents for cost of college, that does not amount

to economic value to current creditors. “Familial obligation” to pay for child’s expenses was not reasonably equivalent value where parent did not have any legal obligation to do so and did not satisfy either present or antecedent debt of parents.

- (8234) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Transfer is constructively fraudulent under Michigan Compiled Laws Section 566.35 if Debtor made transfer or incurred obligation without receiving reasonably equivalent value in exchange for transfer or obligation and Debtor was insolvent at that time or Debtor became insolvent as result of transfer or obligation. Trustee using “strong arm” power under Section 544 must also prove the existence of a pre-transfer unsecured claim that is allowable under 11 USC Section 502. Whether Debtor received reasonable equivalence is determined from perspective of creditors, comparing what they lost as a result of the transfer and what they gained, if anything. Property while located in the trust would have been subject to claims of individual creditors, while transfer to entreties deprived individual creditors of any remedy against property.
- (8235) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 548 allows Court to avoid constructively fraudulent transfer where Debtor received less than reasonably equivalent value in exchange for transfer. Conclusory allegation that Debtors transfer to defendants “was not supported by adequate consideration” was insufficient to state cause of action. Further, complaint expressly alleged that defendants received transfers as holders of valid promissory notes where payment of valid antecedent debt, as a matter of law, is not constructively fraudulent as dollar for dollar reduction in indebtedness amounts to reasonably equivalent value.
- (8236) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – In determining whether transfer was “constructively fraudulent”, Court can consider badges of fraud including insider relationship of parties, failure to disclose transactions in Debtor’s bankruptcy filings, consideration provided for transactions, and existence of litigation at time transfers were made. Court unable to determine on summary judgment whether sufficient evidence of fraud existed.
- (8237) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Complaint to recover “constructively fraudulent” transfer under section 548(a)(1)(B)(ii) requires transfer of property of the Debtor within two years before the date of the filing of the petition where Debtor received less than reasonably equivalent value and either was insolvent on the date of the transfer or became insolvent as a result of the transfer. Complaint alleging “constructive fraud” is not subject to strict pleading requirements of Rule 9(b), but complaint must still identify transfers to be avoided including dates of transfers, name of transferor, and name of transferee. Payments by Corporation to defendant were for reasonably equivalent value where defendant held judgment against Corporation and payments were reduction of balance owed. Debtor is “insolvent” for purposes of constructive fraudulent transfer or liabilities exceed assets as of date of transfer. Allegations that Corporation was insolvent in 2010 through 2011 were insufficient to establish that Corporation was insolvent when Corporation made transfers in March, 2013, nearly 2 years later.
- (8238) *Roach v. Skidmore College*, Case No. 15-4048 (Bankr. S.D. Ga. 2017) – Debtor’s payment of adult-child’s college tuition is constructively fraudulent transfer. Funds transferred from Section 529 plan to college were not property of estate even though funds passed through Debtor’s personal checking account as long as funds paid to college could be fairly traced to Section 529 withdrawals. Payments to college before Debtor transferred funds from 529 plan were transfers of Debtor’s interest in property for purposes of Section 548. Debtor did not receive reasonably equivalent value for transfers where Debtor did not receive any direct or indirect economic benefit from transfers. College received benefit of funds transferred by Debtor but Debtor’s child received benefit of education. Absent statutory requirement that parent pay for college costs of child, moral obligation that parent may have felt and any alleged enhancement of child’s financial well-being do not constitute “value” received by Debtor. Absent either satisfaction of legal duty or enhancement of assets, Debtor did not receive reasonably equivalent value for tuition payments.
- (8239) *Silagy v. Schroeder*, 2017 WL 598495 (Bankr. N.D. Ohio 2017) - Section 548 allows Trustee to avoid transfers that are “constructively fraudulent”. Transfer is “constructively fraudulent” where Debtor made transfer within two years of petition and Debtor received less than reasonably equivalent value in exchange and was either insolvent on date of transferor became insolvent as a result of transfer. Circumstances regarding alleged to transfer of funds from Debtor to spouse did not demonstrate absence of factual issues for purposes of summary judgment, where Trustee alleged that Debtor made transfer but defendant denied ever receiving transfer and Trustee produce no documents or other evidence to support existence of transfer.
- (8240) *Perkins v. Lehman Brothers*, Case No. 08-6186 (Bankr. N.D. Ga. 2017) - Transfers by “Ponzi” scheme are not presumptively fraudulent where transferee is one who innocently supplies goods, services or labor. Presumption applies only to transactions that are “in furtherance of” Ponzi scheme, requiring that transfer is inherent and integral part of fraudulent scheme and continuation of fraudulent scheme depends on transfers. Transfer that does not induce future investors is not inherent and integral part of fraud. Transfers to investment advisors and brokers were not presumptively fraudulent as transfers did not remove assets from Debtor or concealed assets from creditors.
- (8241) *DeGiacomo v. Sacred Heart University*, 2016 WL 4259787 (Bankr. D. Mass. 2016) – Parents who pay college tuition for adult child receive “reasonably equivalent value” precluding recovery from school of tuition payments as constructively fraudulent. Noting a split of authority, court held that “love and affection” is not consideration and state did not mandate parents to support adult child. Parents received value because child would be financially self-sufficient and college degree would directly contribute to financial self-sufficiency. While economic success cannot be guaranteed, outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment. Parent can reasonably assume that paying for child to obtain undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent.
- (8242) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Constructive fraudulent transfer is transfer made for less than reasonably equivalent value and is intended to avoid transfers that unfairly or improperly deplete Debtor’s assets or dilute claims. Constructively fraudulent transfers have no intent element – sole issue is whether the Debtor received less than reasonably equivalent value, determined by comparing value of property transferred by Debtor to value of what Debtor received.
- (8243) *The First State Bank and Trust Company v., Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Factors giving rise to presumption of

fraudulent intent include (1) The transfer or obligation was to an insider; (2) The Debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the Debtor had been sued or threatened with suit; (5) The transfer was of substantially all the Debtor's assets; (6) The Debtor absconded; (7) The Debtor removed or concealed assets; (8) 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) The Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the Debtor. Less than one year prior to filing, Debtors sold their business to their son. After filing, bank contested sale as fraudulent. First badge of fraud was present as sale was to Debtors' son, considered in insider for fraudulent transfer purposes. There was no evidence that Debtors maintained any control over the transferred assets as evidence was uncontroverted that after acquiring business, son operated business with no involvement from parents. Debtors knew that they were in financial distress when property sold, as Debtors' primary business (unrelated to the business sold) filed bankruptcy only 6 weeks after sale to son. Transfer was not substantially all of Debtors' assets. While sale encompassed all assets of the particular business sold, evidence was that Debtors had significant business interests other than the business sold. However, business sold accounted for more of Debtors income than all other businesses combined and was the most profitable and stable of the businesses. Insolvency is presumed if the sum of the transferor's assets after the transfer is less than the total amount of Debtors' debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in Debtors' assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets. Question then became whether son paid reasonable equivalent value, defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where Debtors' own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but Debtors' financial statements valued property at no less than \$390,000.00. Taken as whole, evidence indicated that sale was constructively fraudulent as made for less than reasonably equivalent value. Value of assets sold exceeded price paid by at least \$59,000.

- (8244) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, Case No. 14-8011 (6th Cir. BAP 2014) – Transfer is constructively fraudulent where Debtor transfers interest in property less than 2 years prior to petition date for less than reasonably equivalent and either was insolvent or became insolvent as a result of the transfer.
- (8245) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) –Fraudulent transfer must be of property of the Debtor. Debtor had no interest in assets where pre-petition State Court judgment determined that Debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor. To extent Debtor transferred Accounts Receivable to creditor, creditor held properly perfected security interest in those assets. When creditor acquired accounts, the transfer was as a matter of law for reasonably equivalent value as transfer reduced balance owed on pre-petition liability.
- (8246) *Geltzer v. Xaverian High School*, 2013 WL 6283582 (Bankr. E.D.N.Y. 2013) – Private school tuition payments for Debtor's minor children are not constructively fraudulent. Debtor received indirect benefit equal to amount of payments as Debtor was obligated to provide education for children and Debtors receive benefits in from of education for children.
- (8247) *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.
- (8248) *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.
- (8249) *Lingham Rawlings, LLC v. Gaudiano*, 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.
- (8250) *Degriolamo 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.
- (8251) *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.
- (8252) *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.

- (8253) *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.
- (8254) *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.
- (8255) *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.
- (8256) *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; 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.
- (8257) *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.
- (8258) *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”.
- (8259) *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.
- (8260) *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.

14.28 Transfer of Property of Debtor

- (8261) *Hagan v. Mickens*, 2018 WL 3913760 (W.D. Mi. 2018) – Debtors’ conveyance of Homestead from joint tenants to tenants by entireties constituted voluntary transfer of property by Debtors when Debtors were insolvent. From standpoint of individual creditors, there was no reasonably equivalent value given as transfer had effect of cutting creditors out of potential recovery that would have been available but for transfer to entireties.
- (8262) *Roumeliotis v. Johnson & Wales University*, Case No. 15-3011 (Bankr. D. Conn. 2018) – Fraudulent transfer requires transfer of Debtor’s interest in property. Loan obtained by Debtors under Federal PLUS loan program used to finance daughter’s college education never became Debtor’s property. Program regulations require parents to certify the proceeds will be used only for child’s education and government transfers loan proceeds directly to university. Proceeds were never in account in name of parents or under parents’ control. Governments interest in safeguarding loan proceeds was countervailing federal interest that would permit Court to determine ownership by reference to federal law.
- (8263) *Murk’s Village Markets, Inc. v. Bank of America, NA*, 2017 WL 4516822 (W.D. Mi. 2017) – Fraudulent transfer requires transfer of debtor’s interest in property. Payments to creditors were not avoidable where Debtor fraudulently embezzled money from Employer by causing Employer to issue checks directly to Debtor’s personal creditors. At no point did transferred funds become property of Debtor as Debtor did not have interest in funds before transfer and direct transfer from employer to creditor did not produce any property interest of Debtor in funds.
- (8264) *Nathan v. Minardi*, 2017 WL 5903457 (E.D. Mi. 2017) – Constructively fraudulent transfer requires proof of transfer by debtor of interest in property; within 2 years pre-petition; for which Debtor received less than reasonably equivalent value; and Debtor was insolvent when transfer was made. Landlord’s acquisition of improvements constructed by Debtor at end of lease did not constitute transfer by Debtor of interest in improvements. Lease provisions stated that any improvements constructed by Debtor become part of the premises and remain thereon at termination of lease. Improvements remained property of Debtor on construction as lease provided for improvements to “become” part of premises at termination of lease, not at any earlier date. Rights remaining in parties at termination of lease do not constitute “transfer” of any interest in property, but rather a termination of any possessory right. One lease terminated, Debtor had no rights left to transfer because right to use and possess property expired leaving Debtor with nothing to convey.
- (8265) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Transfer of property from trust in which Debtor and spouse were settlors and beneficiaries to Debtor and her spouse as tenants by entireties is transfer of Debtor’s interest in property for purposes of Section 548.
- (8266) *Hometown 206-1 1925 Valley View, LLC v. Prime Income Asset Management, LLC*, Case No. 15-10881 (5th Cir. 2017) – Debtor’s contractual right to receive payments during 60-day termination period constitutes interest in property. Debtor’s contractual waiver of right to receive payments during termination period constitutes transfer of Debtor’s interest in property for purposes of Section 548. Underlying contract was terminable only upon 60 days written notice, and each party was entitled during 60 day notice period to full performance by other party. But for waiver of notice period, Debtor would have been entitled to future income stream generated from contractual relationship during 60-day termination period. Waiver of the 60-day notice period effected transfer of right to continued performance under the agreement and receive payments due under the agreement, payments which had value and were sufficiently vested as to constitute “assets”.
- (8267) *Ivey v. First Citizens Bank & Trust Co.*, 848 F.3d 205 (4th Cir. 2017), *cert denied*, 138 S.Ct. 314 (2017) – Debtor’s deposit of funds into Debtor’s own, unrestricted, bank account is not a “transfer” within scope of Section 101(54). Accordingly, deposits cannot be recovered as fraudulent transfers even if funds were deposited into account as part of Ponzi scheme with actual intent to hinder, delay or defraud creditors. Court relied on 90 year old Fourth Circuit holding, rejecting Western District of Michigan holding in *Meoli v. Huntington Bank*.
- (8268) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – “Transfer” includes any conveyance of an interest of Debtor in property including retention of title as security interest, foreclosure, and any other method, absolute or conditional, voluntary or involuntary, of disposing with or parting with property or an interest in property including any legal or equitable interest of the Debtor in property. Contingent interests are property if Debtor’s interest is sufficiently rooted in pre-bankruptcy past. Debtor’s endorsement of promissory note in favor of his wife constituted “transfer of property”.
- (8269) *ADP Commercial Leasing, LLC v. Obeid*, 2016 WL 74880 (E.D. Mi. 2016) – Transfer is fraudulent only if transfer is of Debtor’s interest in property. If Debtor has no interest in property transferred, transfer cannot be fraudulent as matter of law. Under Michigan law, property that is encumbered by a valid lien is not an asset within the definition of the Uniform Fraudulent Transfer Act. When secured lender swept Debtor’s bank accounts and then used proceeds to pay third party creditors of Debtor as part of global resolution, neither sweep of accounts nor payment to third party was fraudulent transfer, as lender held lien on all assets and amount owed exceeded value of assets, leaving no equity for Debtor and, therefore, no interest in the funds swept and transferred.
- (8270) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – To be fraudulent, transfer must involve property of Debtor at time of transfer. Debtor’s removal of name from bank accounts that were owned by Debtor and mother was not fraudulent transfer where Debtor did not have legal interest in accounts when Debtor removed name. Bank accounts jointly owned by Debtor and third party are presumptively owned in proportionate shares. However, presumption is rebuttable by evidence indicating that Debtor was not intended to have present interest. Fact that Debtor could, at any time, access funds for personal expenses is not conclusive where Debtor did not, in fact, access funds. Evidence rebutted presumption that Debtor had ownership interest in funds in accounts titled in Debtor’s name and mother’s name where evidence was uncontroverted that all of the funds in the accounts came from mother’s social security, life insurance received by mother when her husband died, funds transferred from an account formerly in the names of mother and husband, sale of building owned by Debtor’s husband and had been used by him in business, and collection of money owed to husband or his business when he died. Mother added Debtor’s name to accounts some years earlier for estate planning and to ensure that if mother became unable to manage her affairs, daughter would have access to funds for mom’s benefit. Treasure bonds jointly owned by Debtor and third party are presumptively by both parties. However,

where equitable interests exist, court can impose constructive or resulting trust on bonds and proceeds. Requirements of Code of Federal Regulations that states that registration of bonds is conclusive of ownership is not controlling and does not apply to proceeds after bonds are liquidated. Funds used to purchase bonds were provided exclusively by mother from her separate funds and not from any funds or property of Debtor. After mom liquidated bonds, she placed funds in her bank account. Treasury regulations do not undercut conclusion that Debtor did not own any of the funds used to purchase bonds and so bonds were sole property of mom notwithstanding named ownership on face of bonds themselves. As transfers did not implicate any property in which Debtor had interest, Debtor's removal of name from accounts was not fraudulent as matter of law.

- (8271) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – Deposit of money into bank account constitutes “transfer” of funds to bank. Bank’s right to use funds deposited provides sufficient control by bank over funds to amount to transfer for purposes of Section 548.
- (8272) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Constructive fraudulent transfer is transfer made for less than reasonably equivalent value and is intended to avoid transfers that unfairly or improperly deplete Debtor’s assets or dilute claims. Evidence established transfer of property where funds used to purchase property came from Debtor’s personal account but title to property was taken in Debtor’s daughter’s name.
- (8273) *Spradlin v. Beads & Steeds Inns, LLC*, 2014 WL 4199637 (Bankr. E.D. Ky. 2014), *aff’d*, 2017 WL 24570 (6th Cir. 2017) – Action to recover fraudulent transfer dismissed where property transferred was not Debtor’s but was property of wholly owned LLC. There is no state law basis to allow Debtor to “reverse pierce” the corporate veil and allow assets of LLC to be considered property of Debtor.
- (8274) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff’d*, Case No. 14-8011 (6th Cir. BAP 2014) – Fraudulent transfer must be a transfer of the Debtor’s interest in property. Debtor has an interest in property if the property would have become property of the estate had it not been transferred. If Debtor held bare legal title to property, transfer would not be transfer of Debtor’s interest as property interest would not have become property of estate in first instance. Debtor will hold bare legal title either where property is held in an express trust or where property is held in constructive trust in favor of another; or perhaps where property is subject to resulting trust. Express trust requires a trustee who holds property for benefit of another; a beneficiary to whom trustee owes equitable duties; and identifiable trust property. Parties must intend to create trust. Evidence did not support express trust where mother gave Debtor money to buy house but Debtor was intended to be owner of house and to use and reside in house and to make payments on house and Debtor in fact made payments for 4 years until becoming disabled. There was no evidence of any express agreement that Debtor would hold property for benefit of mother or that Debtor would hold property as anything other than Debtor’s own property. Constructive trust requires that person acquired property with equitable duty to convey it to another, such that retention of property would unjustly enrich the party holding the property. Evidence did not indicate that Debtor acquired property in unjust or inequitable manner where mother gave Debtor money to buy property in Debtor’s own name, Debtor in fact bought the property and made payments on the property, and lived in and used the property as Debtor’s residence. Without deciding whether property held as resulting trust would similarly be excluded court concluded that property was not held in resulting trust. Resulting trust is an equitable remedy that requires clear and convincing evidence that one person became invested with legal title but was equitably obligated to hold title for another, although no intention to create a trust has been expressly or inferentially expressed and there being no fraud or constructive fraud involved. Evidence failed to support finding of resulting trust where only evidence was recorded deeds and mortgages showing Debtor was the owner of the property and neither Debtor nor mother testified at the hearing. Only evidence was that Debtor held title in his own name and used and occupied the property as his personal residence and made the mortgage payments until he became disabled, none of which supported imposition of resulting trust.
- (8275) *Still v. Nelson Bowers II Exit 20 Auto Mall, LLC*, 2014 WL 693446 (Bankr. E.D. Tn. 2014) – To be avoidable fraudulent transfer, property transferred must have been property of the Debtor. Sale of assets by LLC is not transfer of property of Debtor who was 50% owner of LLC and, therefore, could not be avoidable as a matter of law.
- (8276) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Fraudulent transfer must be of property of the Debtor. Debtor had no interest in assets where pre-petition State Court judgment determined that Debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor.
- (8277) *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.
- (8278) *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.

- (8279) *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 Lawyer’s 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.
- (8280) *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.

14.29 Time of Transfer

- (8281) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Action to recover transfers under “actual fraud” prong of section 548 requires that complaint allege, as to each transfer, the date of the transfer; the amount of the transfer; the name of the transferor; the name of the transferee; in the consideration paid, if any, for the transfer. Complaint that failed to identify date or amount of any transfer failed to state cause of action under Federal Rule of Civil Procedure 9(b). Complaint must also allege that transfers were made with intent to hinder, delay or defraud creditors and that transfers occur within two years before the date of the filing of the petition. Although fraud may be inferred from “badges of fraud”, complaint must allege facts supporting alleged badges of fraud with reasonable specificity. Bare allegation that payments were made in anticipation of potential involuntary bankruptcy proceeding lacked specificity and asserted matters which had occurred two years prior to corporation’s payments to defendant. There was no allegation that payments made were done in anticipation of potential litigation where there had been no litigation contemplated for at least two years. Allegation that Corporation may have been insolvent lacked factual support and was insufficient to constitute badger fraud. Further, insolvency requires that Debtor transfer all or appreciable part of property while it is insolvent and complaint failed to allege amount of any transfers or that transfers constituted all or appreciable part of Debtor’s property. Transfer on account of pre-existing debt can be fraudulent if complaint alleges that challenge transfer was done for purposes of hindering, delaying or defrauding other legitimate creditors. Complaint that merely allege that defendant paid outstanding obligation did not raise payment to level of “actual fraud”.
- (8282) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Debtor’s abandonment of claim to deceased father’s estate under intestacy laws occurred when father died and Debtor’s mother took and retained entire estate. While Debtor may have had right to intestate share, Debtor abandoned that interest by not taking any steps to obtain interest. Father died 23 years earlier, so any “transfer” of Debtor’s intestate interest to mother occurred well outside any applicable time parameter under Section 548

14.30 Payments Under Employment Contracts

- (8283) *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.

14.31 Transfer of Property of Estate

- (8284) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Section 550(a)(2) governs ability to recover transfers from subsequent transferee of initial transferee, subject to good-faith defense. Immediate or immediate transfer he is one who takes in a later transfer down the chain of title. Complaint challenged payments made by corporate Debtor using funds received from Debtor’s subsidiaries. Complaint failed to state cause of action where it did not state which subsidiary made transfer to Corporation, Mount transferred, or date of any transfer. Complaint challenging fraudulent transfers must provide more than mere recitation of statutory elements, and must, at the least, reasonably identify types of transfers sought to be avoided. Allegations of complaint were so vague and failed to identify any specific transfer that it would not be possible for defendant to assess potential defenses with respect to any particular transfer. Complaint also did not allege that initial transfer from subsidiary two corporation was fraudulent which is necessary element to action to impose successor liability. Complaint also did not allege facts to support that corporation was “mere conduit” rendering defendant and “initial transferee” thereby

precluding use of “good faith” defense. Whether Corporation was transferee or merely “conduit” depends on whether Corporation had dominion and control over money or right to use money for corporation’s own purposes. Plaintiff did not allege that the corporation lacked discretion or control over funds received from subsidiaries or raise any plausible inference that Corporation lacked discretion and use of funds received from subsidiaries. Complaint failed to allege any basis to conclude that defendant was entity for whose benefit subsidiaries transferred funds to Corporation were corporate structure provided for daily “sweeps” of subsidiary accounts into corporations general account. There was no indication that subsidiaries made any particular transfer to corporation for purposes of benefiting defendant rather than as part of normal course of business operations.

14.32 Particular Transfers Avoidable

- (8285) *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.
- (8286) *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.
- (8287) *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”).
- (8288) *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.
- (8289) *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; 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.
- (8290) *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 recording fee be paid when the mortgage is 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.
- (8291) *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.
- (8292) *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.
- (8293) *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.
- (8294) *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

14.33 Particular Transfer— Perfection of Security Interest

- (8295) *Trinity 83 Development, LLC v. ColFin Midwest Funding, LLC*, Case no. 17-0286 (Bankr. N.D. Ill. 2017) – Re-perfection of mortgage that had been erroneously satisfied was not “fraudulent transfer”. Creditor erroneously recorded satisfaction of mortgage. Creditor later discovered error and recorded cancellation of satisfaction of mortgage. During “gap” both parties continued to perform as if mortgage had not been satisfied in the first instance. While Section 548 allows avoidable of transfer that creates lien, Section 548 still requires that debtor relinquish some property as part of transfer. Debtor gave mortgage when it first executed documents more than 10 years pre-petition. Recording of lien, or recording of cancellation of satisfaction, perfects lien as against third parties but did not operate to transfer any interest of debtor, as those interests were transferred when mortgage was first given. Cancellation of satisfaction did not constitute any transfer of any interest and no property actually changed hands. Court suggested that had cancellation occurred within 90 days pre-petition, cancellation may have been avoidable as preference, but transfer scientifically predated 90-day lookback.
- (8296) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest against Debtor’s property constitutes transfer of property of estate as of date of perfection. Debtor’s grant of security interest to defendant lacked reasonably equivalent value where debt secured was one owed by Debtor’s principal for which Debtor was not otherwise liable, such that Debtor received no consideration for grant.

14.34 Particular Transfers – Tax Sales

- (8297) *Hampton v. Ontario County*, Case No. 17-6810 (W.D.N.Y. 2018) – Real property tax foreclosure sale can constitute fraudulent transfer. Supreme Court holding in *BFP* limited to mortgage foreclosures and has no bearing on other forced sale such as tax liens. After County had obtained judgment of possession and before County resold property, Debtor filed Chapter 13 petition and submitted Plan to pay real estate taxes in full. Tax collector proceeded with auction which generated surplus of \$21,000 which would benefit County, not Debtor or Debtor’s creditors. Tax sales are different and command lower prices compared to mortgage foreclosures and tax sale would allow County to receive windfall at expense of creditors.
- (8298) *Tracht Gut, LLC v. Los Angeles County*, Case No. 14-60007 (9th Cir. 2016) – Regularly conducted tax sale that complies with state law cannot be set aside as fraudulent transfer. Court joined Fifth and Tenth Circuits in holding that ruling in *BFP v. Resolution Trust Co.* that regularly conducted foreclosure sales cannot result in fraudulent transfers applied equally to property tax sales.
- (8299) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by Debtors. Presumption of *BFP v. Resolution Trust* does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.

14.35 Particular Transfers Not Avoidable

- (8300) *Perkins v. Lehman Brothers*, Case No. 08-6186 (Bankr. N.D. Ga. 2017) - Transfers by “Ponzi” scheme are not presumptively fraudulent where transferee is one who innocently supplies goods, services or labor. Presumption applies only to transactions that are “in furtherance of” Ponzi scheme, requiring that transfer is inherent and integral part of fraudulent scheme and continuation of fraudulent scheme depends on transfers. Transfer that does not induce future investors is not inherent and integral part of fraud. Transfers to investment advisors and brokers were not presumptively fraudulent as transfers did not remove assets from Debtor or concealed assets from creditors.
- (8301) *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.
- (8302) *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.
- (8303) *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.

14.36 Reasonably Equivalent Value

- (8304) *Farinash v. Ellis*, 2018 WL 2176346 (Bankr. E.D. Tn. 2018) – Transfer is not avoidable if made for reasonably equivalent value. Focus is on consideration received by debtor rather than value given by transferee to determine net effect of transfers on debtor’s estate and funds available to unsecured creditors. If unsecured creditors are no worse off because debtor, and consequently estate, received reasonably equivalent to what it paid, no fraudulent transfer has occurred. Debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value and issue of value is question of fact. Court could not decide on summary judgment whether sale of real estate was for reasonably equivalent value. Closing statement from sale reflected price of \$216,500 from which Debtors received \$173,000 in cash and lien payoffs. Defendants presented appraisal that property was worth on more than \$180,000. Court could not resolve conflicting evidence

of value on summary judgment.

- (8305) *R&G Nursing Care, Inc. v. Hrivnak*, 2018 WL 1115204 (Bankr. N.D. Ohio 2018) – Debtor liable for fraudulent transfer of assets by third party where fraudulent transfer results in third party’s inability to pay debts. Transfer to debtor can be either actually fraudulent or constructively fraudulent. Actual fraud requires proof of intent based on factors including whether transfer was to insider; whether transfer was of substantially all assets of debtor; whether consideration received by debtor was reasonably equivalent to value of asset transferred or the amount of the obligation incurred; whether debtor was insolvent or became insolvent shortly after transfer; and whether transfer occurred shortly before or shortly after substantial debt was incurred. Constructive fraudulent transfer does not require intent but focuses on transfer without transferor receiving reasonably equivalent value and transferee reasonably believes that transferor will incur debts beyond ability to pay. Debtor diverted portion of Mother’s Social Security Income to Debtor’s personal use, leaving Mother unable to pay charges owed to Nursing Home. Transfers from Mother to Debtor were transfers to “insider”, and were made when Debtor knew that transfers would not leave Mother with sufficient assets to pay Nursing Home expenses. Debtor gave no consideration for funds received from Mother where only asserted consideration was that Debtor used funds to pay his mortgage and Mother “would appreciate Debtor being able to keep his house.” Consideration must be tangible; non-economic, intangible, or psychological benefits are insufficient to constitute reasonably equivalent value for constructive fraudulent transfer purposes, consideration which is neither concrete nor quantifiable.
- (8306) *Thermo Credit, LLC, v. DCA Services, Inc.*, 2017 WL 5128998 (S.D. Ohio 2017) – “Value” for purposes of UFTA includes all value received by transferor, both direct and indirect. Payments for management services by third party vendor were reasonable where vendor provided services amount which Plaintiff’s expert admitted were reasonable and by retaining third party manager, Debtor was able to retain its largest customer who had previously threatened to terminate relationship with Debtor. Customer, who was largest customer of Debtor, threatened to turn off services and put Debtor out of business and retained management company was able to work out issues with customer and allowed Debtor to remain in business for additional 2 plus years.
- (8307) *In re Mickens*, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Transfer of property from debtor-spouses as joint tenants to tenants by entireties was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. Although transfer did not have adverse effect on total estate as Debtors both continued to own property, transfer did adversely affect creditors of one debtor solely, as transfer removed from reach of individual creditors property that would have been available as joint tenancy that would not be available as tenants in the entireties. Whether transfer was for reasonably equivalent value is viewed from standpoint of creditors and issue is whether transfer placed property out of reach of creditors. Transfer of property from joint tenants to tenants in the entireties placed property beyond reach of each debtor’s individual creditors, diminishing the assets that those creditors could reach, constituting fraudulent transfer.
- (8308) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Transfer is constructively fraudulent under Michigan Compiled Laws Section 566.35 if Debtor made transfer or incurred obligation without receiving reasonably equivalent value in exchange for transfer or obligation and Debtor was insolvent at that time or Debtor became insolvent as result of transfer or obligation. Trustee using “strong arm” power under Section 544 must also prove the existence of a pre-transfer unsecured claim that is allowable under 11 USC Section 502. Whether Debtor received reasonable equivalence is determined from perspective of creditors, comparing what they lost as a result of the transfer and what they gained, if anything. Property while located in the trust would have been subject to claims of individual creditors, while transfer to entireties deprived individual creditors of any remedy against property.
- (8309) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 548 allows Court to avoid constructively fraudulent transfer where Debtor received less than reasonably equivalent value in exchange for transfer. Conclusory allegation that Debtors transfer to defendants “was not supported by adequate consideration” was insufficient to state cause of action. Further, complaint expressly alleged that defendants received transfers as holders of valid promissory notes where payment of valid antecedent debt, as a matter of law, is not constructively fraudulent as dollar for dollar reduction in indebtedness amounts to reasonably equivalent value.
- (8310) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Section 548 requires proof that either Debtor made transfer with actual intent to hinder, delay or defraud creditors or (1) received less than reasonably equivalent value; and (2) either was insolvent or became insolvent as a result of transfer, or was engaged in business for which remaining property was unreasonably small, or intended to incur additional debts beyond Debtor’s ability to pay, or made transfer under an employment contract not in the ordinary course of business. Court could not determine on summary judgment whether defendant received property from Debtors as outright gift, for discounted sales price, or for fair market value. Factual disputes existed as to extent that defendant acquired property for which defendant agreed to pay Debtor, presenting genuine issue of material fact regarding whether defendant acquired property for reasonably equivalent value.
- (8311) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Complaint to recover “constructively fraudulent” transfer under section 548(a)(1)(B)(ii) requires transfer of property of the Debtor within two years before the date of the filing of the petition where Debtor received less than reasonably equivalent value and either was insolvent on the date of the transfer or became insolvent as a result of the transfer. Complaint alleging “constructive fraud” is not subject to strict pleading requirements of Rule 9(b), but complaint must still identify transfers to be avoided including dates of transfers, name of transferor, and name of transferee. Payments by Corporation to defendant were for reasonably equivalent value where defendant held judgment against Corporation and payments were reduction of balance owed. Debtor is “insolvent” for purposes of constructive fraudulent transfer or liabilities exceed assets as of date of transfer. Allegations that Corporation was insolvent in 2010 through 2011 were insufficient to establish that Corporation was insolvent when Corporation made transfers in March, 2013, nearly 2 years later.
- (8312) *Tow v. Bulmahn*, Case No. 15-3141 (E.D. La. 2017) - Salary and bonuses paid to company’s officers in one year preceding commencement of Chapter 7 are not constructively fraudulent transfers under Section 548(a)(1)(B). There was no evidence that officers’ compensation was out of line with peer firms or that officers did not honestly and diligently performed jobs. Officers alleged poor business decisions which ultimately lead to failure of company did not equal finding that services were not reasonably equivalent value.
- (8313) *Kelley v. Opportunity Finance, LLC*, 2016 WL 7030622 (Bankr. D. Mn. 2016) – Initial transfer of allegedly constructive fraudulent transfer

has burden to show that transfer was for reasonably equivalent value, which is inherently a fact question. Defendant contended that transfers were repayment of loans and that satisfaction of antecedent debt is reasonably equivalent value. Documents attached to complaint demonstrated that defendant loaned money to third party who in turn advanced fund to party engaged in Ponzi scheme. The Ponzi scheme then repaid loans from the third party who in turn repaid loans from the defendant. Whether repayments to defendant by third party were repayment of antecedent debt was not defense where trustee for Ponzi Scheme was bringing action against plaintiff for receipt of fraudulent transfer and was no evidence that third party ever assigned or transferred to defendant any of third party's rights against Ponzi Scheme, so that when Ponzi Scheme repaid third party, it was repaying obligation owed to third party and not to defendant. If defendant was subsequent transferee, defendant cannot be liable if it received payments from immediate transferee for value and in good faith. There was no dispute that defendant received payments from initial transferee in repayment of loans by defendant to initial transferee, constituting value. Good faith requires that subsequent transferee not have any indicia of fraud or financial irregularity. Given allegations in complaint, court was unable to resolve factual issue via Motion for Judgment on Pleadings.

- (8314) *DeGiacomo v. Sacred Heart University*, 2016 WL 4259787 (Bankr. D. Mass. 2016) – Parents who pay college tuition for adult child receive “reasonably equivalent value” precluding recovery from school of tuition payments as constructively fraudulent. Noting a split of authority, court held that “love and affection” is not consideration and state did not mandate parents to support adult child. Parents received value because child would be financially self-sufficient and college degree would directly contribute to financial self-sufficiency. While economic success cannot be guaranteed, outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment. Parent can reasonably assume that paying for child to obtain undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent.
- (8315) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – “Value” for purpose of constructive fraudulent transfer includes satisfaction of antecedent debt. Under severance agreement between Debtor and transferee agreed to almost one year before transfer, Debtor agreed to pay transferee exact amount that Debtor actually paid about one year later. Transfer was for reasonably equivalent value as transfer exactly satisfied pre-existing obligation. Second payment to satisfy debt under separate Settlement Agreement of \$700,000 was for reasonably equivalent value where in exchange for payment transferee released claim totaling over \$1.4 million.
- (8316) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest against Debtor's property constitutes transfer of property of estate as of date of perfection. Debtor's grant of security interest to defendant lacked reasonably equivalent value where debt secured was one owed by Debtor's principal for which Debtor was not otherwise liable, such that Debtor received no consideration for grant.
- (8317) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee must prove either that transfer was made with intent to hinder, delay or defraud creditors; or that transfer was made for less than reasonably equivalent value. “Value” is based on what the Debtor received in exchange for transfer as of the date of the transfer by the Debtor. Spouse to whom promissory notes were transferred did not establish “value” for transfers allegedly made for estate planning purposes. Spouse's “promise” of future love and affection was unperformed promise to furnish support which is not value under Section 548(d)(2)(A).
- (8318) *Shapiro v. Kesteloot*, 2015 WL 4040190 (Bankr. E.D. Mi. 2015) – Debtor's transfer of funds to separated spouse during pendency of divorce was for reasonably equivalent value where funds satisfied spousal support obligations. However, issue of “value” of spousal support obligation and property divisions were factual questions requiring evidentiary hearing. Reasonably equivalent value, which can include satisfaction of antecedent debt, requires court to determine whether Debtor received *any* value for transfer, determined by circumstances that existed as of the moment of the transfer; and then whether value received was reasonably equivalent to value of property transferred by Debtor.
- (8319) *Brown v. Raygoza*, 2015 WL 3404505 (Bankr. E.D. Ky. 2015) – Transfer is for less than reasonably equivalent value where value of property transferred by Debtor is substantially higher than value received by Debtor. Transfer of mineral rights by Debtor to sister was presumptively for less than reasonably equivalent value where sister paid Debtor \$20,000 and deed stated on its face that the value of the rights transferred is \$150,000.00. Further, royalties received by sister supported higher valuation than the \$20,000 paid where sister had pre-existing smaller interest and received royalties of more than \$20,000 per year and the royalties attributable to portion received from Debtor exceeded \$17,000 just for 2009.
- (8320) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Whether value is reasonably equivalent focuses on net effect of transfers on Debtor's estate and funds available to pay unsecured creditors. As long as unsecured creditors are no worse off because the estate received an amount reasonably equivalent to what was transferred, the transfer is not constructively fraudulent. The value does not need to be dollar for dollar to be reasonably equivalent. Debtor's funds that were admittedly used to purchase property taken in daughter's name lacked reasonably equivalent value. Factual issues remained as to whether balance of purchase price was from funds which Debtors were holding on behalf of or owed to daughter precluding summary judgment on remaining issues.
- (8321) *The First State Bank and Trust Company v. Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Reasonable equivalent value is defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where Debtors' own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but Debtors' financial statements valued property at no less than \$390,000.00. Purchase price was at least \$59,000 less than value of property establishing lack of reasonably equivalency.
- (8322) *Meoli v. Cooper*, 521 BR 613 (Bankr. W.D. Mi. 2014) – Transfer of property in discharge of obligations under divorce judgment cannot be constructively fraudulent unless underlying obligations themselves are avoidable. If Debtor's obligations under divorce judgment are not avoidable, Debtor's transfers of property in satisfaction of those obligations constitutes reasonably equivalent value on a dollar for dollar basis. Debtor's obligations incurred in the divorce judgment were for reasonably equivalent value. Court would be reluctant to second guess

State Court division of assets and liabilities as family law matters are inherently matters for State Court. Absent evidence of fraud or collusion, judgment of divorce would be presumed to be fair division of marital assets in settlement of competing claims of the parties. Transfer was for reasonably equivalent value where Debtor transferred property to ex-spouse in satisfaction of ex-spouse's contributions to Debtor. Debtor borrowed money against his wife's pre-marital property and used money to start business. Debtor later failed to make payments and spouse lost property, and her previously existing equity, in foreclosure. Transfers pursuant to divorce agreement were intended to recompense ex-spouse for value of lost equity which constituted a valid marital obligation.

- (8323) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E.D. Mi. 2014) – in order to determine whether the Debtor received reasonably equivalent value for the assets that it transferred in this larger transaction, the Court must consider the value of everything that the Debtor transferred, and the value of every benefit, direct and indirect, that the Debtor received in exchange, not just directly from the transferee, but from any source, as part of the larger transaction. Although direct purchaser paid only \$100,000 for assets, a related entity paid off Debtor's obligation to lender in the amount of \$9.2 million. Viewed as part of the larger transaction, record failed to demonstrate lack of reasonably equivalent value for purposes of summary judgment.
- (8324) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, Case No. 14-8011 (6th Cir. BAP 2014) – Reasonably equivalent value is question of fact based on whether Debtor received value, not whether transferee parted with value, based on the circumstances as they existed at the time of the transfer and whether the parties reasonably believed that transfer would produce benefit to Debtor; and whether value received was reasonably equivalent to value of property transferred by Debtor. Value must be concrete, definite and quantifiable and can include property or satisfaction or securing of antecedent Debtor but does not including unperformed promise to provide support. Value does not have to be dollar for dollar. Transfer of property from Debtor to mother lacked reasonably equivalent value where Debtor transferred ownership of property worth \$22,000 and deed recited consideration as \$0 – love and affection. Fact that mom provided bulk of money to allow Debtor to purchase property in first instance did not amount to consideration for transfer by Debtor to mother where there was no consideration paid at time of transfer and there was no evidence that Debtor was indebted to mother, it appearing that initial payment was not intended as loan to son.
- (8325) *Lim v. Champion Products*, Case no. 13-4727 (Bankr. E.D. Mi. 2014) – Court just determine whether Debtor received value and whether value was reasonably equivalent to the value of the asset transferred by Debtor. Value includes satisfaction of debt of the Debtor. After business was sold, Debtor paid back invoice to supplier of business. Record was not clear as to whether Debtor retained obligation to pay creditor or whether that obligation had been assumed by purchaser of business.
- (8326) *Geltzer v. Xaverian High School*, 2013 WL 6283582 (Bankr. E.D.N.Y. 2013) – Private school tuition payments for Debtor's minor children are not constructively fraudulent. Debtor received indirect benefit equal to amount of payments as Debtor was obligated to provide education for children and Debtors receive benefits in from of education for children.

14.37 Reasonably Equivalent Value – Domestic Relations

- (8327) *Limor v. Anderson*, 2018 WL 321884 (Bankr. M.D. Tn. 2018) - In determining reasonably equivalent value transferee resulting marital dissolution, test is whether there was reasonable equivalence between value of property surrendered and that which was received. Dissolution Agreements awarded to Debtor's spouse two parcels of real property plus various works of art, all of which were purchased with mutual, co-mingled assets and Debtor received no value in exchange for transfer where Debtor did not receive any property or assets in exchange.
- (8328) *Nathan v. Libra*, 2018 WL 2138272 (Bankr. E.D. Mi. 2018) – Reasonably equivalent value is property or satisfaction of present or antecedent debt. Focus is on value received by debtor with focus to leave unsecured creditors no worse off because of transfer. Value need not be dollar-for-dollar and analysis includes good faith of parties, disparity between fair value and what debtor actually received, and whether transaction was arm's length. On filing of divorce, each spouse acquires interests in property formerly owned solely by spouse and that was acquired during marriage, even if prior to filing for dissolution, other spouse owned asset singly. Spouse's release of right to support constitutes value where waiver is executed after commencement of divorce proceeding, and where it is reasonably likely that but for waiver, spouse would receive support based on length of marriage and disparity of relative financial positions of spouses. Right to receive spousal support is not in nature of "promise for future support" but is legally enforceable right and can be collected through garnishment, execution and other remedies as well as civil and criminal remedies. However, payments made by one spouse to other voluntarily and before commencement of dissolution of marriage proceedings are not supported by value as right to receive support did not arise until dissolution was filed. At time of pre-dissolution transfer, there was no debt owed by Husband to Wife that could be used to offset payments by Husband to Wife, and Wife did not release any enforceable right at time of receipt of funds. Debtor's transfer of marital homestead to Wife executed during dissolution proceeding supported by value where wife waived right to support in exchange. Trustee did not present any evidence of value received (measured by amount of spousal support waived) absent which Trustee did not carry burden to prove value was not equivalent, preventing avoidance of transfer of marital property.

14.38 Reasonably Equivalent Value – Lien Securing Pre-Existing Indebtedness

- (8329) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Lien given to secured pre-existing indebtedness cannot be constructively fraudulent. Constructive fraud required lack of reasonably equivalent value. Section 548 defines value to include "securing of pre-existing indebtedness". As such, grant of lien is, by definition, supported by value and is not constructively fraudulent.
- (8330) *Tavenner v. Wells Fargo Bank*, 2014 WL 1044897 (Bankr. E.D. Va. 2014) – Security interest granted to secure pre-existing obligation as part of forbearance agreement not avoidable as constructively fraudulent. Section 548(d)(2)(A) specifically defines value as securing a present or antecedent debt. Antecedent debt stands as value for the granting of the security interest. Where underlying debt is not itself avoidable, security interest is not avoidable as constructively fraudulent.
- (8331) *Higgason v. Staley*, 2014 WL 640986 (Bankr. E.D. Ky. 2014) – Debtor who gave mortgage to secure pre-existing debt did not commit

constructively fraudulent transfer as granting of security interest to secure pre-existing debt is done for reasonably equivalent value. Section 548 defines value as “property ... securing present or antecedent debt”. Mortgage secured antecedent debt and constituted “value” as matter of law.

- (8332) *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.
- (8333) *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.
- (8334) *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.
- (8335) *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.
- (8336) *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.
- (8337) *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.
- (8338) *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 some of the transfers were also preferential, court would use care to ensure that court did not award double recovery for same transfers.
- (8339) *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.
- (8340) *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.
- (8341) *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.

- (8342) *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.
- (8343) *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.
- (8344) *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 prepetition 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.
- (8345) *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.
- (8346) *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.
- (8347) *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.

14.39 Reasonably Equivalent Value – Tax Sale

- (8348) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Normally, repayment of debt resulting in dollar-for-dollar reduction is not constructively fraudulent as reduction in obligation constitutes reasonably equivalent value. However, where the underlying "debt" was legally unenforceable, Debtor did not receive reasonably equivalent value. Debtor's payment to mom on alleged "debt" was not reasonably equivalent value as parties failed to introduce sufficient evidence that any debt actually existed; and if one did, it pre-dated Debtor's prior Chapter 13 case in which Debtor received discharge, thus discharging any debt to mom. Even assuming debt existed, balance would not have exceeded \$6,000, yet Debtor transferred \$30,000 to mom, far in excess of any value "received".
- (8349) *Janvey v. Golf Channel, Inc.*, Case No. 13-11305 (5th Cir. 2016) – Creditor provided reasonably equivalent value where creditor performed services in exchange for payment and services were performed at reasonable and customary rates in industry. Although services did not directly enhance Debtor's balance sheet and payments diminished Debtor's assets, that alone does not mean that Debtor did not receive reasonably equivalent value for payments.
- (8350) *Tracht Gut, LLC v. Los Angeles County*, Case No. 14-60007 (9th Cir. 2016) – Regularly conducted tax sale that complies with state law cannot be set aside as fraudulent transfer. Court joined Fifth and Tenth Circuits in holding that ruling in *BFP v. Resolution Trust Co.* that regularly conducted foreclosure sales cannot result in fraudulent transfers applied equally to property tax sales.

- (8351) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Value includes property or satisfaction or securing of present or antecedent debt but does not include unperformed promise to furnish support. Court must first determine whether Debtor received any value. Focus is on value Debtor received, not value given by transferee. If value was received, court must then determine if value was “reasonably equivalent”. Evidence indicated that transfer of promissory note from Debtor to wife was for “love and companionship” and “gifts”. Although wife contended that she had contributed to initial asset, sale of which generated the promissory note in question, the promissory note itself was always payable only to husband as redemption of stock interest owned by husband. Husband was sole owner of note when transferred. Debtor did not present any evidence that Debtor received any value in exchange for transfer where husband’s testimony was that note represented redemption of husband’s stock interest and that payments under the promissory note before assignment were made solely to husband. Transfer lacked reasonably equivalent value where consideration was “love and affection”.
- (8352) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by Debtors. Presumption of *BFP v. Resolution Trust* does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.
- (8353) *In re Varquez*, 2013 WL 6578925 (Bankr. D.N.J. 2013) – Debtor could challenge pre-petition tax deed sale as fraudulent transfer where sale price of property at tax sale was far below value of property. Tax sale does not create presumption of value as tax sale does not meet requirements of *BFP v. Resolution Trust* for purposes of concluding that sale conclusively determines value of property. At entry of judgment of foreclosure in tax deed, there is no sale, forced or otherwise. There is simply the foreclosure of Debtor’s equity or redemption and transfer of fee simple interest to the tax sale certificate holder.

14.40 Secured Claims – Novation

- (8354) *Bash v. Textron Financial Corp.*, 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – Trustee can avoid under State UFTA transfer made or obligation incurred if debtor made transfer with actual intent to hinder, delay or defraud. Intent must be shown by clear and convincing evidence. Remaining elements require only preponderance of evidence. Assets encumbered by valid lien are not subject to fraudulent transfers. Plaintiff seeking to recover payments to allegedly secured creditor must prove that assets were not encumbered by enforceable security agreement. Novation results when parties enter into agreement to extinguish prior obligations and replace them with new undertakings, supported by valid consideration. novation can never be presumed but must be evinced by a clear and definite intent on the part of all the parties to the original contract to completely negate the original contract and enter into the second. Second agreement constituted novation where lender had previously advised borrower that lender would not extend earlier agreement; creditor acknowledge that security agreement in second Agreement was intended to replace security agreement in First; Second Agreement was result of Borrower’s application using credit approval form used by lender for new loans; Parties exchanged commitment fees for both first and second agreement but did not do so for later amendments to second agreement; Borrower issued corporate resolution authorizing grant of security interest under Second Agreement; both agreements were signed in person while other amendments to Second agreement were done by mail; Creditor’s notices to other parties of security agreement referenced only Second Agreement; and Second Agreement did not contain any express language preserving prior liens. Trustee’s complaint alleging payments under Second Agreement stated cause of action where it appeared Second Agreement replaced and did not merely amend prior Agreement.
- (8355) *Bash v. Textron Financial Corporation*, 2016 WL 4437606 (6th Cir. 2016) – Whether transfers were made pursuant to preexisting loan agreement depended on whether later loan agreement was “extension” of prior loan agreement or was “novation”. Novation results where previous valid obligation is extinguished by new valid contract. Intent, knowledge and consent are essential elements in determining whether second agreement is intended to completely discharge and replace earlier agreement. Execution of new promissory note between existing parties is presumed to be renewal of original debt that retains the same security but presumption can be overcome by evidence demonstrating that the parties intended for second loan transaction to discharge prior debt. Terms of second agreement were ambiguous as to whether novation was intended. Provisions of second agreement support a finding that the parties demonstrated intent to extinguish obligations under prior agreement and be bound anew under new agreement. Parties entered into new agreement on date prior agreement matured; parties replaced the prior note and personal guarantees with new promissory note and new personal guarantees; new agreement imposed significant new terms on both parties, including (1) new interest rate and fee terms; (2) an increased financial commitment on the part of lender; (3) a requirement that the borrower deliver to lender 50% of the amount required to obtain release participant-lender plus all accrued interest, fees, expenses and other charges owing earlier agreement; and (4) the removal of participant-lender.

14.41 Insolvency

- (8356) *Limor v. Anderson*, 2018 WL 321884 (Bankr. M.D. Tn. 2018) – Insolvency for purposes of constructively fraudulent transfer is based on “balance sheet insolvency” and looks to whether Debtor’s assets exceeded Debtor’s liabilities excluding value of property transferred or concealed with intent to hinder, delay or creditors and property that may be exempted. Evidence indicated that Debtor was insolvent when Debtor executed Domestic Settlement Agreement which transferred various parcels of real property and artwork to Debtor’s spouse. Debtor had history of not paying debts as reflected by three prior bankruptcy filings and as of date of execution of Settlement Agreement, Debtor had liabilities exceeding \$120,000 while Debtor’s assets had aggregate value of less than \$55,000.
- (8357) *Russell v. Harper*, 2017 WL 4220396 (Bankr. E.D. Tn. 2017) – Insolvency is not element of action to recover actual fraudulent transfer.
- (8358) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Complaint to recover “constructively fraudulent” transfer under section 548(a)(1)(B)(ii) requires transfer of property of the Debtor within two years before the date of the filing of the petition where Debtor received less than reasonably equivalent value and either was insolvent on the date of the transfer or became insolvent as a result of the transfer. Debtor is “insolvent” for purposes of constructive fraudulent transfer or liabilities exceed assets as of date of transfer. Allegations that Corporation was insolvent in 2010 through 2011 were insufficient to establish that Corporation was insolvent when Corporation made

transfers in March, 2013, nearly 2 years later.

- (8359) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Constructive fraud requires that Debtor be insolvent at time of transfer or that transfer itself results in insolvency. Trustee did not offer adequate evidence of Debtor’s solvency at time of transfer 2 years earlier, and insolvency is not presumed for transfers that predate filing by more than 90 days. Debtor had significant assets, some of which were concealed, including significant amount of cash in addition to \$30,000 paid to mom. At time of transfer, Debtor had significant stream of income and Debtor was paying spousal support to his separated wife as ordered by court. While evidence may have established that Debtor incurred debt beyond his willingness to pay, insolvency requires proof that Debtor incurred debts beyond ability to pay.
- (8360) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Debtor is insolvent where, as of date of transfer, Debtor’s liabilities exceed value of property at fair value, excluding value of property transferred, concealed or removed with intent to hinder, delay or defraud creditors; and property that may be exempted under Section 522. Debtor’s petition and schedules indicated that all of Debtor’s assets were exempted and that he was retired and had no income. Debtor had same assets on date of transfer of promissory note to wife as Debtor had as of date of petition. Debtor had stated in State Court marriage dissolution proceedings that Debtor had no assets and sole income was SSI and Air Force retirement benefits and any requirement that he pay spousal support would result in hardship. State Court refused to increase amount of spousal support based on this testimony. Debtor now judicially estopped to assert additional assets. Debtor’s statement in divorce proceeding (1) asserted position inconsistent with position being currently asserted and (2) State Court adopted contrary position as part of disposition of divorce proceeding. Although issue was now being raised by Debtor’s current wife, issues raised related directly to husband’s financial condition supporting preclusive effect against wife as well as Debtor. Neither Debtor nor his new wife would be permitted to argue Debtor’s financial condition was different than what Debtor asserted in State Court divorce proceeding.
- (8361) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Transfer is constructively fraudulent only if Debtor was insolvent as of date of transfer or became insolvent as a result of transfer. Corporation is insolvent if debts exceed all property at fair valuation, using liabilities and the fair market value of assets within reasonable time of transfer. Court can take judicial notice of Debtor’s bankruptcy schedules and contents of court docket in adversary proceeding. Although Debtor’s valuation of assets on Schedules indicated that Debtor was insolvent as of date of bankruptcy filing, Schedule B specifically did not value Debtor’s principal asset at fair market value but stated that valuation was “book value” defined as cost less depreciation. Appraisal of principal asset was not admissible as appraisal and affidavit in support of appraisal stated only that the person doing the valuation was licensed auctioneer and owner of an auction company but did not set forth any facts to show that he is competent to appraise asset in question, and failed to state the effective date on which the valuation is based or to allow conclusion that stated value reflected value as of date of transfer as appraisal was dated 2 years after date of transfer in question. Plaintiff also failed to show evidence of Debtor’s debts at time of transfer. Bankruptcy Schedules did not indicate dates on which liabilities were incurred or amount of liabilities as of date of allegedly fraudulent transfer. Debtor’s primary debts were also joint and several with other obligors and Plaintiff failed to show either that Debtor would be solely responsible or to include the value of the contribution claims that Debtor would have if Debtor is called on to answer for joint and several debts. Evidence was insufficient at Summary Judgment stage to support entry of final judgment for plaintiff.
- (8362) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee raised sufficient evidence of insolvency. In calculating solvency, property that is exempted from estate under Section 522 is not considered in determining whether assets exceed liabilities. Trustee submitted evidence based on the Debtor’s statements and submissions during the post-judgment divorce proceedings in State Court that he had no earned income and could no longer pay the alimony and attorney fees ordered by the State Court; and that the property defendant claims establishes that the Debtor was not insolvent at the time of the transfer may be considered exempt property that cannot be considered in determining whether the Debtor was insolvent at the time of the transfer.
- (8363) *Shapiro v. Castelo*, 2015 WL 4040190 (Bankr. E.D. Mi. 2015) – Constructive fraudulent transfer requires that Debtor have been insolvent at time of transfer or that transfer rendered Debtor insolvent. Debtor was insolvent as defined in 11 USC Section 101(32)(A) where Debtor admitted that at the time of the transfer he lacked any source of income, was unable to pay his bills, and surrendered two vehicles to creditors because he could not make the payments to the secured creditors. Debtor’s schedules, filed only one month after transfers, listed liabilities far in excess of assets, meeting definition of “insolvent”.
- (8364) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Debtor is insolvent for purposes of constructive fraudulent transfer is sum of debts exceeds value of property at fair value, excluding any property transferred, concealed, or removed with intent to hinder, delay or defraud creditors. General inquiry is whether Debtor’s assets exceeded liabilities on date transfer took place. Debtor’s schedules indicated that even if disputed debt is excluded, Debtor had liabilities in excess of \$7 million while schedules indicated, at best, only \$5.6 million in assets.
- (8365) *The First State Bank and Trust Company v. Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Insolvency is presumed if the sum of the transferor’s assets after the transfer is less than the total amount of Debtors’ debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in Debtors’ assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets.
- (8366) *Paris v. SSAB Enterprises, Inc.*, 2014 WL 5595113 (Bankr. E.D. Tn. 2014) –
- (8367) *Lim v. Champion Products*, Case no. 13-4727 (Bankr. E.D. Mi. 2014) – Debtor is insolvent if sum of debts exceeds value of assets, at a fair valuation, exclusive of property transferred with intent to conceal or hinder or delay or defraud; and property that may be exempt. Debtor’s schedules amply demonstrated that Debtor’s liabilities substantially exceeded assets as of date of payment to creditor.
- (8368) *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.

- (8369) *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 complied by Trustee indicated that Debtor’s liabilities exceeded assets as of the date of the transfer by more than \$29,000.00.

- (8370) *Newton v. Sims*, 2011 WL 600852 (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.

14.42 Defenses – Charitable Giving

- (8371) *Wadsworth v. Word of Live Christina Center*, 2013 WL 6570853 (10th Cir. 2013) – Section 548 excludes from definition of fraudulent transfers any charitable giving up to 15% of Debtor’s annual gross income (AGI) where giving is consistent with prior practices of Debtor in making charitable contributions. However, if Debtor’s contributions exceed 15% of AGI, entire amount contributed is avoidable. Avoidance and recovery is not limited to amount in excess of 15%. Exceeding cap renders entire contribution outside scope of safe-harbor for charitable giving.

14.43 Defense – Securities Settlement Payments

- (8372) *Greede v. FCStone, LLC*, Case No 13-1232 (7th Cir. 2014) – Section 546(e) precludes recovery for allegedly preferential or fraudulent transfers that constitute settlement payments on securities transactions. Debtor operated an investment management firm. Customers would deposit funds into accounts with Debtor. Debtor would pool deposited funds and invest funds. Customers did not have ownership of any investment, rather customers had a share of the value of the securities in the pool. Shortly before filing Debtor sold \$300 million in investments and deposited those funds into investment pool for Debtor’s most favored customers, distributing some of those funds to investors including defendant, and the bankruptcy court later approved distribution of the funds in that account to the investors in that pool, including the defendant in this adversary. Although payments met technical definition of preference, as all payments were on account of antecedent debts, made within 90 days pre-petition, at a time when Debtor was insolvent, all payments to investors fell within Section 546(e) protection for securities settlement payments. When customer “redeemed” investment and received payment, it did so in settlement of accounts between customers and Debtor, although funds used to pay customer were not necessarily derived from the sale of any particular security or investment. Proceeds were also “in connection with a securities contract” as agreement between Debtor and customer called for Debtor to invest in securities on behalf of customers, such that Debtor’s obligation to customers arose directly out of a “securities contract”.

14.44 Defense – Leveraged Buyout

- (8373) *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 publicly 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.

14.45 Defense – Forward Contract Payment

- (8374) *DeGirolamo v. McIntosh Oil Co.*, 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Section 546(e) “safe harbor” for forward contracts does not apply in actions under Section 548(a)(1)(A) for actual intent to hinder, delay or defraud creditors.

- (8375) *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).

14.46 Defense – Wrongful Conduct of Debtor

- (8376) *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.

- (8377) *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).

14.47 Defense – Earmarking

- (8378) *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.

14.48 Defense – Prepetition Return of Money to Third Party

- (8379) *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.

14.49 Defense – Good Faith and Value

- (8380) *Hagan v. Mickens*, 2018 WL 3913760 (W.D. Mi. 2018) – from standpoint of individual creditors, there was no reasonably equivalent value given for transfer of property from joint tenants to tenants by entireties as transfer had effect of cutting creditors out of potential recovery that would have been available but for transfer to entireties. Whether transfer was for "value" is determined from perspective of creditors in light of purpose to protect estate from being depleted to prejudice of unsecured creditors. Consideration that has no utility from creditors viewpoint does not satisfy statutory definition. Transfer had effective showing property for proximally \$37,000 in debts owed to non-joint creditors that would otherwise have been recovered by obtaining judgment and levying on joint tenancy interests.
- (8381) *Russell v. Harper*, 2017 WL 4220396 (Bankr. E.D. Tn. 2017) –Transferee's alleged good faith was not defense to actual fraudulent transfer where focus is on intent of debtor, not transferee.
- (8382) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Section 550(a)(2) governs ability to recover transfers from subsequent transferee of initial transferee, subject to good-faith defense. Immediate or immediate transfer he is one who takes in a later transfer down the chain of title. Complaint challenged payments made by corporate Debtor using funds received from Debtors subsidiaries. Complaint failed to state cause of action where it did not state which subsidiary made transfer to Corporation, Mount transferred, or date of any transfer. Complaint challenging fraudulent transfers must provide more than mere recitation of statutory elements, and must, at the least, reasonably identify types of transfers sought to be avoided. Allegations of complaint were so vague and failed to identify any specific transfer that it would not be possible for defendant to assess potential defenses with respect to any particular transfer. Complaint also did not allege that initial transfer from subsidiary two corporation was fraudulent which is necessary element to action to impose successor liability. Complaint also did not allege facts to support that corporation was "mere conduit" rendering defendant and "initial transferee" thereby precluding use of "good faith" defense. Whether Corporation was transferee or merely "conduit" depends on whether Corporation had dominion and control over money or right to use money for corporation's own purposes. Plaintiff did not allege that the corporation lacked discretion or control over funds received from subsidiaries or raise any plausible inference that Corporation lacked discretion and use of funds received from subsidiaries. Complaint failed to allege any basis to conclude that defendant was entity for whose benefit subsidiaries transferred funds to Corporation were corporate structure provided for daily "sweeps" of subsidiary accounts into corporations general account. There was no indication that subsidiaries made any particular transfer to corporation for purposes of benefiting defendant rather than as part of normal course of business operations.

- (8383) *Silagy v. Schroeder*, 2017 WL 598495 (Bankr. N.D. Ohio 2017) -Section 548(c) provide shelter from recovery of fraudulent transfer if transferee takes for value and in good faith. In that case, transferee retains a lien on or may retain interest transferred to the extent transfer he gave value. "Value" means property or satisfaction or securing a present or antecedent debt". "Reasonably Equivalent Value" compares valuable was transferred against value of what was received and focuses on net effect of transfers on Debtor's estate. "Good Faith" looks at subjective intent of transferee in light of object of factors including knowledge of presence of "badges of fraud" or "red flags" that should have put defendant on inquiry notice, and focuses on whether transferee had actual knowledge concerning transfers insolvency or fraudulent intent; the date on which defendant should have made a diligent inquiry; and if no fraud was revealed through inquiry, would fraud or insolvency come to light using reasonable investigation. Defendant failed to prove that deposit of \$169,000 into joint bank account of defendant and Debtor was intended as "reasonably equivalent value" for transfer by Debtor to defendant of \$60,000 more than three months later. Defendant testified that defendant may deposit into joint account and used funds to pay living expenses for next three months. When Debtor transferred \$25,000 to defendant, defendant had already expended all of the funds from the deposit and any funds left in the account were attributable entirely to Debtor's earnings. Transfer could not have involved any return of funds originally deposited by defendant as those funds had been completely expended. Additional transfer of \$60,000 came from joint savings account, not joint checking account into which defendant had deposited funds. Payment of living expenses for Debtor constitutes "reasonably equivalent value" and must be evaluated by tracing deposit and expenses from co-mingled funds. Defendants subjective intent supported good faith where defendant understood that new accounts were opened to segregate and protect defendant's individual money. Defendant had contributed sizable amount to couple's joint accounts and it was not unreasonable for defendant to believe she had interest to protect. There was no evidence that defendant had actual knowledge of husband's insolvency or fraudulent intent and testified that she did not believe husband was contemplating bankruptcy and was attempting to resolve underlying financial difficulties. Facts indicated that parties' marriage was similar to most where one spouse exercises greater knowledge and control over certain matters such as finances. Defendants actual knowledge was not sufficient to create inquiry notice as to Debtors fraud or insolvency supporting finding that defendant received transfers in good faith.
- (8384) *Perkins v. Lehman Brothers*, Case No. 08-6186 (Bankr. N.D. Ga. 2017) - Good Faith defense under Section 548(c) is determined using subjective test. To flunk good faith test, transferee must be "willfully blind". While evidence indicated that Broker violated regulatory requirements and compliance rules, subjectively speaking Broker acted honestly and with integrity and evidence was insufficient to demonstrate that program willfully ignored possible fraud.
- (8385) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – "Good faith" for purposes of Section 548 and 550 is subjective standard, taking into account creditor's actual mental state at time of transfers. Lender acted in subjective good faith until date on which lender's regional security officer learned there were outstanding judgments against corporate borrower's principal for bank fraud. Good faith cannot be based on amalgamation of knowledge of all of lender's employees and agents but must depend on knowledge and understandings of each person individually.
- (8386) *GLC Limited v. Hunter Miller Family, LLC*, 2015 WL 4204111 (S.D. Ohio 2015) – Recipient of fraudulent transfer is not liable if transferee takes for value and in good faith, to the extent the transferee gave value. Objective test of good faith determines whether the transferee knew or should have known of the fraudulent purpose of the transfer or the transferor's insolvency, without regard to transferee's actual knowledge. Transfer lacks good faith if trier of fact concludes that circumstances would place reasonable person on inquiry of Debtor's fraudulent purpose and diligent inquiry would discover fraudulent purpose. Hybrid objective-subjective test looks at subjective intent of transferee in light of objective facts, and uses what the transferee actually knew that would suggest a fraudulent purpose, and is based on information that the transferee has that would give him a duty to inquire further. Transferee bears burden to prove absence of badges of fraud or red flags when he received the transfer, and that the transferee undertook a diligent inquiry and that the results of the inquiry did not reveal that transferor was insolvent or was engaged in fraudulent activity. Inquiry then turn to whether any reasonable investigation would have disclosed the transferor's insolvency or fraudulent intent. Court adopted hybrid approach to determine whether payments from Ponzi scheme to investors were fraudulent.
- (8387) *Williams v. Federal Deposit Insurance Corporation*, Case No. 12-20687 (5th Cir. 2014) – Section 548(c) provides defense to otherwise avoidable fraudulent transfer where transferee takes in good faith and for value.
- (8388) *DeGirolamo v. McIntosh Oil Co.*, 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Section 548(c) excepts from recovery any transfer that takes place for value and in good faith, to the extent the transferee gave value in exchange for the transfer. Courts use two tests for good faith, an objective test that considers whether the transferee objectively knew or should have known that the Debtor was engaged in fraudulent activity, and transferee is put on inquiry notice and must conduct a sufficient investigation. Inquiry notice requires of transferee knows Debtor is involve or that Debtor made transfer for improper purpose. Hybrid standard uses three step inquiry: what did the transferee actually know, and was he subjectively aware of badges of fraud or red flags; if transferee was aware of red flags, did transferee make any reasonable investigation; and if the transferee's diligent inquiry did not disclose fraudulent intent, would a reasonable investigation beyond that performed by transferee have disclosed fraudulent intent. Badges of fraud are relevant under either test, and sufficient number of badges may convince court that transferee had actual knowledge of Debtor's fraudulent intent. Factual issues of good faith overlap issues giving rise to liability in first instance under "actual fraud" prong of Section 548. Accordingly, those issues should be considered at a single evidentiary hearing rather than being bifurcated for separate trial.
- (8389) *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.
- 14.50 Defense – Equitable Grounds
- (8390) *Picard v. Lustig Family 1990 Trust*, Case No. 10-4417 (Bankr. S.D.N.Y. 2017) - Recipient of Fraudulent Transfer cannot assert equitable defenses in effort to avoid or limit Trustees recovery. Equitable defenses to fraudulent transfer action would be inconsistent with express

provisions of code. Case arose out of Madoff Ponzi scheme. Transfer he received “profits” distributed from Madoff accounts of \$7 million within 2 years preceding the commencement of case. Trustee filed action under Section 548 to recover distribution as “fraudulent transfer”. Transferee alleged that he had received the \$7 million, had reinvested those into other, non-Madoff funds, and those funds, in turn, reinvested in Madoff funds, with entire reinvestment being lost. Court concluded that while investor who reinvested funds into Madoff investments had right of set-off, transfer he did not have right of set-off as transfer he did not reinvest funds into Madoff accounts but, rather, into third-party accounts. Third-party accounts which invested with Madoff had rights of set-off but transferee could not exercise those rights on behalf of third-party investments under equitable grounds that at the end of the day, all of the profits he received from Madoff were, in fact, reinvested in, and lost to Madoff.

14.51 Defense – Transfer of Potentially Exempt Assets

- (8391) *Wheatley v. Johnson*, 2017 WL 6550499 (Bankr. W.D. Ky. 2017) – Fact that debtor had available exemptions which, had debtor not made pre-petition transfer, would have allowed debtor to fully exempt transferred funds was not defense to fraudulent transfer action. So called “no harm – no foul” defense has been rejected by majority of courts as Section 522 prevents Debtor for asserting exemption in asset that was voluntarily transferred pre-petition. Potential exemption is personal to debtor and is not available to transferee as defense to avoidance action.

14.52 Statute of Limitations

- (8392) *Tow v. Bulman*, Case No. 15-3179 (Bankr. S.D. Tx. 2017) – Statute of Limitations under Section 546 for any action under Section 544, Section 547 and Section 548 must be brought within one year of conversion of case from Chapter 11 to Chapter 7. Although initial complaint was timely filed, amended complaint that sought to identify additional defendants was filed 14 months after limitations period had expired. Motion to Amend Complaint denied as futile where proposed action against additional defendants is barred by statute of limitations. Statute of Limitations under Section 546 is an affirmative defense subject to equitable tolling, estoppel and waiver. Equitable tolling is applied when a defendant actively or passively conceals facts to prevent Trustee from identifying defendant’s identity, or when Trustee is delayed by extraordinary circumstances. Trustee must demonstrate that despite exercising diligence, he could not have discovered identity of defendants prior to expiration of limitation period. Although identity of ultimate recipient of dividend payments from Debtor was difficult to determine where dividend payments pass through at least 3 intermediaries, nothing was extraordinary and legal title to vast majority of equity securities was held by publicly known brokerage company. Alleged delays in responding to discovery by various intermediaries does not constitute extraordinary circumstance where ordinary discovery disputes took place well before statute of limitations expired and plaintiff failed to exercise full extent of discovery rights or seek any assistance of Court in obtaining discovery. Plaintiff’s inability to discover identity of potential defendants was not result of any concealment by proposed defendants or any extraordinary circumstances which would have prevented plaintiff from discovering identity of additional defendants.
- (8393) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Section 548(a) allows Court to avoid transfers made with actual intent to hinder, delay or defraud creditors as well as “constructively fraudulent” transfers made for less than reasonably equivalent value where transferor either was insolvent or became insolvent as a result of the transfer; and where transfers occurred on or within 2 years before the date of the filing of the petition. If statute of limitations has not expired as of the date of the bankruptcy petition, Trustee is afforded 2 years after entry of the Order for Relief to commence actions under Section 546(a)(1)(A). Debtors commenced bankruptcy case in 2013 allowing Trustee to recover transfers that occurred in 2011 and later, not transfers that occurred in 2010 or prior.
- (8394) *Mukamal v. Citibank, NA*, Case No. 16-1045 (Bankr. S.D. Fl. 2016) – Where IRS is unsecured creditor, avoidance actions brought by Trustee are subject to 10-year status of limitations notwithstanding that State law on which action was based had 4-year limitation and even where avoidance action is not against IRS. Internal Revenue Code Sections 6502(a)(1) and 6901(a)(1)(A) grant IRS a 10 years limitations period on any action to collect unpaid taxes, and Trustee under Section 544 has all powers of a general unsecured creditor in existence as of petition date. This would allow Trustee to bring actions over same duration as would be available to IRS even where state law has much shorter time limit, as IRS is governed by Federal, not State, limitation period.
- (8395) *Bash v. Textron Financial Corporation*, 2016 WL 4437606 (6th Cir. 2016) – Statute of limitations on constructive fraud runs from date of transaction and does not depend on notice to creditors. To extent 2004 security agreement may have been constructively fraudulent transfer, bankruptcy trustee’s action brought in 2010 barred by statute of limitations. Limitation period for actual fraudulent transfer is four years from the date of the transfer or one year from the date on which the claimant discovered or reasonably could have discovered transfer. “Discovery” requires knowledge beyond fact of transfer itself, and includes information that would indicate that transfer may have been fraudulent. Crux of issue is when plaintiff possessed, or should have possessed through exercise of reasonable diligence, actual knowledge of both transfer and fraudulent nature of transfer. Trustee’s complaint timely where trustee had been appointed following involuntary petition although grant of security interest had occurred 6 years prior, where it was not clear until trustee investigated that grant of security interest may have been actually fraudulent.
- (8396) *Whittaker v. Groves Venture, LLC*, 2015 WL 5781111 (Bankr. S.D. Ohio 2015) – Action to avoid fraudulent transfer must be brought within 2 years of commencement of case. Chapter 7 Trustee of LLC could not rely on earlier filing date of LLC’s sole member, as filing by member did not constitute an order for relief as to LLC, which is separate legal entity.
- (8397) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Transfer of promissory notes from Debtor to spouse not avoidable under Section 548 where transfer occurred more than two years prior to commencement of case.
- (8398) *Cestone v. First National Cemetery Bank*, 2014 WL _____ (Bankr. M.D. Pa. 2014) – Where trustee brings action under both Section 548 and state fraudulent transfer act through Section 544, Trustee can recover all transfers made within whichever statute of limitations provides greater relief. Section 548 limitations period did not prevent trustee from recovering transfers made up to four years pre-petition where state UFTA provided for 4 year “look back”. Only statute of limitations in Section 544 is that action must be brought within 2 years of order for

relief or one year from trustee's appointment, whichever is longer.

- (8399) *Crawford v. Teague*, 2014 WL _____ (Bankr. W.D.N.C. 2014) – Where trustee brings action under both Section 548 and state fraudulent transfer act through Section 544, Trustee can recover all transfers made within whichever statute of limitations provides greater relief. Section 548 limitations period did not prevent trustee from recovering transfers made up to four years pre-petition where state UFTA provided for 4 year “look back”. Only statute of limitations in Section 544 is that action must be brought within 2 years of order for relief or one year from trustee's appointment, whichever is longer.
- (8400) *Still v. Nelson Bowers II Exit 20 Auto Mall, LLC*, 2014 WL 693446 (Bankr. E.D. Tn. 2014) – Statute of limitations under Sections 546 and 549 are not jurisdictional. Court can conclude that statute of limitations is tolled where equitable tolling is [t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired, and evidence indicates that 1) defendants concealed the conduct that constitutes the cause of action; 2) defendants' concealment prevented plaintiffs 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. Evidence indicated that defendants actively worked to conceal Debtor's sale of membership interest in LLC. Defendants did not have any documentation for the sale to indicate whether the sale was of assets of the LLC or Debtor's interest in the LLC. Defendant issued the payment directly to Debtor's daughter, not to the LLC or to the Debtor himself; and was drawn on the personal account of the shareholders of Defendant rather than the corporate account. After the sale, and even after the filing of the bankruptcy case, Debtor continued to list his membership interest as an asset valued at over \$1 million. Defendant caused the LLC to file tax returns 9 months later showing that Debtor was still 50% owner of the LLC. Equitable estoppel arises where plaintiff knows of action but defendant's conduct prevents plaintiff from timely filing suit, and requires affirmative steps or actions on part of defendant. Plaintiff's allegation that he was unaware of cause of action until after statute of limitations expired prevented application of equitable estoppel.
- (8401) *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.
- (8402) *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.
- (8403) *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.
- (8404) *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.
- 14.53 Damages
- (8405) *PAH Litigation Trust v. Water Street Healthcare Partners, LP*, Case No. 15-51238 (Bankr. D. Del. 2017) – Recovery of fraudulent transfer is not limited to losses suffered by creditors. Plan provided for allowance of creditor claims of \$210 million and to be paid partially with stock valued at \$85 million and a remaining claim for the balance. Trustee's potential recovery of fraudulent transfer is based on amount of transfer, not amount remaining owing to creditors. Trustee could pursue recovery of full \$250 million alleged fraudulent transfer notwithstanding that claimed amount exceeded losses suffered by creditors.
- (8406) *Russell v. Harper*, 2017 WL 4220396 (Bankr. E.D. Tn. 2017) – Avoidance of fraudulent transfer does not automatically establish defendant's liability. Section 550 establishes liability for initial transferee; or for immediate or mediate transferee of the initial transferee. Trustee may recover property itself or value of property. Debtor's fiancée was the recipient of numerous fraudulent transfers and as immediate transferee is strictly liable. Judgment entered against Transferee for difference between \$150,000 value of property at time of transfer and \$90,000 paid by transferee for property. Transferee liable for full value of property received from Debtor as “wedding gift” to transferee, Debtor's fiancée. Fact that property was transferred to trust did not prevent recovery from fiancée as Section 550 allows recovery from entity for whose benefit the transfer occurred and fiancée, as sole beneficiary of trust into which assets were transferred, constituted “beneficiary” of transfer. Fact that trust later sold property and that transferee did not receive any of proceeds of resale did not defeat or reduce liability of transferee for value of property initially transferred.
- (8407) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Avoidance of transfer under Section 548 does not automatically result in recovery of transferred property, and depends on whether interest transferred was possessory or non-possessory. If transferee had possessory

interest in property, trustee will have to pursue recovery as avoidance itself does not bring property back into estate. If transferee did not have possessory interest, then trustee is not required to pursue recovery of property. Property transferred to Debtor and husband as tenants by entireties gave husband possessory interest, requiring trustee, after avoidance, to pursue recovery of property itself.

- (8408) *Sweet v. Chambers*, Case No. 13-11127 (E.D. Mi. 2016) – Section 550 allows trustee to recover, for benefit of estate, property transferred. Trustee entitled to recover four promissory notes transferred by Debtor to spouse. Court has authority under Section 105 to take any action avoid abuse of system including ordering wife to transfer promissory notes to trustee.
- (8409) *In re Keeley and Grabanski Land Partnership*, Case No. 14-6037 (8th Cir. BAP 2015) – Remedy for fraudulent transfer under Section 548 is to allow trustee to recover either property transferred or value of property as of date of transfer under Section 550. Where property transferred consisted of a long-term lease at far below market rent, lease itself is avoided and brought back into the estate. Recovery would include avoidance of lease itself plus damages equal to “below market” rent amount (difference between charged rent and market rent) during term from execution to avoidance of lease.
- (8410) *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014) – Uniform Fraudulent Transfer Act allows plaintiff to recover a fraudulent transfer to extent necessary to satisfy its claim, subject to adjustment for the value of the assets as equities may require.
- (8411) *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.
- (8412) *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.
- (8413) *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.
- (8414) *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.
- (8415) *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.
- (8416) *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.
- (8417) *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.

14.54 Damages – Setoff by Defendant

- (8418) *In re Keeley and Grabanski Land Partnership*, Case No. 14-6037 (8th Cir. BAP 2015) – Under Section 550(e)(1), good faith transferee of avoidable fraudulent transfer is entitled to setoff for the lesser of (a) costs of improvements made after transfer and (b) increase in value as a result of any improvements. Defendant not entitled to setoff where defendant did not perform any improvements. Value of crops on land were not “improvements” but were incidental to use of leased premises. Remedy awarded to plaintiff was difference between market rent and rent charged. Had defendant paid market rent in first instance, he would have been entitled to keep the proceeds of the crop sales. As damage award places defendant and plaintiff in same positions as they would have had if the lease had been at market rate in first instance, estate could not make further claims against crops or proceeds. To extent trustee recovered property and then sold crops, defendant entitled to offset for value of crops sold. However, defendant entitled to offset for real estate taxes paid during time of occupancy as taxes are expressly defined in Section 550 as an “improvement”.

14.55 Complaint

- (8419) *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.

14.56 Parties Liable – Initial Transferee

- (8420) *Bodenstein v. University of Northern Iowa*, Case No. 14-0441 (Bankr. N.D. Ill. 2018) – “Transferee” must have ability to use funds for its own purpose to be considered initial transferee. Party through whose hands funds pass but who never held funds in account of his own and had no right to use funds for his own purpose is not “transferee” but is instead “mere conduit”. Donation to University Foundation could be used only for Foundation business and could not be used by University for its purposes. Although check was issued to University, there was no dispute that all donations for benefit of University would be made to Foundation. Although Foundation may ultimately use funds for benefit of University, that would render University at most a subsequent transferee. Funds paid by Debtor to satisfy a written agreement between the Debtor’s principal and University Foundation by which principal pledged \$2 million for benefit of athletic fund were paid on behalf of principal. Principal was “initial transferee” as funds were paid to satisfy his obligation. University and Foundation which ultimately received funds did so as a transferee from Debtor’s principal, not a transfer from Debtor itself. University and Foundation were protected by “good faith” defense under Section 550.
- (8421) *Henry v. Official Committee of Unsecured Creditors*, 872 F.3d 954 (9th Cir. 2017), *cert denied*, 138 S.Ct. 314 (2018) – Initial transferee is liable for constructive fraudulent transfer even if transferee was unaware of fraud. Whether party is “initial transferee” or “subsequent transferee” depends on whether transferor exercised dominion and control over assets prior to transfer. Business owner created secret bank account and company name to which owner diverted business income that owner subsequently used for his own benefit. Owner maintained dominion and control overall funds in account notwithstanding that funds were in business name. Recipients of payments from that account constitute “initial transferees”. Court rejected arguments that initial transfer was from Corporation to owner and that later recipient was subsequent transferee who would be insulated from recovery if transferee gave full value in good faith under Section 550(b)(1).
- (8422) *Ivey v. First Citizens Bank & Trust Co.*, 848 F.3d 205 (4th Cir. 2017), *cert denied*, 138 S.Ct. 314 (2017) – Debtor’s deposit of funds into Debtor’s own, unrestricted, bank account is not a “transfer” within scope of Section 101(54). Accordingly, deposits cannot be recovered as fraudulent transfers even if funds were deposited into account as part of Ponzi scheme with actual intent to hinder, delay or defraud creditors. Court relied on 90 year old Fourth Circuit holding, rejecting Western District of Michigan holding in *Meoli v. Huntington Bank*.
- (8423) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by Debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.
- (8424) *Higgason v. Staley*, 2014 WL 640986 (Bankr. E.D. Ky. 2014) – Debtor cannot be liable for fraudulent transfer as matter of law. Section 550 imposes liability only on transferee, not transferor.
- (8425) *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.

14.57 Mediate and Immediate Transferee of Initial Transferee

- (8426) *Bodenstein v. University of Northern Iowa*, Case No. 14-0441 (Bankr. N.D. Ill. 2018) – “Transferee” must have ability to use funds for its own purpose to be considered initial transferee. Party through whose hands funds pass but who never held funds in account of his own and had no right to use funds for his own purpose is not “transferee” but is instead “mere conduit”. Donation to University Foundation could be used only for Foundation business and could not be used by University for its purposes. Although check was issued to University, there was no dispute that all donations for benefit of University would be made to Foundation. Although Foundation may ultimately use funds for benefit of University, that would render University at most a subsequent transferee. Funds paid by Debtor to satisfy a written agreement between the Debtor’s principal and University Foundation by which principal pledged \$2 million for benefit of athletic fund were paid on behalf of principal. Principal was “initial transferee” as funds were paid to satisfy his obligation. University and Foundation which ultimately received funds did so as a transferee from Debtor’s principal, not a transfer from Debtor itself. University and Foundation were protected by “good faith” defense under Section 550.
- (8427) *Pergament v. Hofstra University*, Case No. 16-8122 (Bankr. E.D.N.Y. 2018) – Section 550(a)(2) allows recovery from person who was not immediate transferee from transferor unless transferee took in good faith and for value. Trustee could not recover tuition payments made by student’s parents where parents deposited funds into account maintained at University from which University withdrew tuition payments, where account was in Student’s name; Student had full control over money in account; Student could control access to account including preventing parents from viewing or accessing account; and if any refunds were issued by University, funds were deposited into account and Student could withdraw funds. Student was initial transferee from parents as Student enjoyed dominion and control over funds while in account and University did not acquire funds until Student took actions that resulted in payment of tuition. University took funds in good faith as University had no knowledge of Parents financial condition or other reason to believe the transfer could be avoided; and University

gave value by providing education to Student.

- (8428) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Section 550(a)(2) governs ability to recover transfers from subsequent transferee of initial transferee, subject to good-faith defense. Immediate or immediate transfer he is one who takes in a later transfer down the chain of title. Complaint challenged payments made by corporate Debtor using funds received from Debtors subsidiaries. Complaint failed to state cause of action where it did not state which subsidiary made transfer to Corporation, Mount transferred, or date of any transfer. Complaint challenging fraudulent transfers must provide more than mere recitation of statutory elements, and must, at the least, reasonably identify types of transfers sought to be avoided. Allegations of complaint were so vague and failed to identify any specific transfer that it would not be possible for defendant to assess potential defenses with respect to any particular transfer. Complaint also did not allege that initial transfer from subsidiary two corporation was fraudulent which is necessary element to action to impose successor liability. Complaint also did not allege facts to support that corporation was “mere conduit” rendering defendant and “initial transferee” thereby precluding use of “good faith” defense. Whether Corporation was transferee or merely “conduit” depends on whether Corporation had dominion and control over money or right to use money for corporation’s own purposes. Plaintiff did not allege that the corporation lacked discretion or control over funds received from subsidiaries or raise any plausible inference that Corporation lacked discretion and use of funds received from subsidiaries. Complaint failed to allege any basis to conclude that defendant was entity for whose benefit subsidiaries transferred funds to Corporation were corporate structure provided for daily “sweeps” of subsidiary accounts into corporations general account. There was no indication that subsidiaries made any particular transfer to corporation for purposes of benefiting defendant rather than as part of normal course of business operations.
- (8429) *Kelley v. Opportunity Finance, LLC*, 2016 WL 7030622 (Bankr. D. Mn. 2016) – Initial transfer of allegedly constructive fraudulent transfer has burden to show that transfer was for reasonably equivalent value, which is inherently a fact question. Defendant contended that transfers were repayment of loans and that satisfaction of antecedent debt is reasonably equivalent value. Documents attached to complaint demonstrated that defendant loaned money to third party who in turn advanced fund to party engaged in Ponzi scheme. The Ponzi scheme then repaid loans from the third party who in turn repaid loans from the defendant. Whether repayments to defendant by third party were repayment of antecedent debt was not defense where trustee for Ponzi Scheme was bringing action against plaintiff for receipt of fraudulent transfer and was no evidence that third party ever assigned or transferred to defendant any of third party’s rights against Ponzi Scheme, so that when Ponzi Scheme repaid third party, it was repaying obligation owed to third party and not to defendant. If defendant was subsequent transferee, defendant cannot be liable if it received payments from immediate transferee for value and in good faith. There was no dispute that defendant received payments from initial transferee in repayment of loans by defendant to initial transferee, constituting value. Good faith requires that subsequent transferee not have any indicia of fraud or financial irregularity. Given allegations in complaint, court was unable to resolve factual issue via Motion for Judgment on Pleadings.
- (8430) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by Debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale. However, transferee from initial transferee not liable to bankruptcy trustee where subsequent purchaser took for value and in good faith and without knowledge of allegedly fraudulent transfer. Evidence indicated that subsequent transferee had no knowledge of alleged avoidability of transfer and took title in good faith and for value.
- (8431) *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.

14.58 Parties Liable – “Mere Conduit”

- (8432) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as “mere conduit” is not “transferee” for purposes of liability under Section 550. “Mere conduit” is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is “mere conduit” if party shows that they did not have control over asset and merely served as conduit for assets that were under the actual control of Debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on “pass through” income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal’s personal tax liabilities as constructively fraudulent. Court concluded that IRS was not “transferee” for purposes of Section 550. Although the IRS received the payments, it did so as a “mere conduit”, holding the funds until the principal’s tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually “receive” any payment and did not constitute a “transferee”. The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal ultimately received the

money from the IRS.

14.59 Parties Liable – Non-Transferees

- (8433) *GATX Corp. v. Addington*, 2012 WL 4886942 (E.D. Ky. 2012) – Non-transferee of alleged fraudulent transfer is not liable for violation of fraudulent transfer statutes. Prior to filing bankruptcy, Debtor transferred property to an irrevocable trust. After Debtor filed, Plaintiff sought to hold trustees of trust personally liable for fraudulent transfer. Trustees in their individual capacity, as non-transferees, cannot be held liable for fraudulent transfers or for aiding and abetting

14.60 Section 548(c) – Lien of Transferee for Avoided Transfer

- (8434) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, Case No. 14-8011 (6th Cir. BAP 2014) – Transferee of avoided transfer under Section 547 or Section 548 obtains a lien on the property to extent that transferee gave value to transferor in exchange for the transfer and transferee took property for value and in good faith. Transferee did not establish value where deed recited that conveyance from Debtor to mother was for \$0 – love and affection and there was no evidence that mom made any improvements after receiving the transfer that increased or enhanced the value of the property. Mom also failed to demonstrate good faith. Good faith is objective standard measured by whether circumstances would place reasonable person on inquiry of Debtor's fraudulent purpose and where diligent inquiry would have uncovered fraudulent purpose. At time of transfer, mom knew that Debtor was in financial distress and that transfer involved all of Debtor's non-exempt property. Reasonable person with knowledge of these facts would have been suspicious as to possible fraudulent nature of transfer, such that mom was not acting in good faith when she received title to property for no consideration. Fact that mom provided bulk of money to allow Debtor to purchase property in first instance did not amount to consideration for transfer by Debtor to mother where there was no consideration paid at time of transfer and there was no evidence that Debtor was indebted to mother, it appearing that initial payment was not intended as loan to son.

C. Turnover of Property

14.61 Generally

- (8435) *Stubbins v. Jones*, 2018 WL 3905624 (Bankr. S.D. Ohio 2018) – Section 542(a) requires any entity in possession, custody or control of property of estate to deliver property to Trustee and account for property or value of property unless property is of inconsequential value or benefit to estate. Property of estate includes all legal or equitable interests of Debtor in property as of commencement of case. Court could not determine whether funds garnished from Debtor's bank account constituted property of estate where there were factual issues as to whether Debtor owned funds in account prior to garnishment or whether Debtor was acting merely as constructive Trustee for benefit of father who allegedly deposited all funds into account and was solely entitled to beneficial ownership of funds.
- (8436) *Lee v. Field*, Case No 15-17451 (9th Cir. 2018) – Adversary complaint seeking to avoid transfer of property from Debtor to Debtor and his wife as fraudulent and seeking turnover of property constituted objection to Debtor's claimed exemption as tenants by the entirety where adversary complaint was filed within 30 days of creditors meeting as required by Section 522(l) and Rule 4003. Rule 4003 proscribes no particular form for objections to exemptions and adversary complaint gave more than adequate notice that Trustee objected to claimed exemption where relief in adversary proceeding and objection to exemption were inextricably intertwined.
- (8437) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Avoidance of transfer under Section 548 does not automatically result in recovery of transferred property, and depends on whether interest transferred was possessory or non-possessory. If transferee had possessory interest in property, trustee will have to pursue recovery as avoidance itself does not bring property back into estate. If transferee did not have possessory interest, then trustee is not required to pursue recovery of property. Property transferred to Debtor and husband as tenants by entirety gave husband possessory interest, requiring trustee, after avoidance, to pursue recovery of property itself. Trustee who avoided transfer of property by Debtor to Debtor and husband as tenants by entirety could not recover property itself where Debtor claimed entirety interest exempt and there were no objections to exemptions filed. Once entirety exemption was established, Debtor's interest in property could not be made subject to Debtor's individual creditors and avoidance of transfer that created entirety exemption in first instance does not change fact that Debtor's interest in property is exempt. Remedy under Section 550 would be to enter money judgment against husband for value of property transferred to him.
- (8438) *Kendrick v. Rister*, 2017 WL 3381810 (Bankr. E.D. Ky. 2017) – Asset constitutes "proceed" or "product" of only where asset that generated product or proceed was itself property of estate. Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Automobile could not be proceed or product where Debtor had only contract right to purchase vehicle as of date of commencement of case. Trustee had no cognizable claim to vehicle acquired by Debtor post-petition.
- (8439) *Kendrick v. Rister*, Case No. 16-2010 (Bankr. E.D. Ky. 2017) – Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Trustee could not seek turnover of motor vehicle as motor vehicle was not property of estate as of date of petition.
- (8440) *Baumgartner-Novak v. Gualdoni*, 2017 WL 3044394 (Bankr. N.D. Ohio 2017) – Turnover action requires proof of a transfer of an interest of Debtor in property; to or for the benefit of a creditor; made on account of antecedent debt; made while Debtor was insolvent; made either within 90 days before the petition date or between 90 days and one year if the creditor was an insider; and that allowed Defendant to receive more than Defendant would have received in Chapter 7 had transfer not been made. Evidence indicated that Debtor paid Defendant by personal check payable to and endorsed by Defendant and drawn on Debtor's account. Defendant acknowledged that the payment was repayment of loan made to Debtor in 2016. Transfer occurred within 90 days pre-petition resulting in presumption of insolvency that was

not rebutted. Evidence also indicated that Defendant is Debtor's mother, although Defendant denied being Debtor's mother and alleged instead that she was Debtor's sister, but in either event Defendant was "insider" as defined in 11 USC Section 101(30). Debtor's payment to Defendant allowed Defendant to receive 100% repayment while Chapter 7 Case would produce significantly lower dividend than 100%, requiring Defendant to repay preference to Estate. If Defendant repaid Estate within 30 days, Defendant would be allowed claim in Bankruptcy and would receive pro-rata share of any dividend paid.

- (8441) *Parker v. Nagel*, 2016 WL 4383821 (Bankr. N.D. Ohio 2016) – Trustee seeking turnover of assets from third party bears burden of proof that assets while in possession of third party are property of estate. Trustee failed to establish that tractors which were subject of turnover had been transferred by brother to Debtor at any time pre-petition. Sole evidence was that Debtor took tax deduction for depreciation on tractors, and Debtor produced a receipt signed only by him, not brother allegedly for purchase of tractors. Record indicated there was no transfer of funds in either Debtor's or his ex-wife's bank account that would have been used to pay purchase price, and ex-wife testified that there was only one tractor owned by Debtor and that tractor had already been sold by trustee, and there were no other tractors listed in divorce decree.

- (8442) *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.

14.62 Jurisdiction

- (8443) *BCL-Sheffield, LLC v. Gemini International, Inc.*, Case No. 16-1083 (7th Cir. 2016) – Action to pierce corporate veil to reach assets held by Debtor's closely held corporation is non-core that must be resolved by District Court under 28 USC Section 157. However once District Court enters order piercing veil, assets of target corporation become property of estate, and Bankruptcy Court has jurisdiction to enforce turnover of assets as "core" proceeding. Core proceedings are those that arise under the Code, and turnover of assets is arises under Sections 542 and 543 of the Code., rendering limitations on bankruptcy court jurisdiction irrelevant.

14.63 Parties

14.64 Procedure

- (8444) *In re Armstrong*, 2015 WL 5299461 (Bankr. N.D. Ohio 2015) – Action for turnover of funds garnished in 90 days preceding commencement of case must be brought by adversary proceeding. Debtor's Motion for turnover of funds denied notwithstanding garnishor's failure to respond to motion.

- (8445) *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.

- (8446) *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

14.65 Standing to Bring Action

- (8447) *Parrish v. Lincoln National Bank*, 2018 WL 2175926 (Bankr. W.D. Ky. 2018) – Chapter 13 Debtor lacks standing to bring action under Section 547. Section 547 authorizes Trustee to bring actions. Debtor can assert standing only if, before filing action. Debtor obtains court order allowing exercise of derivative standing. Court would not belatedly grant derivative standing where complaint demonstrated that action was futile.

- (8448) *Kalesnik v. HSBC Bank USA, NA*, Case No. 16-3027 (Bankr. W.D. Mass. 2017) – Chapter 13 Debtor lacks standing to exercise Trustee's avoidance powers found in Chapter 5 other than in narrow confines of Section 522(h) to augment available exemptions. Congress specifically gave to Chapter 11 and Chapter 12 Debtors authority to exercise Chapter 5 avoidance powers but chose not to include Chapter 13 Debtors in grant of authority. Court cannot ignore plain language of statute, and if Congress intended to give authority to Chapter 13 Debtors, it clearly knew how to do so.

- (8449) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under Section 522(h) where the Debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor' claimed garnished funds as exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547.

- (8450) *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.

- (8451) *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.

- (8452) *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.

(8453) *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.

(8454) *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.

14.66 Standing – Chapter 13 Trustee

(8455) *In re Cecil*, 488 BR 200 (Bankr. M.D. Fl. 2013) – Chapter 13 Trustee has standing under 11 USC Section 1302 and 11 USC Section 103 to pursue avoidance actions. Fact that authority to conduct avoidance actions is not specifically referenced in Section 1302(b)(1) does not deprive Trustee of authority to bring action, as neither Section 1302 nor Section 704 are the source of, or a limitation on, Trustee’s power to bring avoidance actions. Power to bring avoidance actions emanates from Section 103 which applies in all cases under Bankruptcy Code.

14.67 Preference Versus Fraudulent Transfer

(8456) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Transfer cannot be both a preferential transfer and a fraudulent transfer. Plaintiff required to amend complaint to state cause of action on which plaintiff intended to proceed at trial.

14.68 Procedure

(8457) *In re Minneweather*, Case No. 15-48402 (Bankr. E. D. Mi. 2015) – Motion to avoid preferential transfer under Section 547 denied without prejudice. Action under Section 547 must be brought by adversary proceeding.

(8458) *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).

(8459) *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 plain statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff’s claim and the grounds upon which it rests.

14.69 Transfers to “Insiders”

(8460) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(b) allows Court to avoid certain prepetition transfers of an interest of Debtor in property in order to foster equality of distribution among creditors and discourage “secret liens”. Transfer of funds from Debtors bank account for loan repayments and creation of security interests constitute “transfers”. Avoidance of preferential transfer requires proof that transfer was made to or for the benefit of a creditor; transfer made on account of antecedent debt; transfer made while Debtor was insolvent; transfer made on or within 90 days before the date of the filing of the petition or between 90 days and one year if the creditor was an “insider”; and transfer must enable creditor to receive more than creditor would have received in Chapter 7.

(8461) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – Transfer made more than 90 days but less than one year before petition is avoidable only if transferee was, at time of transfer, an insider. Payout on employment severance agreement negotiated some years earlier when transfer left Debtor’s employment was not to “insider” as transferee was not Insider at time of payment. Payment was almost one year after transferee had left Debtor’s employ and transferee had no connection with Debtor other than right to receive payments.

(8462) *Graham v. Huntington National Bank*, 521 BR 259 (Bankr. N. D. Ohio 2014) – To constitute insider for purposes of preferential transfers, party must have controlling interest in Debtor or exercise sufficient authority over Debtor as to unquestionably dictate corporate policy and disposition of assets. Superior bargaining power in contractual relationship is not sufficient. Courts examine whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the Debtor, directed work performance, and directed payment of the Debtor’s expenses. Party must have day-to-day control, not merely monitoring or exertion of influence regarding financial transactions in which creditor has direct stake. Ability to deposit and to transfer checks that is incidental to Debtor-creditor relationship does not render the bank an insider. Requirement that Debtor to submit frequent reports on receivables, invoices, and operations, coupled with right to receive payments on receivables and endorse checks does not render bank insider where bank has no control of the day-to-day decision making of the Debtor. Bank was not insider where bank lacked any day-to-day control and instead entered into relatively routine lending relationship with Debtor. Fact that lender chose State Court receiver and assertions that bank was exerting pressure on Debtor to pay loans is not sufficient indicia of control where there was no evidence that receiver was under control of bank.

(8463) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – For purposes of Section 547, an “insider” is one who has a sufficiently close relationship with the Debtor that his conduct is made subject to closer scrutiny than those dealing at arm’s length. Close relationship generally allows insider to know more about the Debtor’s financial affairs than the Debtor’s other creditors, and to influence or control, at least in part, the Debtor’s actions; and to know that a Debtor is contemplating bankruptcy petition to allow insider to step ahead of other creditors by demanding payment and then influencing the timing of the Debtor’s bankruptcy petition to avoid the ninety-day preference period. Whether party is insider depends on facts and circumstances of particular transaction and case. To be held as insider based on “actual control” of Debtor, party must have ability to unqualifiedly dictate corporate policy, dispose of corporate assets, or legal right of ability to exercise actual control. Pre-petition settlement agreement that allowed creditor to name CEO of Debtor and that precluded removal of CEO

without creditor's consent did not place creditor in "actual control". Nothing in settlement agreement gave creditor right to control either actions of Debtor or actions of CEO, and CEO was not employee or agent of creditor. Creditor was not "insider" of Debtor and preference period would be limited to 90 days pre-petition.

- (8464) *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.
- (8465) *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.

14.70 Parties Liable – Initial Transferee

- (8466) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 550 provides that a Trustee may recover either property transferred or value of property from the initial transferee of the transfer. Initial transferee is strictly liable for any avoidable transfers they receive. Initial transferee is one who receives money from a person or entity and who exercises dominion over funds. Trustee may not recover from a subsequent transferee that takes for value, including satisfaction or securing a present or antecedent debt, in good faith, and without knowledge of avoidability of transfer. Direct transferees of Debtor are not entitled to avail themselves of good faith defense. Although evidence indicated that defendant accepted payments in good faith, as initial transferee, defendant could not assert good faith defense, allowing Trustee to recover full value of payments made by Debtor to defendant.
- (8467) *Fitzpatrick v. Allsup, Inc.*, 2014 WL 294322 (Bankr. E.D. Tn. 2014) – To be liable for preferential transfer, transfer must be made to creditor on account of antecedent debt. Transfer to third party who whom Debtor was not indebted, for purposes of third party forwarding funds to creditor on Debtor's behalf, was not preferential as to the third party. Defendant served as Debtor's agent in applying for Social Security Disability. Debtor had been receiving disability payments from insurer and was contractually obligated to reimburse insurer if Debtor received retroactive SSD benefits. Agreement between Debtor and Defendant provided that Debtor authorized Defendant to transfer funds from Debtor's SSD award to insurer if Debtor received disability benefits. Debtor received retroactive payment, and Defendant forwarded those funds to disability carrier. At time Defendant "received" the SSD funds that Defendant then paid to the disability carrier, Defendant was not creditor of Debtor as Debtor as Defendant has, as part of retention agreement waived any right to payment from Debtor for services rendered. Defendant, who acted merely as conduit for payment to disability carrier, could not have received a preferential transfer as matter of law.
- (8468) *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.
- (8469) *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.

14.71 Mediate and Immediate Transferee of Initial Transferee

- (8470) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 550 provides that a Trustee may recover either property transferred or value of property from the initial transferee of the transfer. Initial transferee is strictly liable for any avoidable transfers they receive. Initial transferee is one who receives money from a person or entity and who exercises dominion over funds. Trustee may not recover from a subsequent transferee that takes for value, including satisfaction or securing a present or antecedent debt, in good faith, and without knowledge of avoidability of transfer. Direct transferees of Debtor are not entitled to avail themselves of good faith defense. Although evidence indicated that defendant accepted payments in good faith, as initial transferee, defendant could not assert good faith defense, allowing Trustee to recover full value of payments made by Debtor to defendant.
- (8471) *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.
- (8472) *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.

14.72 Parties Liable – “Mere Conduit”

- (8473) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as “mere conduit” is not “transferee” for purposes of liability under Section 550. “Mere conduit” is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is “mere conduit” if party shows that they did not have control over asset and merely served as conduit for assets that were under the actual control of Debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on “pass through” income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal’s personal tax liabilities as constructively fraudulent. Court concluded that IRS was not “transferee” for purposes of Section 550. Although the IRS received the payments, it did so as a “mere conduit”, holding the funds until the principal’s tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually “receive” any payment and did not constitute a “transferee”. The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal ultimately received the money from the IRS.

14.73 Damages

- (8474) *Dery v. Ross*, 2018 WL 1913768 (Bankr. E.D. Mi. 2018) – Section 550(a)(1) allows Trustee to avoid either property transferred or value of property from initial transferee. Trustee entitled to judgment for amounts paid to Defendants under consulting agreements that were avoidable as preferential payments. Court can award pre-judgment interest where award would compensate prevailing party and award is equitable under circumstances or to prevent unjust enrichment of Defendant. Factors include: (1) need for full compensation of injured party; (2) considerations of fairness and relative equities of award; (3) remedial purpose of statute involved, and/or (4) other general principles as are deemed relevant by court. Prejudgment interest awarded (1) from date on which Plaintiff filed adversary proceedings until last post-trial brief was filed at the federal statutory rate in effect when adversary proceedings were filed; and (2) from post-trial date until date of judgment at federal statutory rate in effect when last post-trial brief was filed. Rates were high enough to be properly compensatory but not so high as to be punitive. Post-judgment interest awarded at federal statutory rate in effect as of the date of entry of judgment.
- (8475) *In re Parham*, 2017 WL 3207663 (Bankr. E.D. Mi. 2017) – Debtor not entitled to entry of judgment voiding preferential transfers or awarding any damages where creditor voluntarily, if somewhat belatedly, returned funds garnished pre-petition before Debtor filed adversary proceeding seeking avoidance.
- (8476) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Court has broad discretion to award prejudgment interest. Prejudgment interest is not automatically applied but may be used to make estate whole. Trustee failed to present any evidence regarding recoverability of prejudgment interest and costs incurred in prosecution. Court denied Trustee’s request for prejudgment interest and costs without prejudice.
- (8477) *Sheppard v. Speck*, 2014 WL 6611661 (Bankr. E.D. Mi. 2014) – Recovery of preferential transfer is amount of money received by creditor. Funds withheld from Debtor’s income but retained by employer to cover administrative expenses of implementing garnishment are not recoverable from creditor as funds were not paid to or for the benefit of the creditor.
- (8478) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Section 550 allows trustee to recover property transferred in violation of Section 547. Where pledge of collateral was given to secure previously unsecured loan, pledge itself was avoidable and estate would hold title to pledged property free and clear of claims of creditor.

14.74 Elements – Generally

- (8479) *Wheatley v. Oklahoma Tower & Energy Services, LLC*, 2018 WL 524569 (Bankr. W.D. Ky. 2018) – Recovery of preference requires proof of transfer (1) to or for benefit of creditor; (2) on account of antecedent debt; (3) made while debtor was insolvent; (4) made within 90 days before bankruptcy; and (5) enabled creditor to receive more than if transfer had not been made. Plaintiff entitled to summary judgment where Plaintiff served Request for Admissions, Defendant did not respond and matters were deemed admitted, and admissions established each element of action and negated each affirmative defense.
- (8480) *Wheatley v. Johnson*, 2017 WL 6550499 (Bankr. W.D. Ky. 2017) – Trustee must prove that interest of debtor in property was transferred (1) to or for benefit of a creditor; (2) for or on account of antecedent debt owed by debtor before such transfer was made; (3) made while

debtor was insolvent; (4) made – (A) on or within ninety days before date of filing of petition; or (B) between ninety days and one year before date of filing of petition, if creditor at time of transfer was insider; and (5) that enabled creditor to receive more than creditor would receive if – (A) the case was under Chapter 7; (B) transfer had not been made; and (C) creditor received payment of debt to the extent provided by Chapter 7. Payments by debtor to son or to medical providers on son's behalf, made within 90 days pre-petition, were avoidable as to son. Debtor was presumptively insolvent and debtor did not present evidence to rebut presumption. Transfers were made within 90 days from tax refund received by debtor within 90-day period. Transfers allowed son to receive, either directly or indirectly through payments to third party medical providers, more than son would have received in Chapter 7 as neither son nor medical providers were creditors in Debtor's Chapter 7 case.

- (8481) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Section 548(a)(1)(B) does not involve any element of intent. The transfer is avoidable as a preference if the transfer was of property of the Debtor made within 2 years of commencement of the case for less than reasonably equivalent value and Debtor was or became insolvent as a result of the transfer.
- (8482) *Fitzpatrick v. Allsup, Inc.*, 2014 WL 294322 (Bankr. E.D. Tn. 2014) – To be liable for preferential transfer, transfer must be made to creditor on account of antecedent debt. Transfer to third party who whom Debtor was not indebted, for purposes of third party forwarding funds to creditor on Debtor's behalf, was not preferential as to the third party. Defendant served as Debtor's agent in applying for Social Security Disability. Debtor had been receiving disability payments from insurer and was contractually obligated to reimburse insurer if Debtor received retroactive SSD benefits. Agreement between Debtor and Defendant provided that Debtor authorized Defendant to transfer funds from Debtor's SSD award to insurer if Debtor received disability benefits. Debtor received retroactive payment, and Defendant forwarded those funds to disability carrier. At time Defendant "received" the SSD funds that Defendant then paid to the disability carrier, Defendant was not creditor of Debtor as Debtor as Defendant has, as part of retention agreement waived any right to payment from Debtor for services rendered. Defendant, who acted merely as conduit for payment to disability carrier, could not have received a preferential transfer as matter of law.
- (8483) *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.
- (8484) *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.
- (8485) *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.
- (8486) *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.
- (8487) *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.

- (8488) *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.
- (8489) *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).
- (8490) *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.
- (8491) *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.
- (8492) *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.
- (8493) *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.
- (8494) *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.
- (8495) *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.
- (8496) *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.
- (8497) *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.
- (8498) *In re Foley*, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Funds garnished by Debtor’s sister during year preceding bankruptcy filing were recoverable where there was no dispute that Debtor was, at all times, unable to pay debts as they came due and had liabilities in excess of assets, and garnishment permitted creditor to recover more than creditor would have receive in Chapter 7 as Chapter 7 estate was administratively insolvent.
- (8499) *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.

- (8500) *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.
- (8501) *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.
- (8502) *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.
- (8503) *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 "arm's 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.
- (8504) *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.
- (8505) *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.
- (8506) *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.
- (8507) *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.
- (8508) *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.
- (8509) *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.

14.75 Elements – Transfer of Property

- (8510) *Stubbins v. Jones*, 2018 WL 3905624 (Bankr. S.D. Ohio 2018) – To be avoidable as preference, property transferred must have been property of Debtor. Debtor's name on Checking Account Statement is evidence that funds in account were property of Debtor at time of garnishment. Evidence was unclear as to whether Debtor had ownership interest of funds or whether Debtor's only interest was that of Trustee of resulting trust where Debtor had intent to hold checking account for benefit of father and father made all contributions and deposits to account. Court could not resolve issues on summary judgment in light of factual disputes.
- (8511) *Newton v. Metal Craft Fabrication & Sale, LLC*, 2018 WL 671109 (Bankr. E.D. Tn. 2018) – Transfer must be of debtor's interest in property. Transfer of property in which debtor had no interest is not preferential even if all other elements are met. Debtor has sufficient interest in illegally obtained proceeds such that transfer of proceeds is avoidable. Debtor embezzled over \$120,000 from her employer. As part of criminal plea agreement, Debtor was required to pay restitution. Within 90 days pre-petition, debtor repaid \$70,00.00. Restitution payments are avoidable as preferences. Fact that proceeds repaid to employer were proceeds of embezzled funds did not prevent debtor from having sufficient interest in funds to constitute preferential payment. Funds Debtor paid to employer that were proceeds of embezzlement were Debtor's property and Debtor had power to spend as she chose. Debtor exercised sufficient dominion and control over the funds to demonstrate an interest in property.
- (8512) *Brown v. Landmark Acceptance Corporation* 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Perfection of previously created security interest in "transfer" for purposes of Section 547. Where debtor purchased automobile and signed note and took delivery of automobile, Security interest became effective even if transfer was conditioned on final loan approval which occurred 16 days later. Recording of lien on title 32 days after Debtor signed Note and took delivery was avoidable preference as transfer occurred when lien was perfected, and lien was perfected outside of 30 day "grace period" under Section 547.
- (8513) *Barney v. Bank of America, NA*, Case No. 15-8097 (10th Cir. 2016) – Trustee cannot use strong arm power to avoid obligation incurred by Debtor to avoid mortgage that is properly recorded but as to which assignment of mortgage has not been recorded. Debtor incurred debt when Debtor executed mortgage and mortgage itself was properly recorded. Mortgage does not become invalid or unenforceable merely because later assignment is not recorded, as assignment is not transfer of interest in property that has to be recorded to enforce obligation as to Debtor. Mortgage itself was issued and recorded outside preference period and assignment of mortgage from one lender to another did not transfer any interest of Debtor in property.
- (8514) *Slobodian v. U.S.*, Case No. 15-2833 (3d Cir. 2016) – Property transferred must be property of the Debtor when transferred. Property in which Debtor held no legal interest but was held solely as statutory trustee was not property of Debtor and transfer could not be avoided. Amounts withheld from employee paychecks for payment of taxes are deemed held in a statutory trust pursuant to 26 USC Section 7501. Statutory trust arises immediately upon withholding and attaches to amount withheld, not necessarily the specific dollars withheld, and payment to IRS establishes that amount paid was "trust" property and therefore is not avoidable. Fact that funds passed through hands of third party on way to IRS does not alter conclusion that funds were "trust funds". Debtor operated a payroll service company. Debtor would withdraw funds from client's account, issue checks to client's employees for net taxes and remit withheld amounts to IRS. Withholdings by Debtor were equivalent to withholding by employer, and intermediary did not change fact that withholdings were for payment of taxes. Funds withheld and subsequently paid to IRS were "trust fund" amounts that were not property of Debtor at time of transfer and transfer to IRS could not be avoided.
- (8515) *Ute Mesa Lot 1, LLC, v. First-Citizens Bank & Trust Co.*, Case No. 12-1134 (10th Cir. 2013) – Under Colorado law, recording lis pendens is not a "transfer of property" that could be avoided as preference. Lis pendens does not transfer interest in property, but merely provides notice to third parties that litigation is pending. While lis pendens may effectively render property unmarketable until litigation is resolved, rendering title unmarketable is not the equivalent of a "transfer of an interest" in that property.
- (8516) *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.
- (8517) *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.
- (8518) *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.

14.76 Elements – Perfection of Security Interest

- (8519) *In re Cheerview Enterprises, Inc.*, Case No. 17-56162 (Bankr. E.D. Mi. 2018) – Debtor’s grant of security interest to creditor is not avoidable preference where security interest was perfected within 30 days after Debtor obtained interest in collateral, even if perfection of security interest is otherwise within preference. Debtor hired creditor to install equipment on November 6. Creditor installed equipment on November 7 and filed you CC one financing statement on November 21, well within 30 day safe harbor of Section 547(c)(3)(B).
- (8520) *Brown v. Landmark Acceptance Corporation* 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Perfection of previously created security interest in “transfer” for purposes of Section 547. Where debtor purchased automobile and signed note and took delivery of automobile, Security interest became effective even if transfer was conditioned on final loan approval which occurred 16 days later. Recording of lien on title 32 days after Debtor signed Note and took delivery was avoidable preference, as lien was perfected outside of 30 day “grace period” under Section 547.
- (8521) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(b) allows Court to avoid certain prepetition transfers of an interest of Debtor in property in order to foster equality of distribution among creditors and discourage “secret liens”. Transfer of funds from Debtors bank account for loan repayments and creation of security interests constitute “transfers”. Avoidance of preferential transfer requires proof that transfer was made to or for the benefit of a creditor; transfer made on account of antecedent debt; transfer made while Debtor was insolvent; transfer made on or within 90 days before the date of the filing of the petition or between 90 days and one year if the creditor was an “insider”; and transfer must enable creditor to receive more than creditor would have received in Chapter 7. There was no dispute that at the time of perfection of security agreement and at time of transfer of funds, Debtor was indebted to creditor and that transfers of funds were on account of antecedent debt. Determining whether transfer of security interest is on account of antecedent debt depends on when transfer is perfected. If transfer is perfected within 30 days of the grant of the security interest, perfection dates back to the date of the grant of the security interest. If perfection occurs more than 30 days after grant of security interest, transfer takes effect upon perfection. Although security agreement was signed in May, security agreement was perfected in October as to loan advance which took place less than 30 days prior to recording. Debt is incurred at time lender disburses proceeds. Security agreement recorded within 30 days of the transfer of the proceeds dated back to the date of the disbursement rendering security interest not avoidable as to that loan advance. To the extent that other loan advances occurred more than 30 days prior to recording, the security agreement was not perfected as to those transfers until actual recording date which was less than 90 days prior to commencement of the case and did not constitute a contemporaneous transaction. Debtor is presumed to be insolvent within 90 days prior to filing and may be rebutted only if Debtor presents evidence of solvency that is more than speculative. For transfers that occurred outside 90 day presumed insolvency, Court must determine whether some of Debtor’s debts is greater than all of Debtor’s property exclusive of property transferred, concealed or removed with intent to hinder, delay or defraud creditors and property that may be exempted from the property of the estate. Bankruptcy schedules reflected assets of approximately \$1,500,000 and total liabilities of approximately \$1,650,000. After subtracting value of Debtor’s exempt assets, liabilities exceeded assets by more than \$226,000 rendering Debtor clearly insolvent at the time of the bankruptcy filing. Debtor admitted there were no significant differences in assets or liabilities between petition date and 6 months prior to petition when Debtor repaid loans and granted security interests. Transfer is allowed creditor to obtain more than creditor would have received in Chapter 7 liquidation where there was no conceivable way that Debtor’s unsecured creditors would receive 100% distribution and transfers allowed one unsecured creditor to recover some portion of unsecured claim. By definition, payment of unsecured creditors results in distribution in excess of amount which would have been received in Chapter 7 unless Chapter 7 case produces 100% dividend.
- (8522) *Tower Credit, Inc. v. Schott*, Case No. 16-30274 (5th Cir. 2017), *petition for certiorari filed*, 2017 WL 4251920 (U.S. 2017) - Funds garnished within 90 days of bankruptcy filing are avoidable as preferences under Section 547 even where Writ of Garnishment was served more than 90 days pre-petition. Service of writ does not “perfect” creditor’s interest in future income as Section 547(e)(3) requires that Debtor have interest in property before lien can attach. Debtor does not obtain rights in future wages until services have been performed at which point creditor’s garnishment lien would attach. Lien “attached” to compensation for services performed within preference period. Lien is avoidable and transfers are recoverable. Fifth Circuit cited with approval 6th circuit decision in *In re Morehead*, 249 F.3d 445 (6th Cir. 2001) and expressly rejected contrary decisions from 2nd, 7th and 11th Circuits, setting up circuit split and likely request for certiorari.
- (8523) *Luper v. Valueland Auto Sales, Inc.*, 2017 WL 7912003 (Bankr. S.D. Ohio 2017) - Section 547 allows Chapter 7 Trustee to avoid transfer of the Debtor’s interest in property under certain circumstances. Debtor transferred interest in property by creating security interest in automobile. Security interest arose when parties executed Purchase Contract which contained grant of security interest; seller gave value by agreeing to sell vehicle to Debtor; and Debtor acquired rights in vehicle upon taking possession. Security interest is deemed perfected as of moment when security interest arises if perfected within 30 days after the creation of the security interest. If security interest is not perfected within 30 days, security interest is perfected on date of perfection. Lien was not recorded on Certificate of Title until 34 days after Debtor acquired vehicle resulted in lien being unperfected on petition date. Security interest would result in creditor receiving more than creditor would have received as a general unsecured creditor where chapter 7 estate is not able to pay a 100% dividend to general unsecured creditors. Transfer of unperfected security interest occurring less than 90 days prior to commencement of the case is avoidable under Section 547.
- (8524) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest in assets of Debtor constitutes transfer as of date of perfection. Where creditor was previously unsecured or held unperfected security interest, perfection is preferential transfer if other requirements of preference are met.
- (8525) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – If creditor is fully secured as of date of transfer, then transfer cannot be preferential as creditor will not have done better than creditor would have done in Chapter 7. If, however, security interest attached for previously unsecured loan within preference period, attachment of lien itself is preferential transfer subject to avoidance.
- (8526) *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.

- (8527) *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.

14.77 Elements – Lack of Reasonably Equivalent Value

- (8528) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Whether transfer was for reasonably equivalent value focuses on whether Debtor received any value and, if so, whether value received was reasonably equivalent to property interests transferred. Time for determining reasonableness of value is date of transfer. Value does not need to be dollar for dollar and courts generally look to net effect of transfer to determine whether transfer resulted in unsecured creditors being worse off. Debtor did not receive any value when Debtor gave security for loans that had already been extended to closely held entities. Pledge did not modify terms of loans and did not indicate that any antecedent debt was satisfied by the pledge. The record indicated that the liabilities for which the pledge was given were antecedent debts, and there did not appear to be any future value given or promised to Debtor in exchange for pledge.

14.78 Elements – To or For Benefit of Creditor

- (8529) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – To be avoidable as preferential, payment must be to or for benefit of creditor. Trustee failed to establish that transferee, the transferor’s mother, was a creditor at time to alleged preference. Evidence was not sufficient to indicate that any Debtor-creditor relationship ever existed between transferor and transferee. Even if Debtor-creditor relationship ever existed, it predated Debtor’s prior Chapter 13 case in which Debtor received discharge. As such, at time of transfer, mom lacked any enforceable debt.
- (8530) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – To be avoidable as preferential, transfer must be to or for benefit of creditor of the Debtor. Perfection of security interest against property of Debtor was not to or for benefit of creditor where Debtor granted security interest to secured Debtor’s principal’s debt to third party to whom Debtor was not directly indebted and there was no evidence that Debtor was indebted to principal as of date of transfer.

14.79 Elements - Antecedent Debt

- (8531) *Dery v. Karafa*, 2018 WL 1913768 (Bankr. E.D. Mi. 2018) – Section 547 allows Trustee to avoid payments on “antecedent debts”. Debt is incurred and arises for purposes of Section 547 as soon as debt exists even if debt is still contingent or unmatured. Compensation for consulting services accrued and became “debt” when services were performed, even though payment was not due until after Defendant Invoiced Debtor for those services. Defendant performed services daily and invoiced Debtor once per week with payment made the day after the invoice date. Payment was on account of “antecedent” debt as Debtor’s obligation to pay arose on date services were performed even if payment was not due until later date.
- (8532) *Wheatley v. Johnson*, 2017 WL 6550499 (Bankr. W.D. Ky. 2017) – Trustee must prove that interest of debtor in property was transferred (1) to or for benefit of a creditor; (2) for or on account of antecedent debt owed by debtor before such transfer was made; (3) made while debtor was insolvent; (4) made – (A) on or within ninety days before date of filing of petition; or (B) between ninety days and one year before date of filing of petition, if creditor at time of transfer was insider; and (5) that enabled creditor to receive more than creditor would receive if – (A) the case was under Chapter 7; (B) transfer had not been made; and (C) creditor received payment of debt to the extent provided by Chapter 7. Payments by debtor to son or to medical providers on son’s behalf, made within 90 days pre-petition, were avoidable as to son. Debtor was presumptively insolvent and debtor did not present evidence to rebut presumption. Transfers were made within 90 days using tax refund received by debtor within 90-day period. Transfers allowed son to receive, either directly or indirectly through payments to third party medical providers, more than son would have received in Chapter 7 as neither son nor medical providers were creditors in Debtor’s Chapter 7 case.
- (8533) *Brown v. Landmark Acceptance Corporation*, 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Perfection of previously created security interest in “transfer” for purposes of Section 547. Where debtor purchased automobile and signed note and took delivery of automobile, Security interest became effective even if transfer was conditioned on final loan approval which occurred 16 days later. Subsequent recording of lien related to antecedent debt as Debtor’s obligation to make payments arose when he signed note in first instance and lien was recorded 32 days later. Recording of lien on title 32 days after Debtor signed Note and took delivery was avoidable preference, as transfer occurred when lien was perfected and lien was perfected outside of 30 day “grace period” under Section 547.
- (8534) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Antecedent debt is one that existed prior to date of transfer. Perfection of security interest against property of Debtor was not on account of antecedent debt of Debtor where Debtor granted security interest to secured Debtor’s principal’s debt to third party to whom Debtor was not directly indebted and there was no evidence that Debtor was indebted to principal as of date of transfer.
- (8535) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under

Section 522(h) where the Debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor claimed garnished funds as exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547. Creditor could not avoid recovery by alleging that debts were result of willful and malicious conduct where creditor did not file action to except debt from discharge and discharge had been entered.

- (8536) *Newton v. McKay*, 2014 WL 1612356 (Bankr. E.D. Tn. 2014) – Evidence failed to evidence any pre-existing debt between mother and Debtor. Debtor acquired house on behalf of her parents using funds entirely supplied by mother. Property was titled in Debtor's name only because Debtor purchased at foreclosure sale and seller refused to issue deed in name other than the person who physically placed successful bid. The property had been leased by mother to third party and all rentals were paid to mother. When property sold, all of the proceeds were paid to mother. At all times, while property was nominally titled in Debtor's name, property actually belonged to mother. Thus, when mother received title to property and then sold property and retained proceeds, the transfer was not inconsideration of debt owed by Debtor because Debtor never owed mother any money. There was no agreement that Debtor would repay mother or that Debtor was anything other than title on behalf of mother.
- (8537) *The Flower Factory, Inc. v. Magic Creations, Inc.*, 2014 WL 271651 (Bankr. N.D. Ohio 2014) – Payment is on account of “antecedent debt” where debt was incurred before the payment in question. Debtor's payment of invoice 30 days after issuance and creation of obligation to pay was antecedent debt, even if paid before the due date.
- (8538) *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.
- (8539) *Suhr 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.
- (8540) *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.
- (8541) *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.

14.80 Elements – Insolvency

- (8542) *Brown v. Landmark Acceptance Corporation*, 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Insolvent is defined in Code as condition where sum of debts exceeds sum of property exclusive of property transferred and exempted, and creates presumption of insolvency for 90-day period pre-petition. Debtor presumptively insolvent where debtor filed for relief less than 90 days after finance company recorded lien on automobile, and Debtor's schedules reflected as of petition date debts in excess of \$50,000 versus assets of \$20,000.
- (8543) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(b) allows Court to avoid certain prepetition transfers of an interest of Debtor in property in order to foster equality of distribution among creditors and discourage “secret liens”. Transfer of funds from Debtors bank account for loan repayments and creation of security interests constitute “transfers”. Debtor is presumed to be insolvent within 90 days prior to filing and may be rebutted only if Debtor presents evidence of solvency that is more than speculative. For transfers that occurred outside 90 day presumed insolvency, Court must determine whether sum of Debtor's debts is greater than all of Debtor's property exclusive of property transferred, concealed or removed with intent to hinder, delay or defraud creditors and property that may be exempted from the property of the estate. Bankruptcy schedules reflected assets of approximately \$1,500,000 and total liabilities of approximately \$1,650,000. After subtracting value of Debtor's exempt assets, liabilities exceeded assets by more than \$226,000 rendering Debtor clearly insolvent at the time of the bankruptcy filing. Debtor admitted there were no significant differences in assets or liabilities between petition date and 6 months prior to petition when Debtor repaid loans and granted security interests.
- (8544) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – Insolvency under Section 547 requires that transferor's assets, after transfer, and after allowing for exemptions, is less than total debts. Insolvency is presumed for any transfer made within 90 days preceding the filing. If insolvency is presumed, then transferee must present evidence to rebut by showing that Debtor was solvent as of date of transfer. Defendant produced two balance sheets generated by Debtor. However, balance sheets were not generated on or proximate to the date of the transfer and sole issue is whether Debtor was solvent on the transfer date. Further, balance sheets were consolidated sheets for multiple related entities, when only the solvency of Debtor is at issue. Finally, assets were valued at “book” value while analysis requires use of actual fair market value measured by price that could actually be achieved if sold in prudent manner within a reasonable time. Book values use costs basis for purposes of depreciation and tax accounting and do not necessarily reflect true value of assets.
- (8545) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Debtor is presumed insolvent where transfer

occurs within 90 days of commencement of case. Perfection of security interest against property of Debtor constitutes transfer as of date of perfection. Where lien was perfected within 90 days, presumption of insolvency arises.

- (8546) *Paris v. Walker*, 2015 WL 5576391 (Bankr. E.D. Tn. 2015) – Rule 59 Motion can be granted only where there was clear error of law, newly discovered evidence, intervening change in controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case or to raise arguments that could have been, but were not, raised before judgment issued. Trustee carried burden of proof on insolvency of Debtor based on Trustee’s affidavit that “As Chapter 7 Trustee, I am familiar with the value of the Debtors’ assets and the extent of their liabilities in May and June, 2013. Based on a review of their records, the petition and my knowledge of the net values of their properties, the Debtors were balance sheet insolvent by at least \$10,000,000 on May 17, 2013. This condition did not change materially from then to the petition date.” Trustee supported allegations with Debtor’s schedules which showed liabilities well in excess of assets, and Debtor’s schedule C which showed that Debtor had no non-exempt assets. While schedules and statement of financial affairs may not be controlling as those do not account for changes in financial affairs between date of allegedly preferential transfer and date of filing, trustee’s affidavit indicated that trustee considered financial affairs and events in addition to schedules and SOFA. Debtor’s responsive affidavit that indicated that one of Debtor’s creditors had potential \$6 million recovery from third party that would reduce Debtor’s total debts, even if true, would not alter conclusion that even if \$6 million claim is eliminated, Debtor is still \$4 million insolvent.
- (8547) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Insolvency for purposes of preferential transfers is “balance sheet” insolvency where liabilities exceed assets. Insolvency is presumed only where transfer is made within 90 days preceding commencement of case. While transfer to insider extends “look back” for one year, it does not carry presumption of insolvency. Complaint that alleged that transfer occurred on January 5, 2012, and that petition was filed on April 30, 2012, did not give rise to presumption of insolvency and request for summary judgment did not include any evidence of insolvency.
- (8548) *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.

14.81 Elements – Timing of Transfer

- (8549) *Tower Credit, Inc. v. Schott*, Case No. 16-30274 (5th Cir. 2017), *petition for certiorari filed*, 2017 WL 4251920 (U.S. 2017) - Funds garnished within 90 days of bankruptcy filing are avoidable as preferences under Section 547 even where Writ of Garnishment was served service of A writ cannot “perfect” creditor’s interest in future income as Section 547(e)(3) requires that Debtor have interest in property before lien can attach. Debtor does not obtain rights in future wages until services have been performed at which point creditors garnishment lien would attach. Lien “attached” within preference period and services were performed within 90 days of bankruptcy petition, Lien is avoidable and transfers are recoverable. Fifth Circuit cited with approval 6th circuit decision in *In re Morehead*, 249 F.3d 445 (6th Cir. 2001) and expressly rejected contrary decisions from 2nd, 7th and 11th Circuits, setting up circuit split and likely request for certiorari.
- (8550) *Spradlin v. Pryor Cashman, PC*, 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Section 547 allows Court to avoid transfers made on or within 90 days before the petition date. Rule 8 requires that pleading to avoid preferential transfer do more than merely plead conclusory elements of transfer in order to allow defendant to formulate answer and assert affirmative defenses. However, it is not necessary to identify each specific transfer that occurred within 90-day preference. As long as complaint contains adequate notice of the name of the transferor, the name of the transferee, the form of the transfers, and the total amount of the alleged preferences. Defendants would be allowed through discovery to obtain any details missing from complaint and to amend answer and affirmative defenses as necessary.
- (8551) *South v. Asset Systems, Inc.*, 2015 WL 1213362 (Bankr. W.D. Wash. 2015) – Garnishment takes effect for preference purposes when writ is served. Writ served on bank 91 days prior to commencement of bankruptcy case but funds actually turned over to creditor only 30 days prior to commencement of case. Because writ became effective on service, garnishment technically occurred 91 days prior to commencement of bankruptcy case placing payment outside the time for an avoidable preferential transfer.
- (8552) *Flooring Systems, Inc. v. Chow*, 2014 WL 4251114 (5th Cir. 2014) – Transfer of funds pursuant State Court appointment of receiver occurs when bank received notice of receivership appointment at which time receiver’s interest in property vested. Transfer is not effective when receivership order is entered because entry of order, without notice to holder of funds, is of no effect.
- (8553) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Transfer of assets pursuant to pre-petition settlement agreement occurred more than 90 days prior to commencement of case. Settlement Agreement that transferred property dated more than 9 months pre-petition. To extent that settlement agreement may have been unclear as to title to assets, any dispute was resolved when State Court entered Judgment declaring that all assets belonged to creditor and Debtor did not have any interest in assets, in judgment dated more than 90 days pre-petition.
- (8554) *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.

14.82 Elements – Timing of Transfer – “Insider”

- (8555) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Action under state statute to avoid preferential transfer is governed

by state statute of limitations, not federal limitations period of Section 547. Ohio law allowing avoidance of preferential transfers has no statute of limitations and so there is no limitation on the “lookback” period for an action under Ohio law.

- (8556) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – Generally, control exercised by secured creditor does not transform creditor into “insider”. To be “insider” party must have a controlling interest in Debtor or must exercise such authority as to dictate corporate policy and disposition of assets. Allegedly superior bargaining position between alleged insider and Debtor in contractual relationship is not sufficient to constitute “insider”. Courts examine whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the Debtor, directed work performance, and directed payment of the Debtor's expense or exercised day-to-day control, rather than some monitoring or exertion of influence regarding financial transactions in which the creditor has a direct stake. Even if the bank requires the Debtor to submit frequent reports on receivables, invoices, and operations, receives all payments on the receivables, has the power to endorse checks, and obtain concessions from the Debtor, the bank is not thereby an insider because there is no control of the day-to-day decision making of the Debtor. A close relationship with an officer or director of the bank is also insufficient to render the bank an insider. Bank was not “insider” where there was no evidence of any joint enterprise, interlocking directorates, or joint ownership. Bank made standard commercial loan to Debtor without involving itself in day to day operations of Debtor. Fact that bank selected the State Court receiver and worked with proposed receiver on terms of receivership order insufficient to hold bank as “insider”, nor do communications between bank and receiver concerning conduct of receivership. Record was devoid of any evidence that bank, as of date of alleged transfer, exercised any control over receiver or Debtor beyond normal involvement in protecting security interest and liquidation of Debtor's assets.
- (8557) *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.

14.83 Elements – Timing of Transfer – Garnishment

- (8558) *Tower Credit v. Schott*, Case No. 16-30274 (5th Cir. 2017), *petition for certiorari pending*, Case No. 17-444 (S. Ct. 2017) – When transfer occurs is matter of federal law. If a lien attaches outside 90-day preference period, fact that creditor actually realizes on lien within 90-day preference period does not make transfer preferential. Transfer occurs under Section 547 when transfer is perfected, such that no third party could obtain better claim to property than that of garnishor, and requires that Debtor have interest in property to which garnishment can attach. Debtor first acquires interest in wages when services are performed for which those wages are to be paid. Wages paid for services rendered within 90 days are recoverable as preferences regardless of when writ of garnishment was served. court rejected 7th Circuit's holding in *In re Coppie*, 728 F.2d 951 (7th Cir. 1984) that service of writ of garnishment “irrevocably transferred” to garnishor Debtor's future wages, as assertion that Debtor's interest transferred at service of writ conflicts with provision of Section 547 that no transfer can occur until Debtor obtains interest in property.

14.84 Elements – Allow Creditor to Recover More Than Hypothetical Chapter 7

- (8559) *Parrish v. Lincoln National Bank*, 2018 WL 2175926 (Bankr. W.D. Ky. 2018) – Debtor must prove that transfer allowed creditor to receive more than creditor would have received in hypothetical Chapter 7 commenced on day of transfer. Creditor held non-avoidable lien on Debtor's automobile worth more than the total amount owed. Lender's exercise of set off against Debtor's account paid lien in full and Lender promptly issued release of lien. Creditor did not receive more than creditor would have received in Chapter 7.
- (8560) *Brown v. Landmark Acceptance Corporation* 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Perfection of previously created security interest in “transfer” for purposes of Section 547. Where debtor purchased automobile and signed note and took delivery of automobile. Security interest became effective even if transfer was conditioned on final loan approval which occurred 16 days later. Subsequent recording of lien related to antecedent debt as Debtor's obligation to make payments arose when he signed note in first instance and lien was recorded 32 days later. Recording of lien on title 32 days after Debtor signed Note and took delivery would allow creditor to receive more than if creditor held unsecured loan as liquidation of estate would into produce 100% repayment to unsecured creditors. Security interest avoidable preference as transfer occurred when lien was perfected and lien was perfected outside of 30 day “grace period” under Section 547.
- (8561) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(b) allows Court to avoid certain prepetition transfers of an interest of Debtor in property in order to foster equality of distribution among creditors and discourage “secret liens”. Transfer of funds from Debtors bank account for loan repayments and creation of security interests constitute “transfers”. Transfers allowed unsecured creditor to obtain more than creditor would have received in Chapter 7 liquidation where there was no conceivable way that Debtor's unsecured creditors would receive 100% distribution and transfers allowed one unsecured creditor to recover some portion of unsecured claim. By definition, payment of unsecured creditors results in distribution in excess of amount which would have been received in Chapter 7 unless Chapter 7 case produces 100% dividend

- (8562) *Tower Credit, Inc. v. Schott*, Case No. 16-30274 (5th Cir. 2017), *petition for certiorari filed*, 2017 WL 4251920 (U.S. 2017) - Funds garnished within 90 days of bankruptcy filing are avoidable as preferences under Section 547 even where Writ of Garnishment was served service of A writ cannot “perfect” creditor’s interest in future income as Section 547(e)(3) requires that Debtor have interest in property before lien can attach. Debtor does not obtain rights in future wages until services have been performed at which point creditors garnishment lien would attach. Lien “attached” when services were performed within preference period. Lien is avoidable and transfers are recoverable. Fifth Circuit cited with approval 6th circuit decision in *In re Morehead*, 249 F.3d 445 (6th Cir. 2001) and expressly rejected contrary decisions from 2nd, 7th and 11th Circuits, setting up circuit split and likely request for certiorari.
- (8563) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – “More than” test requires court to construct hypothetical Chapter 7 case to determine how much creditor would have received in liquidation. In general, when transferee is unsecured creditor, any transfer will meet “more than” standard unless Chapter 87 estate is solvent and can pay all creditors in full. However, where payment is only fraction of what is owed in exchange for release of entire debt, Court must determine whether percentage received by creditor is more or less than would have been paid had transfer not occurred and case liquidated in Chapter 7 on date of transfer. Court had to first determine whether claim would have been capped by Section 502(b)(7). If claim is not capped, amount paid in satisfaction would have been lower percentage than would have been paid in Chapter 7 resulting in payment not being preferential. If the cap applied, however, amount of payment far exceeded distribution on capped claim and payment would be preferential. Claim was capped as Settlement Agreement that generated payment was to settle Debtor’s obligations under Executive Severance Plan (ESP). Under ESP transferee was entitled to certain payments. Settlement Agreement provided that transferee would release claims against Debtor in exchange for immediate payment of lower amount. Transferee’s claim arose from the termination of employment within meaning of Section 502(b)(7). Court was unable to determine actual cap amount where defendant included in calculation certain bonuses to which defendant would not have been entitled as they were not earned as of date of severance and plaintiff failed to present evidence concerning other bonuses to which defendant may have been entitled or whether financial conditions were met to trigger those bonuses. Absent evidence on whether defendant would have been entitled to bonuses and, if so, amount of bonuses, amount of cap could not be determined.
- (8564) *Dymarkowski v. Savage*, 2015 WL 7455630, 541 BR 829 (Bankr. W.D. Ohio 2015), *aff’d*, 2016 WL 7383965 (6th Cir. BAP 2016) – Transfer of title will not be preferential where lender held perfected security interest that was not avoidable, and transfer to lender was in satisfaction of underlying obligation and value of asset transferred did not exceed amount owed. Where perfected lien exceeds value, creditor cannot be deemed to have received more than creditor would have received in Chapter 7. Attorney has retaining lien in property, papers and documents and money coming into attorney’s hands during representation. Attorney did not have perfected retaining lien against automobile where client signed title to vehicle and gave it to attorney to hold as security for payment of attorney fees, and automobile was not involved in and did not constitute proceeds of litigation. Ohio Ethics rules seriously limit retaining lien as ethics rules require that all papers and property must be promptly returned to client and attorney cannot hold lien where doing so requires attorney to violate ethical obligations. Attorney did not have charging lien as vehicle was not proceed of litigation. Even if attorney held charging or retaining lien, lien was not perfected for purposes of Section 544 as state law provided that sole method of perfecting lien in automobile is by recording lien on title and attorney never recorded lien. Retention of title, without recording lien, does not operate to perfect lien. Trustee could avoid transfer of vehicle where although attorney held title for more than 2 years pre-petition, Debtor actually signed over title less than 90 days pre-petition, at which point attorney actually obtained interest in vehicle.
- (8565) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – If creditor is fully secured as of date of transfer, then transfer cannot be preferential as creditor will not have done better than creditor would have done in Chapter 7. If, however, security interest attached for previously unsecured loan within preference period, attachment of lien itself is preferential transfer subject to avoidance.
- (8566) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Payment to creditor who is fully secured is not preference as payment does not allow creditor to receive more than creditor would have received in Chapter 7 proceeding. Creditor did not receive preference by obtaining assignment of Accounts Receivable in which creditor held perfected security interest and value of accounts receivable was less than total owed to creditor, such that liquidation of accounts receivable would not produce a recovery in excess of what creditor would have received in Chapter 7.
- (8567) *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.
- 14.85 Element – Intent
- (8568) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Under Ohio law, party bringing preference action must prove that transferor had “actual intent” to hinder, delay or defraud creditor coupled with knowledge of transferee of transferor’s fraudulent intent.
- 14.86 Setoff as Preference
- (8569) *Berg v. Social Security Administration*, 900 F.3d 864 (9th Cir. 2018) - Debtor may recover setoff under 11 USC Section 553(b)(1) to extent that creditor improved position within 90 days preceding filing of bankruptcy petition, determined by whether insufficiency on setoff date is less than insufficiency on later of (a) 90 days preceding petition date and (b) first date on which there was insufficiency during 90 days immediately preceding petition date. Insufficiency is amount by which creditors claim exceeds amount of debt owed to it. Ninety days before petition date, Debtor was owed disability benefits of \$17,385 and Debtor owed Social Security Administration \$19,400, creating

“insufficiency” of \$2015. SSA exercised right of set off approximately 80 days later at which point Debtor still owed SSA \$19,400 but SSA owed Debtor \$20,307, leaving no insufficiency. SSA improved its position by \$2015 which is amount that can be avoided as preference.

- (8570) *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. 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.
- (8571) *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.

14.87 Defenses – *De Minimis Transfers*

- (8572) *Neal v. Graves-Gilbert Clinic*, 2018 WL 3357403 (Bankr. W.D. Ky. 2018) – Trustee may not avoid transfer in case filed by individual Debtor was debts are primarily consumer debts if aggregate value of all property that constitutes transfer is less than \$600. Total amount of garnished funds was \$634. However, \$133.50 was paid to creditors counsel for reimbursement of fees which are properly deducted from aggregate some garnished. Total funds received by defendant were less than \$600, falling within *de minimis* exception.
- (8573) *Slobodian v. U.S.*, Case No. 15-2833 (3d Cir. 2016) – In commercial cases, de minimis amount below which transfers cannot be avoided is \$5,850.00. Where Debtor made multiple transfers to same creditor, each of which was less than threshold, court can aggregate separate payments to produce total over de minimis amount if separate transfers are transactionally related such that payments are, in effect, a single transfer on account of one debt or are transfers pursuant to a single, common plan. Multiple independently qualifying transfers will not trigger avoidability unless transfers are strategically divided but transactionally related. Transfers by Debtor to IRS for payroll taxes could not be aggregated where transfers were for payments of separate obligations on behalf of separate taxpayers. Debtor operated a payroll management company. Debtor would withdraw sufficient funds from client’s account to pay employee payroll including withholdings for taxes with employees receiving net payments. Debtor would then make payments of withheld amounts to IRS. The payments on behalf of each individual employer were less than threshold, although all payments aggregated would be more. Court held that payments could not be aggregated because there was no transactional relationship and payments were, in fact, on behalf of separate and unrelated clients for payment of each client’s specific liability.
- (8574) *In re Brown*, Case no. 15-44526 (Bankr E.D. Mi. 2015) – Debtor could not recover garnished funds where amount paid to creditor totaled less than \$600.00. Creditor received garnishment payments totaling \$534.99 prior to Debtor filing bankruptcy. One day after petition filed, creditor received a check for \$175.08. Creditor returned the check uncashed to the garnishee. Check received post-petition and not cashed is not a transfer as check was never honored and creditor never received funds. “Transfer” when payment is made by ordinary check occurs when the check is honored, and not before.
- (8575) *Pierce v. Collection Associates, Inc.*, 2015 WL 1003613 (8th Cir. 2015) – Debtor could not recover garnished funds where amount paid to creditor totaled less than \$600.00. Although garnishment caused employer to withhold \$858.98 in wages, when Debtor filed for bankruptcy employer was holding \$296.20 that had not been paid to creditor and was ultimately paid to Debtor. As creditor received less than \$600 creditor could not be compelled to disgorge proceeds.
- (8576) *In re Jacobs*, 2014 WL 8186753 (E.D. Mi. 2014) – Creditor not required to refund to Debtor \$500 garnished from salary within 90 days prepetition. Section 547(c)(8) excepts from preference any transfer that aggregates less than \$600.00.
- (8577) *Sheppard v. Speck*, 2014 WL 6611661 (Bankr. E.D. Mi. 2014) – Whether preferential transfer is within *de minimis* exception depends on amount withheld from Debtor’s income, not amount paid to creditor. Transfer avoidable where amount withheld from income was \$676.98 but employer retained \$80.00 for service fee and paid only \$596.98 to creditor. Total withheld exceeded \$600 rendering *de minimis* exception inapplicable.

- (8578) *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.

14.88 Defenses – Safe Harbor – 547(c)(3)

- (8579) *In re Cheerview Enterprises, Inc.*, Case No. 17-56162 (Bankr. E.D. Mi. 2018) – Debtor’s grant of security interest to creditor is not avoidable preference where security interest was perfected within 30 days after Debtor obtained interest in collateral, even if perfection of security interest is otherwise within preference.. Debtor hired creditor to install equipment on November 6. Creditor installed equipment on November 7 and filed you CC one financing statement on November 21, well within 30 day safe harbor of Section 547(c)(3)(B).
- (8580) *Brown v. Landmark Acceptance Corporation* 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Section 547(c)(3) provides that the trustee may not avoid a transfer that creates a security interest in property acquired by the debtor: (A) to the extent such security interest secures new value that was—(i) given at or after the signing of a security agreement that contains a description of such property as collateral; (ii) given by or on behalf of the secured party under such agreement (iii) given to enable the debtor to acquire such property; and (iv) in fact used by the debtor to acquire such property; and (B) that is perfected on or before 30 days after the debtor receives possession of such property. Section 547(c)(3) did not prevent avoidance of lien where debtor received possession of vehicle more than thirty days before creditor perfected its security interest. Time for recording is tied to time when debtor received possession of the property, not when debtor received title. Fact that creditor considered delivery to be “conditional” was irrelevant as statute looks only to date on which debtor obtained possession.
- (8581) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(b) allows Court to avoid certain prepetition transfers of an interest of Debtor in property in order to foster equality of distribution among creditors and discourage “secret liens”. Transfer of funds from Debtors bank account for loan repayments and creation of security interests constitute “transfers”. Avoidance of preferential transfer requires proof that transfer was made to or for the benefit of a creditor; transfer made on account of antecedent debt; transfer made while Debtor was insolvent; transfer made on or within 90 days before the date of the filing of the petition or between 90 days and one year if the creditor was an “insider”; and transfer must enable creditor to receive more than creditor would have received in Chapter 7. Determining whether transfer of security interest is on account of antecedent debt depends on when transfer is perfected. If transfer is perfected within 30 days of the grant of the security interest, perfection dates back to the date of the grant of the security interest. If perfection occurs more than 30 days after grant of security interest, transfer takes effect upon perfection. Although security agreement was signed in May, security agreement was perfected in October as to loan advance which took place less than 30 days prior to recording. Debt is incurred at time lender disburses proceeds. Security agreement recorded within 30 days of the transfer of the proceeds dated back to the date of the disbursement rendering security interest not avoidable as to that loan advance. To the extent that other loan advances occurred more than 30 days prior to recording, the security agreement was not perfected as to those transfers until actual recording date which was less than 90 days prior to commencement of the case and did not constitute a contemporaneous transaction.
- (8582) *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.

14.89 Defenses – Not Primarily Consumer Debts – 547(c)(9)

- (8583) *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 priced, 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.

14.90 Defenses – Earmarking

- (8584) *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.

- (8585) *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.
- (8586) *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.
- (8587) *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.
- (8588) *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.
- (8589) *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).
- (8590) *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 distribute the funds was avoidable preferential transfer under section 547.

14.91 Defenses – Administrative Expenses

- (8591) *Official Committee v. Tyson Foods, LLC*, Case No. 15-50254 (Bankr. D. Del. 2016) – Creditor who supplied goods and services to Debtor post-petition had administrative claim in administratively insolvent estate. Creditor permitted to offset unpaid administrative claim against alleged pre-petition preferential payments. While Section 502(d) prohibits setoff until preference is repaid, administrative expense is not a "claim" and as such administrative expenses are not subject to limitation of Section 502(d).
- (8592) *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.

14.92 Defenses – Payments for Fines and Penalties

- (8593) *Newton v. Metal Craft Fabrication & Sale, LLC*, 2018 WL 671109 (Bankr. E.D. Tn. 2018) – Trustee cannot avoid otherwise preferential transfer if transfer was intended by debtor and creditor as contemporaneous exchange for new value and is in fact substantially contemporaneous. New value is defined as money or money's worth in goods, services or new credit or release by transferee of property that itself is not voidable but does not include one obligation substituted for another. Debtor embezzled over \$120,000 from her employer. As part of criminal plea agreement, Debtor was required to pay restitution. Within 90 days pre-petition, debtor repaid \$70,00.00. Restitution

payments are avoidable as preferences. Avoidance of incarceration is not “new value” as it is not money or money’s worth. Estate was depleted by transfer and if transfer is not avoided, unsecured creditors bear burden of criminal behavior and preferential payments did nothing to add financial value back to estate.

- (8594) *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.

14.93 Defenses – Contemporaneous Exchange of Value

- (8595) *Dery v. Karafa*, 2018 WL 1913768 (Bankr. E.D. Mi. 2018) – Trustee cannot avoid transfer (A) intended by debtor and creditor to be contemporaneous exchange for new value given to debtor; (B) that was substantially contemporaneous exchange. Contemporaneousness requires temporal proximity between new value and transfer. If “new value” is services “new value” is given on date(s) the services were performed; and services must have monetary value in form of direct or indirect economic benefit to Debtor viewed from perspective of Debtor's creditors that (1) brought in money to Debtor or estate; (2) saved Debtor or bankruptcy estate expense; or (3) reduced or eliminated or avoided liability of Debtor or bankruptcy estate. Defense is limited to amount of new value given. Defendants not entitled to presumption that services performed were equal to value received by Debtor. Terms of agreement may provide some evidence of value of services which will be considered with all other relevant evidence, particularly where transferees were also insiders. Evidence did not support finding that payments were intended to be contemporaneous exchanges for new value. Consulting Agreements required each of the Defendants to be paid a regular weekly salary and regular benefits in same specific amounts for each week and for each month at regular weekly intervals but did not require either Defendant to perform any particular services at any particular time and potentially perform no services. Consulting Agreements did not require Defendants to work full time the Debtor; expressly allowed the Defendants to engage in other business ventures; and stated that each Defendant was independent contractor only required to devote such time as necessary to perform duties and responsibilities hereunder without any specific definition of duties and responsibilities. Defendants also did not prove that transfers were in fact contemporaneous where Defendants each failed to prove what services were performed during week to which transfer related or any other time temporarily proximate to date of transfer; and did not prove amount of value, if any, of any services.
- (8596) *Camfoi Master LDC v. Spradlin*, 2017 WL 4478332 (Bankr. E.D. Ky. 2017) – Contemporaneous exchange defense under Section 547(c)(1) protects transfers that are intended to be contemporaneous; are actually contemporaneous; and Debtor received new value. Agreement to repay loan at later date means transfer is not intended as contemporaneous. Pre-petition and post-petition transfers that were repayments on short-term loans are not, by definition, contemporaneous exchanges for new value.
- (8597) *Brown v. Landmark Acceptance Corporation*, 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – Section 547(c)(1) prevents Trustee from avoiding transfer that was intended by debtor and creditor to be contemporaneous exchange and transfer was in fact substantially contemporaneous. Delayed perfection of security interest is not contemporaneous exchange for new value as debtor did not receive any additional or new value when line was recorded. Debtor obtained value when he purchased car 32 days prior to recording of security interest on automobile title.
- (8598) *Moyer v. Fabrizio & Brook*, 2016 WL 6091515 (Bankr. W.D. Mi. 2016) – Party seeking to establish contemporaneous exchange defense needs to establish that parties intended exchange to be contemporaneous and exchange was, in fact substantially contemporaneous. Debtor's son held lien on Debtor's motor vehicle. Debtor contacted her son and advised that she was attempting to sell the vehicle. Son retrieved the title and signed of release the lien but held the original title in his possession. About 6 weeks later, Debtor found buyer, at which time Son sent he title to Debtor to deliver to the buyer. Debtor delivered the title, received payment of the proceeds, and promptly transferred the proceeds of son in repayment of his loan. Transfer was intended to be contemporaneous as son and Debtor intended lien to be released when Debtor paid son, and transfer was in fact contemporaneous as son mailed the title to Debtor within days of receiving payment. Fact that son had executed title release some weeks earlier did not affect transfer as son held the title and did not deliver it to Debtor until Debtor was ready to consummate sale. Son's retention of title prevented transfer and delayed effectiveness of release. Under Michigan law, where secured party is in possession of title, lien release is accomplished only by execution of termination statement coupled with mailing or delivery of title to owner. Son effectively preserved security interest by retaining title and did not intend signature to become effective until payment was received. Release of valid lien constitutes “new value” for purposes of contemporaneous exchange.
- (8599) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – New value defense requires that payment be intended by parties as contemporaneous exchange for new value given to Debtor and transfer was in fact substantially contemporaneous. “New value” does not consist of release of pre-existing obligation. Acceptance of only portion of debt in satisfaction of entire debt did not meet requirement for money or money's worth in goods, or services or new credit. New value as defined in Section 547 specifically states that release of pre-existing obligation is not “new value. Any contract rights of Debtor were created when agreements were entered into, and later release of those agreements did not transfer anything to Debtor or convey to Debtor any property rights.
- (8600) *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.

- (8601) *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.

14.94 Defenses – New Value

- (8602) *Kaye v. Blue Bell Crameries, Inc.*, Case No. 17-13588 (11th Cir. 2018) – “New value” defense to preferential transfer does not require that new value remain unpaid as of petition date. Repayment of credit extended as “new value” for preferential transfer does not eliminate new value exception as long as repayments on extended credit are not themselves unavoidable transfers other than as “new value”, such as contemporaneous exchange for value or payments on ordinary business terms. Creditor sold products to Debtor on terms which parties admitted were not “ordinary course”. In exchange for extension of new credit, Debtor repaid creditor for prior credit transactions. Each time Debtor made payment on prior credit balances, creditor extended additional value by shipping additional new product. Debtor repaid all additional extensions of credit before filing Chapter 11 proceeding. Repayments by Debtor on “new value” extensions of credit work, themselves, unavoidable transfers, occurring within 90 days of commencement of case and not within any exception to preference other than “new value” exception. Payment of credit extended as “new value” does not eliminate availability of “new value” defense to preference action.

- (8603) *Dery v. Karafa*, 2018 WL 1913768 (Bankr. E.D. Mi. 2018) – Trustee cannot avoid transfer to extent transferee provided new value in exchange for transfer. Services performed after commencement of Bankruptcy Case are not “new value” for purposes of pre-petition payments. Where new value consists of continuing to perform services, Defendant has burden to prove that services were performed after and as result of prior payments and the “new value” in monetary equivalent of those services. “New value” requires that services produce direct or indirect economic benefit to Debtor viewed from perspective of Debtor’s creditors by (1) bringing in money to Debtor or bankruptcy estate; (2) saving Debtor or estate expense; or (3) reducing or eliminating or avoiding liability of Debtor or estate. Defendant

must prove value of “new value” with specificity. Contract price does not create presumption of value of subsequent services but is one piece of evidence that Court may consider. Contract price not given any weight where there was no evidence that amounts represented fair market value of services to be provided. Amounts were simply identical to salary amounts that Defendants had been receiving before company closed, employees were terminated; company had no business to operate; and company was preparing to file Chapter 7 bankruptcy. Defendants’ services during the time business operated were quite different from Defendants’ wind-down services under the Consulting Agreements.

- (8604) *Newton v. Metal Craft Fabrication & Sale, LLC*, 2018 WL 671109 (Bankr. E.D. Tn. 2018) – Trustee cannot avoid otherwise preferential transfer if transfer was intended by debtor and creditor as contemporaneous exchange for new value and is in fact substantially contemporaneous. New value is defined as money or money’s worth in goods, services or new credit or release by transferee of property that itself is not voidable but does not include one obligation substituted for another. Debtor embezzled over \$120,000 from her employer. As part of criminal plea agreement, Debtor was required to pay restitution. Within 90 days pre-petition, debtor repaid \$70,000.00. Restitution payments are avoidable as preferences. Avoidance of incarceration is not “new value” as it is not money or money’s worth. Estate was depleted by transfer and if transfer is not avoided, unsecured creditors bear burden of criminal behavior and preferential payments did nothing to add financial value back to estate.
- (8605) *Camfoi Master LDC v. Spradlin*, 2017 WL 4478332 (Bankr. E.D. Ky. 2017) – “New value” defense under Section 547(c)(4) applies where borrower prepays loan and creditor, based on repayment, extends new financing or new credit. Defense applies to extent of new financing or new credit made available. Parties agreed that in exchange for \$65,000 loan repayment, creditor made new loan of \$25,000. New value defense applied to extent of \$25,000, leaving \$40,000 as potentially preferential transfer.
- (8606) *Levin v. Verizon Business Global, LLC*, Case No. 16-1940 (7th Cir. 2017) – New Value defense of Section 547(c)(4) excepts from recovery otherwise preferential transfers where creditor receiving transfer extends additional “new value” in exchange for transfer. Creditor continued to provide services (bulk cell phone system access) during preference period while receiving payments from Debtor for previously provided services. Court determined value of “new services” provided during preference period by averaging monthly service charges to determine per diem average amount and then applied that per diem average amount to determine extent of value provided after date of payment. Creditor invoiced services only on monthly basis and payment to creditor occurred in middle of month, leaving Court to fashion some way to determine how much of monthly bill was attributable to period before preferential payment (and could not constitute new value) versus value of services provided after payment date.
- (8607) *Unsecured Creditors Committee v. Jason’s Foods, Inc.*, Case No. 15-2356 (7th Cir. 2016) – New value defense exists when, after receiving otherwise preferential payment, creditor extends additional credit to Debtor in form of additional goods, services or money. Seller of products to Debtor received payments and thereafter provided additional goods for which vendor was not paid and which had value in excess of amount of alleged preferential payments. Vendor provided new value after receiving otherwise avoidable payments, sufficient to qualify for “new value” defense.
- (8608) *In re LGI Energy Solutions, Inc.*, Case No. 12-3899 (8th Cir. 2014) – New value can be in form of services provided by recipient of allegedly fraudulent transfer to third party to whom Debtor is also indebted. Debtor was a utility payment processing company. Utilities would provide services to Debtor’s customers and send invoices to Debtor. Debtor would accumulate invoices and send a single invoice to its customer who would then pay Debtor the amount invoiced. Debtor would, in turn, pay the utility bills of the customers, allowing customers

to continue to receive services. Trustee sued customers as the beneficiaries of the preferential transfers. Future utility services after the date of payments constituted new value for transfers, although new value was not provided to Debtor but to third parties. Preferential transfers by Debtor to utility companies were for benefit of customers who contracted with Debtor for that service. New value provided to third party avoided inequitable result of third party customers having to pay twice while unfairly enriching estate.

- (8609) *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.
- (8610) *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 as 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.

14.95 Defenses – Liquidation Amount in Chapter 7

- (8611) *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.
- (8612) *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.
- (8613) *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.

14.96 Defenses – Ordinary Course of Business

- (8614) *Gardner v. Recovery Services International, Inc.*, 2018 WL 3059907 (Bankr. E.D. Ky. 2018) – Payment by Debtor to disability insurance carrier constituted payment in ordinary course of business. Debtor received benefits from disability carrier pending award of Social Security Disability, with requirement that Debtor reimburse disability carrier if SSD payment resulted in overpayment on disability policy. Debtor advised disability carrier of amount of SSD benefits and carrier determined that benefit resulted in overpayment on disability policy. Debtor mailed payment to disability carrier for amount of overpayment. 18 days later, Debtor filed for relief under Chapter 7. Payment by Debtor to disability carrier resulted from usual business between insured and insurer pursuant to contract and was incurred according to specific language of insurance policy and payment complied with policy. Payment was ordinary in relation to other business dealings between Debtor and carrier. Fact that payment was a one time or first-time transaction does not automatically exclude payment from ordinary course where timing, amount and manner of payment and circumstances surrounding payment indicated that payment was ordinary course. Payment made according to ordinary business terms where disability carrier showed that payment comported with standard conduct in industry as insurers generally do not permit double recovery and routinely recover overpayments.
- (8615) *Simon v. Short*, 2018 WL 3004641, *reh'g denied*, (Bankr. E.D. Mi. 2018) - Ordinary course of business defense prevents recovery of transformation ordinary course of business or financial affairs of Debtor and transferee; or made according to ordinary business terms. Purpose is to protect recurring, customary credit transactions which are incurred and paid ordinary course of business and to leave undisturbed

normal financial relations. Debts must first have been incurred in routine operations of Debtor and creditor. Although defendant and other principles of Debtor routinely made loans to and received payments from Debtor, terms and conditions of loans varied but always involved exchange of promissory note. However, loan by defendant was “handshake” because Debtor had severe cash flow crunch and was about to bounce checks. Loan was only loan between Debtor and defendant that did not include exchange of promissory note; loan was to be repaid with specific funds expected to be received by hospital from insurance companies; and loan was interest-free. Second element of defense focuses on payment by Debtor to defendant to determine whether payment was made according to ordinary business terms between Debtor and defendant. Issues focus on changes in timing of payments; changing method of payment; unusual collection activity; and unusual amounts of payments. Court must look at payments made in preferential. And compare them to pass practice. Defendant did not present evidence of parties past practice with respect to terms of repayments and did not link any repayment to any particular loan, but instead consisted of list of loans by date issued and separate list of repayments by repayment date without any correlation between loans and payments. Court could not determine average timeframe for repayment or any terms of repayment. Factors supporting defense included fact that there was no substantial change in method of payment as all prior loan repayments were made by check and there was no evidence of unusual collection activity during preference period. However, absent further evidence concerning terms of repayment, defendant did not sustain defense of ordinary course.

- (8616) *Prudential Real Estate & Relocation Services, Inc. v. Burtch*, Case No. 17-1794 (3d Cir. 2018) – “Ordinary Course of Business” exception requires that payments be made either in the ordinary course of business between Debtor and Creditor; or made according to ordinary business terms. Payments by Debtor to creditor within preference. Were made within normal range of payments from Debtor to creditor and consistent with agreed-upon payments between Debtor and Creditor. However, Debtor accelerated the frequency of payments after creditor delivered ultimatum of sort that had never occurred before preference. And occurred only after creditor became aware of Debtor’s financial troubles. Further, payment amount was significantly different from original credit terms, although was consistent with amount of earlier work out. “New and unusual collection efforts during the preference period, taken as a whole” coupled with creditor’s aggressive conduct in the preference period deviated from parties ordinary course business practices.
- (8617) *Dery v. Karafa*, 2018 WL 1913768 (Bankr. E.D. Mi. 2018) – Section 547 excepts from recovery transfer made in ordinary course of business or financial affairs of Debtor and transferee. Transfer must be either (a) payment made in ordinary course of business of debtor and transferee; or made according to ordinary business terms. Purpose is to leave undisturbed normal financial relations between debtor and creditors and protects recurring, customary credit transactions that incurred and paid in ordinary course of business of debtor and transferee. Transfers solely for benefit of insider is not ordinary course of business. Consulting agreements by which Defendants became “consultants” were executed when Defendants were also Debtor’s president, COO and Treasurer and were “insiders” of Debtor. Agreements were signed when Debtor was in distressed financial condition and was imminent danger of closing. Purpose was to induce insiders to remain with Debtor to wind down business. Payments to Defendants were not “ordinary course of business” but were instead to insiders as part of closing of business.
- (8618) *Camfoi Master LDC v. Spradlin*, 2017 WL 4478332 (Bankr. E.D. Ky. 2017) – Ordinary Course of Business defense under Section 547(c)(2) applies where transfer was in payment of debt incurred by Debtor in ordinary course of business or was repayment of debt according to ordinary business terms. Defendant could not prove that we payments were in ordinary course of business of Debtor or made according to ordinary business terms where defendant was contractor that does not routinely make loans or provide short-term financing; and for prepetition loans did not create sufficient pattern to demonstrate that short-term lending was in ordinary course of Debtor’s business.
- (8619) *Williams v. McNabb*, 567 BR 326 (Bankr. W.D. Tn. 2017) – Section 547(c)(2) provides that Trustee may not avoid otherwise avoidable preferential transfer if transfer was payment of debt incurred by Debtor in ordinary course of business or made according to ordinary business terms. Section 547(c)(2) operates in disjunctive, such that transfer is not avoidable if transfer was made either in ordinary course of business of debtor and creditor; or was made according to ordinary business terms. Party seeking to invoke exception 547(c)(2)(A) must prove both the debt and the payment occurred in the ordinary course, focusing on factors including timing, amount and manner of transfer, and circumstances under which transfer was made and requires proof only that neither Debtor nor creditor did anything abnormal to gain advantage. First time transactions between parties may be excepted where transaction would not be out of ordinary for person in borrower’s position. Mere existence of family relationship will not establish ordinary course of business and may suggest motivation for loans outside ordinary course of business, requiring lender to produce evidence that he extended credit within ordinary course of his own business or financial affairs. Fact that defendant is not in business of lending money can serve as evidence that that was not incurred in ordinary course of business and fact that loan between family members is interest free also weighs in favor of finding that transfer is not ordinary course of business. Evidence did not support finding that loans from Debtor’s mother to Debtor were incurred in ordinary course of business of either Debtor or Debtor’s mother. While Debtor testified that ordinary way of doing business was to pay lien holders when crops were harvested, defendant did not present any evidence that ordinary course of business included obtaining interest-free crop financing loans, and Debtor’s mother acknowledged that she was not in business of lending money to anyone. Defendant also failed to present evidence sufficient to establish that payments were made according to ordinary business terms as required by 547(c)(2)(B) where defendant did not present any evidence of standard business conduct within crop financing industry and crop financing is rarely, if ever, provided on interest-free terms. Transfer of security interest is not constitute “payment of a debt” such that granting of security interest cannot fall within scope of Section 547(c)(2).
- (8620) *Unsecured Creditors Committee v. Jason’s Foods, Inc.*, Case No. 15-2356 (7th Cir. 2016) – Payments that otherwise meet definition of preferential will be excluded from recovery if payments are made either (a) in the ordinary course of business or financial affairs of the Debtor and transferee (the “subjective ordinary course defense”); or (b) are made according to ordinary business terms (the “objective ordinary course defense”). In applying the subjective test, court must first establish historical period over which business terms are to be determined, which should include the period before, and preferably well before, the start of the preference period, so that baseline reflects practices established before onset of financial difficulties of Debtor. Court established historical time period from start of business relationship to 6 months pre-petition, at which point Debtor’s financial condition deteriorated and Debtor began paying invoices at later and

later times. Once time period is determined, court must determine baseline payment terms using either “average-lateness” method by which court determines average number of days by which payments were late during historical period to establish range of “normal” payments; or “total-range” method which uses minimum and maximum age ranges of all invoices over historical period. Total-range method is more complete but average-range eliminates “outliers” invoices that may have been paid much longer than the norm. Court chose “average-range” method to conclude that average invoice was paid 22 days late. Court when allowed 6 days on either side to conclude that invoices paid within 16-28 days would be “ordinary”. On appeal, Seventh Circuit held that methodology was correct but 6 day range was too narrow. Using 6 days plus-or-minus would sweep in 64% of the invoices, while using an additional 2 days on either side – 14-30 days – would sweep in 88% of all invoices. As purpose is to determine “normal” course, using methodology that swept in substantial percentage of invoices while not unreasonably extending the adjustment would be preferable and better reflect parties’ practices. Court held that 9 of 11 invoices would be included if period ran 14-31 days and that best reflected practices of parties. Only two invoices, one 37 days late and one 38 days late, were so far outside the historical majority payments periods as to be outside ordinary course of business of parties.

- (8621) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – Ordinary course of business defense requires that transfer was in normal course of business of transferee and Debtor; and that transfer was either (i) in normal course of business of Debtor and transferee or (ii) made according to ordinary business terms. If debts were incurred in routine operations of Debtor and transferee, then debts are ordinary course. Payment is not in the ordinary course where payment is extraordinary, one-time payment rather than payment on recurring, customary credit transactions which are incurred and paid no ordinary basis. Although Debtor was engaging in settlement discussions with other former employees concerning severance rights, discussions with transferee were unique and were different than severance related discussions with other employees, as transferee was asked to, and did, accept a settlement for far less than amount stated in original severance agreement, and compromise amount between Debtor and transferee was far greater percentage than reached between Debtor and other former employees. Transfer was also made at time when Debtor was experiencing serious financial distress and had hired financial turnaround manager to explore drastic alternative ways to deal with financial problems. Agreement itself recited unusual and extraordinary conditions leading to execution of agreement defeating claim that agreement was in ordinary course of business.
- (8622) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Salary of corporate officer paid by related company can constitute ordinary course of business of corporation making payment where the corporations were closely related and routinely paid salary for the principal. Factual issues remained concerning timing and method of payment that precluded summary judgment.
- (8623) *The Flower Factory, Inc., v. Magic Creations, Inc.*, 2014 WL 271651 (Bankr. N.D. Ohio 2014) – Payment is in the ordinary course of business where the payment is in the ordinary course of business of the Debtor and transferee; or made according to ordinary business terms. Payment is on account of “antecedent debt” where debt was incurred before the payment in question. Court must examine history of transactions between parties including timing of payments, amount at issue and circumstances of transaction. Payments were not in ordinary course where Debtor was historically “slow” to pay, averaging more than 107 days while terms were “net 30”. Payment at issue was made substantially shorter than normal, with two-thirds of the balance paid within 35 days and the entire balance paid in 54 days, or roughly half the time of the normal payments, indicating that these payments were not “ordinary”. Payments were also abnormally large when compared to historic payments. Defendant failed to produce evidence of normal terms in the industry. Defendant provided only anecdotal statements about payments in the industry, with no specifics. Statements were made in a vacuum with no effort to connect payments to specific industry or to establish that Debtor operated on same terms as retailers such as Wal-Mart.
- (8624) *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.
- (8625) *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 or 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.
- (8626) *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.

- (8627) *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.
- (8628) *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.
- (8629) *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.
- (8630) *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.

14.97 Defenses – Short Term Loans or Equity Contributions

- (8631) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Whether payments by Debtor to shareholder were repayments of short term loans consistent with ordinary course of business depended on whether advances by shareholder in first instance were intended as short term loans or were intended as equity contributions. If advances were short term loans, then repayment was in ordinary course of business. If advances were capital contributions, then repayment is not in ordinary course. Whether advance is short term loan or equity contribution depends on whether there is a written note or instrument of indebtedness and, if so, the name used in the document; presence or absence of a fixed maturity date and payment schedule; presence or absence of fixed rate of interest and schedule of interest payments; whether advance are to be repaid solely based on success of business, which indicated equity, or whether repayment is required independent of business success; whether the corporation was adequately capitalized at time of advances; the relationship between the creditor and the entity and whether the advance was made in proportion to ownership interests; whether the creditor received any security for the advances; the corporation’s ability to obtain outside financing; whether the advances were subordinated to claims of outside creditors; extent to which advances were used to acquire capital assets, which indicated equity, or to pay ongoing business obligations, more consistent with debt; and whether the borrower instituted a sinking fund for repayment. Questions presented inherent factual issues precluding summary judgment.
- (8632) *Sweet v. Rumbold & Family, LLC*, Case No 14-3085 (Bankr. E.D. Mi. 2015) – Whether payments by Debtor to shareholder were repayments of short term loans consistent with ordinary course of business depended on whether advances by shareholder in first instance were intended as short term loans or were intended as equity contributions. If advances were short term loans, then repayment was in ordinary course of business. If advances were capital contributions, then repayment is not in ordinary course. Whether advance is short term loan or equity contribution depends on whether there is a written note or instrument of indebtedness and, if so, the name used in the document; presence or absence of a fixed maturity date and payment schedule; presence or absence of fixed rate of interest and schedule of interest payments; whether advance are to be repaid solely based on success of business, which indicated equity, or whether repayment is required independent of business success; whether the corporation was adequately capitalized at time of advances; the relationship between the creditor and the entity and whether the advance was made in proportion to ownership interests; whether the creditor received any security for the advances; the corporation’s ability to obtain outside financing; whether the advances were subordinated to claims of outside creditors; extent to which advances were used to acquire capital assets, which indicated equity, or to pay ongoing business obligations, more consistent with debt; and whether the borrower instituted a sinking fund for repayment. Questions presented inherent factual issues precluding summary judgment.

14.98 Defenses – Constructive Notice

- (8633) *Corzin v. DiGiammarino*, 2016 WL 6068815 (Bankr. N.D. Ohio 2016) – Under Ohio law, party bringing preference action must prove that transferor had “actual intent” to hinder, delay or defraud creditor coupled with knowledge of transferee of transferor’s fraudulent intent. Constructive notice is not sufficient and normal cash payments to creditors are not preferential.
- (8634) *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.

14.99 Defenses – Duly Conducted Foreclosure Sale

- (8635) *Veltre v. Fifth Third Bank*, Case No. 16-2213 (Bank. W.D. Pa. 2017) - Regularly conducted foreclosure sale cannot be preferential as matter of law, even where mortgage holder acquired property with substantial equity in satisfaction of antecedent debt, and lender received far more than lender would have received had Debtor filed for Chapter 7 as Trustee would have sold property and paid secured creditor in full but preserved equity for benefit of unsecured creditors rather than allowing equity to be acquired by antecedent secured creditor. Court relied on *BFP v. Resolution Trust Company*, in which Supreme Court held that regularly conducted foreclosure sale could not be fraudulent transfer as matter of law as satisfaction of antecedent debt is “reasonably equivalent value”.

14.100 Defenses – Payment of Domestic Support Obligation

- (8636) *Halbert v. Dimas*, Case No. 16-0479 Bankr. E.D. Il. 2017) – Debt owed to governmental agency resulting from overpayment of funds paid for purposes of allowing Debtor to purchase food for support of herself and two minor children is not “Domestic Support Obligation”. Debt is simply debt for return of benefits that should never have been paid. Governmental Unit that seized Debtor’s tax refund within 90 days pre-petition not protected by exclusion in Section 547(c) that insulates bona fide payments or transfers that are in nature of support (including benefits paid by governmental agency) and paid to spouse, former spouse or child.

14.101 Statute of Limitations

- (8637) *Tow v. Bulman*, Case No. 15-3179 (Bankr. S.D. Tx. 2017) – Statute of Limitations under Section 546 for any action under Section 544, Section 547 and Section 548 must be brought within one year of conversion of case from Chapter 11 to Chapter 7. Although initial complaint was timely filed, amended complaint that sought to identify additional defendants was filed 14 months after limitations period had expired. Motion to Amend Complaint denied as futile where proposed action against additional defendants is barred by statute of limitations. Statute of Limitations under Section 546 is an affirmative defense subject to equitable tolling, estoppel and waiver. Equitable tolling is applied when a defendant actively or passively conceals facts to prevent Trustee from identifying defendant’s identity, or when Trustee is delayed by extraordinary circumstances. Trustee must demonstrate that despite exercising diligence, he could not have discovered identity of defendants prior to expiration of limitation period. Although identity of ultimate recipient of dividend payments from Debtor was difficult to determine where dividend payments pass through at least 3 intermediaries, nothing was extraordinary and legal title to vast majority of equity securities was held by publicly known brokerage company. Alleged delays in responding to discovery by various intermediaries does not constitute extraordinary circumstance where ordinary discovery disputes took place well before statute of limitations expired and plaintiff failed to exercise full extent of discovery rights or seek any assistance of Court in obtaining discovery. Plaintiff’s inability to discover identity of potential defendants was not result of any concealment by proposed defendants or any extraordinary circumstances which would have prevented plaintiff from discovering identity of additional defendants

14.102 Particular Transfers – Tax Sales

- (8638) *Hackler v. Arianna Holdings Co., LLC*, Case No. 16-1881 (Bankr. D. N.J. 2017), *aff’d*, Case No. 17-6589 (D.N.J. 2018) – Post-petition tax sale can be set aside as preferential where value of property exceeds amount owed for taxes. Property was valued at \$335,000, with no mortgage but subject to taxes of \$45,000 and judgment liens of \$90,000.00. Entity holding tax liens foreclosed liens and purchased property at foreclosure sale for amount owing on taxes. Debtors filed for Chapter 13 less than 90 days later. Creditor acknowledged that sale was for pre-petition debt and that sale allowed Creditor to recover property worth far more than amount of debt owed. *BFP v. Resolution Trust* did not control outcome because policy concerns for mortgage foreclosures differed from tax sales and preference period did not create additional cloud on title as State law allowed 90 days for party to redeem property, same time period as covered by preference period.

14.103 Particular Transactions – Avoidable

- (8639) *Luper v. Valueland Auto Sales, Inc.*, 2017 WL 7912003 (Bankr. S.D. Ohio 2017) - Section 547 allows Chapter 7 Trustee to avoid transfer of the Debtor’s interest in property under certain circumstances. Debtor transferred interest in property by creating security interest in automobile. Security interest arose when parties executed Purchase Contract which contained grant of security interest; seller gave value by agreeing to sell vehicle to Debtor; and Debtor acquired rights in vehicle upon taking possession. Security interest is deemed perfected as of moment when security interest arises if perfected within 30 days after the creation of the security interest. If security interest is not perfected within 30 days, security interest is perfected on date of perfection. Lien was not recorded on Certificate of Title until 34 days after Debtor acquired vehicle resulted in lien being unperfected on petition date. Security interest would result in creditor receiving more than creditor would have received as a general unsecured creditor where chapter 7 estate is not able to pay a 100% dividend to general unsecured creditors. Transfer of unperfected security interest occurring less than 90 days prior to commencement of the case is avoidable under Section 547
- (8640) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under Section 522(h) where the Debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor’ claimed garnished funds as

exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547. Creditor could not avoid recovery by alleging that debts were result of willful and malicious conduct where creditor did not file action to except debt from discharge and discharge had been entered

- (8641) *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.
- (8642) *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.
- (8643) *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.
- (8644) *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.
- (8645) *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.
- (8646) *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.
- (8647) *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.

14.104 Particular Transfers – Not Avoidable

- (8648) *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 did not 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.
- (8649) *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.
- (8650) *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.
- (8651) *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 from, 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.

- (8652) *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.
- (8653) *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.
- (8654) *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.

14.105 Claim Following Avoidance of Transfer

- (8655) *In re Book*, 2015 WL 6153695 (Bankr. N.D. Ohio 2015) – Section 502(h) allows party against whom trustee prevailed in action to avoid transfer to file a claim against estate. Damages are measured by amount of loss to creditor as result of avoidance. Prior to commencement of case, co-owner purchased Debtor's one-half interest in property for \$35,000 but did not record deed. Co-owner recorded deed 6 years later and only one month before Debtor filed bankruptcy. Transfer was effective as to the estate on date deed was recorded, transfer was made as result of payment by co-owner years earlier that resulted in liability of Debtor until deed transferred, and co-owner did not pay any consideration at time of transfer, allowing transfer to be avoided as preference. Co-owner settled with Trustee by purchasing Debtor's one-half interest for \$30,000, and then file claim for \$35,000 the amount originally paid by co-owner. Court concluded that creditor's damages were measured by the amount paid as a result of the preference, which was \$30,000.00.

E. Post-Petition Transfers – Section 549

14.106 Elements

- (8656) *Eisenberg v. Toledo-Lucas County Port Authority*, 2018 WL 2094300 (Bankr. N.D. Ohio 2018) – Section 549 allows avoidance of any transfer of property of estate that occurs after commencement of case and that is not authorized by Code or Court. Post-petition transfers made pursuant to Cash Collateral Orders are not avoidable where Cash Collateral Order was entered after providing adequate notice to parties in interest.
- (8657) *McKinstry v. B&H Contractors, LLC*, 2017 WL 4564693 (Bankr. E.D. Ky. 2017) – Post-petition financing other than unsecured credit incurred in ordinary course of business under Section 364 must be authorized under Section 364. Creditor not entitled to repayment of post-petition loans given without authorization, even where creditor was unaware of bankruptcy filing when funds were advanced. Creditor must return to Debtor the payments received post-petition in repayment of these post-petition loans under Section 549(a)(2)(B) as loans were not authorized by Court in first instance. Creditor did not demonstrate that financing was in ordinary course of business. "Horizontal test" requires comparison of Debtor's business to other businesses in Debtor's industry to determine whether conduct is typical for Debtor's trade. Defendant offered no evidence that other restaurants in Debtor's position would engage in similar transfers as part of day-to-day operations

where evidence did not include any industry standards or customs regarding short-term financing. “Vertical test” examines transactions to determine whether creditors are subject to economic risks of different nature than those contemplated when credit was extended in first instance. Irregularities in lending and repayment arrangements, problems with Debtor’s management, and ultimate appointment of Chapter 11 Trustee presented economic risks that were not consistent with past risks and business practices. Financing was jumble of loans and payments from and to multiple parties with irregular repayments and repayments by one borrower for loans extended to second borrower.

- (8658) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Section 549 allows the court to avoid a transfer of property of the estate that occurs after commencement of case and is not authorized by the Court or the Code. Avoidance requires (i) that property of the bankruptcy estate must have been transferred; (ii) the transfer must have occurred after commencement of the case; and (iii) the transfer must not have been otherwise authorized by the court or the Bankruptcy Code. Sale in ordinary course of business does not need court approval, but sale outside ordinary course is subject to approval under Section 363. Debtor, a farming partnership, sale of a large part of its equipment and cows, was outside ordinary course and Debtor did not seek court approval for sale.
- (8659) *Mostoller v. Bowens*, 2014 WL 2198135 (Bankr. E.D. Tn. 2014) – Section 549 allows avoidance and recovery of transfer of property of estate that occurs after commencement of case and is not authorized by court. Recovery can be either the property transferred or the value of the property transferred, and can be recovered from the initial transferee or any immediate or mediate transferee. Trustee must prove that transfer occurred; that transfer was of property of estate; that transfer occurred after commencement of case; and that transfer was not authorized. Fact that transfer was not authorized is presumed. Motion for summary judgment denied where record was not clear whether transfer occurred prior to or subsequent to commencement of case and where it was not clear whether assets transferred were property of corporate Debtor or were property of second entity that was also owned by Debtor’s principal.
- (8660) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff’d* 2014 WL 1978917 (6th Cir. BAP 2014) – Surplus proceeds remaining from post-petition foreclosure sale of Debtor’s non-exempt property are property of estate. Debtor’s retention of third party to recover surplus proceeds without disclosing existence of proceeds to trustee, and with the third party retaining those proceeds and ultimately paying those proceeds (less the third party fees) constituted avoidable post-petition transfer of property of estate.
- (8661) *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.
- (8662) *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.
- (8663) *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.
- (8664) *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.
- (8665) *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.
- (8666) *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.

14.107 Jurisdiction

- (8667) *Icenhower v. Diaz-Barba*, 2014 WL 3978491 (9th Cir. 2014) – United States Bankruptcy Court has exclusive jurisdiction over property of estate regardless of where located. Court could exercise jurisdiction over property in Mexico that Debtor transferred post-petition in violation of Section 549.

14.108 Defenses

- (8668) *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).
- (8669) *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.
- (8670) *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.
- (8671) *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.

14.109 Defenses – Transfers Approved by Court

- (8672) *Eisenberg v. Toledo-Lucas County Port Authority*, 2018 WL 2094300 (Bankr. N.D. Ohio 2018) – Section 549 allows avoidance of any transfer of property of estate that occurs after commencement of case and that is not authorized by Code or Court. Post-petition transfers made pursuant to Cash Collateral Orders are not avoidable where Cash Collateral Order was entered after providing adequate notice to parties in interest. Order properly entered is binding on later appointed liquidating trustee. Two separate Cash Collateral Orders disclosed Debtor’s intent to make Payments to Defendant pursuant to amended Management Agreement. Parties were directed to circulate and submit agreed Order which included budgeted payment to Defendant. Second cash collateral again included payment to Defendant. Cash Collateral Orders expressly provided that payments listed in attached budgets were (i) critical to Debtor’s ability to maximize the value of estate, (ii) in best interests of Debtor and estate, and (iii) necessary to avoid immediate and irreparable harm to Debtor, creditors, and assets, businesses, goodwill, reputation, and employees. Payments made pursuant to Cash Collateral Order, although constituting payments on pre-petition executory contract, were authorized by Court and were not avoidable.

14.110 Defenses – Statute of Limitations

- (8673) *Manty v. Bougie*, 2014 WL 2025124 (Bankr. D. Mn. 2014) – Statute of limitations under Section 549 equitably tolled where Debtor failed to list either property or mortgage on property in schedules. Mortgage was not recorded until after Debtor received discharge, although Debtor owned property and had signed mortgage some time prior to filing for relief. Debtor’s failure to disclose property equitably tolled statute until trustee discovered property allowing trustee to avoid mortgage recorded post-petition and sell the Debtor’s interest in the property free and clear of the lien.
- (8674) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff’d* 2014 WL 1978917 (6th Cir. BAP 2014) – Statute of Limitations under Section 549 is the earlier of two years from the date of the transfer to be avoided or the closing of the case. Although case closed before adversary filed, statute of limitations would be equitably tolled and complaint would be considered timely where Debtor failed to schedule property or to disclose that foreclosure sale conducted post-petition after grant of stay relief generated substantial surplus proceeds. Proceeds were themselves property of estate but were not disclosed to Trustee prior to closing of case. Equitable tolling applies when, through either active or passive concealment, the trustee does not learn critical facts necessary to timely file avoidance action. While equitable tolling generally focuses on conduct of the defendant, equitable tolling can also apply where it was the actions of the Debtor, not the defendant, that caused delay in discovery by trustee.

14.111 Defenses - Involuntary Petitions

- (8675) *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.

14.112 Particular Transfers Avoidable

- (8676) *McKinstry v. B&H Contractors, LLC*, 2017 WL 4564693 (Bankr. E.D. Ky. 2017) – Post-petition financing must be authorized under Section 364. Creditor note entitled to repayment of post-petition loans given without authorization, even where creditor was unaware of bankruptcy filing when funds were advanced. Creditor must return to Debtor the payments received post-petition in repayment of these post-petition loans under Section 549(a)(2)(B) as loans were not authorized by Court in first instance.
- (8677) *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).
- (8678) *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.
- (8679) *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.
- (8680) *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.

14.113 Particular Transfers Not Avoidable

- (8681) *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.
- (8682) *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.

14.114 Persons Liable – Debtors

- (8683) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Debtors were not liable for post-petition avoidable transfer of proceeds of property of estate where evidence indicated that Debtors did not receive any of the proceeds. All of the proceeds were paid to third party hired to recover funds and then paid to third party and later disbursed to principal of third party.

14.115 Persons Liable - Transferees

- (8684) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Section 550 allows trustee to recover property transferred or value of property transferred in trustee's discretion.
- (8685) *Icenhower v. Diaz-Barba*, 22014 WL 3978491 (9th Cir. 2014) – Section 549 prohibits recovery from purchaser of real estate in good faith and without notice of the commencement of the case and for present fair equivalent value. Bankruptcy Code, not law of location of property, controls determination of good faith. Purchaser did not act in good faith where although seller of Villa was corporation, purchase price was

reduced to account for debt that corporate principal owed buyer; purchaser was on notice of bankruptcy and of possibility of litigation to avoid transfer of Villa from Debtor to Corporate seller; Villa was corporation's sole asset; sale was not authorized by shareholder resolution; and buyer paid most of the consideration to entities other than seller including entity associated with buyers.

- (8686) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Surplus proceeds remaining from post-petition foreclosure sale of Debtor's non-exempt property are property of estate. Third party that recovered and then retained proceeds liable as transferee of post-petition transfer. Principal of third party recovery company also liable for proceeds transferred by recovery company to principal individually as "mediate transferee".
- (8687) *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

14.116 Standing

- (8688) *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.

14.117 Requirements

- (8689) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – Reformation of contract based on innocent misrepresentation requires proof of (1) a representation in a transaction between two parties; (2) that is false; (3) that actually deceives the other party; (4) that the other party relied on; (5) that the other party suffered damage from; and (6) the party making the misrepresentation benefited from it. Although Debtor may have been a bit confused about terms of loan as modified, there was no evidence of any false representation regarding loan modification agreement.
- (8690) *Chrysler Group, Ltd. v. Eagle Auto-Mall Corp.*, 2015 WL 4887593 (E.D. Mi. 2015) – Deliberately prepared and executed agreement is strongly presumed to reflect true intention of parties, especially between counseled businessmen. Reformation requires high order of evidence that agreement does not reflect agreement actually made by contracting parties.
- (8691) *Junk v. CitiMortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Mortgage can be reformed only if reformation would not adversely affect rights of third parties such as bona fide purchasers and judgment lien holders. Under Section 544, Debtors hold rights and powers of BFP and hypothetical judgment lien creditor. Bankruptcy court would grant stay relief to allow creditor to pursue reformation leaving to State Court issue of whether reformation would adversely affect bona fide purchaser for value.
- (8692) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Mortgage with incorrect legal description cannot reform mortgage to correct description if doing so would adversely affect rights of third parties who parted with value and without notice of the error. Lender cannot reform mortgage where doing so would adversely affect trustee's right to avoid mortgage under strong arm powers as bona fide purchaser under section 544.
- (8693) *JP Morgan Chase Bank, NA v. Winget*, 901 F.Supp.2d 955 (E.D. Mi. 2012), *reversed*, 2015 WL 728060 (6th Cir. 2015) – Reformation of contract due to mutual mistake is equitable remedy. 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. Reformation not warranted where contract was clear and unambiguous and negotiated by sophisticated and well-represented parties in arms-length transaction. Contract is ambiguous only where language is reasonably susceptible to more than one interpretation, not merely because one party disputed meaning of contractual term.
- (8694) *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.
- (8695) *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.

14.118 Statute of Limitations

- (8696) *Hensley v. Associates First Capital Corp.*, 2013 WL 4505908 (E.D. Ky. 2013), *aff'd*, 2014 WL 4251567 (6th Cir. 2014) – 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.

14.119 Laches

- (8697) *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

14.120 Preservation for Benefit of Estate

- (8698) *Luper v. Valueland Auto Sales, Inc.*, 2017 WL 7912003 (Bankr. S.D. Ohio 2017) - Section 551 preserves any transfer avoided under Section 547 for benefit of the estate. Motor vehicle is property of bankruptcy estate. Lien on motor vehicle, avoided as preference under Section 547, is preserved in its entirety for benefit of estate.
- (8699) *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.
- (8700) *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.
- (8701) *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.

14.121 Damages

- (8702) *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.

14.122 Good Faith Purchaser – Section 550 Lien

- (8703) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Good faith purchaser for value can assert lien against avoided transfer to extent that purchaser incurred costs to improve the property after the date of the transfer.
- (8704) *Icenhower v. Diaz-Barba*, 22014 WL 3978491 (9th Cir. 2014) – Section 549 prohibits recovery from purchaser of real estate in good faith and without notice of the commencement of the case and for present fair equivalent value. Bankruptcy Code, not law of location of property, controls determination of good faith. Purchaser did not act in good faith where although seller of Villa was corporation, purchase price was reduced to account for debt that corporate principal owed buyer; purchaser was on notice of bankruptcy and of possibility of litigation to avoid transfer of Villa from Debtor to Corporate seller; Villa was corporation's sole asset; sale was not authorized by shareholder resolution; and buyer paid most of the consideration to entities other than seller including entity associated with buyers.

XV. Collateral Attack – Final Orders

A. Parties Bound

15.1 Successor Trustee

- (8705) *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

- (8706) *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.
- (8707) *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 is 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

- (8708) *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.
- (8709) *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.
- (8710) *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.

15.4 Criminal Convictions

- (8711) *Behrens v. U.S.*, 2014 WL 4942308 (8th Cir. BAP 2014) – Debtor cannot use bankruptcy proceeding to collaterally attack validity of criminal conviction. After being convicted and sentenced to prison and restitution, Debtor filed chapter 7 and filed adversary contending that government's prosecution that lead to conviction violated Federal Court Receivership Order that stayed litigation; and that continued efforts to collect restitution violated Section 362. Adversary complaint did nothing more than mount collateral attack on conviction warranting dismissal.

15.5 State Court Judgments

- (8712) *Reed v. Blount*, 2016 WL 3625602 (E.D. Mi. 2016), *aff'd*, 2017 WL 3597425 (6th Cir. 2017) – Provisions of State Court Judgment awarding claimant certain monies was res judicata on issue of existence and amount of obligation for purposes of filing Proof of Claim in Bankruptcy. Debtor could not challenge in Federal Court through vehicle of Claim Objection the validity of the State Court Order. Any dispute with validity or correctness of State Court Order must be addressed to State Court. Federal Court lacks authority to look behind and revisit correctness of State Court judgment. Debtor failed to present any evidence that judgment itself was entirely “void” but only argued that judgment was incorrect.

XVI. Closed Cases

A. Reopening and Reinstatement

16.1 Reopening Case – Futility

- (8713) *In re White*, 2018 WL 1887327 (Bankr. W.D. Mi. 2018) – Section 727(b) provides that discharge affects only debts that arose before date of order for relief. Debtor’s requires to reopen case to add omitted creditors denied where creditors to be added were post-petition creditors. Whatever obligation debtor has is not affected by discharge.
- (8714) *In re Parham*, 2017 WL 3207663 (Bankr. E.D. Mi. 2017) – Court would not reopen case to allow Debtor to seek sanctions for alleged violation of stay as reopening would be futile. Creditor garnished funds pre-petition, although within preferential transfer period. Creditor received funds pre-petition terminating any interest of Debtor in funds. Creditor’s post-petition retention of funds was not violation of stay as retention did not involve property of estate. Debtor did not file adversary to set aside avoidable transfer and creditor voluntarily, if belatedly, returned funds before Debtor sought Order requiring creditor to return funds.
- (8715) *In re Walker*, Case No. 15-42265 (Bankr. E.D. Mi. 2017) – Section 522(f) does not permit Debtor to avoid valid, consensual lien. Retainer agreement between attorney and client granted attorney charging lien which was valid, consensual lien. Although judicial process was required to enforce lien, that does not result in lien being a “judicial lien” for purposes of Section 522(f). Debtor’s motion to reopen case to avoid lien under Section 522(f) denied as reopening case would be futile.
- (8716) *In re Bedell*, Case No. 03-10509 (Bankr. D. Kan. 2017) – *Barton* doctrine precludes action against liquidating agent appointed by Court in pending Chapter 7 proceeding without permission from the Court that appointed liquidating agent. Debtor precluded from reopening previously closed Chapter 13 Case to strip lien where lien was being serviced by Chapter 7 liquidating agent in bankruptcy filed by prior owner of mortgage pool. Court will not reopen case where doing so would be futile. Debtor had not obtained permission from Court that appointed liquidating agent to bring action against liquidating agent to strip lien. Accordingly, reopening bankruptcy case would not allow Bankruptcy Court in Chapter 13 to grant any effective relief. Exception to *Barton* doctrine contained in 28 USC Section 959 allows actions against Trustee without leave of Court with respect to acts or transactions in carrying on business connected with property of estate. Liquidating agent was not conducting business but was, instead, attempting to liquidate Chapter 7 Debtor’s estate, rendering Section 959 inapplicable.
- (8717) *Elkins v. United States*, 2016 WL 7742203 (Bankr. N.D. Ohio 2016) - Court can deny motion to reopen case to administer assets where it appears from the face of motion that reopening case would be futile. Debtor sought to reopen case to recover taxes paid to Internal Revenue Service that resulted from damage award for the wrongful incarceration of Debtor’s spouse. Statute exempting compensation for wrongful incarceration is limited to compensation paid to person incarcerated. Debtor was not “person incarcerated” and, therefore, was not entitled to exemption are federal tax liability. Reopening case to pursue recovery against IRS would be futile as Debtor had no legal recourse against IRS to recover taxes.
- (8718) *In re Elkins*, 2016 WL 3414823 (Bankr. N.D. Ohio 2016) – Section 350 allows court to reopen case to administer assets, accord relief to Debtor, or for other cause. Reopening is vested in sound discretion of bankruptcy court. Although reopening is mere ministerial act, court can deny reopening where underlying basis for request is futile. Debtors could not reopen case to take advantage of change in tax laws where change excludes from taxable income compensation received by wrongfully incarcerated individual, where the wrongfully incarcerated individual was not the Debtor but was Debtor’s husband and second Debtor’s father. Because tax law was limited to compensation paid to wrongfully incarcerated individual, reopening would be futile as court could not afford Debtors any relief based on tax law change.
- (8719) *In re Segura*, 2016 WL 829830 (Bankr. N.D. Ohio 2016) – Court can deny Motion to Reopen Case where reopening would serve no purpose. Chapter 7 would not be reopened to administer asset where asset, a cause of action, arose post-petition and so was not included in Chapter 7 estate in first instance.
- (8720) *In re Simo*, Case No. 14-54373 (Bankr. E.D. Mi. 2015) – Reopening of case to add unscheduled creditor unnecessary where Trustee filed report of no distribution. Because case was “no asset” case, unscheduled debt is discharged to same extent it would have been discharged if properly scheduled. Court lacked any ability to grant additional relief if case is reopened.
- (8721) *In re Crew*, Case No. 15-43067 (Bankr. E.D. Mi. 2015) – Reinstatement denied where motion did not allege any palpable defect by which court was misled in entering order of dismissal. Debtor was not eligible under Section 109 where Debtor did not receive re-petition credit counseling until 2 days after case filed.
- (8722) *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 - Grounds

- (8723) *In re Woods*, 2018 WL 2021254 (Bankr. N.D. Ohio 2018) – Section 350 allows Court to reopen case to administer assets, to accord relief to debtor or for other cause. Decision to reopen is vested in discretion of Bankruptcy Court taking into account (1) whether there is reasonable explanation for lack of compliance that led to case closing, (2) whether request was timely, (3) whether fault lies with counsel, and (4) whether creditors are prejudiced. Court closed Chapter 13 case without discharge after Debtor did not file Domestic Support Certification within 28 days of Trustee filing final report. Debtor filed the Certification one month later and 2 days after the case closed without discharge. Debtor took no action for 2 years before filing Motion to Reopen. Motion to reopen was not timely where Debtor waited two years after the case closed with no explanation for delay or explanation for failure to timely file end-of-case documents. Prejudice to creditors is high where creditors listed in case may have sold or transferred the, could have moved, or any number of other scenarios may complicate getting notice of discharge to the proper parties.
- (8724) *In re Villareal*, Case No. 18-40697 (Bankr. E.D. Mi. 2018) – Debtor must show good cause to reinstate dismissed case. Case dismissed when neither debtor nor counsel appeared for hearing on confirmation of plan, and plan did not correctly treat secured claims, plan was not properly funded, and debtor had not provided documentation to Trustee as required by Local Rules. Counsel acknowledged failure to attend hearing based on calendar error but indicated that Debtor was not providing documents and information preventing Counsel for amending plan or providing information to Trustee. Although Debtor had good payment history, Debtor had obligation to pay attention to case and communicate with counsel to allow prompt prosecution of confirmation. Motion to reinstate denied for lack of cause.
- (8725) *In re Hoffman*, 582 BR 181 (Bankr. E.D. Mi. 2018) – Court denied Debtor's request to set aside discharge where even if discharge was set aside Debtor could not be afforded additional relief. Debtor sought to set aside discharge to allow Debtor and creditor to enter into reaffirmation agreement. Section 524 allows parties to enter into reaffirmation only before granting of discharge. Parties did not sign reaffirmation agreement before entry of discharge and "reaffirmation cannot occur through conduct but only in writing signed by both debtor and creditor. Setting aside discharge would not cure problem as discharge has already been entered and setting aside discharge would not change that fact. Even if discharge is set aside, deadline for filing reaffirmation is 60 days after date first set for Section 341 meeting, a deadline which has long past. Although court has discretion to extend deadline, extension can be granted only if request made before deadline expires, and no such request was filed in this case.
- (8726) *In re Lundy*, 2017 WL 4417692 (Bankr. N.D. Ohio 2017) – Motion to Reinstate constitutes Motion for Reconsideration of Order under Rule 60(b), which provides 6 different grounds to grant relief. Residual clause under Rule 60(b)(6) applies to extraordinary circumstances not addressed other five enumerated subsections. Court's continuance of confirmation hearing to allow Trustee to file written objections to confirmation not error where adjournment provided debtors with ample time to prepare for evidentiary hearing. At adjourned hearing, Debtor refused to proceed with hearing on confirmation leaving Court with no choice but to dismiss case. Motion did not state any basis for setting aside dismissal order.
- (8727) *In re Hicks*, 2017 WL 3225913 (Bankr. N.D. Ohio 2017) – Rule 9006(b)(3) allows Court to extend deadline to pay filing fee to a date no longer than 180 days after filing of the petition. Case dismissed where Debtor did not pay filing fee within time permitted by Order allowing payment of filing fees in installments. Debtor did not tender payment of the filing fee until eleven months after dismissal and did not allege any excusable neglect for failing to pay filing fee timely, and allowing Debtor to reinstate and pay filing fee 11 months after dismissal would violate time limits of Rule 1006. Discharges are not favors given for attending a party. Discharges are the result of a Debtor timely and thoroughly fulfilling the duties and responsibilities set forth in the Bankruptcy Code and Rules. Allowing Debtors to continually ignore their obligations, only to later seek to avoid the repercussions, creates a culture of only performing obligations if it is convenient. The court cannot condone, and will not foster, this culture.
- (8728) *In re Vozza*, 2017 WL 2992481 (Bankr. E.D. Mi. 2017) – Court will not reopen case and set aside discharge to allow Debtor to execute reaffirmation agreement where reaffirmation agreement was not executed by parties before entry of discharge. Setting aside discharge would not cure defect as discharge has already been entered, cutting off time for executing reaffirmation agreement. Further, Rule 4008 requires reaffirmation agreement to be filed with Court within 60 days of First Meeting of Creditors. Deadline long ago expired and no party sought, before expiration, to extend time to execute reaffirmation.
- (8729) *In re McCoy*, 2016 WL 6956640 (6th Cir. BAP 2016) – Section 350 allows court to reopen case to administer assets, accord relief to Debtor, or for other cause. Request to reopen to avoid judicial lien fits as it presents potential relief to Debtor. However, Motion may be denied if motion results in prejudice to creditor as result of Debtor's conduct. Neither Section 350 nor rule 5010 imposes any deadline to reopen, and passage of time alone is not necessarily prejudice to creditors sufficient to bar reopening of case. Debtor's failure to avoid judicial liens while case was open was not basis to deny motion filed 4 years later to reopen case to avoid judicial liens, where no creditor opposed reopening, there was no evidence of any prejudice to creditors and Debtor had plausible explanation for changing course of action.
- (8730) *In re Ryan*, Case No. 09-1604 (Bankr. D. Hawaii 2016) – Reopening of case is appropriate to accord relief to the Debtor. Court would reopen case to allow parties to obtain clarification of effect of "surrender" of property in chapter 7 proceeding including whether Debtors waived any right to oppose foreclosure post-discharge.
- (8731) *Grant v. Granader*, 2016 WL 5936797 (6th Cir. 2016) – Bankruptcy Court did not abuse discretion in denying Motion to Reopen Chapter 7 case more than 3 years after entry of discharge. Although plaintiff sought determination that particular debt was excepted from discharge as Domestic Support Obligation, evidence indicated that debt at issue was neither incurred in connection with divorce decree or in course of divorce proceeding, but was promissory note from trust in which Debtor had no interest to creditor, and Debtor was not party to transfer. Court also did not abuse discretion to refuse to reopen case notwithstanding creditor's allegation that Debtor committed transfers that would

be avoidable by bankruptcy court, where estate had long been closed and creditor was in equal or better position to assert state law fraudulent transfer claims than estate giving creditor an adequate remedy at state law short of reopening case. Court can also deny Motion to Reopen based on laches where party seeking to reopen lacked due diligence and delay prejudiced Debtor. However, mere delay without more is not “prejudice”. Bankruptcy Court found that creditor lacked diligence but did not make finding of prejudice as Court denied motion for other grounds.

- (8732) *In re Concepts Plus, LLC*, 2016 WL 2344244 (Bankr. W.D. Mi. 2016) – 11 USC Section 350 and Rule 5010 allow court to reopen case to administer assets, to accord relief to Debtor or for other cause. After closing of Chapter 7 estate, Debtor pursued collection of judgment obtained during pendency of case. State Court judge asked for clarification as to whether Debtor had standing to pursue collection. Request by State Court judge for clarification on arcane and technical issue of abandonment constituted “cause” to reopen case.
- (8733) *In re Yonish*, 2016 WL 826056 (6th Cir. BAP 2016) – Bankruptcy court erred in denying motion to reopen case for purposes of avoiding judicial liens where no creditor objected to motion. Debtor waited 2 years after closing of case to seek to reopen. Bankruptcy Court denied motion under Rule 60 and for laches as motion was not brought within reasonable time. Mere delay without more was not basis to deny motion absent prejudice and delay did not in any way prejudice creditors.
- (8734) *McKinstry v. Richard Holmes Enterprises, LLC*, 2016 WL 482331 (E.D. Ky. 2016) – Section 350 allows court to reopen case but also allows court to impose conditions to reopening. Court did not abuse discretion in requiring creditor who received distributions from liquidating trust to deposit those distributions into escrow account as condition to reopening to permit creditor to pursue action against liquidating trustee. Reopening case would prejudice trustee as trustee had indemnification rights against trust but creditor waited until trust disbursed all assets before seeking to reopen, effectively denying trustee’s right of indemnification. While Code does not expressly permit imposition of conditions, Code also does not expressly prohibit imposition of conditions, such that *Law v. Siegel*, which holds that the court cannot contravene an express provision, does not preclude imposition of conditions.
- (8735) *In re Kiriazis*, 2016 WL 386586 (6th Cir. BAP 2016) – Motion to reopen case denied where reopening would serve no purpose. Creditor sought to reopen case to file Motion to set aside Order. Creditor did not seek to reconsider order under Rule 9023 within 14 days permitted, and Motion did not allege either that motion was brought within a reasonable time or any basis for granting relief under Rule 9024. Order that was subject to dispute was agreed order after creditor’s counsel acknowledged that creditor had issued incorrect billing statements in violation of discharge, leaving no basis to set aside order.
- (8736) *In re Kahn*, 2016 WL 323716 (Bankr. E.D. Tn. 2016) – Bankruptcy Court has no jurisdiction to interpret a State Court confirmed arbitration award. Any interpretation of the award would fall within the province of the State Court in enforcing the arbitration agreement. Court would not reopen Chapter 7 proceeding to “interpret” arbitration award as court could not grant any effective relief, rendering reopening of case futile.
- (8737) *In re Saputo*, Case No. 10-51920 (Bankr. E.D. Mi. 2015) – Motion to reopen case to add omitted creditor denied where Chapter 7 was “no asset” case in which no claims bar date was established. Reopening case would serve no useful purpose and underlying debt has already been discharged.
- (8738) *Farrell v. US Bank, NA*, Case No. 15-10559 (E.D. Mi. 2015) – Decision to reopen closed case is committed to sound discretion of bankruptcy court. Debtor’s motion to reopen case to allow Debtor to seek damages against lenders for evicting Debtor after foreclosure. Debtor had previously filed actions in both state and federal court seeking relief from foreclosure proceedings, all of which were decided adverse to Debtor. There did not appear to be any further relief that bankruptcy court could afford where issues were previously fully and finally litigated in other forums.
- (8739) *In re Duckett*, 2015 WL 5002522 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, accord relief to Debtor, or for other cause. Reopening case is ministerial act that has no independent legal significance and determines nothing with respect to merits. However, where court cannot grant any effective relief if case is reopened, court will deny request to reopen. Court lacked authority to afford Debtor relief where, after conclusion of bankruptcy case, mortgage holder commenced foreclosure proceedings, obtained State Court judgment and sold property, and State Court also denied Debtor’s Motion to Dismiss Fraudulent Foreclosure as issues regarding lender’s standing to foreclose had already been raised and decided in State Court. Debtor sought to reopen bankruptcy case to again contest mortgage holder’s standing to foreclose. *Rooper-Feldman* precludes losing party in State Court from asking federal court to review correctness of decision. Debtor lost in State Court and was complaining of injuries caused by State Court judgments entered before Debtor sought relief in federal court, and Debtor was essentially asking federal court to determine whether State Court had correctly determined standing to foreclose.
- (8740) *In re Merlo*, Case No. 14-54368 (Bankr. E.D. Mi. 2015) – Court will not reopen case where court cannot afford relief. Motion to reopen for purposes of entering into reaffirmation agreement denied where court lacked authority to approve reaffirmation. Section 524 requires reaffirmation agreement to be executed within 60 days of date first set for 341 meeting, and to be filed with the court prior to entry of a discharge. Court cannot extend deadline on request first filed after deadline has already expired.
- (8741) *In re Smith*, 2015 WL 3455356 (Bankr. N.D. Ohio 2015) – Court will not reopen case where court cannot afford any relief even if case is reopened. Reaffirmation agreements must be filed in later than 60 days after date first set for 341 meeting. Where deadline passed without Debtor or creditor filing reaffirmation agreement, court lacked authority to approve reaffirmation even if case reopened. Rule 4004 allows court to extend deadline but only on motion to extend filed before expiration of initial deadline and in any event requires reaffirmation agreements to be “made” before entry of the discharge. Reaffirmation agreement is made when agreement is signed by both Debtor and creditor. Parties did not sign reaffirmation agreement before discharge precluding entry of an order approving the reaffirmation. Court also would not vacate discharge to permit making and filing of untimely reaffirmation notwithstanding equities of situation and potential hardship faced by Debtor as there is no basis in the Code to vacate a discharge on request of the Debtor or for purposes of executing a reaffirmation

agreement.

- (8742) *In re Grunas*, Case No. 14-53813 (Bankr. E.D. Mi. 2015) – Court would deny motion to reopen case where court could not afford Debtor effective relief even if case reopened. Debtor sought to reopen case to redeem vehicle. Deadline to redeem is, at most, 45 days after commencement of case. Debtor did not meet deadline and court lacked authority under Section 521 to extend time where Debtor did not file motion to extend until after deadline had already expired.
- (8743) *In re Shear*, 2015 WL 1246046 (Bankr. N.D. Ohio 2015) – Court would re-open case to allow Debtor to file certificate of post-petition financial management class. Time between closing of case and request to re-open was not unduly long and Debtor timely took the financial management course.
- (8744) *In re Quinn*, 2015 WL 535533 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, to accord relief to the Debtor or for other cause. Grant or denial of request is in sound discretion of court. Debtor request to enforce discharge injunction is common basis to reopen case. Reopening case does not itself grant relief but provides procedural platform for merits of issue to be resolved. Motion stated at least colorable basis for relief from violation of discharge injunction. While creditor disputes Debtor's assertions, court would not resolve disputed facts or resolve merits in ruling on reopening case.
- (8745) *In re Plusfunds Group, Inc.*, 2015 WL 249790 (2d Cir. 2015) – Motion to reopen case is vested in discretion of bankruptcy court. However, court should set forth reasons for granting or denying motion. Action remanded to bankruptcy court to determine whether any party would suffer prejudice if case is reopened.
- (8746) *In re Reis Borough Building, LLC*, 2014 WL 5529604 (Bankr. W.D. Mi. 2014) – Court would not reopen case to enforce a stipulation between Debtor and creditor where the stipulation was signed before dismissal but not approved by Court as of date of dismissal. Court would be reluctant to exercise post-dismissal jurisdiction particularly where parties have adequate remedies in State Court.
- (8747) *In re Oglesby*, 2014 WL 5113587 (Bankr. N.D. Ohio 2014) – Section 350 allows case to be reopened to administer assets, to accord relief to Debtor, or for other cause. Debtor does not have absolute right to reopen case and court can use equitable powers to determine whether to reopen case taking into account the substantive issues involved rather than just technical considerations. Court will not reopen case where court cannot afford relief to moving party; or where reopening case would unduly prejudice affected creditor. Court reopened case to allow Debtor to file motion to avoid judicial liens impairing exemptions. While Debtor was fully aware of judicial lien during pendency of case and had full knowledge of ability to avoid lien, Debtor failed to do so before case closed. Debtor then delayed until after creditor expended significant effort and expense to foreclose judicial lien in State Court, which amounted to unreasonable delay where motion to avoid lien could have been filed while case was opened or at much earlier date than when motion actually filed. However, prejudice to creditor could be avoided by conditioning reopening of case on Debtor's payment of creditor's attorney fees incurred after closing of Debtor's case in State Court efforts to foreclose lien. This condition eliminates prejudice to creditor and affords Debtor opportunity to attempt to strip lien where that remedy, if available, could have been achieved before case closed, such that creditor's substantive right to contest merits were unaffected.
- (8748) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor's failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor's Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (8749) *In re Wilson*, Case No. 13-41923 (Bankr. E.D. Mi. 2014) – Court normally will not re-open case to address dischargeability of omitted creditor. However, where creditor arguably asserted a claim that could fall within scope of Section 523(a)(6), court would reopen case at request of Debtor for purposes of allowing Debtor or creditor to file adversary to determine whether debt is excepted from discharge.
- (8750) *In re Steward*, 2014 WL 1356558 (Bankr. W.D. Mi. 2014) – Court can reopen case at request of Debtors to add omitted creditors where reopening provides opportunity for further relief by court. While unsecured claims are normally discharged in no-asset Chapter 7, discharge does not affect debt of unsecured creditor where debt falls within scope of Section 523(a)(2), (4), or (6). Debtor can reopen case to add unsecured creditor for purposes of having bankruptcy court, rather than State Court, rule on dischargeability of debt under Section 523(a)(2), (4) or (6). Complexities of jurisdictional overlaps and nature of controversy being within court's (at least) concurrent jurisdiction constitutes cause under Section 350 to reopen the case.
- (8751) *In re Caswell*, 2014 WL 1364835 (Bankr. W.D. Mi. 2014) – Motion to Set Aside Final Decree denied as there is no basis to set aside a final decree. Party can seek to reopen case if motion demonstrates basis to reopen under Rule 9024, but naked allegation that case was closed "erroneously" does not demonstrate intake, inadvertence, surprise or excusable neglect. Further, Chapter 7 Trustee lacks standing to seek to reopen case. When case was closed, Trustee was discharged and no longer represented any interest in the case. While UST may have standing to reopen case, Chapter 7 trustee lacks any financial or pecuniary interest in case other than, perhaps, the hope that if the case is re-opened, the UST will re-appoint the Trustee in the reopened case.
- (8752) *In re Stahl*, 2014 WL 1329551 (Bankr. N.D. Ohio 2014) – Case may be reopened to administer assets. Decision to re-open case is committed to sound discretion of bankruptcy court. Case will be reopened only where there is some additional relief that can be afforded by court. Case reopened at request of Chapter 7 Trustee to administer undisclosed personal injury action. Debtor's schedules stated that Debtor did not have any liquidated or unliquidated claims of any nature. Trustee's report of no distribution and order closing case did not work abandonment of undisclosed asset. Case reopened to allow Chapter 7 Trustee to capture proceeds of litigation settlement.
- (8753) *In re Pool*, 2014 WL 1024029 (Bankr. N.D. Ohio 2014) – Court has discretion to reopen case as reopening case is ministerial act that has no independent legal significance. However, court will not reopen case to add omitted creditor where there is no potential relief available to the moving party. Court would not reopen Chapter 7 that was closed as no asset case, as doing so would not afford Debtor any relief. Creditors were advised not to file claims and court never set claims bar date. Debt was not of the type described in Section 523(a)(2), (4) or (6) and so

was discharged regardless of whether creditor was scheduled or not. Although Debtor also sought to reopen case to seek sanctions for violation of discharge injunction, Motion did not identify creditor against whom sanctions would be sought or the nature of any conduct that Debtor contended was a violation. Absent some factual allegations of the nature of the debt, the nature of the actions of creditor, and the identity of creditor, court could not determine whether there existed any basis to reopen case.

- (8754) *In re McKinnie*, 2013 WL 6154206 (Bankr. E.D. Mi. 2013) – Court will not reopen case where re-opening would not serve useful purpose. Debtor's request to re-open case to seek sanctions against Sallie Mae for post-discharge collection of student loans would not produce any benefit as Debtor never filed adversary to have debts declared dischargeable. Student loans pass through bankruptcy unaffected unless Debtor brings adversary proceeding under Section 523(a)(8). Court would grant motion of Debtor seeks to reopen case for purpose of filing Section 523 action to discharge debts as undue hardship.
- (8755) *Underhill v. Huntington National Bank*, 2014 WL 4435977 (6th Cir. 2014) – Post-petition claim of wholly owned subsidiary that arose post-petition was not property of estate, such that settlement proceeds ultimately paid to Debtor were not property of estate and did not have to be surrendered to trustee. Although conduct leading to litigation started pre-petition conduct did not cause any harm or damage to Debtor or Debtor's corporation until months after the petition was filed, at a time when the corporation's suppliers actually cut off supplies to corporation at the behest of a competitor. Action against competitor did not ripen into cause of action until supplier acted on that information as, until that point, conduct of competitor caused no harm or damage such that Debtor an corporation could not have maintained any cause of action against competitor.
- (8756) *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.
- (8757) *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.
- (8758) *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.
- (8759) *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.
- (8760) *In re Sadowski*, 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.
- (8761) *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.
- (8762) *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.
- (8763) *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.
- (8764) *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.

- (8765) *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.
- (8766) *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.
- (8767) *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 un-administered asset.
- (8768) *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 continue to liquidate assets and pursue recoveries for unsecured creditors.
- (8769) *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.
- (8770) *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.
- (8771) *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 Reopening Case – Conditional Reopening

- (8772) *McKinstry v. Richard Holmes Enterprises, LLC*, 2016 WL 3448287 (E.D. Ky. 2016) – Court has authority to condition reopening of case as necessary to protect rights of parties. Where reopening would place unfair financial burden on opposing side, court may condition reopening on moving party's agreement to reimburse nonmovant's fees and costs. Court acted within discretion in requiring moving party to place into trust account \$500,000 received by moving party from distributions in Chapter 11 estate as condition for reopening estate, as nonmoving party (the Chapter 11 Unsecured Creditor Trust) lacked any assets from which to pay costs of defense or to indemnify trust manager or attorneys for trust manager as required by terms of liquidating trust. While no provision of code specifically allows conditioning of reopening, no provision prohibits it either, such that nothing in *Law v. Siegel* precludes court from exercising equitable powers.

16.4 Reopening Adversary Proceeding

- (8773) *G&H Customs, LLC v. Carter*, Case No. 17-4706 (Bankr. E.D. Mi. 2018) – Court would grant Debtor's Motion to Reopen Adversary to allow Debtor to set aside judgment determining debt to be nondischargeable and awarding monetary damages where Debtor asserted state law basis to relieve Debtor from monetary portion of adversary judgment. Motion to set aside judgment must be presented by motion pursuant to Rule 60. Motion to Reopen asserted good cause to reopen but did not, itself, seek relief under Rule 60. Court would allow Debtor 30 days to file Rule 60 Motion.
- (8774) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60. Motion failed to state basis to reopen adversary under Rule 60(b)(1) where motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor's motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor's failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney's office and failure of attorney's staff member to properly calendar hearings. Court had issued scheduling order well before assistant's absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor's motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel's action was neglect, it was not excusable for purposes of Rule 60 relief.

16.5 Standing to Request

- (8775) *Grant v. Grandier*, 2016 WL 5936797 (6th Cir. 2016) – Creditor has standing to reopen case where necessary to protect creditor's rights including determination of dischargeability of debt.

16.6 Filing Fee

- (8776) *In re Concepts Plus, LLC*, 2016 WL 2344244 (Bankr. W.D. Mi. 2016) – Court will waive fee to reopen case for impecunious Debtors.

Debtor seeking reopening was corporate entity, not individual. Entity had assets and was seeking to pursue recovery of judgment entered in favor of Debtor during bankruptcy proceeding. While case was being reopened at request of State Court judge, and interests of comity supported reopening, comity did not warrant excusal of fee to reopen to resolve dispute between Debtor and one creditor that would produce no benefit to creditors as a whole.

- (8777) *In re Gibbs*, 2015 WL 1915522 (Bankr. N.D. Ohio 2015) – Court denied motion to waive fee to reopen case to allow Debtor to take post-petition financial management class and file From 23. Miscellaneous Fee Schedule adopted by Judicial Conference requires filing fee to reopen case when case has been closed without discharge, with limited exceptions not applicable in this case. 28 USC Section 1930 allows court to waive filing fees, but fee to reopen case is not “filing fee” as the fee is not “payable to the clerk upon the commencement of a case under chapter 7”. Court otherwise has discretion to waive filing fee “under appropriate circumstances”. Where Debtor seeks to reopen after failing to file certification of completing of course in personal financial management, Debtor must provide specific facts to explain why he did not file the certification within the time permitted, such as medical or personal reasons that prevented Debtor from attending course; or inability to find agency to provide certificate. Debtor must then explain why the problem was not addressed in a timely manner by filing pleading prior to expiration of deadline in Rule 1007. Although Debtor testified that Debtor had minimal income, Debtor failed to provide any explanation for his failure to take financial management class before case closed. Case filed in November, 2007 and closed in March, 2008. Debtor claimed that his failure to take financial management class was due to accident in South Carolina that critically injured his brothers, but Debtor’s testimony was that the accident occurred in the Summer of 2007, months before bankruptcy case ever filed.
- (8778) *In re Shear*, 2015 WL 1246046 (Bankr. N.D. Ohio 2015) – Court would not waive filing fee to reopen case where Debtor had gross income of \$3,190 per month which allowed Debtor to pay fee. Debtor’s statement that he lacked ability to pay was based in part on daughter’s tuition expense which was daughter’s expense, without which Debtor had wherewithal to pay filing fee in full.
- (8779) *In re Godlove*, 2014 WL 2525855 (Bankr. N.D. Ohio 2014) – Court can waive filing fee to reopen case where based on alleged violation of discharge injunction. Motion stated that Debtor sought to reopen case to file adversary proceeding to seek relief from creditor who violated discharge injunction.
- (8780) *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.
- (8781) *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.
- (8782) *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.
- (8783) *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.
- (8784) *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.
- (8785) *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.
- (8786) *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.
- (8787) *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.
- (8788) *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.

- (8789) *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

- (8790) *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

- (8791) *In re Johnson*, Case No 09-65523 (Bankr. E.D. Mi. 2015) – Motion to Allow Debtor to be excused from financial management class denied where there was no evidence that motion was filed by anyone authorized to act on behalf of Debtor. Debtor died during pendency of chapter 13 case and plan was completed by his co-Debtor/spouse. Motion on behalf of deceased Debtor must be filed by personal representative appointed by the probate court. There was no evidence that party filing motion was either the personal representative or the attorney for the personal representative.
- (8792) *In re Fogel*, 507 BR 734 (Bankr. D. Colo. 2014) – Post-petition financial management class cannot be taken by anyone other than Debtor. Debtor passed away during chapter 13 case. Although Debtor (and the estate) completed all payments under the plan, Debtor could not take financial management course and there is no authority in code for class to be taken by Debtor’s widow as personal representative of the estate. Motion to waive financial management class denied and case dismissed.
- (8793) *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”.
- (8794) *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).
- (8795) *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.
- (8796) *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

- (8797) *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

- (8798) *In re Ebert*, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Wife’s failure to attend financial management course leaves her ineligible for discharge.
- (8799) *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.
- (8800) *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.
- (8801) *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

- (8802) *In re Moore*, Case No. 17-49005 (Bankr. E.D. Mi. 2018) – Motion to Reopen Case to allow Debtor to file Post-Petition Financial Education Certificate denied where Debtor waited more than 10 months after case closed to file Motion to Reopen. Motion did not allege any grounds to reopen case where Debtor did not take Course until 10 months post-closing and did not demonstrate any reason why Debtor did not complete course and file certificate by deadline or why Debtor waited more than 10 months to seek relief. Court can extend deadline for cause shown based on (a) whether there is reasonable explanation for non-compliance; (b) whether request to reopen is timely; (c) whether fault lies with counsel; and (d) whether creditors would be prejudiced. Record indicated that fault was that of Debtor rather than counsel; and creditors would be prejudiced given delay between closing of case and Motion to Reopen.
- (8803) *In re Kessler*, 2018 WL 4182111 (Bankr. E.D. Mi. 2018) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than five years after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited more than 5 years before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 5 year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8804) *In re Lockhart*, 582 BR 1 (Bankr. E.D. Mi. 2018) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than one year after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited more than 1 year before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 1 year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8805) *In re Garnett*, 2018 WL 661392 (Bankr. E.D. Mi. 2018) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than 5 years after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited more than 5 years before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 5 year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8806) *In re Bragg*, 2017 WL 6033660 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited nearly 11 months after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited 11 months before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 11 month delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8807) *In re Sims*, 2017 WL 5054311 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than 5 years after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited over 5 years before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 5 year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8808) *In re Rondeau*, 2017 WL 4842070 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than 3 years after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited over 3 years before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 3 year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8809) *In re Whitaker*, 2017 WL 4842071 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited almost 1 year after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited almost one year before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; almost one year delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8810) *In re Wilson*, 2017 WL 4838741 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition

Financial Education denied where Debtor waited almost 15 months after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited over one year before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; fault lies with counsel rather than Debtor; and creditors would not be prejudiced. Debtor offered no explanation for the delay; 15 month delay was not “timely”; Debtor did not assert that delay was fault of counsel as Debtor was pro se; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.

- (8811) *In re Barrett*, 2017 WL 2992483 (Bankr. E.D. Mi. 2017) – Motion to Reopen Case to allow Debtor to file Certificate of Post-Petition Financial Education denied where Debtor waited more than 8 years after closing of case to seek to reopen and file Certificate. Motion did not allege any good cause why Debtor failed to obtain Certificate at time case was pending or why Debtor waited 8 years before seeking to do so. Court may, for cause, reopen case and extend time to file certificate if Motion is filed within short time after case is closed; there is reasonable explanation for failure to comply; whether fault lies with counsel or Debtor; and whether creditors would be prejudiced. Debtor offered no explanation for the delay; 8 year delay was not “timely”; Debtor did not assert that delay was fault of counsel; and creditors would be prejudiced if discharge was “sprung” on creditors after such an extended delay.
- (8812) *In re Chrisman*, 2016 WL 4447251 (Bankr. N.D. Ohio 2016) – Motions to reopen cases are governed by 11 USC Section 350, which allows court to reopen case to administer assets or to accord relief to Debtor. Debtor filed Chapter 7 in 2009. Section 341 Meeting was set and held in April, 2009. Deadline for Debtor to obtain financial management certificate was June 12, 2009. After Debtor failed to file certificate, court closed case without discharge. However, Debtor did not actually complete financial management class until Summer, 2016, a delay of more than 7 years. While court may sanction a minor delay in completing financial management class after expiration of deadline to do so, court must balance reopening of case against rights of creditors, based on whether there is reasonable explanation for failure to comply; whether request to comply was timely; whether fault lies with counsel or instead with Debtor; and whether creditors are prejudiced. Debtor failed to offer any explanation for 7 year delay. While Debtor appeared pro se, it is Debtor’s obligation to be aware of and comply with basic requirements. Debtor’s case had large number of unsecured creditors, many of whom were receiving mail from court when discharge entered but are no longer receiving mail. To spring discharge on creditors 7 years later would be unfair. Delay was not in filing certificate, but in completing financial management course in the first instance. Congressional intent of requiring Debtor to complete course as condition of discharge would be completely thwarted by delay in this case.
- (8813) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor’s failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor’s Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (8814) *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.
- (8815) *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

- (8816) *Mavrikis v. Kurt*, 2018 WL 1035151 (N.D. Ohio 2018) - Court Clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are integral part of judicial process. Whether act is judicial in character does not depend on whether it is discretionary. Immunity applies to all acts of auxiliary court personnel that are basic and integral parts of judicial function unless acts are done in clear absence of all subject matter jurisdiction of court. Acts committed in error or in excess of jurisdiction will not abrogate immunity, even if it results in grave procedural errors. Acts of Court Clerk deciding where to docket Motion and interpreting and following orders of judicial officers are integral parts of judicial process and within subject matter jurisdiction Court.
- (8817) *In re Chaban*, 2015 WL 5026079 (E.D. Mi. 2015) – State Court judge enjoys judicial immunity for judicial acts unless judge’s actions are not made in judicial capacity or when judicial action is taken in complete absence of all jurisdiction. State Court judge who imposed sanctions against Debtor after Debtor filed bankruptcy acted within judicial capacity. Judge did not lack all jurisdiction in entering sanctions. Acts may be in excess of jurisdiction but not entirely without jurisdiction and so are protected by judicial immunity. Imposition of sanctions was not violation of stay, but even if State Court had acted in violation of stay, actions would have been merely in excess of jurisdiction and not entirely without jurisdiction and so are protected by immunity. State Court judge had proper jurisdiction over all State Court proceedings that culminated in imposition of sanctions and imposition of stay did not divest court entirely of any jurisdiction over action whatsoever.
- (8818) *Kilgore-Wilson v. Delk*, 2014 WL 4929252 (W.D. Tn. 2014) – Bankruptcy Judge and chambers staff are entitled to absolute immunity for actions taken in course of duties. Only exceptions are where conduct occurs when person is not acting as judge, or when conduct alleged, although judicial in nature, is taken in complete absence of all subject matter jurisdiction. Complaint against judge based on orders entered in separate bankruptcy case dismissed.
- (8819) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) – Judge performing judicial function is absolutely immune for suit, even if judge acts erroneously, maliciously or in excess of authority. Judicial immunity can be overcome only where actions are not

taken within judicial capacity, or actions are taken in complete absence of all jurisdiction. Complaint sought damages based on alleged erroneous rulings was squarely within scope of judicial immunity.

- (8820) *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.

18.2 Court Staff

- (8821) *Bedell v. Ohio Dept. of Jobs & Family Services*, 2017 WL 6055227 (N.D. Ohio 2017) - Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are integral part of judicial process. Immunity applies to all acts of auxiliary court personnel that are basic and integral parts of judicial function unless those acts are done in clear absence of all subject matter jurisdiction of court. Acts committed in error or in excess of jurisdiction will not abrogate immunity, even if it results in “grave procedural errors.”

B. Trustee Immunity

18.3 Quasi-Judicial Immunity

- (8822) *Phoenician Mediterranean Villa, LLC*, Case No. 16-3366 (3d Cir. 2017) – Chapter 7 Trustee enjoys qualified immunity for acts taken in official capacity that are not contrary to clearly established law. Trustee not liable to tenant allegedly “constructively evicted” when Trustee of Debtor-Lessor’s estate took control of leased premises and locked out tenant in effort to preserve property. Trustee’s discretionary actions to secure and preserve property within scope of authority.
- (8823) *White v. Corcoran*, Case No. 17-2024 (Bankr. E.D. Mi. 2017) – Trustee entitled to quasi-judicial immunity for acts within scope of duties and is liable personally only for acts willfully and deliberately taken in violation of fiduciary duty. Complaint against Trustee barred where all actions complained of involved Trustee’s actions in administering assets of estate including sale of property and collection of rents. While Plaintiff may not agree with all of actions of Trustee, those actions were within scope of authority and discretion afforded Trustee.
- (8824) *In re Rogan*, Case No. 16-21469 (Bankr. D. Conn. 2017) – Quasi-Judicial Immunity is independent bar against claims against Trustee for actions involving administrative and quasi-adjudicatory functions. Chapter 13 Trustee immune from answering State Court Writ of Execution obtained and served post-dismissal that sought to compel turnover of funds received by Trustee during course of Chapter 13 case. Trustee’s acts in overseeing administration of case and disposition of payments when plan is not confirmed are duties delegated to Trustee and are inextricably linked with court’s function in Chapter 13 process.

18.4 Barton Doctrine

- (8825) *McDonald v. Wenzloff*, 2018 WL 1185283 (E.D. Mi. 2018) – *Barton* doctrine established by U.S. Supreme Court provides that before lawsuit is brought against trustee, leave of court by which he was appointed must be obtained. Doctrine does not apply in case where Trustee is Plaintiff.
- (8826) *Bell v. McLemore & Young, PLLC*, 2017 WL 4999627, *report and recommendation adopted*, 2017 WL 5899270 (M.D. Tn. 2017) – *Barton* doctrine requires leave of appointing forum before bringing action in non-appointing forum against trustee for acts done in the trustee’s official capacity and within trustee’s authority as officer of court. Doctrine does not apply to claims arising out of acts or transactions in carrying on business in connection with property of estate. Collecting, taking steps to preserve, holding assets, and other aspects of administering and liquidating estate do not constitute carrying on business. Claims based on Trustee’s alleged failure to pursue causes of action that belong to estate and trustee’s intervention when Debtor attempted to bring actions on his own behalf involve property of estate such that suit against Trustee is precluded by *Barton*. Plaintiff’s claims against Trustee related directly to actions taken by Trustee in capacity and responsibility as Trustee.
- (8827) *In re Rogan*, Case No. 16-21469 (Bankr. D. Conn. 2017) – *Barton* doctrine prohibits suits against Trustee for actions taken in Trustee’s official capacity and with Trustee’s authority without prior approval of appointing Court. Doctrine is jurisdictional, and failure to comply deprives Court of subject matter jurisdiction. Creditor violated *Barton* by obtaining State Court Writ of Execution and serving Writ on Trustee following dismissal of Chapter 13 case. Execution was of no legal force or effect and Trustee was not required to honor execution.
- (8828) *In re Bedell*, Case No. 03-10509 (Bankr. D. Kan. 2017) – *Barton* doctrine precludes action against liquidating agent appointed by Court in pending Chapter 7 proceeding without permission from the Court that appointed liquidating agent. Debtor precluded from reopening previously closed Chapter 13 Case to strip lien where lien was being serviced by Chapter 7 liquidating agent in bankruptcy filed by prior owner of mortgage pool. Court will not reopen case where doing so would be futile. Debtor had not obtained permission from Court that appointed liquidating agent to bring action against liquidating agent to strip lien. Accordingly, reopening bankruptcy case would not allow Bankruptcy Court in Chapter 13 to grant any effective relief. Exception to *Barton* doctrine contained in 28 USC Section 959 allows actions against Trustee without leave of Court with respect to acts or transactions in carrying on business connected with property of estate. Liquidating agent was not conducting business but was, instead, attempting to liquidate Chapter 7 Debtor’s estate, rendering Section 959 inapplicable.
- (8829) *Budzynski v. Shapiro*, Case No. 16-12983 (E.D. Mi. 2016) – Prior consent of appointing court under *Barton* is not needed to institute suit against Trustee in court that appointed trustee.
- (8830) *Halloum v. Kasolas*, Case No. 15-1401 (9th Cir. BAP 2016) – *Barton* doctrine provides that trustee can be sued only with leave of court that appointed trustee in first instance. Action brought in State Court challenging actions of Chapter 7 Trustee dismissed where only allegations were associated with trustee’s handling of estate assets and in his position as trustee and was brought in State Court without prior Bankruptcy

Court authorization. Doctrine continues to apply even after estate is fully administered and case is closed. If party requests Court authorization, party must demonstrate to appointing court a prima facie case against Trustee by demonstrating either that Trustee acted beyond scope of authority or breached fiduciary duties through gross negligence or willful and deliberate violations.

- (8831) *Dietrich v. Simon*, 2016 WL 6106742, *report and recommendation approved*, 2016 WL 6083752 (E.D. Mi. 2016) – *Barton* doctrine requires that before suit is commenced against receiver or trustee, plaintiff obtain consent of appointing court to bring action. Action dismissed where Defendant was originally appointed as receiver by State Court and later remained as Trustee in bankruptcy where plaintiff did not obtain consent of either State Court or Bankruptcy Court before commencing action. Nothing in 28 USC Section 959, which allows suits against Trustees, receivers or managers of any property, including Debtors in possession, without leave of the court appointing them with respect to any of their acts or transactions in carrying on business connected with such property did not abdicate *Barton* requirement where complaint alleges that trustee committed theft an illegal seizure and disposition of property to amass fees for benefit of trustee. Exception created in Section 959 does not apply to suits against trustee for actions taken while administering estate including collecting, preserving, and holding assets are not “carrying on business” as used in statute. Allegations that trustee acted illegally were contrary to State Court Order appointing receiver which specifically authorized receiver to change locks and bar plaintiff from the business premises as well as to take possession of, safe guard and liquidate assets. Relief requested based specifically on actions taken by receiver at the direction of and with approval of State Court, barring suit against receiver without State Court authorization. Complaint did not allege that Trustee improperly carried on business as phrase is used in statute but alleges to the contrary that trustee improperly closed business, terminated employees, and disposed of assets.
- (8832) *Kilgore-Wilson v. Delk*, 2014 WL 4929252, *order adopted*, 2014 WL 4929256 (W.D. Tn. 2014) – Chapter 13 Trustee’s staff attorney entitled to absolute immunity for actions taken in course of Chapter 13 case.
- (8833) *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.
- (8834) *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.
- (8835) *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.
- (8836) *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.
- (8837) *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.
- (8838) *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.

- (8839) *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.
- (8840) *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.

18.5 Barton Doctrine – Limitations

- (8841) *In re Bedell*, Case No. 03-10509 (Bankr. D. Kan. 2017) – *Barton* doctrine precludes action against liquidating agent appointed by Court in pending Chapter 7 proceeding without permission from the Court that appointed liquidating agent. Debtor precluded from reopening previously closed Chapter 13 Case to strip lien where lien was being serviced by Chapter 7 liquidating agent in bankruptcy filed by prior owner of mortgage pool. Court will not reopen case where doing so would be futile. Debtor had not obtained permission from Court that appointed liquidating agent to bring action against liquidating agent to strip lien. Accordingly, reopening bankruptcy case would not allow Bankruptcy Court in Chapter 13 to grant any effective relief. Exception to *Barton* doctrine contained in 28 USC Section 959 allows actions against Trustee without leave of Court with respect to acts or transactions in carrying on business connected with property of estate. Liquidating agent was not conducting business but was, instead, attempting to liquidate Chapter 7 Debtor's estate, rendering Section 959 inapplicable.
- (8842) *Budzynski v. Shapiro*, Case No. 16-12983 (E.D. Mi. 2016) – Prior consent of appointing court under *Barton* is not needed to institute suit against Trustee in court that appointed trustee.
- (8843) *Halloum v. Kasolas*, Case No. 15-1401 (9th Cir. BAP 2016) – *Barton* doctrine provides that trustee can be sued only with leave of court that appointed trustee in first instance. Action brought in State Court challenging actions of Chapter 7 Trustee dismissed where only allegations were associated with trustee's handling of estate assets and in his position as trustee and was brought in State Court without prior Bankruptcy Court authorization. Doctrine continues to apply even after estate is fully administered and case is closed. If party requests Court authorization, party must demonstrate to appointing court a prima facie case against Trustee by demonstrating either that Trustee acted beyond scope of authority or breached fiduciary duties though gross negligence or willful and deliberate violations.
- (8844) *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.
- (8845) *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.
- (8846) *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.
- (8847) *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.

- (8848) *Grant, Konvalinka & Harrison, P.C. v. Banks*, 2011 WL 3585622 (Bankr. E.D. Tn. 2011) *aff'd* 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.
- (8849) *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.
- (8850) *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.
- (8851) *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 from other than appointing court where State Court action seeks to hold Trustee liable for actions taken after commencement of bankruptcy case.
- (8852) *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.
- (8853) *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.

C. Creditor Committee Immunity

18.6 Generally

- (8854) *Blixseth v. Brown*, Case No. 14-35363 (9th Cir. 2016) – *Barton* doctrine protects members of creditor's committee from suit without prior consent of appointing court for actions within course and scope of committee authority. Immunity limited to actions taken by committee member where Debtor had notice of proposed acts and bankruptcy court approved the acts. Case remanded to Bankruptcy court to determine if actions taken by Committee Chairman were within scope of committee authority and were approved by the Court.

18.7 Testimonial Immunity – Absolute Privilege

- (8855) *AFS/IBEX v. Larson*, Case No. 15-11409 (E.D. Mi. 2018) – Statements made at Section 341 meeting are subject to absolute privilege and cannot form basis of cause of action for defamation. Absolute privilege applies to proceedings of legislative bodies; judicial proceedings;

and communications by military officers. Section 341 Meeting is “judicial proceeding” as testimony at Section 341 Meeting assists Court in administration Bankruptcy estate and involves disclosing to creditors possible assets and potential targets of recovery. Debtor does not have right to evaluate liability or collectability and then fail to disclose. Statements are privileged if made during trial or part of judicial proceeding. Testimony, even if false or malicious, is absolutely privileged.

XIX. Bankruptcy Crimes

A. Fraud

19.1 Generally

- (8856) *U.S. v. Williams*, Case No. 17-2244 (7th Cir. 2018) – Serial bankruptcy petitions to avoid foreclosure can constitute bankruptcy fraud. Debtor filed five separate Chapter 13 petitions to stop condominium Association from proceeding with addition. In each case, Debtor file Chapter 13 petition but did not file completing documents and did not make payments. Debtor also temporarily transferred title of unit to friend for no consideration who then filed his own Chapter 13 petition which was also dismissed. Multiple Chapter 13 bankruptcy filings in bad faith constitute fraud. Debtor’s sentenced to 47 months in prison where claims increased from first filing to last filing by \$193,000, justifying finding that losses resulting from fraud exceeded \$150,000. For purposes of sentencing enhancement, losses not limited to those suffered by condominium Association because fraudulent bankruptcy filings automatically precluded other creditors from collecting debts.
- (8857) *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.
- (8858) *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.
- (8859) *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.”
- (8860) *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.
- (8861) *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.
- (8862) *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 refilling 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).
- (8863) *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.
- (8864) *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

- (8865) *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

- (8866) *U.S. v. Kurlmann*, 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.
- (8867) *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

- (8868) *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

- (8869) *U.S. v. Johnson*, 2012 WL 2564437 (S.D. Ohio 2012) –

19.6 Sanctions

- (8870) *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.
- (8871) *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.
- (8872) *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.
- (8873) *United States v. Mason*, 2008 WL 4280123 (6th Cir. 2008) - Defendant sentenced to 42 months in prison for bankruptcy fraud.
- (8874) *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.

19.7 Statute of Limitations

- (8875) *U.S. v. Curtis*, 2014 WL 3444947 (5th Cir. 2014) – Statute of limitations on charge of bankruptcy fraud for concealment of assets begins to run on day after entry of discharge and not day of discharge itself.

19.8 Advice of Counsel Defense

- (8876) *United States v. Bruner*, 2015 WL 4567843 (6th Cir. 2015) – Advice of counsel defense requires that defendant alleged to have performed a criminal act argues that she did so on her lawyer’s advice, and therefore lacked the requisite mens rea element of the offense. Defendant must offer evidence of (1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel’s advice. Defendant who fully disclosed all pertinent facts to counsel, and relied in good faith on counsel’s advice, is entitled to a reliance jury instruction. Instruction should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation. Instruction not warranted where even assuming counsel incorrectly advised Debtor regarding trust and Social Security income, Debtor also failed to disclose other income and assets including over \$223,000 in cash found in Debtor’s residence, two other homes, and several vehicles. Evidence also indicated that Debtor did not fully disclose all pertinent facts regarding the trusts to attorney. Attorney testified that Debtor asked him only a general question about a trust held exclusively by Debtor’s mother and sister and counsel replied that as a general principle of law, property held in an irrevocable

trust for the benefit of someone other than the Debtor would not be deemed property of her bankruptcy estate. Debtor provided nothing more than a general, incomplete question that elicited only a general, incomplete response”.

XX. Personally Identifiable Information

A. Generally

20.1 Statutory Requirements

(8877) *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.

(8878) *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

(8879) *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

(8880) *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.

(8881) *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.

(8882) *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.

(8883) *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 Injunctive Relief

(8884) *In re Bankston*, 2015 WL 6126440 (Bankr. E.D. Tn. 2015) – Neither Section 107 nor Rule 9037 creates private right of action for disclosure of personally identifiable information. Section 107 and Rule 9037 deal with records of the court, not records maintained by or behavior of parties who may appear before the court. National Data Center erroneously reported Debtor’s full social security number which was then disclosed to subscriber to NDC. Request for injunctive relief to require NDC to remove information and to not re-publish information was directed solely to conduct of NDC and not the court.

20.5 Damages

(8885) *Mallard v. Wynn-Singer & Associates*, 2014 WL 988779 (Bankr. E.D. Ky. 2014) – There is no private right of action for alleged violations of local rules implementing the E-Government Act. Section 105 does not authorize court to create remedy where statute that is allegedly violated does not, itself, create a remedy. Creditor that allegedly improperly disclosed personal medical information in attachment to proof of claim not liable for damages under either local rules or E-Government Act of 2002. Debtor could not maintain state law action for public disclosure of private facts where evidence was uncontroverted that no member of the public ever accessed or reviewed the proof of claim. Absent evidence that the private information was “publicized”, state law claim failed.

(8886) *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.

(8887) *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”.

- (8888) *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 Contempt

- (8889) *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.
- (8890) *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.
- (8891) *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.
- (8892) *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.

20.7 Redaction from Transcript

- (8893) *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

- (8894) *Hoy v. Aurora Loan Services, LLC*, 2017 WL 2438807 (S.D. Ohio 2017) - Prior to October 3, 2015, RESPA did not apply to consumer transactions involving property in excess of 25 acres. Complaint against mortgage servicer failed to state cause of action where foreclosure proceedings were completed prior to October 3, 2015 and property exceeded 25 acres.
- (8895) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Provisions of RESPA contained in 12 USC Section 2604 did not provide for private cause of action based on alleged failure to make disclosures.
- (8896) *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 Standing

- (8897) *Keen v. Ocwen Loan Servicing, LLC*, 2018 WL 4111938 (M.D. Tn. 2018) – RESPA and rules under Regulation X apply only to individual who is “borrower”, defined as individual obligated to repay note. Plaintiff was not “borrower” where plaintiff’s spouse was sole signatory on promissory note. Plaintiff signed mortgage but was not personally obligated to pay sums secured by mortgage. Although plaintiff submitted to lender a “family transfer package” to transfer mortgage loan from plaintiff’s now deceased spouse to plaintiff individually, lender did not accept or confirm transfer of liability to plaintiff. Amendments to Mortgage Servicing Rules that took effect in April 2018 did not apply to loan transaction that was completed prior to effective date of Amendments and could not be used to support argument that plaintiff was “borrower” for purposes of RESPA.

- (8898) *Roes v. Specialized Loan Servicing*, 2018 WL 3636543 (E.D. Tn. 2018) – 12 CFR Section 1024.35 addresses servicers duties on receipt of Notice of Error. Regulation prohibits mortgage servicer from furnishing adverse information to consumer reporting agencies for 60 days after receipt of notice of error. Regulation does not create private right of action.

21.3 Construction With Bankruptcy Code

- (8899) *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.

21.4 Statute of Limitations

- (8900) *Nino v. Flagstar Bank, FSB*, 2018 WL 1556235 (E.D. Mi. 2018) – RESPA has three-year statute of limitations. Complaint alleging that servicer did not timely respond to Qualified Written Request accrued when deadline to provide response expired, not when response provided. QWR response deadline passed in November, 2013. Complaint filed in December 2016 was filed one month after expiration of Statute of Limitations and must be dismissed.
- (8901) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – RESPA has three year statute of limitations. Plaintiff's adversary proceeding commenced in February, 2010, was time barred as to any letter or other cause of action that arose prior to February, 2007. Counts of complaint based on lender's alleged failure to acknowledge or respond to QWRs sent more than three years prior to commencement of adversary complaint were time barred.

B. Qualified Written Request

21.5 Defined

- (8902) *Baker v. Nationstar Mortgage, LLC*, 2018 WL 3496383 (S.D. Ohio 2018) – QWR is defined as any written correspondence other than notice on payment coupon or payment medium, that includes or enables servicer to identify name and account of borrower and includes a statement of reasons for borrower's belief that account is in error or provides sufficient detail to servicer regarding other information sought by borrower. Borrower's letter constituted QWR were letter included are owners name and account and detailed list of information sought including name, address and telephone number of owner of note; date that current noteholder acquired note; date servicer began servicing loan; complete payment history of how payments and charges were applied; current interest rate on loan and accounting of any adjustment; statement of amount necessary to reinstate loan; complete copy of loan closing documents; and copy of all appraisals, property inspections and risk assessments. Letter specifically stated that it was Qualified Written Request pursuant to RESPA. Inquiry constitutes QWR notwithstanding language extending inquiry beyond servicing of loan as QWR includes requests for information relating to servicing of loan but is not limited to servicing as any request for information made was sufficient detail is enough under RESPA to constitute QWR. Request for information about appraisals and property values triggered obligation to respond regardless of whether inquiry related to "servicing".
- (8903) *Lieber v. Everbank Mortgage Company*, 2017 WL 8896203 (E.D. Mi. 2017) – QWR must identify the loan and include[statement of reasons for the belief that the account is in error; provide] sufficient detail to servicer regarding other information sought by the borrower; or request accounting loan including history of payments and future amounts due. Letter that requested list of documents dealing with origination of loan did not constitute QWR as letter did not raise any issue regarding servicing of loan. Second letter detailing hardships suffered by Borrower not QWR as letter did not identify loan and lamented denial of loan modification but did not assert any error in servicing. Third letter, while identifying loan by name and account number and seeking answers relating to escrow shortfall, was more intended to express disbelief and surprise as to mechanism of loan modification and ownership of debt without any details as to why Borrower believed account to be in error other than general perception that "something's fishy". Even if third letter constituted QWR, Servicer timely responded detailing two prior loan modifications and noting that Borrower had not made payments and declined to accept third proffered loan modification. Response adequately addressed issues and concerns raised in third letter.
- (8904) *Farr v. Nationstar Mortgage, LLC*, 2017 WL 445601 (E.D. Mi. 2017) – RESPA require servicer of mortgage who receives Qualified Written Request to acknowledge receipt of request within five days and to provide information within 30 days. To qualify as Qualified Written Request, letter must contain information that enables servicer to identify name and account of borrower and statement of reasons for borrower's belief that account is in error or provides sufficient detail to servicer regarding other information sought. Complaint failed to state cause of action where complaint alleged only that "plaintiff previously requested all required Notices as part of a Qualified Written Request" but did not set forth any specific deficiencies or explain how or when plaintiffs were harmed by servicers alleged failure to respond. Further, documents attached to complaint indicate that servicer did respond and did attempt to answer questions raised.
- (8905) *Valandingham v. Springleaf Financial Services*, 2016 WL 6432834 (S.D. Ohio 2016) – QWR is correspondence that identifies borrower's account and includes statement of reasons for borrower's belief that account is in error or provides sufficient detail to servicer regarding other information sought by borrower. Servicer of a federally related mortgage loan may be liable for damages if servicer fails to adequately respond to a qualified written request. However, QWR is untimely if it is delivered servicer more than one year after servicer transferred servicing of mortgage loan. Servicer receiving untimely QWR has no duty to respond and cannot be held liable under RESPA. Borrower's QWR mailed to servicer almost 2 years after servicer transferred servicing was untimely and cannot support cause of action under RESPA.
- (8906) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – Recent rules adopted by Consumer Financial Protection Bureau

substantially alter and increase the scope of QWRs and reduce technical language that must be used to constitute a QWR. Rules require that if servicer establishes any web page including an address to which QWRs must be sent, servicer must also include address on *all* web pages used by servicer. Complaint that alleged that servicer included address on one web page but did not include address on second web page stated cause of action for violation of CFPB rules, even though borrower had correct address from the initially designated web page. QWR can now include a request for any information relating to servicing of loan, defined as receiving scheduled payments, and any other payments received from borrower pursuant to loan terms and includes any notice of error, as long as communication includes name of borrower; contains sufficient information to allow mortgage servicer to identify borrower's account; asserts error that borrower believes has occurred; and states information borrower is requesting. QWR can include request for correction of error in servicing, or information relating to servicing of loan, but need not include both. Further, servicer must reply to any notice of error even if notice does not constitute QWR and lender cannot ignore request for correction of error merely because request does not meet statutory formalities of QWR. "Error" can include servicer's alleged failure to provide accurate information to borrower regarding loss mitigation options and foreclosure; or servicer's moving for foreclosure judgment or order of sale or conducting foreclosure sale as a result of servicer's failure to diligently process request for loan modification or to request or otherwise attempt to obtain information needed for review for information beyond consumer's control such as third party credit reports. Complaint stated cause of action where plaintiff was not alleging that lender improperly denied loan modification but alleged instead that lender did not properly consider request for loan modifications by failing to take timely action to respond to borrower's request to correct errors relating to efforts to avoid foreclosures or other standard servicer duties.

- (8907) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Qualified Written Request is one that identifies the loan and states the reasons for the belief of the borrower that the account is in error or that provides sufficient information regarding other information sought. Loan servicer must then respond and failure to do so constitutes violation of RESPA. Letter from borrowers to lender's servicer, while not styled a "Qualified Written Request" sought accountings including accounting for funds paid into escrow accounts; and requested that servicer make an investigation of irregularities and borrower's disputes regarding proper crediting of payments. Request for accounting is sufficient to constitute QWR.
- (8908) *French v. Specialized Loan Servicing, LLC*, 2016 WL 2930938, 2016 U.S. Dist. LEXIS 95786 (E.D. Tn. 2016) – Qualified Written Request is correspondence from borrower that enables servicer to identify name and account of borrower, and must include statement of reasons for the borrower's belief that the account is in error or provide sufficient detail to the servicer regarding information sought by the borrower. Servicer then has 60 days to either make corrections to account or provide written explanation including a statement of reasons the servicer believes account is correct or any other information requested. To state cause of action under RESPA, plaintiff must show that he sent correspondence that met requirements of QWR, that servicer failed to timely respond, and that failure caused actual damages. Twenty-four page letter contained generic laundry list of document requests and legal arguments, none of which were specific to plaintiffs or their loan, questioning whether origination of the loan was lawful and whether servicer was the holder in due course of the note, and forth pages of document requests for loan documents, origination documents, agreements, assignments, transfers, allonges. Letter did not constitute QWR as it did not request information required to be responded to under RESPA. Absent proper QWR, servicer has no legal obligation or duty to respond. Further, record indicates that servicer did respond to extent provided for in RESPA by providing loan payment history, detailed outline of transactions, servicing expenses paid to third parties, tax and insurance payments, and any late charges assessed and paid, and provided phone number that borrower could contact for other questions. To extent letter requested specific information under RESPA, servicer fully complied with that request.
- (8909) *Martini v. JPMorgan Chase Bank, NA*, 2015 WL 8479633, 634 Fed. Appx. 159 (6th Cir. 2015) – Request for loan modification and request for guidelines and calculations used in denying loan modification are not Qualified Written Requests and neither sought any information regarding servicing of the loan.
- (8910) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Qualified Written Request ordinarily must come from the borrower or an agent for the borrower. "Agent" is one that acts for or in the place of another by authority from him as a representative, emissary, or official of a government a business representative; or a person authorized by another to act for him. State Attorney General is "agent" of borrower for purposes of issuing QWR where borrower reached out to AG for assistance in obtaining information about loan modification and AG send letters to act on behalf of borrower by contacting lender and servicer.
- (8911) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Qualified Written Request must include sufficient information to allow lender to identify loan and statement of reasons for belief that account is in error or otherwise provides sufficient detail to the servicer regarding other information requested by borrower. If letter does not constitute QWR, lender is under no duty to respond. Letter was not QWR where letter merely made vague allegations that borrower was victim of predatory lending and essentially requested all documents relating to the loan including mortgage and deed, assignments, escrow analyses, tax information, servicing agreements, copies of every cancelled check, money order or other payment, and many other documents; and did not seek information that related to servicing of the loan such as the monthly payment amount or any other payment under the terms of the loan.
- (8912) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Qualified Written Request must be in writing and contain sufficient information to allow the lender or services to identify the name and account of the borrower and must include a statement of the reasons for the borrower's belief that the account is in error or provide sufficient detail to the lender or servicer regarding the information sought by the borrower. To state cause of action under RESPA, complaint must show plaintiff sent correspondence that qualified as QWR and that servicer failed to respond timely, and that plaintiff suffered damages as a result. Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender's alleged failure to respond was not RESPA violation. Further, request must be made by borrower or borrower's agent. Letter from State Department of Finance sent to servicer following borrower's complaint to State was not request from borrower or borrower's agent where there was no evidence of any agency relationship between State and borrower. Request that did not ask for information about the loan, but challenged validity of

loan itself or that surround circumstances of loan origination, is not QWR. Letter that requested copies of loan documents is not QWR as request did not relate to loan servicing.

- (8913) *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.
- (8914) *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.
- (8915) *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.

21.6 Address for Mailing Qualified Written Request

- (8916) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – Recent rules adopted by Consumer Financial Protection Bureau substantially alter and increase the scope of QWRs and reduce technical language that must be used to constitute a QWR. Rules require that if servicer establishes any web page including an address to which QWRs must be sent, servicer must also include address on *all* web pages used by servicer. Complaint that alleged that servicer included address on one web page but did not include address on second web page stated cause of action for violation of CFPB rules, even though borrower had correct address from the initially designated web page.
- (8917) *Best v. Ocwen Home Loan Servicing*, 2016 WL 125875 (E.D. Mi. 2016), *aff’d* 2016 WL 10592245 (6th Cir. 2016) – Mortgage servicer has right to establish an address exclusively for receipt of QWR. Borrower must mail QWR to that address. Lender has no duty to respond to any QWR sent to an address other than the designated address. Complaint dismissed where record indicated that borrower did not mail QWR to designated address due to typographical error in address. Fact that servicer actually received QWR does not obviate need for borrower to use designated address and does not require servicer to respond.
- (8918) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender’s alleged failure to respond was not RESPA violation.
- (8919) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender’s alleged failure to respond was not RESPA violation. Further, request must be made by borrower or borrower’s agent. Letter from State Department of Finance sent to servicer following borrower’s complaint to State was not request from borrower or borrower’s agent where there was no evidence of any agency relationship between State and borrower. Request that did not ask for information about the loan, but challenged validity of loan itself or that surround circumstances of loan origination, is not QWR. Letter that requested copies of loan documents is not QWR as request did not relate to loan servicing.

21.7 Servicer’s Duty to Respond

- (8920) *Roes v. Specialized Lian Servicing*, 2018 WL 3636543 (E.D. Tn. 2018) – Servicer that receives “Notice of Error” has duty to respond to issues raised in Notice. Servicer complied with RESPA requirements where Notice of Air delineated five payments that borrower believed had been improperly applied to mortgage and servicer responded to Notice of Error by advising borrower that servicer had properly credited payments and waive late charges and fees and provided updated Life of Loan detailing corrections.
- (8921) *Baker v. Nationstar Mortgage, LLC*, 2018 WL 3496383 (S.D. Ohio 2018) – Upon receipt of QWR, servicer must acknowledge receipt within five days and within 30 days must (A) make appropriate corrections in account of borrower including crediting of late charges or penalties and transmit to borrower written notice of correction; (B) after conducting an investigation, provide borrower with written explanation or clarification that includes statement of reasons for which servicer believes account is correct and name and telephone number of individual employed by servicer who can provide assistance to borrower; or (C) provide borrower with written explanation of clarification that includes information requested by borrower or explanation why information requested is unavailable and cannot be obtained by servicer; and name and telephone number of individual employed by servicer who can provide assistance to borrower. Servicer must also refrain from reporting on borrower’s credit during 60 day period beginning on date of receipt of QWR. Servicer’s response was not sufficient under RESPA where response did not provide copies of appraisals and property inspections and did not provide any information regarding charges or any inspection reports although mortgage statement indicated that servicer had charged more than \$12,000 for property inspections amounting to 865 inspections at \$15 per inspection. Lender did not conduct meaningful investigation where response stated in only cursory fashion that lender reviewed account and all transactions appeared to be correct. “Investigation” means search or inquiry, systematic examination, and

careful and minute research. Definition of “investigation” is inconsistent with cursory or superficial inquiry. Lender pointed to no evidence that it conducted reasonably thorough investigation and relied solely on language that investigation was conducted with no evidence whether investigation was reasonable. Lender was required to not only conduct investigation, but to explain why account was correct and lenders response that stated concludes orally that account was correct was not sufficient as response did not provide borrower with information requested or explanation of why information was unavailable. Lender did not include requested information or explain why information was unavailable without any explanation why information was unavailable.

- (8922) *Lieber v. Everbank Mortgage Company*, 2017 WL 8896203 (E.D. Mi. 2017) – Servicing is defined as (i) receiving scheduled periodic payments from borrower pursuant to terms of any loan including escrow accounts and (ii) making payments of principal and interest and such other payments from funds received from borrower as required by loan documents. 12 U.S.C. § 2605(e)(2) requires servicer to respond to QWR within 30 days of receipt. If QWR asserts error in servicing and servicer determines account is correct response must state reasons for servicer’s belief that account is correct and name and telephone number of individual who can provide assistance to borrower. Servicer timely and adequately responded to letter that expressed disbelief and surprise as to loan modification agreement and ownership of the debt by detailing two prior loan modifications and noting that Borrower had not made payments and declined to accept third proffered loan modification. Response adequately addressed issues and concerns raised in third letter.
- (8923) *Farr v. Nationstar Mortgage, LLC*, 2017 WL 445601 (E.D. Mi. 2017) – RESPA require servicer of mortgage who receives Qualified Written Request to acknowledge receipt of request within five days and to provide information within 30 days. To qualify as Qualified Written Request, letter must contain information that enables servicer to identify name and account of borrower and statement of reasons for borrower’s belief that account is in error or provides sufficient detail to servicer regarding other information sought. Complaint failed to state cause of action where complaint alleged only that “plaintiff previously requested all required Notices as part of a Qualified Written Request” but did not set forth any specific deficiencies or explain how or when plaintiffs were harmed by servicers alleged failure to respond. Further, documents attached to complaint indicate that servicer did respond and did attempt to answer questions raised.
- (8924) *Valandingham v. Springleaf Financial Services*, 2016 WL 6432834 (S.D. Ohio 2016) – QWR is correspondence that identifies borrower’s account and includes statement of reasons for borrower’s belief that account is in error or provides sufficient detail to servicer regarding other information sought by borrower. Servicer of a federally related mortgage loan may be liable for damages if servicer fails to adequately respond to a qualified written request. However, QWR is untimely if it is delivered servicer more than one year after servicer transferred servicing of mortgage loan. Servicer receiving untimely QWR has no duty to respond and cannot be held liable under RESPA. Borrower’s QWR mailed to servicer almost 2 years after servicer transferred servicing was untimely and cannot support cause of action under RESPA.
- (8925) *Cole v. JPMorgan Chase Bank*, 2016 WL 4491731 (S.D. Ohio 2016) – Recent rules adopted by Consumer Financial Protection Bureau substantially alter and increase the scope of QWRs and reduce technical language that must be used to constitute a QWR. Servicer must reply to any notice of error even if notice does not constitute QWR and lender cannot ignore request for correction of error merely because request does not meet statutory formalities of QWR. “Error” can include servicer’s alleged failure to provide accurate information to borrower regarding loss mitigation options and foreclosure; or servicer’s moving for foreclosure judgment or order of sale or conducting foreclosure sale as a result of servicer’s failure to diligently process request for loan modification or to request or otherwise attempt to obtain information needed for review for information beyond consumer’s control such as third party credit reports. Complaint stated cause of action where plaintiff was not alleging that lender improperly denied loan modification but alleged instead that lender did not properly consider request for loan modifications by failing to take timely action to respond to borrower’s request to correct errors relating to efforts to avoid foreclosures or other standard servicer duties.
- (8926) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Qualified Written Request is one that identifies the loan and states the reasons for the belief of the borrower that the account is in error or that provides sufficient information regarding other information sought. Loan servicer must then respond and failure to do so constitutes violation of RESPA. Letter from borrowers to lender’s servicer, while not styled a “Qualified Written Request” sought accountings including accounting for funds paid into escrow accounts; and requested that servicer make an investigation of irregularities and borrower’s disputes regarding proper crediting of payments. Request for accounting is sufficient to constitute QWR.
- (8927) *French v. Specialized Loan Servicing, LLC*, 2016 WL 2930938, 2016 U.S. Dist. LEXIS 95786 (E.D. Tn. 2016) – Servicer has 60 days from receipt of QWR to either make corrections to account or provide written explanation including a statement of reasons the servicer believes account is correct or any other information requested. Twenty-four page letter contained generic laundry list of document requests and legal arguments, none of which were specific to plaintiffs or their loan, questioning whether origination of the loan was lawful and whether servicer was the holder in due course of the note, and forth pages of document requests for loan documents, origination documents, agreements, assignments, transfers, allonges. Letter did not constitute QWR as it did not request information required to be responded to under RESPA. Absent proper QWR, servicer has no legal obligation or duty to respond. Further, record indicates that servicer did respond to extent provided for in RESPA by providing loan payment history, detailed outline of transactions, servicing expenses paid to third parties, tax and insurance payments, and any late charges assessed and paid, and provided phone number that borrower could contact for other questions. To extent letter requested specific information under RESPA, servicer fully complied with that request.
- (8928) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Servicer must provide written response acknowledging receipt of QWR within 5 days of receipt unless action is taken within that period. Within 30 days of receipt of QWR, servicer must either make appropriate corrections to account including creditor of late charges or penalties, and transmit to the borrower written notice of the correction; provide a statement of the reasons why the servicer believes the account is correct including the name and telephone number of an individual or office or department of the servicer who can provide assistance; or provide written notification that the information is unavailable and cannot be obtained by the servicer, including a phone number for a person, office or department who can provide assistance. Complaint stated cause of action by asserting that plaintiff made QWR, that defendant never acknowledged receipt of QWR, and defendant never responded to QWR, although defendant did dismiss foreclosure action.

- (8929) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Servicer under RESPA must respond either with information requested by borrower or with explanation as to why information is not available or cannot be provided. Servicer violated RESPA requirement when borrower inquired about status of loss mitigation application and servicer and servicer inaccurately responded that borrower had been offered a trial loan modification when servicer had not offered modification but did offer a forbearance agreement. Complaint stated cause of action by alleging that servicer provided inaccurate or incomplete information and servicer failed to perform adequate investigation to obtain requested information. Servicer also inaccurately stated that borrower had been considered for two possible loss mitigation programs, one with a loan modification and one with a forbearance agreement, but servicer had provided only forbearance option and never offered loan modification.
- (8930) *Jacques v. JPMorgan Chase Bank*, 2015 WL 58646 (W.D. Mi. 2015) – Entity that is not servicer of loan at time QWR is issued is not required to respond and cannot be sanctioned either for failure to acknowledge QWR or to respond to QWR. Chase had previously serviced borrower's first mortgage. Some years earlier, borrower refinanced and paid off prior mortgage and new mortgage, through different lender, was serviced by different company. Chase had no contact with loan or borrower for a number of years and borrower had previously acknowledged in bankruptcy filings that other entity, not Chase, was servicer. Chase had no obligation to respond to QWR as Chase was not acting as servicer at time QWR issued and borrowers knew that Chase was not servicer.
- (8931) *Patrick v. CitiMortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – QWR is written correspondence 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. On receipt of QWR, lender or mortgage servicer must provide a written response acknowledging receipt within 5 days and respond within 30 days indicating the appropriate corrections have been made, after investigation servicer believes that no error has occurred and provide contact information, or after investigation explain why servicer does not have sufficient information to make a determination and to provide contact information. HUD Rule found in 24 CFR Section 3500.21(e) allows a mortgage service to establish a separate and exclusive office and address for receipt and handling of QWRs. If servicer has established an address, inquiry must be sent to that address to qualify as QWR. Servicer sufficiently informed borrower of address by including specific language in each monthly mortgage statement specifying address to which QWR must be sent. Debtor's letter, addressed to address other than that specified, is not QWR and servicer's alleged failure to timely respond is not actionable.
- (8932) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Lender or servicer must respond to QWR within 30 days of receipt. Where letters sent to servicer did not meet requirements for QWR, servicer had no duty to respond.
- (8933) *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.
- (8934) *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.
- (8935) *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.

21.8 Damages

- (8936) *Baker v. Nationstar Mortgage, LLC*, 2018 WL 3496383 (S.D. Ohio 2018) – RESPA imposes liability solely on mortgage servicer. Owner of note is not directly or vicariously liable for servicer's failure to comply with RESPA requirements.
- (8937) *Kantz v. Bank of America*, 2018 WL 1948164 (M.D. Tn. 2018) – Servicer's failure to respond to Qualified Written Request renders servicer liable for any actual damages suffered by borrower as result of failure, plus additional damages if evidence supports pattern or practice of non-compliance. Proof of actual damages is essential element of action under RESPA. Costs of preparing QWR are not damages as cost to prepare QWR entirely unrelated to and had not causal connection with any alleged failure of Servicer to respond. Costs of preparing and filing lawsuit alleging non-compliance are not actual damages under Section 2605(f)(1)(A) as those are specifically addressed in Section 2605(f)(3) that provides that recover is actual damages "in addition to" costs of action.
- (8938) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Servicer's failure to investigate and take remedial action if appropriate allows court to award damages to borrower. Complaint sufficiently alleged damages by alleging that despite reasonable requests, servicer failed to investigate irregularities or dispute of the amount of the debt and failed to properly credit payments and that borrowers suffered damages including improper and late charges and the cost of legal counsel prior to, during and post-bankruptcy proceedings. Complaint further alleged that servicer assessed unearned fees and costs including late fees on a monthly basis that were not agreed upon and/or, not fully disclosed causing borrower to overdraft their bank account on several occasions and that the fees and costs were wrongfully

deducted from payments before payments were applied to principal, interest and escrow; and that portions of the payments were not applied to the Mortgage and were not placed into the escrow account such that servicer began assessing unearned fees and costs including late fees. However, to extent complaint sought injunctive relief, complaint failed to state cause of action as injunctive relief is not available under RESPA.

- (8939) *Phillips v. Green Tree Servicing, LLC*, 2016 WL 627903 (E.D. Mi. 2016) – RESPA does not allow court to set aside foreclosure sale as remedy. Even if creditor violated RESPA by failing to timely respond to Qualified Written Request, that is not basis to set aside subsequent foreclosure sale.
- (8940) *Martini v. JPMorgan Chase Bank, NA*, 2015 WL 8479633 (6th Cir. 2015) – Even assuming borrower’s requests for guidelines and calculations used by lender in denying loan modification was QWR, borrowers failed to demonstrate any damages where only damages were inability to pay mortgage which did not arise from and had no connection with any alleged RESPA violation. Lender’s refusal to grant loan modification is not RESPA violation.
- (8941) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Section 2605(f) provides that in the event of a violation of RESPA, aggrieved party is entitled to actual damages, additional damages not to exceed \$2,000 in the case of a pattern or practice of non-compliance. Plaintiff must show damages and establish connection to alleged violation. Plaintiff’s complaint alleged actual damages resulting from misapplication of payments, dismissal of foreclosure without prejudice, and out of pocket costs of representation in attempting to resolve issues. Recovery is cumulative, to extent that servicer breaches RESPA on multiple occasions and allows court to award damages for each such failure. However, where all damages related to single QWR, that constitutes only single violation even if violation leads to multiple types of damages.
- (8942) *Jester v. CitiMortgage*, 2015 WL 631964 (N.D. Ohio 2015) – Action under RESPA requires more than establishing a violation. Borrower must also suffer actual, demonstrable damages that result from specific violation of RESPA. Allegation that plaintiff “suffered damages” or that plaintiff “became concerned that” payments were not properly accounted for were insufficient to demonstrate any actual damages allegedly resulting from RESPA violation.
- (8943) *McKey v. JPMorgan Chase Bank*, 2014 WL 5529672 (S.D. Ohio 2014) – Where lender fails to timely respond to Qualified Written Request, borrower is entitled to actual damages and, if the creditor is engaged in pattern or practice of non-compliance, an additional amount not to exceed \$2,000.00. Complaint sufficiently stated cause of action by alleging that creditor failed to correct or investigate missing or misapplied payments causing plaintiff to pay interest on a higher principal balance; that borrower had been denied refinancing and employment because of creditor’s erroneous reports to credit bureaus; and that borrower incurred attorney fees and costs in attempting to enforce QWR.
- (8944) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Plaintiff can recover emotional damages for violation of RESPA where plaintiff proves causal link between servicer’s activities and actual, demonstrable emotional turmoil.

C. Duties Generally

21.9 Notice of Assignment, Sale or Transfer of Servicing

- (8945) *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 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.
- (8946) *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.

21.10 Loss Mitigation

- (8947) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Regulations implementing RESPA, 12 CFR Section 1024.41, impose obligation on loan servicer who receives loss mitigation package more than 37 days before foreclosure sale to within 30 days (i) evaluate loan modification request; and (ii) provide borrower with notice of determination including specific reasons why loan modification is denied. Regulations also prevent foreclosure of a loan that is delinquent for less than 120 days, and provides that if borrower submits loan modification request while loan is less than 120 days delinquent, servicer may not make first notice of foreclosure sale unless (i) it has informed the borrower that they are not eligible for loss mitigation options, (ii) the servicer offers a loan modification and the borrower rejects such an option, or (iii) the borrower fails to perform under an agreement on loss mitigation. Violation allows borrower to recover actual damages plus additional damages not to exceed \$2,000 if servicer engages in pattern or practice of non-compliance. Lender is required to consider only one loan modification. Lender and servicer did not violate RESPA by rejecting borrower’s loan modification request where borrower had already modified loan twice and servicer had already considered third request for loan modification and advised borrower that modification was denied. Any alleged failure to provide additional notices after that would not constitute violation of RESPA. Denial further provided adequate information on denial, stating that complete package had not been received and that borrower had previously modified loan and was not eligible for another loan modification. Even if servicer had violated RESPA, there is no basis under the statute to set aside a previously conducted foreclosure sale or to order lender to modify mortgage, as remedy is limited to damages only.

D. Remedies

21.11 Rescission

- (8948) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Rescission is relief available under RESPA, but is not an independent claim. Any claim seeking rescission that does not allege facts warranting relief under RESPA is not actionable and must be dismissed

21.12 Vacating Sale

- (8949) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) - Violation of RESPA regulations allows borrower to recover actual damages plus additional damages not to exceed \$2,000 if servicer engages in pattern or practice of non-compliance. Even if servicer had violated RESPA, there is no basis under the statute to set aside a previously conducted foreclosure sale or to order lender to modify mortgage, as remedy is limited to damages only.
- (8950) *Parker v. Midwest Loan Services, Inc.*, 2016 WL 1242440 (E.D. Mi. 2016) – RESPA remedy is limited to monetary relief where violation of RESPA is result of pattern or practice. RESPA does not allow court to vacate foreclosure sale. Plaintiff also cannot recover under RESPA if borrower participated in loan modification process, even if process did not result in granting of loan modification. Plaintiff had previously availed himself of loan modification and later defaulted. Plaintiff could not maintain action under RESPA for alleged refusal of lender to consider new loan modification.

21.13 Loan Modification

- (8951) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Regulations implementing RESPA, 12 CFR Section 1024.41, impose obligation on loan servicer who receives loss mitigation package more than 37 days before foreclosure sale to within 30 days (i) evaluate loan modification request; and (ii) provide borrower with notice of determination including specific reasons why loan modification is denied. Regulations also prevent foreclosure of a loan that is delinquent for less than 120 days, and provides that if borrower submits loan modification request while loan is less than 120 days delinquent, servicer may not make first notice of foreclosure sale unless (i) it has informed the borrower that they are not eligible for loss mitigation options, (ii) the servicer offers a loan modification and the borrower rejects such an option, or (iii) the borrower fails to perform under an agreement on loss mitigation. Violation allows borrower to recover actual damages plus additional damages not to exceed \$2,000 if servicer engages in pattern or practice of non-compliance. Even if servicer had violated RESPA, there is no basis under the statute to set aside a previously conducted foreclosure sale or to order lender to modify mortgage, as remedy is limited to damages only.
- (8952) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – Action for alleged denial of loan modification dismissed where all facts underlying cause of action occurred prior to date on which RESPA regulations became effective.
- (8953) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Lender’s alleged denial of loan modification without providing in writing specific reasons for denial is not actionable under RESPA. Failure to comply with federal guidelines in connection with loan modification review is not subject to private right of action. Even if RESPA applied, RESPA would not provide a basis for a Court to either set aside a foreclosure sale or to order a loan modification.

21.14 Parties Liable

- (8954) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – Action for violation of RESPA in loan origination cannot be brought against party who was not party to origination of loan. Action against FNMA as successor to loan originator dismissed.

21.15 Pleading Requirements

- (8955) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Provisions of RESPA contained in 12 USC Section 2604 did not provide for private cause of action based on alleged failure to make disclosures.
- (8956) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – RESPA creates private cause of action for 3 kinds of acts: (1) payment of kickback and unearned fees for real estate settlement services; (2) requiring buyer to use title insurance selected by seller; and (3) failure by loan servicer to give proper notice of transfer of servicing rights or respond to qualified written request. Complaint failed to state cause of action or complaint alleged only generally that lender violated RESPA but failed to allege that lender engaged in any conduct which would give rise to cause of action under RESPA.
- (8957) *Jester v. CitiMortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Party not entitled to recover under RESPA absent evidence of actual damages. Pleading must state with specificity nature of violation and must demonstrate actual damages as a result. However, complaint need not specifically identify every element of damages as long as allegations are sufficient to demonstrate some damages. While complaint may have been “inartful” it did allege pattern of activity in violation of TILA that caused plaintiffs to “suffer[] damages” including failure to credit improperly charged late fees and penalties. Reasonable inference from allegations is that because lender failed to correct or investigate misapplied payments, plaintiff paid interest on higher principal balance that should have been the case.
- (8958) *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.
- (8959) *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.
- (8960) *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.

21.16 Actual Damages

- (8961) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Servicer’s failure to investigate and take remedial action if appropriate allows court to award damages to borrower. Complaint sufficiently alleged damages by alleging that despite reasonable requests, servicer failed to investigate irregularities or dispute of the amount of the debt and failed to properly credit payments and that borrowers suffered damages including improper and late charges and the cost of legal counsel prior to, during and post-bankruptcy proceedings. Complaint further alleged that servicer assessed unearned fees and costs including late fees on a monthly basis that were not agreed upon and/or, not fully disclosed causing borrower to overdraft their bank account on several occasions and that the fees and costs were wrongfully deducted from payments before payments were applied to principal, interest and escrow; and that portions of the payments were not applied to the Mortgage and were not placed into the escrow account such that servicer began assessing unearned fees and costs including late fees. However, to extent complaint sought injunctive relief, complaint failed to state cause of action as injunctive relief is not available under RESPA.
- (8962) *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.
- (8963) *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.
- (8964) *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.

21.17 Exemplary Damages

- (8965) *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.

21.18 “Pattern or Practice of Non-Compliance”

- (8966) *Kantz v. Bank of America*, 2018 WL 1948164 (M.D. Tn. 2018) – Servicer’s failure to respond to Qualified Written Request renders servicer liable for any actual damages suffered by borrower as result of failure, plus additional damages if evidence supports pattern or practice of non-compliance. Pattern or practice requires proof of similar conduct with other borrowers or repeated non-compliance in connection with request by Plaintiff. Claim for damages based on pattern or practice first requires Plaintiff to establish actual damages. Plaintiff made single QWR seeking payoff information to which Servicer responded 7 months later. Single alleged violation is not “pattern or practice”. Plaintiff did not produce evidence of actual damages. Request for payoff information came three years after commencement of foreclosure proceedings. Plaintiff did not allege that he had financial means at that time to pay balance of loan or that Plaintiff suffered any damages during 7 month delay in Servicer providing payoff information.

21.19 Injunctive Relief

- (8967) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Injunctive relief is not available under RESPA.

XXII. Mortgage Issues

A. Validity

22.1 Tenants in Common

- (8968) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Where property is titled in joint owners who are not spouses and deed does not specify joint tenant with right of survivorship, the estate conveyed is tenancy in common. Any tenant in common can validly mortgage the tenant’s interest. Lack of signature of other tenant in common does not invalidate mortgage. Mortgage is valid only as to ownership interest of tenant who signed mortgage.

22.2 Dower

- (8969) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Wife holds dower interest in property owned by husband where wife is not also on deed. Dower attaches at marriage and applies to land that husband brings to marriage as well as land that husband acquires during course of marriage. If mortgage is signed before marriage, dower interest is subject to mortgage. If mortgage is signed after marriage, mortgage is subject to dower rights. Lack of wife’s signature on mortgage does not render mortgage defective. Dower right is inchoate right

that does not vest until death of husband. Dower interest is limited to right to redeem mortgage upon foreclosure.

B. Foreclosures

22.3 Homestead

- (8970) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Mortgage on homestead does not have to be signed by both spouses where title to property is solely in one spouse's name. Husband could validly mortgage property he owned individually without signature of spouse. To be homestead, property must be owned and occupied by person asserting homestead status. As wife was not on title, wife was not owner of property and could not assert homestead status to invalidate mortgage.

22.4 Statute of Limitations

- (8971) *SRB Servicing, LLC v. McIntyre*, 2018 WL 2738879 (N.D. Ohio 2018) - Action to foreclose mortgage timely where statute of limitations has already run on action to enforce promissory note, where state law had six-year statute of limitations for action on note but eight-year statute of limitations to foreclose mortgage and action was brought more than six years but less than eight years after lender took affirmative action to accelerate debt. Inability to enforce personal liability does not prevent foreclosure of mortgage.

22.5 Standing to Foreclose

- (8972) *SMS Financial JDC, LP v. Cope*, Case No. 16-6063 (10th Cir. 2017) – Promissory note is negotiable instrument that may be enforced only by someone with standing, defined as someone who is party to the note or in privity with party to note. Standing has established by presenting facially enforceable note.
- (8973) *Skaags v. Nationstar Mortgage*, 2017 WL 1371077 (W.D. Mi. 2017) – Michigan law permits holder of mortgage to foreclose even if mortgage holder does not also owned note. Mortgage is made in trust to secure obligations and trust and beneficial interest in trust do not need to be the same party. Mortgagee is an owner of an interest in the indebtedness and is entitled to foreclose.
- (8974) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Under Michigan law, loan servicer has standing to foreclose even without ownership interest in note or mortgage.
- (8975) *Yaldo v. Homeward Residential, Inc.*, 2015 WL 4636627 (6th Cir. 2015) – Fact that lender transferred servicing to third party does not deprive lender of right to foreclose.
- (8976) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.
- (8977) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.
- (8978) *MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corporation, LLC*, 2015 WL 542176 (S.D. Ohio 2015) – A party in interest who does not hold an interest in the note or mortgage at the time that it files foreclosure action lacks standing that is fatal to court jurisdiction and cannot be cured after commencement of action. Plaintiff sufficiently demonstrated standing where plaintiff's complaint alleged that plaintiff was "successor by assignment" from original lender and there was no evidence that, at the time the action was filed, the plaintiff did not hold an interest in the note and mortgage.
- (8979) *BAC Home Loans Servicing, LP v. Groves*, 2014 WL 5511048 (5th Cir. 2014) – Borrowers conceded that lender had standing to foreclose by entering into agreed final judgment that established facts necessary for standing. Borrowers could not later contest standing under Rule 60 merely because borrowers no longer want to be bound by agreed judgment.
- (8980) *Frazer v. Deutsche Bank National Trust Co.*, 2014 WL 5335419 (9th Cir. 2014) – Party in physical possession of promissory note endorsed in blank has standing to pursue foreclosure and enforce the mortgage.
- (8981) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Endorsement of note from initial payee to Saxon which allegedly violated Freddie Mac guidelines did not render endorsement ineffective or result in not being void or unenforceable. Promissory note was in all respects a negotiable instrument within scope of UCC and was fully transferrable and negotiable. Party holding note is entitled to foreclose. Assignment of note carried with it assignment of deed of trust even absent separate assignment of deed of trust.
- (8982) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Foreclosure action can be brought by the mortgagee of record, any party who owns the indebtedness, and any parties who act as servicing agents. Foreclosure was proper where ABN was record owner, CitiMortgage was servicer, and attorney acted on behalf of servicer.
- (8983) *Deutsche Bank National Trust Co. v. Tibbs*, 2014 WL 280365 (M.D. Tn. 2014) – Under Article 3, party seeking to enforce note must be "holder". Holder does not need to be the owner of the note, but must be party entitled to enforce the note as defined in Article 3.
- (8984) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Federal Institutions Reform, Recovery and Enforcement Act (FIRREA) gives FDIC broad discretion to deal with assets of failed banks. FDIC must provide notice to creditors of failed institution of right to bring claims against institution and a deadline by which those claims must be brought or will be foreclosed. Plaintiff never filed claim against failed institution and was precluded from alleging any such claims as defense to foreclosure by successor institution.
- (8985) *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.

- (8986) *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.
- (8987) *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.
- (8988) *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.
- (8989) *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.
- (8990) *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.
- (8991) *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.

22.6 Refusal to Foreclose

- (8992) *Canning v. Beneficial Maine, Inc.*, 462 BR 258 (1st Cir. BAP 2011) , *aff’d* Case No. 12-9002 (1st Cir 2013) – Creditor does not violate stay or discharge injunction by refusing to release lien or foreclose against property. Surrender under Section 521 requires that Debtor make collateral available to secured creditor but does not obligate secured creditor to accept possession of collateral unless refusal to accept collateral is subterfuge to coerce payment by the Debtor of the discharged debt. Lender was not demanding that Debtors pay debt in full to obtain release of lien and offered to release lien through settlement or short sale, which provided ability of Debtor to sell property and indicated intent by creditor to recover no more than value of collateral.
- (8993) *Brown v. Branch Banking & Trust Co.*, 477 BR 915 (Bankr. S.D. Ga. 2012) – Surrender of collateral does not obligate creditor to take affirmative action to transfer title or to foreclose. Creditor does not violate stay by failing to take any action to either foreclose or transfer title after confirmation of Plan.
- (8994) *In re Arsenault*, 456 BR 627 (Bankr. S.D. Ga. 2011) – Creditor cannot be compelled to accept title to property that is surrendered in plan. Creditor does not violate stay by, post confirmation, refusing to accept title to property or to record deed or other conveyance of title. Although Debtor is no longer required to make payments and Debtor cannot take action to impede creditor’s completion of foreclosure process, creditor is under no obligation to either pursue foreclosure or to accept the conveyance.
- (8995) *In re Fristoe*, 2012 WL 4483891 (Bankr. D. Utah 2012) – Lender cannot be forced to foreclose or to accept deed in lieu of foreclosure. Broad equitable powers under Section 105 do not include power to sanction creditor for failure to timely foreclosure or to order the Trustee to sell property free and clear of liens. To force lender to foreclose would require lender to violate stay as property had not been abandoned by Chapter 7 Trustee and no party had requested relief from stay to proceed with foreclosure. There was no basis to force sale under Section 363 where none of the conditions under Section 363 applied. Fact that Debtor is now stuck with post-petition condominium fees on property Debtor no longer wants or occupies is issue for Congressional action, not something that the court can ignore or “work around”.

22.7 “Securitization”

- (8996) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit. Deed of Trust that listed MERS as nominee for lender is not invalid and MERS has proper role in loan administration when designated as nominee and beneficiary.
- (8997) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.

- (8998) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Loan transaction that named MERS as nominee for Bank, with later securitization of loan, did not render loan or mortgage invalid or assignment defective, or deprive Bank of standing to foreclose. Naming of MERS allows MERS to act as agent on behalf of any valid note holder, including assigning the deed of trust and enforcing the note. Securitization, by which third parties acquire interest in note by paying lender, did not discharge obligation under note or result in the note being deemed paid in full. Under Tennessee law, deed of trust follows note automatically, such that assignment of note transfers to assignee full right to enforce the deed of trust unless the assignment of the note expressly states to the contrary. Securitization does not render note or mortgage unenforceable or alter borrower's obligation to repay loan. Borrower lacks standing to allege that assignment of note and mortgage violated Pooling and Servicing Agreement as borrower is not party to that agreement.

22.8 State Law Procedures

- (8999) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Plaintiff's complaint alleging violation of MCL 600.3220 adequately stated "prejudice" resulting from foreclosure process by alleging that Plaintiff would have been in better position to retain property but for Defendant's non-compliance. Plaintiff alleged that she was not provided notice of sale until after sale occurred. Had plaintiff known of foreclosure sale before sale occurred, plaintiff would have had opportunity to challenge foreclosure sale before sale occurred and possibly sort out payment disputes with application of mortgage payments. Further, belated notice of sale deprived Plaintiff of full 6 months within which to redeem property or to file suit before expiration of redemption. Although defendant in response to complaint filed records demonstrating that defendant was correct and plaintiff had not made all required mortgage payments, that did not resolve second issue that plaintiff's time for redemption was artificially shortened.
- (9000) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Plaintiff's complaint alleging violation of Michigan's foreclosure statute based on alleged lack of proper notice failed to state cause of action where Plaintiff failed to demonstrate any prejudice arising from alleged deficiency, such as the loss of an ability to preserve interest in property or some risk of double liability based on lender's failure to comply with foreclosure statute.
- (9001) *Poole v. Federal National Mortgage Association*, 2016 WL 3085765 (W.D. Mi. 2016) – Michigan law allows foreclosure by advertisement if (a) a default in a condition of the mortgage has occurred, by which the power to sell became operative; (b) an action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part; (c) The mortgage containing the power of sale has been properly recorded; and (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. If the party foreclosing is not the original mortgagee, record chain of title must exist prior to the sale date evidencing the assignment of the mortgage to the party foreclosing.
- (9002) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Creditor complied with deed of trust when creditor issued written notice of sale pursuant to deed of trust, and written notice provided that the trustee could adjourn the sale from time to time by oral announcement at the scheduled sale location and date. Deed of trust required only that initial notice be in writing and did not require each adjourned sale to be noticed in writing. Creditor's alleged oral statements that sale would be cancelled and not rescheduled was not breach of deed of trust where deed of trust did not contain any such obligation and creditor's actions strictly complied with notice requirements.
- (9003) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Court cannot enter default judgment where record shows that defendant was not properly served with complaint as required by Rule 7004. Court also will deny request for default judgment where well pled allegations of complaint fail to state claim on which relief can be granted. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale.
- (9004) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Failure to comply with state statutes regarding foreclosure by advertisement did not render foreclosure void, but merely voidable, such that plaintiff must prove that plaintiff would have been in a better position to preserve his interest in the property absent defendant's non-compliance with statute. Plaintiff must show that defect prevented plaintiff from preserving his interest in the property. Where there was no dispute that plaintiff had defaulted on mortgage and plaintiff lacked any ability to redeem or pay off the loan, any alleged violation of state statutes caused no prejudice as plaintiff lacked any viable means of saving property had lender complied with state statute.
- (9005) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action for alleged violation of state foreclosure procedures, where borrower alleged that he requested loss mitigation mediation but did not contact a housing counselor to obtain that mediation as required by statute. Lender could foreclose by advertisement without mediation where borrower did not comply with statutory condition to lender's obligation to mediate.
- (9006) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Borrower can contest validity of foreclosure proceeding only if borrower can demonstrate prejudice that results from defect. Defective procedure renders sale process voidable, not void. Prejudice required is such that, but for alleged defect, borrowers would have been in a better position to preserve their interests in the property. Plaintiffs did not allege that they would have been able to redeem the property, that they would have been able to make monthly payments, or otherwise prevent foreclosure but for allegedly defective assignment of mortgage and subsequent foreclosure by assignee.
- (9007) *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.

- (9008) *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.
- (9009) *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.
- (9010) *In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff’s foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff’s sale by filing “Affidavit Expunging Sheriff’s Deed” was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ores alleged “mistake” in credit getting the full amount of the note is not “fraud” or a “mistake” sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

22.9 Chain of Title – MCL 600.3204

- (9011) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015), *aff’d*, 2017 WL 3169242 (6th Cir. 2017) – Section 600.3204 provides that if party foreclosing by publication is not the original mortgagee, party must establish record chain of title evidencing assignment of mortgage to party seeking to foreclose. Chain of title recorded in county records established required assignments to give lender standing to foreclose. Borrowers lacked standing to contest validity of assignments recorded in public record absent showing that defects would prejudice borrowers in efforts to retain property. Allegations of robo-signing and other alleged defects were intrinsic to assignments and did not prejudice borrowers in any way. Mere fact that borrowers may not know who owns loan is not sufficient to establish prejudice because borrowers did not allege that any party other than lender had interest in note or that some third party was attempting to also hold them liable for note.

22.10 Timing of Sale – MCL 600.3220

- (9012) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Section 600.3220 requires adjournment of sale to be done by posting notice adjournment before or at time and place of sale, and if any adjournment is more than one week, notice must also be published in newspaper where original notice was published, cannot be published within 10 days of original sale date, and weekly thereafter during duration of adjournment. Complaint that alleged that last publication occurred one year prior to actual sale date stated cause of action under Section 600.3220. To comply with statute, Defendant would have needed to post notice of adjournment each week if the sale is adjourned week-to-week; and if the sale was adjourned more than one week, to publish notice of adjournment within 10 days. Sheriff deed stated only that sale was adjourned from June 12, 2012, to June 4, 2013, by posting a notice of adjournment at the place of sale. While Sheriff statement is not inconsistent with posting from week to week, language crated sufficient ambiguity to state cause of action. Even if defendant posted notices each week, defendant sent plaintiff a letter in May, 2013, advising plaintiff that servicing had been changed, that as of June 1 plaintiff should send payments to new address, and that plaintiff needed to contact new servicer regarding questions on account, implying that the foreclosure process was being interrupted to allow continuation of payment of mortgage by plaintiff.
- (9013) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015), *aff’d*, 2017 WL 3169242 (6th Cir. 2017) – Section 600.3220 allows adjournment of foreclosure sale for longer than one week if sheriff, at request of party in whose name the notice of sale is published, posts a notice of adjournment at the place where the sale is scheduled, and the notice of adjournment is published in the newspaper where the original notice was published each week during the adjournment period. Bare allegation that lender failed to post the notice at the place of sale failed to state cause of action where complaint failed to plead any facts indicating how borrowers knew or had reason to believe that notice had not been published. Borrowers established only that notice of adjournment was not posted at property, but as place of sale was not the situs of the property there was no requirement to post notice at the property. Notice does not need to contain name of lender foreclosing, but only of party requesting adjournment. Trott & Trott requested adjournment and notice correctly listed T & T as party requesting adjournment. Where lender adjourned sale for 6 weeks, lender was not required to re-post notice each week, only to publish each week.

22.11 Posting Notice of Sale – MCL 600.3208

- (9014) *Bucciarelli v. Wells Fargo Home Mortgage*, 2017 WL 1157890 (E.D. Mi. 2017) - After redemption has expired, property owner loses all right, title and interest in property. Filing a lawsuit before expiration of redemption does not toll redemption. Former owners precluded from challenging foreclosure sale after redemption has expired unless plaintiff can show prejudice as a result of alleged failure to file for closure statute. Prejudice requires that plaintiff would have been in better position to preserve interest in property absent defendant’s noncompliance and must allege (1) fraud or regularity in foreclosure procedure; (2) prejudice to mortgage or; and (3) causal relationship between the alleged fraud or regularity and alleged prejudice. Complaint that alleged that lender miscalculated balance due but does not include any factual allegation and conclusory statement that amount due was inaccurate, and plaintiff’s references to unidentified legal opinions and media reports that Wells Fargo may have made costly accounting errors in administration of many home loans were not sufficient to demonstrate fraud in foreclosure process itself. Plaintiff’s allegation that defendant did not provide proper notice as required by Michigan compiled laws Section 600.3208 failed to state cause of action where plaintiff on 4 different properties, each of which were subject to separate foreclosure, yet complaint did not identify which property was subject of alleged deficient notice and plaintiff did not allege that plaintiff would have been in better position to preserve interest in property absent alleged noncompliance with statute. Complaint did not contain any clear allegations as to how lender allegedly violated foreclosure law or create any plausible claim of wrongful foreclosure.

- (9015) *Kent v. Worldwide Financial Services, Inc.*, 2017 WL 1044990 (E.D. Mi. 2017) - Owner of property is barred from making any claim with respect to foreclose property after statutory redemption has lapsed unless moving party shows fraud, accident or mistake in foreclosure proceeding itself. Alleged failure to provide contractually required written notice of foreclosure sale did not constitute fraud, accident or mistake where Michigan statute does not require any written, mailed notice of foreclosure. Statute requires only for publication and posting of notice. Lenders alleged failure to provide contractually required notice is not basis to set aside foreclosure sale. Even if failure to provide notice was defect, moving party can still avoid foreclosure sale only if moving party demonstrates prejudice such that they would have been in a better position to preserve interest in property absent noncompliance with statute. Owner clearly had notice of foreclosure before sheriff sale occurred and knew of foreclosure before statutory redemption period lapsed. Any potential defects a notice provided to owner did not prevent him from exercising right to redeem.
- (9016) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Section 600.3208 requires publication of notice over 4 successive weeks. Plaintiff's complaint failed to state cause of action where complaint attached and incorporated exhibit which demonstrated that notice had been published as required.
- (9017) *Sower v. Chase Home Finance, LLC*, 2016 WL 4446591 (E.D. Mi. 2016) – District Court can modify or dissolve State Court injunctions entered in case before case is removed to federal court. Once case is removed injunction remains in place but is governed by federal law. In considering whether to dissolve injunction, court will consider same factors as in entering injunction in first instance: likelihood that party seeking injunction will prevail on merits; whether party seeking injunction will suffer irreparable harm; probability that injunction would cause substantial harm to others; and whether public interest is advanced by issuance of injunction. Court does not err in entering injunction merely because there is factual dispute between parties., as purpose of injunction is to preserve relative positions of parties until trial. Complaint stated cause of action by alleging that foreclosure process violated MCL 600.3220 by adjourning week to week and posting of adjournment at place of sale. If court did not enter injunction extending redemption, plaintiff would be irreparably harmed as the property would be lost to plaintiff, rendering moot any effort to set aside foreclosure sale. Harm of injunction was equally balanced as plaintiff would be deprived of property if injunction is dissolved and defendant is deprived of right to complete foreclosure process with injunction in place, and public interest is equally balanced as public has interest to prevent those who fail to pay mortgages from remaining in homes at lender's expense, but public is also served by knowing that plaintiff has right to pursue claim without facing loss of property.
- (9018) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015), *aff'd*, 2017 WL 3169242 (6th Cir. 2017) – Section 600.3208 requires posting of notice of sale on property within 15 days of first publication. Borrower's complaint failed to state cause of action where complaint alleged only in conclusory terms that notice had not been posted but failed to state the time frame in which the notice was allegedly not posted. Further, failure to post at property would not warrant unwinding of sale unless borrower could show they were somehow prejudiced. Borrowers made no plausible allegations that if sale had been posted on front door of house, they would have been in a better position to halt foreclosure process.

22.12 Publication – MCL 600.3212

- (9019) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Plaintiff's complaint failed to indicate how notices of foreclosure were inadequate. While plaintiff alleged that defendant could not provide accurate accounting of balance owed, that is not attack on foreclosure notices themselves.

22.13 Perfection of Mortgage

- (9020) *Young v. Chase Home Finance, LLC*, 2015 WL 178355 (Bankr. S.D. Ohio 2015) – Debtor cannot bring action to avoid mortgage based on improper recording of mortgage in wrong county. Although incorrect recording may give rise to action by Trustee to avoid mortgage under Section 544, improper recording of mortgage has no effect on validity or enforceability between mortgagor and mortgagee.

22.14 Redemption

- (9021) *Town Center Flats, LLC v. ECP Commercial II, LLC*, Case No. 16-13911 (E.D. Mi. 2017), *aff'd*, 2018 WL 1181626 (6th Cir. 2018), *cert petition docketed*, Case No. 17-1653 (2018) - Under Michigan law, time for post-foreclosure redemption of property can be extended by agreement of successful purchaser at the sheriff sale in which case ownership of the property does not change until expiration of the extended period. Owner validly redeemed property one day after original deadline set by Circuit Court for redemption where parties had agreed to a 2-day extension of redemption deadline as acknowledged by purchaser's attorney; purchaser's attorney prepared quitclaim deed to "resolve and effectuate a redemption"; parties did not pay transfer taxes on the quitclaim deed which indicates that transfer was intended as a redemption; and calling transfer a "sale" rather than redemption would result in an absurd transaction where purchaser would sell building worth \$2 million for a mere \$32,500 redemption amount. Owner successfully redeemed building within extended redemption period, avoiding sheriff's deed and preserving second mortgage holder's interest.
- (9022) *Sower v. Chase Home Finance, LLC*, 2016 WL 4446591 (E.D. Mi. 2016) – District Court can modify or dissolve State Court injunctions entered in case before case is removed to federal court. Once case is removed injunction remains in place but is governed by federal law. In considering whether to dissolve injunction, court will consider same factors as in entering injunction in first instance: likelihood that party seeking injunction will prevail on merits; whether party seeking injunction will suffer irreparable harm; probability that injunction would cause substantial harm to others; and whether public interest is advanced by issuance of injunction. Court does not err in entering injunction merely because there is factual dispute between parties., as purpose of injunction is to preserve relative positions of parties until trial. Complaint stated cause of action by alleging that foreclosure process violated MCL 600.3220 by adjourning week to week and posting of adjournment at place of sale. If court did not enter injunction extending redemption, plaintiff would be irreparably harmed as the property would be lost to plaintiff, rendering moot any effort to set aside foreclosure sale. Harm of injunction was equally balanced as plaintiff would be deprived of property if injunction is dissolved and defendant is deprived of right to complete foreclosure process with injunction in place, and public interest is equally balanced as public has interest to prevent those who fail to pay mortgages from remaining in homes

at lender's expense, but public is also served by knowing that plaintiff has right to pursue claim without facing loss of property.

- (9023) *Panny v. Pennymac Loan Services, LLC*, 2016 WL 3165722 (E.D. Mi. 2016) – Plaintiff's allegation that lender refused to accept redemption funds from loan servicer did not state basis to set aside foreclosure sale. Michigan Compiled Laws Section 600.3240 requires purchaser at Sheriff sale to provide an affidavit that states the exact amount required to redeem the property. Plaintiff then must pay the required amount to either the purchaser, the purchaser's personal representative or assigns, or the register of deeds in whose office the deed is deposited. Purchaser filed affidavit. If Plaintiff believed that purchaser refused to accept payment, Plaintiff needed only to pay the money to the register of deeds; once the payment is made, the property is redeemed. Plaintiff did not contend that she posted redemption funds at the Office of Deeds to redeem the property as required by statute.
- (9024) *Conlin v. Mortgage Electronic registration Systems*, 714 F.3d 355 (6th Cir. 2013) – Filing of lawsuit before expiration of redemption does not toll redemption period.
- (9025) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, Case No. 15-45642 (Bankr. E.D. Mi. 2015) – Motion for expedited hearing on request for preliminary injunction denied where automatic 60 day extension of redemption that came into effect under Section 108 when Debtor filed bankruptcy before expiration of redemption allowed ample time for court to schedule hearing on request for preliminary injunction in normal course before expiration of 60 day extension.
- (9026) *Federal National Mortgage Corp. v. Royal Manor Apartments LLC*, 2014 WL 3735336 (E.D. Mi. 2014), *aff'd in part and rev'd in part*, 2015 WL 3505238 (6th Cir. 2015) – Lender allowed to recover late fees to extent that fees are reasonably calculated to compensate lender for expenses incurred as a result of missed installment payments. Lender also entitled to late payment fee on entire amount of balloon payment when payment not made by date required. Interest for purposes of redemption is calculated from date of sale at the rate specified in the mortgage. While mortgage did not state interest rate, it did incorporate note which provided for interest at 5.74%. However, lender not entitled to higher default rate of interest post-foreclosure and default rate applies only to payments past due, and upon foreclosure borrower no longer has obligation to make payments under note and mortgage and, therefore, those payments cannot be in "default".
- (9027) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Once redemption expires, owner can contest validity of foreclosure sale only on a clear showing of fraud or irregularity. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself. Alleged defect in assignment of mortgage does not constitute fraud or irregularity in process unless defect is such that it renders assignment absolutely invalid or ineffective or void. Borrower did not allege any risk of being required to pay twice or that borrower faced any demands from anyone other than foreclosing lender.
- (9028) *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.
- (9029) *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 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 contents 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.
- (9030) *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.

22.15 Expungement of Sale

- (9031) *Potter v. Wilmington Savings Fund*, 2017 WL 991072 (6th Cir. 2017) - Mortgage holder can use affidavit filed pursuant to Michigan Compiled Laws Section 565.451a to both expunge foreclosure sale and revive mortgage, returning parties to status quo before sale. Post-foreclosure sale recording of Affidavit expunging sale did not prevent later foreclosure of mortgage or vest title in property owner free and clear of mortgage.
- (9032) *Connolly v. Deutsche Bank National Trust Company*, 2014 WL 4435962 (6th Cir. 2014) – Affidavit expunging foreclosure sale recorded by mortgage holder rehabilitates mortgage and sufficiently appraises parties that mortgage has not been discharged and remains in force and effect. Expungement affidavit effectively voids sheriff sale.
- (9033) *In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff's foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff's sale by filing "Affidavit Expunging Sheriff's Deed" was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ores alleged "mistake" in credit getting the full amount of

the note is not “fraud” or a “mistake” sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

22.16 Assignment of Mortgage – Validity

- (9034) *Wilcoxon v. Lehman Brothers*, 2016 WL 4119802 (E.D. Mi. 2016) – Insolvency of bank holding mortgage does not defeat validity of mortgage or ability of mortgagee or MERS as nominee to assign mortgage Assignment of mortgage held by MERS as nominee for Lehman Brothers validly assigned by MERS notwithstanding insolvency of Lehman Brothers. Assignment of note and mortgage to US Bank effective to transfer interest to US Bank authorizing US Bank to thereafter foreclose mortgage.
- (9035) *Elrod v. Green Tree Servicing, LLC*, 2016 WL 4801374 (N.D. Ohio 2016) – Complaint against assignee of mortgage alleging breach of contract failed to state cause of action as complaint failed to identify any contract between plaintiff and defendant. To extent complaint was intended to challenge assignability of mortgage, complaint contradicted terms of mortgage that expressly permitted mortgage to be enforced by successors and assigns.
- (9036) *Veasley v. Federal National Mortgage Association*, 2015 WL 5729537 (6th Cir. 2015) – Minor typographical error in assignment of mortgage does not void assignment. At best, assignment becomes voidable and requires showing of prejudice to borrower. Error in legal description did not prejudice borrower as assignment also reflected correct street address, foreclosure process and sheriff deed reflected correct address, and there was no evidence of any harm to borrower from error.
- (9037) *Zordich v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Alleged defect in assignment of mortgage does not void mortgage or alter borrower’s obligation to pay.
- (9038) *Dags II, LLC. v. Huntington National Bank*, 2015 WL 4174312 (6th Cir. 2015) – Purchaser of mortgaged property lacks standing to enforce or contest validity of assignment between original mortgage holder and subsidiary-assignee. Purchaser was not party to nor third party beneficiary of the assignment and there was no allegation that purchaser faced double liability based on terms of assignment.
- (9039) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Borrower’s contention that trust to which loan had allegedly been transferred had in fact been dissolved prior to transfer, such that transfer to trust was invalid and trust servicer lacked standing to foreclose not factually supported. Although public registration of trust with SEC terminated prior to taking assignment, there was no indication that trust itself ceased to exist, only that it ceased to be a publicly traded trust.
- (9040) *Jernigan v. Household Finance Corporation II*, 2015 WL 4481992 (Bankr. W.D. Ky. 2015) – Lender validly transferred note and mortgage to assignee after filing Proof of Claim in bankruptcy case. Lender held both note and mortgage and executed valid allonge to the assignee endorsed in blank and delivered to assignee.
- (9041) *Fialka v. US Bank*, 2014 WL 5361988 (E.D. Mi. 2014) – Splitting of note and mortgage does not render mortgage unenforceable. Mortgage servicer to whom mortgage had been assigned without assignment of note had standing to pursue foreclosure as servicer had interest in the indebtedness.
- (9042) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) –
- (9043) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Allegedly defective assignment of mortgage could not be contested after foreclosure sale and issuance of sheriff deed. Only claims recognizable after redemption are limited to actions based on fraud or irregularity in foreclosure process itself. There was no connection between allegedly defective assignment and foreclosure process that would support post-redemption action.
- (9044) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Once redemption expires, owner can contest validity of foreclosure sale only on a clear showing of fraud or irregularity. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself. Alleged defect in assignment of mortgage does not constitute fraud or irregularity in process unless defect is such that it renders assignment absolutely invalid or ineffective or void. Borrower did not allege any risk of being required to pay twice or that borrower faced any demands from anyone other than foreclosing lender.
- (9045) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Property owner lacks standing to contest validity of assignment of mortgage and note. Borrower is not a party to assignments and lacks standing to attack them.
- (9046) *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.
- (9047) *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.
- (9048) *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.

22.17 Assignment of Mortgage – Recording

- (9049) *Barney v. Bank of America, NA*, Case No. 15-8097 (10th Cir. 2016) – Assignment of mortgage is not transfer of interest in property. Where mortgage is properly recorded, mortgage remains valid and enforceable even if later assignment of mortgage is not recorded.
- (9050) *Zordich v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Recording of assignment is not required for valid assignment of mortgage. Validity of mortgage itself remains unaffected by timing of recording of assignment, as recording statute is intended to govern priority between competing lenders and not the validity of the lien itself. Alleged failure to record assignment does not render mortgage itself unenforceable.
- (9051) *Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1333069 (E.D. Ky. 2014) – Under Kentucky law, assignment of a note transfers to the assignee all interests in the mortgage including the rights of the mortgagee. Kentucky law requires that all assignments of mortgage be recorded. If the assignment of the mortgage is attendant to the assignment of the note rather than in a separate instrument, the assignee must record the assigned note. Statute is designed to ensure that public records maintain accurate record of mortgages and note holders on mortgage properties. Kentucky statute provides for private right of action by anyone who is damaged by failure to record, with minimum of \$500.00. Property owners whose property is encumbered are within scope of statutory protection and have right of action for damages.

22.18 Assignment of Mortgage – Splitting Note and Mortgage

- (9052) *Barney v. Bank of America, NA*, Case No. 15-8097 (10th Cir. 2016) – Assignment of mortgage is not transfer of interest in property. Where mortgage is properly recorded, mortgage remains valid and enforceable even if later assignment of mortgage is not recorded. Transfer of note necessarily transfers enforceable interest in mortgage as mortgage follows the note. There was no allegation that multiple parties were attempting to enforce note and mortgage or that there was some conflicting claims between assignor and assignee of note and mortgage.
- (9053) *Zordich v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Under Ohio law, mortgage follows the note. Assignment of mortgage to securitization trust does not sever the mortgage from the note. Assignment of mortgage with no specific reference to a transfer of the note is sufficient to transfer both the note and mortgage. Even if assignment of mortgage resulted in split of note and mortgage, split is not a basis to invalidate the note or the mortgage.
- (9054) *Spadafore v. Aurora Loan Servicing, LLC*, 564 Fed. Appx. 168 (6th Cir. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.
- (9055) *Dye v. Wells Fargo Home Mortgage*, 2014 WL 1908285 (E.D. Mi. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.
- (9056) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Assignment of mortgage that did not also assign note did not render mortgage assignment invalid or deprive assignee of standing to foreclose. Separation of note and mortgage does not nullify the mortgage assignment.
- (9057) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Under Tennessee law, assignment of note carries with it automatic transfer of deed of trust. Party to whom note was endorsed had standing to foreclose notwithstanding the lack of a separate assignment of deed of trust.

22.19 Assignment of Mortgage – Securitizing Trusts

- (9058) *Zordich v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Placing mortgage into securitized trust does not invalidate note or mortgage. Federal law specifically provides for crating of mortgage related securities and pooling of mortgages into investment trusts and assignment does not taint underlying mortgage or alter borrower's obligation to repay loan.

22.20 Assignment of Mortgage – Standing to Contest

- (9059) *Akers v. Gregory Funding, LLC*, 2018 WL 2363976 (M.D. Tn. 2018) - Motion for Stay Pending appeal denied where primary argument was that mortgage holder lacked standing to enforce lien based on alleged defects in assignments. Debtor lacks standing to challenge the validity of assignment of note. Debtor could not demonstrate likelihood of success on appeal.
- (9060) *Turner v. Wells Fargo Bank*, 2017 WL 2587981 (9th Cir. 2017) – Borrower lacks standing to contest validity of assignment of mortgage unless assignment by which foreclosing party took beneficial interest was void, not merely voidable. Pooling and Servicing Agreement required assignment of mortgage to be transferred from originating lender within 90 days. Actual transfer did not occur for almost 6 years but assignment was accepted by assignee. Late assignment, while inconsistent with PSA, was not void but arguably only voidable, such that borrower lacked standing to contest.
- (9061) *JGMM Realty, LLC v. LNR Partners, LLC*, 2017 WL 2992511 (6th Cir. 2017) – Generally, a stranger to assignment lacks standing to challenge validity of assignment. Third party may assert defenses that render assignment void, such as non-assignability of instrument, assignee's lack of title, or prior revocation of assignment. Borrowers have standing to assert that assignment is void because of potential double liability. Although initial assignment incorrectly identified the assignor, a subsequent assignment was recorded to correct the error and removed any reference to incorrect prior assignor. Borrower offered no reason to doubt authenticity of corrective assignment and did not point to any Michigan law that requires corrective assignment to be accomplished in any particular way, and absent plausible claim of defect in chain of title, borrower could not be subject to double liability.
- (9062) *Poole v. Federal National Mortgage Association*, 2016 WL 3085765 (W.D. Mi. 2016) – Action based on allegedly defective assignment of

mortgage from one lender to another, plaintiff lacked standing to maintain that contest as there was no evidence of any third party who also claimed ownership of the note or right to payment and there was on other evidence of any threat that borrower would have to pay twice.

- (9063) *Jepson v. Bank of New York Mellon*, Case No. 14-2459 (7th Cir. 2016) – Debtor lacks standing to contest validity of assignment of note and mortgage to Real Estate Trust based on alleged violation of terms of Pooling and Servicing Agreement. Debtor is not party to PSA and is not intended third party beneficiary of PSA. PSA concerns only relationship between Trust and Investors, and Debtor was neither of those. While Debtor may have ability to challenge assignment that is entirely void, assignment that fails to comply with terms of trust agreement is voidable, not void.
- (9064) *Burniac v. Wells Fargo Bank*, 2016 WL 146515 (6th Cir. 2016) – Even assuming assignment of mortgage was defective, plaintiff failed to demonstrate any prejudice where plaintiff failed to demonstrate any potential claim that plaintiff will be subject to liability from anyone other than foreclosure of mortgage and did not show that plaintiff would be in a better position to save the property but for the alleged defect. Plaintiff acknowledged that he was not confused by the property party to pay as plaintiff consistently received monthly mortgage payments from Wells Fargo and paid Wells Fargo until he defaulted on the mortgage.
- (9065) *Zordich v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Borrower lacks standing to raise concerns about assignment of mortgage into trust, as borrower is not a party to the assignment and is not a beneficiary of the investment trust to which the mortgage was assigned.
- (9066) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015), *aff'd*, 2017 WL 3169242 (6th Cir. 2017) – Section 600.3204 provides that if party foreclosing by publication is not the original mortgagee, party must establish record chain of title evidencing assignment of mortgage to party seeking to foreclose. Chain of title recorded in county records established required assignments to give lender standing to foreclose. Borrowers lacked standing to contest validity of assignments recorded in public record absent showing that defects would prejudice borrowers in efforts to retain property. Allegations of robo-signing and other alleged defects were intrinsic to assignments and did not prejudice borrowers in any way. Mere fact that borrowers may not know who owns loan is not sufficient to establish prejudice because borrowers did not allege that any party other than lender had interest in note or that some third party was attempting to also hold them liable for note.
- (9067) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Borrower lacks standing to contest whether assignment of note and mortgage violated Pooling and Servicing Agreement.
- (9068) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Borrower lacks standing to contest whether assignment of note and mortgage violated Pooling and Servicing Agreement as borrower was not party to PSA.
- (9069) *McHugh v. Bank of America*, 2015 WL 3475520 (Bankr. N.D. Ohio 2015) – Borrower lacks standing to contest assignment of mortgage that allegedly violated Pooling and Servicing Agreement, as Debtor was not party to PSA and had no right, either directly or as intended third party beneficiary, to enforce PSA. Borrower can contest assignment only based on allegations of fraudulent assignment that, if proven, would render assignment void in first instance such that lender would not have held title at time of commencement of case. Alleged violation of PSA did not render assignment void, although it may have given rise to causes of action between assignor and assignee, neither of which was the Debtor.
- (9070) *Fialka v. US Bank*, 2014 WL 5361988 (E.D. Mi. 2014) – Borrower lacks standing to contest foreclosure based on alleged flaw in assignment documents. Alleged irregularity would be strictly matter between assignor and assignee where alleged defect in assignment did not expose borrower to double liability. Borrower did not allege any risk of double liability and did not present any evidence that anyone other than mortgage holder had attempted to collect debt or could attempt to do so. Further, alleged lack of recorded chain of title in assignment is not basis to set aside assignment, particularly where recorded chain of title established that US Bank, as assignee, held mortgage.
- (9071) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Non-party property owner has standing to contest validity of assignment where property owner alleged that assignment was fraudulent. Property owner cannot contest assignment based solely on technical defects that would prevent assignment from being properly recorded or from establishing chain of title. Complaint that alleged that assignments had been fraudulently backdated and so assignee did not hold title at time of purported foreclosure challenged validity of the assignment and not merely “technical defects” in otherwise valid assignments.
- (9072) *Storp v. Lerner, Sampson & Rothfuss*, 2014 WL 4800100 (6th Cir. 2014) – Non-party homeowner has standing to contest validity of assignment to establish assignee’s lack of title. However, non-party homeowner may not contest validity of assignment based solely on technical defects in otherwise valid assignment.
- (9073) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Borrower lacks standing to contest assignment under Pooling and Servicing Agreement as borrower is not party to that agreement. Assignee holds power to foreclose notwithstanding allegation that assignment violated PSA.
- (9074) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Borrower lacks standing to contest alleged assignment of mortgage from loan originator to MERS. MERS, as assignee, holds power to foreclose upon default.
- (9075) *Davies v. Deutsche Bank National Trust Co.*, 2014 WL 1152800 (9th Cir. 2014) – Borrower lacks standing to contest assignment of mortgage based on alleged violation of Pooling and Servicing Agreement. Debtor did not allege that underlying mortgage was invalid or contest that Debtor owes the debt.
- (9076) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio 2014) – Borrower is not party to assignment of mortgage and note and lacks standing to contest validity of assignment. Debtor lacked standing to claim that assignment violated underlying trust agreement by which original lender held and later assigned mortgage.

- (9077) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Mortgagor is not party to assignment of note or mortgage and lacks standing to challenge assignment. Only exception is where plaintiff asserts a genuine claim that he may be subject to double liability. Otherwise, assignment of note and mortgage do not alter borrower's rights and duties.
- (9078) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) – After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged invalidity of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (9079) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice. Plaintiff lacked standing to contest foreclosure based on allegedly defective assignments because plaintiff was not party to the assignments and even if assignments were defective, plaintiff suffered no prejudice where it was uncontested that plaintiff signed mortgage on property and had defaulted in payments.
- (9080) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Borrower lacks standing to allege that assignment of note and mortgage violated Pooling and Servicing Agreement as borrower is not party to that agreement.
- (9081) *Sigmon v. Cornerstone Home Lending*, 2014 WL 948490 (Bankr. W.D. N. C. 2014) – Litigant who is not party to assignment lacks standing to contest validity of assignment. While assignments may have been incorrect or in violation of inter-lender agreements, borrower lacked standing to contest assignee's right to enforce mortgage.
- (9082) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Debtor lacks standing to contest foreclosure process based on allegedly unrecorded assignment of mortgage. Post-redemption, Debtor may challenge foreclosure sale only based on fraud or irregularity in sale itself. Alleged failure to record mortgage had no connection to foreclosure process or any claim of prejudice.
- (9083) *DAGS II, LLC v. Huntington National Bank*, 2013 WL 6884242 (W.D. Mi. 2013) – Mortgagor lacks standing to contest terms of assignment of mortgage as mortgagor is not a party to the assignment. Questions concerning scope and extent of assignment, and in particular whether assignment included all of the debt owed to Huntington or only a portion of that debt could be litigated only between Huntington and purported assignee.
- (9084) *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.
- (9085) *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.
- (9086) *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.
- (9087) *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.
- (9088) *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.
- (9089) *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.

22.21 Contest of Mortgage Foreclosure Pre-Sale – Ripeness

- (9090) *Poole v. Federal National Mortgage Association*, 2016 WL 3085765 (W.D. Mi. 2016) – Action for wrongful foreclosure based on alleged failure to follow statutory requirements cannot be brought until sale has actually occurred. However, party can bring action by way of declaratory judgment before sale has occurred if (1) harm to plaintiff is likely to come to pass; (2) the factual record is sufficiently developed to allow fair adjudication of parties' rights; and (3) whether denial of judicial relief would produce hardship. Plaintiff failed to meet standard for declaratory relief where complaint did not allege any facts but consisted largely of legal conclusions that cannot support claim. To extent that action relied on allegedly defective assignment of mortgage from one lender to another, plaintiff lacked standing to maintain that contest as there was no evidence of any third party who also claimed ownership of the note or right to payment and there was on other evidence of any threat that borrower would have to pay twice. However, proposed Amended Complaint was sufficient to state cause of action on issue of whether loan was in default where plaintiff alleged facts that would establish that plaintiff made payments to lender, pursuant to a loan modification agreement, that lender misapplied those payments contrary to the loan modification and that lender ultimately refused to accept any further payments. If proven, mortgage holder would be precluded from foreclosing as there is no default on which to base foreclosure action.

22.22 Contest of Mortgage Foreclosure Post-Redemption

- (9091) *Bucciarelli v. Wells Fargo Home Mortgage*, 2017 WL 1157890 (E.D. Mi. 2017) - After redemption has expired, property owner loses all right, title and interest in property. Filing a lawsuit before expiration of redemption does not toll redemption. Former owners precluded from challenging foreclosure sale after redemption has expired unless plaintiff can show prejudice as a result of alleged failure to file for closure statute. Prejudice requires that plaintiff would have been in better position to preserve interest in property absent defendant's noncompliance and must allege (1) fraud or regularity in foreclosure procedure; (2) prejudice to mortgage or; and (3) causal relationship between the alleged fraud or regularity and alleged prejudice. Complaint that alleged that lender miscalculated balance due but does not include any factual allegation and conclusory statement that amount due was inaccurate, and plaintiff's references to unidentified legal opinions and media reports that Wells Fargo may have made costly accounting errors in administration of many home loans were not sufficient to demonstrate fraud in foreclosure process itself. Plaintiff's allegation that defendant did not provide proper notice as required by Michigan Compiled Laws Section 600.3208 failed to state cause of action where plaintiff on 4 different properties, each of which were subject to separate foreclosure, yet complaint did not identify which property was subject of alleged deficient notice and plaintiff did not allege that plaintiff would have been in better position to preserve interest in property absent alleged noncompliance with statute. Complaint did not contain any clear allegations as to how lender allegedly violated foreclosure law or create any plausible claim of wrongful foreclosure.
- (9092) *Kent v. Worldwide Financial Services, Inc.*, 2017 WL 1044990 (E.D. Mi. 2017) - Owner of property is barred from making any claim with respect to foreclose property after statutory redemption has lapsed unless moving party shows fraud, accident or mistake in foreclosure proceeding itself. Alleged failure to provide contractually required written notice of foreclosure sale did not constitute fraud, accident or mistake where Michigan statute does not require any written, mailed notice of foreclosure. Statute requires only for publication and posting of notice. Lenders alleged failure to provide contractually required notice is not basis to set aside foreclosure sale. Even if failure to provide notice was defect, moving party can still avoid foreclosure sale only if moving party demonstrates prejudice such that they would have been in a better position to preserve interest in property absent noncompliance with statute. Owner clearly had notice of foreclosure before sheriff sale occurred and knew of foreclosure before statutory redemption period lapsed. Any potential defects a notice provided to owner did not prevent him from exercising right to redeem.
- (9093) *Wilcoxson v. Lehman Brothers*, 2016 WL 4119802 (E.D. Mi. 2016) – Michigan law well settled that action to contest foreclosure sale after redemption expires requires clear showing of fraud or irregularity in the foreclosure process. Plaintiff's alleged dispute and request for validation of debt, even if creditor failed to respond, was not defect in foreclosure process, and Plaintiff failed to allege how "error" prejudiced Plaintiff's ability to save home from foreclosure or to otherwise preserve interest in property.
- (9094) *Chadwick v. PNC Bank*, 2016 WL 12591751 (W.D. Mi. 2016) – Once redemption expires, plaintiff seeking to upset foreclosure sale bears high burden to show fraud related to the foreclosure process that prejudiced plaintiff. Prejudice requires that plaintiff prove he would have been in better position to preserve interest absent fraud such a potential opportunity to preserve interest in property. Alleged violation by Lender in dealing with plaintiff's request for loan modification, even if a violation of MCL 3205, does not constitute fraud in the foreclosure process itself. Allegations that lender's attorney assured plaintiff that foreclosure sale would not occur while modification was in process did not constitute fraud where plaintiff was notified before sale occurred that lender rejected proposed modification. Further, any alleged statements by lender's attorney to hold foreclosure was unenforceable under Statute of Frauds which prohibits enforcement of promise or commitment to permit delay in payment or performance unless agreement is in writing signed by party to be charged. If plaintiff believed that foreclosure process was faulty, remedy was to file suit before sale to convert case to judicial foreclosure.
- (9095) *Sower v. Chase Home Finance, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Plaintiff does not lose right to contest foreclosure sale where, prior to expiration of redemption, Court issues injunction staying expiration of redemption during pendency of litigation.
- (9096) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Upon expiration of redemption, plaintiff loses all rights in or title to the property precluding action for wrongful foreclosure. Rule applies even where action began before expiration of redemption. Once redemption lapses, foreclosure sale can be set aside only on clear showing of fraud or irregularity in foreclosure process itself.
- (9097) *Panny v. Pennymac Loan Services, LLC*, 2016 WL 3165722 (E.D. Mi. 2016) – To invalidate foreclosure sale once the statutory redemption period has elapsed, party must make clear showing of fraud, or irregularity in the foreclosure sale itself and that Plaintiff would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. Plaintiff's statement if the Sheriff's sale had not taken place, she would have been able to possibly reinstate her mortgage from default by possibly filing for Chapter 13 bankruptcy and spread the approximately \$100,000 she owed over 60 months. Plaintiff did not demonstrate that it would have been possible to reinstate her mortgage. There were no facts to suggest that Defendant failed to follow the statutory requirements in the foreclosure proceeding or that even if sale originally scheduled had been cancelled, that Defendant would not have been allowed to conduct the Sheriff's Sale as soon as the 14 days later. There is no dispute that Plaintiff was in default on the mortgage and did not take any action prior to the sale to remedy the default, and has continued to not take action, failing to redeem the property as of the March 9, 2015 deadline.
- (9098) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – To set aside a foreclosure sale on the basis of a wrongful foreclosure requires evidence of irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee that caused or contributed to an inadequate price. Plaintiff's complaint did not allege facts that would show any action by Defendants that contributed to an inadequate price. Complaint only alleged that Plaintiff received two different notices containing two different foreclosure sale dates, but there was no evidence of any harm of confusion where only correct date was published and plaintiff had full knowledge of and attended the foreclosure sale itself.
- (9099) *Hurni v. Bank of America*, 2016 WL 1583827 (E.D. Mi. 2016) – If the mortgagor fails to redeem within statutory period, mortgagor's right, title and interest in property is extinguished. Court may thereafter set aside sale only on clear showing of fraud or irregularity as to foreclosure proceedings themselves, and not merely conduct by the defendant; and that fraud or irregularity caused prejudice such that owner would have been in better position to preserve interest in property but for fraud or irregularity. Plaintiff failed to state cause of action where plaintiff alleged only that defendant did not provide answer to request for loan modification or failed to approve plaintiff for loan modification.

Irregularity in loan modification process is not fraud or irregularity in foreclosure process. Plaintiff failed to demonstrate prejudice as plaintiff failed to allege that he would have been eligible for a loan modification but for wrongful conduct of defendant.

- (9100) *Parker v. Midwest Loan Services, Inc.*, 2016 WL 1242440 (E.D. Mi. 2016) – Plaintiff cannot challenge foreclosure and sale after expiration of 6 month redemption absent clear evidence of fraud or irregularity in foreclosure process itself. Irregularity cannot relate to the instrument being foreclosed. Plaintiff must also show that he would have been in better position to keep property absent the fraud or irregularity. Plaintiff failed to allege any causal connection between the foreclosure process or that plaintiff would have been able to retain property had proper procedures been followed. Bare allegation that plaintiff did not post notice of foreclosure in conspicuous place on property or publish notice of adjournment were not sufficient to establish fraud in the process.
- (9101) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Complaint for wrongful foreclosure dismissed where plaintiff did not redeem property before expiration of redemption and did not allege any fraud or irregularity in the foreclosure process itself. Complaint alleged only that lender did not publish notice for four consecutive weeks prior to sale. Sheriff's deed issued after sale constitutes presumptive evidence that all required procedures were complied with. Further, plaintiff failed to allege how any alleged irregularity in foreclosure process prejudiced his ability to either participate in foreclosure process or redeem property.
- (9102) *Burniac v. Wells Fargo Bank*, 2016 WL 146515 (6th Cir. 2016) – Plaintiff seeking to set aside foreclosure sale based on alleged violation of Section 600.3204 must prove that there was defect in the foreclosure process itself that prejudiced plaintiff's ability to retain property. Plaintiff must prove that it would have been in better position to preserve interest in property absent alleged non-compliance. Conclusory statements unadorned with supporting facts are not sufficient to set aside sale.
- (9103) *Martini v. JPMorgan Chase Bank, NA*, 2015 WL 8479633 (6th Cir. 2015) – Once redemption has expired, former owner loses all right, title and interest in and to the property. Only way to set aside sale is to demonstrate clear showing of fraud or irregularity in the foreclosure process itself that prejudices mortgagor's rights. Prejudice requires that mortgage or would have been in a better position to protect their interest in property absent non-compliance with statutory requirements. Complaint that alleged that lender to record the mortgage transfer in violation of MCL § 600.3204(3); lender improperly used a credit bid during the foreclosure proceedings in violation of MCL §§ 600.3204(3) and 600.3228; and that lender failed to provide the borrower with the loan modification calculations in violating of MCL 600.3205c; did not allege any fraud or impropriety in the foreclosure process itself. Further, complaint failed to allege that any actions prejudiced mortgagor where only allegations were that (1) mortgagors were unable to preserve ownership of their property under a modified loan structure and (2) mortgagors may be subject to double collection. Any alleged failure to modify the loan happened prior to foreclosure process which must be raised as defense during foreclosure process and not afterward; and any allegation that two parties may claim rights in mortgage was not supported by record where Sheriff's deed clearly delineated the history of the loan from Washington Mutual to Chase to FDIC, leaving no ambiguity as to correct holder of mortgage and note, and there was no allegation that both entities ever attempted to collect debt or that borrowers inadvertently sent payments to wrong entity.
- (9104) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – A mortgagor's failure to avail themselves of the statutory right of redemption following a sheriff's sale extinguishes all of their rights in and to the property. Filing suit does not toll the redemption period. Foreclosure sale may be voided where the mortgagor shows fraud or irregularity resulting in prejudice such that borrower would have been in a better position to preserve their interest in the property absent the foreclosing party's noncompliance with Michigan's foreclosure statute. Lender did not violate MCL 600.3205a by failing to provide calculations used to deny mortgage modification where lender was required to provide calculations only if borrower met with housing counselor or lender to negotiate modification under Section 600.3205b, and borrower never contacted a counselor or otherwise requested to negotiate modification.
- (9105) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Once redemption expires, party contesting foreclosure sale must prove fraud or irregularity in the foreclosure process itself. Alleged securitization of loan does not render loan unenforceable or render foreclosure sale void. Splitting of note and mortgage does not invalidate foreclosure sale.
- (9106) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – Once redemption expires, prior owner can contest only by showing that foreclosure sale itself was fraudulent or irregular. Alleged irregularities in mortgage modification process is not basis to set aside subsequent sale.
- (9107) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower has standing to contest foreclosure process post-redemption. Borrower is the person most directly impacted by foreclosure process sufficient to support constitutional and prudential standing. Borrower must prove fraud in the foreclosure process itself in order to prevail, but high burden of proof is not issue of standing but of recovery on merits.
- (9108) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) - After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged invalidity of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (9109) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice.
- (9110) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Property owner's right to challenge foreclosure sale after expiration of redemption is limited to allegations of fraud or irregularity in foreclosure process itself.
- (9111) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Plaintiff lacked standing to maintain quiet title action after foreclosure based on alleged impropriety in foreclosure process. Michigan law requires that Plaintiff in quiet title action be able to demonstrate title superior to contested interests. Plaintiff could not contest validity of mortgage and could not establish title superior to mortgage interest.

- (9112) *Baker v. Bank of America*, 2013 WL 5945055 (E.D. Mi. 2013) – Expiration of redemption terminates all right, title and interest of prior owner and vests the property in the purchaser at the sale. Former owner cannot make any claims with respect to the foreclosed property after expiration of redemption. Court can extend redemption only on clear showing of fraud or irregularity in the foreclosure. Mere accident or mistake, or possible injustice, is not sufficient to tamper with foreclosure process.
- (9113) *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.
- (9114) *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.
- (9115) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *aff'd*, 2014 WL 4435962 (6th Cir. 2014) – 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.
- (9116) *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.
- (9117) *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.

22.23 Standing to Contest – Robosigning

- (9118) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Borrower cannot contest foreclosure based on alleged robo-signing of assignment documents. Borrower is not party to the assignments and cannot contest the validity where alleged issues of robo-signing would not render assignment absolutely invalid or void, such as non-assignability of mortgage, assignee's lack of title, or a prior revocation of the assignment.
- (9119) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) – After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged “robo-signing” of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (9120) *Sigmon v. Cornerstone Home Lending*, 2014 WL 948490 (Bankr. W.D. N. C. 2014) – Borrower lacks standing to challenge assignments based on so-called “robo-signing”. Allegations concerning robo-signing of documents do not contest validity of underlying debt.

22.24 Foreclosure Fraud – “Excessive” Bid

- (9121) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – Once redemption expires, prior owner can contest only by showing that foreclosure sale itself was fraudulent or irregular. Alleged excessive bid is not type of fraud sufficient to set aside foreclosure process. While Section 600.3228 requires fairness and good faith, nothing in Section 600.3228 requires a “fair market value” bid.
- (9122) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Mortgage holder can bid any amount desired. MCL Section 600.3228 does not create cause of action for allegedly “excessive” bid even where lender's bid allegedly exceeds actual value of property.
- (9123) *Washington v. BAC Home Loans Servicing*, 2013 WL 5476023 (E.D. Mi. 2013) – Owner has no cause of action against lender based on allegedly “excessive” bid. Lender has right to bid whatever amount lender desires. Fact that bid exceeded fair market value of collateral is not actionable.

22.25 Foreclosure Fraud Generally

- (9124) *Kent v. Worldwide Financial Services, Inc.*, 2017 WL 1044990 (E.D. Mi. 2017) – Owner of property is barred from making any claim with respect to foreclose property after statutory redemption has lapsed unless moving party shows fraud, accident or mistake in foreclosure proceeding itself. Alleged failure to provide contractually required written notice of foreclosure sale did not constitute fraud, accident or mistake where Michigan statute does not require any written, mailed notice of foreclosure. Statute requires only for publication and posting of notice. Lenders alleged failure to provide contractually required notice is not basis to set aside foreclosure sale. Even if failure to provide notice was defect, moving party can still avoid foreclosure sale only if moving party demonstrates prejudice such that they would have been in a better position to preserve interest in property absent noncompliance with statute. Owner clearly had notice of foreclosure before sheriff sale occurred and knew of foreclosure before statutory redemption period lapsed. Any potential defects a notice provided to owner did not prevent him from exercising right to redeem.

- (9125) *Yaldo v. Homeward Residential, Inc.*, 2015 WL 4636627 (6th Cir. 2015) – Borrower’s challenge to foreclosure based on fraud requires proof that “fraud” prejudiced borrower’s ability to preserve interest in property. Borrower’s complaint failed to allege fraud based on an assertion that plaintiff assigned the balance of the indebtedness to another lender after the foreclosure, as assertion did not demonstrate any irregularity in process. Borrower also failed to allege prejudice as plaintiff failed to allege any effort to redeem and only “prejudice” alleged arose based on lender’s allegedly wrongful failure to cancel the note and reporting borrower in default to the credit reporting agencies.
- (9126) *Roller v. Federal National Mortgage Assn*, 2015 WL 3823848 (E.D. Mi. 2015) – After expiration of redemption, borrower can contest foreclosure only on clear showing of fraud or irregularity in foreclosure process itself, where irregularity prejudiced borrower as borrower would have been in a better position to preserve its interest in the property absent noncompliance. Borrower’s action failed to allege any fraud or irregularity based solely on lender’s failure to provide itemized statement underlying denial of decision to modify loan, and failed to allege that failure to produce itemization in any way caused borrowers to be unable to redeem or otherwise avoid foreclosure.
- (9127) *Baker v. Residential Funding Company, LLC*, 2014 WL 3767843 (E.D. Mi. 2014) – Foreclosure defects are not void but are voidable and require showing that defects resulted in prejudice to Debtors. Alleged fraud or irregularity in assignment did not prejudice Debtors who did not contend that defect precluded them from making payments or from redeeming property after sale.
- (9128) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower must prove fraud in the foreclosure process itself in order to prevail in action filed after expiration of redemption. Lender’s alleged failure to finalize mortgage modification or to accept modified payments is not type of “fraud or irregularity” that warrants setting aside foreclosure sale, as defects, if any, do not go to foreclosure process itself. Remedy for failure to complete loan modification, if any, is to require lender to halt foreclosure by advertisement and use judicial foreclosure process. Once foreclosure sale occurred, there is no foreclosure action for the court to enjoin or convert to a judicial foreclosure process.
- (9129) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Lender’s credit bid at foreclosure sale in excess of total amount of debt is not actionable. There is no requirement that lender enter only “fair bid” based on value of property and lender has right to bid amount in excess of value. Debtor reaps benefit of higher bid as bid in excess of loan amount extinguishes any possible deficiency claim.
- (9130) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *aff’d*, 2014 WL 4435962 (6th Cir. 2014) – 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 apparently 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.
- (9131) *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 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.
- (9132) *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.
- (9133) *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.
- (9134) *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.

- (9135) *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.
- (9136) *Young v. Fannie Mae*, 2013 WL 12842332 (N.D. Ohio 2013) – Tenant in property lacks standing to contest validity of foreclosure sale.
- (9137) *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 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.
- (9138) *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.

22.26 Forgery of Mortgage

- (9139) *Bazinski v. JPMorgan Chase Bank*, 2014 WL 1405253 (E.D. Mi. 2014), *aff’d*, 2015 WL 1003036 (6th Cir. 2015) – Once foreclosure sale has occurred and redemption expired, former owner can seek relief only for irregularities in the foreclosure process itself that caused or will cause prejudice to former owner. Plaintiff failed to state cause of action based on allegation that Plaintiff never signed the mortgage or that her signature was forged by her former husband because Plaintiff did not bring action or contest foreclosure before sale occurred or redemption expired. No aspect of foreclosure complaint went to foreclosure process itself, as Plaintiff did not contend that her signature was forged on any documents relating to the foreclosure process itself.

22.27 Standing to Object – Lack of Interest in Property

- (9140) *Dietrich v. JPMorgan Chase Bank*, 2017 WL 57240 (E.D. Mi. 2017) - Standing to bring action under Article III requires that plaintiff shall an injury in fact that is concrete and particularized and actual or imminent; injury must be fairly traceable to challenge the action of defendant; and it is likely that injury will be redressed by favorable decision. Plaintiff lacks standing to challenge foreclosure mortgage a condominium unit that was owned solely by Plaintiff’s son. Plaintiff was not owner of property and was not party to mortgage. Mere occupants or tenants in the property lack standing to challenge foreclosure.
- (9141) *Phillips v. Green Tree Servicing, LLC*, 2016 WL 627903 (E.D. Mi. 2016) – Party who lacks interest in property lacks standing to contest foreclosure sale. Plaintiff quit claimed title to property to her ex-husband some years prior to foreclosure. As of date of foreclosure process, Debtor did not hold any legal or equitable interest in property.

22.28 Standing to Contest – Notice of Foreclosure Sale

- (9142) *Haywood v. Roundpoint Mortgage Servicing Corporation*, 2018 WL 3159624 (E.D. Mi. 2018) – After redemption expires, party can contest foreclosure only for fraud or irregularity in foreclosure process itself. Allegation that lender pursued foreclosure while simultaneously engaging in loan modification discussions is not fraud in foreclosure process itself and does not warrant setting aside sale. Alleged lack of posting notice of foreclosure sale rebutted by Sheriff’s Deed that attached affidavit of process server that he posted notice on the premises. Michigan Compiled Laws Section 600.3256 creates presumption that affidavit of posting is accurate and outweighs Debtor’s unsworn statements alleging failure of notice.
- (9143) *Bucciarelli v. Wells Fargo Home Mortgage*, 2017 WL 1157890 (E.D. Mi. 2017) - After redemption has expired, property owner loses all right, title and interest in property. Filing a lawsuit before expiration of redemption does not toll redemption. Former owners precluded from challenging foreclosure sale after redemption has expired unless plaintiff can show prejudice as a result of alleged failure to file for closure statute. Prejudice requires that plaintiff would have been in better position to preserve interest in property absent defendant’s noncompliance and must allege (1) fraud or irregularity in foreclosure procedure; (2) prejudice to mortgage or; and (3) causal relationship between the alleged fraud or irregularity and alleged prejudice. Complaint that alleged that lender miscalculated balance due but does not include any factual allegation and conclusory statement that amount due was inaccurate, and plaintiff’s references to unidentified legal opinions and media

reports that Wells Fargo may have made costly accounting errors in administration of many home loans were not sufficient to demonstrate fraud in foreclosure process itself. Plaintiff's allegation that defendant did not provide proper notice as required by Michigan compiled laws Section 600.3208 failed to state cause of action where plaintiff on 4 different properties, each of which were subject to separate foreclosure, yet complaint did not identify which property was subject of alleged deficient notice and plaintiff did not allege that plaintiff would have been in better position to preserve interest in property absent alleged noncompliance with statute. Complaint did not contain any clear allegations as to how lender allegedly violated foreclosure law or create any plausible claim of wrongful foreclosure.

- (9144) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Complaint for wrongful foreclosure dismissed where plaintiff did not redeem property before expiration of redemption and did not allege any fraud or irregularity in the foreclosure process itself. Complaint alleged only that lender did not publish notice for four consecutive weeks prior to sale. Sheriff's deed issued after sale constitutes presumptive evidence that all required procedures were complied with. Further, plaintiff failed to allege how any alleged irregularity in foreclosure process prejudiced his ability to either participate in foreclosure process or redeem property.
- (9145) *Burniac v. Wells Fargo Bank*, 2016 WL 146515 (6th Cir. 2016) – Plaintiff seeking to set aside foreclosure sale based on alleged violation of Section 600.3204 must prove that there was defect in the foreclosure process itself that prejudiced plaintiff's ability to retain property. Plaintiff must prove that it would have been in better position to preserve interest in property absent alleged non-compliance. Conclusory statements unadorned with supporting facts are not sufficient to set aside sale.
- (9146) *Bryce v. CitiMortgage, Inc.*, Case no. 14-2048 (Bankr. E.D. Mi. 2015) – Foreclosure sale creates presumption that valid notice was provided and former owner bears burden of showing that sale should be set aside. Plaintiff's blanket statement denying notice and insisting that it is not her signature on return receipt card is insufficient to overturn otherwise valid foreclosure sale. Further, all other documents presented to court, including return receipt card, communications prior to and after the foreclosure sale. The proof of service and affidavit showing mailing of the notice of foreclosure, the proof of publication, the affidavit of posting, and the Sheriff's deed supported finding that property owner received all statutorily required notices.

22.29 Standing to Contest – Other Grounds

- (9147) *Panny v. Pennymac Loan Services, LLC*, 2016 WL 3165722 (E.D. Mi. 2016) – To invalidate foreclosure sale once the statutory redemption period has elapsed, party must make clear showing of fraud, or irregularity in the foreclosure sale itself and that Plaintiff would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. Allegation that party purchasing property at foreclosure sale lacked authority to conduct business in Michigan raises issues under Michigan Compiled Laws 450.5010, which allows only Attorney General to raise issues and does not provide private cause of action. Corporation is not considered to be "doing business" if corporation owns real property. Purchase of property by corporation not registered to do business in Michigan does not violate Michigan Business Corporation Act and does not provide basis to set aside foreclosure sale.
- (9148) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Property owner's right to challenge foreclosure sale after expiration of redemption is limited to allegations of fraud or irregularity in foreclosure process itself.
- (9149) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action to quiet title after redemption. Per state law, expiration of redemption vests all right, title and interest in lender. Absent proof that foreclosure sale itself was tainted by fraud, accident or mistake in the foreclosure itself, owner no longer had interest that was superior to that of lender.
- (9150) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Expiration of redemption does not deprive owner of standing. Article III standing requires injury that is concrete and particularized, and is fairly traceable to the challenged action. There is no dispute that property owner suffers concrete and particular injury if foreclosure sale was improper. State law also confers standing as statute allows foreclosure only upon compliance with the state statute. However, after redemption expires, owner may contest foreclosure upon showing that foreclosure sale was result of fraud or irregularity by the lender. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself.
- (9151) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Plaintiff lacked standing to maintain quiet title action after foreclosure based on alleged impropriety in foreclosure process. Michigan law requires that Plaintiff in quiet title action be able to demonstrate title superior to contested interests. Plaintiff could not contest validity of mortgage and could not establish title superior to mortgage interest.

22.30 Deficiency Claims

- (9152) *DAGS II, LLC v. Huntington National Bank*, 865 F.3d 384 (6th Cir. 2017) – Deficiency balance remaining after foreclosure sale requires deducting from total debt the "true value" of the property at the time of foreclosure sale. Price paid at foreclosure sale is frequently lower than "true value" as there are no normal market conditions present in forced sale; mortgage holder can credit bid creating significant advantage that could discourage other bidders; unsophisticated bidders rarely have any idea of true value of property; and potential bidders may not be able to inspect property until after sale. Object is to determine fair value of property when lender and buyer stand on equal footing, and focuses on preventing double recovery. Value determined by District Court reasonable where lender purchased property at foreclosure sale and resold it less than one year later, and District Court used the higher, actual sale price rather than lower foreclosure bid.
- (9153) *In re Black*, 2014 WL 690159 (Bankr. E.D. Mi. 2014) – Lender may have violated Michigan statutory prohibition against deficiency judgments were lender purchased property at foreclosure sale with a credit bid equal to full amount of the indebtedness, as lender is deemed to have received the amount of the credit bid, leaving no portion of the obligation outstanding. However, creditor's actions in attempting to collect deficiency judgment from second parcel of collateral, while possibly violating Michigan law, did not constitute violation of discharge injunction.

22.31 Discharge or Release of Mortgage at Final Payment – MCL §§ 565.41 and 565.44

- (9154) *Sutter v. Saxon Mortgage Services, Inc.*, Case no. 06-3150 (Bankr. E.D. Mi. 2015) – Sections 565.41 and 565.44 award owner damages where lender refuses or neglects to discharge mortgage or to execute and acknowledge certificate of discharge or release, and allows award of actual damages plus \$1,000.00. Statutes did not apply where court determined that mortgage was void *ab initio*.

22.32 Effect of Sale – Junior Interests

- (9155) *In re Parsons*, 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Foreclosure judgment for unpaid property taxes that purported to strip mortgagee of right to property did not remove lien from property where property was not sold at foreclosure sale. Language in foreclosure judgment issued by default was not conclusive on rights of mortgagee in or to property.

C. Reverse Mortgage

22.33 Default – Death of Borrower

- (9156) *Pikaart v. Financial Freedom*, 2017 WL 5624747 (W.D. Mi. 2017) – Lender allowed to foreclose when reverse mortgage is in name only of one spouse and that spouse passes away, even if surviving spouse remains in house. Surviving spouse had no interest in property when reverse mortgage was obtained as he had quitclaimed property to wife prior to execution of reverse mortgage. Reverse mortgage identified only wife as borrower although both spouses signed mortgage itself. Mortgage documents allowed foreclosure where Borrower dies and property is not owned by at least one surviving Borrower. Surviving Spouse was not “borrower” as he did not sign note and note identified only Wife as borrower. Regulations at 12 USC Section 1715z-20 governs insurance of reverse mortgages and governs relationship between reverse mortgage issuer and HUD but does not impact rights and duties of reverse mortgage grantor and grantee.

XXIII. Fair Debt Collection Practices Act

A. Generally

23.1 Standing

- (9157) *Macy v. GC Services, Limited Partnership*, 2018 WL 3614580 (6th Cir. 2018) - Article III limits power of United States Courts to “cases” and “controversies”. Standing requires that plaintiff have personal stake in outcome sufficient to warrant invocation of federal Court jurisdiction. Standing requires that plaintiff have suffered “injury in fact” defined as invasion of legally protectable interest which is (a) concrete and particularized and (B) actual or imminent rather than conjectural or hypothetical; there must be causal connection between injury and conduct complained of rather than independent action of some third-party not before Court; and it must be likely that injury will be redressed by favorable decision. Plaintiff must clearly allege facts demonstrating each element of standing. In class actions, named plaintiff must allege and show they personally have been injured, not just that injury has been suffered by other, unidentified class members. Bare procedural violation of statute is not sufficient where violation does not produce concrete injury. However, violation of procedural right can be sufficient without additional harm beyond harm specifically identified by Congress. Plaintiff’s complaint sufficiently demonstrated standing for alleged violation of Fair Debt Collection Practices Act where complaint alleged violation of procedural right specifically created by Congress to protect plaintiff from abusive debt collection practices act. Complaint sufficiently alleged that defendant violated validation of debt requirements of FDCPA giving rise to private cause of action. Letters presented risk of harm to FDCPA goal of ensuring that consumers are free from deceptive debt collection practices act because letters provide misleading information about matter in which consumer can exercise statutory right of debt verification.

- (9158) *Smith v. US Bank, NA*, 2018 WL 1488391 (N.D. Ohio 2018) – Standing requires that Plaintiff establish injury in fact that is (a) concrete and particularized and (B) actual or imminent; causal connection between injury and Defendants alleged wrongdoing; and that injury likely can be redressed. Concrete injury is one that actually exists but is not necessarily synonymous with tangible but must not be abstract. Intangible injuries are more likely concrete if intangible harm has close relationship to harm traditionally regarded as providing basis for a lawsuit. Injuries that are too immaterial include dissemination of incorrect ZIP Code; violation of state procedural rules with no collect connection to FDCPA; and debt collector’s inability to prove present debt ownership at a time collection action is filed. Defendant’s inclusion in Validation Letter of 3 new charges did not allege concrete injury. Defendants lack of response to inquiry concerning total amount of debt does not necessarily equate to false representation of amount owed, given that Plaintiff only alleged that Defendant did not provide explanation of new charges, not that Defendant falsely represented amount, character or legal status of debt. Plaintiff also did not allege injury sufficient for standing based on Defendant’s alleged lack of proof that it was authorized to seek repayment as Plaintiff did not allege that Defendants state foreclosure action caused injury concerning debt owed. Plaintiff’s contention that Defendants are not party in interest to collect does not cause heart harm where it was undisputed that Plaintiffs, regardless of home party in interest is, owes and must answer for debt.

- (9159) *Thompke v. Fabrizio & Brook, PC*, 2017 WL 3479529 (E.D. Mi. 2017) – Article III standing requires that Plaintiff (1) suffered injury in fact, (2) that is fairly traceable to Defendant’s conduct Defendant, and (3) that is likely to be redressed by favorable judicial decision. Plaintiffs’ Complaint that law firm violated FDCPA by including extraneous information in foreclosure notice and by sending letter that was confusing alleged that the harm suffered was caused by law firm sending letters and publicizing their personal information which can be redressed through award of statutory damages under the FDCPA. To establish injury in fact, Plaintiff must show an invasion of legally protected interest that is concrete and particularized. General statement that Plaintiffs were embarrassed by publication of extraneous information in foreclosure notice, and that they were confused by letter from a non-attorney staff member of the Fabrizio law firm alleged injuries that are intangible but still meet test of concrete. Concrete is not synonymous with tangible and while tangible injuries are perhaps easier to recognize, intangible injuries can nevertheless be concrete. Plaintiffs alleged they suffered confusion and embarrassment, channeling the FDCPA prohibition against false representation or implication that any individual is attorney or that communication is from attorney or from communicating with debtor in misleading or deceptive manner, such as using stationery of attorney unless person is an attorney. FDCPA prohibits debt collector from communicating with any person other than the consumer, his attorney, a consumer reporting

agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector and is meant to protect debtors from harassment, embarrassment, loss of job, and denial of promotion. Plaintiffs alleged that Defendant published extraneous information, which cast them in a bad light with their neighbors, causing them to suffer opprobrium that continues to this day. Injury is particularized if it affects Plaintiff in personal and individual way. Complaint alleged particularized harm that resulted letters sent directly to them and information provided to public concerned mortgage.

- (9160) *Walker v. Fabrizio & Brook, PC*, 2017 WL 5068340 (E.D. Mi. 2017) – Article III standing requires that Plaintiff (1) suffered injury in fact, (2) that is fairly traceable to Defendant’s conduct Defendant, and (3) that is likely to be redressed by favorable judicial decision. Plaintiffs’ Complaint that law firm violated FDCPA by including extraneous information in foreclosure notice and by sending letter that was confusing alleged that the harm suffered was caused by law firm sending letters and publicizing their personal information which can be redressed through award of statutory damages under the FDCPA. To establish injury in fact, Plaintiff must show an invasion of legally protected interest that is concrete and particularized. General statement that Plaintiffs were embarrassed by publication of extraneous information in foreclosure notice, and that they were confused by letter from a non-attorney staff member of the Fabrizio law firm alleged injuries that are intangible but still meet test of concrete. Concrete is not synonymous with tangible and while tangible injuries are perhaps easier to recognize, intangible injuries can nevertheless be concrete. Plaintiffs alleged they suffered confusion and embarrassment, channeling the FDCPA prohibition against false representation or implication that any individual is attorney or that communication is from attorney or from communicating with debtor in misleading or deceptive manner, such as using stationery of attorney unless person is an attorney. FDCPA prohibits debt collector from communicating with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector and is meant to protect debtors from harassment, embarrassment, loss of job, and denial of promotion. Plaintiffs alleged that Defendant published extraneous information, which cast them in a bad light with their neighbors, causing them to suffer opprobrium that continues to this day. Injury is particularized if it affects Plaintiff in personal and individual way. Complaint alleged particularized harm that resulted letters sent directly to them and information provided to public concerned mortgage.
- (9161) *Fausz v. NPAS, Inc.*, 237 F.Supp.3d 559 (W.D. Ky. 2017) – Article III requires actual case or controversy for Federal Court to exercise jurisdiction. Plaintiff must demonstrate an injury in fact, defined as invasion of legally protected interest which is concrete and particularized and actual or imminent. However, injury need not be tangible to elevate injury to one that is legally cognizable where violation of procedural right granted by statute constitutes injury in fact without any allegation of any additional harm. FDCPA imposes protections for consumers who may be disadvantaged in effort to promote fair and consistent protections. Violation of FDCPA is sufficient to confer standing even absent independent actual damages.

23.2 Class Action

- (9162) *Macy v. GC Services, Limited Partnership*, 2018 WL 3614580 (6th Cir. 2018) – Class Certification is vested in sound discretion of trial Court. To merit certification, putative class must demonstrate numerosity (a class so large that joinder of all members is impracticable); commonality (questions of law or fact common to class); typicality (named parties claims or defenses are typical of class); and adequacy of representation (representatives will fairly and adequately protect interests of class). Approval of class action status in case seeking class status for action for violation of Fair Debt Collection Practices Act was not abuse of discretion where each class member had same claim that defendant violated FDCPA by failing to include in debt collection letters written notification of consumers right to obtain debt validation; and resolution of common contention regarding sufficiency of demand letter would resolve issues central to all claims at one time.

23.3 “Debt Collector” Defined

- (9163) *Hake v. Simpson*, 2018 WL 3973098 (S.D. Ohio 2018), *Notice of Appeal filed*, (6th Cir. 2018) – “Debt Collector” is defined as any person who uses interstate commerce or mail to collect consumer debts. Consumer debts are defined as those that arise out of transaction in which money borrowed was used primarily for personal, family or household purpose. “Debt Collector” specifically excludes any officer or employee of the United States or any State to extent that collecting or attempting to collect debt is in performance of official duties. Action contesting Sheriff’s employees’ actions in connection with enforcement of foreclosure judgment did not violate FDCPA as named defendants were all state actors and underlying debts were commercial debts resulting from investments in real estate and did not constitute consumer debts.
- (9164) *Howard v. Wells Fargo Home Mortgage, Inc.*, 2018 WL 3743976 (S.D. Ohio 2018) – Original creditor on loan attempting to collect debt owed to it is not “debt collector” within scope of FDCPA.
- (9165) *Smith v. US Bank, NA*, 2018 WL 1488391 (N.D. Ohio 2018) – “Debt Collector” is any person who uses instrumentality of interstate commerce or mails in any business where principal purpose is collection of debts or who regularly collects debts owed to a 3rd person. Entity is not debt collector where entity is attempting to collect that owed to it. Entity that acquired debt at time obligation was not in default is not debt collector. Entity that acquires debt that is in default is not debt collector if entity does not engage in collection activities. Neither Mortgage Holder nor Mortgage Servicer could be considered debt collectors where obligation to be collected was owed to Mortgage Holder on its own behalf.
- (9166) *Johnson v. Santander Consumer USA*, 2018 WL 2158778 (W.D. Tn. 2018) – “Debt Collector” for purposes of FDCPA is one who collects debt owed to another. Creditor who acquired debt when debt was not in default does not qualify as debt collector as obligation was owed directly to party seeking to collect. Further, party is not “Debt Collector” where party has sold or transferred loan to third-party prior to receipt of debt validation letter.
- (9167) *Elizarov v. Equity Experts, LLC*, 2018 WL 2129817 (E.D. Mi. 2018) – Fair Debt Collection Practices Act applies to “debt collector” defined in 15 USC Section 1692a(6) as person who regularly collects or attempts to collect debts owed or do to another person; or one whose principal purpose of business is collection of debts. Defendant is not “debt collector” where party purchased defaulted debt and then attempts

to collect debt in his own name as person is not acting to collect debt owed to another person. Whether “principal purpose” of business is collection of debts is fact specific and requires more than debt collection services be rendered “regularly” if those services are small fraction of total activity. Defendant entitled to summary judgment where Plaintiff did not produce any evidence to support argument that Defendant’s “principal purpose” is collection of debts.

- (9168) *Fish v. Stone, Higgs & Drexler, PC*, 2017 WL 6757575 (W.D. Tn. 2017) – “Debt collector” is any person who uses instrumentality of interstate commerce or mails in any business where principal purpose is collection of any debts, or who regularly collects or attempts to collect, debts owed or due or asserted to be owed or due to another. Attorney did not act as debt collector where attorney did not send anything to borrower through mail and did not have any telephone or other contact with borrower other than service of summons and complaint which was personally delivered.
- (9169) *Fausz v. NPAS, Inc.*, 237 F.Supp.3d 559 (W.D. Ky. 2017) – FDCPA regulates conduct of debt collectors when the loan is in default. Whether account in “in default” generally depends on how debt holder defines debt or where debt holder has treated debt as if it were in default. Hospital would attempt to collect debts for period of time, and would then pass debts to debt collector which sent letter to Plaintiff stating that it was debt collector and debt was in default. Hospital clearly classified debt as “in default” for purposes of FDCPA.
- (9170) *Witz v. Fishman Group, PC*, 2017 WL 3386381 (E.D. Mi. 2017) – Attorney can be held personally liable for FDCPA violation where attorney personally signed request for Writ of Garnishment after being advised of bankruptcy filing. Attorney’s personal acts create personal liability without need to pierce law firm corporate veil, as long as attorney personally regularly engages directly or indirectly in debt collection activity.
- (9171) *Henson v. Santander Consumer USA, Inc.*, Case No. 16-349 (U.S. 2017) – Fair Debt Collection Practices Act applies only to third-parties were collecting debts owed to a different creditor. Purchaser of debts from original creditor and who has thereafter owned debts out right are not “debt collectors” within scope of FDCPA. FDCPA does not contain any suggestion that would limit or expand the scope based on how that owner came to be debt owner for any provision that would limit “debt owner” only to original creditor.
- (9172) *Maze v. Wells Fargo Bank, NA*, 2017 WL 956596 (W.D. Ky. 2017) – FDCPA applies only to “debt collectors” and precludes any abusive, deceptive or unfair debt collection practices. Under FDCPA, 1) Plaintiff must be a consumer as defined by the Act; (2) the debt must arise out of transactions which are “primarily for personal, family or household purposes; (3) Defendant must be a debt collector as defined by the Act; and (4) Defendant must have violated § 1692e’s prohibitions. “Debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Company hired to dispossess Plaintiff form property after completion of foreclosure action and issuance of writ of possession was not debt collector as company did not demand payment of any debt, notify Plaintiff of any debt or communicate to Plaintiff regarding outstanding debt; and clearing of property from foreclosed property is incidental to foreclosure and is not debt collection activity. Complaint that alleged that company broke into the property, ransacked it and stole and/or damaged very valuable music equipment and other personal property failed to state cause of action under FDCPA.
- (9173) *Donley v. Seterus, Inc.*, 2016 WL 4138235 (E.D. Mi. 2016) – “Debt collector” for purposes of FDCPA is one who collects obligations owed to third party. Creditor collecting debt owed to it, in creditor’s own name, is not “debt collector”. Creditor or mortgage servicer how acquires interest in loan when loan is not in default is not “debt collector” but is considered the “creditor” and is not subject to FDCPA liability.
- (9174) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – Allegations of violation of FDCPA were barred as Plaintiff raised those issues in Bankruptcy Court and issues were resolved by Bankruptcy Court Judgment. Plaintiff also failed to state FDCPA violation as all actions were taken by creditor, and FDCPA does not apply to creditor collecting debt in its own name. Further, alleged confusion regarding foreclosure sale date did not cause harm to Plaintiff as Plaintiff was fully aware of, and attended, foreclosure sale itself.
- (9175) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Debt collector for purposes of FDCPA does not include any person collecting in his own name, or which was acquired by creditor at time when loan was not in default. Debt was not in default when loan was assigned such that lender and mortgage servicer were not within scope of FDCPA.
- (9176) *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.
- (9177) *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”.
- (9178) *Washington v. Roosen, Varchetti & Oliver, PLLC*, 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.

- (9179) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – FDCPA prevents debt collector from using false, deceptive or misleading representations or means in connection with collection of debt. Loan servicer did not violate FDCPA by providing borrower with proposed forbearance agreement where nothing in forbearance agreement contained misrepresentations or misleading representations. Forbearance agreement was not representation that other loss mitigation options were not available, it only presented terms of this specific loss mitigation option. Additional communications between lender and State Attorney General acting at the request of borrower were not communications within scope of FDCPA, as FDCPA governs only communications for the purpose of inducing payment and response to AG was ministerial response to borrower's inquiry that made no attempt to induce payment. Monthly mortgage statements do not violate FDCPA where mortgage statement did not contain any false statement or misrepresentation.
- (9180) *Hart v. Wood*, 2015 WL 4276272 (W.D. Tn. 2015) – Complaint failed to allege that Defendant was "debt collector" within scope of FDCPA where party was acting exclusively as trustee for purposes of initiating non-judicial foreclosure. Party is not "debt collector" if party is acting solely for purpose of enforcing security interest.
- (9181) *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.
- (9182) *Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – FDCPA applies only to those who meet the statutory definition of "debt collector", which turns on whether the person "regularly" attempts to collect debts. Business that principally focuses on enforcement security interests but who does not otherwise regularly attempt to collect debts is exempt from FDCPA except for Section 1692f(6) which prohibits taking or threatening to take property where there is no lawful right to possession or whether there is no intention to take property. Deed of Trust holder was not debt collector as only role was to enforce security agreement after default and there were no allegations that Deed of Trust holder took or threatened to take any action that would violate 1962f(6).
- (9183) *Geary v. Green Tree Servicing, LLC*, 2015 WL 1286347 (S.D. Ohio 2015) – "Debt collector" includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it was in default as of the date of acquisition, even if that treatment is incorrect as a result of clerical mistake, other error or intention. Plaintiff alleged that Defendant acquired debt after debt had been paid off, but Defendant then attempted to collect debt as if it was in default. Defendant claimed that it could not be a debt collector because debt, according to Plaintiff, was paid off when Defendant acquired servicing so debt could not have been "in default" which is trigger for FDCPA. Defendant was "debt collector" even if loan was paid in full as of date of transfer of servicing as Defendant treated the loan as if it were in default. Letter from Defendant to Plaintiff advising of change of servicing was "initial communication" where letter did not state that the only purpose was to advise of a change of servicing or that it was otherwise for information only, and letter contained total amount due and a due date and included a payment coupon, clearly intended to induce Plaintiff to make payments to Defendant. However, letter that included names of both original creditor and Defendant in the letterhead was not misleading or confusing, even using the least sophisticated consumer standard, where letter clearly identified both parties and their relationship and informed Plaintiff that right to collect loan payments was transferred from predecessor to Defendant.
- (9184) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – FDCPA applies only to debt collectors and not to actual creditor. Loan servicer is considered "creditor" for purposes of FDCPA. Servicer who acquires rights at time when loan is not in default is not "debt collector" within scope of FDCPA.
- (9185) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – In general, FDCPA does not apply to person attempting to collect debt in its own name or where the entity seeking to collect acquired the debt at a time when the debt was not in default. If mortgage lender was the originator of the loan, lender could not be held liable under FDCPA. Court denied motion to dismiss where originating lender was Countrywide, not B of A, and complaint did not clearly allege that B of A was successor to Countrywide. However, if B of A could prove it was successor to Countrywide as loan originator, B of A could not be liable as successor to originator by merger is deemed to be the originator and not a party who "acquired" the loan, regardless of whether loan was in default as of date of merger or not. Complaint

alleged cause of action against loan servicer where complaint alleged that servicer made repeated communications with borrower that it would accept payments on loan when servicer had already accelerated loan and intended to pursue foreclosure. Further, statements were made in effort to coerce payments amounting to effort to collect on otherwise previously discharged debt. While security interest did survive bankruptcy and lender had right to foreclose, demands by servicer were not limited to efforts to realize on collateral but instead asked for money and implied that payment was required in effort to collect debt.

- (9186) *Jester v. CitiMortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Creditor who originates debt is not a debt collector within scope of FDCPA. Lender that is successor by merger with original lender remains the “lender” and is not subject to FDCPA. Limitations period runs for one year from date of violation without regard to when Plaintiff learned of violation. Action for alleged misapplication of payments in Chapter 13 that discharged in March, 2012, was untimely when filed in September, 2013, more than one year later. Court can extend statute for “equitable tolling” if 1) Defendants concealed the conduct that constitutes the cause of action; 2) Defendants’ concealment prevented Plaintiffs from discovering the cause of action within the limitation period; and 3) until discovery of the cause of action, Plaintiffs exercised due diligence in trying to find out about the cause of action. Allegations must contain specific statements of dates and times when fraud, mistake, concealment or misrepresentation was discovered and must demonstrate that discovery would not have been possible through ordinary diligence as a result of extraordinary circumstances. Allegations that Plaintiffs repeatedly requested mortgage statements that were not provided is not sufficient statement of fraud. Failure to respond to Qualified Written Request under RESPA is not evidence of fraud. Even if actions were intended to conceal, Plaintiffs could have discovered alleged deficiencies through reasonable efforts.

23.4 Debt Collector – Mortgage Servicer

- (9187) *Roes v. Specialized Lian Servicing*, 2018 WL 3636543 (E.D. Tn. 2018) – “Debt Collector” for purposes of FDCPA is any business which regularly collects or attempts to collect debts owed to third party. FDCPA excludes any person collecting debt which is not in default at time debt is obtained by such person and excludes mortgage holders and loan servicers as long as debt was not in default at time servicing rights were acquired. Evidence indicated that loan was not in default at time SLS acquired servicing rights as evidenced by Notice of Transfer of Claim filed in Bankruptcy proceedings. SLS is not “debt collector” by definition, requiring dismissal of complaint.
- (9188) *Donley v. Seterus, Inc.*, 2016 WL 4138235 (E.D. Mi. 2016) – “Debt collector” for purposes of FDCPA is one who collects obligations owed to third party. Creditor collecting debt owed to it, in creditor’s own name, is not “debt collector”. Creditor or mortgage servicer how acquires interest in loan when loan is not in default is not “debt collector” but is considered the “creditor” and is not subject to FDCPA liability. Seterus could not be considered “debt collector” where Seterus acquired servicing rights at least 5 years before first event of default.
- (9189) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – 15 USC Section 1692a(6) defines “debt collector” as any person who uses instrumentality of interstate commerce of the mails in any business, the principal purpose of which is the collection of debt, or one who regularly collects or attempts to collect, directly or indirectly, Debtor owed or due or asserted to be owed. Section 1692a(6)(F), “debt collector” does not include any person collecting or attempting to collect any debt owed or due or asserted to be owed or due to the extend the debt was not in default at the time it was obtained by the person. However, Section 1692a does not exclude from “debt collector” any person who acquired the loan when it was in default at time of acquisition or if the servicing company treated it as such, regardless of actual status. Complaint was sufficient to state cause of action against successor servicer where prior servicer had filed Motion for Relief From Stay asserting that Debtors were in default and successor servicer later acquired servicing rights.
- (9190) *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.
- (9191) *McKay v. JPMorgan Chase Bank*, 2014 WL 5529672 (S.D. Ohio 2014) – FDCPA applies only to “debt collectors” defined as one who has collection of debts as either its principal business purpose or who regularly engages in debt collection. FDCPA does not apply to the party to whom the debt is owed but is limited to parties collecting debts owed to others. Creditors and mortgage servicers who acquire the loan are excluded from “debt collectors” if loan was not in default and the creditor or servicer did not treat the debt as if it was in default at the time of acquisition. Complaint that failed to allege that loan was in default when acquired by Defendant and failed to assert any facts to demonstrate that Defendant treated loan as if it were in default when acquired failed to state cause of action as matter of law.
- (9192) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – FDCPA applies only to debt collectors and not to actual creditor. Loan servicer is considered “creditor” for purposes of FDCPA. Servicer who acquires rights at time when loan is not in default is not “debt collector” within scope of FDCPA.
- (9193) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Letter to mortgage servicer cannot form basis of action under FDCPA against lender. Further, FDCPA does not apply to actions against lender collecting debts in its own name or to third parties collecting Debtors that was not in default when obtained by the collector, but applies only to persons collecting Debtors owed to another that are first acquired by collector post-default. Mortgage servicer that assumed servicing when mortgage was not in default could not be liable under FDCPA for subsequent alleged violations.
- (9194) *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.

- (9195) *Williams v. Federal National Mortgage Ass'n*, 2013 WL 5445883 (E.D. MI. 2013) – Assignee of mortgage loan is not subject to 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.
- (9196) *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.
- (9197) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Entity that did not originate loan but acquired ownership at later date will be “debt collector” if loan was in default at the time entity acquired its interest. Servicer admitted that loan was in default for at least 8 months prior to date on which servicer acquired loan. As such, servicer was “debt collector” within scope of FDCPA. FDCPA has one year statute of limitations. Regardless of whether statute of limitations runs from occurrence or from “discovery” of occurrence, complaint filed more than 18 months after servicer mailed untimely debt validation letter was beyond statute. “Discovery” requires knowledge of facts that would give rise to action, not to knowledge of legal basis of action. Debtor had knowledge of receipt of validation letter which constituted discovery. Fact that Debtor did not know that late sending of letter was actionable did not delay running of statute. Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.

23.5 Debt Collector as Creditor

- (9198) *Tepper v. Amos Financial, LLC*, Case No. 17-2851 (3d Cir. 2018) - “Debt Collector” under FDCPA includes person who uses mails or interstate commerce in any business, principal purpose of which is collection of any debt; *or* regularly collects debts owed to another person. Definitions are mutually exclusive and principal purpose of collection of debt does not distinguish to whom debt is owed. Whether defendant owns debt does not resolve whether entity is debt collector without determining whether debt buyer has a principal purpose of collection of debt. Defendant admitted that sold business was collecting debts defendant had purchased and that it used mail and wires for its business, more than sufficient to establish status as debt collector under first FDCPA definition.

23.6 Relationship to Bankruptcy Code – Pre-Emption

- (9199) *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.
- (9200) *Simon v. FIA Card Services, NA*, 2013 WL 5508868 (3d Cir. 2013) – Bankruptcy Code does not pre-empt FDCPA claim where alleged violations of FDCPA occurred during pendency of bankruptcy case. Creditor sent letter to Debtor's counsel stating that FIA was considering challenge to dischargeability of claims and offered Debtor opportunity to settle by agreeing to except debt from discharge and also included notice of Rule 2004 Examination. Notice of Rule 2004 exam was quashed by Court for failure to comply with Rule 9016 and Rule 45 by scheduling examination in New York although bankruptcy was filed in New Jersey. Creditor's actions were actionable under both Bankruptcy Code and FDCPA, and Code did not pre-empt separate action based on FDCPA merely because violation occurred within scope of bankruptcy case.

23.7 Statute of Limitations

- (9201) *Jodway v. Orlans, PC*, 2018 WL 1570303 (E.D. Mi. 2018) – Action under FDCPA must be brought within one year of date of violation. Complaint alleging deceptive, abusive, or otherwise unfair lawsuit accrues on date of conduct. Action barred by Statute where all three actions complained of by Plaintiff – Filing Proof of Claim in Bankruptcy Case alleging that Mortgage was valid when Plaintiffs contended Mortgage was invalid; Moving to Lift Stay based on allegedly invalid Mortgage; and initiating and prosecuting foreclosure action – occurred more than one year before action commenced. Discrete, separate, actionable violations of FDCPA do not constitute “continuing” violations for purposes of Statute as violations do not by nature require repeated conduct.
- (9202) *Fish v. Stone, Higgs & Drexler, PC*, 2017 WL 6757575 (W.D. Tn. 2017) – Action under FDCPA must be brought within one year of date of violation. Statute begins to run when Plaintiff knows or has reason to know of violation, not date on which improper litigation is commenced.
- (9203) *Turnbull v. O'Reilly Rancilio, PC*, 2017 WL 976918 (E.D. Mi. 2017) - Fair Debt Collection Practices Act requires suit to be brought within one year from date on which violation occurs. Statute of limitations arising from Collection lawsuit begins to run when aggrieved party received notice of lawsuit. Record contains sufficient factual dispute as to date on which debt collector first advised Plaintiff of pendency of collection action to prevent grant of summary judgment.
- (9204) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - Statutory limitations under FDCPA is one year from date on which violation occurs. To extend that complaint sought to hold Defendants liable for actions taken in connection with summary eviction more than one year prior to commencement of action, claims would be dismissed pursuant to statute of limitations.
- (9205) *DePizzo v. Bank of New York Mellon*, 2015 WL 5675098 (N.D. Ohio 2015) – Statute of Limitations on FDCPA action is one year from alleged violation. Where violation is alleged institution of litigation that is deceptive, abusive or otherwise unfair, limitations period begins

to run on date of commencement of suit, not on later date on which complaint is served on Defendant.

- (9206) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Limitations period under FDCPA is one year from the alleged violation. Complaint was time barred when alleged misrepresentation occurred in 2008 but Plaintiff did not bring an action until 2011. Statute of limitations was not extended by Plaintiff's Chapter 13 petition as limitations period had already expired prior to commencement of bankruptcy case. Section 108 suspends a limitation period if the period has not expired pre-petition but does not create new limitation period where limitation period has previously expired. "Continuing violation" doctrine does not apply to FDCPA claims where alleged violation occurred when lender commenced foreclosure proceedings and those proceedings had not been concluded. Pleadings and other communications in connection with the foreclosure do not start new statute of limitations.
- (9207) *Fillinger v. Sampson*, Case no. 14-4097 (6th Cir. 2015) – Fair Debt Collection Practices Act has one year statute of limitations. Without addressing whether equitable tolling was available under FDCPA, Court held that Plaintiff failed to prove fraudulent concealment as required if court is to equitably toll statute. Equitable tolling requires that Defendant concealed underlying conduct; Plaintiff was prevented from discovering cause of action by that concealment; and Plaintiff exercised due diligence to discover cause of action. Plaintiff's complaint failed to allege with particularity any facts that would support finding that Defendant concealed true identity of creditor, where Plaintiff never made inquiry. Mere silence of party is not sufficient – concealment requires some trick or contrivance intended to exclude suspicion and prevent inquiry.
- (9208) *Mooneyham v. GLA Collection Co., Inc.*, 2015 WL 3607647 (W.D. Ky. 2015) – Consumers are not charged with constructive knowledge or erroneous information in credit reports. Court can equitably toll statute of limitations even in absence of any wrongful or other effort by Defendant to prevent Plaintiff from using. Tolling applies when Plaintiff knows of cause of action such that statute of limitations begins to run, but Plaintiff is unable to obtain information necessary to determine whether injury is due to wrongful conduct and, if so, whether Defendant committed the wrongful conduct. Equitable tolling applies only in compelling circumstances based on lack of actual or constructive notice of filing requirement, diligence in pursuing one's rights, absence of prejudice to Defendant, and Plaintiff's reasonableness in remaining ignorant of legal requirements. Plaintiff lacked either actual or constructive notice of errors in credit report and acted diligently when the errors were discovered. Although Defendant would be prejudiced by 4 year delay between erroneous report to credit bureau and institution of litigation, purpose of FDCPA to ensure consumer protection outweighs this prejudice.
- (9209) *Goodson v. Bank of America, NA*, 2015 WL 364045 (6th Cir. 2015) – Statute of limitations under FDCPA is one year from date of violation. Borrower knew that collection letter dated 2010 mis-identified the actual creditor, such that statute of limitations began to run on date of receipt. Borrower's action, commenced more than one year later, barred by statute of limitations. Further, letters were not "in connection with" an attempt to collect debt where letters designed to inform borrower of a change in servicer, not to induce payments, taking into account the nature of the relationship between the parties, the fact that the letters did not expressly demand payment or state a balance due, the letters were sent in response to an inquiry by the borrower, the statements were not part of a strategy to make payment more likely, the communication was from the mortgage servicer and not a "debt collector", and the letters did not threaten any consequence if the debt was not paid.
- (9210) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015) *aff'd*, 2016 WL 4269803 (6th Cir. 2016) – Statute of Limitations on FDCPA action is one year from alleged violation. Where violation is alleged institution of litigation that is deceptive, abusive or otherwise unfair, limitations period begins to run on date of commencement of suit.
- (9211) *Simmons v. BAC Home Loan Servicing, LLP*, 2014 WL 3844788 (M.D. Tn. 2014) – FDCPA has one year statute of limitations. Action brought in 2014 arising out of loan origination in 2010 and alleged wrongful foreclosure in 2012 barred as untimely. Although state law provided for three year limitations period for any action that involves real property, FDCPA is federal statute and limitations period is governed by federal, not state, law.
- (9212) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – FDCPA has one year statute of limitations. Regardless of whether statute of limitations runs from occurrence or from "discovery" of occurrence, complaint filed more than 18 months after servicer mailed untimely debt validation letter was beyond statute. "Discovery" requires knowledge of facts that would give rise to action, not to knowledge of legal basis of action. Debtor had knowledge of receipt of validation letter which constituted discovery. Fact that Debtor did not know that late sending of letter was actionable did not delay running of statute. Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.
- (9213) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – FDCPA statute of limitations requires that suit be brought within one year of date on which violation occurred. Complaint filed 13 months after creditor allegedly violated FDCPA dismissed.
- (9214) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Fair Debt Collection Practices Act has one year statute of limitations. Where alleged violation occurred in 2009, complaint filed in 2013 was untimely.

23.8 Statute of Limitations – Equitable Tolling

- (9215) *Jodway v. Orlans, PC*, 2018 WL 1570303 (E.D. Mi. 2018) – Tolling under the fraudulent concealment doctrine requires well-pled allegations that (1) Defendant concealed conduct that constitutes cause of action; (2) concealment prevented Plaintiffs from discovering cause of action within limitations period; and (3) Plaintiffs exercised due diligence in trying to find out about cause of action. Although it is not clear whether equitable tolling applies to FDCPA claims, Plaintiff's allegations failed to state basis for equitable tolling where complaint lacked any factual allegations that would support finding of fraudulent concealment.
- (9216) *Roberson v. Macnicol*, 2017 WL 2629099 (6th Cir. 2017) - Federal equitable tolling principles apply only to claims that arise under federal law. State equitable tolling principles apply to state-law claims. 18 USC Section 108 which governs extensions of limitations periods caused by bankruptcy, extends the statute of limitations to the later of the end of the ordinary limitations period or 30 days after receiving notice of

lifting of the stay.

- (9217) *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 2016 WL 2909333 (6th Cir. 2016) – Central distinction between Statute of Limitation and Statute of Repose is that limitation runs from date on which Plaintiff knows of injury and requires Plaintiff to diligently prosecute action, while Statute of Repose runs from date on which Defendant acted that created liability regardless of when injury resulted or when injury may have been discovered. After legislatively limited time period, action cannot be commenced and Defendant will thereafter be free of liability. Statute of Limitations is subject to equitable tolling while Statute of Repose is not, even where time passes in extraordinary circumstances beyond Plaintiff's control. Securities statute that provided that action must be brought within one year of discovery but in no event more than 3 years after event contained both statute of limitation of one year and statute of repose of three years from initial activity. Statutes of Repose effectively create substantive right of Defendant to be free from claims after certain period, time cannot be extended.
- (9218) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Equitable tolling requires proof that Defendant concealed conduct that constitutes cause of action, that concealment prevented Plaintiff from discovering cause of action within limitation period, and Plaintiff exercised due diligence in trying to find out about cause of action. Equitable tolling not available where alleged violation of FDCPA was representation in foreclosure action that lender had possession of original note when lender did not have possession but had affidavit of lost instrument signed by predecessor-in-interest. Thus, lender has legal right to foreclosure on loan such that neither statement in complaint nor statement in affidavit in support of summary judgment were false or misleading.
- (9219) *Fillinger v. Sampson*, Case no. 14-4097 (6th Cir. 2015) – Fair Debt Collection Practices Act has one year statute of limitations. Without addressing whether equitable tolling was available under FDCPA, Court held that Plaintiff failed to prove fraudulent concealment as required if court is to equitably toll statute. Equitable tolling requires that Defendant concealed underlying conduct; Plaintiff was prevented from discovering cause of action by that concealment; and Plaintiff exercised due diligence to discover cause of action. Plaintiff's complaint failed to allege with particularity any facts that would support finding that Defendant concealed true identity of creditor, where Plaintiff never made inquiry. Mere silence of party is not sufficient – concealment requires some trick or contrivance intended to exclude suspicion and prevent inquiry.

23.9 “Communication” Defined

- (9220) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 889547 (W.D. Ky. 2018) – Communication falls within FDCPA where communication is attempt to collect debt. Letter that initially advised that servicing of loan had been transferred was communication where letter also included section showing payment amount and payment instructions with directions to “detach and return with payment”. Door hanger that advised of change in servicing could be found to be communication as there would be no other motivation for servicer to leave hanger with phone number and instructions to call other than collection of debt.
- (9221) *Thompke v. Fabrizio & Brook, PC*, 2017 WL 3479529 (E.D. Mi. 2017) – Posting of Notice of Foreclosure Sale is attempt to collect debt within scope of FDCPA. Notice was designed to make payment on mortgage more likely to succeed and has requisite connection to debt collection.
- (9222) *Walker v. Fabrizio & Brook, PC*, 2017 WL 5068340 (E.D. Mi. 2017) – Posting of Notice of Foreclosure Sale is attempt to collect debt within scope of FDCPA. Notice was designed to make payment on mortgage more likely to succeed and has requisite connection to debt collection.
- (9223) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Posting of foreclosure notice is plausibly a communication as it is convey information about the debt and foreclosure process is attempt to collect debt. Although FTC Staff Commentary excludes law, Commentary is not binding on public or Courts and nothing in statute itself contains that exception. Even if borrower consented to publication of notice, the notice itself contained information beyond that required by Michigan law and it is not clear that borrower consented to any disclosure beyond the minimum required by law.
- (9224) *Jones v. US Bank*, 2017 WL 2191629 (S.D. Ohio 2017) – Mortgage servicer does not violate FDCPA by filing Notice of Appearance in Bankruptcy Case. NOA identified party as Wells Fargo Bank, NA, Creditor, at time when Wells Fargo served only as servicer. As servicer, Wells Fargo was party to bankruptcy proceeding and was entitled to notices in the case. Further, NOA is not statement made in attempt to collect debt and does not amount to assertion of right to payment in bankruptcy case.
- (9225) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) - Whether communications from creditor to borrower constitutes attempt to collect debt under FDCPA's commonsense inquiry that evaluates nature of the parties relationship, objective purpose and context of communication, and whether communication includes demand for payment. Posted discharge letters from mortgage loan servicer to Debtor or not attempts to collect debt where communications where communications contained clear and unequivocal disclaimers establishing that communications were not in connection with effort to collect debt, but were instead for informational purposes related to a mortgage which survived Debtor's discharge. Communications continuously included disclaimer, “if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and it does not constitute an attempt to collect a debt”. Debtor should have known that mortgage servicer was not attempting to collect debt based on disclaimers and Debtor's knowledge and understanding that debt had been discharged. FDCPA does not completely prohibit communications related to foreclosure has right to foreclose survived bankruptcy discharge, as long as communications are not false, deceptive or misleading.
- (9226) *Brown v. Van Ru Credit Corp.*, 2015 WL 6220521 (6th Cir. 2015) – “Communication” for purposes of FDCPA is one that conveys information regarding a debt directly or indirectly to any person through any medium. Voicemail left by debt collector to Debtor's payroll department that stated only collector's name, phone number and reference number was little more than a request for someone to return the call and did not imply existence of debt and was not “communication” within FDCPA.

23.10 Public Communication – 15 USC Section 1692c(b)

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- (9227) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Section 1692c prohibits debt collector from communicating with anyone other than with borrower, his attorney or consumer reporting agency, absent permission of debt collector or court of competent jurisdiction, or as reasonably necessary to effectuate post-judgment judicial remedy. Posting of foreclosure notice is plausibly a communication as it is convey information about the debt and foreclosure process is attempt to collect debt. Although FTC Staff Commentary excludes law, Commentary is not binding on public or Courts and nothing in statute itself contains that exception. Creditor itself can post notice of foreclosure without violating FDCPA as creditor is not “debt collector”. Even if borrower consented to publication of notice, the notice itself contained information beyond that required by Michigan law and it is not clear that borrower consented to any disclosure beyond the minimum required by law.

23.11 “Consumer Debts”

- (9228) *Fish v. Stone, Higgs & Drexler, PC*, 2017 WL 6757575 (W.D. Tn. 2017) – FDCPA applies to debts incurred for personal, family or household purposes. Although Creditor did not know intended use of proceeds when creditor extended loan. Borrower’s affidavit stating that he used funds for personal and household expenses was sufficient to establish debt as “consumer debt”.
- (9229) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio) – FDCPA does not apply to commercial transactions. Mortgages taken out by borrowers secured by rental and income properties are not consumer transactions and are beyond scope of FDCPA. Further, to extent that FDCPA complaint alleged that creditor lacked standing because of allegedly defective assignments of mortgages, lender had original note and mortgage endorsed in blank as of date of foreclosure action, foreclosing any argument that lender was attempting to collect debt not owed to it.
- (9230) *Anarion Investments, LLC, Carrington Mortgage Services*, 2014 WL 3556026 (M.D. Tn. 2014) – FDCPA protections are limited to “consumers”. Corporation, LLC or other business entity cannot maintain cause of action for alleged violation. Entity lacks standing to maintain action – dismissal for failure to state cause of action proper.
- (9231) *Thomas v. Daneshgari*, 2014 WL 584890 (E.D. Mi. 2014) – FDCPA does not apply to collection of business or commercial debts. Obligations arising out of disputed purchase of business are not included in FDCPA protections. FDCPA applies only to third parties who regularly collect or attempt to collect Debtors owed to another person. Creditor’s actions in collection debts owed to it are excluded from FDCPA protections.

23.12 “Consumer Debts” Defined

- (9232) *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.
- (9233) *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, Case No 11-1954 (6th Cir. 2012) – Condo association assessments were “debts” 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.
- (9234) *Loschiavo v. Bank of America, N.A.*, 2015 WL 3742491 (N.D. Ohio 2015) – FDCPA applies only to consumer debts and does not apply to mortgage on property owned by Plaintiff and used as rental property as of time of acquisition of mortgage.

23.13 “Person” Defined

- (9235) *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.
- (9236) *Anarion Investments, LLC v. Carrington Mortgage Services, LLC*, 2015 WL 4503588 (6th Cir. 2015) – FDCPA provides that any debt collector who violates the FDCPA is liable to any person injured by the failure. “Person” for purposes of FDCPA remedy provision includes corporations and other artificial entities.

23.14 Eviction Proceedings

- (9237) *Maze v. Wells Fargo Bank, NA*, 2017 WL 956596 (W.D. Ky. 2017) – FDCPA applies only to “debt collectors” and precludes any abusive, deceptive or unfair debt collection practices. Under FDCPA, 1) Plaintiff must be a consumer as defined by the Act; (2) the debt must arise out of transactions which are “primarily for personal, family or household purposes; (3) Defendant must be a debt collector as defined by the Act; and (4) Defendant must have violated § 1692e’s prohibitions. “Debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or

attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Company hired to dispossess Plaintiff form property after completion of foreclosure action and issuance of writ of possession was not debt collector as company did not demand payment of any debt, notify Plaintiff of any debt or communicate to Plaintiff regarding outstanding debt; and clearing of property from foreclosed property is incidental to foreclosure and is not debt collection activity. Complaint that alleged that company broke into the property, ransacked it and stole and/or damaged very valuable music equipment and other personal property failed to state cause of action under FDCPA.

- (9238) *Phillips v. Randall S. Miller & Associates*, 2017 WL 389727 (E.D. Mi. 2017) - FDCPA does not apply to post foreclosure action to obtain possession of property. After foreclosure, there is no longer a “debt”. Lenders post foreclosure eviction action cannot constitute debt collection and can therefore, cannot violate FDCPA. Lenders post foreclosure settlement framework that would allow borrower to re-acquire title to property falls under Rule that post foreclosure actions do not constitute attempts at debt collection. Lenders settlement framework to allow Plaintiffs to repurchase property does not fall under FDCPA.
- (9239) *Todaro v. Reimer, Arnovitz, Chernek & Jeffrey Co., LPA*, 2016 WL 6777805 (N.D. Ohio 2016), *aff’d*, 2017 WL 3207145 (6th Cir. 2017) – Post-foreclosure eviction proceedings are not actions to collect debt but are instead actions to recover possession of property. Communications sent in effort to recover possession are not actionable under FDCPA where attempt to recover possession were not accompanied by any demand for payment of money.

23.15 Garnishment Proceedings

- (9240) *Fish v. Stone, Higgs & Drexler, PC*, 2017 WL 6757575 (W.D. Tn. 2017) – Garnishment is not action against consumer for purposes of FDCPA. Garnishment is directed to third party who owes money to borrower. Wage garnishment is directed to employer, not borrower. Garnishee must answer garnishment and communications are exclusively between creditor and garnishee. Further, borrower would not be deprived of any right under FDCPA by garnishment where borrower had full opportunity to defend himself in underlying lawsuit and also to respond to action to domesticate judgment.

23.16 Bankruptcy Court Jurisdiction

- (9241) *VanderKodde v. Mary Jane M. Elliott, PC*, 314 F.Supp.3d 836 (W.D. Mi. 2018) – Errors in State Court Judgment and in Writ of Garnishment issued by Court is not false or misleading statement by Creditor where Creditor correctly applied for Writ using State promulgated form and information in form was true and accurate. Alleged false statement related to interest rate specified in State Court Judgment which is source of underlying injury. Writ is issued by State Court and accurately recited terms of Judgment itself. *Rooker-Feldman* precludes Federal Court review of State Court Actions, prohibiting Federal Court from reviewing correctness of State Court specified interest rate in judgment or adjudicating correctness or propriety of Writ itself.
- (9242) *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.
- (9243) *Marshall v. PNC Bank*, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – 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.

23.17 Complaint – Generally

- (9244) *Wilcoxson v. Lehman Brothers*, 2016 WL 4119802 (E.D. Mi. 2016) – Complaint based on allegedly fraudulent statements must allege with specificity the facts underlying the fraud. Complaint which merely parroted the language of the statute and made conclusory allegations that lender made “false statements and evidence” without details lacked any factual substance did not state cause of action for violation of FDCPA.
- (9245) *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.

23.18 Venue for Action to Collect Debts

- (9246) *Elizarov v. Equity Experts, LLC*, 2018 WL 2129817 (E.D. Mi. 2018) – 15 USC Section 1692 specifies venue for action under Fair Debt Collection Practices Act where action is to enforce interest in real property securing consumers obligation, action must be brought in judicial district where property is located. For actions other than to enforce interest in real property, action must be brought in either district where

consumer signed contracts sued upon or where consumer resides at time of commencement of action. “Real property” venue is limited to mortgage foreclosure actions and not collection actions for debt that may be secured by real property. Action to collect unpaid condominium Association dues is not action to enforce security interest in real property or Plaintiff did not seek to foreclose condominium Association loan but only to recover money judgment. “Judicial district or similar legal entity” determined by applicable local judicial districts. Venue appropriate in Oakland County where deed by which Debtor obtained title to condominium and related mortgage were signed, notarized and recorded in Oakland County and subsequent action was brought in District Court in Oakland County. Action brought in 51st Judicial District complied with venue provisions as 51st Judicial District was location of condominium unit although Defendant allegedly resided in 52nd Judicial District. Bringing action in 51st Judicial District, even when viewed through the lens of lease sophisticated consumer, could not be characterized as “so distant or inconvenient” that Debtor would be unable to appear or that Plaintiff was attempting to obtain default judgment or engage in other deceptive practices.

- (9247) *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) – FDCPA requires that any suit to collect debt must be brought in judicial district or similar entity where Debtor resided or where contract sued upon was signed. Where courts are organized by county but small claims courts are subdivided by township, action must be brought in township in which Debtor resides or where contract signed, not merely county in which either occurs. Although jurisdiction may be county wide, subdivision of courts into smaller geographic areas controls proper location for legal proceedings.

23.19 Arbitration

- (9248) *Allen v. Equifax Information Systems, Inc.*, 2017 WL 5762414 (W.D. Ky. 2017) – Court must engage in limited review to determine if dispute is arbitrable, based on (1) whether there is agreement arbitrate; (2) the scope of arbitration agreement; (3) whether Congress intended claims to be subject to arbitration; and (4) if some but not all claims are subject to arbitration whether to stay remaining proceedings pending arbitration. Plaintiff’s claims under FCRA and FDCPA based on alleged incorrect reporting of accounts on credit report where accounts had been discharged in bankruptcy subject to arbitration. Plaintiff agreed to terms when Plaintiff used credit card, and standard terms provided that all disputes would be subject to arbitration and specifically included disputes regarding credit reporting as subject to arbitration. Court would excuse arbitration of dispute that was within scope of arbitration clause only on most extenuating and explicit circumstances none of which were present here where arbitration agreement specifically included disputes at issue. Discharge in bankruptcy eliminates personal obligation of Plaintiff but did not terminate contract and arbitration clause survived discharge and remained fully enforceable. There was no indication that Congress either expressly or impliedly intended to preempt arbitration of FCRA and FDCPA claims based on discharge in bankruptcy and arbitration not inconsistent with “fresh start” purpose of Bankruptcy Code where Creditor’s actions were not attempt to collect debt and did not constitute violation of discharge injunction.
- (9249) *Holland v. LVNV Funding, LLC*, 2016 WL 6156187 (W.D., Ky. 2016) – Federal Arbitration Act evidences a strong federal policy in favor of arbitration. In keeping with that policy, whenever a party moves to compel arbitration pursuant to a contractual provision, courts engage in limited review to see if a valid arbitration agreement exists, and if the particular dispute falls within the scope of that agreement. With respect to the arbitration agreement’s validity, “the party opposing arbitration must show a genuine issue of material fact as to the validity of the agreement to arbitrate.” There is a presumption of arbitrability and court should order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Credit Card Cardholder Agreement provision that either party could elect to send “any controversy or dispute” to arbitration enforceable where Plaintiff did not deny that he received Cardholder Agreement in form introduced by Defendant and Plaintiff admitted that he used the card for personal, family and household purposes. Plaintiff’s use of card after receipt of Cardholder Agreement manifested acceptance of terms in Agreement. Claims for alleged violation of Fair Debt Collection Practices Act arising out of post-default collection efforts were within scope of arbitration because claim that Defendant collected or attempted to collect amounts not authorized by the agreement arose directly from Agreement. Balance of action, based on post-default judgment taken by Defendant, also arose out of the contractual relationship established by the Cardholder Agreement, bringing entire FDCPA action within scope of arbitration. Although Defendant was not the original card issuer, Defendant as assignee of the obligation had full rights to enforce arbitration agreement where Cardholder agreement specifically referred to creditor, its successors and assigns. Case dismissed without prejudice to parties invoking arbitration provisions of Agreement.

B. Allowed and Prohibited Actions

23.20 Initial Communication

- (9250) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 889547 (W.D. Ky. 2018) – Section 1692e(11) requires any communication to state clearly that communication is attempt to collect debt and any information will be used for that purpose. Notice included on top of second page of letters sufficient where disclaimer could be quickly located at very top of “Legal Disclosures” section in bold, capitalized text; disclaimer was in paragraph of its own not hidden amongst other text, and presuming basic willingness to read with care no reasonable jury could find that notice was insufficient or deceptive.
- (9251) *Zemeckis 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.
- (9252) *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.

23.21 Location Information

- (9253) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – Collector also failed to disclose to consumer’s 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.

23.22 Enforcement of Security Interest Generally

- (9254) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) - Whether communications from creditor to borrower constitutes attempt to collect debt under FDCPA’s commonsense inquiry that evaluates nature of the parties relationship, objective purpose and context of communication, and whether communication includes demand for payment. Posted discharge letters from mortgage loan servicer to Debtor or not attempts to collect debt where communications where communications contained clear and unequivocal disclaimers establishing that communications were not in connection with effort to collect debt, but were instead for informational purposes related to a mortgage which survived Debtor’s discharge. Communications continuously included disclaimer, “if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and it does not constitute an attempt to collect a debt”. Debtor should have known that mortgage servicer was not attempting to collect debt based on disclaimers and Debtor’s knowledge and understanding that debt had been discharged. FDCPA does not completely prohibit communications related to foreclosure has right to foreclose survived bankruptcy discharge, as long as communications are not false, deceptive or misleading.
- (9255) *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.

23.23 Enforcement of Security Interest Post-Bankruptcy

- (9256) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) - Whether communications from creditor to borrower constitutes attempt to collect debt under FDCPA’s commonsense inquiry that evaluates nature of the parties relationship, objective purpose and context of communication, and whether communication includes demand for payment. Posted discharge letters from mortgage loan servicer to Debtor or not attempts to collect debt where communications where communications contained clear and unequivocal disclaimers establishing that communications were not in connection with effort to collect debt, but were instead for informational purposes related to a mortgage which survived Debtor’s discharge. Communications continuously included disclaimer, “if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and it does not constitute an attempt to collect a debt”. Debtor should have known that mortgage servicer was not attempting to collect debt based on disclaimers and Debtor’s knowledge and understanding that debt had been discharged. FDCPA does not completely prohibit communications related to foreclosure has right to foreclose survived bankruptcy discharge, as long as communications are not false, deceptive or misleading.
- (9257) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – In general, FDCPA does not apply to person attempting to collect debt in its own name or where the entity seeking to collect acquired the debt at a time when the debt was not in default. If mortgage lender was the originator of the loan, lender could not be held liable under FDCPA. Court denied motion to dismiss where originating lender was Countrywide, not B of A, and complaint did not clearly allege that B of A was successor to Countrywide. However, if B of A could prove it was successor to Countrywide as loan originator, B of A could not be liable as successor to originator by merger is deemed to be the originator and not a party who “acquired” the loan, regardless of whether loan was in default as of date of merger or not. Complaint alleged cause of action against loan servicer where complaint alleged that servicer made repeated communications with borrower that it would accept payments on loan when servicer had already accelerated loan and intended to pursue foreclosure. Further, statements were made in effort to coerce payments amounting to effort to collect on otherwise previously discharged debt. While security interest did survive bankruptcy and lender had right to foreclose, demands by servicer were not limited to efforts to realize on collateral but instead asked for money and implied that payment was required in effort to collect debt.

23.24 Verification of Debt

- (9258) *Finley v. Ocwen Loan Servicing, LLC*, 2018 WL 1705802 (N.D. Ohio 2018) – Mortgage servicer violated Section 1692d by sending letter threatening foreclosure and stating that Servicer “is not required to wait until the end of the thirty (30) day periods ... before filing a foreclosure action”. Servicer continued to send letters even after Mortgage company admitted validity of prior Loan Modification and acknowledged Borrowers were performing under Loan modified. Servicer does not have duty to investigate consumer debt before issuing validation letter. Letter sent to attorney for borrower is still judged by least sophisticated consumer standard and not more stringent “competent counsel” standard.
- (9259) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 989547 (W.D. Ky. 2018) – Plaintiff’s non-response to debt validation letter does not itself validate debt. Validation notice must be sent within 5 days of initial communication and must state (1) “unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector,” and (2) “upon the consumer’s written request within the thirty day period, the debt collector will provide the consumer with the name and address of the original creditor.” Notices must be large enough to be easily read and sufficiently prominent to be noticed and must

not be overshadowed or contradicted by other messages or notices appearing in initial communication. Notice met the requirements of 1692(g) where name of creditor is easily ascertainable; required statements about presumed validity of debt after thirty days and ability of consumer to request name of original creditor were both present; although notices were on second page, letter was very short and even least sophisticated consumer is assumed to have read it; and required statements were found in separate paragraphs and were not be overshadowed by rest of information on page.

- (9260) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Verification of debt requires more than merely restating amount previously demanded. Baseline for verification is to enable consumer to sufficiently dispute payment obligation. An itemized accounting detailing transactions in an account that led to debt is often best means of accomplishing that objective and makes good sense by leading to faster resolutions of disputes with consumers who act in good faith, because verification will either show valid debt that consumer acting in good faith will actually pay, uncover error in the record of debt leading to cancellation of the debt, or reveal underlying dispute between parties that can be resolved. Verification letter that merely restated initial amount of loan and current principal balance did not provide adequate itemization, particularly where amount stated in initial demand did not correspond with either of the amounts alleged in the verification letter.
- (9261) *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.
- (9262) *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.
- (9263) *Zemeckis 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.
- (9264) *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, Case No 11-1954 (6th Cir. 2012) – Condo association assessments were “debts” under FDCPA where Debtor purchased unit for personal use and resided in until for 13 years before deciding to lease unit to third party. 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.

23.25 False or Misleading Statements – Section 1692e

- (9265) *VanderKodde v. Mary Jane M. Elliott, PC*, 314 F.Supp.3d 836 (W.D. Mi. 2018) – Errors in State Court Judgment and in Writ of Garnishment issued by Court is not false or misleading statement by Creditor where Creditor correctly applied for Writ using State promulgated form and information in form was true and accurate. Alleged false statement related to interest rate specified in State Court Judgment which is source of underlying injury. Writ is issued by State Court and accurately recited terms of Judgment itself. *Rooker-Feldman* precludes Federal Court review of State Court Actions, prohibiting Federal Court from reviewing correctness of State Court specified interest rate in judgment or adjudicating correctness or propriety of Writ itself.
- (9266) *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co., LPA*, 2018 WL 3575882 (N.D. Ohio 2018) – Section 1692e prohibits false, deceptive or misleading misrepresentation or means in connection with collection of debt including falsely representing or implying that communication is from an attorney. Demand letter is not false or misleading for using letterhead that accurately describes relevant legal entities, has accurate and truthful signature block, and includes conspicuous notation that letter is sent by debt collector. Demand letter indicating that it comes from an attorney can be found deceptive even if literally true where letter is not product of attorney’s professional judgment or attorney was not sufficiently involved in collection of debt or drafting of letter. Plaintiff must prove that least sophisticated Debtor would believe based on additional demand letter that law firm was acting as attorney in debt collection process; that lawyers were not meaningfully involved in debt collection process; and fact that law firm was acting as attorney in debt collection was material. Least sophisticated Debtor is considered to be uninformed, naïve and trusting but possessing reasonable intelligence and capable of making basic logical deductions. It is not necessary that defendant intended to mislead or deceive as long as language would deceive or mislead reasonable Debtor and does not require frivolous misinterpretation or nonsensical interpretations. Attorney has sufficient personal involvement in process if attorney reviews file of individual consumer to whom letter is sent and/or exercises some professional judgment as to delinquency and validity of debt. Representation is material if it is likely to influence least sophisticated Debtor’s decision whether or not to pay debt. Demand letter was not misleading or deceptive where letter was created using attorney-approved template that included law firm name and “attorneys at law”; demand letter accurately described identity and legal description of entity sending letter; demand letter advised Debtor that debt had been placed for collection and consumer had rights under FDCPA; letterhead accurately conveyed that defendant was law firm retained to collect debt and did not state that attorney had reviewed particular circumstances of account, did not mention legal action, and did not purport to be signed by attorney; demand letter template contained adequate and appropriate FDCPA warnings; most of content of letter followed language of FDCPA; law firm was not practicing law when sending demand letters; although law firm did not require attorney to review each individual account before demand letter was sent or form professional judgment about

validity of debt, law firm obtains information from clients about consumer accounts and attorneys were involved in attorney-client relationship with creditor clients before demand letters are sent; attorneys obtain warranties as to validity of debts provided by clients for collection; law firm retained outside vendor to “scrub” files to flag consumers who should not receive collection letters; the firm has formal compliance program and hundreds of policies and procedures drafted by attorneys and conduct routine audits for compliance; attorneys assess issues that may arise with statutes of limitations, arbitration clauses, choice of law issues, calculation of interest, last date of payment, deceased Debtor’s, and other legal questions before demand letters are sent; attorneys and non-attorney staff work together daily and interactive weekly meetings; attorneys review cases for litigation and litigate collection actions; law firm demand letter had not been found in any jurisdiction to be false or misleading and law firm collected debts for State of Ohio using substantially similar demand letters following thorough review and approval by Ohio Attorney General; and plaintiff offered no evidence to show that consumer was harmed based on statement and demand letter that letter was sent by law firm, no evidence to show that any consumer did were would be inclined to pay even if Debtor did not oh debt; and even if law firm letters misrepresented level of attorney involvement, Debtor did not present any evidence that any consumers decision on when or whether to pay debt was influenced by inclusion of attorney identifiers in demand letters.

- (9267) *Sparks v. EquityExperts.Org, LLC*, 2018 WL 3387245 (E.D. Mi. 2018) – Debt Collector does not violate FDCPA by including in demand letter attorney’s fees and collection costs where Debtor has contractually agreed with creditor to pay attorney’s fees and costs. Failure to include attorney’s fees and costs in initial demand letter may result in subsequent letters seeking to collect attorney’s fees and costs misleading as second letter would be inconsistent with initial demand letter. Nature and amount of costs and fees charged must be consistent with agreement between debt collector and creditor. Debt collector potentially violated FDCPA by including in initial demand letter costs in excess of actual amount agreed to between debt collector and creditor and including additional costs and fees which are not provided for in fee agreement between debt collector and creditor. Attempt to pass on to borrower fees and charges that exceeded amounts actually agreed to be paid to attorney by creditor raises disputed issue of material fact regarding potential violation of FDCPA.
- (9268) *Smith v. US Bank, NA*, 2018 WL 1488391 (N.D. Ohio 2018) – Section 1692e prohibits false, deceptive or misleading representations of character, amount or legal status of any debt. Plaintiff must establish that it is “consumer”; that arose out of personal, family or household purpose; Defendant is “debt collector” as defined in FDCPA; and Defendant violated Section 1692e. Plaintiff did not demonstrate that Defendant engaged in any deceptive or misleading practices where Debt Validation Letter added 3 new charges without explanation including interest, escrow advance, and corporate advance. Plaintiff did not present any evidence challenging total amount of debt or showing that Defendant made any false representation of debt owed or that amount claimed by Defendant was in any way inaccurate. Plaintiff also did not present evidence demonstrating that Defendant engaged in unfair collection activities by instituting state foreclosure actions, where pleadings filed in State Court clearly showed that Defendant had been appointed Trustee for enforcing Plaintiff’s mortgage. Although Defendant did not file Assignment of Mortgage until after initiation of State Foreclosure Action, it is not violation of FDCPA to file complaint without immediate means of proving claim. Plaintiff did not refute ultimate fact that Defendant was correctly appointed Trustee of mortgage and held right to foreclose.
- (9269) *Woody v. Aurora Commercial Corporation*, 2018 WL 1884826 (W.D. Tn. 2018) - Section 1692e prohibits use of false, deceptive or misleading representations or means in connection with collection of debt. Plaintiff must show that Defendant violated substantive provision of FDCPA while engaging in debt collection activity. Whether communication constitutes debt collection activity turns on whether animating purpose of communication is to induce payment. Court must consider nature of relationship of parties; whether communication expressly demanded payment or stated balance due; whether communication was sent in response to inquiry or request by Debtor; whether statements were part of strategy to make payment more likely; whether communication was from debt collector; whether communication stated it was attempt to collect debt; and whether communication threatened consequences should Debtor failed to pay. Letter from Mortgage Servicer to Plaintiff sent in response to Plaintiff’s request for information and merely informed Plaintiff that Servicer would be servicing loan. Communication did not make demand for payment, state balance due, indicate that communication was attempt to collect debt, or threaten negative consequences. Letter sent by second Servicer in response to Plaintiff’s communication included “payment history” that showed remaining balance but did not make demand for payment, list payment due date or threaten consequences if Plaintiff failed to pay. “Animating purpose” of letters was to respond to Plaintiff’s “validation request”.
- (9270) *Finley v. Ocwen Loan Servicing, LLC*, 2018 WL 1705802 (N.D. Ohio 2018) – Section 1692e prohibits false, deceptive or misleading representation r means in connection with collection of debt. Whether actions are false or misleading based on least sophisticated consumer standard, which is lower than whether language would deceive or mislead reasonable debtor. Statement must be both technically false and materially false, meaning that statement would tend to mislead or confuse reasonable but unsophisticated consumer. Complaint stated cause of action by alleging that Mortgage servicer violated act by sending letters stating that Borrowers’ mortgage was in default and purporting to accelerate and demand full payment under mortgage where statements were inaccurate as Borrowers and Lender previously entered in to Loan Modification and Borrowers were current. Whether letter was merely “verification letter” that does not constitute attempt to collect debt; or was instead demand for payment, is factual question that cannot be resolved on Motion tDismiss.
- (9271) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 989547 (W.D. Ky. 2018) – Section 1692e broadly prohibits use of false, deceptive or misleading representations or means in connection with collection of debt. Section 1692(e)(2) precludes any false representation of the character, amount or legal status of debt or any services rendered or compensation which may be received. Plaintiff raised plausible action to survive summary judgment where Plaintiff alleged that creditor lacked any right to sue based on fraud and lack of endorsements. If Plaintiff is correct, Defendant would violate FDCPA by attempting to collect debt that creditor is not legally entitled to collect. Plaintiff’s non-response to debt validation letter does not itself validate debt, and Court would not weigh in on validity of note and mortgage as that issue was being litigated in State Court proceedings.
- (9272) *Thompke v. Fabrizio & Brook, PC*, 261 F.Supp.3d 798 (E.D. Mi. 2017) – 15 USC Section 1692e prohibits any false, deceptive or misleading representation or means of collection of debt. Section 1692e is violated where communication has tendency to confuse least sophisticated

consumer and specifically prohibits any false representation or implication that individual is attorney or that communication is from attorney. Test is objective one, and does not depend on confusion by Plaintiff himself, only that communication would be deceptive to hypothetical least sophisticated consumer. Complaint stated cause of action where Plaintiff alleged that validation and foreclosure letters were misleading because they were sent by law firm, on law firm letterhead, but were signed by non-attorney and were mass produced without any meaningful attorney involvement. If Plaintiffs can prove that law firm sent the letters to the Plaintiffs without any meaningful attorney review or involvement, and that they were generated by rote, by non-attorney employees of the firm, then law firm may be liable under the FDCPA for sending letters purporting to be from an attorney, when those communications “were not from any attorney employed by the firm in any meaningful sense. Fact that party signing letter was not listed on letterhead as “attorney” did not prevent potential confusion to least sophisticated consumer.

- (9273) *Walker v. Fabrizio & Brook, PC*, 2017 WL 5068340 (E.D. Mi. 2017) – 15 USC Section 1692e prohibits any false, deceptive or misleading representation or means of collection of debt. Section 1692e is violated where communication has tendency to confuse least sophisticated consumer and specifically prohibits any false representation or implication that individual is attorney or that communication is from attorney. Test is objective one, and does not depend on confusion by Plaintiff himself, only that communication would be deceptive to hypothetical least sophisticated consumer. Complaint stated cause of action where Plaintiff alleged that validation and foreclosure letters were misleading because they were sent by law firm, on law firm letterhead, but were signed by non-attorney and were mass produced without any meaningful attorney involvement. If Plaintiffs can prove that law firm sent the letters to the Plaintiffs without any meaningful attorney review or involvement, and that they were generated by rote, by non-attorney employees of the firm, then law firm may be liable under the FDCPA for sending letters purporting to be from an attorney, when those communications “were not from any attorney employed by the firm in any meaningful sense. Fact that party signing letter was not listed on letterhead as “attorney” did not prevent potential confusion to least sophisticated consumer.
- (9274) *Schoolcraft v. Fochtman Enterprises, Inc.*, 2017 WL 2951619 (E.D. Mi. 2017) – Section 1692e prohibits in connection with the collection of any debt false representation of character, amount or legal status of debt or communicating to any third party credit information known to be or which should be known to be false including failure to communicate that debt is disputed. Complaint dismissed where Plaintiff alleged Creditor erroneously represented debt to Credit Reporting Agency but presented no evidence that Defendant did so with any intent to collect debt or that reporting was done in effort to coax payment of discharged debt. Further, Defendant, on request of Plaintiff, advised Credit Reporting Agencies that debt had been discharged in bankruptcy and requested Credit Reporting Agencies delete the account from Plaintiff’s credit file completely.
- (9275) *Fausz v. NPAS, Inc.*, 237 F.Supp.3d 559 (W.D. Ky. 2017) – FDCPA Section 1692e prohibits any misleading, false or deceptive representation or means in connection with collection of debt, including failure to disclose that debtor collector is trying to collect debt and that any information would be used for that purpose. Whether communication is false, deceptive or misleading uses “least sophisticated consumer” standard. Information must also be materially false or misleading such that statement would tend to confuse or mislead reasonably unsophisticated consumer, and is more than merely technically false. Letter was not materially false where letter omitted notice that Defendant was debt collector or would use information for that purpose where Plaintiff testified that she assumed letter was form debt collector and there was no evidence that omission would lead to confusion by unsophisticated consumer.
- (9276) *Pfeffer v. National Credit Systems, Inc.*, 2017 WL 3600437 (S.D. Ohio 2017) – Section 1692e prohibits use of any false, deceptive or misleading statements in connection with debt, and collector cannot falsely represent character, amount or legal status of debt.
- (9277) *Hebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Section 1692e prohibits false representation of character, amount or legal status of debt. Court reviews debt collector’s conduct through eyes of least sophisticated consumer. Initial Foreclosure Notice that merely stated total amount of debt without itemized breakdown of amount owed was not false or misleading and did not constitute unfair or deceptive manner. To extent consumer could be unsure about what “total” included, Notice indicated that total included interest, late charges and other changes that may vary from day to day. Notice was accurate recitation and did not contain any false, misleading or unfair statements and Section 1692e does not require debt collector to provide itemized statement in initial communication. However, once debt collector had been advised that debtor had been making payments and that debtor contended that loan was not in default, it is plausible that least sophisticated consumer would be confused or misled absent itemized statement of balance due, plausibly created misleading impression concerning character of debt. However Debt Verification letter sent in response to borrower’s request for verification could be misleading where verification letter contained two different totals, neither of which equaled the amount set out in the initial Notice and did not explain how total in initial Notice was determined. Instead, letter recited only original loan amount and current principal balance, which could cause least sophisticated consumer to be confused or misled.
- (9278) *Thompson v. General Revenue Corp.*, 2017 WL 3276018 (S.D. Ohio 2017) - Claim under Section 1692e requires proof that (1) Plaintiff is a ‘consumer’; (2) debt must have arisen out of transactions which are primarily for personal, family or household purposes; (3) Defendant must be debt collector ; and (4) Defendant used false, deceptive, or misleading representation or means. “False or deceptive” covers wide variety of actions and is judged using “least-sophisticated consumer” standard. Demand letter that asserted amount of outstanding principal balance potentially false or deceptive where Plaintiff repeatedly denied owing money to creditor on whose behalf Defendant was acting as collection agent. Plaintiff is not required to request verification of debt before instituting action under FDCPA, as failure to dispute debt is not admission of liability by consumer. Debt collector is not liable for violations of FDCPA that result from bona fide error, which requires that debt collector demonstrate that violation was unintentional and that it was result of bona fide error, and that collector maintained procedures to avoid error. Debt collector did not point to any steps it took to prevent errors in collections instead blindly relying on creditor’s information without any attempt to verify debt or to implement any procedure to prevent erroneous demands for payment.
- (9279) *Jones v. US Bank*, 2017 WL 2191629 (S.D. Ohio 2017) – Mortgage servicer does not violate FDCPA by filing Notice of Appearance in Bankruptcy Case. NOA identified party as Wells Fargo Bank, NA, Creditor, at time when Wells Fargo served only as servicer. As servicer, Wells Fargo was party to bankruptcy proceeding and was entitled to notices in the case. Further, NOA is not statement made in attempt to

collect debt and does not amount to assertion of right to payment in bankruptcy case.

- (9280) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) - Whether communications from creditor to borrower constitutes attempt to collect debt under FDCPA's commonsense inquiry that evaluates nature of the parties relationship, objective purpose and context of communication, and whether communication includes demand for payment. Posted discharge letters from mortgage loan servicer to Debtor or not attempts to collect debt where communications where communications contained clear and unequivocal disclaimers establishing that communications were not in connection with effort to collect debt, but were instead for informational purposes related to a mortgage which survived Debtor's discharge. Communications continuously included disclaimer, "if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and it does not constitute an attempt to collect a debt". Debtor should have known that mortgage servicer was not attempting to collect debt based on disclaimers and Debtor's knowledge and understanding that debt had been discharged. FDCPA does not completely prohibit communications related to foreclosure has right to foreclose survived bankruptcy discharge, as long as communications are not false, deceptive or misleading.
- (9281) *Mehling v. Fullett Rosenlund Anderson, PC*, Case No. 16-5921 (N.D. Ill. 2016) - In determining whether communication is false, court will use "unsophisticated consumer" standard to determine whether the recipient of the statement would know or reasonably should know that the statements are false. Attorney for Condominium Association filed a motion in bankruptcy case to modify automatic stay, alleging that Debtors had not paid condominium Association assessments although Debtors had been in chapter 13 for one year; and alleged that the unpaid assessments total \$750. As of the filing of the Motion for Relief, Debtors had been in chapter 13 for only six months, and at the time of the filing the arrears were only \$550. Incorrect allegations about being in chapter 13 for one year did not violate FDCPA as even unsophisticated consumer would know that bankruptcy was only six months old and error was "readily apparent" on face of filings. However, inflating arrears by \$200 did stay claim under FDCPA as overstatement was material and likely to mislead unsophisticated consumer.
- (9282) *Karmol v. Ocwen Loan Servicing, LLC*, 2016 WL 7188742 (W.D. Mi. 2016) - Complaint for alleged violation of Fair Debt Collection Practices Act must allege the false, deceptive or misleading misrepresentations were means used in collection of any debt. Conclusory allegations that Defendant "knowingly, affirmatively, and actively concealed and suppressed material facts", without any supporting facts as to how conduct would violate FDCPA was insufficient to show more than "sheer possibility" that Defendant had acted unlawfully.
- (9283) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) - Plaintiff failed to state FDCPA violation where actions were taken by creditor, and FDCPA does not apply to creditor collecting debt in its own name. Plaintiff received two different notices of foreclosure from two different firms, stating two different foreclosure dates and letters stated that attorneys represented lender when attorneys had, in fact, been hired by sub-servicers. Entire basis of complaint was that attorneys were expressly working for either the lender directly or its servicer, which removes action from FDCPA. Further, alleged confusion regarding foreclosure sale date did not cause harm to Plaintiff as Plaintiff was fully aware of, and attended, foreclosure sale itself.
- (9284) *Sheriff v. Gillis*, ___ US ___ (2016) - Outside attorney retained by State as "Special Counsel" does not violate FDCPA by issuing letters on Attorney General Letterhead as letterhead correctly identifies the Ohio Attorney General as the "principal" and the signature block names the agent, a private attorney hired as outside counsel. Special counsel works closely with Attorney General Office to provide legal services in furtherance of Attorney General's debt collection responsibilities. Debtor's impression that letter from private attorney is a letter from AG office is not inaccurate as attorney signing letter, while private attorney, is acting at the direction and at the behest of the AG office. Letterhead did not constitute false representation that communication was authorized, issued or approved by State because AG created and required Special Counsel to use AG's letterhead and use of letterhead could not create false impression that communication authorized. Special Counsel did not use false name in communication by using AG letterhead where Special Counsel used letterhead at direction of AG and was acting as AG agent-in-fact in sending letter and use of letterhead was not attempt to lie about relationship between Special Counsel and AG. Fact that some recipients of letters then contacted AG's office to confirm that letters were legitimate did not render letters confusing or misleading where letters were indisputable legitimate and AG's office always responded to inquiries by answering "Yes".
- (9285) *Gater v. Russell Collection Agency, Inc.*, 2015 WL 6955402 (E.D. Mi. 2015) - Collection agency may be liable for false or deceptive statements where, after Debtor received chapter 7 discharge, creditor assigned debt to collector who sent one letter to Debtor. Letter contained all required notices under FDCPA including right to dispute debt. Debtor called the collector and advised that the debt had been discharged, and collector made appropriate notes in file. Collector did not take any other actions to collect the debt, did not send any additional letters, or make any additional efforts to contact Debtor for purposes of collection. *Bona Fide* error defense requires that (1) the violation was not intentional; (2) the violation was a result of a bona fide error; and (3) the debt collector maintained procedures reasonably adapted to avoid any such error. Record was not sufficiently developed for summary judgment as *bona fide* error defense is fact intensive. Creditor's affidavit that it does not attempt to collect debts that have been discharged and does not knowingly accept debts that are discharged for collection, and answers to interrogatories indicated that collector has now instituted procedures to "scrub" files for bankruptcy, did not provide any information on how it implements these policies such as whether agency asks clients whether debts have been subject to bankruptcy proceedings. While *bona fide* error defense does not require debt collector to take every conceivable precaution, it does require reasonable precautions, and evidence presented at summary judgment was not sufficient for court to make that determination. Further, actions taken after the collection letter is sent, such as policies to correct errors or to ensure no further communications with Debtors after being advised of bankruptcy are not sufficient, as TILA requires collectors to prevent occurrences not merely to correct occurrences once they happen.
- (9286) *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.
- (9287) *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.

- (9288) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – Collector 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.
- (9289) *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.
- (9290) *Washington v. Roosen, Varchetti & Oliver, PLLC*, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – FDCPA applies 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.
- (9291) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Section 1692e prohibits debt collector from using false, deceptive or misleading representation or means in connection with collection of debt.
- (9292) *Carpenter v. Monroe Financial Recovery Group, Inc.*, 2015 WL 4724785 (E.D. Mi. 2015) – Statements made by debt collector are actionable when the makes a statement that has a tendency to confuse the least sophisticated consumer. However, only material violations of FDCPA will result in liability. In addition to being technically false, the statement must tend to mislead or confuse a reasonable but unsophisticated consumer. Misstatement must be one that could objectively affect least sophisticated consumer. Statement that is not likely to mislead is not material and is not actionable. Statement in complaint that Plaintiff was not in possession of the written instrument on which case was based but that Defendant was in possession of the account documents was not material. Even if statement was false and Defendant was not in possession of account documents, statement would not mislead Defendant as Defendant would know whether or not he was in possession of the account documents. Knowledge does not require technical expertise or legal training and would not mislead even least sophisticated consumer. Complaint also did not violate FDCPA by pleading in the alternative a count for account stated, which is a well-established cause of action under Michigan law.
- (9293) *Wilson v. Trott Law, PC*, 2015 WL 4600216 (E.D. Mi. 2015) – FDCPA prevents debt collector from using false, deceptive, or misleading representation or unfair or unconscionable means in connection with collection of debt. Debt collector send demand letter to borrower which included item designated “corporate advances” in which collector lumped charges including property inspection fees, and attorney fees and costs. Although charges themselves were properly recoverable under loan documents, such that letter was neither unfair nor unconscionable, letter used term of art that did not correspond to any term of note or mortgage creating risk of confusion constituting materially misleading statement. Fact that letter was “literally true” does not avoid FDCPA liability where terms used had tendency to create confusion in least sophisticated consumer.
- (9294) *Buchanan v. Northland Group, Inc.*, 2015 WL 149528 (6th Cir. 2015) – Even true statement in debt collection letter can violate FDCPA if statement creates misleading impression. Letter offered to resolve debt without disclosing that statute of limitations had run and without advising that partial payment would restart statute of limitations period, and could have been interpreted by least sophisticated consumer as implied statement that debt could be enforced in court. Statute of limitations does not eliminate the debt and the debt remains a “debt” even after statute has run. Creditor could not then enforce debt in court without facing legal defense to collection; however, creditor remains free to let the borrower know what the debt is and to ask for payment. Creditor did not violate FDCPA merely by advising borrower of debt and offering to resolve for lower amount. Further, letter containing settlement offer is not a threat of litigation as not even unsophisticated consumer would reasonably draw such an inference. Complaint contained sufficient evidentiary foundation to create issue of fact as to whether least sophisticated consumer would be misled by letter in question, and lower court erred in dismissing complaint as deficient as matter of law.

(9295) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month “service charge” on unpaid account. Court determined that “service charge” was actually disguised interest at rate in excess of statute usury statute. Inclusion of “service charge” in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called “serial violation” – original report would not be construed as “continuing” or repeating. Court did not determine whether statute of limitations runs from original reporting or whether “discovery rule” applies, finding that it was not necessary to do so on this record.

(9296) *Newton v. Portfolio Recovery Associates, LLC*, 2014 WL 340414 (S.D. Ohio 2014) – Courts use “least sophisticated consumer” standard in evaluating FDCPA claims. FDCPA precludes use of false, deceptive or misleading representations or means in effort to collect, including false statements regarding legal status, character or amount of debt. To be actionable, statement must be technically false, and one that would tend to mislead or confuse the reasonable unsophisticated consumer. Further, creditor will not be liable for unintentional and bona fide errors where creditor maintains procedures to avoid errors. Plaintiff failed to establish any misrepresentation where creditor repeatedly stated that creditor was attempting to collect debt owed by Plaintiff’s spouse and Plaintiff generally understood and agreed that creditor was seeking recovery against spouse. Creditor had no duty to disclose that collection may have been barred by statute of limitations where creditor did not pursue legal action to recover debt. Further, nothing in content of conversation was abusive, deceptive or unfair. Plaintiff lacks standing to bring FDCPA action where even least sophisticated consumer in Plaintiff’s position would have understood that collection actions were not directed at Plaintiff.

23.26 Communication With Represented Consumer

(9297) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 989547 (W.D. Ky. 2018) – Section 1692c(a)(2) prohibits communication with consumer if debt collector knows that consumer is represented by attorney in connection with debt. Factual issues precluded summary judgment where Plaintiff alleged that collector “must have known” that Plaintiff was represented by counsel as there was ongoing litigation over validity of debt in State Court, but factual question remained as to whether debt collector was aware of those proceedings and jury could find that Defendant did not know that Plaintiff was represented.

23.27 Communication to Third Party

(9298) *Thompke v. Fabrizio & Brook, PC*, 261 F.Supp.3d 798 (E.D. Mi. 2017) – Section 1692(f)(7) and (8) prohibit communication with debtor by post card or by using any language or symbol other than debt collector’s address on any envelope when communicating with consumer by mail. Fact that foreclosure notice is published as required by State law does not preempt FDCPA where foreclosure notice went beyond State statutory requirements by including statement that “AS A DEBT COLLECTOR, WE ARE ATTEMPTING TO COLLECT A DEBT”. Complaint stated plausible theory that Defendant abused foreclosure-by-publication by including extra information designed to publicly disseminate private facts and to induce Plaintiffs into paying debt.

(9299) *Walker v. Fabrizio & Brook, PC*, 2017 WL 5068340 (E.D. Mi. 2017) – Section 1692(f)(7) and (8) prohibit communication with debtor by post card or by using any language or symbol other than debt collector’s address on any envelope when communicating with consumer by mail. Fact that foreclosure notice is published as required by State law does not preempt FDCPA where foreclosure notice went beyond State statutory requirements by including statement that “AS A DEBT COLLECTOR, WE ARE ATTEMPTING TO COLLECT A DEBT”. Complaint stated plausible theory that Defendant abused foreclosure-by-publication by including extra information designed to publicly disseminate private facts and to induce Plaintiffs into paying debt.

(9300) *Pfeffer v. National Credit Systems, Inc.*, 2017 WL 3600437 (S.D. Ohio 2017) – Section 1692(e)(8) prohibits communicating or threatening to communicate to any person credit information which is or should be known to be false.

(9301) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Section 1692c prohibits debt collector from communicating with anyone other than with borrower, his attorney or consumer reporting agency, absent permission of debt collector or court of competent jurisdiction, or as reasonably necessary to effectuate post-judgment judicial remedy. Posting of foreclosure notice is plausibly a communication as it is convey information about the debt and foreclosure process is attempt to collect debt. Although FTC Staff Commentary is persuasive, Commentary is not binding on public or Courts and nothing in statute itself contains that exception. Creditor itself can post notice of foreclosure without violating FDCPA as creditor is not “debt collector”. Even if borrower consented to publication of notice, the notice itself contained information beyond that required by Michigan law and it is not clear that borrower consented to any disclosure beyond the minimum required by law.

23.28 Unfair or Unconscionable Means – Section 1692f

(9302) *Finley v. Ocwen Loan Servicing, LLC*, 2018 WL 1705802 (N.D. Ohio 2018) – Section 1692f prohibits unfair or unconscionable means to collect or attempt to collect debt including any attempt to collect amount not expressly allowed in by agreement or applicable law but covers only conduct not otherwise covered by different FDCPA provisions. Complaint did not state cause of action under Section 1692f based on alleged asserting incorrect amount of debt in validation letter and by attempting to do more than utilize ordinary judicial process, as allegations were included in other provisions of FDCPA.

(9303) *Allison v. Specialized Loan Servicing, LLC*, 2018 WL 989547 (W.D. Ky. 2018) – FDCPA prohibits attempt to collect amount not authorized by agreement or permitted by law. Demand for payment of fees, costs and charges could be unfair if Plaintiff prevailed on cause of action alleging that note and mortgage were invalid based on fraud and lack of endorsement.

(9304) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – Section 1692e prohibits use of any unfair or unconscionable means to collect debt. Court reviews debt collector’s conduct through eyes of least sophisticated consumer. Initial Foreclosure

Commencement Letter that merely stated total amount of debt without itemized breakdown of amount owed was not false or misleading and did not constitute unfair means or manner. To extent consumer could be unsure about what “total” included, Notice explained that total included interest, late charges and other changes that may vary from day to day. Notice was accurate recitation and did not contain unfair or unconscionable means and Section 1692f does not require debt collector to provide itemized statement in initial communication. However, once debt collector was advised that had been making payments and that loan was not in default, it is plausible that least sophisticated consumer would be confused or misled without itemized balance due, plausibly creating misleading impression concerning character of debt. In addition, Debt Verification letter sent in response to borrower’s request for verification could be unfair or deceptive where verification letter contained two different totals, neither of which equaled the amount set out in the initial Notice and did not explain how total in initial Notice was determined. Instead, letter recited only original loan amount and current principal balance, which could cause least sophisticated consumer to be confused or misled.

- (9305) *Thompke v. Fabrizio & Brook, PC*, 261 F.Supp.3d 798 (E.D. Mi. 2017) – Section 1692(f)(7) and (8) prohibit communication with debtor by post card or by using any language or symbol other than debt collector’s address on any envelope when communicating with consumer by mail. Fact that foreclosure notice is published as required by State law does not preempt FDCPA where foreclosure notice went beyond State statutory requirements by including statement that “AS A DEBT COLLECTOR, WE ARE ATTEMPTING TO COLLECT A DEBT”. Complaint stated plausible theory that Defendant abused foreclosure-by-publication by including extra information designed to publicly disseminate private facts and to induce Plaintiffs into paying debt.
- (9306) *Walker v. Fabrizio & Brook, PC*, 2017 WL 5068340 (E.D. Mi. 2017) – Section 1692(f)(7) and (8) prohibit communication with debtor by post card or by using any language or symbol other than debt collector’s address on any envelope when communicating with consumer by mail. Fact that foreclosure notice is published as required by State law does not preempt FDCPA where foreclosure notice went beyond State statutory requirements by including statement that “AS A DEBT COLLECTOR, WE ARE ATTEMPTING TO COLLECT A DEBT”. Complaint stated plausible theory that Defendant abused foreclosure-by-publication by including extra information designed to publicly disseminate private facts and to induce Plaintiffs into paying debt.
- (9307) *McNamee v. Nationstar Mortgage*, 2015 WL 5174776 (S.D. Ohio 2015) – Section 1692f is “backstop” to catch practices that do not fall under other sections of act. Plaintiff cannot bring action under Section 1692f if factual allegations fit more narrowly into another subsection of FDCPA. Same letter was alleged as factual predicate for action under Section 1692e and 1692f, communications that gave rise to false impression that debts were collectable even though debts were discharged, false statements about character, amount and legal status of debts, and threats to communicate creditor information known to be false were all covered by other sections of Section 1692e and so could not form basis of action under Section 1692(f).

23.29 Threats – Section 1692e(5)

- (9308) *Finley v. Ocwen Loan Servicing, LLC*, 2018 WL 1705802 (N.D. Ohio 2018) – Section 1692e(5) prohibits threats to take action that cannot legally be taken or are not intended to be taken. Complaint stated cause of action by alleging that Mortgage Servicer threatened to foreclose when Servicer knew that Borrowers were not in default based on prior Loan Modification.

23.30 Fraud

- (9309) *Mandingo v. PNC Bank*, 2017 WL 6506368 (6th Cir. 2017) – Silent fraud requires proof that Defendant did not disclose material fact known and non-disclosure would create false impression with intent that Plaintiff rely on that impression. Lender’s alleged failure to conduct escrow analyses that may have resulted in inaccurate calculation of Plaintiff’s mortgage arrearage not actionable as there was no evidence that lender intended omission to defraud.
- (9310) *Skaags v. Nationstar Mortgage*, 2017 WL 1371077 (W.D. Mi. 2017) – Fraud requires fraudulent statements or misrepresentations. Lender did not commit fraud by sending Debtor post-discharge mortgage statements or in accelerating payments when Plaintiff failed to make mortgage payments. Discharge in bankruptcy did not extinguish debt or mortgage. Accordingly, there was nothing false about statements showing monthly and total amount due under the note or stating that amounts needed to be paid to prevent default or foreclosure.
- (9311) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Complaint alleging fraud in connection with mortgage foreclosure must contain sufficient factual allegations if, accepted as true, state claim upon which relief can be granted. Complaint that alleged only in conclusory fashion that the lender made false statements as to alleged ownership of mortgage and entitlement to payments did not state cause of action as allegations did not allege time, place or content of alleged misrepresentation; any fraudulent scheme; any fraudulent intent of lender; or any injury resulting from the fraud. Complaint did not allege any specific statements claim to be false, the time and place of the statements, or the identity of the Defendant making the statements.
- (9312) *Jester v. CitiMortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Creditor who originates debt is not a debt collector within scope of FDCPA. Lender that is successor by merger with original lender remains the “lender” and is not subject to FDCPA. Limitations period runs for one year from date of violation without regard to when Plaintiff learned of violation. Action for alleged misapplication of payments in Chapter 13 that discharged in March, 2012, was untimely when filed in September, 2013, more than one year later. Court can extend statute for “equitable tolling” if 1) Defendants concealed the conduct that constitutes the cause of action; 2) Defendants’ concealment prevented Plaintiffs from discovering the cause of action within the limitation period; and 3) until discovery of the cause of action, Plaintiffs exercised due diligence in trying to find out about the cause of action. Allegations must contain specific statements of dates and times when fraud, mistake, concealment or misrepresentation was discovered and must demonstrate that discovery would not have been possible through ordinary diligence as a result of extraordinary circumstances. Allegations that Plaintiffs repeatedly requested mortgage statements that were not provided is not sufficient statement of fraud. Failure to respond to Qualified Written Request under RESPA is not evidence of fraud. Even if actions were intended to conceal, Plaintiffs could have discovered alleged deficiencies through reasonable efforts.

23.31 Harassment – Section 1692d

- (9313) *Finley v. Ocwen Loan Servicing, LLC*, 2018 WL 1705802 (N.D. Ohio 2018) – Section 1692d prohibits conduct where natural consequence is to harass, oppress or abuse any person in connection with collection of debt, including tactics intended to embarrass, upset or frighten; and conduct designed to collect money with debtor, through no fault of debtor, debtor does not have and causes suffering and anguish. Complaint stated cause of action by alleging that Lender harassed and abused them by filing and prosecuting foreclosure proceeding after both Bankruptcy Judge and Lender recognized validity of prior Loan Modification and Borrowers had properly and timely performed under Loan Modification. Servicer refused to dismiss foreclosure action for more than 14 months, causing Borrowers anguish as conduct would be frightening and upsetting.
- (9314) *Zemeckis 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.
- (9315) *Brister v. American Home Mortgage Servicing, Inc.*, Case no. 11-13574 (11th Cir. 2012) – 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 and whether servicer regularly collected or attempted to collect debts as required for determination as to whether servicer was “debt collector”.
- (9316) *Newton v. Portfolio Recovery Associates, LLC*, 2014 WL 340414 (S.D. Ohio 2014) – Courts use “least sophisticated consumer” standard in evaluating FDCPA claims. Issue is whether there is a reasonable likelihood that an unsophisticated consumer who considers carefully the contents of a communication may nonetheless be misleading. FDCPA precludes conduct, the natural consequence of which, is to annoy or harass. Telephone calls will be considered harassment if they are made with excessive frequency, with a series of calls one right after the other. While there is no bright line when a number of calls constitutes harassment, 18 calls over four months, with no two occurring on the same date, are not sufficient to support inference of harassment. Plaintiff did not present any evidence that calls were at inconvenient time or place, or that they were made after Plaintiff requested that they stop.

23.32 Disputed Debts

- (9317) *Thebert v. Potestivo & Associates, PC*, 2017 WL 3581322 (E.D. Mi. 2017) – 15 USC Section 1692 requires debt collector to suspend collection efforts if consumer notifies debt collector within thirty days of receipt of initial notification that the debt or any portion is disputed until collector obtains verification of debt and mails the verification to consumer. Consumer notified debt collector by e-mail of dispute. After receipt of e-mail and before sending verification, debt collector published two notices of foreclosure sale. Foreclosure is “collection” of debt and publication of notices of sale were arguably debt collection efforts in violation of Section 1682(g).
- (9318) *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.

23.33 Filing Proof of Claim

- (9319) *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.
- (9320) *Hanson v. Antigo, LLC*, 2015 WL 1259409 (Bankr. M.D. Fl. 2015) – Creditor who acquired debt after commencement of case did not violate FDCPA by filing proof of claim. Defendants were precluded by bankruptcy stay from sending notice to Debtor of transfer of claim. Defendants cannot violate FDCPA by taking actions, or refraining from taking actions, where mandated by bankruptcy code itself.
- (9321) *Mallard v. Wynn-Singer & Associates*, 2014 WL 988779 (Bankr. E.D. Ky. 2014) – Filing proof of claim that improperly disclosed personal medical information is not violation of FDCPA. FDCPA applies only to actions designed to induce payment by the Debtor. Filing a proof of claim is not an attempt to induce payment by the Debtor but is, at most, a request to participate in bankruptcy claims allowance process.
- (9322) *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.

23.34 Proof of Claim – Time Barred Debts

- (9323) *Casamatta v. Resurgent Capital Services, LP*, Case No. 16-4102 (Bankr. W.D. Mo. 2017) – After *Midland Funding v. Johnson*, Court cannot sanction creditor who routinely files claims after expiration of limitations period on underlying debt. Current states of law does not permit

Bankruptcy Court to sanction creditor merely for robo-signing or for filing stale claims. Further, form Proof of Claim did not require person signing Claim to have personally reviewed the claim before filing. Under current form, robo-signing without a person reviewing the claim may cause claim to lose presumption of validity but is not basis, without more, to disallow claim entirely.

- (9324) *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (2017) - Debt collector who files claim that is obviously barred by statute of limitations has not engaged in false, deceptive, misleading, unconscionable, or unfair conduct and does not violate Fair Debt Collection Practices Act. Filing proof of claim is not false, deceptive or misleading because state law provides that creditor has right to payment of debt even after limitation period has expired and bankruptcy code uses broadest available definition of claim to include disputed claims. Statute of limitations is an affirmative defense which must be raised. Filing time-barred claim is not unfair or unconscionable as bankruptcy claim is subject to review by a "knowledgeable Trustee" which is not available where the debt collector, in a non-bankruptcy context, files State Court litigation.
- (9325) *Dubois v. Atlas Acquisition, LLC*, 2016 WL 4474156 (4th Cir. 2016) – Joining Second, Seventh and Eighth Circuits, court held that filing proof of claim on time-barred debt is not violation of FDCPA. While filing lawsuit on time-barred debt may be violation, Bankruptcy Code defines "claim" broadly and does not suggest that time-barred debt is not a "claim". Code allows filing of time-barred claims and controls over FDCPA in light of Code provisions. Although allowing time-barred claims may adversely affect other creditors, that does not render claims improper.
- (9326) *Owens v. LVNV Funding, LLC*, Case No. 15-2044 (7th Cir. 2016) – Creditor does not violate FDCPA by filing proof of claim on time barred debt as long as proof of claim is otherwise accurate and not misleading. Nothing in Bankruptcy Code precludes creditor from filing time barred claim although creditor would be prohibited from pursuing collection through State Court litigation, and reasonably competent counsel would know that claim is time barred such that there is nothing deceptive, misleading,, unfair or abusive.
- (9327) *Robinson v. JH Portfolio Debt Equities, LLC*, Case No. 16-03004 (Bankr. W.D. La. 2016) – Filing otherwise accurate proof of claim on time barred debt is not violation of FDCPA. Recognizing split at Circuit level, with Second, Eighth and Ninth holding that filing of time barred claim is not violation of FDCPA or that Bankruptcy Code preempts FDCPA; and Third, Seventh and Eleventh allowing Debtors to bring suit under FDCPA for time barred but otherwise accurate proof of claim.
- (9328) *Willis v. Calvary Investments, LLC*, Case No. 14-227 (S.D. Ga. 2016) – Creditor's filing of proof of claim in Chapter 13 case to which neither trustee nor Debtor objected did not bar later suit by Debtor alleging that proof of claim filed on stale debt violated Fair Debt Collection Practices Act. Filing proof of claim addresses only whether underlying claim is valid, not whether filing violated FDCPA. FDCPA does not invalidate debt or otherwise affect amount of debt, which are issues presented in claims process. Claims process did not involve determination as to whether actions of creditor were attempt to use improper means to collect debt. Issues in determining validity of claim for claims purposes did not raise same facts and did not involve same cause of action as later suit for violation of FDCPA.
- (9329) *Nelson v. Midland Credit Management, Inc.*, Case No. 15-2984 (8th Cir. 2016) – FDCPA does not apply to proof of claim for allegedly time barred debts. FDCPA applies to actual or threatened litigation o time barred debts. Proof of Claim is not "actual or threatened litigation" but is Bankruptcy required procedural matter. Further, FDCPA designed to protect unsophisticated consumer from harassment, or being misled or deceived. Bankruptcy claims process, aided by Trustee who has fiduciary obligation to object to unenforceable claims, provides adequate protections for Debtors. Claims process is quick and inexpensive and far less unnerving for Debtor than collection lawsuits and Debtors have less at stake in claims process s impact normally affects only the pro rata distribution of available funds to unsecured creditors. In light of protections already afforded under Code, there is no need to supplement remedies afforded by Code itself by injecting FDCPA into claims process.
- (9330) *Johnson v. Midland Funding, LLC*, 2016 U.S. App. LEXIS 9478 (11th Cir. 2016), *cert pending* 135 S.Ct. 1844 (2016) – Provisions of Bankruptcy Code that require creditors to file Proofs of Claim as not in conflict with provisions of FDCPA that prevents efforts by debt collector to collect time barred debts. Code allows creditors to file proof of claim for a debt, defined as a right to payment. Code allows creditor to file claim that is otherwise time barred because creditors may file claims that are unenforceable. However, FDCPA prevents debt collector from using false, deceptive or misleading representation or means in collection of debt. Debt collector who knowingly files time barred claim violates FDCPA's prohibition. While there may be tension between Code and FDCPA regarding filing of claims, tension is not irreconcilable when FDCPA is limited to debt collectors.
- (9331) *Broadrick v. LVNV Funding, LLC*, 2015 WL 3855251, 532 BR 60 (Bankr. M.D. Tn. 2015) – Filing proof of claim on time barred debt is not automatically violation of FDCPA, but filing claim on stale debt is also not necessarily protected from FDCPA exposure merely because filing occurred in bankruptcy proceeding. FDCPA does not apply when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations. Proof of claim on time-barred debt did not trigger FDCPA liability where parties agreed that claim accurately identified the creditor, the amount of the debt, the date of last transaction, date of last payment, date of charge off, and expiration of limitations period did not extinguish debt but only extinguished any remedy of creditor to force Debtor to pay the otherwise valid debt.
- (9332) *Dunaway v. LVNV Funding, LLC*, 2015 WL 2414866 (Bankr. W.D. Mo. 2015) – Filing of proof of claim on "stale" debt is not violation of FDCPA where information in proof of claim was accurate and correctly disclosed required information.
- (9333) *Perkins v. LVNV Funding, LLC*, 2015 WL 4312313 (Bankr. W.D. Mi. 2015) – Filing of proof of claim on "stale" debt is neither a per se violation of FDCPA nor per se permitted by FDCPA. Filing proof of claim is "collection activity" within scope of FDCPA. Proof of claim was not false or misleading where claim correctly identified the debt, listed an amount that was both accurate and far less than the amount listed by Debtor in his bankruptcy schedules, and continued specific information regarding date of charge off, date of last payment, and date of last transaction. Proof of claim did not misrepresent status of debt where Debtor's schedules listed debt as undisputed, non-contingent

and liquidated, and listed amount greater than amount set forth in proof of claim. Statute of limitations does not extinguish debt and creditor is fully entitled to continue to advise borrower of amount owed, as long as creditor does not institute litigation or threaten to institute litigation. Proof of claim is not act to harass, oppress or abuse Debtor where proof of claim was act endorsed by Bankruptcy Code and did not on its face cause any suffering or embarrassment to Debtor. Proof of claim was not unfair or unconscionable where proof of claim contained required disclosures, none of which were alleged to be untruthful, and which complied with the applicable Rules of Bankruptcy Procedure; and Debtor scheduled claim and so would not be surprised by filing of claim by creditor. Claim also met verification requirement, as debt was initially scheduled by Debtor thereby inviting filing of proof of claim, and proof of claim contained sufficient information to allow Debtor to dispute debt.

- (9334) *Gatewood v. CP Medical, LLC*, Case No. 15-6008 (8th Cir. 2015) – Filing of proof of claim on time barred debt that is otherwise accurate on its face and not misleading is not violation of FDCPA. Filing proof of claim is neither litigation nor threat of litigation, and proof of claim is not misleading or inaccurate as there is nothing improper about collecting otherwise time barred debts absent litigation or threat of litigation. Statute of limitations does not eliminate debt, it only limits judicial remedies available.
- (9335) *Broadrick v. LVNV Funding, LLC*, 2015 WL 3855251 (Bankr. M.D. Tn. 2015) – Filing proof of claim on time barred debt is not automatically violation of FDCPA, but filing claim on stale debt is also not necessarily protected from FDCPA exposure merely because filing occurred in bankruptcy proceeding. FDCPA does not apply when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations. Proof of claim on time-barred debt did not trigger FDCPA liability where parties agreed that claim accurately identified the creditor, the amount of the debt, the date of last transaction, date of last payment, date of charge off, and expiration of limitations period did not extinguish debt but only extinguished any remedy of creditor to force Debtor to pay the otherwise valid debt.
- (9336) *LaGrone v. LVNV Funding, LLC*, 2015 WL 273373 (Bankr. N.D. Il. 2015) – Filing of proof of claim on time barred debt does not violate FDCPA. FDCPA does not prevent creditor from collecting on time barred debt as long as creditor does not engage in false representations, threats of illegal actions, and deceptive means of collection. Filing proof of claim did not violate any particular proscription of FDCPA.
- (9337) *Johnson v. Midland Funding, LLC*, 2015 WL 1345431 (S.D. Al. 2015) – Creditor's act in filing proof of claim on debt barred by statute of limitations did not violate FDCPA, rejecting 11th Circuit holding in *Crawford v. LVNV Funding*, as long as expiration of statute of limitations does not, under state law, extinguish creditor's right to payment. Creditor retained right to payment but lost ability to judicially enforce claim when statute of limitations expired.
- (9338) *Crawford v. LVNV Funding, LLC*, 2014 WL 3361226 (11th Cir. 2014) – Filing proof of claim for debt that is barred by statute of limitations is unfair, unconscionable, deceptive and misleading for purposes of FDCPA. Threat or action to collect time-bared debts violates 15 USC Section 1692e and 1692f. Debtor entitled to statutory damages of \$1,000 per violation plus attorney fees.

23.35 Discharge Injunction

- (9339) *Goad v. MCT Group*, 2014 WL 2211690 (9th Cir. 2014) – Debtor cannot bring FDCPA action based on alleged violation of discharge injunction.
- (9340) *Osburn v. Seth L. Goldner, PC*, 2014 WL 466174 (E.D. Mi. 2014) – FDCPA prohibits false, deceptive or misleading collection activities including the false representation of the legal status of a debt. Complaint that alleged that creditor attempted to collect debt after discharge of debt in bankruptcy sufficiently stated cause of action for misrepresenting the legal status of the debt.
- (9341) *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.

23.36 Non-Dischargeable Debts

- (9342) *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.
- (9343) *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.

23.37 Adversary Proceedings

- (9344) *Simon v. FIA Card Services, NA*, 732 F.3d 259 (3d Cir. 2014) – Letter sent to Debtor’s bankruptcy attorney constituted “communication” for purposes of FDCPA. While letter did not explicitly demand payment, letter was attempt to collect debt where letter noted that Debtors had defaulted on the obligation, advise that creditor was contemplating challenge to dischargeability of Debtor, scheduled 2004 exam to which Debtor was to bring financial information and documents, and offering to settle with stipulation that part of debt was not discharged. Issuance of subpoenas without more is not violation of FDCPA. While letter to attorney is equivalent of letter to Debtor, letter does not have to include statutory warning language as doing so may constitute demand for payment which would violate automatic stay. Creditor possibly violated FDCPA by issuing subpoenas to Debtors but failing to include statutorily mandated language and for serving subpoenas on Debtor’s counsel rather than on Debtor personally as required by applicable rules.

23.38 Collection Efforts Not Permitted by Law – Section 1692(f)

- (9345) *Sparks v. EquityExperts.Org, LLC*, 2018 WL 3387245 (E.D. Mi. 2018) – Debt Collector does not violate FDCPA by including in demand letter attorney’s fees and collection costs where Debtor has contractually agreed with creditor to pay attorney’s fees and costs. Failure to include attorney’s fees and costs in initial demand letter may result in subsequent letters seeking to collect attorney’s fees and costs misleading as second letter would be inconsistent with initial demand letter. Nature and amount of costs and fees charged must be consistent with agreement between debt collector and creditor. Debt collector potentially violated FDCPA by including in initial demand letter costs in excess of actual amount agreed to between debt collector and creditor and including additional costs and fees which are not provided for in fee agreement between debt collector and creditor. Attempt to pass on to borrower fees and charges that exceeded amounts actually agreed to be paid to attorney by creditor raises disputed issue of material fact regarding potential violation of FDCPA.
- (9346) *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.
- (9347) *Stratton v. Portfolio Recovery Associates, LLC*, 2014 WL 5394517 (6th Cir 2014) - When original lender enters into agreement with borrower to waive right to collect interest on debt, later debt buyer is bound by that agreement and cannot charge either statutory or contract interest. Debt buyer who acquired debt after lender waived interest violated Fair Debt Collection Practices Act when debt buyer later attempted to collect debt plus statutory interest as attempting to collect interest when not permitted by law.
- (9348) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month “service charge” on unpaid account. Court determined that “service charge” was actually disguised interest at rate in excess of statute usury statute. Inclusion of “service charge” in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called “serial violation” – original report would not be construed as “continuing” or repeating. Court did not determine whether statute of limitations runs from original reporting or whether “discovery rule” applies, finding that it was not necessary to do so on this record.
- (9349) *Osburn v. Seth L. Goldner, PC*, 2014 WL 466174 (E.D. Mi. 2014) – FDCPA prohibits false, deceptive or misleading collection activities including the false representation of the legal status of a debt. Complaint that alleged that creditor attempted to collect debt after discharge of debt in bankruptcy sufficiently stated cause of action for misrepresenting the legal status of the debt.
- (9350) *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.

23.39 Collection Efforts Not Permitted by Law – Usury

- (9351) *Detton v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 4727479 (E.D. Mi. 2016) – Courts will traditionally uphold a choice-of-law provision contained in a contract, unless: (1) the chosen state lacks a substantial relationship to the parties or the transaction; (2) there is no reasonable basis for adopting the law of the chosen state; or (3) it “would be contrary to a fundamental policy of [Michigan] which has a materially greater interest than the chosen state in the determination of the particular issue and which... would be the state of the applicable law in the absence of an effective choice of law by the parties. Contract that specified that Ohio law would govern required application of Ohio usury law which has a higher rate of interest allowable than does Michigan. Ohio had substantial relationship to transaction and parties where (1) lender all relevant times resided and was located in Ohio; (2) lender was contacted in Ohio on Debtor’s behalf; (3) Debtor was seeking a loan, which would be funded by an Ohio lender; (4) the Loan Documents were prepared in Ohio; and (5) the loan documents were sent to Debtor from Ohio. The fact that Debtor did not physically travel to Ohio to negotiate and execute the Loan Documents is not outcome determinative. Ohio law had reasonable connection to transaction where Ohio law allowed higher interest rate on loans in excess of \$100,000, creating a reasonable basis for the parties to choose Ohio law. Higher interest rate was not contrary to public policy of Michigan. Public policy will be offended where contract itself is illegal, or is the result of oppressive use of superior bargaining power. Michigan’s policy concerns regarding usury were not implicated because the creditor was sought out by the Debtor, Debtor was a sophisticated commercial party, and the Debtor was fully aware of what it was getting into when he negotiated and agreed to the terms of the loan. Even if the loan at issue was usurious, the contract is not an illegal contract which is unenforceable in its entirety. While Michigan has an interest in protecting its residents from usurious interest rates, Ohio has an equally strong—or stronger—interest in protecting its residents, particularly when out-of-state Debtors seek funding from its in-state creditors.
- (9352) *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *cert denied*, 2016 WL 3461580 (2016) – Debt collector violates FDCPA by attempting to collect interest at rate in excess of statutory rate permitted under law of state where borrower resides. Under National

Banking Act, Federally chartered National Bank can charge highest interest rate allowed under law where bank is chartered. However, when debt is sold to private debt collector, debt collector is limited to interest rate permitted by state law. Debt collector is not National Bank and is not entitled to protections of National Banking Act. Provisions of NBA can be extended to non-bank entities only when application of state law would significantly interfere with national bank's ability to exercise powers under NBA. Debt collector not carrying or acting on behalf of national bank, but is instead collecting as private entity for its own behalf. Excluding debt collectors from NBA does not interfere or limit activities of national bank.

23.40 Collection Efforts Permitted by State Law

- (9353) *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.

23.41 Garnishment

- (9354) *Nichols v. Roosen, Varchetti & Oliver, PC*, 2015 WL 5936335 (E.D. Mi. 2015) – FDCPA does not require collector to release writ that has expired on its own terms. Debt collector violates FDCPA when collector uses false, deceptive or misleading representation or means of collection. Debt collector did not violate FDCPA where garnishment served by collector on Debtor's employer expired over a year when employer resumed garnishing funds from Debtor's wages. Collector did not ask or take any steps to cause employer to restart garnishment and promptly refunded payments to Debtor when received from employer. Debt collector did not violate FDCPA where collector, on behalf of a different creditor, served writ naming different Defendant, on Debtor's employer. Employer misread writ and incorrectly withheld funds from Debtor. Although writ named person with similar name as Debtor, none of the other identifying information was the same or similar to Debtor or to the writ previously served on Debtor's employer on behalf of Debtor's creditor. Collector did not take any action in connection with second writ that could be considered an effort to collect from Debtor and Collector has no reason to believe that employer would be confused or misled by second writ which did not refer to Debtor in any way.

23.42 Language, Symbols or Account Numbers on Envelope

- (9355) *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014) – Debt collector violated FDCPA where account number printed on letter itself was visible through window in envelope. FDCPA precludes any language or symbols on any envelope, which includes language or symbols that are visible through the transparent window of an envelope. Exposure of account number raised serious privacy concerns that FDCPA were designed to prevent.

23.43 Credit Reporting

- (9356) *O'Neal v. First Tennessee Bank*, 2018 WL 1352519 (E.D. Tn. 2018) – Constitution limits Federal Court jurisdiction to cases and controversies, requiring Plaintiff to have personal stake in outcome of controversy to assure concrete adverseness. *Spokeo* requires that Plaintiff base standing on injury in fact; fairly traceable to Defendant's conduct; likely to be redressed by favorable decision from court. Injury in fact requires invasion of legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Concrete injury must actually exist, and Plaintiff personally must suffer some actual or threatened injury as opposed to bringing generalized grievance. Prospective injury is sufficiently concrete if threatened injury is real, immediate, and direct. Bare procedural violation, divorced from concrete harm will not suffice. Invasion of privacy is sufficiently particularized injury if Debtor was personally harmed and offended that personal information and privacy had been invaded. However, alleged invasion of privacy resulting from improper credit inquiry does not constitute concrete injury in fact. Plaintiff alleged nothing more than bare procedural violation absent public dissemination of credit information or conduct highly offensive to reasonable person. Plaintiff did not demonstrate any imminent threat where Plaintiff alleged only generally that data breaches occur but did not allege any risk that Plaintiff's data in hands of Defendant was subject to data breach such as that Defendant has been target of hackers or lacks the security features necessary to ward off data breach.
- (9357) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) – Fair Credit Reporting Act, 15 USC Section 1681s-2(a)(2) requires that any party who regularly and in ordinary course of business furnishes information to consumer reporting agencies was correct and update information provided to ensure that information is complete and accurate. However, Section 1681s-2(c) does not contain a private right of action for violation. Section 1681s-2(b) creates private cause of action only where creditor who has been notified by credit reporting agency that consumer has disputed information and creditor either fails to investigate the dispute, to report the results of the investigation, or, if any information was inaccurate, to report the results of the investigation. Mortgage servicer fully complied with requirements where Debtor filed dispute with credit reporting agency, credit reporting agency contacted mortgage servicer, and mortgage servicer promptly responded with the results of the investigation correcting the information contained in the credit report. Party who fully complied with FCRA cannot be deemed to have violated FDCPA.
- (9358) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month “service charge” on unpaid account. Court determined that “service charge” was actually disguised interest at rate in excess of statute usury statute. Inclusion of “service charge” in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and

communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called “serial violation” – original report would not be construed as “continuing” or repeating. Court did not determine whether statute of limitations runs from original reporting or whether “discovery rule” applies, finding that it was not necessary to do so on this record.

C. Remedies

23.44 Standing to Sue

(9359) *Fausz v. NPAS, Inc.*, 237 F.Supp.3d 559 (W.D. Ky. 2017) – Article III requires actual case or controversy for Federal Court to exercise jurisdiction. Plaintiff must demonstrate an injury in fact, defined as invasion of legally protected interest which is concrete and particularized and actual or imminent. However, injury need not be tangible to elevate injury to one that is legally cognizable where violation of procedural right granted by statute constitutes injury in fact without any allegation of any additional harm. FDCPA imposes protections for consumers who may be disadvantaged in effort to promote fair and consistent protections. Violation of FDCPA is sufficient to confer standing even absent independent actual damages.

(9360) *Geary v. Green Tree Servicing*, 2017 WL 2608691 (S.D. Ohio 2017) – After *Spokeo*, standing requires Plaintiff to show an injury in fact that is concrete and particularized and actual or imminent, not merely conjectural or hypothetical; injury is fairly traceable to challenge the conduct of Defendants; and it is likely, as opposed to merely speculative, that entry will be redressed by a favorable decision. Plaintiff’s complaint alleging that Defendant violated Fair Debt Collection Practices Act by sending out initial demand letters without required “Validation Notice” stated injury that was sufficiently concrete and particularized. Statute was designed to ensure disclosure of required information. Failure to disclose involves risk of real harm in form of consumers potentially waiving rights to dispute or seek validation of debts

23.45 Parties Liable

(9361) *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.

23.46 Statutory Damages

(9362) *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.

23.47 Punitive Damages

(9363) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.

23.48 Attorney Fees

(9364) *Nance v. Zwicker & Associates, P.C.*, 2015 WL 2195063 (N.D. Ohio 2015) – Individual who prevails in FDCPA action entitled to recover costs of action including reasonable attorney fees. Once prevailing party is known, primary issue becomes reasonableness of fee, defined as one adequate to attract competent counsel but not to produce windfalls to attorneys. Analysis starts at reasonably hourly rate times number of hours reasonable expended. Number of hours requested unreasonable where case was not complicated and legal framework of case was well known to Plaintiff’s attorney who had brought 2 similar actions in one year before the current case. Plaintiff served discovery requests that were identical on each of the Defendants and case settled reasonably early in the proceeding. Number of attorneys was excessive and Plaintiff is not entitled to compensation for a number of well qualified attorneys when fewer attorneys could have done the job. Three attorneys resulted in duplicative and unnecessary work and redundancy was inherent in work flow structure. Redundancy also caused multiple inter-office meetings and discussions billed by both participants, or multiple attorneys participating in same phone conference with client and all three attorneys billing that time; or one attorney billing to review work produced by other attorney who also billed. Hourly rates ranging from \$275 to \$375 excessive for simple case and no evidence that attorneys each made distinct contributions to the outcome of the case. Fees for services that were of no benefit are not compensable. Time spent on Motion to add party was not compensable because motion was denied and nothing learned in the process in any way advanced Plaintiff’s case. Multiple hours spent over 2 weeks researching issues of statute of limitations and tolling not reasonable where issues were not complex and should have been known to attorneys who bill at substantial rates. Similarly, time spent researching venue not reasonable where case filed in district where Plaintiff lived which was “obvious choice” and any research would not have benefitted parties but was done solely to maximize convenience of attorneys. Services also evidenced an element of waste. Early on in case, Defendant offered to settle for \$4,000 plus attorney fees, far higher than the statutory maximum recovery of \$1200. Work spent after date of offer of settlement was not compensable as it added no value to settlement or award of case and amounted to little more than performing unreasonable and unnecessary services.

D. Defenses

23.49 Bona Fide Error

(9365) *Fausz v. NPAS, Inc.*, 237 F.Supp.3d 559 (W.D. Ky. 2017) – FDCPA Section 1692k allows debt collector to raise bona fide error defense, requiring that violation was not intentional and that collector maintains procedures reasonably adapted to avoid the error. Record raised

issues of material fact where Service Agreement with creditor-hospital specifically stated that Defendant would not be assigned any claims that are in default or patient accounts on which there would be no legal right to collect. However, agreement did not define when accounts would be in default and hospital did not use term “default” but instead referred to accounts as “aging”. Defendant did not review accounts to ensure that accounts were not in default.

- (9366) *Pfeffer v. National Credit Systems, Inc.*, 2017 WL 3600437 (S.D. Ohio 2017) – Bona fide error defense requires that collector show that violation was not intentional and resulted from bona fide error notwithstanding maintenance of procedure reasonably adapted to prevent error. Defendant must prove that violation was unintentional; violation was result of bona fide error; and that debt collector maintained procedures reasonably adapted to prevent the error. Genuine issue of material fact remained as to whether debt collector’s practices were within bona fide error defense where collector continued collection efforts and continued to report debt as outstanding notwithstanding repeated notices from Plaintiff and Plaintiff’s attorney that debt had been discharged in bankruptcy.
- (9367) *Thompson v. General Revenue Corp.*, 2017 WL 3276018 (S.D. Ohio 2017) - Debt collector is not liable for violations of FDCPA that result from bona fide error, which requires that debt collector demonstrate that violation was unintentional and that it was result of bona fide error, and that collector maintained procedures to avoid error. Debt collector did not point to any steps it took to prevent errors in collections instead blindly relying on creditor’s information without any attempt to verify debt or to implement any procedure to prevent erroneous demands for payment.
- (9368) *Turnbull v. O’Reilly Rancilio, PC*, 2017 WL 976918 (E.D. Mi. 2017) - Bona Fide Error is defense to claims under Fair Debt Collection Practices Act pursuant to 15 USC Section 1692k(c), which provides that debt collector is not liable if debt collector shows that violation was not intentional and resulted from bona fide Error Notwithstanding maintenance of procedures reasonably adapted to avoid such error. Debt collectors attempt to contact borrower at borrower’s previous address was result of bona fide Error where collector had been provided information by United States Department of Justice which identified borrower is living at specified address, collector sent “debt validation letter” to address and borrower responded to that letter, and collector had no reason to believe that address of record with Department of Justice was not correct, and collector contacted United States Postal Service which confirmed that borrower had not filed any notice of change of address. Collector also reasonably relied on affidavit of process server which stated that process server had personally served borrower at stated address. Collector did not intend to force borrower to defend action outside of judicial district in which Plaintiff resided.
- (9369) *Gater v. Russell Collection Agency, Inc.*, 2015 WL 6955402 (E.D. Mi. 2015) – Collection agency may be liable for false or deceptive statements where, after Debtor received chapter 7 discharge, creditor assigned debt to collector who sent one letter to Debtor. Letter contained all required notices under FDCPA including right to dispute debt. Debtor called the collector and advised that the debt had been discharged, and collector made appropriate notes in file. Collector did not take any other actions to collect the debt, did not send any additional letters, or make any additional efforts to contact Debtor for purposes of collection. *Bona Fide* error defense requires that (1) the violation was not intentional; (2) the violation was a result of a bona fide error; and (3) the debt collector maintained procedures reasonably adapted to avoid any such error. Record was not sufficiently developed for summary judgment as *bona fide* error defense is fact intensive. Creditor’s affidavit that it does not attempt to collect debts that have been discharged and does not knowingly accept debts that are discharged for collection, and answers to interrogatories indicated that collector has now instituted procedures to “scrub” files for bankruptcy, did not provide any information on how it implements these policies such as whether agency asks clients whether debts have been subject to bankruptcy proceedings. While *bona fide* error defense does not require debt collector to take every conceivable precaution, it does require reasonable precautions, and evidence presented at summary judgment was not sufficient for court to make that determination. Further, actions taken after the collection letter is sent, such as policies to correct errors or to ensure no further communications with Debtors after being advised of bankruptcy are not sufficient, as TILA requires collectors to prevent occurrences not merely to correct occurrences once they happen.
- (9370) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – 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.

23.50 Substantial Compliance

- (9371) *Wallace v. Diversified Consultants, Inc.*, Case no. 13-2214 (6th Cir. 2014) – Collector does not violate act by sending letter that advised that collector will presume debt valid unless Debtor disputes it “within 30 days of receiving notice”. While letter departed from language of statute that provides “within 30 days after receiving notice”, discrepancy did not change meaning of letter. Collector not required to specifically parrot language of statute, as long as language used conveys the required information. Collector’s letter advised Debtor that Debtor had thirty days to dispute the debt; that the clock would start ticking when the letter was received; and that if the Debtor did not act the collector would presume the debt to be valid.

23.51 Unclean Hands

- (9372) *Gater v. Russell Collection Agency, Inc.*, 2015 WL 6955402 (E.D. Mi. 2015) – Unclean hands defense to action under FDCPA requires clear, unmistakable and convincing evidence that harm alleged is the result of Plaintiff’s own conduct. Plaintiff’s alleged failure to list collection agency in bankruptcy schedules did not support finding of unclean hands where account had not been assigned by creditor to the agency until after bankruptcy case had concluded. Plaintiff did list the debt in the schedules under the original and actual creditor’s name and address. Whether address for creditor was correct address would not change outcome where there was no convincing evidence of any wrongdoing by Debtor in the bankruptcy proceeding.

23.52 Michigan Regulation of Collection Practices Act

- (9373) *Turnbull v. O’Reilly Rancilio, PC*, 2017 WL 976918 (E.D. Mi. 2017) - Michigan Regulation of Collection Practices Act, Michigan compiled

laws Section 445.252(a), prohibits any person in process of collecting debt from misrepresenting legal rights of creditor or Debtor or from making inaccurate, misleading, untrue or deceptive statement or claim. MCRPA is “strict liability” statute which does not provide for bona fide error defense, unlike Federal FDCPA.

XXIV. Truth In Lending Act

A. Generally

24.1 “Creditors” Defined

(9374) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Truth in Lending Act applies only to actions taken by “creditors” defined as persons who regularly extend consumer credit. Complaint contains no allegations that individual corporate officers named as defendants, acting in their individual capacities, qualified as “creditors”.

(9375) *Kantz v. Bank of America*, 2018 WL 1948164 (M.D. Tn. 2018) – Section 1639g requires creditor or servicer of home loan to send accurate payoff balance within reasonable time, but in no case more than 7 business days, after receipt of a written request from or on behalf of borrower. Creditor or assignee that does not currently own mortgage loan not required to provide a payoff statement.

24.2 “Servicer” Defined

(9376) *Kantz v. Bank of America*, 2018 WL 1948164 (M.D. Tn. 2018) – Section 1639g requires creditor or servicer of home loan to send accurate payoff balance within reasonable time, but in no case more than 7 business days, after receipt of a written request from or on behalf of borrower. Servicer or assignee that does not currently own mortgage servicing rights not required to provide a payoff statement.

(9377) *Valandingham v. Springleaf Financial Services*, 2016 WL 6432834 (S.D. Ohio 2016) – TILA requires mortgage servicer to respond to written request to best knowledge of servicer as to name, address and telephone number of owner or master servicer of obligation. Borrower’s letter to Defendant was mailed almost 2 years after defendant transferred servicing to new servicer. At time defendant received letter, it was no longer the “servicer” and could not be held liable for failing to respond to TILA request.

24.3 “Extension of Credit” Defined

(9378) *Billings v. Propel Financial Services, LLC*, Case No. 14-51326 (5th Cir. 2016) – Purchase of tax certificates is not “extension of credit” within TILA. Defendant purchased delinquent tax certificates and entered into promissory note to allow owner to pay delinquent taxes in installments, essentially allowing owners to borrow money to pay past due property taxes. However, tax certificate was issued directly to defendant and taxes were not satisfied or paid such that lien would be extinguished, but continued in existence for benefit of certificate purchaser. End result of transaction was to shift pre-existing tax obligations to new entity, not to create new or additional extension of credit.

24.4 Disclosure of Terms

(9379) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – TILA requires creditors to provide clear and accurate disclosure of terms including finance charges, annual percentage rates, and borrower’s rights. Borrower’s loan is secured by principal dwelling and who did not receive requisite disclosures may rescind loan transaction in its entirety. Right to rescind expires 3 days after transaction unless lender fails to deliver forms or disclose important terms accurately at which point right to rescind is extended to 3 years commencing from date on which borrower signs loan documents and becomes obligated to pay. TILA action is time-barred where loan transaction closed in 2006 it plaintiff did not bring cause of action until 2016.

24.5 Crediting Payments

(9380) *Cawood v. Seterus, Inc.*, 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – 15 USC Section 1639f requires mortgage loan servicer to credit payments to account as of date of receipt. Servicer violated TILA by rejecting payments when payments were lawfully made. Complaint alleged numerous instances of payment made and received by servicer but held and not credited to account.

24.6 Written Request for Information

(9381) *Valandingham v. Springleaf Financial Services*, 2016 WL 6432834 (S.D. Ohio 2016) – TILA requires mortgage servicer to respond to written request to best knowledge of servicer as to name, address and telephone number of owner or master servicer of obligation. Borrower’s letter to Defendant was mailed almost 2 years after defendant transferred servicing to new servicer. At time defendant received letter, it was no longer the “servicer” and could not be held liable for failing to respond to TILA request.

24.7 Request for Payoff Statement – 15 USC §1639g

(9382) *Kantz v. Bank of America*, 2018 WL 1948164 (M.D. Tn. 2018) – Section 1639g requires creditor or servicer of home loan to send accurate payoff balance within reasonable time, but in no case more than 7 business days, after receipt of a written request from or on behalf of borrower. 12 CFR §1026.36 extends time to send statement where loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or other similar circumstances. creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this paragraph (c)(3) to provide a payoff statement. Letter sent by Borrower’s attorney to Creditor’s attorney is not request under Section 1639g as statute requires request be sent to the creditor. Unanswered request for information from one attorney to another during ongoing litigation does not fall within TILA provisions. Where Creditor receives letter ostensibly from third party on behalf of Borrower, 12 CFR §1026.36(c)(3) allows Creditor to take reasonable measures to verify identity of person acting on behalf of consumer before period to respond commences. Creditor did not violate TILA where Creditor requested written confirmation from Borrower of authorization to release information to Borrower’s attorney and Borrower never provided that verification.

B. Remedies

24.8 Rescission

- (9383) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – TILA requires creditors to provide clear and accurate disclosure of terms including finance charges, annual percentage rates, and borrower’s rights. Borrower’s loan is secured by principal dwelling and who did not receive requisite disclosures may rescind loan transaction in its entirety. Right to rescind expires 3 days after transaction unless lender fails to deliver forms or disclose important terms accurately at which point right to rescind is extended to 3 years commencing from date on which borrower signs loan documents and becomes obligated to pay. TILA action is time-barred where loan transaction closed in 2006 it plaintiff did not bring cause of action until 2016.
- (9384) *GMAC Mortgage, LLC v. McKeever*, 2016 WL 3090330 (6th Cir. 2016) – Regulation Z (12 CFR §226.23), promulgated in connection with TILA, allows consumer to rescind credit transaction in which a security interest is or will be retained or acquired in a consumer’s principal dwelling. Consumer must notify the creditor of the rescission by mail, telegram or other means of written communication prior to midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last; but any event within 3 years after consummation, upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first.

24.9 Statute of Limitations

- (9385) *Johnson v. Santander Consumer, USA*, 2018 WL 3061920 (W.D. Tn. 2018) - Statute of Limitations under TILA and related Regulation Z have one year statute of limitations on any action for damages. Debtor purchased the vehicle which is the subject of the alleged TILA violation in 2012 but did not institute suit until 2017.
- (9386) *Elam v. Aurora Commercial Corporation*, 2018 WL 3059625 (W.D. Tn. 2018) - Statute of Limitations for damages for violation of Truth in Lending is one year from consummation of loan. Statute of Limitations for rescission is three years after Dave consummation of transaction. Statutes of Limitations for loan consummated in 2004 expired in 2005 (for damages) and 2007 (for rescission).15 USC Section 1640(k)(1) allows consumer to assert violation as defense or recoupment or set off without regard for time limit on private action for damages. Section 1640(k)(1) did not apply where plaintiff initiated suit seeking damages or other relief. Plaintiff was bringing “offenses” claim which did not fall within extended statute of limitations.
- (9387) *Elam v. Aurora Services Loan, LLC*, 2018 WL 2074202 (W.D. Tn. 2018) – Statute of limitations for damages under Truth in Lending is one year after loans consummation. Statute of limitations for rescission under Truth in Lending is three years after loan consummation. Action brought in 2017 challenging alleged violation of Truth in Lending arising out of loan originated in 2004 barred by statute of limitations.15 USC 1640(k)(1) allows time-barred Truth in Lending claim to be raised as matter of defense but does not apply where borrower sues lender under Truth in Lending.
- (9388) *Kirschbaum v. Wells Fargo, NA*, 2017 WL 1190914 (E.D. Ky. 2017) – TILA requires creditors to provide clear and accurate disclosure of terms including finance charges, annual percentage rates, and borrower’s rights. Borrower’s loan is secured by principal dwelling and who did not receive requisite disclosures may rescind loan transaction in its entirety. Right to rescind expires 3 days after transaction unless lender fails to deliver forms or disclose important terms accurately at which point right to rescind is extended to 3 years commencing from date on which borrower signs loan documents and becomes obligated to pay. TILA action is time-barred where loan transaction closed in 2006 it plaintiff did not bring cause of action until 2016.
- (9389) *Farr v. Nationstar Mortgage, LLC*, 2017 WL 445601 (E.D. Mi. 2017) – Statute of Limitations under Truth in Lending Act is three days following consummation of transaction or delivery of information and rescission forms whichever is later, but in any event right to rescind expires three years after occurrence giving rise to right of rescission or upon transfer of consumers interest in property, whichever occurs first. Claims alleging that lender failed to provide notice of rescission time barred where mortgage was obtained in 2007 but plaintiffs did not attempt to rescind until 2016.
- (9390) *GMAC Mortgage, LLC v. McKeever*, 2016 WL 3090330 (6th Cir. 2016) – Regulation Z (12 CFR §226.23), promulgated in connection with TILA, allows consumer to rescind credit transaction in which a security interest is or will be retained or acquired in a consumer’s principal dwelling. Consumer must notify the creditor of the rescission by mail, telegram or other means of written communication prior to midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last; but any event within 3 years after consummation, upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first.

24.10 *Rooker-Feldman*

- (9391) *Brantley v. CitiMortgage*, 2016 WL 6092709 (S.D. Ohio 2016) – Action under TILA barred by *Rooker-Feldman* where property at issue has been subject to four separate State Court lawsuits, that resulted in entry of final judgment of foreclosure. Plaintiff’s current action sought to enjoin foreclosure sale on the basis that lender failed to respond to demand of rescission and therefore plaintiff was no longer indebted to defendant. Complaint sought relief that would require Federal Court to review State Court Order to determine whether State Court correctly rejected plaintiff’s defenses in State Court action and State Court’s holding that plaintiff was indebted to defendant, and that defendant had the right to foreclose and terminated any interest of plaintiff in the property.
- (9392) *Campbell v. Citibank, NA*, 547 BR 49 (Bankr. E.D. N.Y. 2016) – Lender did not violate TILA by extending credit to allow Debtor to take bar exam as lender never misrepresented that obligation would be non-dischargeable. Fact that promissory note was captioned “Master Student Loan Promissory Note” did not constitute representation of dischargeability, particularly where note never referenced dischargeability. Simply calling the note a “Student Loan” does not automatically bring loan within ambit of Section 523(a)(8).

- (9393) *Phillips v. Green Tree Servicing, LLC*, 2016 WL 627903 (E.D. Mi. 2016) – Limitations period for alleged violation of TILA based on failure to notify borrower of transfer of servicing is one year from date of transfer. Action brought more than 3 years after alleged transfer barred by Statute of Limitations.
- (9394) *Golden v. Bank of New York Mellon Trust Company*, 2015 WL 1281792 (W.D. Mi. 2015) – Statute of limitations under TILA for failure to notify of change in mortgage servicer is one-year from date of occurrence of violation. Debtor had actual knowledge of new servicer and had communicated with new servicer more than 2 years prior to filing complaint. Although Debtor never received TILA required notification of change in servicer, Debtor had actual knowledge more than one year prior to commencing action.
- (9395) *James v. Petra Finance, LLC*, 2015 WL 7289430 (W.D. Tn. 2015) – Statute of limitations for action for damages under TILA is one year from date of alleged violation. TILA requires that when loan servicing is transferred, the transferee must provide notice to the borrower within 30 days, advising of the transfer, identifying the contact information for the new creditor, date of transfer, and instructions on how to reach a person of authority for new lender. Plaintiff's action alleging failure to notify barred by statute of limitations where transfer was recorded in public records in 2011 but plaintiff did not bring suit until 2015. Without ruling on whether the statute is subject to "discovery rule", that rule would extend time only if failure of plaintiff to know of cause of action is without fault or lack of diligence or care. Where transfer was recorded in public records, hypothetical reasonably diligent plaintiff would have discovered it within one year and plaintiff did not allege any facts that indicate that plaintiff was somehow precluded from discovering matter at earlier date.
- (9396) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Limitations period for rescission under TILA is three years from transaction date. Complaint that alleged TILA violations for transaction that closed in December, 2010, time barred when suit not filed until December, 2014.
- (9397) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Limitations period for rescission under TILA is 3 years from the date of the loan closing or sale of the secured property, whichever occurs first. Complaint that alleged TILA violations when loan acquired in 2007 and when loan modified in 2009 time barred where complaint not filed until 2014.
- (9398) *Jesinoski v. Countrywide Home Loans, Inc.*, ____ S. Ct. ____ (2015) – Truth in Lending Act does not have any formal requirements for notification of exercise of right of rescission. Letter mailed by borrowers to lender was valid notice of rescission. TILA does requires only that borrower "notify" lender, and does not require institution of litigation to constitute "notice".
- (9399) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Statute of limitations under TILA is one year from occurrence of the violation. Action based on original note and mortgage untimely where first brought more than one year after closing.
- (9400) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – TILA action cannot be brought against party who was not party to loan origination. FNMA, as successor to original lender, not liable for any alleged TILA violations. Further TILA action must be brought within one year of cause of action. Loan obtained in 2008 but TILA action not filed until 2013 required dismissal.
- (9401) *Davies v. Deutsche Bank National Trust Co.*, 2014 WL 1152800 (9th Cir. 2014) – Action under TILA must be brought within one year of alleged violation. TILA requires that borrower be given notice of transfer of servicing within 30 days. Assignment of deed recorded in August, 2009, provided notice to Debtor no later than September, 2009, such that action brought in January, 2011, was untimely.
- (9402) *Jester v. CitiMortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Statute of limitations under TILA is one year from occurrence of violation. Action brought in 2013 based on alleged failure to provide required disclosures in 2007 barred.
- (9403) *Lodge v. Kona Capital Corp.*, 2014 WL 1813298 (11th Cir. 2014) – Party seeking redress under TILA must prove that offending party is "debt collector" as defined in statute. Plaintiff failed to produce evidence to prove that McCalla Raymer, LLC, was "debt collector".
- (9404) *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.
- (9405) *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.
- (9406) *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.
- (9407) *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 years 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.

- (9408) *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.
- (9409) *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 plaintiff's allegations when the alleged TILA violations occurred, the Court cannot determine whether the TILA claim is barred by the statute of limitations.
- (9410) *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.
- (9411) *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, plaintiff 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.
- (9412) *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.

XXV. Other Causes of Action

A. Generally

25.1 Tortious Interference with Contract

- (9413) *Lanton v. Owlen Loan Servicing, LLC*, 2016 WL 4734674 (S.D. Ohio 2016) – Intentional interference with contracts already in existence requires proof of (1) existence of contract; (2) wrongdoer's knowledge of contract; (3) wrongdoer's intentional procurement of contract's breach; (4) lack of justification; and (5) damages. Tortious interference with potential business relationship generally results where person, without privilege to do so, induces or otherwise purposely causes third person not to enter into or continue business relationship with another. Knowledge of business relationship is essential under either theory, and there is no cause of action for negligent interference with business relationship. Complaint failed to state cause of action where complaint neither identified any existing contracts or any advantageous business relationships. Complaint alleged that as result of incorrect information in Debtor's credit report, Debtor's company had been unable to obtain financing that would allow company to enter into business relationships, but complaint did not allege that defendants were or had any reason to be aware of any existing or anticipated business relationships or contracts or that defendants intended to cause either loss of potential business relationships or breaches of existing agreements.
- (9414) *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.

- (9415) *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

25.2 Innocent or Negligent Misrepresentation

- (9416) *Mandingo v. PNC Bank*, 2017 WL 6506368 (6th Cir. 2017) – Action for negligent or innocent misrepresentation requires some misrepresentation be made in connection with formation of contract. Lender's alleged assertions in bankruptcy action that debtor was in default, even if incorrect, were not made in course of formation of contract. Debtor's allegations related to alleged misapplication of payments by creditor well after contract formed, that created alleged incorrect impression that loan was in default. To extent lender made statements in Bankruptcy action, those statements were not part of transaction and did not give rise to the contract itself.
- (9417) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Borrower's action for negligent misrepresentation failed to state cause of action. Borrower's allegation that lender promised to reinstate loan when borrower brings account current did not state cause of action where complaint failed to allege that plaintiff paid or tendered amount necessary to reinstate or that lender, upon receipt of those funds, refused to reinstate. To extent plaintiff requested breakdown of reinstatement figures, lender had no legal duty to provide those figures. Plaintiff could not maintain cause of action where lender did not breach duty owed to plaintiff. Further, lender did provide a breakdown but plaintiff was "not satisfied", which is not sufficient to support finding that lender made misrepresentation in advising borrower that lender would provide breakdown. Borrower's dissatisfaction with from of breakdown did not demonstrate any misrepresentation by lender.
- (9418) *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.
- (9419) *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.

25.3 Punitive Damages

- (9420) *Waldman v. Stone*, 2016 WL 205502 (W.D. Ky. 2016) – Where Court awards punitive damages, amount should be proportionate to actual damage award but is not limited to actual damage award, and should take into account degree of reprehensibility of conduct, difference between harm or potential harm suffered by injured party and the punitive damage award, and difference between remedy and civil penalties awarded in similar cases. Punitive damages in an amount that was double the actual damages supported by defendants' willful violation of legal and ethical requirements and represented amount that would serve purpose to punish what occurred and deter repetition. Damages would be apportioned between two co-defendants in same ratio as actual damages are apportioned.
- (9421) *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.
- (9422) *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.
- (9423) *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.

25.4 Conversion

- (9424) *Embraer Aircraft Maintenance Services, Inc. v. Aerocentury Corp.*, 2018 WL 1172957 (M.D. Tn. 2018) – Conversion is appropriation of tangible property to party’s own use in exclusion or defiance of owner’s rights. Plaintiff must prove: (1) appropriation of another’s property to one’s own use and benefit, (2) by intentional exercise of dominion over it, (3) in defiance of true owner’s rights. Sale of airplane to someone outside United States, and removing plane from U.S. registration with actual knowledge that Plaintiff held prior statutory and recorded security interest constituted conversion where transfer either destroyed any lien of Plaintiff or made repossession and sale impracticable or impossible.
- (9425) *Hagan v. Baird*, 2015 WL 6152959 (Bankr. W.D. Mi. 2015), *aff’d*, 2018 WL 480356 (W.D. Mi. 2018) – Conversion is any distinct act of dominion wrongfully asserted over property of another. Conversion can result from wrongful obtaining of possession of property, or wrongful exercise of dominion over property lawfully in possession of third party that is inconsistent with rights of third party. Debtor lawfully transferred proceeds of asset sale to shareholders who then used funds for personal expenses. Defendant did not convert property in first instance as transfer by Debtor was voluntary and knowing and done with intent to transfer property to defendant free and clear of any further claims of Debtor. Defendant’s receipt of funds was not wrongful and so could not constitute conversion. Defendant’s later use of funds for personal expenses was not act inconsistent with Debtor’s rights as Debtor, upon transfer of funds, retained no further interest in property with which defendant could have interfered.
- (9426) *Patrick v. CitiMortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – Conversion requires wrongful exercise of dominion over property in exclusion of rights of owner, or withholding possession under claim inconsistent with owner’s rights. Lender did not convert borrower’s money where lender paid insurance premiums from escrow account as required by terms of mortgage. In Debtor-creditor relationship, conversion of money can occur only where owner attempts to recover identical funds, not merely recover money generally. Money paid to lender under loan obligation was fungible and was co-mingled with other loan payments and moved into and out of escrow account as necessary to pay insurance and taxes. Borrower did not request return of same money paid into escrow account, but only requested the refund of the sum of money paid in.
- (9427) *Liggett v. Schwartz*, 2015 WL 4478033 (6th Cir. 2015) – Action based on contractual relationship cannot constitute conversion as matter of law. Divorce decree that awarded wife one-half of retirement account had contract right to recover one-half of the account. Husband’s failure to transfer funds amounted to breach of contract and could not constitute conversion as a matter of law.
- (9428) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Michigan conversion statute applies only to personal property. Allegations that defendant converted title to Plaintiff’s condominium unit through foreclosure process involved real property and is beyond scope of statute.
- (9429) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Ex-wife could not maintain action for conversion or recover treble damages where State Court judgment of divorce included findings that Husband had not converted assets and wife could not otherwise prove elements of conversion, particularly where Husband never denied that wife was entitled to 50% of IRA and that obligation to wife was non-dischargeable, and Husband’s Chapter 11 Plan proposed to pay the claim in full in monthly installments.
- (9430) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Conversion requires a distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with the other party’s rights. Real estate allegedly taken by creditor could not form basis of action for conversion as real estate is not “personal property”. Personal property could not have been converted as State Court judgment entered pre-petition determined that assets were owned by creditor and not Debtor, such that Debtor had no right to assets as to which creditor could have wrongfully interfered. Remaining assets were voluntarily transferred by Debtor to creditor pursuant to a pre-petition settlement of State Court action. Creditor could not “convert” assets that Debtor transferred to creditor as Debtor did not retain any right to those assets and creditor had the full right to exercise control of those assets.
- (9431) *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.
- (9432) *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.
- (9433) *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.

25.5 Breach of Fiduciary Duty

- (9434) *Kravitz v. LaRocca*, Case No. 17-80180 (Bankr. W.D. Mi. 2018) – Michigan law imposes duty on directors of Corporation of care, good faith and loyalty. State law gives significant deference to decision of directors under business judgment rule and affords presumption that directors acted on informed basis, in good faith and an honest belief that action was in best interest of company. Presumption can be rebutted on showing of breach of fiduciary duty or bad faith. Michigan law requires Debtor to exercise ordinary care, requiring plaintiff to plead existence of duty; breach of duty; and causation. Complaint plausibly stated claim where complaint alleged that defendant was director and owed duty of care; and that directors should have investigated potential misconduct by officers following in formal complaints with governmental agencies, reports of billing disputes that were resulting in cash flow issues, and warning that company would post significant losses. Complaint alleged sufficient facts that would have placed defendant on notice of need to investigate further. However, Michigan law permits director of Corporation to rely on information, reports and statements presented by officers where director reasonably believes officer to be reliable and competent in matter presented. Director was wholly attentive to affairs of Corporation, regularly attended and participated in board meetings and was not otherwise derelict in his duties. Officers went to great lengths to conceal scheme by repeatedly misleading board; misrepresenting in formal complaints as byproduct of billing disputes; advising directors that officers were seeking assistance from governmental agencies in resolving disputes; reporting to directors that mediation was ongoing; officers advised bore that officers had advised Debtors secured lender of disputes; and officers led board to believe that officers were proactively pursuing resolution including working with outside counsel. Facts alleged demonstrated that board reasonably relied on officers' misrepresentations no less than seven times. True state of facts leading to discovery of officers' schemes not discovered until more than six months after director left board. Michigan law provide a complete defense to director who acted in good faith requiring dismissal of adversary proceeding.
- (9435) *CMH Liquidating Trust v. Anderson*, Case No. 14-2020 (Bankr. E.D. Mi. 2017) – Complaint did not state cause of action for breach of fiduciary duty where complaint alleged lengthy list of wrongful acts and omissions by Debtor's Board of Directors but did not make any distinction between defendants, identify respective roles or periods of relationships with Debtor, or allege what particular act may be attributed to which particular defendant. "Group pleading" may be permitted where defendants as a group were similarly situated and engaged in similar conduct, but Plaintiff brought action against 36 former members of Board in corporation that was not closely held and defendants were not similarly situated, some being directors, some officers, and some non-supervisory employees, as well as volunteer and paid directions which have different duties and are subject to different legal standard; and complaint included period of over 9 years and none of defendants held positions at all times during that period.

25.6 Unjust Enrichment

- (9436) *Karmol v. Ocwen Loan Servicing, LLC*, 2016 WL 7188742 (W.D. Mi. 2016) - Action for unjust enrichment requires court to imply the existence of a contract. Court will not imply existence of contract where express contract governs the same subject matter. Plaintiff cannot bring action for unjust enrichment under circumstances where alleged actions of defendant would amount to breach of express contract.
- (9437) *Elrod v. Green Tree Servicing, LLC*, 2016 WL 4801374 (N.D. Ohio 2016) – Complaint for unjust enrichment fails to state cause of action as plaintiff failed to allege that plaintiff conferred a benefit on defendant and suffered a detriment in doing so. Complaint also failed to state cause of action as unjust enrichment is not available when parties relationship is governed by express contract, and plaintiff brought separate count seeking damages for breach of express contract.
- (9438) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – Complaint that alleged that lender misapplied payments and failed to credit payments was barred by res judicata where plaintiff made same arguments in Chapter 13 Bankruptcy Case in objection to lender's claim and Bankruptcy Court entered judgment in favor of lender.
- (9439) *Campbell v. Citibank, NA*, 547 BR 49 (Bankr. E.D. N.Y. 2016) – Unjust enrichment requires (1) that Debtor benefitted; (2) at plaintiff's expense; and (3) that equity and good conscience requires restitution. Lender was not "unjustly enriched" when lender sold loan on secondary market, allegedly at a profit, based on representation that loan was not dischargeable. Any surplus in the price would have been at expense of third party purchaser, not plaintiff.
- (9440) *Rose v. Friendly Finance Co.*, 2016 WL 98597 (S.D. Ohio 2016) – Unjust enrichment exists only where there is no enforceable contractual relationship between parties. As such, recovery cannot be obtained for both. However, pleading rules allow complaint to allege counts for both breach of contract and unjust enrichment in the alternative, with the party later being required to elect remedies to avoid possible inconsistent and duplicate recovery.
- (9441) *Citizens Corporation v. Meyers*, 2014 WL 3362255 (M.D. Tn. 2014) – Unjust enrichment requires (1) a benefit conferred upon the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof. The enrichment of the beneficiary must be unjust. If the beneficiary has given any consideration to any person for the benefits received from the plaintiff, there is no injustice in allowing the defendant to retain those benefits without paying the plaintiff. If the beneficiary did not have privity with the transferor under a written contract, the plaintiff must first pursue recovery from person with whom plaintiff had privity before pursuing beneficiary. Defendant was not unjustly enriched by Plaintiff's pledge of collateral for loan to corporation where Plaintiff was shareholder of corporation and received benefit in form of loan to corporation.
- (9442) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Unjust enrichment requires proof of receipt of a benefit by defendant from plaintiff where it is inequitable for defendant to retain the benefit. Third party could not have benefitted where Debtor/plaintiff did not have any interest in the property acquired by Third Party from creditor, as State Court judgment previously determined that property belonged solely to transferring creditor and not to Debtor. Absent some transfer of property in which Debtor had an interest, transfer

could not have unjustly enriched third party at expense of Debtor.

- (9443) *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.
- (9444) *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.

25.7 Legal Malpractice

- (9445) *Schulze v. Chandler*, Case No. 12-15186 (9th Cir. 2014) – Bankruptcy court has jurisdiction to enter final judgment in adversary proceeding brought by member of Unsecured Creditor Committee against Committee counsel for alleged malpractice. Post-petition claim against court appointed professional is core proceeding because attorney’s employment and compensation were approved by Bankruptcy Court and duties pertained solely to administration of estate and cause of action arose out of the performance of those duties. Case dismissed because counsel owed duty to Committee as a whole, and did not owe duty to individual members of Committee.
- (9446) *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.

25.8 Piercing Corporate Veil

- (9447) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Shareholder of Corporation is not usually liable for acts of Corporation. However, under appropriate circumstances, Court may disregard separate legal identity of Corporation and treat shareholders as identical to Corporation who may be held individually responsible for corporate liabilities. Evidence must show that separate corporate entity was a sham or dummy or that disregarding separate corporate entity is necessary to accomplish justice. Factors to consider include whether there was failure to collect paid in capital; whether Corporation was grossly undercapitalized; non-issuance of stock certificates; sole ownership of stock by one individual; use of same office or business location; employment of same employees or attorneys; use of Corporation as instrumentality or business conduit for individual; version of corporate assets by or to stockholder to detriment of creditors or manipulation of assets and liabilities; use of Corporation as subterfuge for illegal transactions; formation and use of Corporation to transfer to an existing liabilities of another person; and failure to maintain arm’s-length relationship. Court would peers corporate veil and hold Debtor personally liable for corporations debt based on Debtor’s sole ownership of Corporation and Debtor’s diversion of corporate funds to pay personal income taxes and other liabilities. At time Debtor transferred funds to pay personal liabilities, Corporation and received payments from 3rd parties that should have been paid to prime contractor. Debtor’s Corporation, through Debtor, transfer those funds to Debtor reducing balance substantially below amount owed to prime contractor and at time when Debtor knew that prime contractor was entitled to payment of those funds.
- (9448) *DAGS II, LLC v. Huntington National Bank*, 2016 WL 3180044 (W.D. Mi. 2016) – Piercing corporate veil to treat one company as alter ego of second company requires proof that (1) corporate entity was mere instrumentality of other entity or individual; (2) corporate entity was used to commit fraud or wrong; and (3) plaintiff would suffer an unjust loss if the veil is not pierced. Subsidiary of Huntington was “mere instrumentality” where only purpose of subsidiary was to hold property pledged to secure loans to Huntington. Court was unable to determine whether use of subsidiary produced harm to plaintiff or whether Huntington used subsidiary to commit wrong. Huntington issued a first mortgage and a second mortgage on parcel of property. At later date, Huntington assigned second mortgage to subsidiary. One year later, subsidiary foreclosed junior lien and purchased property at foreclosure sale. Under Michigan law, if the holder of both the senior and junior liens forecloses the junior line and purchases the property at foreclosure sale, then the personal liability of the borrowers on both mortgages is extinguished. Whether the subsidiary’s purchase of the property extinguished liability on senior mortgage held by Huntington depended on whether corporate veil could be pierced such that subsidiary and Huntington would be treated as single entity. Borrowers alleged that property had value sufficiently in excess of balance owed on first mortgage that Huntington owned should be considered paid in full, and if Huntington was allowed to continue collection efforts on first mortgage notwithstanding acquisition through subsidiary of title to property, borrowers and guarantors would be prejudiced and suffer harm and Huntington would be wrongfully enriched by double recovery at borrower’s expense. Court was unable on summary judgment to determine actual value of property obtained by subsidiary when it purchased title at foreclosure sale, leaving court unable to determine if Huntington received property sufficient to pay off the balance owed. If the property was worth less than the balance owed on the first mortgage, then Huntington has not been unjustly enriched as there would remain deficiency balance that could be collected. Evidence indicated that value ranged from amount less than balance owed on second mortgage alone to value in excess of total owed on both mortgages, precluding summary judgment.
- (9449) *Bash v. The Sydney Jackson Williams Jr. Irrevocable Trust*, 2016 WL 1592445 (N.D. Ohio 2016) – Florida law does not recognize action to pierce veil of trust to seize assets for creditors of the settlor where the settlor does not retain a beneficial interest in the trust corpus.

- (9450) *Lim v. Miller Parking Co.*, 2016 WL 1399253 (E.D. Mi. 2016) – To pierce corporate veil requires proof that corporation whose separate identity is to be disregarded was used to commit fraud or other wrongdoing. Wrong must be more than diminishment of plaintiff's prospective recovery should court decline to pierce veil. Wrongdoing consists of actions such as a parent corporation that caused a sub's liabilities and its inability to pay for them would escape those liabilities; or an intentional scheme to squirrel assets into a liability-free corporation while heaping liabilities upon an asset-free corporation; or parent corporation abusing position of control and using subsidiary as a mere instrumentality in a deliberate scheme to cause the subsidiary to breach its contractual obligations. Wrong must be such that plaintiff would suffer an unjust loss based on whether the manner of use of the entity operated as a 'mere instrumentality' resulting in a fraud or wrong on the complainant. Evidence did not support disregarding corporate structure where corporation had assets, enjoyed independent stream of revenue, provided services and paid bills as they came due, and kept separate books and records and observed typical corporate formalities. Fact that corporation lacked sufficient assets or answer for judgment did not establish any unjust loss by plaintiff where there was no evidence of money flowing out of defendant corporation either to shareholders or to related corporations.
- (9451) *Sesquatchie Mountain Creditors v. Detweiler*, 2016 WL 321037 (Bankr. N.D. Ohio 2016) – Corporate form may be disregarded when (1) control over corporation was so complete that corporation had no separate mind, will or existence of its own; (2) control is exercised in such a manner as to commit fraud or an illegal act against person seeking to disregard corporate entity; and (3) injury or unjust loss would result. Whether individual and corporation are fundamentally indistinguishable depends on (1) grossly inadequate capitalization; (2) failure to observe corporate formalities; (3) insolvency of corporation at time debt is incurred; (4) shareholders holding themselves liable for certain corporate obligations; (5) diversion of funds or property for personal use; (6) absence of corporate records; and (7) fact that corporation was mere façade for dominate shareholders. Plaintiff proved only that Debtor was sole shareholder of two corporations but did not present any evidence of any other factor, resulting in judgment for Debtor/defendant.
- (9452) *Michigan Department of Environmental Quality v. Asmar*, Case No. 14-3172 (Bankr. E.D. Mi. 2015) – Bankruptcy Court lacks jurisdiction to hold individual principals liable for all legal obligations of the Debtor whenever created or to be created, and to find that assets of corporation are, as a matter of law, the property of defendants and that all actions taken by the Debtor are actions taken by principals personally, jointly and severally and that corporate bankruptcy should be considered as filed in name of corporate principal. Request for relief exceeded scope of anything that court could lawfully grant, even with parties consent. State Court already had jurisdiction over action by MDEQ seeking to impose personal liability against non-Debtor principals. Action dismissed without prejudice to MDEQ pursuing relief in State Court.
- (9453) *Kentucky Petroleum Operating, Ltd. V. Golden*, 2015 WL 927258 (E.D. Ky. 2015) – Corporate veil will be pierced so as to render one corporation liable for debts of another if one corporation so dominates the relationship as to cause loss of corporate separateness; or circumstances where continued recognition of corporate separateness would sanction fraud or promote injustice. Injustice must be more than creditor's inability to collect debt but can be found where parent company caused subsidiary to become unable to pay debt; or where there is intentional scheme to funnel assets into liability free entity while leaving debts with asset-free entity. Court will consider (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the Debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. Corporate veil pierced where entities had same sole shareholder who owned and controlled all aspects of both entities; at least one entity was undercapitalized where capital contributions totaled \$10.00, grossly insufficient to fund any business; entities disregarded corporate formalities and commingled funds, paying each other's obligations and receiving each other's revenues; and transaction had effect of circumventing creditors by diverting assets from Debtor to other related corporations. Maintaining corporate veil would result in injustice as parent corporation and sole shareholder would cause transfer of assets of related corporation leaving corporation unable to pay liabilities.
- (9454) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – Parent corporation is not liable for actions of subsidiary unless parent company is mere alter ego of subsidiary. Actions of subsidiary, without more, do not impose liability on parent.
- (9455) *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 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.
- (9456) *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.

- (9457) *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.
- (9458) *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.
- (9459) *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.

25.9 Alter Ego Theory

- (9460) *WRK Rarities, LLC v. U.S.*, 2016 WL 775422 (N.D. Ohio 2016) – Whether second company is mere later ego or “continuation” of first company is matter of state law. Successor company will be liable for debts of predecessor if successor expressly or impliedly agrees to assume liability; transaction is de facto merger or consolidation; successor corporation is mere continuation of predecessor; or transaction is entered in fraudulently or for purpose of avoiding liability. Touchstone is continuation of corporate entity, not the operation of business, after transaction, and focuses on whether same people own both predecessor and successor corporations with new corporation being “reincarnation” of prior corporation. Common ownership is essential, and sale of assets to new company with different owners is fatal so successor liability absent finding that transaction was done for fraudulent purpose. Same individual was sole shareholder of both predecessor and successor corporations. Assets transferred from predecessor to successor were for less than reasonably equivalent value and were virtually all assets used by predecessor; successor maintained same physical space; successor retained and sued predecessor's furniture, fixtures and computers; successor had same employees, suppliers and business operations; and successor made attempt to pay tax liability of predecessor but proposal was rejected by IRS; and successor was created specifically for purpose of escaping back tax liability and for “fresh start” as new entity. Successor was mere continuation of predecessor for purposes of continuation liability.
- (9461) *Bash v. The Sydney Jackson Williams Jr. Irrevocable Trust*, 2016 WL 1592445 (N.D. Ohio 2016) – Florida law does not recognize alter ego liability of trust for claims of creditors of the settlor where the settlor does not retain a beneficial interest in the trust corpus.
- (9462) *Lim v. Miller Parking Co.*, 2016 WL 1399253 (E.D. Mi. 2016) – Alter ego theory allows court to ignore normal separation of identity between corporation and shareholders and impose liability on shareholders for corporate debts. Alter ego doctrine requires proof that shareholders were using corporation to commit fraud or other abuse; that corporation was mere instrumentality of shareholders; and that plaintiff suffered an unjust loss or injury. It is not necessary to prove that owner caused entity to directly harm complainant; it is sufficient that owner exercised his or her control over the entity in such a manner as to wrong the complainant. However, establishing an entity for the purpose of avoiding personal responsibility is not by itself a wrong that would warrant disregarding the entity's separate existence. Factors to determine whether entity is “mere instrumentality” include (1) whether the corporation is undercapitalized, (2) whether separate books are kept, (3) whether there are separate finances for the corporation, (4) whether the corporation is used for fraud or illegality, (5) whether corporate formalities have been followed, and (6) whether the corporation is a sham. Evidence did not support disregarding corporate structure where corporation had assets, enjoyed independent stream of revenue, provided services and paid bills as they came due, and kept separate books and records and observed typical corporate formalities. Fact that corporation lacked sufficient assets or answer for judgment did not establish any unjust loss by plaintiff where there was no evidence of money flowing out of defendant corporation either to shareholders or to related corporations.

25.10 Continuation of Debtor

- (9463) *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.

25.11 Federal Tort Claims Act

- (9464) *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.

25.12 Injunctions and Temporary Restraining Orders

- (9465) *JWJ Hotel Holdings, Inc. v. W&H Realty, LLC*, 2018 WL 3772179 (S.D. Ohio 2018) – Party requesting injunctive relief must show strong likelihood of success on merits; irreparable harm if injunction is not issued; issuance of injunction would not cause substantial harm to others; and public interest supports injunction. Plaintiff not entitled to temporary injunctive relief where complaint alleged facts which amount, at most, to business dispute between co-managers of trust and did not allege any failure to exercise management rights that would constitute a breach of fiduciary duty. Complaint sought monetary damages which indicates that injuries are not “irreparable” and mere fact that defendant may be insolvent does not establish irreparable injury. Entry of injunction would cause substantial harm to defendants by depriving defendants of ability to exercise co-management rights and public interest is served by Court refraining from interfering with private business transactions and powers that are currently property of Bankruptcy Estate.
- (9466) *Firstenergy Solutions Corp. v. Federal Energy Regulatory Commission*, 2018 WL 2315916 (Bankr. N.D. Ohio 2018) - Court can use Section 105 to enjoin governmental agency from taking actions which are otherwise within “police power” exception to automatic stay where necessary to protect court’s jurisdiction and implement other Sections of Code. Court applies standards for implementing preliminary injunction including whether movant has shown strong or substantial likelihood of success on merit; whether movant has shown irreparable injury in absence of injunction; whether issuance of preliminary injunction would cause substantial harm to others; and whether public interest would be served by issuing preliminary injunction. Irreparable harm requirement is met where action to be enjoined threatens reorganization process or impairs court’s jurisdiction. Although automatic stay prevents governmental agency from taking action, Court would enter an injunction under Section 105 as additional protection of court’s jurisdiction.
- (9467) *Rajapakse v. Credit Acceptance Corp.*, 2018 WL 1041578 (E.D. Mi. 2018) – Temporary Restraining Order is extraordinary remedy reserved for emergent situations in which party may suffer irreparable harm during time required to give notice to opposite party or where notice itself may precipitate harm. Court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. Reasonable notice” consists of information received within a reasonable time to permit an opportunity to be heard. Party seeking TRO must allege specific facts in affidavit or verified complaint clearly showing that immediate and irreparable injury, loss, or damage will result before adverse party can be heard in opposition. Plaintiff’s certificate of service merely stated that Defendants had not been served and so defendant was not provided copy of motion although Plaintiff was clearly able to provide notice.
- (9468) *Keeper of the Word Foundation v. Nathan*, 2018 WL 732156 (E.D. Mi. 2018), *rehearing denied*, 20178 WL 994486 (E.D. Mi. 2018) – Federal Courts have power under All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions. Bankruptcy Court correctly enjoined Appellant from filing any lawsuits against specifically named parties absent prior authorization from Bankruptcy Court. Appellant demonstrated pattern of vexatious conduct by filing multiple actions in State Court seeking to stop Bankruptcy Court Ordered sale of property and collaterally attacking Bankruptcy Court Order. State Court actions were frivolous as evidenced by Appellant’s failure to appeal Orders of Dismissal of each of those actions. Appellants had document history of vexatious conduct in Bankruptcy Case as well, and Order to Enjoin is proper remedy to address Appellant’s behavior. Injunction was narrowly tailored, preventing Appellant from filing actions without prior permission and limited to specific parties that played role in Bankruptcy Court approval of sale of property.
- (9469) *Tennial v. Bank of America*, 2017 WL 4707513 (W.D. Tn. 2017) – Anti-Injunction Act, 28 USC Section 2283, prohibits Federal Court from granting injunction staying State Court proceeding unless specifically authorized by Act of Congress or as necessary in aid of jurisdiction or to protect or effectuate judgment. Federal Court lacked jurisdiction to enter injunction preventing State Court foreclosure proceeding or to prevent issuance of writ of possession.
- (9470) *Ford Motor Credit Company v. Hall*, 2017 WL 3084373 (E.D. Mi. 2017) – Rule 65(a) allows Court to enter preliminary injunction only on notice to adverse party. Court abused discretion by *sua sponte* imposing injunction prohibiting lender from repossessing vehicle absent post-discharge payment default in connection with disallowance of reaffirmation agreement where np party requested entry of an injunction in any pleading or motion and without notice, and effectively creating “ride through” on non-reaffirmed debt in violation of express Congressional intent to abolish “ride through” option.
- (9471) *McGirr v. Rehme*, 2017 WL 1426456 (W.D. Ohio 2017) – Anti-Injunction Act, 28 USC Section 2283, precludes any Federal Court from granting an injunction to stay proceedings in State Court unless expressly authorized by Act of Congress or where necessary in aid of jurisdiction or to protect or effectuate judgments. Federal Court lacked jurisdiction to enjoin State Court receivership proceedings where Congress had not expressly authorize injunctions against state law receivership proceedings and case did not involve such overwhelming complexity as to prevent State Court proceedings from granting effective relief.

- (9472) *Condado Restaurant Group, Inc. v. U.S.*, Case No. 17-050 (Bankr. D.P.R. 2017) – Anti-Injunction Act prohibits suits in any Court by any person to restrain assessment or collection of any tax whether or not the person is the person against whom such tax was assessed. Anti-Injunction Act prevents Bankruptcy Court from enjoining Internal Revenue Service from pursuing corporate officers to collect trust fund taxes drink course of corporate Chapter 11 proceeding. Act protects governments need to assess and collect taxes with minimum of judicial interference and corporate officers liability is separate and distinct from Corporation's obligation and IRS is not required to attempt collecting from company first.
- (9473) *Skaags v. Nationstar Mortgage*, 2017 WL 1371077 (W.D. Mi. 2017) – Party seeking entry of a preliminary injunction must prove (1) likelihood of success on merits of claim; (2) irreparable harm without grant extraordinary relief; (3) granting injunction will not cause substantial harm to others; and (4) preliminary injunction furthers public interest. Plaintiff could not demonstrate likelihood of success on merits where claims were based on mistaken belief that discharge in bankruptcy avoided mortgage it prevented lender from pursuing foreclosure or from accepting payments from plaintiff. Discharge in bankruptcy operates as injunction to prevent attempts to collect from Debtor personally but does not, in any way, impede mortgage holder's ability to foreclose and realize on collateral. Discharge in bankruptcy does not render debt invalid or eliminate outstanding debt and lender's continued acceptance of payment was not result of fraud or misrepresentation and did not unjustly enriched lender. Payment made under mistaken belief that party is obligated to make payment may be recovered as long as the recipient of the payment has not changed position as a result of payment or setting aside payment would be unjust. Debtor did not make payments under mistake of fact where Debtor made payments on mortgage after discharge in bankruptcy. Although Debtor mistakenly believed that discharge extinguished underlying debt itself, discharge does not extinguish debt and lender remained entitled to receive payments from plaintiff.
- (9474) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Anti-Injunction Act, 28 USC Section 2283 precludes Court from issuing Order enjoining State Court foreclosure proceedings. Federal Court is prohibited from granting injunction to stay proceedings in State Court unless expressly authorized by Congress or where necessary in aid of Court's jurisdiction, or to protect or effectuate Court's judgments. Complaint failed to allege any facts which would support the application of any of the 3 exceptions embodied in the Anti-Injunction Act. Any defenses which plaintiff could or should have raised in foreclosure proceedings regarding defendant's alleged fraudulent conduct should have been raised in State Court foreclosure action.
- (9475) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Injunctive relief is remedy and not independent cause of action. Complaint must show viable cause of action before remedy can be sought, and cause of action must warrant specific relief sought. Count of complaint that merely sought injunctive relief, without more, failed to state cause of action.
- (9476) *Burniac v. Wells Fargo Bank*, 2016 WL 146515 (6th Cir. 2016) – Prior preliminary injunction entered by State Court prior to removal of action to Federal court against defendant does not prevent Federal court from granting judgment in favor of defendant on merits. Preliminary injunction is intended only to maintain status quo while court determines action on merits.
- (9477) *Rajapakse v. Wells Fargo Home Mortgage*, 2015 WL 4133179 (W.D. Tn. 2015) – Plaintiff seeking to enjoin foreclosure sale must prove likelihood of success on merits of case; irreparable harm if injunction denied; that injunction would not substantially harm interest of opposing parties; and considerations of public interest. Plaintiff's complaint failed to allege any facts that would meet state statutory requirements to enjoin foreclosure sale.
- (9478) *In re Gardner*, Case No. 15-40823 (Bankr. E.D. Mi. 2015) – Court must consider four factors in determining propriety of injunctive relief: (1) whether party seeking injunction has shown strong likelihood of success on merits; (2) whether moving party would suffer irreparable harm if the injunction is not granted; (3) whether injunction would cause substantial harm to others; and (4) public interest. Debtor's Motion seeking to enjoin lender from taking possession of property denied. Court had previously determined that Debtor had no interest in property, meaning Debtor had no chance for success in efforts to stop repossession process. Because Debtor lacked any interest in property, denial of injunction would not cause any harm to Debtor. Grant of injunction would substantially prejudice party seeking to take possession and to enforce state law remedies as to property in which party had immediate right of possession and Debtor had no rights in or to the property. Further, court had already granted party relief from automatic stay and request for injunction would be directly contrary to the court's prior rulings. Public interest would not be served by injunctive relief.
- (9479) *Jacques v. JPMorgan Chase Bank*, 2015 WL 58646 (W.D. Mi. 2015) – Court has authority to enjoin party from filing additional lawsuits for same issues where later suits are designed to harass other party. The issue is whether the litigant has a history of vexatious litigation that is likely to continue in the future absent judicial intervention. Factors include: litigant's history of litigation and in particular whether it entails vexatious, harassing, or duplicative lawsuits; litigant's motive in pursuing the litigation; whether litigant is represented by counsel; whether litigant caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and whether other sanctions would be adequate to protect the courts and the other parties. Injunction warranted where plaintiff has filed multiple cases against same defendant for same alleged wrongdoing; each action was entirely without merit; and plaintiff's prior actions indicated a likelihood that plaintiff would continue to do so in the future.
- (9480) *Portfliet v. Wells Fargo Home Mortgage*, 2014 WL 4987810 (W.D. Mi. 2014) – District Court has authority to issue injunction to prevent prolific litigant from filing pleadings without first obtaining court approval. Injunction must use least restrictive means available to deter the inappropriate behavior. In most cases, proper remedy is to require litigant to obtain court permission before filing suit that involves the same operate facts that have been the basis of the litigiousness. Court would enjoin plaintiff from instituting actions concerning the property in question in Federal Court without first obtaining court permission. However, court would not expand injunction to preclude institution of suits in State Court in effort to balance interests in avoiding duplicative litigation with plaintiff's right to access courts.
- (9481) *Farrell v. US Bank, NA*, 2014 WL 2480055 (E.D. Mi. 2014) – Party seeking temporary restraining order must demonstrate a strong likelihood of success on merits; irreparable harm if the injunction is not granted; that issuance of the injunction will not cause substantial harm to others; and that the injunction would serve the public interest. Debtor's request for temporary restraining order to prevent

foreclosure of mortgage denied where motion failed to allege any immediate or irreparable harm, as motion did not demonstrate that foreclosure or eviction were imminent and did not produce any eviction notice of Court Order to support need for immediate relief.

- (9482) *In re Medlar*, 2014 WL 793329 (Bankr. N.D. Ohio 2014) – Party seeking injunction must prove strong likelihood of success on merits of underlying claim; that movant would suffer irreparable injury if the injunction is not granted; that the injunction would not cause substantial harm to others; and that public interest would be served by injunction. Movant failed to demonstrate basis for injunction against condominium association that was pursuing relief in State Court. Bankruptcy court had already lifted stay for purposes of allowing State Court to rule on merits of dispute. There was no matter pending in the Bankruptcy court regarding condo association’s action against Debtor (as stay had been lifted) so Debtor could not demonstrate any likelihood of success on the merits in bankruptcy court. To extent condo association secured property and changed locks after Debtor vacated and left property open to damages, Debtor could not demonstrate lack of adequate remedy at law if court ultimately determined that condo association acted improperly. Injunction would not serve public interest where Debtor created situation that allowed pipes to freeze and burst, causing substantial damages to other units and condo association was required to shut off water and take steps to prevent further damage and secure property.
- (9483) *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.
- (9484) *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.
- (9485) *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.
- (9486) *Traster v. Ohio Northern University*, 2012 WL 12875964 (N.D. Ohio 2012) – In considering request for preliminary injunction, Court must balance four considerations: (1) Whether the movant has a “strong” likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. Plaintiff brought action seeking reinstatement to employment position and preliminary injunction to require defendant to pay his salary during pendency of lawsuit. Contract on which plaintiff relied did not prohibit unpaid suspension or require terminated or suspended employee to be paid salary during period of suspension. Plaintiff did not demonstrate likelihood of success where contract on which Plaintiff based cause of action did not support the relief requested.
- (9487) *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.
- (9488) *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.
- (9489) *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.
- (9490) *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.

- (9491) *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.
- (9492) *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.
- (9493) *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.
- (9494) *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.

25.13 Tax Injunction Act and Section 505

- (9495) *In re Meggitt*, 2018 WL 1614735 (Bankr. N.D. Ohio 2018) – Section 505(a)(2)(C) prohibits Bankruptcy Court from determining amount or legality of any amount in connection with ad valorem taxes on real or personal property of estate if applicable period for contesting or determine amount under applicable non-bankruptcy law expired. Debtor's objection to claim based on alleged wrongful removal by Tax Collector of property from agricultural tax program was not reviewable where debtor did not timely appeal decision before filing Bankruptcy. While Court can determine amount or legality of tax generally, Court cannot determine amount or legality of ad valorem tax where applicable period to contest expired pre-petition. Agricultural land list and fees associated with removal of property from list are ad valorem as based on property's true market value.
- (9496) *Scott v. City of Hamtramck Treasurer*, Case No. 17-4411 (Bankr. E.D. Mi. 2017) – Section 505 does not permit Bankruptcy Court to determine amount or legality of any ad valorem tax after expiration of applicable period for contesting or redetermining amount under applicable non-bankruptcy law. Once taxes are transferred to County, County's authority is limited to collection. Court lacked jurisdiction in adversary proceeding to redetermine property taxes where taxes had long become final and property had been transferred to County with Treasurer assuming title.
- (9497) *In re Bush*, Case No. 15-1318 (S.D. In. 2016) – Section 505 is not independent grant of jurisdiction to bankruptcy courts over tax matters but is instead procedural mechanism for court to act in cases where jurisdiction otherwise existed. Debtor had already been granted a Chapter 7 discharge and only issue was amount of penalties to be imposed. Action to determine tax amount does not arise under Section 505 as action is not created by bankruptcy code. Action was not "related to" the bankruptcy case as outcome could have no effect on bankruptcy case as estate was administratively insolvent and there would be no funds for payment of claim regardless of outcome of tax dispute. Court lacked subject matter jurisdiction 28 USC Section 1334 notwithstanding Section 505's grant of authority to Bankruptcy Court to determine tax claims.
- (9498) *Layher v. Missouri Department of Revenue*, 2016 WL 3620744 (Bankr. E.D. Tn. 2016) – Section 505 allows Bankruptcy Court to adjudicate amount or legality of any tax whether or not contested before any judicial or administrative tribunal, but Bankruptcy Court cannot determine amount or legality of any tax if the amount or legality was contested before and adjudicated by a judicial or administrative tribunal before commencement of case. Court can redetermine amount of tax liability even where Debtor failed to avail himself of state law procedures for challenging taxes. Bankruptcy Court can nonetheless abstain if necessary to protect interests of Debtor and creditors such as to prevent dissipation of estate assets in the event Debtor failed to contest liability, and speedy resolution of disputed tax claims to allow orderly administration of estate. Court will consider complexity of tax issues, need to administer bankruptcy case on expeditious fashion, burden

on bankruptcy court's docket, length of time necessary to conduct a hearing and render a decision, asset and liability structure of Debtor, and potential prejudice to Debtor, creditors and the taxing authority. Bankruptcy court was appropriate forum as Debtor had no state law right to contest tax determinations more than 60 days after notice was given and that deadline had long passed. Creditors would be better served by allowing Debtor to contest taxes, parties agreed to expedited trial, and tax issues were not so complex as to be beyond Bankruptcy Court's ability, and absent Bankruptcy Court intervention, Debtor would be without forum to resolve necessary fresh start issues on a tax liability that arose years pre-petition.

- (9499) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Tax Injunction Act, 28 USC Section 1341, precludes federal court from enjoining, suspending or restraining assessment, levy or collection of tax under state law where State Courts afford plain, speedy and efficient remedy. Tax Injunction Act does not preclude Bankruptcy Court from enforcing provisions of Code that affect collection of taxes. Court can exercise jurisdiction over proceedings that would otherwise violate Tax Injunction Act where necessary to enforce bankruptcy code provisions. Section 505 allows bankruptcy court to adjudicate amount or legality of any tax unless the amount was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. Bankruptcy Court had jurisdiction to disallow amount of taxes claimed to extent claim exceeded value of property as valuation did not enjoin or suspend assessment, levy or collection of taxes or set aside or attach tax valuations.

25.14 Declaratory Relief

- (9500) *Rose v. Friendly Finance Co.*, 2016 WL 98597 (S.D. Ohio 2016) – Declaratory relief is available where necessary to determine questions of construction of contracts where resolution of dispute is necessary for future relationship between parties. Plaintiff failed to state cause of action for declaratory relief in connection with loan secured by plaintiff's automobile, where lender had already seized and sold automobile and there were no ongoing relationships between parties. There was no sufficiently immediate need to declare rights and obligations of parties to contract.
- (9501) *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.

25.15 Declaratory Judgment Act – 28 USC Section 2201

- (9502) *Kerger v. United States*, 2018 WL 1182528 (N.D. Ohio 2018) - Declaratory Judgment Act prohibits Court from entering declaratory relief with respect to federal taxes. Complaint which request declaratory judgment that plaintiff does not owe any amount for back taxes seeks precisely kind of declaratory relief prohibited by DJA. However, claim that United States equitably estopped from collecting alleged tax liabilities states cause of action where key issue is whether it plaintiff's prior bankruptcy discharge discharged federal tax liabilities which United States seeks to enforce.

25.16 Quiet Title

- (9503) *Haywood v. Roundpoint Mortgage Servicing Corporation*, 2018 WL 3159624 (E.D. Mi. 2018) – Quiet title action under MCL 600.2932 and 600.3201 requires that Plaintiff have claim to title to property and provides remedy, not freestanding claim. Quiet title must be paired with cause of action that would establish Plaintiff's right to property based on independent claim that demonstrates Plaintiff's superiority of title. Claim that requested only quiet title with no underlying independent cause of action fails to state cause of action and is dismissed.
- (9504) *Mandingo v. PNC Bank*, 2017 WL 6506368 (6th Cir. 2017) – Quiet title action requires Plaintiff to show facts establishing superiority of plaintiff's claim. Plaintiff's complaint to quiet title against foreclosing creditor did not state cause of action where lender acquired title at foreclosure sale and Plaintiff admitted that she no longer owned property. Vague allegations regarding allegedly incorrect escrow analyses and lender's alleged failure to provide accurate payment information did not render Plaintiff's title superior to lender's or explain how these allegations otherwise related to quiet title action.
- (9505) *Zordichquiet v. Christiana Bank and Trust*, 2015 WL 6583028 (N.D. Ohio 2015) – Borrower who voluntarily signs mortgage cannot bring quiet title action against mortgage holder in effort to extinguish mortgage where there is no allegation that borrower satisfied the mortgage and repaid the loan, or that the loan has otherwise been forgiven, cancelled or fully paid. Mortgage is not an adverse interest nor a cloud on title to the property.
- (9506) *Trombley v. Seterus, Inc.*, 2014 WL 1664823 (E.D. Mi. 2014), *aff'd*, 2015 WL 3620412 (6th Cir. 2015) – Borrower cannot quiet title and avoid consensual mortgage lien if borrower cannot establish agreement to modify loan or any other fact that would give borrower superior title over the lien of the mortgage holder.
- (9507) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Borrower cannot maintain action to quiet title over claims of mortgage holder where borrower cannot establish that he has satisfied obligation under the note. Quiet title requires that claimant hold title to property free and clear of the cloud on title. Where borrower agreed to repay money, and loan was secured by mortgage, unless borrower satisfied note, borrower's title was not superior to the claim of the mortgage holder.
- (9508) *McKeever v. Mortgage Electronic Registration Systems*, 2010 WL 996474 (E.D. Ky. 2016) – Complaint seeking to quiet title dismissed where defendant specifically disclaimed any interest in property. Quiet title applies only to party who claims interest in property. MERS as mortgage holder previously assigned its interest to Deutsche Bank, assignment was recorded, and MERS no longer claimed any interest in property.

25.17 Accounting

- (9509) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Accounting is equitable cause of action available only when existing legal remedies are insufficient, Accounting is not available where discovery is sufficient to determine amounts are issue, and is not

warranted where action is for specific sum due under contract. Plaintiff's action for accounting against defendant arose out of promissory note and mortgage under which amounts due can be calculated. Action for accounting dismissed.

- (9510) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Accounting is remedy available only where parties are unsure of amounts at stake and accounts at issue are greatly complicated. Action for accounting requires mutual demands and where the transactions are so complex that ordinary discovery procedures would be inadequate. Accounting is not necessary where discovery is sufficient to determine amounts at issue. Chapter 7 Trustee's demand for accounting for assets of Debtor failed to state cause of action where State Court judgment previously determined that Debtor had no right, title or interest in assets and that assets belonged solely to creditor. There was no reason to appoint special master, expert witness or business appraiser to prepare accounting of assets and valuation of property where Debtor's estate had no claim of ownership in property.
- (9511) *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.

25.18 Recoupment

- (9512) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Recoupment requires that debts from Debtor to creditor and from creditor to Debtor arise from same transaction. Plaintiff did not have right of recoupment based on loan to beneficiary of Trust where beneficiary's right arose from creation of trust agreement itself while debt from beneficiary to trust arose from loan made some years later.
- (9513) *In re Slayton*, 509 BR 90 (Bankr. E.D. Mi. 2014) – Right of recoupment is not discharged in bankruptcy case. Right of recoupment exists where right to recover money from Debtor arises out of same transaction as Debtor's right to money from creditor. Pension plan's offset of Debtor's future pension plan distributions to recover prior, erroneous distributions from same pension plan, constituted right of recoupment. All rights of the parties emanated from the pension plan documents themselves. Exercise of right of recoupment while case is pending does not violate stay and continued exercise post-discharge does not violate discharge injunction.
- (9514) *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.
- (9515) *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.

25.19 Federal Debt Collection Practices Act

- (9516) *U.S. v. Mannarino*, 2014 WL 2611831 (N.D. Ohio 2014) – Federal Debt Collection Practices Act, 28 USC Section 3001 *et. seq.*, provides exclusive civil procedures for United States to recover a judgment on a debt. Debts include amounts owing to the United States on account of a fee, restitution or other source of indebtedness, and allows garnishment of any property that is in the possession, custody or control of a person other than the Debtor in which the Debtor has a substantial, non-exempt interest. Debtor must file a response to the garnishee's answer if Debtor wants to assert defense to garnishment. However, garnishment is not vehicle to contest validity of underlying debt.

25.20 Telephone Consumer Protection Act

- (9517) *ARcare, Inc. v. Centor US Holdings, Inc.*, 2017 WL 4326659 (N.D. Ohio 2017) – TCPA requires any sender of a fax to include the telephone number of the sending machine and the date and time on which the fax was sent. Company that hired third party "fax blaster" to conduct fax advertising campaign is liable for third party's violations of TCPA.
- (9518) *Smith v. Stellar Recovery, Inc.*, 2017 WL 1336075 (E.D. Mi. 2017) – Telephone Consumer Protection Act, 47 USC Section 153, prohibits the use of an "automatic telephone dialing system" to call a person's cellular phone, unless the person gives prior consent or the call is made for emergency purposes. An automatic telephone dialing system, or ATDS, is defined as "equipment that has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers. Statute provides for damages of \$500 per call and Court can increase award to \$1500 if it finds defendant acted willfully, defined as actual knowledge that phone number was cell phone number. Treble damages not warranted where defendant could not have known that phone number provided by plaintiff was cell phone versus landline to which automated calls are not prohibited. System that generated phone numbers but required employee to then click on number to actually cause number to be dialed was not automatic telephone dialing system. While system was advanced and automated to large degree, it could not store numbers or dial numbers without affirmative human involvement. However, second system that was entirely "cloud sourced" and did not involve human interaction to place calls was automated dialing system even if employees were in place to respond if phone call was answered. Defendant failed to demonstrate that it had consent to use automated calling system to contact Debtor by cell phone.
- (9519) *Matthew Fulton DDS v. Enclarity, Inc.*, 2017 WL 783499 (E.D. Mi. 2017) – Telephone Consumer Protection Act, 47 USC Section 227 prohibits party from sending unsolicited fax which is transmitted to any person without that person's prior express invitation or permission. "Advertisement" includes any message to promote goods or services, even at no cost, so just free magazines, catalogs or free consultations. "Advertising" is action of drawing public's attention to something to promote sale and must relate to commerce with profit as primary aim

and involving “buying and selling”. Fax transmission that does not mention any product available to be bought or sold or offer or solicit any product, good or service for sale is not advertisement. Fact that future economic benefit may flow from noncommercial fax does not convert fax into advertisement for purposes of TCPA. Fax sought only to validate contact information related to plaintiff including plaintiff’s business location, practice and contact information. Fact that fax included webpage domain name for “Lexis” did not convert fax into advertising as whether content constitutes advertising is determined by 4 corners of facts, not advertising that might appear on a webpage that is referenced in the facts. Fax sent to plaintiff for purposes of gathering contact information that defendant may subsequently sell to third parties any profit does not violate TCPA.

- (9520) *Vinny's Landscaping, Inc. v. United Auto Credit Corp.*, 2016 WL 4801276 (E.D. Mi. 2016) – Telephone Consumer Protection Act as amended by Junk Fax Prevention Act prohibits sending unsolicited facsimile advertisements. An unsolicited advertisement is any material advertising commercial availability or quality of any product, good or services which it transmitted to a person without prior express invitation or permission. However, fax does not have to overtly offer to sell if it advertises something for sale. If fax does not qualify as advertisement. But if fax only informational or transactional or is intended to facilitate, complete or confirm a commercial transaction to which recipient previously entered into with sender and relates specifically to existing accounts or transactions, FCC rules remove fax from TCPA. To be “advertisement”, fax must advertise something, defined as the action of drawing public’s attention to something to promote its sale; and fax must be commercial in nature, by promoting goods or services to be bought or sold with profit as the primary aim. Fax was “advertisement” where it went beyond providing information regarding financing available to those who are discharged in bankruptcy and openly solicited business. There was no indication that fax was targeted to specific party who receive fax as fax was not addressed to anyone in particular; fax did not contain member-specific information; fax did not include information regarding any network to which recipient belonged and fax did not indicate that recipient received fax because he is member of any particular network.
- (9521) *Drozowski v. Citibank, Inc.*, 2016 WL 4544543 (W.D. Tn. 2016) – Federal Arbitration Act requires courts to enforce privately negotiated agreements to arbitrate absent grounds in law or equity to revoke the contract. Courts must engage in limited review to determine whether failed agreement to arbitrate exists and whether dispute falls within scope of that agreement. Sixth Circuit has adopted four factor test: (1) is there an agreement to arbitrate; (2) is the dispute in the scope of that agreement; (3) if federal statutory claims are involved, did Congress intend those disputes to be subject to arbitration; and (4) if only some of the claims are subject to arbitration, should non-arbitrable claims be stayed pending arbitration. Claims brought by Plaintiff against defendant for alleged violation of Telephone Consumer Protection Act arising out of alleged unwanted robo-calls subject to arbitration. Citibank demonstrated agreement to arbitrate by producing exemplar of card agreement at time Plaintiff acquired credit card and 2003 “change in terms notice” that included valid arbitration clause. While undated exemplar first used many years after issuance of card in question would not be sufficient, in this case Citibank produced exemplar of agreement in effect when card acquired and plaintiff did not dispute accuracy or validity of that exemplar. Arbitration provision was broadly written, providing that “any dispute may be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to a jury trial and the right to participate in a class action or similar proceeding” and defined “claims covered” to include “all claims related to your account no matter what legal theory they are based on or what remedy ... they seek” and that any disputes about whether claim are excluded from arbitration would be determined by the arbitration panel. Alleged violations relate to robo-calls that originate with Plaintiff’s credit card agreement with Citibank and with attempts to collect outstanding balances and fall within scope of Arbitration agreement. Nothing in TCPA evidenced any intent by congress to remove claims from scope of arbitration agreement and all claims were within arbitration agreement leaving no un-arbitrable claims. Motion to compel arbitration granted and Motion for certification of class action denied as arbitration clause specifically waived any right class action status.
- (9522) *Drew v. Ocwen Loan Servicing, LLC*, Case No. 14-369 (M.D. Fl. 2015) – Creditor violated TCPA when creditor, after Debtor obtained discharge of debt, called Debtor’s cell phone over 600 times in effort to collect debt.
- (9523) *Gulf Coast Collection Bureau v. Mais*, 2014 WL 4802457 (11th Cir. 2014) – When consumer provides cell phone number to a creditor, for example in an application for credit or request for medical care, consumer expressly consents to auto-dialed and pre-recorded calls under TCPA. Collection agency did not violate TCPA where Debtor, in seeking treatment in an emergency room, listed his cell phone number on the medical forms, and collection agency thereafter used an auto-dialer to make prerecorded calls about the outstanding balance on the account.

25.21 Fair Credit Reporting Act

- (9524) *Booth v. Trans Union, LLC*, 2018 WL 3069295 (E.D. Mi. 2018) – Fair Credit Reporting Act requires credit reporting agency informed by consumer of dispute to conduct reasonable reinvestigation and either correct inaccurate information, record current status of information, or delete item within 30 days from date on which agency received notice of dispute; and to provide written notice to consumer a results of reinvestigation within 5 days after completion of reinvestigation. Statute of Limitations under Fair Credit Reporting Act. Statute of Limitations under FCRA is 2 years from date on which plaintiff first discovers that consumer reporting agency did not investigate or correct erroneous information, and not date on which fraudulent loans shown on credit report were originated. Complaint timely filed where allegedly fraudulent loans were taken out in 2013, consumer filed notice of dispute with credit reporting agency in 2015, but did not discover until November 2017 that consumer reporting agency had not corrected erroneous information and filed complaint in December 2017.
- (9525) *Strohmeyer v. Chase Bank, NA*, 2018 WL 2669991 (E.D. Tn. 2018) – Fair Credit Reporting Act imposes obligations on three entities: credit reporting agencies; users of credit report; and furnishers of information to consumer reporting agencies. “Furnisher of information” is obligated to provide accurate information and to investigate upon receiving notice of dispute from credit reporting agency. 15 USC Section 1681s-2(a) imposes duty on furnishers of information to provide accurate information about consumer and if furnishers receives notice that information is inaccurate, furnisher has duty to correct and update information. However, Section 1681s(2) does not include private right of action as duties can be enforced only by governmental agency. Section 1681e(b) requires credit reporting agency to maintain and follow reasonable procedures to assure maximum possible accuracy. Duties under Section 1681e(b) are imposed on credit reporting agency and cannot support claim against furnisher of information. Section 1681s-2(b) imposes duty on furnisher of information after receipt of notice

of dispute from consumer reporting agency to conduct investigations; review relevant information; report results of investigation; if investigation finds incomplete or inaccurate information, report corrected information to consumer reporting agencies; and modify, delete or block reporting of incorrect or under file information. Obligations under Section 1681s-2(b) arise only after furnisher of information has been advised of dispute by credit reporting agency. Letters from consumer directly to furnisher of information do not trigger obligations of furnisher of information. Plaintiff could not prevail in action against furnisher of information based on alleged lack of response to consumers letters of dispute or furnisher of information's alleged failure to provide notice of dispute to credit bureaus or to correct allegedly inaccurate information as furnisher of information has no obligation to respond to notices directly from consumer were to report results of investigation directly to consumer. Further, Section 1681s-2(b) also requires that consumer raise "bona fide dispute" defined as one that could materially affect how reported that is understood. Failing to report meritless dispute does not violate FCRA because reporting actual debt without noting that it is disputed would not be materially misleading. Plaintiff did not allege any factual inaccuracy in credit report by merely alleged that debt was disputed and inaccurate, asserting that plaintiff had provided "consumers and note" to fund charges to credit account, eight debt elimination scheme which has been universally rejected by courts. FCRA preempts state law claims that do not allege willfulness; and preempts any claim alleging willfulness if claim involves subject matter regulated under FCRA. State law claims of invasion of privacy; negligence; and other unspecified state law claims including negligent hiring and supervision preempted as claims related directly to duties and responsibilities of furnishers of information to consumer reporting agencies.

- (9526) *Sandlin v. Citibank*, 2018 WL 2370769 (W.D. Tn. 2018) – Fair Credit Reporting Act requires creditor who provides information to Consumer Reporting Agency to modify, delete or block in accurate information. Provision is triggered when Consumer Reporting Agency provides notice to furniture of alleged inaccurate information. Demand by consumer direct to creditor does not trigger creditors obligations under Fair Credit Reporting Act. Plaintiff could not support claim under FCRA where there was no allegation that Consumer Reporting Agency provided notice of any dispute to creditor.
- (9527) *Chandler v. Peoples Bank & Trust Co. of Hazard*, 2018 WL 1473800 (E.D. Ky. 2018) – 15 USC Section 1681n prohibits willful noncompliance with duties imposed under FCRA and Section 1681o prohibits negligent non-compliance. Section 1681s requires person who regularly and in ordinary course of business provides credit information to consumer reporting agency must notify consumer reporting agency of any inaccuracy and provide corrections or additional information necessary to correct information provided. Creditors duty requires that information be inaccurate or incomplete. Creditors alleged failure to report payments as timely not actionable for payments made under contemplated Reaffirmation Agreement prior to execution and filing of Re-affirmation Agreement. Without enforceable Reaffirmation Agreement, lender could not have violated terms of Reaffirmation Agreement. Further, evidence indicated that lender applied payments consistent with terms of Reaffirmation Agreement such that reporting of Plaintiff as making late payments was not incorrect leaving creditor with no duty to correct information.
- (9528) *Handaway v. Bank of America, NA*, 2018 WL 453912 (E.D. Tx. 2018) – Statute of Limitations under CRA is 2 years of Plaintiff's discovery of violation. Each republication of false information is independent and distinct harm giving rise to cause of action. Even though Plaintiff knew that Defendant was circulating incorrect data more than 4 years before filing suit, current suit was based on denials of credit occurring within 2 years of filing suit and were within applicable statute of limitations.
- (9529) *Allen v. Equifax Information Systems, Inc.*, 2017 WL 5762414 (W.D. Ky. 2017) – Court must engage in limited review to determine if dispute is arbitrable, based on (1) whether there is agreement arbitrate; (2) the scope of arbitration agreement; (3) whether Congress intended claims to be subject to arbitration; and (4) if some but not all claims are subject to arbitration whether to stay remaining proceedings pending arbitration. Plaintiff's claims under FCRA and FDCPA based on alleged incorrect reporting of accounts on credit report where accounts had been discharge in bankruptcy subject to arbitration. Plaintiff agreed to terms when Plaintiff used credit card, and standard terms provided that all disputes would be subject to arbitration and specifically included disputes regarding credit reporting as subject to arbitration. Court would excuse arbitration of dispute that was within scope of arbitration clause only on most extenuating and explicit circumstances none of which were present here where arbitration agreement specifically included disputes at issue. Discharge in bankruptcy eliminates personal obligation of Plaintiff but did not terminate contract and arbitration clause survived discharge and remained fully enforceable. There was no indication that Congress either expressly or impliedly intended to preempt arbitration of FCRA and FDCPA claims based on discharge in bankruptcy and arbitration not inconsistent with "fresh start" purpose of Bankruptcy Code where Creditor's actions were not attempt to collect debt and did not constitute violation of discharge injunction.
- (9530) *Duraj v. PNC Bank, NA*, 2017 WL 5508380 (N.D. Ohio 2017) – FCRA imposes liability on person who willfully fails to comply with requirements with respect to any consumer, including actual and statutory and punitive damages. FCRA also prohibits any person from obtaining credit report under false pretenses of knowingly without permissible purposes. Compliant alleged cause of action where Plaintiff alleged that he had no accounts or financial dealings with Defendant and had not requested or initiated any credit transaction with Defendant, yet Defendant pulled Plaintiff's credit report.
- (9531) *Walker v. Fabrizio & Brook, PC*, 2017 WL 50100781 (E.D. Mi. 2017) – FCRA requires "credit reporting agency" to follow reasonable procedures to assure maximum possible accuracy. Consumer Reporting Agency is person or entity that regularly engages in practice of assembling or evaluating consumer credit information or other consumer information for the purpose of furnishing consumer reports to third parties and requires more than receipt and retransmission of information identifying particular debt. Detroit Legal News is not Consumer Reporting Agency by publishing legal notice of foreclosure sale. Information is automatically downloaded from computer of foreclosing attorney to DLN which then populates and formats information into legal notice. Transmission of legal notices to targeted marketers does not convert DLN into Credit Reporting Agency. Information provided by DLN does not constitute "consumer report" within meaning of FCRA. Consumer Reporting Agency is one that assembles or evaluates consumer credit information or other consumer information for purpose of furnishing consumer reports to third parties which involves more than receipt and retransmission of information identifying particular debt. While notices of foreclosure contained personal information and were used by marketers to offer credit related services and could qualify as consumer report, FCRA requires that report come from Credit Reporting Agency and there was no evidence that DLN

assembled or compiled information or acted as anything other than conduit for information provided by attorneys without any assembling or evaluating of that information.

- (9532) *Turner v. Experian Information Solutions, Inc.*, 2017 WL 2832738 (N.D. Ohio 2017) – Credit Reporting Agency must maintain reasonable procedures to assure maximum possible accuracy of information; and to conduct reasonable reinvestigation on receiving notice of dispute. Action asserting that CRA failed to maintain reasonable procedures requires proof that CRA reported inaccurate information; CRA either negligently or intentionally failed to follow reasonable procedures to assure accuracy of information; injury; and proximate cause. Information complies with FCRA where it is technically accurate, even if information could be potentially misleading or incomplete. FCRA does not impose strict liability standard, but only requires reasonable procedures. Whether CRA’s procedures are reasonable is fact question unless reasonableness or unreasonableness is shown “beyond question”. Plaintiff failed to prove that CRA did not provide reasonable procedures where Plaintiff repeatedly complained about same alleged inaccuracies and CRA repeatedly investigated complaints including 15 separate times on one account, 6 separate times each on two other accounts. In each investigation, the creditor reported that the information was correctly reported. Plaintiff did not dispute that accounts were late paid, only that Plaintiff did not remember ever being late, which is not affirmative evidence of error. Reporting of account for one month as “ND” (no data) was factually correct as creditor did not provide updated information to CRA for that month. While ND may have been somehow misleading, it was technically correct and not actionable. One month discrepancy between account open date and first reported date accurately reported information provided by Creditor. CRA’s practice of contacting consumer when CRA receives “suspicious mail” before providing information could not cause errors in credit report as letters merely seek to confirm contact and do not place any information on record. Plaintiff could not demonstrate proximate cause where there was no evidence that information harmed credit or that Plaintiff ever suffered adverse credit decision based on CRA’s report. Plaintiff’s claim that CRA refused to investigate errors on receipt of dispute where Plaintiff did not allege that credit report actually contained any error. Further, disputes asserted by third party credit repair agency do not trigger CRA’s duty to investigate as FCRA requires CRA to respond only to inquiries directly by Consumer, not indirect disputes filed by third parties allegedly on Consumer’s behalf.
- (9533) *Schoolcraft v. Fochtman Enterprises, Inc.*, 2017 WL 2951619 (E.D. Mi. 2017) – Fair Credit Reporting Act creates private right of action against entity that furnishes credit reporting information to Credit Bureau for one of five duties specified in 15 USC Section 1681s-2: (a) investigation undertaken by furnisher must be reasonable; (b) furnisher must review all information available to it regarding dispute which can be affected by nature and specificity of information provided by Credit Reporting Agency to furnisher; (c) furnisher must respond to Credit Reporting Agency dispute regarding outcome of investigation regardless of outcome; (d) if investigation reveals information is inaccurate or incomplete, furnisher must report results of investigation to all Credit Reporting Agencies to whom furnisher provided information and inaccurate or incomplete information can include information that is technically correct but creates materially misleading impression or omits information that renders information incomplete or could materially alter how reported debt is understood; and (e) furnisher has duty to modify, delete or block original report if it discovers after investigation that it cannot verify information originally supplied to Credit Reporting Agency. If furnisher is negligent in breaching one of these duties, consumer can recover actual damages. If furnisher willfully breaches duty, consumer can recover actual or statutory damages plus punitive damages. “Willful” covers both knowing and reckless violations. Consumer can also recover attorney fees and costs for negligent or willful violation. Plaintiff must show that Credit Reporting Agency notified furnisher of consumer’s dispute, not that consumer made dispute directly to furnisher. Complaint failed to state cause of action where it alleged that Consumer contacted Credit Reporting Agency but did not allege that Credit Reporting Agency in turn contacted defendant.
- (9534) *Pfeffer v. National Credit Systems, Inc.*, 2017 WL 3600437 (S.D. Ohio 2017) – Furnishers of consumer information have duty to provide credit reporting agencies with accurate information. If furnisher receives notice from consumer reporting agency of dispute regarding accuracy of consumer information, furnisher must conduct investigation with respect to disputed information under 15 U.S.C. § 3681s-2(b)(1)(A). If investigation determines that information is inaccurate or incomplete or cannot be verified, the furnisher must modify, delete, or permanently block reporting of item of information pursuant to 15 U.S.C. § 1681s-2(b)(1)(E). Investigation of dispute must be reasonable and where furnisher receives notice of specific nature of underlying dispute, reasonable investigation requires that furnisher review relevant, underlying documentation. If a furnisher negligently fails to comply, consumer may “recover actual damages, and potentially attorney’s fees and costs and if furnisher willfully fails to comply consumer may seek actual or statutory damages and punitive damages and attorney’s fees and costs. Willful violation requires unjustifiably high risk of harm that is either intended or so obvious that it should be known. Plaintiff raised genuine issue of material fact regarding creditor’s reporting of debt as outstanding when debt had been discharged in bankruptcy. Plaintiff repeatedly and specifically disputed debt at issue as having been discharged in bankruptcy including letter from his attorney to defendant. Nonetheless, defendant continued attempts to collect the debt raising genuine issue of fact as to whether defendant conducted a reasonable investigation, and defendant’s continued reporting of debt to credit reporting agencies violated FCRA. However, Plaintiff did not establish actual damages where only testimony was from Plaintiff that he had to pay higher interest rates but lacked any specific evidence of any higher rates charged or claims, and Plaintiff’s subjective belief that he is being charged higher rates is not actual damages. Inability to purchase home can be basis for actual damages but requires proof from third party of reason for declining credit to plaintiff. Plaintiff’s hearsay statements about why he believes he was denied credit are insufficient. Plaintiff alleged that he suffered emotional distress but did not present evidence that sufficiently explained circumstances surrounding purported emotional distress. Plaintiff could still recover statutory damages or punitive damages even in absence of actual damages if Plaintiff can prove to trier of fact that creditor’s actions were willful.
- (9535) *Jenkins v. Fifth Third Bank*, 2017 WL 3605357 (S.D. Ohio 2017) – In considering Motion to Compel Arbitration, court must determine whether parties agreed to arbitration; whether act is within scope of arbitration agreement; if federal statutory claims are involved, whether Congress intended claims to be non-arbitrable; and if court concludes that some but not all claims are subject to arbitration, whether to stay remaining claims pending arbitration. In determining whether action is within scope of arbitration agreement, issue is whether action could be maintained without reference to contract or relationship that gave rise to arbitration provision, and any doubts are to be resolved in favor of arbitration. Action for alleged violation of Fair Credit Reporting Act subject to arbitration where underlying contract included broad arbitration provision, Credit Card Account Agreement contained arbitration clause and Plaintiff used card after receiving Agreement.

Bankruptcy discharge of underlying debt does not render arbitration clause unenforceable as action did not allege attempt to collect discharged debt and claim would have existed even if Plaintiff had never filed for bankruptcy and was not core proceeding. Arbitration agreement was not “contract of adhesion” and Plaintiff would have full opportunity to present claims through arbitration.

- (9536) *Lanton v. Ocwen Loan Servicing, LLC*, 2017 WL 1386375 (S.D. Ohio 2017) – Fair Credit Reporting Act specifically excludes credit reports used in connection with business transactions. Errors in plaintiff’s personal credit report fit within business exception to Fair Credit Reporting Act were credit report was pulled solely for purposes of plaintiff obtaining a small business loan for plaintiff’s business. Plaintiff’s only damages related to failure to obtain business loan and loss of resulting business opportunity which constitute business damages not recoverable under Fair Credit Reporting Act.
- (9537) *Griffor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Allegations that mortgage servicer defamed borrowers by reporting to credit reporting agencies that plaintiffs were delinquent in mortgage payments is preempted by Fair Credit Reporting Act unless plaintiff proves that information was provided to credit reporting agency with malice or with willful intent to injure. Complaint that alleged only that service are furnished inaccurate information after receiving notice from plaintiff of a dispute is preempted by Fair Credit Reporting Act. Allegations of complaint related specifically to servicer’s function as furnisher of credit information that is specifically preempted by FCRA.
- (9538) *Lanton v. Ocwen Loan Servicing, LLC*, 2017 WL 633468 (S.D. Ohio 2017) – Creditor’s alleged violation of Fair Credit Reporting Act for allegedly reporting incorrect information does not apply to losses arising out of non-consumer related transactions. FCRA specifically exempts from its coverage any business or business transactions. Creditor owed no duty to plaintiff as to information on plaintiff’s credit report to extent credit report was later used in connection with business loan application or business loan was denied based on alleged incorrect information.
- (9539) *Kehren v. JPMorgan Chase Bank*, 2017 WL 373513 (S.D. Ohio 2017) - Fair Credit Reporting Act allows injured party to recover damages including actual damages and reasonable attorney fees resulting from negligent failure to comply with requirements. Actual damages include both “concrete” damages and “humiliation and mental distress”, and can include damages for loss of opportunity in the home mortgage market, emotional distress and loss of income from missing work to address defendant’s mistakes. Plaintiff’s complaint sufficiently stated cause of action alleging that based on inaccurate information provided by lender, plaintiff was rejected for home loan and lost any potential equity to begin from home purchase; and that incorrect information in credit report resulted in multiple inquiries into plaintiff’s credit history which adversely affected plaintiff’s credit score. Fair Credit Reporting Act also allows injured party to recover actual and punitive resulting from willful failure to comply with requirements. Willfulness requires proof that creditor acted knowingly or recklessly. Plaintiff’s complaint sufficiently stated cause of action for willful violation of FCRA by alleging that plaintiff notified lender and the credit reporting agency, which also notified lender, of incorrect information, yet lender failed to correct information over a period of several years. Lender continued to report that plaintiff owed lender \$10 when debt had actually been discharged in bankruptcy. Complaint alleged that lender conducted a reasonable investigation only after plaintiff had obtained counsel. Allegations were sufficient to draw a reasonable inference that lender failed to conduct a reasonable investigation in violation of FCRA.
- (9540) *Griffin v. Bank of America, NA*, 2016 WL 7487724 (N.D. Ohio 2016) – Following *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016), standing requires an injury in fact; a causal connection; and a likelihood that injury will be redressed by favorable decision. Injury in fact requires concrete and particular invasion of legally protected interest that is actual and imminent. Intangible injury may be concrete where intangible harm has close relationship to harm that has traditionally been regarded as providing basis for lawsuit and Congress identified and elevated intangible harm to status of legally cognizable injury. Violation of procedural right granted by statute can be sufficient under certain circumstances to constitute injury in fact. Consumer had standing under Fair Credit Reporting Act based on allegation that defendant wrongfully obtained and used information in a credit report in violation of 15 USC section 1681b. Privacy interest protected under FCRA is a substantial right giving rise to cause of action for unauthorized viewing even where information contained in creditor report is not used by party obtaining report or disclosed by party retaining report to any third party. Plaintiff has standing to bring action for mere “procedural violation” of wrongfully obtaining credit report.
- (9541) *Griffin v. Bank of America, NA*, 2016 WL 7487724 (N.D. Ohio 2016) - Fair Credit Reporting Act allows a party to obtain a credit report only for a “permissible purpose” including extension of credit, or review our collection of an account of a consumer; employment purposes; underwriting insurance; eligibility for a license or other benefit granted by government instrumentality; potential investor or servicer in connection with evaluation or assessment of credit; or other legitimate business need for information in connection with a transaction that is initiated by consumer or to review account to determine whether consumer meets the terms of account. Creditor violated FCRA by obtaining credit report where obligation from plaintiff to creditor had been discharged in bankruptcy some years prior to defendant’s obtaining report and creditor had no “permissible purpose” in obtaining credit report. Creditor’s actions violated 15 USC Section 1681b(f) for which plaintiff had standing to maintain private cause of action against defendant.
- (9542) *Lovegrove v. Ocwen Home Loans Servicing, LLC*, Case No. 15-2158 (4th Cir. 2016) – Fair Credit Reporting Act, 15 USC Section 1681s-2(a)(2) requires that any party who regularly and in ordinary course of business furnishes information to consumer reporting agencies was correct and update information provided to ensure that information is complete and accurate. However, Section 1681s-2(c) does not contain a private right of action for violation. Section 1681s-2(b) creates private cause of action only where creditor who has been notified by credit reporting agency that consumer has disputed information and creditor either fails to investigate the dispute, to report the results of the investigation, or, if any information was inaccurate, to report the results of the investigation. Mortgage servicer fully complied with requirements where Debtor filed dispute with credit reporting agency, credit reporting agency contacted mortgage servicer, and mortgage servicer promptly responded with the results of the investigation correcting the information contained in the credit report.
- (9543) *Jackson v. Experian Information Solutions, Inc.*, 2016 WL 2910027 (N.D. Ill. 2016) – Federal Trade Commission rules regarding FCRA are instructive but not binding on court. FTC regulations indicate that it is not inaccurate to disclose debt discharged in bankruptcy as long as

report also indicates Zero balance due to reflect that consumer is no longer liable on debt. FTC rules were unclear as to whether additional information that debt was discharge in bankruptcy was inaccurate or misleading even where consumer did file bankruptcy and obtained discharge. Complaint stated cause of action by alleging that creditor report contained payment history that created false impression that consumer continued to make payments for years after debt was discharged.

- (9544) *Spokeo, Inc. v. Rogins*, ___ US ___ (2016) – Constitutional standing requires (1) injury in fact, (2) that is fairly traceable to the challenged conduct; and (3) that is likely to be redressed by favorable judicial decision. “Injury in fact” requires that plaintiff suffered invasion of legally protected interest that is concrete and particularized. Injury is particularized if it affects plaintiff in personal and individual way, rather than violation of legal right that causes injury to class of people generally and in undifferentiated manner. Injury is “concrete” if it actually exists and is more than merely abstract and can be either tangible or intangible. Plaintiff’s complaint for alleged violation of Fair Credit Reporting Act sufficiently alleged that defendant’s incorrect reporting of personal information violated plaintiff’s statutory rights and that plaintiff had persona interest in the handling of plaintiff’s personal information. However, complaint did not allege any specific or concrete injury that resulted from defendant’s conduct in disseminating the allegedly incorrect information. While plaintiff’s complaint demonstrated violation of plaintiff’s particularized interests, absent pleading of concrete injury plaintiff’s complaint failed to demonstrate constitutional standing.
- (9545) *Winchester v. City of Hopkinsville*, 2015 WL 1117295 (W.D. Ky. 2015) – FCRA requires that party who uses information in credit report when making adverse decision regarding employment must, before taking adverse action, provide a copy of the credit report to the person and advise that person has opportunity to dispute contents of report. “Adverse” employment decision is any denial of employment or other decision for employment purposes that adversely affects current or prospective employee. City failed to comply with FCRA when city based decision not to hire applicant based on information in credit report but did not provide copy of report to applicant. However, failure was harmless error as applicant could not prove that failure to comply caused injury. Applicant executed document acknowledging that City would use his consumer report during hiring process, and that applicant could request the investigative information. Applicant acknowledged City representative discussed credit reports with applicant, line by line, correcting any discrepancies and applicant eventually confirmed two prior bankruptcies as well as ongoing delinquent credit issues that were not disclosed in employment application. Applicant discovered only one alleged error in the background check which would have reduced debts from \$157,000 to approximately \$147,000 and there was no evidence that this relatively slight variance would have redeemed applicant’s application or otherwise altered the City’s decision.
- (9546) *Childress v. Experian Information Solutions, Inc.* Case No. 14-2864 (7th Cir. 2015) – When credit reporting agency receives documentation that Debtor voluntarily dismissed a bankruptcy case prior to discharge, agency must update records to accurately reflect that status. Agency did not violate FCRA when it was advised of dismissal of case and noted credit file as “dismissed” when agency had not been provided documents showing that case had been voluntarily dismissed by Debtor. Agency only has duty to use reasonable effort to make sure report is correct. Any bankruptcy case that terminates before conclusion is dismissed and agency does not have duty to investigate to determine if dismissal is result of voluntary request by Debtor or for some other cause.
- (9547) *Groff v. Wells Fargo Home Mortgage, Inc.*, 2015 WL 2169811 (E.D. Mi. 2015) – FCRA designed to prevent inaccurate consumer credit information on credit reports. Entity that provides information must, on receiving report of a dispute, investigate and if appropriate correct the information. If furnisher is negligent in breaching duty, borrower is entitled to actual or statutory damages as well as punitive damages. Information is accurate if it reflects the terms of and liability for the account; reflects the consumer’s performance and other conduct with respect to the account; and identifies the correct consumer. Bank does not violate FCRA where, after Debtor receives discharge in bankruptcy without reaffirming debt, creditor reports debt as closed, with no balance, and no payments, even if consumer continues to voluntarily make payments on secured debt. Discharge extinguishes liability on note but leaves mortgage intact such that reporting account as closed with a zero balance accurately reflected Debtor’s lack of personal liability on note.
- (9548) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – FCRA does not impose liability on party who accesses consumer credit report with “reason to believe” that the access is permissible. Permissible use includes use of information for collection of account. Creditor had reason to believe that it held two accounts owed by Plaintiff, accounts opened in Plaintiff’s name, date of birth and social security number; and access was for purposes of updating location information which is type of permissible account review. Fact that statute of limitations may have expired on the debt eliminates the remedy, but not the debt, such that creditor’s actions in obtaining information is still connected to the account status of the debt. Utility service accounts are credit transactions within scope of FCRA and permissible use. Credit transaction is the right to purchase property or services and defer payment, and includes utility service contracts. Creditor’s receipt of updated information from credit bureau after creditor received notice that plaintiff disputed debt did not render defendant liable as it appeared that requests were routine and done in good faith and after plaintiff requested information be removed from the credit bureau, the bureau did so. Request to review information, even on closed account, is not violation of FCRA.
- (9549) *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.

- (9550) *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.
- (9551) *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.
- (9552) *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.

25.22 Equal Credit Opportunity Act

- (9553) *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff'd by equally divided Court*, 2016 WL 1092416 (2016) – Guarantor of loan is not “applicant” under ECOA. Lender did not violate ECOA where lender, as condition of loan to LLC owned by husbands, required spouses to sign guarantees, rejecting Sixth Circuit holding in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group*, 754 F.3d 380 (6th Cir. 2014).
- (9554) *RL BB Acquisition, LLC v. Bridgemill Commons Development Group*, 754 F.3d 380 (6th Cir. 2014) – Guarantor is encompassed within definition of “applicant” for purposes of ECOA. While guarantor is not technically asking for loan, guarantor is formally approaching creditor to offer up personal liability if borrower defaults.
- (9555) *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.
- (9556) *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.
- (9557) *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.

25.23 Credit Repair Organizations Act

- (9558) *Payton v. Nationwide Debt Direct*, 2016 WL 3058010 (S.D. Ohio 2016) - CROA is a consumer protection statute designed to prevent fraud and abuses caused by credit repair organizations. CROA prohibits “credit repair organizations” from making untrue or misleading statements and from committing fraud and deception, and it requires certain disclosures to consumers. “Credit repair organization” is means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of (i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i). Defendant did not meet definition of Credit Repair Organization where Defendant's solicitation letter did not contain representations that its debt settlement services could improve a person's credit record, credit history, or credit rating but merely generally identified different financial benefits of debt settlement including debt reduction, interest payment savings, and avoidance of bankruptcy.

25.24 Mortgage Brokers, Lenders and Services Licensing Act

- (9559) *Grifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Michigan Mortgage Brokers, Lenders, and Services Licensing Act (“MMBLSLA”), prohibits knowingly distributing or permitting to be distributed false, misleading or deceptive statements or representations with regard to terms or conditions of mortgage loan or for making false promises or misrepresentations as to an essential material fact. MMBLSLA does not apply to depository financial institutions. MMBLSLA imposes licensing requirements on mortgage brokers, lenders and servicers. Act allows, but does not require, complaint to be filed with State Commissioner. However, complaint must plead fraud with requisite specificity including how the alleged misrepresentations were material, false or how plaintiffs relied on alleged misrepresentations.

25.25 Servicemembers Civil Relief Act – Adjustment of Loan Terms

- (9560) *Banaszak v. CitiMortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, provides that any obligation incurred before entering service may not bear interest at greater than 6% during service and in some cases

for a year after discharge; allows service member to apply for relief from collection efforts; prohibits adverse credit reporting based on relief provided for in SCRA; and precludes foreclosure for taxes or other assessments on real property. Complaint failed to state cause of action where creditor retroactively adjusted interest rate to 6% upon being advised that borrower had been activated and borrower never actually paid more than 6%. However, to extent borrower incurred late fees based on the initial imposition of higher interest rate, complaint stated cause of action where borrower alleged that he was not able to make higher payments causing him to become delinquent. Complaint also stated cause of action for failure to lower the interest rate after borrower was activated a second time. Lender made appropriate retroactive changes during first deployment, but there was no evidence that lender made same adjustments after borrower was deployed a second time.

25.26 Servicemembers Civil Relief Act – Injunctive Relief

- (9561) *Banaszak v. CitiMortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, precludes foreclosure for taxes or other assessments on real property. Injunctive relief does not preclude foreclosure of mortgage based on payment default as mortgage foreclosure is not foreclosure for taxes or assessments.

25.27 Servicemembers Civil Relief Act – Credit Reporting

- (9562) *Banaszak v. CitiMortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, prohibits adverse credit reporting based on relief provided for in SCRA. Complaint failed to state cause of action against lender where complaint did not allege that lender had reported adverse information but only stated that borrower believed that creditor may, at some point in the future, make an adverse credit report. Absent an actual reporting of adverse information, complaint essentially sought order directing creditor to comply with law in the future, which is not a justiciable request for relief.

25.28 Interpleader

- (9563) *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.

25.29 Michigan Consumer Protection Act

- (9564) *Nino v. Flagstar Bank, FSB*, 2018 WL 1556235 (E.D. Mi. 2018) – Federally Chartered Banks are generally exempt from State Consumer Protection Statutes regardless of nature of underlying act.
- (9565) *Karmol v. Ocwen Loan Servicing, LLC*, 2016 WL 7188742 (W.D. Mi. 2016) - Michigan Consumer Protection Act excludes from coverage any transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of the state or the United States specifically including residential mortgage loan transactions. Plaintiff's complaint that lender illegally charge late fees, misapplied unspecified payments, mishandled escrow account, and charged marked up fees for default related services or services in connection with "residential mortgage loan transaction" that is exempt from MCPA.
- (9566) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio 2014) – Ohio consumer protection act requires that allegedly unfair or deceptive act or practice occur in connection with consumer transaction, defined as transaction primarily for persona, family or household use. Transactions between financial institutions and their customers are excluded from the definition of consumer transactions. Exemption extends to law firms acting on behalf of exempt financial institution. Allegations arising out of foreclosure action brought by exempt federally insured institution and its law firm failed to state cause of action.
- (9567) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Michigan Consumer Protection Act does not apply to transactions that are subject to or regulated by regulatory board or officer acting under authority of the state or the United States. Loan transactions including loan modifications with FNMA are subject to regulatory control by Michigan Office of Financial Services and also by Federal Housing Authority under its regulatory power over national banks (including FNMA), complaint regarding alleged failure to offer or comply with loan modification fails to state cause of action under Michigan's consumer protection act.
- (9568) *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.
- (9569) *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.

- (9570) *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.

25.30 Michigan Motor Vehicle Sales Act

- (9571) *Allen-Morris v. Nicholas Financial, Inc.*, 2104 WL 5480825 (E.D. Mi. 2014) – Motor Vehicle Sales Act, MCL 491.118, prohibits motor vehicle seller from imposing finance charges in excess of 25% per year. “Finance Charges” are any fees or expenses that a credit buyer pays that a cash buyer would not pay. If seller imposes higher purchase price on credit buyer than for a cash buyer because the purchaser is using credit, increment is included in finance charge calculation. Plaintiff must demonstrate causal connection between purchase price and extension of credit. Fact that buyer paid more for motor vehicle than “blue book” value did not demonstrate that higher price was caused by credit nature of transaction where plaintiff did not demonstrate that but for the credit aspect of the transaction the purchase price would have been lower.

25.31 Conspiracy

- (9572) *Bash v. Textron Financial Corp.*, 2017 WL 2349601 (N.D. Ohio 2017) – Complaint seeking relief for civil conspiracy sufficiently alleged “malicious agreement” where complaint contained sufficient facts to demonstrate that defendant, in exchange for hundreds of thousands of dollars, turned a blind eye to and actually participated in fraudulent conduct including assisting two co-conspirators in looting Debtor company and converting profitable business into Ponzi scheme. Malicious combination does not require express agreement between conspirators, but only a common understanding or design, even if tacit, to commit unlawful act and that conspirators shared general conspiratorial objective.
- (9573) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Complaint failed to allege any basis for recovery for alleged conspiracy between lender and lender’s successor in interest related to plaintiff’s mortgage. Mere conclusory allegations that defendants were engaged in some undefined scheme to use mortgage backed securities and to falsify public records to create non-existent chain of title and then concealing plaintiff’s right to obtain loan modification presented no factual basis for an action for conspiracy.
- (9574) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Conspiracy is not “stand alone” cause of action. Conspiracy requires a separate actionable tort. Where complaint fails to state cause of action for separate tort, cause of action for conspiracy necessarily fails to state cause of action.
- (9575) *Wallace v. Midwest Financial and Mortgage Services, Inc.*, 2013 WL 1729587 (6th Cir. 2013) – Complaint did not sufficiently allege 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.
- (9576) *Brown v. Orleans 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.

25.32 Racketeer Influenced and Corrupt Organizations Act (RICO)

- (9577) *Elam v. Aurora Commercial Corporation*, 2018 WL 3059625 (W.D. Tn. 2018) – RICO action requires two or more predicate offenses; existence of enterprise; nexus between pattern of racketeering activity and enterprise; and injury to business or property. Complaint must allege fraud with particularity including statements which plaintiff contends were fraudulent; identity of speaker; where and when statements were made; and why statements were fraudulent. Mere generalized statements that defendant engaged in mail and wire fraud insufficient to state cause of action under Federal Rule 9. Further, statute of limitations under RICO is four years from discovery of injury. Complaint did not state specific date on which plaintiff discovered alleged RICO conduct, but even viewing allegations in light most favorable to plaintiff, conduct occurred no later than November, 2010, such that statute of limitations expired well before commencement of action in 2017.
- (9578) *Hubbard v. Select Portfolio Services, Inc.*, 2018 WL 2753646 (6th Cir. 2018) – Court can deny Motion for leave to Amend Complaint where amendment would be futile. Proposed amendment to add RICO claim futile where amendment did not allege existence of enterprise engaged in interstate commerce; commission by members of enterprise of two or more predicate offenses; nexus between enterprise and predicate offenses; or injury to Plaintiff based on enterprise. Complaint contained blanket conclusory statements with no factual assertions that Defendants mailed statements to “thousands of homeowners” but did not allege time, place, or content of any false representation on which Plaintiff relied; defendants’ fraudulent intent; or injury resulting from fraud.
- (9579) *Elam v. Aurora Services Loan, LLC*, 2018 WL 2074202 (W.D. Tn. 2018) – Civil RICO claims have four-year statute of limitations running from date of discovery of injury, not discovery of other elements of claim. Plaintiffs RICO claim stemmed from defendants repeated attempts to foreclose mortgage. First foreclosure action constitutes “injury” that begins RICO statute of limitations. Action filed in 2017 time-barred where foreclosure proceedings began in late 2007, substantially more than four years prior to commencement of RICO action. Further, complaint did not contain any factual allegations to support pattern of racketeering activity or the existence of an enterprise that engaged in or affected interstate commerce. Mere alleged wrongful foreclosure is not violation of RICO.

- (9580) *Jones v. US Bank, NA*, 2017 WL 2191629 (S.D. Ohio 2017) – RICO action requires proof of (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Racketeering activity includes defined “predicate acts” including mail fraud and wire fraud. Complaint must allege factual basis for predicate acts including specification of statements that plaintiff contends are fraudulent; identity of speaker; where and when statements were made; and explain why statements were fraudulent. Complaint failed to state cause of action where complaint alleged only in conclusory fashion that defendants had committed mail fraud and wire fraud without any factual basis. Further, complaint alleged only that assignment of mortgage from original lender to US Bank was somehow fraudulent. Allegations involving single mortgage loan are insufficient to establish “pattern” of racketeering activity.
- (9581) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Complaint failed to state cause of action for violation of Ohio Corrupt Practices Act. Violation of OCPA requires that the defendant’s conduct involve commission of 2 or more specifically prohibited offenses; that prohibited criminal conduct constitutes pattern of corrupt activity; and that defendant has participated in an enterprise or has acquired or maintained interest in or control of an enterprise. OCPA action brought us to a collection of “unlawful debt” requires that that be legally unenforceable in whole or in part because debt was incurred or contracted in violation of federal or state law are relating to gambling activity or lending money and usurious rates. Complaint did not allege that underlying loan arose out of gambling or violated usury laws and complaint did not allege any pattern of corrupt practices as required by statute. Contractually and statutorily authorized foreclosure action is not offense referenced in statute and complaint did not allege how defendants, all individuals, attempted to collect any debt or took any action to foreclose mortgage where Corporation, not individual corporate officers, sought to collect obligation.
- (9582) *Karmol v. Ocwen Loan Servicing, LLC*, 2016 WL 7188742 (W.D. Mi. 2016) - RICO claim, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) consisting of at least two “predicate acts” within 10 years. Complaint alleged as predicate acts mail and wire fraud must specify the alleged fraudulent statements; the identity of the speaker; the date and place where the statements were made; and to explain what made the statements fraudulent. Complaint that contained nothing more than conclusory statements of fraud failed to state cause of action.
- (9583) *Clair v. Bank of America*, 2016 WL 3911441, *report and recommendations adopted*, 2016 WL 6092715 (W.D. Tn. 2016) – RICO complaint failed to state cause of action where all fraudulent schemes alleged by plaintiff occurred more than 4 years prior to commencement of action and are barred by statute of limitations. Complaint also failed to allege any pattern of racketeering activity, failed to allege any predicate acts, and failed to allege that acts continued or posed a threat of continuing but at most alleged single objection to defraud plaintiff with respect to plaintiff’s own loan. Request for *in forma pauperis* status denied and case dismissed.
- (9584) *Donley v. Seterus, Inc.*, 2016 WL 4138235 (E.D. Mi. 2016) – RICO action requires that the defendants (1) acquired or maintained, (2) through a pattern of racketeering activity or the collection of an unlawful debt (3) an interest in or control of an enterprise (4) engaged in, or the activities of which affect, interstate or foreign commerce. Plaintiff’s complaint seeking damages for alleged wrongful foreclosure failed to state cause of action for RICO where complaint did not allege that there was any gambling debt involved or that the mortgage and note were somehow unenforceable under state or federal usury laws. Only possible link between creditor and RICO would be if creditor committed wire or mail fraud, which must be pled with specificity as to time and place as well as content of alleged fraudulent statement, a fraudulent scheme, fraudulent intent of the defendant, and injury arising from reasonable reliance on fraud. Complaint alleged only that (1) an employee of Seterus informed Donley by letter that she had been overpaying the mortgage in 2011, and he would request an audit; (2) Seterus sent Donley a letter in February, 2013 stating how her payment had been applied to satisfy monthly payments, late fees, and legal fees incurred as a result of her Chapter 7 bankruptcy which was allegedly inaccurate; (3) Seterus sent Donley a letter in October, 2013 acknowledging that “information was not accurate;” (4) Seterus instructed her to apply for a loan modification in November, 2013; (5) Seterus advised Donley that she was “not on the loan” in November, 2013; (6) Seterus sent Donley a letter that the prior services had “added [her] name to the loan,” and (7) Seterus issued a reinstatement quote that allegedly was inaccurate in February, 2014. There were no allegations in the Complaint that Seterus committed wire or mail fraud as required under RICO as none of the allegations indicated that letters were part of an fraudulent scheme or that Seterus had fraudulent intent. Further, there was no link between alleged fraud and foreclosure where Plaintiffs admittedly stopped paying mortgage 6 months before foreclosure and foreclosure was direct result of Plaintiff’s failing to make payments having nothing to do with any alleged fraud in the letters sent to Plaintiff. Allegation also focused on single scheme or artifice to defraud single victim over relatively short period of time which is insufficient to constitute pattern of racketeering activity.
- (9585) *RICO Wall v. Michigan Rental*, 2016 WL 3418539 (E.D. Mi. 2016) – RICO Act requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Plaintiff must establish that he has been injured in his business or property by the conduct constituting the violation.” Racketeering activity encompasses acts that are indictable as federal mail, wire, and bank fraud. Mail fraud requires: (1) a defendant devised, or intended to devise, a scheme to defraud, or that he performed specific fraudulent acts; (2) involving the use of the mails; (3) did so in order to execute a fraudulent scheme; and (4) A specific intent to defraud is required. Wire fraud requires: (1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property, including (a) that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; and (b) that the defendant did so with the intent to defraud. Plaintiff must plead with specificity 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 with a sufficient factual basis to support an inference that fraudulent misrepresentations were knowingly made. Plaintiffs’ RICO complaint did not state cause of action where in lieu of particular dates, names, and locations, Plaintiffs pointed to unknown fraudulent acts that took place on one or more occasions over a two-year time span. Plaintiffs vaguely asserted that Defendants either did not deposit, or withdrew or transferred funds given by Plaintiff as security deposit for rental and somehow used funds to their own benefit. Plaintiffs also did not adequately plead an injury to business or property as security deposits were returned less deductions, such that even assuming that the landlord mishandled the security deposits in some way, the Plaintiffs did not allege any actual damages as a result.
- (9586) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – RICO claim requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. “Racketeering activity” are acts that violate various state and federal criminal laws, including

mail fraud, wire fraud, and extortion. Pattern of racketeering activity requires at least two acts of racketeering activity within a ten-year period and a relationship between the predicates and of the threat of continuing activity. Even assuming complaint alleged some predicate activity, there was no evidence of any continuity where allegations were limited to single effort by lender to enforce mortgage through foreclosure proceeding with no evidence of any “long-term criminal conduct”.

- (9587) *Rose v. Friendly Finance Co.*, 2016 WL 98597 (S.D. Ohio 2016) – RICO makes it unlawful for any person employed by or associated with any enterprise to conduct or participate in conduct of enterprise affairs through pattern of racketeering. If activity is premised on mail fraud, party must specifically allege the circumstances of mail fraud. Complaint stated cause of action by alleging that lender force placed insurance and then added premium to principal of loan and then used mail in furtherance of fraud, when borrower in fact had insurance and lender lacked any legal basis to obtain insurance. Complaint specified allegedly fraudulent statements and explained why statements were fraudulent, that fraud resulted in injury, and lender’s conduct was proximate cause.
- (9588) *Lindberg v. Bank of America*, 2015 WL 6738690 (W.D. Mi. 2015) – RICO claim must allege that defendant engaged in activities that affect interstate commerce and activities amounted to pattern of racketeering activity or collection of unlawful debt. Racketeering activities included but are not limited to wire fraud and mail fraud, and must include at least two separate predicate activities within 10 year period. Mail fraud consists of scheme to defraud and use of mails in furtherance of scheme. Wire fraud is same as mail fraud except that defendant uses wires in lieu of mail. Scheme to defraud is any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of money where the defendant acted either with a specific intent to defraud or with recklessness with respect to potentially misleading information. RICO also requires additional facts to establish pattern of activity such that predicate acts have same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events and involves either a closed period of repeated conduct, or past conduct that by its nature projects into the future with a threat of repetition. Plaintiff’s complaint must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, (4) explain why the statements were fraudulent and (5) that conduct was proximate cause of damages. Complaint failed to meet pleading requirement where complaint alleged only that mortgage had been altered after execution but did not allege any mailing or communications through the wires related to that alteration; did not identify the speaker or author of the alleged fraudulent statements; and did not specify where and when the statements were made. At most, plaintiffs alleged that they met with a representative of the defendant at some point after the alleged forgery occurred but complaint indicated that communication was in person, not over the phone or other wire. Further, even if this meeting occurred by phone, complaint alleged only a single communication. General allegation of other mailings did not satisfy pleading requirement. Complaint also failed to allege either continuity or past conduct that by its nature projects into the future, where complaint alleged that defendant’s conduct was keyed to the single objective of profiting from foreclosing on plaintiff’s property, with no allegations of any other scheme or that scheme would continue beyond completion of foreclosure process, and there was no evidence of any long term criminal conduct.
- (9589) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015) *aff’d*, 2016 WL 4269803 (6th Cir. 2016) – Borrower’s RICO action based on allegedly fraudulent assignment of mortgage barred by res judicata where State Court had previously entered final judgment foreclosing mortgage and indicating that lender was the real party in interest.
- (9590) *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.

25.33 Intentional Infliction of Emotional Distress

- (9591) *Abraham v. Palmer*, 2016 WL 4544432 (Bankr. N.D. Ohio 2016) – Intentional infliction of emotional distress requires conduct so outrageous in character and so extreme as to be beyond all possible bounds of decency and is atrocious and intolerable, and requires proof that defendant intended to cause serious distress; defendant’s conduct was extreme and outrageous; and defendant’s conduct was proximate cause of emotional distress. Conduct must be so outrageous in character and so extreme as to be beyond all possible bounds of decency and is atrocious and intolerable, and requires proof that defendant intended to cause serious distress; defendant’s conduct was extreme and outrageous; and defendant’s conduct was proximate cause of emotional distress. Statements made by Debtor at public zoning meeting regarding plaintiff’s conduct were made in response to and were responsive to question. Debtor’s failure to later clarify statements demonstrates that Debtor made false statements but does not prove that statements were made willfully and maliciously or that statements were made in extreme and outrageous manner.
- (9592) *Gentry-Youngblood v. MGC Mortgage, Inc.*, 2016 WL 3129190 (E.D. Tn. 2016) – Intentional infliction of emotional distress requires (1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff. While foreclosure action in which person may lose home is undoubtedly an emotionally trying process, emails from attorneys for lender and servicer reflecting quite civil correspondence from a creditor to a Debtor regarding collection of a debt that is owing does not constitute “outrageous conduct” not tolerated by civilized society.

- (9593) *Parker v. Midwest Loan Services, Inc.*, 2016 WL 1242440 (E.D. Mi. 2016) – Intentional infliction of emotional distress required (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. Conduct must be so outrageous in character and extreme in degree as to go beyond all bounds of decency, to be regarded as atrocious and utterly intolerable in civilized community. Cause of action arising out of routine foreclosure in not type of conduct that is outrageous.
- (9594) *Cole v. JPMorgan Chase Bank*, 2016 WL 319866 (S.D. Ohio 2016) – A claim for intentional infliction of emotional distress requires proof that: (1) the defendant(s) engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) caused the plaintiff severe emotional distress. Conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, to point if being atrocious and utterly intolerable in civilized community. Defendant must either engage in conduct with purpose of causing severe emotional distress or knows that conduct is certain or substantially certain to have that result. Lender's refusal to consider possible loan modification does not amount to atrocious and utterly intolerable conduct, even if result is to cause frustration for borrower and possible foreclosure of mortgage.
- (9595) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule. Further, complaint failed to allege extreme and outrageous conduct on part of defendant, constituting conduct 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. Lender's actions in pursuing foreclosure of mortgage consistent with Michigan law is not chargeable with infliction of emotional distress.
- (9596) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Intentional infliction of emotional distress requires that (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. While foreclosure process may be embarrassing, that is not conduct so outrageous and extreme in degree as to go beyond all bounds of decency.
- (9597) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Intentional infliction of emotional distress requires that (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. While foreclosure process may be embarrassing, that is not conduct so outrageous and extreme in degree as to go beyond all bounds of decency.
- (9598) *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.
- (9599) *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.

25.34 Negligent Infliction of Emotional Distress

- (9600) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule. Further, in Michigan, negligent infliction of emotional distress requires that plaintiff witness a negligent injury to third party and suffer a mental disturbance as a result. Lender's prosecution of mortgage foreclosure action consistent with Michigan law cannot support action for negligent infliction.
- (9601) *Brown v. Orlans 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.

25.35 Defamation

- (9602) *AFS/IBEX v. Larson*, Case No. 15-11409 (E.D. Mi. 2018) – Statements made at Section 341 meeting are subject to absolute privilege and cannot form basis of cause of action for defamation. Absolute privilege applies to proceedings of legislative bodies; judicial proceedings; and communications by military officers. Section 341 Meeting is "judicial proceeding" as testimony at Section 341 Meeting assists Court in administration Bankruptcy estate and involves disclosing to creditors possible assets and potential targets of recovery. Debtor does not have right to evaluate liability or collectability and then fail to disclose. Statements are privileged if made during trial or part of judicial proceeding. Testimony, even if false or malicious, is absolutely privileged.
- (9603) *Grifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Allegations that mortgage servicer

defamed borrowers by reporting to credit reporting agencies that plaintiffs were delinquent in mortgage payments is preempted by Fair Credit Reporting Act unless plaintiff proves that information was provided to credit reporting agency with malice or with willful intent to injure. Complaint that alleged only that service are furnished inaccurate information after receiving notice from plaintiff of a dispute is preempted by Fair Credit Reporting Act. Allegations of complaint related specifically to servicers function as furnisher of credit information that is specifically preempted by FCRA.

- (9604) *Abraham v. Palmer*, 2016 WL 4544432 (Bankr. N.D. Ohio 2016) – Cause of action for defamation under state law required proof that Debtor made false statement of fact; about plaintiff; published without privilege to third parties; with fault or at least negligence on part of Debtor; and statement was either defamatory per se or caused special harm. Statements made by Debtor at public zoning meeting regarding plaintiff's conduct were made in response to and were responsive to question. Debtor's failure to later clarify statements demonstrates that Debtor made false statements but does not prove that statements were made willfully and maliciously or that statements were made in extreme and outrageous manner.

25.36 Invasion of Privacy

- (9605) *Abraham v. Palmer*, 2016 WL 4544432 (Bankr. N.D. Ohio 2016) – State law cause of action for invasion of privacy requires that one party places another before the public in false light that would be highly offensive to reasonable person and that actor had knowledge of or acted in reckless disregard of the falsity of the publicized information and the false light in which other would be placed. Statements must be both false and material – privacy is not invaded by disclosure of unimportant false statements, even if made deliberately. Statements made by Debtor at public zoning meeting regarding plaintiff's conduct were made in response to and were responsive to question. Debtor's failure to later clarify statements demonstrates that Debtor made false statements but does not prove that statements were made willfully and maliciously or that statements were made in extreme and outrageous manner.

25.37 Constitutional Claims – Generally

- (9606) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – FNMA is not state actor for purposes of fifth amendment. There is no constitutional impediment to FNMA foreclosure by notice rather than through judicial process.
- (9607) *Mik v. Federal Home Loan Mortgage Corp.*, 743 F.3d 149 (6th Cir. 2014) – Freddie Mac is not state actor. Same conclusion has been reached by every district court that has considered issue and also has been reached by the highest Michigan State Court to have reached the issue.
- (9608) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – 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.
- (9609) *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.
- (9610) *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.
- (9611) *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.
- (9612) *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.
- (9613) *Kapla v. FNMA*, 485 BR 136 (Bankr. E.D. Mi. 2012), *aff'd* 2014 WL 346019 – 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.

25.38 Slander of Title

- (9614) *Mandingo v. PNC Bank*, 2017 WL 6506368 (6th Cir. 2017) – Statements made during course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to issue being tried precluding claim for damages in a civil action for slander. Lender's statements made to Bankruptcy Court regarding status of loan default cannot constitute slander of title even assuming statements were incorrect. Further, Debtor did not demonstrate that Lender took action to slander title. Slander of title requires the publication of some false statement. Defendant's Notice of Foreclosure stated that the mortgage was in default. Debtor did not present any evidence that the statement was false and made only the conclusory statement that loan was not actually in default.
- (9615) *Blasingame v. Church Joint Venture, LP*, 2015 WL 4758933 (W.D. Tn. 2015) – Slander of Title requires 1) that plaintiff has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statements proximately caused the plaintiff a pecuniary loss. Lis pendens recorded by defendant which encompassed Plaintiff's property constituted publication of statement but nothing in Lis pendens was false as it correctly identified the Plaintiff as a co-

defendant in adversary proceedings pending in the United States Bankruptcy Court in which the purpose of the proceeding was to determine if property transfers to defendant were fraudulent. Later dismissal of adversary complaint did not render statements in *Lis pendens* false when made. Plaintiff also failed to demonstrate that recording of *Lis pendens* was done maliciously or with reckless disregard for rights of Plaintiff. Fact that *Lis pendens* was recorded to create cloud on title is not sufficient to demonstrate malice where, at the time of its recording, there was an adversarial proceeding addressing the issue of whether certain properties, including the Farm, were fraudulently transferred by the co-trustees. Defendants had a good faith belief that the Farm had been fraudulently transferred, and filed a legal proceeding to determine the validity of their claim to the disputed property. Failure to terminate *Lis pendens* after termination of adversary proceeding Bankruptcy Court did not make recording in first instance “malicious” was not malicious where adversary proceeding was pending on date *Lis pendens* originally recorded.

- (9616) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Slander of title requires the plaintiff to show (1) that it has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statement proximately caused the plaintiff a pecuniary loss. General allegations that lender published notice of default and notice of sale insufficient where complaint did not attach any documents and did not allege dates, descriptions, quote, copies or other facts to demonstrate that any published document contained any false statement.
- (9617) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Slander of title requires the plaintiff to show (1) that it has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statement proximately caused the plaintiff a pecuniary loss. General allegations that lender published notice of default and notice of sale insufficient where complaint did not attach any documents and did not allege dates, descriptions, quote, copies or other facts to demonstrate that any published document contained any false statement.
- (9618) *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.

25.39 Malicious Prosecution

- (9619) *Kearns v. Havlovic*, 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof of deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts necessary for finding of non-dischargeability. Collateral estoppel applies where (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. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor’s conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff’s favor; and (4) seizure of plaintiff’s person or property during the course of the prior proceedings. Proceedings differ as abuse or process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor’s intentional conduct.

25.40 Abuse of Process

- (9620) *Todaro v. Reimer, Arnovitz, Cherek & Jeffrey Co., LPA*, 2016 WL 6777805 (N.D. Ohio 2016), *aff’d*, 2017 WL 3207145 (6th Cir. 2017) – Abuse of process claim requires (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Complaint failed to state cause of action where complaint alleged that eviction complaint was filed in violation of law and at time when creditor lacked any legal basis of the complaint, as complaint did not allege that eviction proceeding had been properly commenced in first instance. Further, mere filing of complaint cannot constitute abuse of process without some additional act indicating an ulterior purpose other than to obtain possession of property or other “perversion” of the legal process.
- (9621) *Kearns v. Havlovic*, 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof of deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts

necessary for finding of non-dischargeability. Collateral estoppel applies where (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. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor's conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff's favor; and (4) seizure of plaintiff's person or property during the course of the prior proceedings. Proceedings differ as abuse or process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor's intentional conduct.

B. Mediation

25.41 When Appropriate

- (9622) *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.

25.42 Confidentiality

- (9623) *Deshikachar v. Collins*, 2016 WL 826053 (E.D. Mi. 2016) – Settlement achieved during mediation was enforceable where parties signed settlement agreement at mediation and agreement contained all essential terms. While terms of mediation are not normally admissible, where mediation produces settlement agreement, agreement is admissible in evidence on motion to enforce. Settlement agreement is interpreted using normal state law regarding interpretation of contract generally. While "agreement to agree" may not be enforceable, writing that evidences meeting of minds and includes all essential terms constitutes an enforceable agreement, not merely an agreement to engage in further negotiations.
- (9624) *Doe v. Archdiocese of Milwaukee*, 2014 WL 5671155 (7th Cir. 2014) – Statements made during mediation are privileged and not admissible in later proceedings. Statements may be admissible in separate action or proceeding only if action or proceeding is different than the dispute whose settlement was attempted in mediation and even then only if necessary to prevent manifest injustice of sufficient magnitude to outweigh importance of protecting confidentiality of mediation process in general. Dispute was not separate or distinct proceeding where issue was whether plaintiff settled for amount that was too low based on alleged misrepresentations by defendant of amounts paid to others to settle similar disputes and statements concerning defendant's ability to pay. Both mediated dispute and current dispute arose out of same operative facts and sought damages for same alleged conduct.

25.43 Settlement

- (9625) *Shinhan Bank v. Lehman Brothers Holdings, Inc.*, Case No. 17-2700 (2d Cir. 2018) - Casual exchange of emails can constitute written acceptance of mediation terms. Only issue in mediation was amount that defendant would pay to settle. After parties exchanged various drafts settlement agreements, defendant sent plaintiff an email indicating that the terms were acceptable and the defendant would sign the agreement. Defendant later refused to sign settlement agreement and plaintiff filed more's motion to enforce settlement. Defendant informed mediator that there was agreement on settlement amount without expressly reserving right not to be bound absent a signed, written settlement agreement; and defendant's failure to identify disagreement on any material issue was strong evidence of agreement leaving signing of settlement agreement only remaining step that was not completed because defendant reneged on settlement. Although other mediations in adversary proceedings arising out of same bankruptcy case had been settled only after execution of written settlement agreement, there was no specific requirement that a written settlement agreement be signed by parties before becoming effective.

25.44 Sanctions

- (9626) *Dixon v. Grand Trunk Western Railroad Co.*, 2017 WL 4913892 (E.D. Mi. 2017) – Sanctions imposed against party who refused to participate in mediation in good faith. Defendant had already determined that it would not offer any settlement at all and refused to negotiate during the mediation, resulting in mediation being waste of time and resources. Defendant could have filed Motion to dispense with mediation on basis that Defendant did not believe Plaintiff entitled to any recovery and Court could have considered cancelling or postponing mediation, rather than showing up for mediation only to refuse to participate. Tactic smacked of trying to run up Plaintiff's litigation costs in effort to being Plaintiff to his knees financially and thereby force a settlement. Sanctions included costs of mediation plus Plaintiff's attorney fees incurred in preparing for and attending mediation and travel expenses and mileage incurred by Plaintiff and his wife to attend mediation.
- (9627) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff'd* 2014 WL 3452292 (6th Cir. 2014) - 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.

C. Expedited hearing

25.45 Procedure

- (9628) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, Case No. 15-45642 (Bankr. E.D. Mi. 2015) – Motion for expedited hearing on request for preliminary injunction denied where automatic 60 day extension of redemption that came into effect under Section 108 when Debtor filed bankruptcy before expiration of redemption allowed ample time for court to schedule hearing on request for preliminary injunction in normal course before expiration of 60 day extension.
- (9629) *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.
- (9630) *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.
- (9631) *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

D. Disqualification or Recusal of Judge

25.46 Grounds

- (9632) *Mason v. Pichler*, Case No. 12-3348 (Bankr. E.D. Mi. 2017) – Relief from Order based on newly discovered evidence requires that evidence was previously unavailable notwithstanding due diligence in attempting to discover information; and that evidence is material and controlling and would have produced different result if presented before original judgment and is not merely cumulative or impeaching. Court would not reconsider Order Denying Motion for Recusal where Court previously held that Court had no personal knowledge of any disputed evidentiary fact and that its knowledge was limited to matters of record. Motion for Reconsideration alleged only that Counsel for one party in this case was also counsel to the same party in different adversary case and communications between counsel and the Court had no bearing on the instant adversary but rather involved a removed state court probate matter and an effort to surcharge a prior trustee, while the current action was against different defendants to recover fraudulent transfers. Further, any communications were not material as the communications involved only case status updates of state court matters and procedural items such as status and timing.
- (9633) *Mason v. Pichler*, Case No. 12-3348 (Bankr. E.D. Mi. 2017) - Judge is not required to recuse himself when considering post judgment motions or orders. Facts learned by Judge in judicial capacity are not grounds for disqualification. Judge relied on pleadings in entering order, all of which were part of record in this case and learned in judicial capacity. Judge did not have personal knowledge of disputed evidentiary facts and expressed opinions only as part of judicial proceedings.
- (9634) *Keeper of the Word Foundation v. Nathan*, Case No. 16-5089 (Bankr. E.D. Mi. 2017) - Disqualification of Judge under 28 USC Section 455 (a) requires proof that impartiality might reasonably be questioned based on totality of circumstances. Recusal is generally necessitated by extrajudicial factors. Judicial rulings alone almost never constitute valid basis for bias or partiality motion and remedy is appeal from rulings, not recusal. Extrajudicial source requires that alleged bias be based on "personal bias" that emanates from some source other than participation in the proceedings or prior contact with related cases and instead arises out of Judge's background and associations. Opinions formed by Judge on basis of facts introduced or advance occurring and course of proceeding or prior proceeding do not constitute basis for bias or partiality motion unless they display deep-seated favoritism or antagonism. Section 455 motions must be raised at the earliest moment after party acquires knowledge of facts providing basis for disqualification. Appearance of impropriety may be raised and collateral attack only if asserted promptly upon learning facts alleged to warrant recusal and may not be raised collaterally if opportunity to do so existed at time when direct review was available. Motion to Recuse amount into untimely collateral attack on orders previously entered by the Court including orders upheld on appeal. Motion for recusal did not make any allegations regarding extrajudicial conduct and rather merely complained about rulings previously entered by the Court in connection with motions to sell assets and denying motion for Remand. Record indicated that motion was filed for sole purpose of delaying Court rulings on pending adversary proceedings, and defendants unhappiness that it has to defend merits of complaint is not grounds for recusal under 28 USC Section 455.
- (9635) *In re Lundy*, 2016 WL 6108524 (Bankr. N.D. Ohio 2016) – 28 USC Section 455 provides that a judge shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned, or for personal bias or prejudice concerning a party. Standard is objective one, and does not depend on subjective view of party no matter how strongly held. Judge is not required to recuse himself if grounds are not shown. Expressing opinions about litigation is not reason for recusal. Statements of impatience, dissatisfaction, annoyance or even anger are not grounds for recusal. Recusal must be based on extra judicial source which is undeserved or excessive to degree that there is clear inability to render fair judgment. Judge not subject to recusal merely because he was Chapter 13 Trustee before taking bunch, current Trustee was staff attorney for Trustee; Court did not confirm plan even though Trustee had not objected and instead set matter for evidentiary hearing;

Judge, when he was Trustee, established many of the local practices; pamphlet issued to Chapter 13 Debtors continued to reference trustee as “he” indicating close relationship between Judge and current trustee; Court could not be fair given relationship between judge and Trustee; and Debtor believes there have been extrajudicial communications about case and facts. Court’s particular procedures including denying confirmation even in absence of written objection did not demonstrate bias as Court is required to independently determine confirmability even in absence of objections. Other allegations were not sufficient to constitute extrajudicial grounds but were objections to and disagreements with court decisions, which constitute bases for appeal but not recusal.

- (9636) *In re Blumensadt*, 2014 WL 4425823 (Bankr. N.D. Ohio 2014) – 28 USC Section 455 requires judge to disqualify himself if his impartiality may reasonably be questioned or where judge demonstrates personal bias or prejudice concerning a party. Question is whether a reasonable person knowing all of the relevant facts would question judge’s impartiality. Standard is objective one. Judge not required to recuse himself based solely on the subjective view of a party. Fact that judge served as Chapter 13 Trustee in prior case filed by Debtor did not provide sufficient basis for recusal where judge had no extrajudicial information other than gained through prior proceedings. Judge’s knowledge of first chapter 13 proceeding which was dismissed with 180 day bar, and subsequent filing by Debtor’s husband in effort to circumvent 180 day bar, were judicial proceedings, knowledge of which was neither unusual nor extrajudicial so as to warrant recusal.
- (9637) *In re Byers*, 509 BR 577 (S.D. Ohio 2014) – Bankruptcy Rule 5004 requires disqualification under 28 USC Section 455 if the judge’s impartiality might reasonably be questioned; where the judge has personal bias or prejudice, or personal knowledge of disputed evidentiary facts; or where the judge while in private practice served as lawyer in the matter in controversy or a lawyer with whom the judge previously practiced law served during the association as an attorney in the matter in controversy. Standard is objective one, whether a reasonable person with knowledge of all facts would conclude that the judge’s impartiality might reasonably be questioned. Motion must also be made at earliest possible moment after movant becomes aware of possible bias. Even brief delays can result in denial as untimely. Motion filed more than one year after movant discovered alleged bias was untimely. Further, motion alleged only that while in private practice, judge represented bank that was involved in current matter, but not that judge represented bank specifically in that matter. Prior representation of a party to an action is not a basis to recuse judge where representation was unrelated to current proceeding. Movant also failed to prove any bias or that bias stemmed from extrajudicial source that results in judge holding opinion on merits of case based on information other than what judge learned in course of case. Fact that moving party may believe that bias exists is not sufficient for recusal. While Debtor had relationship with lender at a time when judge worked for lender, there was no direct or indirect contact between judge and Debtor, and judge had never met Debtor or any member of Debtor’s family. Movant also did not present evidence of “pervasive bias”. Only information in possession of judge was that developed during court proceedings. Opinions formed by judge on basis of events in current or prior judicial proceedings are not basis for claim of bias. Adverse rulings, including rulings imposing sanctions, do not demonstrate bias.
- (9638) *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.
- (9639) *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.
- (9640) *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.

- (9641) *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.
- (9642) *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.
- (9643) *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.
- (9644) *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.
- (9645) *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.

25.47 Appeal of Order

- (9646) *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.

E. Sealing Court Papers and Records

25.48 Section 107 and Federal Rule 5

- (9647) *Cox v. Sitel Operating Corporation*, 2018 WL 4102838 (E.D. Tn. 2018) – Court will not place documents under seal absent compelling reasons to do so. Ostensible "privacy" right that would be invaded by publishing of settlement agreement pales in comparison to purposes of underlying statute and presumption of public access to any judicial document. Court would not seal proposed settlement of Fair Labor Standards Act litigation where Motion to Seal did not identify any compelling reason to play settlement agreement under seal.
- (9648) *Stone v. Kettering Adventist Healthcare*, 2018 WL 3448315 (Bankr. S.D. Ohio 2018) - Strong public policy favors open access to Court records, facilitating public's right to know about administration of justice and integrity and transparency of bankruptcy proceedings. Court's ability to limit public's right to access is extraordinary measure warranted only in rare circumstances. Section 107 allows Court to seal the records to protect trade secrets, confidential research or commercial information; to protect person with respect to scandalous or defamatory matter; or to minimize risk of identity theft created by information contained in document to be sealed. Rule 9037 provides

Court with inherent authority to seal, restrict access to or redact documents if circumstances warrant. Redacting information in documents is preferable to wholesale sealing. Proposed resolution of adversary proceeding contemplated sealing access to more than 10,000 Proofs of Claim that may contain medical or billing information. Court concluded that wholesale sealing of claims was not necessary where claims can be redacted. Although redaction would impose burden on creditor to file Motion to Restrict Access coupled with redacted version of document, mere fact that process involves significant number of claims does not override public right to know. Further, proposed procedure would pave way for other creditors to seek permanent restrictions of process of claim without filing extra strap of providing redacted claim creating less transparent Court docket and claims registry.

- (9649) *In re Thomas*, 2018 WL 1162523 (Bankr. E.D. Ky. 2018) – Bankruptcy Court records are presumptively accessible to public. Section 107 allows court to seal documents to extent necessary to protect entity with respect to trade secret, confidential research, development or commercial information; or to protect person with respect to scandalous or defamatory matter. Commercial information is information which would cause unfair advantage to competitors by providing information as to commercial operations of debtor or another party, and includes information so critical to entity's operations that disclosing information will unfairly benefit entity's competitors and disclosure must reasonably be expected to cause commercial injury. Party seeking to seal documents must provide evidence to establish that document fall within scope of matters that may be sealed under Section. Motion to seal proposed settlement agreement of adversary action was not accompanied by any evidence that documents contained any commercial information. Fact that settlement indicated that if records were not sealed, there would be no settlement ("no seal-no deal") is not basis to seal document.
- (9650) *McKinstry v. Richard Holmes Enterprises, LLC*, 2016 WL 4433356 (E.D. Ky. 2016) – Public has right to see documents and evidence presented to court. Sealing documents is an unusual measure that requires compelling reason to seal documents, and seal must be narrowly tailored to fit the circumstances. If document is filed and only one part has confidential information, court will seal only that part and not entire document. . When court seals records, it does so under caveat that if member of public seeks to unseal document, party requesting seal will bear burden to show why documents should remain sealed. Defendant's request to unseal documents is not "back door" attempt to avoid non-appeal of order sealing documents in first instance but is request for new order to unseal those same documents. Settlement documents generally provide two compelling reasons to seal. First, parties must be able to negotiate in secrecy and keep settlement amounts confidential. Second, sealing may be necessary to protect privacy of third parties who are not involved in litigation and would not expect to see finances disseminated to public. Party seeking to keep documents sealed failed to demonstrate document-by-document need to keep documents sealed, alleging only a "general need to protect confidential information". Fact that parties designated certain documents confidential is not sufficient, and party's contention that information contained in documents would not be of interest to public was not sufficient as public interest is served by having documents available, not whether public may actually be interested in any particular document. Contention that party seeking to unseal documents has not presented any reason to unseal documents misses point, as documents are presumed to be public unless specific reason to seal them exists. Parity must convince court that documents should not be available, failing which they are available to public.
- (9651) *US v. Associated Community Services, Inc.*, 2016 WL 1072915 (Bankr. E.D. Mi. 2016) – While Section 107 evinces intent that all bankruptcy pleadings be public, Section 107(b) allows court to strike allegations that are scandalous or defamatory. Paper is subject to Section 107(b) where pleading would cause reasonable person to alter opinion of interested party and either (1) material is untrue; or (2) material is potentially untrue and is irrelevant or included for improper purpose. Allegations that special counsel obtained confirmation of plan through fraud, omission or representation calculated to influence court, or made representations with reckless disregard for truth could affect third party's opinion of counsel. Allegations were at least potentially false and were, in any event, irrelevant and unnecessary in connection with Motion to Set Aside Confirmation of Plan.
- (9652) *In re Johnson*, Case no. 09-66230 (Bankr. E.D. Mi. 2015) – Section 107 allows court to seal records to protect an entity with respect to trade secrets of confidential information; or to protect person from scandalous or defamatory matter. Debtor's Motion to Seal Chapter 7 File failed to state any grounds for court to grant relief.
- (9653) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor's failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor's Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (9654) *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.
- (9655) *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.

F. Rehearing or Reconsideration

25.49 Motion for Amended or Additional Findings of Fact – Rule 52

- (9656) *In re Packer*, 2016 WL 5928899 (Bankr. W.D. Mi. 2016) – Rule 52, incorporated by Rule 7052, allows party to ask court amend findings or make additional findings if necessary to create a record on which the appellate court may obtain the necessary understanding of the issues to be determined on appeal, to clarify essential findings or conclusions, correct errors of law or fact, or present newly discovered evidence. But are not to be used to obtain rehearing on the merits or raise new arguments that could have been raised before earlier ruling. . Motion must be filed within 14 days of entry of judgment, versus 28 days permitted by Rule 52.
- (9657) *Morris v. Charron*, 2015 WL 7709308 (Bankr. W.D. Mi. 2015) – Rule 52 allows court, on motion of party, to make additional findings of fact as necessary to create record on which appellate court may obtain necessary understanding of issues to be determined on appeal. Purpose is to clarify essential findings or conclusions, correct errors of law or fact, or to present newly discovered evidence. Motion is limited to correction of egregious errors of law or fact, not to reargue merits of case or raise arguments that could have been, but were not, raised prior to entry of order. Motion not appropriate where matter decided on summary judgment as summary judgment by definition is not factually based and does not entail findings of fact

25.50 Motion to Amend Versus Motion for Relief From Judgment

- (9658) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 463315 (E.D. Mi. 2016) – Motion filed within 14 days after entry of Order is governed by Rule 59 and Local Rule 9024-1; and may be granted based on grounds set out in Rule 59 or Rule 60. Motion filed more than 14 days after entry of Order is filed under Rule 60 and Motion must establish basis for relief under that rule.
- (9659) *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.
- (9660) *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.

25.51 Orders Subject to Relief – Final Orders

- (9661) *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.

25.52 Orders Subject to Relief – Non-Final Orders

- (9662) *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.

25.53 Standing to Bring Rule 60 Motion

- (9663) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Law of case applies where court makes ruling in case that either is not appealed or that is affirmed on appeal. Bankruptcy Court previously dismissed adversary proceeding holding that plaintiffs lacked standing. Plaintiffs did not appeal that order and order became law of case. Plaintiffs could not later contest that ruling under Rule 60 as holding was law of case. Rule 60 is not intended as substitute for appeal of orders when those orders are entered. Because plaintiff lacked standing to bring action in first instance as determined by earlier court decision, plaintiff also lacked standing to seek relief under Rule 60.

25.54 Waiver of Issues

- (9664) *In re Madison Heights Group, LLC*, 2014 WL 1075809 (Bankr. E.D. Mi. 2014) – Party cannot raise issues for first time in motion for rehearing. Party waives arguments by failing to make them to the court in the first instance. Court can overlook waiver and consider issues for first time in exceptional cases or to avoid plain miscarriage of justice.

25.55 Standard of Review

- (9665) *Vande Ryt v. Peace*, 2018 WL 1323982 (6th Cir. BAP 2018) – Grant or denial of Rule 60(b) is within discretion of bankruptcy judge and is reviewed for abuse of discretion. Abuse of discretion requires definite and firm conviction that court committed clear error of judgment. Question is not how reviewing court would have ruled, but rather whether reasonable person could agree with bankruptcy court's decision; if reasonable persons could differ, there is no abuse of discretion. Court did not abuse discretion in denying Motion based on alleged fraud or undiscovered evidence where there was no clear and convincing proof that Expert testimony was false. Motion was not supported by affidavit of expert but was limited to unsworn opinion of Debtor who was not expert. Debtor had ample opportunity to depose Plaintiff's

expert and discover information on which expert predicated his report, opinions, and other evidence affording Debtor full opportunity to expose fraud at trial or to present expert for trial. Bankruptcy Court Order was well-reasoned and supported by record, and denial of Rule 60 Motion was not abuse of discretion.

- (9666) *In re Wilson*, Case No. 17-42454 (Bankr. E.D. Mi. 2017) - Motion to Waive Filing Fee in previous bankruptcy case construed as motion for reconsideration of order filed in prior case denying application to waive filing fee in prior case. Motion failed to demonstrate any palpable defect or otherwise to establish any basis for excusable neglect sufficient for granting relief from prior order. Debtor's present motion which asserted that Debtor paid a Bankruptcy Petition Preparer to prepare prior case directly contradicted Debtor's declaration under penalty of perjury in prior case that Debtor did not have help in preparing documents for bankruptcy filing and did not pay anyone for that out. Present motion was also untimely. Federal Rule Of Civil Procedure 60 requires motion to be brought within reasonable time. Motion brought in 2017 seeking relief from order entered in 2009 was not reasonable. Finally, Debtor never filed required Schedules or Statement of Financial Affairs in prior case rendering it impossible for Court to determine whether facts existed to justify waiver of filing fee or whether Debtor's income was below maximum income for family size under 28 USC Section 1930.
- (9667) *Liberty Mutual Insurance Co., Devere Construction Co.*, 2016 WL 4800796 (E.D. Mi. 2016) – Motion must do more than re-argue issues that were or could have been considered when order was entered in first instance and must identify how new information creates palpable error in initial order. Motion for reconsideration did not raise any argument that Court had not previously considered. Court Order requiring Defendant to post collateral as condition of continuing litigation was not defective merely because Defendants cannot afford to pay the collateral, as ability to pay is not a factor in determining the appropriateness collateral security provision, and Court already considered Defendants' financial difficulties when ordering them to post the collateral in the first place. Defendants' motion for reconsideration did not indicate a palpable defect in Court's prior orders, but merely reiterated prior arguments made which is insufficient justify reconsideration of prior order.
- (9668) *In re Simoukdalay*, 2016 WL 4613346 (Bankr. E.D. Tn. 2016) – Motions for reconsideration under Rule 9023 incorporate motions to alter or amend judgment under Federal Rule of Civil Procedure 59. Moving party must show (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. Motions for reconsideration are not opportunity to re-argue a case or to raise arguments which could, and should, have been made before judgment issued. Motion did not demonstrate error where Court awarded attorney fees to secured creditor for services in connection with pre-bankruptcy restructuring of loan. Note and Deed of Trust provided for attorney fees in case of enforcement, and restructuring was not part of "enforcement, which would not include fees for restructuring. However, Note and Deed of Trust contained second provision for fees incurred in connection with the indebtedness, not limited to collection, was broad enough to include pre-petition modification fees. Fees for services in the Chapter 13 including filing proof of claim, attendance at 341 meeting and review of plan are fees associated with default where Debtor had defaulted on mortgage pre-petition and services were in direct response to Debtors' defensive action of filing bankruptcy, similar to actions to defend lien created by deed of trust. Amount of fee award is governed by federal, not state law, based on all the facts and circumstances presented by the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorneys, the character and extent of the services which they have performed, not only in the technical litigation itself, but also in matters arising out of and incidental to such litigation, and considering other factors including (1) the nature, extent, length and value of the services rendered; (2) the bankruptcy and non-bankruptcy experience, reputation, and ability of the attorneys; (3) awards in similar cases; (4) the novelty and difficulty (or lack thereof) of the questions presented; (5) the skill requisite to perform the legal services properly; (6) the customary fee; (7) professional time actually spent; (8) amount involved in potential risk; (9) the results of the cases; (10) specialty in which the attorneys may be practicing; (11) fees sought to be applied; (12) distinction between partner and associates time; (13) costs of comparable services; (14) use or lack thereof of paralegals; and (15) duplication of efforts. Fees of \$3500 for services in connection with enforcement of mortgage with principal balance of \$70,000 not unreasonable. Although Debtor contended that fees were almost double the customary fee in the area, there was no evidence or implication that the time was not actually spent by the attorneys involved or that the attorneys involved were not worth their hourly rate. Attorneys were knowledgeable attorneys who have appeared before this court in a competent and professional manner. Court reduced the fees where there was duplication or educational charges that a regular bankruptcy practitioner would not have incurred but included fees legal research as attorney who regularly appears before the court should be compensated for making sure he or she is on solid legal ground. Creditor's attorneys were required to reconstruct the accounting in order to file the attachments now required for a mortgage claim allowing parties to reach a consensual resolution on the amount of the principal and interest due under the note.
- (9669) *ECP Commercial II, LLC v. Town Center Flats, LLC*, Case No. 15-11881 (E.D. Mi. 2016) – Motions under Rule 59 and Rule 60 must do more than merely present same issue ruled on by court. Moving party must also demonstrate palpable defect but which the court and parties and other person have been misled, correction of which would result in different disposition. Motion was not sufficient where Motion challenged Bankruptcy Court's statements that the facts were not in dispute, where Motion alleged only that facts were in dispute without identifying any particular fact or how that dispute would have been material to the outcome of the case. Debtor did not present any issues to court regarding factual disputes in briefs submitted to District Court on appeal of Bankruptcy Court Order and did not raise issues that could not have been raised earlier.
- (9670) *Brown v. Ellmann*, Case No. 15-11017 (E.D. Mi. 2016) – Motion for Amendment of Judgment under Rule 59 must be filed within 28 days of entry of judgment and must allege clear error of law, newly discovered evidence, an intervening change in controlling law, or manifest injustice. Motion is not vehicle to re-hash old arguments or proffer new arguments or evidence that moving party could have brought up before entry of judgment. Motion that presents same issues ruled upon by court either expressly or by reasonable implication and fails to allege a palpable defect on which the court and parties were misled failed to meet standard for relief under Rule 59.
- (9671) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 463315 (E.D. Mi. 2016) – Party seeking relief under Rule 59 or Rule 60 must prove that order results from palpable defect and that different disposition must result from a correction of the error. Palpable defect is (1) clear error of law; (2) newly discovered evidence; (3) intervening change in controlling law;

or (4) need to prevent manifest injustice. Motion is not opportunity to reargue case and may not be used to raise arguments that were made or should have been made prior to judgment, and cannot be used to raise new issues or arguments not previously raised. Motion failed to allege basis for reconsideration where motion reasserted moving party's version of the underlying facts that the court considered in granting order in first instance. Moving party did not demonstrate any clear error of law beyond mere disagreement with court's conclusion, and did not allege any intervening change in law, availability of new evidence, or prospect of manifest injustice.

- (9672) *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.
- (9673) *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.
- (9674) *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.
- (9675) *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.

25.56 Scope of Relief

- (9676) *In re LSC Liquidation, Inc.*, 699 Fed. Appx. 503 (6th Cir. 2017) – Relief under Rule 60(b) is vested in discretion of Bankruptcy Court and includes full vista of equitable remedies to correct error. Relief not limited to either accepting order or vacating order. Court properly corrected Sale order to indicate that sale included rights under certain health insurance contracts where original Order did not specifically reference contracts although all parties clearly intended sale to include contract rights.

25.57 Grounds – Rule 54 and 7054

- (9677) *Mason v. Pichler*, Case No. 12-3348 (Bankr. E.D. Mi. 2017) – Where a judgment resolves fewer than all claims or resolves claims against fewer than all parties. Court may direct that Order constitutes Final Judgment only if Court determines that there is no reason for delay. Otherwise, Order does not end the action and the Court retains jurisdiction to revise the prior Order at any time before entry of a Final Judgment adjudicating all claims and all parties. Court has inherent authority as well as authority under Rule 7054 to reconsider and modify interlocutory orders as justice requires. Court would not reconsider Order Denying Motion for Recusal where Court previously held that Court had no personal knowledge of any disputed evidentiary fact and that its knowledge was limited to matters of record. Motion for Reconsideration alleged only that Counsel for one party in this case was also counsel to the same party in different adversary case and communications between counsel and the Court had no bearing on the instant adversary but rather involved a removed state court probate matter and an effort to surcharge a prior trustee, while the current action was against different defendants to recover fraudulent transfers. Further, any communications were not material as the communications involved only case status updates of state court matters and procedural items such as status and timing.

25.58 Grounds – Rule 59 and 9023 Generally

- (9678) *Turk v. Bayview Loan Servicing, LLC*, Case No. 17-4562 (Bankr. E.D. Mi. 2018) – Rule 9023 allows Court to take additional testimony, amend judgment to make additional findings of fact and conclusions of law. However, Motion cannot be used to expand on relief sought in action in first instance. Adversary proceeding requested determination of whether property had equity to support second lien. Adversary proceeding did not request, and Court was not required to determine, specific valuation of property, only whether property was worth more or less than balance owed on first lien. Motion did not allege any error by court, any newly discovered evidence, or any manifest injustice, but sought new form of relief not initially requested. Court would not issue advisory opinion on issue not raised in adversary.
- (9679) *Campbell v. Butz*, 2018 WL 1895689 (Bankr. W.D. Ky. 2018) – Motion to Alter, Amend or Vacate Judgment denied where Motion merely contested Court's factual findings based on evidence presented at trial. However, Motion granted to correct post-judgment interest rate from 15% contact rate of interest to 1.8% federal judgment rate.
- (9680) *EQT Production Company v. Magnum Hunter Production Company*, 2018 WL 1217155 (E.D. Ky. 2018) – Rule 59 allows court to correct its own errors to avoid unnecessary appeals. Rule 59(e) is not opportunity to re-argue case or to relitigate old matters. Motion should only be granted if there was (1) clear error of law; (2) newly discovered evidence; (3) intervening change in controlling law; or (4) need to prevent manifest injustice. Rule is not substitute for appeal or opportunity to quibble or express disagreement with Court's decision.
- (9681) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 1168979 (E.D. Mi. 2018) – Motion for Reconsideration under Rule 59 and Local Rule 7.1 must persuade the Court that it palpably erred when it affirmed the Bankruptcy Court's sanctions order and that even if such a defect existed, it would have resulted in a different disposition of the case.

- (9682) *In re Fuller*, 2018 WL 345943 (Bankr. W.D. Mi. 2018) – When a party seeks to alter or amend judgment within fourteen days of entry, more liberal standard under Bankruptcy Rule 9023 allows court to alter or amend judgment if movant can establish: (i) clear error law, (ii) newly discovered evidence, (iii) intervening change in controlling law, or (iv) manifest injustice. Evidence is “newly discovered” only if it could not, in the exercise of reasonable diligence, have been submitted before Court entered Order. Manifest injustice requires lack of equity or some form of unfairness and that altering or amending judgment would produce outcome in moving party’s favor. Poor strategic decisions are not “manifest injustice”. Debtor’s Motion for Relief from Order Dismissing Case where case was initially dismissed because Debtor did not file Schedules, then reinstated when Debtor filed Schedules and Plan but re-dismissed where Schedules indicated that debtor’s debts exceeded debt limits and Debtor had not made any payments under his Chapter 13 plan. Debtor’s post-second-dismissal filing of amended schedules to bring debts below debt limits did not constitute newly discovered evidence as all information in Schedules and Plan were fully available to debtor before case was dismissed. Dismissal was not manifest injustice where Debtor was provided with numerous opportunities to address various deficiencies, yet Debtor did not amend schedules until after Court dismissed case. Debtor’s claim that former attorney committed a fraud by including debts that had previously been forgiven and that Debtor did not sign the schedules contradicted Debtor’s amended schedules that included same liabilities that were on schedules Debtor filed pro se at outset of case; and Debtor’s signature appears on the top of each page making it difficult to accept Debtor’s allegation that he did not sign the amended schedules.
- (9683) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 6158963 (E.D. Mi. 2016) – Motion for rehearing of appellate court must demonstrate palpable error by which the court and other parties were misled such that correction of the defect will result in different disposition; and must not be mere presentation of same issues ruled on by Court either expressly or by implication. Court did not err in concluding that Appellant failed to demonstrate the Bankruptcy Court’s Order Denying Rehearing was error. Notice of appeal designated Order to be reviewed as Order Denying Rehearing, and did not designate the underlying Order Granting Summary Judgment. Brief to appellate court was directed entirely to correctness of underlying order and did not address any argument about whether Bankruptcy Court erred in denying Motion for Reconsideration or even present correct standard of review when considering appeal of Order Denying Reconsideration. Motion demonstrated neither point of law that was overlooked or any other defect in appellate court’s affirmation of Bankruptcy Court Order Denying Rehearing. Bankruptcy Court also did not err in refusing to consider affidavit of Debtor that was not filed until after summary judgment was granted. While Rule 59 allows Court to consider new affidavits as part of Motion to Alter or Amend, Rule does not require Court to do so and Appellant did not present any argument that Bankruptcy Court abused discretion in refusing to consider affidavit.
- (9684) *Brown v. Ellmann*, Case No. 15-11017 (E.D. Mi. 2016) – Motion for Amendment of Judgment under Rule 59 must be filed within 28 days of entry of judgment and must allege clear error of law, newly discovered evidence, an intervening change in controlling law, or manifest injustice. Motion is not vehicle to re-hash old arguments or proffer new arguments or evidence that moving party could have brought up before entry of judgment. Motion that presents same issues ruled upon by court either expressly or by reasonable implication and fails to allege a palpable defect on which the court and parties were misled failed to meet standard for relief under Rule 59.
- (9685) *Saia v. Flying J, Inc.*, 2016 WL 3200298 (W.D. Tn. 2016), *aff’d* 2017 WL 6398013 (6th Cir. 2017) – Rule 59 allows court to reconsider prior order only for : (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. Motion must state with particularity the grounds for the relief sought in the motion and is intended to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. Reconsideration is an extraordinary remedy which should be used sparingly and is not appropriate way to raise legal arguments or evidence that the movant simply failed to raise in the earlier motion or to reargue a case with new theories the party could have raised at an earlier stage of the case. Motion for reconsideration of Order dismissing adversary for lack of standing raised issues not directed to standing issue and so could not support rehearing. To extent motion alleged that Court overlooked other 6th Circuit precedent, movant failed to raise that precedent in earlier arguments and Rule 59 is not vehicle for movant to raise citations to new cases or additional legal arguments. Further even if court considered new case, that did not alter court’s prior decision. To extent motion was directed to order denying plaintiff leave to amend, prior order was correct as proposed amendment was futile as it did not plead sufficient fact to overcome standing issue and even after denial of motion for leave to amend, plaintiff had ample opportunity to file another motion for leave to amend to address pleading issues in prior complaint.
- (9686) *White v. McDermott*, 2016 WL 865722 (E.D. Mi. 2016) – Motion for reconsideration will be granted if the moving party shows (1) a palpable defect, (2) the defect misled the court and the parties, and (3) that correcting the defect will result in a different disposition of the case. “Palpable defect” is one that is obvious, clear, unmistakable, manifest, or plain. Motion did not show defect where factual issues raised in motion were specifically contradicted by clear evidence in record and where findings in record were maintained motion clearly demonstrated that underlying order was correct. Evidence also supported denial of confirmation of Chapter 11 plan where Debtors were unable to maintain even current standard of living without making payments that would be due under plan, confirming that plan was not feasible.
- (9687) *Hauk v. Valdiva*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Party seeking to set aside default must first establish that default was product of mistake, inadvertence, surprise or excusable neglect. Only if defendant establishes basis for relief under Rule 60 will court consider whether defendant has meritorious defense or whether opposing party would be unduly prejudiced if order is set aside. Fact that defendant may have meritorious defense is not sufficient where defendant has failed to establish that judgment itself was product of mistake, inadvertence or excusable neglect.
- (9688) Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (9689) *Paris v. Walker*, 2015 WL 5576391 (Bankr. E.D. Tn. 2015) – Rule 59 Motion can be granted only where there was clear error of law, newly discovered evidence, intervening change in controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case or to raise arguments that could have been, but were not, raised before judgment issued. Debtor’s argument, raised for first time in motion for rehearing, that court failed to consider other issues regarding Debtor’s schedules did not allege “manifest injustice” where court did not rely exclusively on schedules in reaching conclusion that Debtor was insolvent, and even accepting Debtor’s bleated statements regarding

alleged errors in schedules, Debtor was still insolvent.

- (9690) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Motion for reconsideration must be filed within 14 days of entry of order to which it objects and must demonstrate that the Court and the parties have been confused or misled and that a correction of the defect must produce a different result. Motion failed to demonstrate error in court’s grant of partial summary judgment where court ruled on invoices that indicated both or either “ship to” and/or “invoice to”. Ruling did not translate into requirement that court grant summary judgment where invoices indicated neither “ship to” nor “invoice to” leaving question of material fact.
- (9691) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Motion for rehearing must demonstrate clear error of law, newly discovered evidence, intervening change in controlling law, or manifest injustice. Motion is not opportunity to reargue a case or to raise new arguments that could have been raised in first instance. Motion that does not make new arguments but merely adds additional case citations for arguments already raised and rejected does not warrant relief under Rule 59. Motion did not evidence error in awarding discovery sanctions based on allegation that parties requested sanctions under Rules 26, 37 and 45, where court determined sanctions using Rule 45 as the more specific rule regarding discovery sanctions and did not rely on either Rule 26 or 37 which would not apply. Rule 45 does not require absolute precision in determining amount of discovery costs to shift, and court has discretion to shift enough of the costs to the party requesting discovery to leave remaining costs to non-parties “non-significant”.
- (9692) *U.S. v. Cordes*, 2015 WL 4540453 (E.D. Mi. 2015) – Motion for reconsideration must assert that court was misled by palpable defect, the correction of which must produce a different result. An error is palpable if it is obvious, clear, unmistakable, manifest or plain. Motion is not opportunity to re-hash old arguments or proffer new arguments or evidence that could have been presented earlier. US Motion for reconsideration of order staying proceedings based on parallel proceedings in bankruptcy court denied where motion did not allege any defect in underlying order but merely disagreed with correctness of that order and re-argued same factual and policy issues as were argued in proceeding originally.
- (9693) *In re Daher*, 2015 WL 4555394 (Bankr. N.D. Ohio 2015) – Motion filed within 14 days of entry of order is treated as motion to amend or alter order under Rule 59 and Bankruptcy Rule 9023. Rule 59 provides four grounds for relief: (1) clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. Rule 59 is not merely to reargue a case or to raise issues or claims that could have been, but were not, raised in earlier proceeding. Motion denied where party failed to raise issue of charging lien in prior proceeding brought by trustee to determine parties’ interests in the funds that were recovered from insurance company. Right to charging lien, if any, arose when the judgment was entered in the underlying action. Attorney should have asserted charging lien in response to trustee’s action, rather than waiting until after determination by court that insurance proceeds were property of estate.
- (9694) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015), *aff’d*, 2016 WL 344971 (M.D. Tn. 2016) – Court can grant new trial on some or all issues, and can take additional testimony, amend findings of fact and conclusions of law, and direct entry of new judgment. Granting relief under Rule 59 is vested in sound discretion of Bankruptcy Court. Settlement and release between plaintiff and defendant does not render unenforceable court’s prior rulings requiring defendant to correct records, and where defendant failed to do so after having ample opportunity to do so, court properly held defendant in contempt.
- (9695) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Local Rule 9024-1 allows motion for rehearing or reconsideration only where movant demonstrates that court was misled by palpable defect such that a different disposition of the case must result from a correction of that defect. A “palpable defect” is one arising from a clear error of law; newly discovered evidence; an intervening change in controlling law; or a need to prevent manifest injustice. Motion for rehearing of Order Denying Summary Judgment denied where record contained numerous questions of fact. Parties did not demonstrate any “defect” in underlying ruling.
- (9696) *In re Wilcox*, 2014 WL 2574035 (Bankr. W.D. Mi. 2014) – Motion for rehearing or reconsideration is not opportunity to engage in endless conversation between court and parties. Reconsideration is available only where there is clear error of law; newly discovered evidence that could not have been discovered prior to entry of order; intervening changes in controlling law; or to prevent manifest injustice. Motion that alleged only that the Court was “wrong” was not sufficient to warrant reconsideration.
- (9697) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 59, incorporated by reference in Rule 9023 allows a movant to seek a new trial if there is: (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. Motion for a new trial or to alter or amend a judgment must be filed no later than 14 days after entry of judgment. Motion filed more than three weeks after entry of Judgment must be denied as untimely.
- (9698) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporate by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of Debtor’s counsel’s e-mail account where record indicated that notice of hearing was issued to Debtor’s counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel’s failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than “run of the mill inattentiveness”. Further, court issued summary judgment on merits of motion independent of counsel’s failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.
- (9699) *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.

- (9700) *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.
- (9701) *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.
- (9702) *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 paid 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.
- (9703) *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.
- (9704) *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.
- (9705) *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.
- (9706) *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.

25.59 Clear Error of Law

- (9707) *In re Hill*, 2015 WL 5575499 (Bankr. E.D. Tn. 2015) – Rule 59 allows court to alter or amend judgment where judgment is based on clear error law that needs to be changed to prevent manifest injustice. Order lifting stay was not "clear error" where Debtor failed to timely make payments as required by prior Order Conditionally Lifting Stay. Creditor and Chapter 13 Trustee did not wrongfully refuse payment based on Debtors tender of "bill of exchange" with instructions on how both parties should take the documents tendered to the United States Treasury for payment in full of the Debtors' obligations. "Redemptionist" theory on which Debtor propounds that a person has a split personality: a real person and a fictional person called the "strawman." The "strawman" purportedly came into being when the United States went off the gold standard in 1933, and, instead, pledged the strawman of its citizens as collateral for the country's national debt. Redemptionists claim that government has power only over the strawman and not over the live person, who remains free. Individuals can

free themselves by filing UCC financing statements, thereby acquiring an interest in their strawman, and government created “exemption account” for each citizen based on social security number. Redemptionists argue that debts are then collateralized by exemption amount, ultimately making US Government liable for satisfaction of individual’s debts. Argument is frivolous and a waste of time and judicial resources. Neither lender nor Trustee was required to accept “bill of exchange” as payment.

25.60 Grounds – Rule 60 and 9024 Generally

- (9708) *G&H Customs, LLC v. Carter*, Case No. 17-4706 (Bankr. E.D. Mi. 2018) – Court would grant Debtor’s Motion to Reopen Adversary to allow Debtor to set aside judgment determining debt to be nondischargeable and awarding monetary damages where Debtor asserted state law basis to relieve Debtor from monetary portion of adversary judgment. Motion to set aside judgment must be presented by motion pursuant to Rule 60. Motion to Reopen asserted good cause to reopen but did not, itself, seek relief under Rule 60. Court would allow Debtor 30 days to file Rule 60 Motion.
- (9709) *Simon v. Short*, Case No. 16-5125 (Bankr. E.D. Mi. 2018) – Motion for Reconsideration must demonstrate palpable defect amounting to clear error of law; newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice. Bankruptcy Court conclusion that payments were not in ordinary course of business did not demonstrate palpable defect where loans from Debtor’s stockholders to corporation or not incurred as part of routine operations of Debtor and creditor where terms of and conditions of loans. Significantly; promissory notes were provided for some loans but not others; and there was no evidence that other loans were made to Debtor under similar circumstances and terms as loan at issue further, it did not appear that repayment was consistent with terms and prior loans.
- (9710) *In re Morris*, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Section 554(c) allows for revocation of abandonment for reason that constitutes grounds for relief under Rule 60 - (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by opposing party; (4) judgment is void; (5) judgment has been satisfied, released, or discharged; was based on earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Trustee’s requests to revoke abandonment, filed more than one year after closing of case, was untimely as Rule 60(b)(1) Motion must be filed within one year of order to be reconsidered. Rule 60(b)(5) and (6) are not subject to one-year limit but still must be filed within reasonable time and focus on events after case closure and extent to which equity favors or disfavors revocation. Unanticipated increase in value of asset does not warrant revocation of abandonment given importance of finality and certainty.
- (9711) *Vande Ryt v. Peace*, 2018 WL 1323982 (6th Cir. BAP 2018) – Rule 60 is not substitute for timely appeal. Rule 60(b) allows court to grant relief for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in time to move for new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct by opposing party; (4) judgment is void; (5) judgment has been satisfied, released or discharged; is based on earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.
- (9712) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 1168979 (E.D. Mi. 2018) – Motion for Reconsideration under Rule 59 and Local Rule 7.1 must persuade the Court that it palpably erred when it affirmed the Bankruptcy Court’s sanctions order and that even if such a defect existed, it would have resulted in a different disposition of the case. Motion to Set Aside Order under Rule 60 must explain applicable standards of Rule 60 and apply standards to facts of case. Motion that did nothing more than cite various provisions of Rule 60 denied for failure to demonstrate how or why moving party entitled to relief.
- (9713) *Energy Conversion Devices Liquidation Trust v. 8 Solar Ltd*, 2015 WL 4966856 (E.D. Mi. 2015) – Under Local Rule, motion for post-judgment relief must demonstrate that the error results from a palpable error by which the parties and the court were misled. A defect is palpable where it is obvious, clear, unmistakable, manifest or plan. Court will not grant relief where motion merely presents same issues already ruled on by court. Motion is not appropriate to raise new issues or new arguments or advance positions that could have been raised earlier but were not. Issues raised by moving party regarding application of Sixth Circuit precedent were raised at earlier hearing and were ruled on by court. Alternative theories of recovery were not raised and so were barred from consideration in motion for reconsideration.
- (9714) *Keeley v. Grider*, 2014 WL 5520955 (6th Cir. 2014) – Rule 60(a) allows court to correct judgment to reflect what was intended when judgment was entered in first instance. Rule 60 cannot be used to alter the substantive rights of the parties in a manner different from that intended. Rule 60 allows court to correct errors, or correct orders that do not reflect court’s intent but not to rewrite the past. Creditor brought action to declare judgment non-dischargeable under Section 523. When Debtor failed to answer, creditor submitted proposed final default judgment to court that liquidated debt but did not state that debt was not dischargeable, and court entered judgment submitted by creditor. One year later, creditor filed Rule 60 motion to amend judgment to include provision that debt survived discharge. Court denied motion because the default judgment entered by the clerk was not intended to dealer debt non-dischargeable and clerk lacked authority to make such a declaration. To extent error was made, it was fault of creditor’s counsel, and Rule 60 is not designed to correct errors of judgment by counsel. Any amendment of judgment at this late date would clearly and certainly alter Debtor’s substantive rights and lead to result that is very different from that when the judgment was entered by the clerk in the first instance.
- (9715) *In re Lancett*, 2014 WL ____ (Bankr. W.D.N.C. 2014) – Debtor did not demonstrate any basis for court to reconsider order granting Debtor’s request for voluntary dismissal. After Debtor voluntarily dismissed case, Debtor re-filed. Creditor sought to dismiss second case under Section 109 as Debtor had re-filed within 180 days after dismissal of a case in which the creditor sought stay relief. After second case was dismissed, Debtor requested that court set aside dismissal of first case so Debtor could continue in Chapter 13. Rule 60 did not provide any basis to set aside order that Debtor requested. While Debtor may have made poor choice in dismissing case or may have misunderstood legal consequences of dismissal, that did not rise to level required by Rule 60.
- (9716) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporate by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of Debtor’s counsel’s e-mail account where record indicated that notice of

nearing was issued to Debtor's counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel's failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than "run of the mill inattentiveness". Further, court issued summary judgment on merits of motion independent of counsel's failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.

- (9717) *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.
- (9718) *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.
- (9719) *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.
- (9720) *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.
- (9721) *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.
- (9722) *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.
- (9723) *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 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".
- (9724) *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.
- (9725) *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 from until three weeks after the deadline and two weeks after the case was dismissed.
- (9726) *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.

- (9727) *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.
- (9728) *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.
- (9729) *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.
- (9730) *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.
- (9731) *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.
- (9732) *J.L. Giselson, 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.
- (9733) *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.
- (9734) *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.
- (9735) *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 from.
- (9736) *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.
- (9737) *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.

- (9738) *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.
- (9739) *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.
- (9740) *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).
- (9741) *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).
- (9742) *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.
- (9743) *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).
- (9744) *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.
- (9745) *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.
- (9746) *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.
- (9747) *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.
- (9748) *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.

- (9749) *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.
- (9750) *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.
- (9751) *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.
- (9752) *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.
- (9753) *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.
- (9754) *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.
- (9755) *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 from 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.
- (9756) *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 from 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.
- (9757) *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.

- (9758) *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).
- (9759) *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.
- (9760) *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.
- (9761) *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.
- (9762) *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.
- (9763) *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.
- (9764) *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.
- (9765) *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.
- (9766) *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.
- (9767) *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).
- (9768) *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.
- (9769) *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.

- (9770) *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..."
- (9771) *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.
- (9772) *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.
- (9773) *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.
- (9774) *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.
- (9775) *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).
- (9776) *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.
- (9777) *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.
- (9778) *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.
- (9779) *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).
- (9780) *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).

- (9781) *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.
- (9782) *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.
- (9783) *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).
- (9784) *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.
- (9785) *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.
- (9786) *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.
- (9787) *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.
- (9788) *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.
- (9789) *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.
- (9790) *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 from, Schedules, Statement of Financial Affairs and Credit Counseling Certificate had not been filed is not "cause" to reinstate case.
- (9791) *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.

- (9792) *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.
- (9793) *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.
- (9794) *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.
- (9795) *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.
- (9796) *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.
- (9797) *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.
- (9798) *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.
- (9799) *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.
- (9800) *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.
- (9801) *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.

25.61 Excusable Neglect

- (9802) *In re Clevinger*, 2018 WL 4223251 (Bankr. N.D. Ohio 2018) – Excusable neglect requires consideration of all relevant circumstances including danger of prejudice to Debtor, length of delay and potential impact on proceedings, reason for delay, whether delay was in reasonable control of moving party, and whether moving party acted in good faith, with “reason-for-delay” being given greatest import. Motion for Reconsideration filed eight weeks after deadline for filing response to Objection was not excessive delay and granting relief would not have significant effect on case administration as Chapter 13 Plan still had 12 months remaining and balance owed to creditor was fairly nominal. However, creditor did not present any valid reason for not responding to Objection where creditor received objection at address for notices included in proof of claim and Court sent notice to address listed on proof of claim as well as addresses specified by creditor in Notices of Change of Address. Creditor offered no explanation as to how Debtor’s service of Objection at notice address impaired creditor’s ability to timely file response.
- (9803) *Shapiro v. Abu-hamden*, 2016 WL 6157430 (Bankr. E.D. Mi. 2016) – Any neglect by counsel is attributable to client for purposes of determining whether neglect was excusable. Standard applies even where client was entirely “blameless”. Motion did not show excusable neglect for counsel’s failure to file response to Complaint seeking turnover. Motion alleged only conclusorily that neglect was excusable, but Motion alleged *no facts*, and argues *no reason*, that could support a finding that *attorney’s* alleged neglect is excusable or any explanation why Defendant’s chosen attorney did not timely file an answer to the Plaintiff Trustee’s first or second amended complaints.
- (9804) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60. Motion failed to state basis to reopen adversary under Rule 60(b)(1) where motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor’s motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor’s failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney’s office and failure of attorney’s staff member to properly calendar hearings. Court had issued scheduling order well before assistant’s absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor’s motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel’s action was neglect, it was not excusable for purposes of Rule 60 relief.
- (9805) *In re Player*, 2015 WL 5885348 (Bankr. W.D. Ohio 2015) – Request to Reinstate Stay is Motion under Rule 60(b). Alleged error of attorney in failing to respond to Motion for Relief did not state basis to reinstate, where alleged error was assumption by Debtor’s counsel that confirmation of Chapter 13 Plan would cause Creditor to drop any request to foreclose mortgage. Counsel’s “litigation strategy” of relying on Creditor to take or refrain from taking action based on terms of proposed plan is not basis for relief under Rule 60(b)(1).
- (9806) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Rule 4007 requires adversary to except debt from discharge to be filed within 60 days after the date first set for the meeting of creditors. The court can extend the deadline on motion filed before the deadline expires. Creditor did not timely file adversary or seek extension of time to do so. There was no dispute that creditor received notice of the bankruptcy in time to file the required adversary and there was no suggestion that creditor was in any way confused or misled. Court would not use Rule 60 to alleviate consequences of creditor’s own failure to act in a timely manner. Motion did not allege that creditor failed to file adversary as result of excusable neglect.
- (9807) *In re Williams*, Case No. 14-21663-DOB (Bankr. E.D. Mi. 2015) – Court denied motion for reconsideration of order that enjoined BPP from performing services anywhere in the Eastern District of Michigan unless acting under supervision of attorney. To set aside order under Rule 60(b)(1), party must demonstrate that order was result of excusable neglect. Neglect is an equitable conclusion based on danger of prejudice to other party; length of delay and potential impact on judicial proceedings; reason for delay; whether delay was within reasonable control; and whether late acting party acted in good faith. Focus ultimately is whether other party will be prejudiced; whether movant has meritorious defense; and whether moving party was culpable in entry of order in first instance. Ordinary negligence, alone, is not excusable. Gross negligence may be, depending on circumstances and whether it would be equitable to set aside order. Record indicated that movant was fully apprised of reasons UST sought to enjoin BPP from acting as petition preparer. Language or consent order signed by BPP was clear and direct. BPP was fully aware of all circumstances before signing consent order and did not allege any newly discovered evidence. While BPP may have felt pressure to sign consent order, that does not constitute excusable neglect or palpable defect.

25.62 Meritorious Defense

- (9808) *Hauk v. Valdiva*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Alleged fraud or misrepresentation by plaintiff in underlying transaction may constitute a defense to action but does not amount to fraud in entry of judgment itself. Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (9809) *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.

25.63 By Court *Sua Sponte*

- (9810) *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.

25.64 Defect in Notice

- (9811) *In re Gainey Corp.*, Case No. 08-9092 (Bankr. W.D. Mi. 2014) – Notice is proper when mailed to address listed on proof of claim. If creditor moves, creditor bears burden of updating address with court pursuant to Rule 2002. Creditor's failure to receive confirmation order did not amount to lack of notice where order was mailed to address on proof of claim. If creditor did not receive copy of order, it was because he did not update his address with the court and is not a basis to set aside an order.
- (9812) *Thornton v. Digenis*, 2014 WL 412652 (W.D. Ky. 2014) – Court correctly set aside "Agreed Order" where moving party was adversely affected by Order and did not have prior notice of or agree to entry of Order. Bankruptcy Court acknowledged error in entering Order where Order did not comply with procedural requirements for relief requested.
- (9813) *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.
- (9814) *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).

25.65 Rule 60(a) - Clerical Error

- (9815) *In re LSC Liquidation, Inc.*, 699 Fed. Appx. 503 (6th Cir. 2017) – Rule 60(a) allows court to correct clerical mistake or mistake arising from oversight or omission in judgment, order or other part of record. Rule applies to errors of transcription, copying or calculation and not to fundamental failure of discovery or notification. Request to clarify prior order requested relief beyond scope of Rule 60(a) as ambiguity resulted from failure of parties to make Sale Agreement correctly reflect intentions to include certain executory contracts and not from clerical mistake or oversight by Court.
- (9816) *Kosa v. International Union*, 2016 WL 5219535 (E.D. Mi. 2016) – "Mistake" or "Clerical Error" for purposes of Rule 60 relief is error in execution of judgment or order, not error in content or decision. The basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of blunders in execution whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. Rule 60 involves purely ministerial act of correcting clerical mistake, not in altering substantive rights or resolving any disputes in case.
- (9817) *Kohut v. United Healthcare Insurance Co.*, 2016 WL 4204132 (E.D. Mi. 2016), *aff'd*, 2017 WL 3034271 (6th Cir. 2017) – Court may correct clerical mistake or mistake arising from oversight or omission in judgment, order, or other part of the record. Correction is not appropriate where the court changes its mind or revisits its legal analysis or otherwise to correct an error of substantive judgment but is limited to correcting mistakes or oversights that cause the judgment to fail to reflect what was intended at the [relevant] time and correction is needed to make the judgment or record speak the truth. Order that confirmed liquidating plan in Chapter 11 and rejected any unassumed executory contracts erroneously omitted contract between Debtor and health insurance company that was intended to be assumed. At the time of the sale to the successor buyer, all parties intended that health coverage would be in place and would remain in place and failure to delineate the health insurance contract was mere oversight or error. Further, Creditor's Committee failed to demonstrate any prejudice by allowing the amendment. Although Committee would not be able to recover as avoidable preferences the premiums paid to Healthcare Insurer post-confirmation, loss of preference claim based solely on mistake would result in windfall that does not constitute prejudice.
- (9818) *Ernst v. Michigan Educational Credit Union*, 2015 WL 1345359 (E.D. Mi. 2015) – Rule 60(a) allows court to correct order where, through inadvertence, the order entered does not accurately reflect the court's intentions. Error may be corrected where error was mechanical in nature and correction is necessary to reflect court's intent. Court Order on objection to creditor's proof of claim disallowed secured portion of claim but allowed claim as an unsecured claim. However, written order submitted by counsel and signed by court disallowed claim in its entirety. Court had authority under Rule 60(a) to amend the order to reflect that order was allowed as unsecured, consistent with court's stated intention.
- (9819) *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.
- (9820) *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.
- (9821) *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.
- (9822) *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.

25.66 Rule 60 (b)(1) - Mistake, Inadvertence, Surprise or Excusable Neglect

- (9823) *In re Clevinger*, 2018 WL 4223251 (Bankr. N.D. Ohio 2018) – “Excusable neglect” requires consideration of all relevant circumstances including danger of prejudice to Debtor, length of delay and potential impact on proceedings, reason for delay, whether delay was in reasonable control of moving party, and whether moving party acted in good faith, with “reason-for-delay” being given greatest import. Motion for Reconsideration filed eight weeks after deadline for filing response to Objection was not excessive delay and granting relief would not have significant effect on case administration as Chapter 13 Plan still had 12 months remaining and balance owed to creditor was fairly nominal. However, creditor did not present any valid reason for not responding to Objection where creditor received objection at address for notices included in Proof of Claim and Court sent notice to address listed on Proof of Claim as well as addresses specified by creditor in Notices of Change of Address. Creditor offered no explanation as to how Debtors service of objection at notice address impaired creditor’s ability to timely file response.
- (9824) *In re Morris*, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Rule 60(b)(1) Motion must be filed within one year of order to be reconsidered.
- (9825) *In re LSC Liquidation, Inc.*, 699 Fed. Appx. 503 (6th Cir. 2017) – Courts consider three factors when determining whether to grant relief under Rule 60(b)(1): “(1) culpability—that is, whether the neglect was excusable; (2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense. Attorney error can fit Rule 60(b)(1). Order approving sale of assets erroneously did not include health insurance contracts. Motion was timely where brought within one year of entry of order. Omission was excusable where all parties intended that there would be contract in place and Sale Order specifically contemplated further adjustments. Trustee did not suffer prejudice as he would not have had standing to object where Trustee was not appointed until after Sale Order was entered and all other parties acted in reliance on assumption of contract.
- (9826) *Penney v. US*, 2017 WL 3816049 (6th Cir. 2017) – Time limit set forth in Rule 60(b)(1) is not jurisdictional. Jurisdiction involves either the classes of cases over which Court can exercise authority or persons falling with Court’s adjudicatory power. Rule 60’s time limit does not implicate either of these; instead it is a claims processing rule that Court can disregard in appropriate circumstances.
- (9827) *In re Hicks*, 2017 WL 3225913 (Bankr. N.D. Ohio 2017) – Rule 9006(b)(3) allows Court to extend deadline to pay filing fee to a date no longer than 180 days after filing of the petition. Case dismissed where Debtor did not pay filing fee within time permitted by Order allowing payment of filing fees in installments. Debtor did not tender payment of the filing fee until eleven months after dismissal and did not allege any excusable neglect for failing to pay filing fee timely, and allowing Debtor to reinstate and pay filing fee 11 months after dismissal would violate time limits of Rule 1006. Fact that creditors may not be prejudiced by reopening of case is not test. Discharges are not favors given for attending a party. Discharges are the result of a Debtor timely and thoroughly fulfilling the duties and responsibilities set forth in the Bankruptcy Code and Rules. Allowing Debtors to continually ignore their obligations, only to later seek to avoid the repercussions, creates a culture of only performing obligations if it is convenient. The court cannot condone, and will not foster, this culture.
- (9828) *In re Schulze*, 2016 WL 6407358, *second Motion for Rehearing denied*, 2016 WL 6407358 (Bankr. E.D. MI. 2016) – Motion for relief from Turnover Order based on mistake must be filed within 14 days of entry of Turnover Order. Motion alleged that court committed legal error in entering turnover order. Rule 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal. Motion filed 6 months after entry of Turnover Order was untimely. Second Motion also untimely as premised on legal error by court. Second motion failed to allege any palpable defect or existence of any excusable neglect. To extent second motion alleged excusable neglect, any “neglect” was result of actions of counsel and are attributable to Debtor. Counsel’s alleged neglect was, by any standard. Inexcusable and grossly negligent, and does not support relief under Rule 60. Motion also failed to allege that different disposition would result from correction of error, as Motion did not establish any valid defense to Trustee’s Motion for Turnover. Motion did not state basis for relief under Rule 60(b)(6) as Motion did not allege any “extraordinary or exceptional circumstance”. Further, basis for motion, that counsel failed to file responsive pleading allowing order to be entered by default, are addressed by Rule 60(b)(1), precluding relief under Rule 60(b)(6).
- (9829) *Hauk v. Valdiva*, Case No. 14-4753 (Bankr. E.D. Mi. 2015) – Defendant failed to demonstrate excusable neglect in failing to respond to adversary complaint where defendant was aware of adversary proceeding and made a conscious decision, after consulting with counsel, not to file an adversary. While there was no evidence of neglect by counsel, if there was it would be attributable to defendant for purposes of determining whether mistake was excusable.
- (9830) *In re Tennielle*, Case No. 15-41869 (Bankr. E.D. Mi., 2015) – Change in controlling law after entry of order does not amount to “mistake” under Rule 60(b)(1). Fact that controlling law would now require different conclusion is not evidence that court erred in first instance.
- (9831) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – “Neglect” is defined as giving little attention to or respect to a matter, or leaving undone or unattended through carelessness. Focus is whether client and attorney actions were “excusable”. Misreading of applicable law or strategic error is not excusable neglect. Failure to timely file objection to Trustee’s Final Report was not excusable neglect where attorney reviewed final report and concluded that there was “nothing to object to” Even if legal analysis was incorrect, that error is not either mistake or excusable neglect.
- (9832) *In re Slayton*, 509 BR 90 (Bankr. E.D. Mi. 2014) – Improper service of process is reason for excusable neglect. Motion demonstrated excusable neglect sufficient to set aside order where record indicated that party seeking relief had not been properly served with motion. Rule 7004 requires service on a corporation by mailing the pleading “to the attention of an office, a managing or general agent, or to any other agent authorized by appointment of by law to receive service of process”. Motion addressed to “Chrysler Benefit Express, ATTN: Bankruptcy Department” did not name any particular officer or agent to whom the motion was addressed; and was not sufficient under state law as Motion was not “delivered” to an officer, managing or general agent, or other agent authorized by appointment or law. General

mailing to corporate entity, without specifying person to whom mailing is addressed, is not sufficient under Rule 7004. As such, court lacked personal jurisdiction over named party leaving order fatally defective.

- (9833) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporate by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of Debtor’s counsel’s e-mail account where record indicated that notice of hearing was issued to Debtor’s counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel’s failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than “run of the mill inattentiveness”. Further, court issued summary judgment on merits of motion independent of counsel’s failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.
- (9834) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 60, incorporated by reference in Rule 9024, requires that party seeking relief based on surprise or excusable neglect must prove that moving party was not culpable; that opposing party would not be prejudiced; and that movant has meritorious claim or defense. Attorney’s inaction or strategic error based upon misreading of applicable law is not deemed “excusable” even if it was “excusable” for client to rely on attorney’s advice. Counsel’s misunderstanding of “adequate protection” in context of Chapter 13 and Motion for Stay Relief was not excusable neglect, where court found lack of excusable neglect based on infeasibility of plan and counsel for Debtor was not aware that he has burden to show at least prima facie case that Chapter 13 Plan could be confirmed and completed.
- (9835) *In re Baker*, 2014 WL 1393955 (Bankr. N.D. Ohio 2014) – Rule 60(b)(1) allows court to relieve party of final judgment or order for mistake, inadvertence, surprise or excusable neglect. Excusable neglect requires neglect, defined as leaving things undone as a result of lack of attention or carelessness. Test for whether neglect is excusable where underlying order did not involve decision on merits, issue is equitable one taking into account all circumstances including danger of prejudice to Debtor, length of delay and potential impact on proceedings, reason for delay, whether reason was within control of moving party, and whether moving party acted in good faith. Where order at issue involves consideration on merits, court will consider whether party seeking relief is culpable, whether party opposing relief would be prejudiced, and whether the party seeking relief has meritorious claim or defense. Only where party seeking relief can demonstrate lack of culpability will court even consider other two factors. Order dismissing adversary proceeding based on erroneous filing in main case rather than opening new adversary was not decision on merits. Attorney’s secretary did not routinely file adversary complaints, leading to mis-filing. Attorney did not monitor case docket which would have indicated deficiency before order was entered and attorney did not bother to contact court until a month after case was filed yet summons had not been issued. Counsel’s failure to monitor docket excusable where attorney did not expect any deficiency notices to be entered and he had no reason to be concerned about delay in issuing summonses as only deadline is requirement for service within 120 days of commencement of adversary. Counsel learned of error and sought relief in timely manner, error had no impact on judicial proceedings as adversary could proceed without adverse impact on main claim and without additional effort than would have been required had adversary been filed correctly in first instance. Fact that Debtors confirmed chapter 13 plan was not prejudice as Debtor knew of claim as creditor had filed proof of claim, and had filed Rule 60 motion four months before plan was confirmed. While attorney certainly made mistake, there was no suggestion of bad faith. Movant demonstrated excusable neglect to set aside order dismissing adversary and order clerk to docket mis-filed complaint as separate adversary proceeding.
- (9836) *In re Ivens Properties, Inc.*, 2014 WL 667659 (Bankr. E.D. Tn. 2014) – Rule 60(b)(1) is intended to provide relief where the party made an excusable litigation mistake or the attorney in the litigation acted without authority; or when the judge made a substantive mistake of law or fact. Courts consider the culpability of the party and whether the order is the result of neglect that was excusable; whether granting the relief would prejudice other parties; and whether the party holds a meritorious claim or defense. Order imposed deadline by which Debtor must file chapter 11 Plan. Debtor missed the deadline and filed a Motion under Rule 60 for relief. Motion evidenced excusable neglect as failure to file plan by deadline resulted from unexpected and extended medical issues that were unforeseen and uncontrollable. Extending deadline to file plan would not prejudice secured creditor where all parties agreed Debtor had substantial equity in the property. Debtor acted diligently to find new counsel when it became apparent that prior counsel would be medically unable to continue representation, and new counsel acted diligently in filing motion to extend deadline.
- (9837) *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.
- (9838) *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.
- (9839) *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.
- (9840) *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.

25.67 Rule 60(b)(2) - Newly Discovered Evidence

- (9841) *Walker v. RDR Real Estate*, 2018 WL 1341649 (6th Cir. 2018) – Newly discovered evidence is evidence that was no available or reasonably discoverable before trial or hearing. Transcript of CD was not newly discovered where Plaintiffs had the CD itself. Transcript represented typed version of CD. Plaintiffs had CD for more than one year before trial and were free to obtain transcription but did not do so. Further, Defendant sent transcript that it had prepared at least a week before trial and Plaintiff did not file transcript in unread e-mails until after trial.
- (9842) *In re Fuller*, 2018 WL 345943 (Bankr. W.D. Mi. 2018) – When a party seeks to alter or amend judgment within fourteen days of entry, more liberal standard under Bankruptcy Rule 9023 allows court to alter or amend judgment if movant can establish: (i) clear error law, (ii) newly discovered evidence, (iii) intervening change in controlling law, or (iv) manifest injustice. Evidence is "newly discovered" only if it could not, in the exercise of reasonable diligence, have been submitted before Court entered Order. Manifest injustice requires lack of equity or some form of unfairness and that altering or amending judgment would produce outcome in moving party's favor. Poor strategic decisions are not "manifest injustice". Debtor's Motion for Relief from Order Dismissing Case where case was initially dismissed because Debtor did not file Schedules, then reinstated when Debtor filed Schedules and Plan but re-dismissed where Schedules indicated that debtor's debts exceeded debt limits and Debtor had not made any payments under his Chapter 13 plan. Debtor's post-second-dismissal filing of amended schedules to bring debts below debt limits did not constitute newly discovered evidence as all information in Schedules and Plan were fully available to debtor before case was dismissed. Dismissal was not manifest injustice where Debtor was provided with numerous opportunities to address various deficiencies yet Debtor did not amend schedules until after Court dismissed case. Debtor's claim that former attorney committed a fraud by including debts that had previously been forgiven and that Debtor did not sign the schedules contradicted Debtor's amended schedules that included same liabilities that were on schedules Debtor filed pro se at outset of case; and Debtor's signature appears on the top of each page making it difficult to accept Debtor's allegation that he did not sign the amended schedules..
- (9843) *Mason v. Pichler*, Case No. 12-3348 (Bankr. E.D. Mi. 2017) – Relief from Order based on newly discovered evidence requires that evidence was previously unavailable notwithstanding due diligence in attempting to discover information; and that evidence is material and controlling and would have produced different result if presented before original judgment and is not merely cumulative or impeaching. Court would not reconsider Order Denying Motion for Recusal where Court previously held that Court had no personal knowledge of any disputed evidentiary fact and that its knowledge was limited to matters of record. Motion for Reconsideration alleged only that Counsel for one party in this case was also counsel to the same party in different adversary case and communications between counsel and the Court had no bearing on the instant adversary but rather involved a removed state court probate matter and an effort to surcharge a prior trustee, while the current action was against different defendants to recover fraudulent transfers. Further, any communications were not material as the communications involved only case status updates of state court matters and procedural items such as status and timing.
- (9844) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 6158963 (E.D. Mi. 2016) – Bankruptcy Court did not err in refusing to consider affidavit of Debtor that was not filed until after summary judgment was granted. While Rule 59 allows Court to consider new affidavits as part of Motion to Alter or Amend, Rule does not require Court to do so and Court's refusal to do so was not abuse of discretion.
- (9845) *Energy Conversion Devices Liquidation Trust v. Trina Solar Limited*, 2015 WL 5216579 (E.D. Mi. 2015) – Rule 59 allows court to alter or amend order based on newly discovered evidence. Motion cannot rely on information readily available during prior proceedings or that could have been adduced during pendency of proceedings, and cannot be used to raise new arguments that could have, and should have, been raised before judgment issued. Plaintiff had information available in July, 2014, and Order dismissing complaint was not entered until October, 2014, and included information dating back to 2012. Plaintiff's failure to include additional count in complaint was not due to lack of information but was result of strategic error in evaluating need to plead additional cause of action in first instance.
- (9846) *Schwab v. Oscar*, 2014 WL 232113 (Bankr. N.D. Ohio 2014), *aff'd*, 517 BR 72 (6th Cir. BAP 2014) – Newly discovered evidence for purposes of Rule 60 relief is evidence that was not available prior to entry of order through reasonable diligence. If Plaintiff was unaware of evidence, but reasonable efforts would have disclosed evidence at earlier date, new evidence will not support Rule 60 relief. Plaintiff's allegations of newly discovered evidence regarding conflict of interest between Debtor's counsel and Debtor, based on counsel's alleged simultaneous representation of secured creditor, was discoverable, where counsel's application for retention referenced relationship between counsel and lender, and subsequent e-mails also disclosed relationship. Plaintiff knew or reasonably should have known of alleged conflict far earlier than May, 2013, when court entered Judgment against Plaintiff in action against counsel and lender.
- (9847) *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.

- (9848) *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.

25.68 Rule 60(b)(3) - Fraud, Misrepresentation or Misconduct

- (9849) *Vande Ryt v. Peace*, 2018 WL 1323982 (6th Cir. BAP 2018) – Party's dispute with accuracy or credibility of witness does not amount to evidence of fraud. Fact that expert relied on data that differed from that on which opposing party relied is not fraud, where opposing party had ample opportunity to depose expert, determine information on which expert based opinion, and introduce contrary evidence to impeach expert; or to retain own expert that could have exposed any alleged fraud.
- (9850) *Dates v. HSBC, USA, NA*, 2017 WL 6402920 (S.D. Ohio 2017) – Relief under Rule 60(b)(3) requires moving party to show that adverse party committed deliberate act that adversely impacted fairness of relevant legal. Only fraud (1) that attempts or succeeds in defiling court or (2) that is perpetrated by officers of court and prohibits court from performing the impartial task of judging cases warrants relief on showing of most egregious misconduct. Motion for Reconsideration that alleged that Defendant committed fraud in underlying transaction is not “fraud” for purposes of relief under Rule 60(b)(3).
- (9851) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Relief under Rule 60(b)(3) requires misrepresentation, affirmative misstatement, fraud including a deliberate omission, or other misconduct including questionable behavior affecting fairness of litigation. Rule 60(b)(3) provided basis for Court to amend Order Dismissing Case to provide for property of estate to remain vested in estate under Section 349 where Debtor did not disclose existence of asset and when Trustee discovered asset and attempted to recover asset, Debtor voluntarily dismissed the Chapter 13 case in effort to keep Trustee from exercising control or paying creditors.
- (9852) *Hauk v. Valdiva*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Alleged fraud or misrepresentation by plaintiff in underlying transaction may constitute a defense to action but does not amount to fraud in entry of judgment itself. Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (9853) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – Party seeking to set aside order for fraud, misrepresentation or misconduct by opposing party must prove either an affirmative misstatement (misrepresentation); deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material (fraud); or questionable behavior affecting the fairness of litigation other than statements or the failure to make statements (misconduct). Debtor's claim that ex-wife was guilty of misconduct or misrepresentation by filing proof of claim did warrant relief where proof of claim contained no factual misstatements or misrepresentations. Creditor's acceptance of payments from Trustee based on proof of claim to which Debtor never objected was not sufficient to set aside order, although Debtor alleged that creditor's right was contingent and required creditor to pay mortgage debt and creditor never paid mortgage debt or otherwise became entitled to reimbursement. At best, Debtor's motion alleged that he and creditor had different view regarding Debtor's obligation under divorce decree, such that creditor's acceptance of payment cannot be basis for fraud or misconduct. Debtor never objected to proof of claim and Trustee paid claim per the allowed proof of claim.
- (9854) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Rule 4007 requires adversary to except debt from discharge to be filed within 60 days after the date first set for the meeting of creditors. The court can extend the deadline on motion filed before the deadline expires. Creditor did not timely file adversary or seek extension of time to do so. There was no dispute that creditor received notice of the bankruptcy in time to file the required adversary and there was no suggestion that creditor was in any way confused or misled. Court would not use Rule 60 to alleviate consequences of creditor's own failure to act in a timely manner. Creditor did not allege that Debtor obtained discharge by fraud or that creditor was somehow fraudulently induced to not file adversary, where creditor's only allegation of fraud was that Debtor filed bankruptcy case between entry of State Court default and hearing to determine damages, resulting in “general unfairness”.
- (9855) *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.
- (9856) *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.

- (9857) *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.
- (9858) *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 misrepresentations, 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.

25.69 Rule 60(b)(3) - Fraud on the Court

- (9859) *Samaritan Alliance, LLC v. Commonwealth of Kentucky*, 2014 WL 4101495 (Bankr. E.D. Ky. 2014) – Fraud on the court is conduct on the part of an officer of the court directed to the judicial machinery that is either intentionally false or made with willful blindness to or reckless disregard for the trust, and that amounts to a positive statement to the court or a concealment where one has a duty to disclose and that deceives the court. Because the Motion seeks an exception to general rule of res judicata and is contrary to requirement for judicial finality, doctrine is narrowly applied and only when conduct harms the integrity of the judicial process and results in a grave miscarriage of justice such as bribery of a judge or fabrication of evidence by counsel. Creditor's claim for recoupment did not rise to fraud on court even though creditor knew, at time it made claim, that it has no right to recover as creditor had, in fact, been overpaid. Issues were not matter of private information that could not have been discovered and were based on facts known to both parties including amounts claimed by and amounts paid to each party by the other. The only additional information is that Debtor now has obtained e-mails from creditor in which creditor knew it was overpaid at time claim brought. Court correctly applied law to facts presented and reached conclusion. Fact that claim may ultimately have lacked substance was not "fraud on the court".
- (9860) *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".

25.70 Rule 60(b)(4) – Void Judgment

- (9861) *In re Clevinger*, 2018 WL 4223251 (Bankr. N.D. Ohio 2018) – Objection to Claim mailed to incorrect address does not render Order void if the notice is reasonably calculated under circumstances to apprise interested parties of pendency of action and affords opportunity to object. Creditor did not deny receipt of Debtor's Objection to Claim and Court's Notice of Objection to Claim issued by clerk was sent by United States mail addressed to address in Proof of Claim, address in first Notice of Change of Address and address in Second Notice of Change of Address and Court did not receive any of the mail returned as undeliverable. Even if Debtor's Objection was served on incorrect address, Court's notice was served on correct address and afforded ample time for creditor to respond such that service complied with constitutional due process requirements.
- (9862) *Parker v. Horvath*, 2017 WL 3707325 (Bankr. N.D. Ohio 2017) – Rule 60(b)(4) requires that judgment, from its inception, be complete nullity and without legal effect, and is narrowly construed and does not include a judgment that is merely erroneous. Neither prior State Court Judgment nor Bankruptcy Court Judgments determining title to property were "void" for lack of jurisdiction where Court determined jurisdiction existed under 28 USC Section 1334 and probate exception to jurisdiction did not deprive Court of that jurisdiction based on facts of case. "Probate exception" to Federal Jurisdiction allows Federal Court to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish claims so long as the Federal Court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. Federal Court may not exercise its jurisdiction to disturb or affect possession of property in the custody of a state court, but *may adjudicate rights in property* as long as Final Judgment does not interfere with State Court's possession of the property except to extent that State Court is bound by Federal Court judgment. Exception is limited to three narrow circumstances: (1) plaintiff seeks to probate a will; (2) plaintiff seeks to annul a will; or (3) plaintiff seeks to reach *res* over which State Court has custody. Probate exception did not prevent Bankruptcy Court for determining title to assets owned by Decedent or in determining Debtor's ownership of those assets where decedent has died 12 years earlier yet nobody sought to open an estate. In subsequent State Court litigation, State Court entered Order determining ownership of assets and since commencement of Bankruptcy, Bankruptcy Court has exercised exclusive jurisdiction over property estate. Probate Court action was not brought and Probate Court was not asked to assert jurisdiction until years after commencement of Bankruptcy as assumption by Bankruptcy Court of jurisdiction over assets. Further, Bankruptcy Court's Orders determining ownership would prevent Probate Court from collaterally attacking

determination of ownership of assets, where issues in both prior State Court action and Bankruptcy proceedings did not involve probate of will or annulment of estate and did not dispose of, or disturb possession of, property in hands of State Probate Court.

- (9863) *In re Olsen*, Case No. 10-38786 (Bankr. E.D. Wis. 2017) – Section 363 sale of property free and clear pursuant to confirmed Chapter 11 Plan did not divest holder of Right of First Refusal where holder of Right did not receive notice of the bankruptcy filing, did not appear in the schedules, and did not receive notice of the purported sale of the property free and clear of liens and interests. Rule 60(b)(4) allows Court to vacate order where order is void. Order is void for lack of due process where party who is adversely affected by Order is not provided with notice reasonably calculated to apprise party of pendency of action and afford party of opportunity to present objections. Holder of Right of First Refusal was not given written notice as required by Federal Rules of Bankruptcy Procedure 2002 and 6004. Holder had, at most, ambiguous information in a telephone call about a “possible” sale less than one week prior to the proposed sale, which would not have provided holder with requisite information, time or opportunity to protect interest. By contrast, both Debtor and potential purchaser had constructive knowledge of Right of First Refusal as Right was recorded in appropriate land records and purchaser was provided with full title report which showed Right of First Refusal before closing of the sale. Constructive notice of Right prevented purchaser from constituting good faith purchaser. Although sale of property to purchaser remained valid and enforceable, Right of First Refusal survived bankruptcy sale and remained fully enforceable according to its terms.
- (9864) *Valdivia v. Hauk*, 2016 WL 39912029 (E.D. Mi. 2016) – Creditor lacks standing to bring action to except debt from discharge where debt is statutorily excepted from discharge without need for adversary. Debtor’s obligations to ex-spouse were non-dischargeable under Section 523(a)(5 and (a)(15). Debtor conceded that debts were non dischargeable. Plaintiff lacked standing to bring action as court lacked power to grant any effective relief. Court could, at best, rule that debts were non-dischargeable but as that result followed as matter of law and court decree could not add to or increase remedy available to plaintiff. Default judgment against Debtor void for lack of jurisdiction where plaintiff lacked standing to bring action in first instance.
- (9865) *Federal National Mortgage Company v. Meeko*, Case No. 15-1200 (D. Or. 2016) – Section 1330 is not exclusive method of contesting Order Confirming Plan. Section 1330 and the temporal limits are applicable only when moving party seeks to set aside Order for fraud. Section 1330 time limits do not apply where basis to set aside Order is Court mistake of fact or clerical error; due process violation; or fraud. Creditor is denied due process that rises to constitutional defect. Violation of due process is not sufficient merely because party fails to strictly comply with rule of procedure, and is not sufficient if creditor had opportunity to object to confirmation yet failed to do so. Constitutional due process requires notice reasonably calculated to apprise interested party of pendency of action and to give party opportunity to object. If creditor received actual notice of proceeding, even if not technically compliance with rules, is sufficient for constitutional due process. Creditor had notice of proceedings including plan and amended plan and failed to object due to error in creditor’s own systems. Creditor’s failure to respond forfeited any due process argument of creditor.
- (9866) *Hauk v. Valdivia*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Defendant’s mere denial of receipt of complaint was insufficient to warrant setting aside order as void where record established that plaintiff mailed the complaint to defendant and to defendant’s counsel by US Mail and there was on dispute that defendant discussed content of adversary complaint before defendant made decision not to answer complaint.
- (9867) *In re Davis*, Case No. 12-33624 (Bankr. E.D. Mi. 2015) – Order Confirming Chapter 13 Plan set aside under Rule 60(b)(4) where creditor did not have notice of the proceedings prior to confirmation of plan. Where creditor lacks notice, confirmation order is void as to that creditor and court abuses discretion by denying motion to set aside. Evidence indicated that Debtor transposed digits in creditor’s address resulting in creditor no receiving notice of case until well after confirmation order entered.
- (9868) *BAC Home Loans Servicing, LP v. Groves*, 2014 WL 5511048 (5th Cir. 2014) – Borrowers conceded that lender had standing to foreclose by entering into agreed final judgment that established facts necessary for standing. Borrowers could not later contest standing under Rule 60 claiming that judgment was void, merely because borrowers no longer want to be bound by agreed judgment.
- (9869) *Spradlin v. Williams*, 2014 WL 5363743 (Bankr. E.D. Ky. 2014) – Judgment is “void” only if court lacked any arguable basis for jurisdiction or that action was manifest abuse of authority. In general, court has power to determine jurisdiction and determination becomes res judicata if not timely appealed. Judgment would not be set aside as void where trial court determined that actions were arguably “arising in” or “arising under” code, even though Sixth Circuit later determined in related proceeding that court lacked subject matter jurisdiction. Later determination in another proceeding that court lacked jurisdiction did not mean that initial determination that court had jurisdiction was “manifestly incorrect” for purposes of Rule 60(b).
- (9870) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – Rule 9024, which incorporates Rule 60(b)(4) allows court to provide relief from judgment when judgment is void. Relief is limited to rare instance where judgment is premised on jurisdictional error or amounts to a violation of due process.
- (9871) *Mitchell v. Weinman*, Case no. 13-1013 (10th Cir. 2014) – Elements of involuntary petition are not jurisdictional. Court would not re-open closed involuntary case based on allegations that involuntary petition failed to comply with Section 303(b)(1) and were filed in bad faith. Involuntary proceedings were not “void” for purposes of Rule 60 relief.
- (9872) *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.

(9873) *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.

(9874) *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.

25.71 Rule 60(b)(5) – Reversal of Earlier Judgment

(9875) *Schaller v. Paulsen*, Case No. 12-80166 (Bankr. W.D. Mi. 2015) – Adversary Judgment predicated on collateral estoppel effect of State Court judgment would be vacated under Rule 60(b)(5) where State Court judgment was later reversed on appeal. Given extensive litigation that had already occurred in State Court, Bankruptcy Court would hold adversary proceeding in abeyance pending final determination by State Court.

25.72 Rule 60(b)(5) – Inequitable Result From Prospective Application

(9876) *Bennett v. Morton Buildings, Inc.*, 2015 WL 9491184 (Bankr. N.D. Ohio 2015) – Rule 60(b)(5) allows court to modify or vacate a judgment or order if a significant change in either the factual conditions or the law renders continued enforcement detrimental. Order denying motion to abstain is not motion that is applied “prospectively” as there is no identified future effect. Mere possibility that order may have some future effect is not “prospective” as every judgment has some reverberations into the future and has some prospective effect. Further, entry by Court of order lifting stay in separate bankruptcy case to allow State Court litigation in which the defendant in the current state is also a party does not indicate any facts that changed as a result of the other court’s Order, as Defendant always had right to ask court to abstain yet never did so. While filing by State Court defendant of separate bankruptcy case may have stayed the prosecution of the State Court action, the lifting of the stay in that case to allow State Court action to proceed and leaving defendant in same position as it was before the filing of the second case.

25.73 Rule 60(b)(5) - Equitable Relief

(9877) *Real Good Technologies, LLC v. Victory Solutions, LLC*, 2018 WL 1621163 (N.D. Ohio 2018) – Rule 60 allows Court to set aside orders for any reason that justifies relief. Garnishee entitled to relief from order requiring garnishee to appear for deposition in aid of execution where garnishee was not served with writ of garnishment in first instance. Service of process is necessary for enforcement of subsequent orders. Party not serviced with Writ of Garnishment entitled to have Writ quashed and Orders requiring appearance at depositions in aid of execution quashed. Fact that garnishee may have been aware of proceedings does not excuse requirement of proper service.

(9878) *In re Morris*, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Motion to Revoke Abandonment under Rule 60(b)(5) and (6) is not subject to one-year limit but still must be filed within reasonable time and focus on events after case closure and extent to which equity favors or disfavors revocation. Unanticipated increase in value of asset does not warrant revocation of abandonment given importance of finality and certainty.

(9879) *In re Cisko*, 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.

25.74 Rule 60(b)(6) - “Catchall” Provisions

(9880) *In re Morris*, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Motion to Revoke Abandonment under Rule 60(b)(5) and (6) is not subject to one-year limit but still must be filed within reasonable time and focus on events after case closure and extent to which equity favors or disfavors revocation. Unanticipated increase in value of asset does not warrant revocation of abandonment given importance of finality and certainty.

(9881) *In re Fuller*, 2018 WL 345943 (Bankr. W.D. Mi. 2018) – When a party seeks to alter or amend judgment within fourteen days of entry, more liberal standard under Bankruptcy Rule 9023 allows court to alter or amend judgment if movant can establish: (i) clear error law, (ii) newly discovered evidence, (iii) intervening change in controlling law, or (iv) manifest injustice. Evidence is “newly discovered” only if it could not, in the exercise of reasonable diligence, have been submitted before Court entered Order. Manifest injustice requires lack of equity or some form of unfairness and that altering or amending judgment would produce outcome in moving party’s favor. Poor strategic decisions are not “manifest injustice”. Debtor’s Motion for Relief from Order Dismissing Case where case was initially dismissed because Debtor

did not file Schedules, then reinstated when Debtor filed Schedules and Plan but re-dismissed where Schedules indicated that debtor's debts exceeded debt limits and Debtor had not made any payments under his Chapter 13 plan. Debtor's post-second-dismissal filing of amended schedules to bring debts below debt limits did not constitute newly discovered evidence as all information in Schedules and Plan were fully available to debtor before case was dismissed. Dismissal was not manifest injustice where Debtor was provided with numerous opportunities to address various deficiencies yet Debtor did not amend schedules until after Court dismissed case. Debtor's claim that former attorney committed a fraud by including debts that had previously been forgiven and that Debtor did not sign the schedules contradicted Debtor's amended schedules that included same liabilities that were on schedules Debtor filed pro se at outset of case; and Debtor's signature appears on the top of each page making it difficult to accept Debtor's allegation that he did not sign the amended schedules.

- (9882) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Relief under Rule 60(b)(6) is available only in extraordinary circumstances not addressed in other subsections of Rule 60(b), and requires unusual and extreme circumstances where principals of equity mandate relief coupled with showing that if relief is not granted, undue hardship will result. Rule 60(b)(6) provided basis for Court to amend Order Dismissing Case to provide for property of estate to remain vested in estate under Section 349 where Debtor did not disclose existence of asset and when Trustee discovered asset and attempted to recover asset, Debtor voluntarily dismissed the Chapter 13 case in effort to keep Trustee from exercising control or paying creditors.
- (9883) *In re Schulze*, 2016 WL 6407358, *second Motion for Rehearing denied*, 2016 WL 6407358 (Bankr. E.D. MI. 2016) – Motion for relief from Turnover Order based on mistake must be filed within 14 days of entry of Turnover Order. Motion alleged that court committed legal error in entering turnover order. Rule 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal. Motion filed 6 months after entry of Turnover Order was untimely. Second Motion also untimely as premised on legal error by court. Second motion failed to allege any palpable defect or existence of any excusable neglect. To extent second motion alleged excusable neglect, any "neglect" was result of actions of counsel and are attributable to Debtor. Counsel's alleged neglect was, by any standard. Inexcusable and grossly negligent, and does not support relief under Rule 60. Motion also failed to allege that different disposition would result from correction of error, as Motion did not establish any valid defense to Trustee's Motion for Turnover. Motion did not state basis for relief under Rule 60(b)(6) as Motion did not allege any "extraordinary or exceptional circumstance". Further, basis for motion, that counsel failed to file responsive pleading allowing order to be entered by default, are addressed by Rule 60(b)(1), precluding relief under Rule 60(b)(6).
- (9884) *Shapiro v. Abu-hamden*, 2016 WL 6157430 (Bankr. E.D. Mi. 2016) – Rule 60(b)(6) applies only where there is no other provision of Rule 60(b) that applies and only in extraordinary or exceptional circumstances. Motion that alleged excusable neglect was governed by rule 60(b)(1) and does not support separate relief under Rule 60(b)(6).
- (9885) *Bennett v. Morton Buildings, Inc.*, 2015 WL 9491184 (Bankr. N.D. Ohio 2015) – Rule 60(b)(6) is mutually exclusive with any other provision of Rule 60(b) and is available only in those extraordinary or exceptional circumstances that are not addressed in the other five subsections of Rule 60(b). Motion failed to identify any exceptional or extraordinary circumstances, and underlying allegations were basis for request under Rule 60(b)(5) precluding application of Rule 60(b)(6).
- (9886) *Hauk v. Valdiva*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Motion for relief under "catchall" provision of Rule 60(b)(6) must show that order is product of extraordinary circumstances suggesting that defendant was faultless in delay. Defendant's failure to respond to adversary complaint, after consulting with counsel, was neither extraordinary circumstance nor event which was over which defendant was faultless.
- (9887) *In re Tennille*, Case No. 15-41869 (Bankr. E.D. Mi. 2015) – Intervening change in controlling law may be grounds for relief under Rule 60(b)(6). Mere change in law alone is not, by itself, extraordinary circumstance. Rule 60 motion also requires evidence of additional special circumstances.
- (9888) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – Grounds for relief under Rule 60(b)(6) are exclusive of grounds under any other section of Rule 60, and apply only in exceptional circumstances which are not addressed by other provisions of Rule 60. Alleged gross negligence of attorney is not sufficient for relief under Rule 60(b)(6) unless counsel's conduct was so egregious as to amount to abandonment or intentional misleading of client. Motion alleged only that counsel may have made error in reaching legal conclusion that there was no basis to object to Trustee's final report, but there was no evidence that counsel either abandoned or intentionally misled client, which was not sufficient for relief under Rule 60(b)(6).
- (9889) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 463315 (E.D. Mi. 2016) - Catch all provision of Rule 60(b)(6) is reserved for extreme and unusual circumstances that do not fit in any of the other five categories of Rule 60, where equity mandates relief coupled with strong showing that extreme and undue hardship will result if relief is not granted. Party may not use Rule 60(b) as substitute for appeal or as technique to avoid consequences of decisions deliberately made yet later revealed to be unwise. Moving party failed to state basis for relief where argument was reassertion of issues and version of events raised in earlier proceedings, and moving party did not demonstrate any exceptional equitable circumstances or that lower court's original order was clearly erroneous.
- (9890) *In re Ivins Properties, Inc.*, 2014 WL 667659 (Bankr. E.D. Tn. 2014) – Rule 60(b)(6) applies in exceptional or extraordinary circumstances not addressed in the other five enumerated sections which themselves cover almost every conceivable ground for relief. Order imposed deadline by which Debtor must file chapter 11 Plan. Debtor missed the deadline and filed a Motion under Rule 60 for relief. Motion evidenced extraordinary circumstances as failure to file plan by deadline resulted from unexpected and extended medical issues that were unforeseen and uncontrollable. Extending deadline to file plan would not prejudice secured creditor where all parties agreed Debtor had substantial equity in the property. Debtor acted diligently to find new counsel when it became apparent that prior counsel would be medically unable to continue representation, and new counsel acted diligently in filing motion to extend deadline.
- (9891) *US v. Fullwood*, 2013 WL 1774717 (E.D. Mi. 2013) –
- (9892) *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.

25.75 Failure to File Response

- (9893) *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.

25.76 Time for Bringing Motion

- (9894) *Walker v. RDR Real Estate*, 2018 WL 1341649 (6th Cir. 2018) – Rule 60 Motion timely filed where Plaintiff initially filed Motion within one year of entry of Order, but Court dismissed Motion without prejudice based on intervening bankruptcy petition filed by Plaintiffs. After Debtors obtained stay relief, Debtors refiled Motion within 30 days of stay relief. Motion timely pursuant to Section 108.
- (9895) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 1168979 (E.D. Mi. 2018) – Motion for Reconsideration under Rule 59 and Local Rule 7.1 must be filed within 14 days of entry of order sought to be reconsidered. Motion filed more than 21 days after entry of Order denied as untimely.
- (9896) *Rosenberg v. DVI Receivables XIV, LLC*, Case No. 14-14620 (11th Cir. 2016) – bankruptcy case removed from Bankruptcy Court to District Court for trial governed by Bankruptcy Rules, not Federal Rules of Civil Procedure. Deadline for filing motion for new trial under Rule 9015 is 14 days versus deadline under Federal Rule 50 of 28 days. Motion for New Trial filed more than 14 days but less than 28 days after District Court entered judgment denied as untimely.
- (9897) *Penney v. US*, 2017 WL 3816049 (6th Cir. 2017) – Time limit set forth in Rule 60(b)(1) is not jurisdictional. Jurisdiction involves either the classes of cases over which Court can exercise authority or persons falling with Court's adjudicatory power. Rule 60's time limit does not implicate either of these; instead it is a claims processing rule that Court can disregard in appropriate circumstances.
- (9898) *In re Wilson*, Case No. 17-42454 (Bankr. E.D. Mi. 2017) - Motion to Waive Filing Fee in previous bankruptcy case construed as motion for reconsideration of order filed in prior case denying application to waive filing fee in prior case. Motion failed to demonstrate any palpable defect or otherwise to establish any basis for excusable neglect sufficient for granting relief from prior order. Debtor's present motion which asserted that Debtor paid a Bankruptcy Petition Preparer to prepare prior case directly contradicted Debtor's declaration under penalty of perjury in prior case that Debtor did not have help in preparing documents for bankruptcy filing and did not pay anyone for that out. Present motion was also untimely. Federal Rule of Civil Procedure 60 requires motion to be brought within reasonable time. Motion brought in 2017 seeking relief from order entered in 2009 was not reasonable. Finally, Debtor never filed required Schedules or Statement of Financial Affairs in prior case rendering it impossible for Court to determine whether facts existed to justify waiver of filing fee or whether Debtor's income was below maximum income for family size under 28 USC Section 1930.
- (9899) *In re Schulze*, 2016 WL 6407358, *second Motion for Rehearing denied*, 2016 WL 2016 WL 6407358 (Bankr. E.D. MI. 2016) – Motion for relief from Turnover Order based on mistake must be filed within 14 days of entry of Turnover Order. Motion alleged that court committed legal error in entering turnover order. Rule 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal. Motion filed 6 months after entry of Turnover Order was untimely. Second Motion also untimely as premised on legal error by court. Second motion failed to allege any palpable defect or existence of any excusable neglect. To extent second motion alleged excusable neglect, any "neglect" was result of actions of counsel and are attributable to Debtor. Counsel's alleged neglect was, by any standard. Inexcusable and grossly negligent, and does not support relief under Rule 60. Motion also failed to allege that different disposition would result from correction of error, as Motion did not establish any valid defense to Trustee's Motion for Turnover. Motion did not state basis for relief under Rule 60(b)(6) as Motion did not allege any "extraordinary or exceptional circumstance". Further, basis for motion, that counsel failed to file responsive pleading allowing order to be entered by default, are addressed by Rule 60(b)(1), precluding relief under Rule 60(b)(6).
- (9900) *Shapiro v. Abu-hamden*, 2016 WL 6157430 (Bankr. E.D. Mi. 2016) – Rule 60(c)(1) requires Motion for Rehearing to be brought within "reasonable time". Motion was not brought within reasonable time after entry of Default Judgment directing turnover of assets, where three months passed and Trustee had engaged in extensive efforts to enforce judgment. Failure to file Motion within reasonable time precludes any relief under Rule 60(b)(1) or 60 (b)(6).
- (9901) *In re Yonish*, 2016 WL 826056 (6th Cir. BAP 2016) – Bankruptcy court erred in denying motion to reopen case for purposes of avoiding judicial liens where no creditor objected to motion. Debtor waited 2 years after closing of case to seek to reopen. Bankruptcy Court denied motion under Rule 60 and by laches as motion was not brought within reasonable time. Mere delay without more was not basis to deny motion absent prejudice and delay did not in any way prejudice creditors.
- (9902) *Walker v. RDR Real Estate*, 2016 WL 123932 (6th Cir. 2016) – Automatic stay precluded unsuccessful party from prosecuting post-trial motions until stay is lifted. Court did not err in denying Motions without prejudice to re-file when stay was re-imposed, but court erred in setting new deadline for date before stay was lifted. Under Section 108, where the time for filing the Motions had not expired as of the petition date, moving party had right to re-file Motions within 30 days of being notified of lifting of stay. Court Order that purported to set deadline as one day before stay modification order became effective failed to properly account for extension afforded by Section 108. Order denying Motions as untimely, when filed one day after deadline but within 30 day window allowed by Section 108, was abuse of discretion.

- (9903) *Hauk v. Valdiva*, 2015 WL 7082477 (Bankr. E.D. Mi. 2015) – Motion was unreasonably late where defendant had knowledge of entry of judgment yet waited 362 days to file motion to set judgment aside.
- (9904) *Spradlin v. Williams*, 2014 WL 5363743 (Bankr. E.D. Ky. 2014) – Rule 60(b)(4) which allows setting aside an order as void must still be brought within reasonable time. Sixth Circuit has generally announced that 3 years is the outside limit for “reasonable” although court can go beyond that if appropriate.
- (9905) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 59, incorporated by reference in Rule 9023 allows a movant to seek a new trial if there is: (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. Motion for a new trial or to alter or amend a judgment must be filed no later than 14 days after entry of judgment. Motion filed more than three weeks after entry of Judgment must be denied as untimely.
- (9906) *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.
- (9907) *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.
- (9908) *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.
- (9909) *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.
- (9910) *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.
- (9911) *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).

25.77 Conditional Grant of Motion

- (9912) *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.

25.78 Stay Pending Disposition

- (9913) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Court can stay effect of order under Rule 62 pending disposition of Rule 59 motion on “appropriate terms”. Once court denied Rule 59 Motion, request for Stay under Rule 62 is rendered moot.

G. Federal Court Review of State Court Actions

25.79 Limitations – *Rooker-Feldman*

- (9914) *Launder v. Doll*, 2018 WL 1189171 (Bankr. N.D. Ohio 2018) - *Rooker-Feldman* prohibits Federal Court from engaging in appellate review of State Court decisions. Bankruptcy Court may not review and redetermine merits of debt or set aside default judgment reflecting it, but may determine whether debt is dischargeable. Dischargeability does not require Bankruptcy Court to reverse the state Court ruling although factual findings in state Court ruling may impact Bankruptcy Court determination of nondischargeability. *Rooker-Feldman* does not require Court to give preclusive effect to State Court judgment that does not reflect findings of fact necessary to satisfy requirements for nondischargeability. Court is applying, not reversing, state Court judgment.

- (9915) *Isaacs v. DBI-ASG Coinvestor Fund III, LLC*, Case No. 16-8041 (6th Cir. BAP 2017), *reversed*, 2018 WL 3453360 (6th Cir. 2018) – Circuit *Rooker-Feldman* doctrine prevents Federal Court from acting as Court of Appeals for State Court judgment. Doctrine is applied on a “claim-by-claim” basis. State Court Judgment of foreclosure precluded later Bankruptcy Court consideration of whether mortgage was enforceable as relief effectively asks Bankruptcy Court to vacate State Court judgment and clearly identifies State Court judgment as source of plaintiff’s injury. Bankruptcy Court would be required to reach conclusion precisely opposite from that reached by State Court on issue of whether mortgage lien attached. However, *Rooker-Feldman* does not preclude Bankruptcy Court’s use of Section 544 “Strong-arm” power to avoid mortgage that was not perfected. Issue of whether mortgage is unperfected and avoidable is separate from issue of whether mortgage was valid in first instance. Determining avoidability under Section 544 does not require Court to review State Court conclusion that mortgage was valid as mortgage can be avoided even assuming that State Court correctly determined that mortgage constituted valid lien on real estate. State Court order made no findings regarding perfection as none were necessary to State Court judgment.
- (9916) *In re White*, Case No. 13-21977 (Bankr. E.D. Mi. 2017) – *Rooker-Feldman* doctrine prevents party who was unsuccessful in State Court to ask Federal Court to effectively act as appellate court based on allegation that State Court judgment somehow violated loser’s federal rights. Doctrine applies even where State Court judgment was in error. Only exception is where State Court judgment is procured through fraud, deception, accident or mistake. Court lacked authority to Order State Court to set aside dismissal of State Court action where action was properly dismissed by Trustee at point when cause of action was property of estate; dismissal was result of negotiations between Trustee and creditor; Bankruptcy Court entered Order authorizing Trustee to settle litigation including dismissal with prejudice; and State Court had denied Plaintiff’s attempts to set aside dismissal and denial had been affirmed by State Appellate Court.
- (9917) *Jacobs v. JPMorgan Chase Bank*, 2017 WL 1399851 N.D. Ohio 2017) – *Rooker-Feldman* bars action in federal Court that seeks to review or overturn State Court decision. Only United States Supreme Court can review State Court judgment, either by appeal or by certiorari. Plaintiff’s complaint asked Court for relief which would necessarily require Court to determine whether State Court judgment of foreclosure was unlawful resulting in Court lacking subject matter jurisdiction.
- (9918) *Underwood v. Silent*, 2017 WL 955288 (E.D. Mi. 2017) – *Rooker-Feldman* prevents party who raised issues in State Court proceeding from using Federal Court litigation to raise same issues an attempt to challenge correctness of State Court, Judgment.
- (9919) *McClafferty v. DeWine*, 2017 WL 1379344 (Bankr. N.D. Ohio 2017) – Although State Court has concurrent jurisdiction to determine whether automatic stay precludes prosecution of State Court litigation, *Rooker-Feldman* does not preclude bankruptcy courts review applicability of automatic stay to State Court litigation. *Rooker-Feldman* does not apply where a federal plaintiff presents some independent claim, even one that denies legal conclusion that a State Court reached in a case to which plaintiff was party. Dispute regarding applicability of automatic stay subject to Bankruptcy Court review where, if State Court erroneously concluded that stay did not apply, proceedings which continued we constitute violation of automatic stay and would be void. Prohibition against Federal Court reviewing Final Judgment of State Court does not apply where proceedings were void and, therefore, there is no Final Judgment of State Court.
- (9920) *Gardner v. Potestivo & Associates*, Case no. 15-4355 (Bankr. E.D. Mi. 2015) – *Rooker-Feldman* doctrine precludes Bankruptcy Court from acting as appellate court for decisions rendered by State Court. Plaintiff had previously brought same cause of action in lawsuits in both State and Federal Court brought prior to commencement of bankruptcy case. Current Adversary asked Court to effectively determine correctness of those prior decisions in violation of *Rooker-Feldman*.
- (9921) *In re Duckett*, 2015 WL 5002522 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, accord relief to Debtor, or for other cause. Reopening case is ministerial act that has not independent legal significance and determines nothing with respect to merits. However, where court cannot grant any effective relief if case is reopened, court will deny request to reopen. Court lacked authority to afford Debtor relief where, after conclusion of bankruptcy case, mortgage holder commenced foreclosure proceedings, obtained State Court judgment and sold property, and State Court also denied Debtor’s Motion to Dismiss Fraudulent Foreclosure as issues regarding lender’s standing to foreclose had already been raised and decided in State Court. Debtor sought to reopen bankruptcy case to again contest mortgage holder’s standing to foreclose. *Rooker-Feldman* precludes losing party in State Court from asking federal court to review correctness of decision. Debtor lost in State Court and was complaining of injuries caused by State Court judgments entered before Debtor sought relief in federal court, and Debtor was essentially asking federal court to determine whether State Court had correctly determined standing to foreclose.
- (9922) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – *Rooker-Feldman* precludes Federal Court review of State Court Orders where federal court would essentially be acting as appellate court determining correctness of State Court ruling. Debtor’s objection to mortgage company proof of claim based on argument that mortgage was invalid barred as State Court had already considered arguments and entered judgment of foreclosure in favor of lender. *Rooker-Feldman* includes issues argued and resolved by State Court plus issues that are inextricably intertwined with claims raised in State Court. Assertion that mortgage was invalid is nothing more than attempt to relitigate issues decided by State Court in foreclosure action. Fact that State Court judgment is on appeal when bankruptcy case is filed does not avoid impact of *Rooker-Feldman* as doctrine applies to interlocutory orders and all other orders of State Courts. Debtor’s recourse is through state appellate procedures only.
- (9923) *Grant v. Unifund CCR, LLC*, 2014 WL 2444600 (9th Cir. 2014) – Federal Court lacked jurisdiction over suit brought by Debtor against collection agency alleging that agency was attempting to collect State Court judgment although Debtor was allegedly never served with complaint and that agency improperly garnished funds and took other actions to collect State Court judgment. Allegations concerning service and validity of judgment were necessarily determined in State Court litigation and Federal Courts lack jurisdiction under *Rooker-Feldman* to act as de facto appellate court. Federal Court could not grant relief to Debtor without effectively setting aside State Court judgment which would constitute improper exercise of federal jurisdiction. However, Federal Court, having determined that *Rooker-Feldman* deprived court of jurisdiction, erred in dismissing case with prejudice. Court should have remanded case to State Court for further proceedings

- (9924) *In re Lancett*, 2014 WL ____ (Bankr. W.D.N.C. 2014) – Bankruptcy court lacked jurisdiction to review State Court foreclosure order. Debtor essentially asked bankruptcy court to review correctness of State Court Order in violation of *Rooker-Feldman*.
- (9925) *Bell v. Countrywide Home Loans*, 2014 WL 2618618 (W.D. Ky. 2014) – *Rooker-Feldman* deprives federal courts of jurisdiction over cases brought by State Court losers complaining of injuries caused by State Court judgments rendered before the district court proceedings commenced, and that invite district court review and rejection of those judgments. Complaint that contested lender's standing to foreclose mortgages dismissed where prior State Court litigation generated final judgment that expressly found that lender had standing, and that judgment was affirmed on appeal. Current action asked district court to sit as quasi-appellate court and enter an order that would circumvent State Court final judgment and prior rulings on lender's standing to maintain action.
- (9926) *Gleason v. GVL Lake properties, LLC*, 2014 WL 1779442 (Bankr. E.D. Ky. 2014) – Federal court lacks jurisdiction to consider correctness of State Court Orders. After bankruptcy had concluded, member of LLC commenced action in State Court against Debtor for declaratory relief that upon filing bankruptcy, Debtor forfeited interest in LLC. State Court agreed and entered judgment that under state law, Debtor lost rights in LLC. Debtor's subsequent suit in bankruptcy case to regain membership rights sought to reconsider correctness of State Court action which is barred by *Rooker-Feldman*. Suit was brought by State Court loser, complaining of injuries caused by State Court judgment rendered before district court proceedings commenced and invited district court review and rejection of that judgment.
- (9927) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – *Rooker-Feldman* protects jurisdictional division of authority between federal and State Courts by preventing lower federal court from sitting as appellate court over state decision. Doctrine governs State Court losers complaining of injuries caused by State Court judgments rendered before the federal court proceedings commenced and that invite district court review and rejection of that judgment. Trustee's motion for turnover of Debtor's marital interest that was awarded in pre-petition dissolution of marriage action did not attempt to undercut or reverse State Court Order; instead, turnover sought to enforce State Court Order by requiring remittance to trustee of property that had already been determined by State Court as Debtor's interest in marital property. State Court had not valued property awarded to Debtor, leaving bankruptcy court with task of valuing Debtor's interest in the asset. Trustee was not seeking to alter or amend State Court Order or to seek relief that was inconsistent with State Court Order.
- (9928) *Skyway Investment Corp. v. Tushman*, 2013 WL 5015591 (6th Cir. 2013) – Federal court is precluded from reviewing correctness of State Court judgment. Action challenging execution of deed would be dismissed where deed was executed pursuant to State Court judgment, and action would necessarily involve determining the propriety of the State Court Order.
- (9929) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) – Federal court lacks jurisdiction under *Rooker-Feldman* to review orders entered by State Courts. Federal courts cannot act as "super-appellate" courts to review correctness of State Court Orders. If the source of the alleged injury is the state court order, federal courts lack jurisdiction to hear case. *Rooker-Feldman* precluded federal court from considering whether plaintiff was the alter-ego of its founder, where State Court had already entered judgment against founder and entered supplemental order finding that foundation was alter-ego and ordering assets held by foundation to be sold to pay judgment against founder. Federal court complaint sought declaration that foundation was not alter-ego and to enjoin sale of assets previously ordered by State Court, and would necessarily have required federal court to consider accuracy of State Court determinations.
- (9930) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – *Rooker-Feldman* precludes federal court from looking behind State Court judgment. *Rooker-Feldman* prevents federal court from reviewing alleged claims of error in State Court decision.
- (9931) *In re Medlar*, 2013 WL 6152325 (Bankr. N.D. Ohio 2013) – Bankruptcy court lacked jurisdiction under *Rooker-Feldman* to look behind foreclosure judgment itself, precluding Debtor from alleging any invalidity in the foreclosure or sale process that had already been validated by State Court Orders.
- (9932) *Dickow v. JPMorgan Chase Bank*, 2013 WL 6051018 (E.D. Mi. 2013) – *Rooker-Feldman* precludes federal court review of issues resolved in State Court proceedings. State Court judgment awarding possession of property to foreclosing lender including findings that lender had standing to pursue foreclosure and that trial court had jurisdiction to enter judgment of possession. Federal Court complaint alleging invalidity of foreclosure sale based on lack of recorded assignment of mortgage was necessarily decided in State Court, and federal court would not reconsider that holding. Federal court is not "super-appellate" court with authority to review or reverse State Court judgments.
- (9933) *Kapla v. FNMA*, 485 BR 136 (Bankr. E.D. Mi. 2012), *aff'd* 2014 WL 346019 (E.D. Mi. 2014) – 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.
- (9934) *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.
- (9935) *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.
- (9936) *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.

- (9937) *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.
- (9938) *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.
- (9939) *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*.
- (9940) *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.
- (9941) *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.
- (9942) *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.
- (9943) *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.
- (9944) *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.
- (9945) *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.
- (9946) *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.

- (9947) *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.
- (9948) *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.
- (9949) *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.
- (9950) *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.
- (9951) *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.
- (9952) *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.
- (9953) *Madera v. Ameriquist 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.
- (9954) *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.
- (9955) *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.

25.80 Limitations – Jurisdictional Priority

- (9956) *Silagay v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – Jurisdictional priority rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed

to judgment. Rule applies only to courts of equal rank at the same level of government. Rule did not prevent Federal Court from ruling even if same action had already been filed in State Court, as the courts involved separate levels of government.

H. Section 341 – Court Authority

25.81 Generally

- (9957) *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.

25.82 Excusal of Attendance

- (9958) *In re Emmerson*, Case No. 12-0864 (Bankr. W.D. Mi. 2015) – Court lacks authority to excuse Debtor's attendance at Section 341 meeting. Section 343 provides that Debtor "shall" attend. Even if court had discretion to do so, court would not excuse attendance where Debtor's inability to attend resulted from Debtor's voluntarily taking mission trip out of country. Events were completely foreseeable and entirely within control of Debtor. Debtor's counsel's suggestion that case was "no asset" case for which attendance would be needless was not basis to deny trustee right to conduct meeting and investigate Debtor's financial condition.

25.83 Compelling Attendance

- (9959) *In re McMillian*, Case No. 15-40417 (Bankr. E.D. Mi. 2015) – Rule 2005 allows court to enter order compelling Debtor to attend Section 341 meeting on motion of any party in interest, supported by an affidavit, alleging that the examination of the Debtor is necessary for proper administration of the estate and there is reasonable cause to believe that Debtor is about to leave or has left residence or place of business to avoid examination; or that Debtor has evaded service of a subpoena or order to attend; or that Debtor has willfully disobeyed a subpoena or order to attend. Court may then enter order to the marshal or other officer authorized by law to bring Debtor before court without unnecessary delay and if court finds at the hearing that the allegations are true, the court shall cause Debtor to be examined forthwith. Court could not grant order to compel where Motion was not accompanied by affidavit. Court also could not grant relief to the extent the Motion sought order for marshal to incarcerate Debtor until Section 341 meeting could be held. However, Motion and court record demonstrates sufficient cause to enter order for Debtor to appear at a hearing regarding Debtor's failure to attend the 341 meeting and to show cause why the court should not compel attendance at a rescheduled 341 meeting.

I. Discrimination

25.84 Section 525

- (9960) *Uberoi v. Supreme Court of Florida*, 2016 WL 1552370 (11th Cir. 2016) – Federal Court barred by Sovereign Immunity and *Rooker-Feldman* from reviewing State Court decision denying Debtor's admission to Bar. Florida Supreme Court rejected Debtor's application based on Debtor's prior, failed chapter 13 case. Debtor sued in Federal Court alleging that denial of admission violated Section 525. Case dismissed as Federal Court lacks jurisdiction to review State Court judgment. Complaint clearly intended to challenge State Court judicial proceeding.
- (9961) *Craig v. Gibbons*, 2016 WL 74650 (Bankr. M.D. Tn. 2016) – State did not discriminate against Debtor by suspending driver's license for unpaid fines and court costs. Nothing in court record indicated that state discriminated against Debtor based on bankruptcy filing. Debtor was treated entirely consistent with treatment of non-Debtors who also have unpaid fines and costs as state law required clerk to notify state in every case where a defendant failed to pay fines, and there was no evidence that clerk applied this procedure only in cases involving Debtors in bankruptcy.
- (9962) *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.
- (9963) *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.
- (9964) *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.
- (9965) *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.

- (9966) *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.
- (9967) *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
- (9968) *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.

J. Consolidation

25.85 Authority to Substantively Consolidate Cases

- (9969) *In re Archdiocese of St. Paul and Minneapolis*, Case No. 17-1079 (8th Cir. 2018) - Substantive Consolidation of Debtor with non-bankrupt affiliates amounts to involuntary petition against non-bankrupt affiliates. Section 303 does not allow involuntary proceeding to be filed against charitable or non-profit organization. Substantive consolidation could not be used to consolidate Chapter 11 proceeding of archdiocese with non-bankrupt nonprofit schools, churches and charitable organizations. General authority of Section 105 to substantively consolidate Debtors does not override prohibitions of Section 303.
- (9970) *Audette v. Kasemir*, Case No. 16-691 (Bankr. N.D. Ill. 2018) – There is no authority in bankruptcy code to substantively consolidate Debtor’s bankruptcy case with non-Debtor affiliates. Appropriate remedies include involuntary petitions and “veil piercing” under state law.
- (9971) *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.
- (9972) *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.
- (9973) *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.

25.86 Standing to Request Substantive Consolidation

- (9974) *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.
- (9975) *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.
- (9976) *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.

25.87 Grounds for Substantive Consolidation

- (9977) *Hardesty v. City Medical Nursing Center, LLC*, 2017 WL 4012391 (Bank. S.D. Ohio 2017) – Substantive consolidation is extraordinary

equitable remedy, and alternative to avoidance actions and other more specific measures to corral and distribute assets. Substantive Consolidation allows Court to dissolve corporate, partnership, and individual legal boundaries and pool separately held assets, and distribute proceeds to newly combined creditor body. Substantive consolidation eclipses state law remedies including “piercing corporate veil” theory and bypasses structural formalities for limited purpose of holding shareholders personally liable for corporate misdeeds. Party seeking substantive consolidation must prove substantial identity between debtor and target including disregard of corporate boundaries, failure to respect joint ownership interests, or dominion over assets to exclusion of all stakeholders; and proof of disarray so substantial that debtor’s creditors benefit more through substantive consolidation, compared to potential harm to subject and its separate creditors. Record warranted substantive consolidation where Members used LLC’s accounts to fund their daily living expenses, from mortgage payments, doctor visits, and health club memberships to shopping trips, airline tickets, hotels, and chain restaurants; and provided Members’ family lifestyle that is enviable. Members purported sale of the LLC to their Son appeared to be sham transaction where LLC generated substantial revenues after the sale but Members, not Son, reported LLC’s gross receipts/sales as owners and listed LLC as Members’ only income. Consideration allegedly paid by Son was grossly inadequate, and Members and Son never intended a true transfer or change in operations. Absent substantive consolidation, LLC’s creditors are without recourse since the “sale” did not include an assumption of liabilities and sale left LLC with no assets to use to pay creditors. Members formed multiple entities and used imprecise names of entities on documents and records making it difficult to trace and unravel transactions through less invasive measures and time and effort required to unravel books and records, trace transactions and look for value, far outweighed prospects of recovery using more traditional collection methods. Members and Son did not establish that substantive consolidation will sufficiently harm their interests and those of other stakeholders. Although LLC provides home health and nursing services that would cease upon consolidation leaving only the physical assets, such as used furniture and equipment, motor vehicles and computer software and claims filed in the Bankruptcy Case already exceeded \$800,000.00 plus substantial legal fees and expenses, all of which will reduce any potential recovery to a consolidated creditor body; and substantive consolidation eliminates Members’ and Son’s only known source of income, all of which weigh against Substantive Consolidation. However, behavior of Members and Son in chaotically handling and comingling business and personal affairs is root cause of these difficulties and more traditional and less invasive measures are not realistic means of recovery and would leave LLC’s creditors have no other recourse. While there was no guarantee of creditor distribution with substantive consolidation, on balance that it was Creditors’ only chance.

- (9978) *In re Newman*, 2017 WL 2589318 (Bankr. E.D. Tn. 2017) – Creditor of only one joint Debtor is entitled to payment only form assets of that joint Debtor and has no claim against assets of other joint Debtor. Joint filing does not substantively consolidate cases or make assets of one Debtor liable to creditors of other Debtor. Estates will not be substantively consolidated where creditors of one estate will benefit at expense of other estate and when affairs and assets are not so intertwined as to prevent efficient administration of estates.
- (9979) *Pitts v. Walker*, 2017 WL 1239561 (Bankr. E.D. Tn. 2017) – Substantive Consolidation is judicially created doctrine that treats separate legal entities as if they were merged into single entity, pooling assets and liabilities of 2 entities so that assets of 2 entities result in common fund available to satisfy debts of both entities. Bankruptcy Court has general equitable power to order substantive consolidation where moving party shows substantial identity between Debtor and target through disregard of corporate separateness, joint ownership, or circumstances such that one entity exercises ultimate control over assets and second entity operates as mere instrumentality; proponent demonstrates that Debtor’s creditors will suffer great prejudice absent consolidation; and consideration of potential harm to creditors of target of substantive consolidation. Court unable to determine Substantive Consolidation on summary judgment. Evidence indicated that defendant’s rental house business was controlled entirely by Debtors who selected properties that defendant would put in her name and managed and maintained those properties, maintained control over how rental income was spent including hiring Debtor’s construction firm to provide services and as a source of income for Debtor personally. Defendant alleged that there was lack of identity with Debtors (her parents) as defendant had purchased the houses from Debtors With Debtors Providing the Financing, Creating a Debtor/Creditor relationship that would defeat “substantial identity” necessary for substantive consolidation. Defendant also raised factual issues regarding prejudice where defendant contended that houses at issue were “her future” and that loss of those properties would be devastating to her future retirement.
- (9980) *In re Bransford*, Case No. 14-30468 (Bankr. E.D. Mi. 2016) – Petition filed under Section 302 commences joint case of individual and spouse. However, joint petition does not constitute consolidation of Debtors’ Estates. Rule 1015 allows joint administration where the Debtors are a husband and wife. Joint administration does not consolidate estates. Absent substantive consolidation, assets of one Debtor, owned separately, stay within that estate and cannot be used to pay creditors of the Codebtor. Substantive consolidation is drastic remedy that requires unusual circumstances such as a substantial co-mingling of assets, liabilities and handling of financial affairs of the separate Debtors. Substantive consolidation not appropriate where asset in question could be clearly ascribed to Debtor-husband and liabilities were easily separated between those of Debtor-husband and Debtor-wife. Debtor-husband’s creditors would suffer minimal harm if estates are consolidated – although personal injury lawsuit of Debtor-husband was personal to Debtor-husband and constituted his property and not property of Debtor-wife’ Debtor-husband’s creditors would receive 100% absent substantive consolidation but 98% of cases are consolidated. However, Debtor-husband would suffer substantial prejudice where husband would receive zero dollars if cases are substantively consolidated versus \$34,000 if husband’s assets are used only to pay husband’s debts. Absent substantive consolidation of Debtors’ estates, there was no authority for Trustee to use proceeds of husband’s personal injury litigation to pay wife’s individual creditors.
- (9981) *Spradlin v. Beads & Steeds Inn, LLC*, 2014 WL 4959143 (Bank. E.D. Ky. 2014), *aff’d*, 2016 WL 3176649 (E.D. Ky. 2016), *aff’d*, 2017 WL 24750 (6th Cir. 2017) – Trustee’s Complaint to substantively consolidate Debtor and Debtor’s non-bankruptcy businesses denied. Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling the assets and liabilities to produce single pool of assets to satisfy debts of both entities to ensure equitable treatment of creditors. Consolidation is extra ordinary remedy to be used only where there are no other adequate remedies, and court must be particularly careful where entity to be consolidated is not itself a Debtor in bankruptcy, and requires proof that the entities pre-petition disregarded separateness so significantly that creditors relied on the breakdown of entity borders and treated them as a single entity; and that post-petition assets and liabilities re so scrambled that separating them is prohibitive and hurts all creditors. Complaint failed to state cause of action for consolidation where complaint alleged only that Debtor used entity vehicles for personal use and that Debtor used the corporate line of credit for Debtor’s personal use. Complaint did not allege that any creditors of either entity treated them as one entity or that the entities

disseminated information to creditors that would cause creditors to be mis-lead as to separateness of entities. While there may be some confusion regarding ownership of assets, complaint did not show that assets were so hopelessly intertwined that separation was impossible. Court would not use equitable power to substantively consolidate non-Debtor, effectively denying the non-Debtor of its substantive due process rights that would be present in involuntary case.

- (9982) *In re James*, 498 BR 813 (Bankr. E.D. Tn. 2013) – Court can consolidate separate estates of husband and wife who filed separate chapter 7 proceedings for the limited purpose of administering entireties owned property for benefit of joint creditors. Consolidation is appropriate where there is substantial identity of assets, liabilities and handling of financial affairs between Debtor spouses; and harm would result if consolidation is denied. Parties had substantial identity of financial affairs, where each party listed all creditors of the other party; both filings were caused by the failure of Debtor-husband's business and not for reasons unrelated to financial affairs of other spouse; Debtor's had very little personal property, all of which was exempt; and consolidation would allow for efficient administration of major asset, which was non-exempt equity in Debtors' jointly owned residence for benefit of joint creditors. Cases would be consolidated for sole purpose of administering non-exempt value of residence for benefit of joint creditors.
- (9983) *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.
- (9984) *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.
- (9985) *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.

25.88 Effect of Substantive Consolidation

- (9986) *Hardesty v. City Medical Nursing Center, LLC*, 2017 WL 4012391 (Bank. S.D. Ohio 2017) – Substantive consolidation is extraordinary equitable remedy, and alternative to avoidance actions and other more specific measures to corral and distribute assets. Substantive Consolidation allows Court to dissolve corporate, partnership, and individual legal boundaries and pool separately held assets, and distribute proceeds to newly combined creditor body. Substantive consolidation eclipses state law remedies including "piercing corporate veil" theory and bypasses structural formalities for limited purpose of holding shareholders personally liable for corporate misdeeds.
- (9987) *Lim v. Miller Parking Co.*, 2016 WL 1399253 (E.D. Mi. 2016) – Substantive consolidation is process that treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities, with claims of creditors against separate Debtors morphing into claims against the consolidated survivor. Substantive consolidation is extreme remedy that is used only where there are no other adequate remedies. Courts apply a more open-ended equitable standard, avoiding any "checklist" of specific factors to determine whether (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) post-petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors, including (1) The presence or absence of consolidated financial statements; (2) The unity of interests and ownership between various corporate entities; (3) The existence of parent and intercorporate guarantees on loans; (4) The degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) The existence of transfers of assets without formal observance of corporate formalities; (6) The commingling of assets and business functions; and (7) The profitability of consolidation at a single physical location. Evidence did not present any post-petition scrambling of assets and liabilities of separate corporate Debtors and there was no evidence of a lack of "separateness" of corporate entities where corporations had assets, enjoyed independent streams of revenue, provided services and paid bills as they came due, and kept separate books and records and observed typical corporate formalities. Fact that one corporation lacked sufficient assets to answer for judgment did not establish any unjust loss by plaintiff where there was no evidence of money flowing out of defendant corporation either to shareholders or to related corporations.
- (9988) *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.
- (9989) *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.
- (9990) *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.

- (9991) *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

25.89 Substantive Consolidation – Non-Debtor entities

- (9992) *In re Archdiocese of St. Paul and Minneapolis*, Case No. 15-30125 (Bankr. D. Mn. 2016) – Court cannot substantively consolidate non-Debtor entities where specific statutory provision of Code limits ability of Court to consider involuntary petition. Creditor Committee sought to substantively consolidate with Archdiocese case roughly 200 parishes, schools and other non-bankruptcy Catholic entities. Attempt to substantively consolidate violated Section 303(a) which precludes involuntary petitions against churches, schools and eleemosynary institutions. Court could not use equitable powers under Section 105 to substantively consolidate where doing so would contravene specific statutory provisions. Further, allegations that Diocese exercised control over institutions through hierarchical structure and authority in doctrinal matters was not sufficient to support consolidation where there were no allegations that finances were so intertwined that court could ignore separate existence of parishes and schools or that structure itself was abuse of corporate form.
- (9993) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Substantive consolidation of Debtor and non-Debtor entities is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling the assets and liabilities of the two entities, so that the assets of the two entities may result in a common fund available to satisfy the debts of both entities. Substantive consolidation is warranted only where it is shown that either: (i) the Debtor and the non-Debtor entity in their prepetition 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. Evidence did not indicate that Debtor and non-Debtor comingled financial affairs or acted in any way to disregard separateness, nor did plaintiff identify even one creditor that was somehow confused about the separateness of Debtor and non-Debtor because of some conduct of Debtor and non-Debtor in which they disregarded separateness. There was no co-mingling of assets present. Although Debtor listed in schedules certain assets also claimed to be owned by non-Debtor, pre-petition State Court judgment determined that those assets were owned solely by non-Debtor and that Debtor had no right, title or interest in or to those assets. Given clear ruling of State Court, there was no scrambling or co-mingling of assets post-petition, as Debtor had no assets post-petition.

25.90 Procedural (Administrative) Consolidation

- (9994) *Blaisngame v. Church Joint Venture, LP*, 2015 WL 3952793 (W.D. Tn. 2015) – Rule 42 allows court to consolidate separate actions that present common questions of law or fact. Goal is promote expeditious and efficient resolution of actions while providing justice to parties. Court must weigh interests of judicial economy against potential for delay, expense, confusion or prejudice, and must determine whether risks of prejudice or possible confusion are outweighed by danger of inconsistent adjudications, burden on parties, witnesses and judicial resources if matters are not consolidated, length of time to resolve multiple separate trials, and expenses related to single trial versus multiple trials. Motion must contain sufficient factual and legal information to show commonality. Bare allegation that “lis pendens was improperly recorded lies within the context and framework of Alter Ego/Fraud Action” does not explain what legal or factual issues are common or intertwined or any relationship between separate proceedings and fails to address risk of confusion or prejudice if matters are consolidated.
- (9995) *In re Barrington Spring House, LLC*, 2014 WL 1652195 (Bankr. S.D. Ohio 2014) – Court can administratively consolidate cases where joint proceedings would expedite cases. Interconnection of cases can constitute basis to procedurally consolidate cases. However, mere fact that Debtor owned and controlled two related bankrupt entities is not sufficient, where each case was different in nature; and different creditors located in different places; one case was under control of Chapter 11 trustee with assets soon to be sold; and creditors of corporate Debtors were largely located in the United States, Debtor’s personal creditors were largely located outside the US and Debtor’s personal financial affairs were much more complex. Consolidation would unduly complicate matters for creditors and other interested parties, and cases are such that many motions, objection and other filings would be discrete to each case rather than applicable to all three.

K. Duties of Debtor

25.91 Duty to Cooperate with Trustee

- (9996) *In re Nunez*, 2014 WL 4473842 (Bankr. Colo. 2014) – Court would deny Debtor’s request to modify plan where Debtor did not provide to Trustee updated Schedules I and J, tax returns or current paystubs. Documentation was necessary to allow Trustee to evaluate feasibility of modification that sought to increase Debtor’s plan payment and to ensure compliance with requirement that Debtor file all tax returns. Further, Section 541 requires Debtor to cooperate with Trustee, and duty does not cease upon confirmation of plan.
- (9997) *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.
- (9998) *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.

25.92 Schedules and Statements

- (9999) *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 all 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.

25.93 Change of Address

- (10000) *Panther Petroleum v. Couch*, 2017 WL 444644 (6th Cir. BAP 2017), *aff'd*, 2017 WL 5127656 (6th Cir. 2017) - Debtor's failure to monitor proceedings or take steps to participate in litigation after withdrawal of State Court Counsel does not indicate that Debtor was deprived of opportunity to participate in case. Plaintiff's service on Debtor of pleadings that Debtor's last known address used in State Court filings was appropriate notwithstanding Debtor's vague assertion that plaintiff "new" Debtor had moved and should have served Debtor at a different address. Service on a party is appropriate if delivered or mailed to the person's last known address. Debtor's failure to apprise State Court of change of address did not require plaintiff to search for Debtor to determine correct service address.
- (10001) *Moyer v. Denham*, 2017 WL 1102848 (Bankr. W.D. Mi. 2017) - Debtor's failure to respond to the Summons and Complaint served on Debtor at address listed with Court left Court with no alternative but to vacate discharge. While it is possible that Debtor no longer resided at that address, it is Debtor's burden to keep Court apprised of any change of address under Rule 4002(a)(5). Trustee, as plaintiff, was entitled to rely on information included within docket and specifying address for service of process on Debtor.
- (10002) *In re Tellis*, Case No. 12-67630 (Bankr. E.D. Mi. 2015) – Motion to Reinstate Stay following entry of Order Lifting Stay is a Motion for Reconsideration of Order under Rule 9023 and 9024. Debtor's motion failed to state basis for relief where Debtor's only argument was that creditor served the motion on Debtor at an incorrect address. Motion was served on Debtor at address of record with the Bankruptcy Court. Debtor did not file a notice of change of address with the court. Further, Debtor's counsel received a copy of the motion by ECF. Debtor had ample notice of the Motion and Motion did not otherwise allege any excusable neglect or other valid cause to set aside order.

25.94 Incompetent Debtor - Appointment of "Next Friend"

- (10003) *In re Ross*, Case No. 11-64877 (Bankr. E.D. Mi. 2015) – Court would not appoint "next friend" on behalf of allegedly incompetent Debtor based on Durable Power of Attorney for Health Care, as power of attorney did not grant named party authority over Debtor's personal financial affairs, and Motion did not allege that a guardian had been appointed for Debtor.
- (10004) *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.

L. Loan Modifications

25.95 Chapter 7 Proceeding

- (10005) *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.
- (10006) *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.

25.96 Chapter 11 Proceeding

- (10007) *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.

25.97 Chapter 13 Proceeding

- (10008) *In re Powell*, 2018 WL 1916173 (Bankr. E.D. Mi. 2018) – Court cannot approve plan modification where modification would cause plan to run beyond 60 months. Debtor, Creditor and Trustee's proposed Stipulation for Loan Modification would require Debtor to make several future mortgage payments through plan although Plan had already run more than 60 months and had expired over one year prior to execution of proposed modification.
- (10009) *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.
- (10010) *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 from of Plan Modification.
- (10011) *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.

25.98 Breach of Contract

- (10012) *Grifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Breach of Contract requires allegation of existence of valid contract; terms of contract; breach of contract; and injury caused by breach. Complaint failed to state cause of action against assignee of servicer of mortgage where complaint alleged that mortgage payments were improperly applied but all referenced mortgage payments were made before loan servicing was transferred to defendant. Complaint did not allege that current servicer breached contract or failed to apply any payments where all factual statements in complaint related to mortgage prior to date of transfer of servicing.
- (10013) *Sower v. Chase Home Mortgages, LLC*, 2016 WL 4446589 (E.D. Mi. 2016) – Complaint alleging that defendant breached contract by pursuing foreclosure sale did not state cause of action as complaint did not allege any specific terms of the contract, did not connect alleged failure to properly credit payments and alleged incorrect calculation of escrow amount to any specific provision of contract.
- (10014) *Lieber v. Everbank Mortgage Company*, 2016 WL 4072022 (E.D. Mi. 2016) – Complaint for breach of contract must allege (1) existence of valid contract; (2) terms of contract; (3) performance of things to be performed by plaintiff; (4) breach of contract by defendant; and (5) damages resulting from breach. Complaint failed to state cause of action where complaint failed to identify any contract or to allege any breach of that contract. Complaint alleged only that defendant wrongfully rejected HAMP loan modification and that defendant failed to comply with Michigan foreclosure statute which amounted to, potentially, tortious conduct but did not plead breach of contract.
- (10015) *Federal Home Loan Mortgage Corporation v. Gilbert*, 2016 WL 3626827 (6th Cir. 2016) – Claim for breach of contract to modify loan failed where plaintiff failed to demonstrate any contract requiring loan modification. Borrower submitted “Application” for a loan modification but failed to submit the documents required to process that application. An “application” is not a contract but is merely the first step in the process that could result in a loan modification. Trial Loan Plan clearly stated that it was a first step and not a modification, and that permanent modification will not occur unless and until borrower satisfies all conditions including proof of income. Borrower represented in application that she was receiving child support on regular basis and presented copy of Judgment of Divorce that awarded support, but borrower did not produce any evidence that she was actually receiving that support because she was not, and had not been receiving, those payments for some time. Borrower’s successful payment of the three trial loan modification payments was not sufficient in light of borrower’s failure to comply with other material terms and conditions of proposed modification.
- (10016) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Michigan law does not recognize cause of action for independent tort of “bad faith” breach of contract’s covenant of good faith and fair dealing. Party may bring action to enforce covenant of good faith only where contract makes performance by opposing party with discretion of that party. Complaint failed to state cause of action where contract did not contain any contractual provision promising that lender would exercise discretion in evaluating possible loan modification.
- (10017) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Breach of contract action requires (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages or loss to the plaintiff. Agreed order in Chapter 13 defining terms by which a default will be cured and payments maintained operates like a consent decree and effectively new contract between Debtor and creditor. Holder of mortgage that cannot be altered under Section 1322(b)(2) retains all contract rights but can exercise those rights only in a manner consistent with the Code, Rules and any Court Orders. Debtor stated cause of action against mortgage servicer by alleging that Debtor has made all payments due under the confirmed plan and consent order but the mortgage servicer failed to properly credit those payments and demanded a higher monthly payment than provided for in the plan and agreed order.
- (10018) *Cultice v. Ocwen Loan Servicing, LLC*, 2015 WL 5093863 (Bankr. N.D. Ohio 2015) – Contractual language of trial loan modification does not create binding permanent modification. Trial modification is only one step in process that could lead to permanent modification. Absent a permanent loan modification signed by the lender, there is no binding modification and the terms of the original note and mortgage remain in full force and effect.
- (10019) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Lender cannot be held liable for breach of contract by failing to modify loan where borrower had already defaulted on loan, thereby committing first breach. Once borrower breached, lender no longer had any duty of performance and borrower was precluded from bringing action based on unexecuted part of contract. Further, complaint did not allege any particular breach of the loan agreement resulting from lender’s failure to negotiate a modification where nothing in the loan agreement required or obligated lender to negotiate any modification.
- (10020) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – First Breach Rule precludes party who first breaches agreement from maintaining action against other party based on subsequent breach or failure to perform. Debtor did not produce any evidence to support argument that lender breached the loan agreement first where lender sent letter to Debtor advising of payment increase based on escrow adjustment that was consistent with the loan documents themselves.
- (10021) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – Loan modification must be in writing signed by both parties to be enforceable. Where Trial Period Plan was not signed by both parties, Plan never ripened into enforceable contract. Borrower’s alleged substantial performance could not operate to create enforceable agreement where lender had not signed proposed Plan.
- (10022) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Action against depository institution by depositor for alleged failure to enforce two signature requirement on checks is governed by UCC Article 4. Bank can honor any instrument presented in accordance with the agreement between customer and bank. Lender improperly honored checks signed by one individual in violation of depositor agreement. However, depositor must bring action within one year after bank makes statement available to depositor. Bank makes statement “available” when bank mails statement to depositor at address on record with the bank, even if depositor no longer resides at or receives mail at that address. Further, depositor must make specific allegations to bank – mere generalized statement that depositor is

suspicious or that embezzlement may have occurred is not sufficient to place bank on notice for purposes of statute of limitations.

- (10023) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Kentucky statute of frauds makes any obligation of a member of an LLC to make capital contributions unenforceable unless set forth in writing signed by the member being charged. Signature card signed by principal and by Bank was not contract between principal and other members and would not support action for breach of contract for alleged signing of checks by only principal without second signature. Similarly, deposit agreement between LLC and Bank was not contract between LLC and members and could not support cause of action for breach of contract against members.
- (10024) *Patrick v. CitiMortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – Breach of contract action arising out of loan modification process requires proof of a binding contract, the party seeking relief must fully perform its obligations, the other party failed to fulfill its obligations without legal excuse, and non-breaching party suffered damages as a result. Fully executed permanent loan modification agreement is binding contract and there was no dispute that borrower fully performed under the permanent loan modification. Modification incorporated HAMP guidelines by repeated references to “Home Affordable Modification Agreement” which is a clear reference to HAMP. However, degree to which guidelines were incorporated and whether borrower waived HAMP requirements by signing the permanent loan modification raised questions of fact that could not be resolved on summary judgment where amount of payment allegedly exceeded HAMP calculations.
- (10025) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint alleging that lender breached contract by failing to offer loan modification failed to state cause of action. Complaint was predicated on alleged contract between lender and Michigan Hardest Hit Program. However, plaintiff was not party to that contract nor a sufficiently identified third party beneficiary. Agreement addressed obligations and duties of MHHP and lender as to each other but did not reference any duties or obligations owed to borrowers and only incidentally even referred to borrower in describing duties of MHHP and the loan servicer.
- (10026) *Trombley v. Seterus, Inc.*, 2014 WL 1664823 (E.D. Mi. 2014) *aff’d*, 2015 WL 3620412 (6th Cir. 2015) – Statute of frauds prevents enforcement of any agreement to modify mortgage loan unless agreement is in writing signed by party against whom agreement is to be enforced. Where lender never signed proposed mortgage modification agreement, alleged mortgage modification is not enforceable by borrower. Signature must be of “authorized representative”. Electronic signature on cover letter does not satisfy statute of frauds. Electronic signature on cover letter “Sincerely, IBM Lender Business Process Services, Inc.” does not meet requirements of statute.
- (10027) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Breach of contract to make loan modification must prove that there was a contract for a loan modification, that the other party breached, and that the plaintiff suffered damages. Statements by lender that if borrower defaulted, then lender would consider loan modification, did not state cause of action for breach of contract, as neither note nor mortgage nor any other contractual agreement required lender to modify loan. General allegations regarding failure to credit payments made and alleged improper allocation of payments between taxes, insurance, and late fees did not state cause of action where complaint did not identify when payments were made, when or how they were supposed to be credited, what mistakes were made, or why they are considered mistakes under the loan documents.
- (10028) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Trial loan modification was not offer of or contract to make permanent modification. Trial loan documents were not signed by both lender and borrower. Under Michigan law, offer does not ripen into contract until signed by both parties. Modification agreement signed by Debtor but not lender did not constitute binding agreement for loan modification. Further, terms of trial modification stated that trial modification was only an application for a permanent modification and would be considered only if certain documents were provided and modification was signed by both parties. Where lender never signed agreement, there was no contract and so no action for breach of that contract.
- (10029) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Trial loan modification is not offer of permanent modification where lender committed only to consider a modification at end of trial period.
- (10030) *Williams v. Saxon Mortgage Services, Inc.*, 2014 WL 765055 (E.D. Mi. 2014) – Plaintiff pled valid cause of action for breach of contract where Trial Loan Modification provided that lender would permanently modify the loan if Plaintiff complied with the trial loan modification. Plaintiff’s complaint sufficiently alleged that plaintiffs complied in all respects with terms of Trial loan modification yet lender failed to offer permanent loan modification. Breach of contract claim was not “back door” way to circumvent HAMP’s prohibition on actions to enforce loan modification under that program, merely because Plaintiff’s action included factors that would be relevant to HAMP modification. Action was brought for state law breach of contract and did not attempt to create private right of action under HAMP.
- (10031) *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.
- (10032) *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.

25.99 Breach of Good Faith and Fair Dealing

- (10033) *Patrick v. CitiMortgage, Inc.*, 2017 WL 318788 (6th Cir. 2017) – Ohio law does not recognize action for lack of good faith and fair dealing independent of action for breach of contract. Debtor did not identify any contractual provision that lender allegedly violated or explain how lender violated that provision. Complaint failed to state claim on which relief can be granted, and Court’s summary Judgment in favor of

lender affirmed.

- (10034) *Brimm v. Wells Fargo Bank*, 2016 WL (E.D. Mi. 2016) – Michigan does not recognize cause of action for “bad faith” refusal to modify loan. Borrower’s complaint to set aside foreclosure sale for “bad faith” dismissed. Complaint did not allege any irregularity in foreclosure process itself, and alleged irregularity in loan modification is not sufficient to set aside foreclosure sale.
- (10035) *Patrick v. CitiMortgage, Inc.*, 2014 WL 7338929 (Bankr. N.D. Ohio 2014) – Good faith is an implied covenant of a contract not to take opportunistic advantage of other party and cannot be used to add terms to a contract or to alter terms contained in contract. Lender did not violate duty of good faith by enforcing terms of signed loan modification agreement that contained monthly payment allegedly in excess of HAMP guidelines. To extent lender collected payments in amount specified in contract, lender abided by terms of contract and court would not use duty of good faith to alter borrower’s explicit obligation to make payments to lender in the amount specified.
- (10036) *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.
- (10037) *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.

25.100 Negligence

- (10038) *Bucciarelli v. Wells Fargo Home Mortgage*, 2017 WL 1157890 (E.D. Mi. 2017) - Tort claim cannot be brought where there is express contractual relationship between parties unless tort is independent from contractual obligations of the defendant. Complaint seeking damages for negligence arising out of mortgage foreclosure did not allege the existence of any duty independent of contractual obligations contained in mortgage or allege that any damages were independent of contractual relationship between parties.
- (10039) *Grifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Cause of action for negligence cannot be sustained where parties are in contractual relationship and alleged negligent conduct relates to performance under contract. Complaint must demonstrate that defendant owed duty to plaintiff that is separate and distinct from defendants contractual obligations, absent which no independent action for tort can be maintained. Complaint alleged that mortgage servicer owed duty to accurately credit payments, to handle a loan modification application properly, and to provide information about loan, all of which arose, if at all, from note and mortgage. Negligence claim did not allege any duty of defendants that is separate and distinct from contractual obligations.
- (10040) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Plaintiff’s complaint alleging that lender negligently failed to review loan modification request, based on duties imposed under HAMP, did not state cause of action to set aside foreclosure sale where plaintiff failed to allege prejudice. Plaintiff did not allege or demonstrate that he would have been in better position to preserve property absent alleged non-compliance with HAMP. Further, HAMP does not require lender to offer a loan modification even where borrower otherwise qualifies under HAMP. Borrower was specifically told that he did not qualify for either HAMP or non-HAMP modification because borrower had already modified loan twice before and HAMP requires only that servicer consider one loan modification request. Borrower could not bring action based on loan modification rules where borrower already previously availed himself of loss mitigation programs.
- (10041) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Michigan law does not allow action for common law negligence for alleged mishandling of a loan modification. Tort claim cannot rest on breach of contractual obligation. Plaintiff’s action arose out of note and mortgage and lender’s alleged failure to modify.
- (10042) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule.
- (10043) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint alleging that lender negligently failed to comply with loan modification dismissed. To extent negligence action was based on lender’s failure to honor oral loan modification agreement, claim was barred by statute of frauds. Complaint also failed to allege sufficient facts to establish that defendant owed plaintiff a duty or that defendant breached that duty, and failed to allege any injuries caused by any breach. Lender does not owe duty of care to loan applicant or to party seeking loan modification. Further complaint failed to allege negligence in failing to approve loan modification when documents attached to complaint stated that property in foreclosure was not eligible for Hardest hit program and that property was in foreclosure at time, such that there was no basis to assert that lender’s negligence could have caused any harm.
- (10044) *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.

25.101 Fraud

- (10045) *Bucciarelli v. Wells Fargo Home Mortgage*, 2017 WL 1157890 (E.D. Mi. 2017) - Action for fraudulent misrepresentation requires that

defendant make material misrepresentation; that representation was false; that defendant knew statement was false or made statement recklessly and without knowledge of truth; that party made representation with the intention that it should be acted upon by plaintiff; that plaintiff acted in reliance; and that plaintiff suffered injury. Complaint for fraud must be stated with specificity pursuant to Rule 9 and must include sufficient details regarding time, place and content of alleged fraudulent statement. Complaint that claimed only general allegations that defendant committed fraud in loan modification process was insufficient to state cause of action. Further, to extent that claims were based on alleged oral promises, claims were barred by statute of frauds which bars enforcement of any oral promise against a financial institution.

- (10046) *Parker v. Midwest Loan Services, Inc.*, 2016 WL 1242440 (E.D. Mi. 2016) – Fraud requires proof that defendant made material representation; that representation was false; that when made defendant knew it was false or made with reckless disregard for truth; made with intention that it should be relied on; and causation. Promises regarding future actions cannot form basis of misrepresentation claim. Plaintiff's complaint failed to state cause of action based on alleged statements that defendant would consider a loan modification, as statements pertained to future actions.
- (10047) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Fraud requires proof of misrepresentation that is false when made. Promises of future conduct are not fraudulent merely because party later fails to perform, absent proof that party made agreement in bad faith with no intention to perform. Borrower's action for fraud against lender for failure of lender to renew or restructure loan did not state cause of action for fraud where Line of Credit agreement vested in Lender discretion any decision to extend the term or to refinance loan. Any alleged promise by lender was qualified and subject to lender's sole discretion, which did not amount to promise to renegotiate or refinance loan.
- (10048) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule.
- (10049) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Fraud requires proof that (1) the defendant made a material representation to the plaintiffs, (2) the representation was false, (3) the defendant knew that it was false or made it recklessly, (4) the defendant made the misrepresentation to induce the plaintiff to act, (5) the plaintiff relied on it, and (6) suffered injury as a result. Borrower's complaint alleging that lender fraudulent represented that borrower had been offered loan modification did not allege that borrower relied on any misrepresentation or that borrower suffered any harm as a result. Main argument was that borrower did not receive any loan modification but any alleged injury did not result from lender's statements about a loan modification. Borrower was offered forbearance agreement but borrower did not allege that forbearance agreement contained any misrepresentations regarding loan modification options or any other false statements. To extent that servicer made false statements to lender, those statements were not made to borrower and so did not constitute statements of fact to the plaintiff.
- (10050) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Complaint did not state cause of action where lender advised borrower in writing that lender would not proceed with foreclosure process while lender evaluated request for loan modification, and proceeded with sale in spite of those representations. Fraud requires statement of existing fact, and statements regarding future promises are contractual and do not amount to fraud unless made in bad faith or with no present intention to perform. Promises to review loan for modification and to not foreclose during review constitute future promises rather than statements of existing fact. Complaint also failed to state cause of action based on statements by lender that investor restrictions precluded further modification or that lender had not received all required documents where plaintiff had sent all requested documents to lender. Although statements were arguably incorrect, plaintiff could not demonstrate any detrimental reliance on those statements, and plaintiff specifically alleged that plaintiff continued to pursue loan modification. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (10051) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Complaint alleging fraud must plead time, place and content of alleged misrepresentation on which deceived party allegedly relied; the nature of the fraudulent scheme, the fraudulent intent of defendants, and that an injury resulted from the fraud. Plaintiff failed to state cause of action where plaintiff failed to plead basic details about an impending or completed foreclosure; plaintiff did not allege any recorded foreclosure on the property or notice of default on the loan; allegations that plaintiff lost equity in their home and that they were unable to obtain a loan modification was contradicted by the loan modification attached as exhibit to complaint; and made only general allegation that "had the truth been disclosed, Plaintiff[s] would not have entered into the Loans". Given conclusory and contradictory allegations, the complaint did not sufficiently allege an injury or plead the time, place, or content of the alleged misrepresentations.
- (10052) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Complaint alleging fraud must plead time, place and content of alleged misrepresentation on which deceived party allegedly relied; the nature of the fraudulent scheme, the fraudulent intent of defendants, and that an injury resulted from the fraud. Plaintiff failed to state cause of action where plaintiff failed to plead basic details about an impending or completed foreclosure; plaintiff did not allege any recorded foreclosure on the property or notice of default on the loan; allegations that plaintiff lost equity in their home and that they were unable to obtain a loan modification was contradicted by the loan modification attached as exhibit to complaint; and made only general allegation that "had the truth been disclosed, Plaintiff[s] would not have entered into the Loans". Given conclusory and contradictory allegations, the complaint did not sufficiently allege an injury or plead the time, place, or content of the alleged misrepresentations.
- (10053) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Fraud requires material representation that is false, known when made to be false, made with intent it be relied on, injured party in fact relied, and injury proximately resulted. Conclusory

statements that defendant submitted draw requests to bank with intent to receive funds personally were not sufficient as there was no evidence that defendant used funds for improper purpose or used alternate contractors to perform services at lower cost allowing defendant to pocket the difference between the initial contractor's bid and the actual price paid to lower cost contractor. Further, even if draw requests fraudulently misidentified contractors, those representations were made to lender, plaintiff was neither the recipient of nor aware of draw requests when made.

- (10054) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – Complaint stated cause of action against mortgage servicer where complaint alleged that servicer fraudulently stated that if borrowers resumed payments, lender would allow borrowers to reinstate mortgage when servicer and lender had already commenced foreclosure proceedings and had no intention of allowing borrowers to reinstate. Borrowers then made payments that they were not required to make (as borrowers had already been discharged in bankruptcy) which servicer received but nonetheless continued foreclosure process
- (10055) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint must allege fraud with particularity including time, place and content of alleged misrepresentation on which plaintiff relied; the fraudulent scheme; the fraudulent intent of defendants; and injury resulting from fraud. Action for fraud requires proof that defendant made material representation; that was false; that defendant knew it was false or made the assertion without knowledge of truth and as a positive statement; that statement was made with intent that plaintiff act on it; that plaintiff in fact relied on it; and that fraudulent statement caused injury. Plaintiff failed to meet pleading standards in complaint for fraud regarding alleged loan modification, where complaint alleged only conclusions that defendants represented that plaintiff was approved for a loan modification but that defendant stopped accepting payments notwithstanding plaintiff's compliance with requirements. Complaint contained no allegations concerning who communicated with plaintiff, the substance of any communication, how the communications occurred, or whether plaintiff ever accepted any offer, and stated only that plaintiff relied on statements without any detail on how or when.
- (10056) *Jester v. CitiMortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Fraud complaint must state with specificity and particularity that defendant made a representation or, where there was a duty to disclose, concealment, of a fact; that was material to the transaction; made falsely and with knowledge of the falsity or with utter and reckless disregard for truth; with intent to mislead another into relying on statements; on which the other person justifiably relied; and that was the proximate cause of the harm. Complaint that was sparse on actual factual allegations stated cause of action where minimal allegations in complaint were just enough to put defendant on sufficient notice of alleged misrepresentations to allow defendant to respond to complaint in informed manner.
- (10057) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – General allegations that lender told borrower that before lender would consider modification, borrower had to default, coupled with general allegations that lender put borrower through “paperwork hell” did not state cause of action for fraud. Complaint must describe specific statements that plaintiff considers fraudulent; identify the speaker; specify when and where the statements were made; and explain why the statements were fraudulent.
- (10058) *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.
- (10059) *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.
- (10060) *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.
- (10061) *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.
- (10062) *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.

25.102 Tortious Interference with Contractual Relationship

- (10063) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Tortious interference requires a contract, a breach of that contract, and an unjustified instigation of the breach by the defendant. Interference must be intentional doing of a wrongful act or the intentional doing of a lawful act with malice and unjustified in law. Allegations that Federal bailout programs created incentive to cause lenders to foreclose based on speculation and failed to allege any facts such as the existence of a contract to modify a loan or the breach of that contract. Mere speculation is not sufficient to sustain a complaint.

25.103 Michigan Hardest Hit Program

- (10064) *In re Chase*, 2015 WL 55326 (Bankr. W.D. Mi. 2015) – Civil contempt motion requires proof by clear and convincing evidence that alleged contemnor violated a definite and specific order of court requiring to perform or refrain from performing a particular act or acts with knowledge of the Court Order. Court Order that permitted Debtor to apply for Michigan Hardest hit funds did not require Debtor's mortgage lender to accept those funds to bring mortgage current. Mortgage company cannot be held in contempt for refusal to accept hardest hit funds where there was no Court Order that required lender to accept funds.
- (10065) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Alleged wrongful failure of lender to complete mortgage modification is not "fraud" going to heart of foreclosure process for purposes of setting aside a foreclosure sale after expiration of redemption.

25.104 Troubled Asset Relief Program (TARP)

- (10066) *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.

25.105 Homeowners Assistance Mortgage Program (HAMP)

- (10067) *Hubbard v. Select Portfolio Servicing, Inc.*, 2017 WL 3725475 (E.D. Mi. 2017) – National Mortgage Settlement is consent judgment operative only between parties to that agreement and does not provide private right of action to individual homeowners who allege that lender failed to modify mortgage. HAMP does not require lenders to modify loans and creates no private right of action.
- (10068) *Patrick v. CitiMortgage, Inc.*, 2017 WL 318788 (6th Cir. 2017) – Lender did not improperly calculate monthly payments in violation of HAMP by including duplicate homeowner insurance premiums where borrower purchased two separate homeowners insurance policies and provided for invoices on both to be sent to lender and lender then paid per terms of loan documents. To extent that borrower intended to replace first policy was second policy, borrower had no duty or power to terminate prior policy and was required to pay insurance premiums pursuant to terms of loan documents. Lender had no authority to cancel insurance policy issued directly to borrower.
- (10069) *Patrick v. CitiMortgage, Inc.*, 2017 WL 318788 (6th Cir. 2017) – Lender did not violate HAMP regulations by capitalizing arrearage over 60 months rather than remaining life of Debtor's loan. HAMP regulations specifically state that escrow arrearages may not be spread over life of loan and must be paid in either lump sum or over 60 months.
- (10070) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Plaintiff's complaint alleging that lender negligently failed to review loan modification request, based on duties imposed under HAMP, did not state cause of action to set aside foreclosure sale where plaintiff failed to allege prejudice. Plaintiff did not allege or demonstrate that he would have been in better position to preserve property absent alleged non-compliance with HAMP. Further, HAMP does not require lender to offer a loan modification even where borrower otherwise qualifies under HAMP. Borrower was specifically told that he did not qualify for either HAMP or non-HAMP modification because borrower had already modified loan twice before and HAMP requires only that servicer consider one loan modification request. Borrower could not bring action based on loan modification rules where borrower already previously availed himself of loss mitigation programs.
- (10071) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – HAMP guidelines do not create cause of action against lender who refuses to modify loan.
- (10072) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – HAMP guidelines did not create cause of action against lender for alleged refusal to consider loan modification where lender was not part of the HAMP program when the loan modification request was submitted. Lender did not violate HAMP directive that lender use reasonable efforts to obtain waiver of investor agreement precluding second modification of loan where borrower had previously modified loan, as borrower did not allege that lender ever promised to undertake such an effort or that the effort would have been successful. Borrower also failed to state cause of action under HAMP based on lender's alleged refusal to consider financial information where borrower did not allege that loan would have been modified had lender considered financial statements, where investor restrictions against second modification rendered financial review a futile act. Further, even had lender reviewed financial information, that review would have confirmed borrower's ineligibility under HAMP. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (10073) *Patrick v. CitiMortgage*, 2015 WL 1883966 (Bankr. N.D. Ohio 2015) – Mortgage payments under HAMP are based on percentage of Debtor's income. Where Debtor receives non-taxable income, that income is multiplied by 1.25 to approximate corresponding gross taxable income. Debtor's social security income was non-taxable and lender correctly multiplied that amount by 1.25 to determine "gross" income.

Payment is then to be as close as possible to 31% of the calculated gross income. The payment is to include principal and interest, prorated taxes, prorated property and flood insurance, prorated homeowners or condominium association fees, and any projected escrow shortfall payment. Payment must be as close to, but not less than, 31% of gross income. Gross income was \$1657,38, of which 31% would be \$513.79, setting floor of payment calculation. Lender's actual calculation of \$519.78, which exceeded 31% by \$5.99, was "as close as possible" to 31%. HAMP also requires pre-modification escrow shortfall to be capitalized and paid over remaining term of loan, but property taxes and insurance that are not due as of effective date must be paid either in one lump sum or amortized over 60 months. Lender's calculated payment included post-modification escrow shortage amortized over 60 months. Monthly payment for private mortgage insurance that pre-existed mortgage modification is not included in payment cap of 31% and remains fully owing and payable in addition to the calculated mortgage payment even though inclusion produces final payment far in excess of 31% target payment.

- (10074) *Patrick v. CitiMortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – HAMP does not create a private right of action but also does not preempt an action for breach of contract.
- (10075) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – HAMP does not contain independent right of action. Negligence in handing request for loan modification is not actionable as lender has no duty to consider loan modification. Consent decree between lender and Federal Reserve obligating lender to properly staff, train and manage employees did not create basis for negligence action as borrower was not party to that decree and consent decrees are not enforceable directly or in collateral proceedings by those not party to it, even if they were intended to be benefitted by the decree.
- (10076) *Corvello v. Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013) – Bank participating in HAMP program is contractually obligated to offer permanent loan modification if Debtors successfully complete trial loan modification requirements and submit accurate documentation. Although trial modification specifically stated that loan would not be permanently modified unless and until borrowers received fully executed copy of Modification Agreement, lender could not make validity conditioned solely on action of lender. Trial modification contained clear obligations of parties, and cannot be converted into unfettered discretion of lender whether to mail Modification Agreement where borrowers fully complied and lender had no reason not to send Agreement. Where borrowers allege that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement.
- (10077) *Starkey v. JPMorgan Chase Bank*, 2013 WL 6669268 (S.D. Ohio 2013) – HAMP does not create private right of action, expressly rejecting *Corvello*.
- (10078) *Young v. Countrywide Home Loans*, 2014 WL 935308 (M.D. Tn. 2014) – HAMP does not create private right of action. Borrower cannot maintain action against lender for refusing to participate in HAMP modification. Further, evidence indicated that borrower's bankruptcy petition, filed after Debtor requested a loan modification, rendered it impossible for lender to offer HAMP modification on terms requested by borrower.
- (10079) *Williams v. Saxon Mortgage Services, Inc.*, 2014 WL 765055 (E.D. Mi. 2014) – Plaintiff pled valid cause of action for breach of contract where Trial Loan Modification provided that lender would permanently modify the loan if Plaintiff complied with the trial loan modification. Plaintiff's complaint sufficiently alleged that plaintiffs complied in all respects with terms of Trial loan modification yet lender failed to offer permanent loan modification. Breach of contract claim was not "back door" way to circumvent HAMP's prohibition on actions to enforce loan modification under that program, merely because Plaintiff's action included factors that would be relevant to HAMP modification. Action was brought for state law breach of contract and did not attempt to create private right of action under HAMP.
- (10080) *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.
- (10081) *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.
- (10082) *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.
- (10083) *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.

- (10084) *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.
- (10085) *Adams v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 95332 (E.D. Mi. 2012) – There is no private right of action under HAMP.
- (10086) *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 from 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.
- (10087) *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.

25.106 National Mortgage Settlement

- (10088) *Hubbard v. Select Portfolio Servicing, Inc.*, 2017 WL 3725475 (E.D. Mi. 2017) – National Mortgage Settlement is consent judgment operative only between parties to that agreement and does not provide private right of action to individual homeowners who allege that lender failed to modify mortgage.
- (10089) *Habib v. Bank of America*, 2013 U.S. Dist. Lexis 98168 (E.D. Mi. 2013) – Borrower has no private right of action against lender for conduct that allegedly breached National Mortgage Settlement, as borrower was not party to that settlement and could not establish that borrower constituted third party beneficiary.

25.107 National Housing Act (NHA)

- (10090) *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.

25.108 Home Owners Loan Act

- (10091) *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.

25.109 Home Ownership Equity Protection Act (HOEPA)

- (10092) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – HOEPA precludes lender from extending loan to consumer without regard to borrower's ability to repay Statute of limitations is one year from loan origination. Complaint filed four years after extension of loan dismissed.
- (10093) *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.
- (10094) *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.

25.110 USDA Rural Housing Service

- (10095) *Sheldon v. Vislack*, 2013 WL 4564422 (6th Cir. 2013) – Federal Courts lack jurisdiction to review discretionary decisions by USDA as to whether to offer a loan modification under RHS procedures. Administrative Procedures Act grants discretion to Federal Agencies including

USDA, and precludes judicial review of discretionary decisions.

25.111 Michigan Compiled Laws Section 600.3205

- (10096) *Brimm v. Wells Fargo Bank*, 2017 WL 1628996 (6th Cir. 2017) – Plaintiff’s complaint alleging violation of Michigan’s foreclosure statute based on alleged lack of proper notice failed to state cause of action where Plaintiff failed to demonstrate any prejudice arising from alleged deficiency, such as the loss of an ability to preserve interest in property or some risk of double liability based on lender’s failure to comply with foreclosure statute.
- (10097) *Hurni v. Bank of America*, 2016 WL 1583827 (E.D. Mi. 2016) – Section 600.3205, now repealed, did not require lender to complete loan modification process or to send answer to loan modification request before commencing foreclosure.
- (10098) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – A mortgagor’s failure to avail themselves of the statutory right of redemption following a sheriff’s sale extinguishes all of their rights in and to the property. Filing suit does not toll the redemption period. Foreclosure sale may be voided where the mortgagor shows fraud or irregularity resulting in prejudice such that borrower would have been in a better position to preserve their interest in the property absent the foreclosing party’s noncompliance with Michigan’s foreclosure statute. Lender did not violate MCL 600.3205a by failing to provide calculations used to deny mortgage modification where lender was required to provide calculations only if borrower met with housing counselor or lender to negotiate modification under Section 600.3205b, and borrower never contacted a counselor or otherwise requested to negotiate modification.
- (10099) *Bready v. PNC Mortgage*, Case No. 14-2347 (6th Cir. 2015) – Section 600.3205 does not apply where borrower had been granted loan modification and defaulted under that loan modification within one year of execution. Borrower and lender modified loan in March, 2011, and borrower defaulted in September, 2011, only 6 months later. Lender free to use non-judicial foreclosure process following default and was not required to use judicial foreclosure process.
- (10100) *Roller v. Federal National Mortgage Assn*, 2015 WL 3823848 (E.D. Mi. 2015) – Sole remedy for alleged violation of Section 600.3205 is to convert non-judicial foreclosure into judicial foreclosure. Where borrower did not assert alleged violation until after sale had occurred, there was no remedy available as court could not, post-sale, convert proceedings into judicial foreclosure process.
- (10101) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Alleged failure of lender to comply with Section 600.3204 renders sale voidable, not void. Borrower must show that he would have been in a better position to preserve interest in property absent lender’s non-compliance with statute. Borrower’s allegation that deficiency in foreclosure process deprived them of opportunity to pursue short sale or deed in lieu did not indicate that lender’s actions impeded borrower’s ability to redeem mortgage. Borrower’s allegation that he contacted lender’s counsel to inquire about loan modification procedures was not sufficient where borrower made nothing more than bare allegation that they requested a meeting, unsupported by any additional facts. Even if borrower had properly inquired about modification process, sole remedy is to seek injunction of sale process and require foreclosure by judicial process. Once foreclosure sale has been concluded, it is too late for borrowers to obtain injunction or seek judicial foreclosure.
- (10102) *Haddad v. Randal S. Miller Associates, PC*, 2014 WL 5303001 (6th Cir. 2014) – MCL 600.3204 allows foreclosure by advertisement as long as no legal proceedings to recover the debt have been filed or, if filed, those proceedings have been discontinued. Prior legal action has been “discontinued” where prior action was stayed by bankruptcy filing and case was closed for administrative purposes.
- (10103) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Non-judicial foreclosure is not invalid where lender does not meet with borrower to discuss mediation where borrower fails to timely provide statutory required documents to lender.
- (10104) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – Action under MCL 600.3204 must be brought before expiration of redemption or must allege fraud or irregularity in connection with sale process. Lender’s alleged failure to participate in loan modification negotiations did not void non-judicial foreclosure sale. Remedy is limited to requiring lender to use judicial foreclosure process. Once non-judicial foreclosure sale has occurred, there is no basis to set aside the sale absent showing of prejudice as a result of failure to comply with statute such as proof that property would have been redeemed or that borrower had current financial ability to redeem but for alleged wrongful foreclosure. Borrower presented no evidence of any prejudice resulting from non-judicial foreclosure process.
- (10105) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower must prove fraud in the foreclosure process itself in order to prevail in action filed after expiration of redemption. Lender’s alleged failure to finalize mortgage modification or to accept modified payments is not type of “fraud or irregularity” that warrants setting aside foreclosure sale, as defects, if any, do not go to foreclosure process itself. Remedy for failure to complete loan modification, if any, is to require lender to halt foreclosure by advertisement and use judicial foreclosure process. Once foreclosure sale occurred, there is no foreclosure action for the court to enjoin or convert to a judicial foreclosure process.
- (10106) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice. Even assuming that foreclosure process failed to comply with state law, plaintiff could not show prejudice as plaintiff admittedly defaulted on mortgage and lacked any ability to redeem mortgage even if lender had fully complied with state requirements. Inability to participate in loan modification discussions is not sufficient prejudice where there was no allegation that plaintiff had any means by which to enter into a loan modification or that she had any chance that lender would entertain discussions for a loan modification.
- (10107) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Borrower who wants to pursue modification under state statute must contact designated person directly or contact housing counselor within 30 days of receipt of notice of foreclosure. Complaint that did

not assert the date on which defendant sent the statutory notice or the date on which Plaintiffs contacted Defendant's designee or a housing counselor failed to state a cause of action. The loan modification statute contains meticulous directions for compliance and without specific allegations the complaint is not sufficient.

- (10108) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Sole remedy for alleged failure of lender to participate in mediation process is to convert foreclosure from advertisement to judicial foreclosure proceedings. Where Debtor failed to raise issues prior to completion of foreclosure sale, Debtor waived right to contest foreclosure by advertisement process.
- (10109) *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.
- (10110) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *aff'd*, 2014 WL 4435962 (6th Cir. 2014) – 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.
- (10111) *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.
- (10112) *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.
- (10113) *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.
- (10114) *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.

25.112 Statute of Frauds

- (10115) *Grifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Michigan law does not recognize breach of oral contract to modify note and mortgage. Michigan's Statute of Frauds requires any action brought against a financial institution to enforce any promise or commitment must be in writing and signed by authorized party of financial institution. "Financial institution" includes any nationally chartered bank. Allegation that lender, as nationally chartered bank, breached oral contract for loan modification failed to state cause of action. Complaint for breach of oral contract for loan modification is unenforceable under Michigan Statute of Frauds as action to either enforce terms of oral promise or enforce oral agreement to waive loan provision.
- (10116) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Michigan Statute of Frauds precludes any action based on promise or commitment to lend, renew, extend, modify or permit delay in repayment or performance of, or any other financial accommodation in connection with any loan or extension of credit unless agreement is in writing and signed by party against whom agreement is to be enforced. Line of Credit agreement that spelled out conditions on which Lender would, at its discretion, extend the term or make other accommodation is not unconditional promise to renew or refinance if borrower meets stated conditions. Borrower could not maintain action against Bank or attempt to rely on Agreement as counterclaim to Bank's action to collect debt.
- (10117) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Borrower's action for breach of contract barred by statute of frauds. Borrower's allegation that lender promised to reinstate loan when borrower brings account current did not allege that lender entered into written agreement for reinstatement, where borrower relied only on letters to lender requesting a breakdown of the reinstatement figures and lender's response that it would do so. None of the referenced documents indicated that lender promised to reinstate the loan. Further, even if lender entered into contract to reinstate upon payment of reinstatement amount, borrower never paid nor tendered the amount required to reinstate.
- (10118) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – Loan modification must be in writing signed by lender to be enforceable. Where Trial Period Plan was not signed by both parties, Plan never ripened into enforceable contract. Borrower's alleged substantial performance could not operate to create enforceable agreement where lender had not signed proposed Plan.
- (10119) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of Frauds precludes action for estoppel based on alleged promises to review loan modification. Statute of Frauds precludes enforcement of any oral agreement that is promise or commitment to renew or modify loan. Promise to consider loan modification is functional equivalent of promise to permit a financial accommodation. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.

- (10120) *6 Mile & Greenfield, Inc. v. PNC Bank, NA*, 2015 WL 3652766 (E.D. Mi. 2015) – Statute of Frauds precludes any oral attempt to waive a provision in a loan, extension of credit or financial accommodation. Where loan agreement unambiguously provided for late payment fees, any alleged oral waiver is unenforceable. Parole evidence cannot be admitted to create ambiguity where document itself is not ambiguous.
- (10121) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Statute of Frauds does not require written notice of sale of property under deed of trust or with oral adjournment of sale date.
- (10122) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Statute of Frauds precludes action for alleged breach oral loan modification agreement. Modification is “financial accommodation” within scope of Michigan Compiled Laws Section 566.132(2). Although couched in terms of fraud claim for failure to accept payments under alleged modification, action was at its core an action to enforce the modification which falls within statute.
- (10123) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action against lender for alleged breach of agreement to modify loan where the lender never signed loan modification. Borrower’s action for promissory estoppel against lender was predicated on unsigned loan modification agreement. Under Michigan law, the Statute of Frauds precludes enforcement against any financial institution of any promise or commitment to make, renew, modify or extend loan unless the agreement is in writing and signed by financial institution. Where lender did not sign, statute of frauds precluded action against lender for promissory estoppel. Lender’s acceptance of payments on terms of trial loan mod did not waive requirement that loan modification be signed.
- (10124) *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.
- (10125) *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.

25.113 Estoppel

- (10126) *ifor v. BSI Financial Services Ventures Trust 2013-I-H-R*, 2017 WL 1196368 (E.D. Mi. 2017) – Complaint for breach of oral contract for loan modification is unenforceable under Michigan Statute of Frauds as action to either enforce terms of oral promise or enforce oral agreement to waive loan provision. Equitable estoppel does not remove claim from statute of frauds. Complaint alleged only that defendants had failed to agree to a loan modification, which does not amount to breach of contract.
- (10127) *Federal Home Loan Mortgage Corporation v. Gilbert*, 2016 WL 3626827 (6th Cir. 2016) – Promissory estoppel requires clear, definite and unambiguous promise to do something. Promise cannot be unclear or vague. Cause of action for promissory estoppel related to possible loan modification failed where borrower did not demonstrate any “actual, clear and definite” or “unambiguous” promise by lender to modify mortgage. Lender sent borrower a letter that advised that borrower may be eligible for loan modification but specifically states that lender could not guarantee that he loan would be modified, and repeatedly stressed that the loan “may” be modified using conditional phrases including “may”, “maybe”, “if”, “could” and “possibly”. Lender’s statements that borrower “may” qualify required borrower to comply with all of the prerequisites, which borrower did not do. Absent evidence of clear promise and compliance with any conditions to that promise, cause of action for promissory estoppel failed.
- (10128) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of Frauds precludes action for estoppel based on alleged promises to review loan modification. Statute of Frauds precludes enforcement of any oral agreement that is promise or commitment to renew or modify loan. Promise to consider loan modification is functional equivalent of promise to permit a financial accommodation. Letters from lender requesting documents for review for possible loan modification did not amount to promise on which the promisor reasonably expected the promisee to rely and that in fact produced reliance or forbearance on part of the promisee. Lender request for information did not state that lender would ignore restrictions on eligibility for loan modification or that plaintiffs were in fact eligible for modification, and plaintiffs did not demonstrate any harm from lender’s decision not to review financial information where plaintiffs were not eligible for modification for reasons unrelated to financials, such that review of financials would have been futile act. However, complaint stated cause of action based on specific promise, in writing on lender’s letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (10129) *Flintkote Co. v. Aviva, PLC*, 769 F.3d 215 (3d Cir. 2014) – Federal Arbitration Act expresses strong federal policy in favor of resolving disputes through arbitration. Arbitration is strictly a matter of contract and where a party has not agreed to arbitrate, the courts have no authority to mandate that he do so. In ruling on Motion to Compel Arbitration, court must consider (1) whether there is a valid agreement to arbitrate between the parties and, if so, (2) whether the merits-based dispute in question falls within the scope of that valid agreement. Party who is non-signatory to an arbitration agreement, may be equitably bound to arbitrate under traditional principles of contract and agency law. Party will be bound where party has directly benefitted from terms of contract and maintains that other provisions of contract should be enforced as to him or otherwise attempts to enforce terms of contract that it likes while attempting to disavow those that party does not like. Party can also be bound where party either intentionally leads another to change position in reliance on party’s conduct. Party alleging

estoppel must show that party lacked knowledge or means of obtaining knowledge of truth of matters in question; reasonable reliance on conduct of party against whom estoppel is asserted; and party suffered prejudicial change in position in reliance. Party failed to demonstrate reliance where opposing party initially consented to arbitration as part of attempt to mediate dispute but later chose to litigate matter, where party was signatory to underlying contract in which opposing party specifically reserved right to litigate disputes such that party seeking arbitration knew of actual state of facts. Further, there was no reasonable basis to rely on party's statements regarding arbitration where mediation agreement did not contemplate arbitration in lieu of litigation if mediation was unsuccessful.

- (10130) *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.

25.114 Promise to Adjourn Foreclosure Sale

- (10131) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of frauds precludes action based on alleged promise to refrain from selling property at foreclosure sale, as promise amounts to request for financial accommodation which must be in writing. Estoppel requires a promise; reasonable expectation of promisor that promise will induce definite and substantial action by promisee; and promisee in fact relies or forbears from taking action under circumstances where promise must be enforced to avoid injustice. Plaintiff's alleged reliance on written statement from lender that lender would refrain from foreclosure as long as borrower complied with terms of workout plan did not support estoppel where workout plan was agreed to two years earlier but never resulted in loan modification, such that lender did comply with promise while modification review was completed and subsequently denied. When plaintiff subsequently requested a second modification, lender specifically advised that foreclosure process would continue while the evaluation process was ongoing and any letter referring to possible suspension of foreclosure process, if any, was not sent until after foreclosure process completed, such that borrower could not have relied on letter in determining how to proceed in foreclosure process. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.

25.115 Fair Labor Standards Act

- (10132) *Guyot v. Ramsey*, 2016 WL 2866403 (E.D. Mi. 2016) - FLSA applies to protect rights of any employee who is either employed by a company engaged in commerce or production of goods for commerce where company has annual gross sales or business revenue of not less than \$500,000 (called "enterprise coverage") or because employee himself is engaged in commerce for in production of goods for commerce (called "individual coverage"). Plaintiff alleging that she worked but was not compensated not protected under Enterprise Coverage as there was no dispute that employer never did more than \$500,000 in gross revenue in any year. Plaintiff also not included in Individual Coverage because plaintiff was secretary who did not spend substantial portion of her time engaged in interstate commerce. Plaintiff presented no evidence that her activities were closely related to movement of commerce between states or that any invoices or bill payments were sent between states or were ever sent out of state. While mailings has potential of moving through interstate commerce, that was not sufficient to trigger FLSA claim absent evidence that defendant actually did business out of state rather than conducting business solely in Michigan.

M. ECF Procedures

25.116 Electronic Filing Required

- (10133) *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 from.

25.117 Electronic Filing Excused

25.118 Original Signature

- (10134) *In re Mayfield*, Case No. 16-22134 (Bankr. E.D. Ca. 2016) – ECF Rules require party submitting paper to have original signature of party. Attorney violated rules when he filed petition, statements, schedules, statement of current monthly income, verification of master address list, and statement of social security number, using electronic signature of Debtor through DocuSign. DocuSign signature is computer generated and does not constitute an "original" signature. DocuSign signature does not take place of "pen to paper" original signature. Attorney sanctioned and required to attend ECF training on court's web page and to file a declaration verifying that he has done so.

25.119 Electronic Signature

- (10135) *In re Benton*, Case No. 09-36642 (Bankr. E.D. Mi. 2016) – Debtor's failure to affix original signature to petition before petition is electronically filed with court does not automatically invalidate filing or require dismissal of case. Code only requires that petition be filed to commence case and does not specify any requirement that Debtor affix original signature. Lack of original signature deprives petition of evidentiary presumption in favor of appropriateness. Although nobody could produce originally signed petition, evidence was sufficient to demonstrate that petition was properly filed even if Debtors did not sign original. Petition was filed in 2009 yet Debtors never raised issue until 2015, after Debtors were convicted of bankruptcy fraud. At original Section 341 meeting, record indicated that Debtors each reviewed the petition and confirmed that the petition contained their original signatures. Debtors were in Chapter 13 for extended time and made

significant plan payments. Debtors completed post-petition financial management classes. After case was converted to Chapter 7, Debtors continued to participate in case and paid Chapter 7 Trustee to settle certain issues and allowed Trustee to sell assets. Evidence was sufficient to find that Debtors did authorize filing and knowingly participated without disavowing petition even though no party could produce original signed petition. Debtors also barred by laches from disavowing signatures in effort to have case dismissed. Laches requires negligent and unintentional failure to protect one's rights. Debtors were in bankruptcy for 6 years and actively participated in case at all stages, and did not attempt to disavow until after conviction for bankruptcy fraud.

- (10136) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or Debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the Debtor, and equity security holders. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that Debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of Debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a Debtor's name to the lists, schedules and statement of financial affairs when Debtor has not actually signed those documents.

- (10137) *In re Mulholland*, Case No. 14-44055 (Bankr. E.D. Mi. 2015) – Chapter 7 case dismissed where electronic signature on Petition and Petition Cover Sheet did not match the ECF login and Debtor failed to correct deficiency within time allowed by court.

25.120 Service on United States Trustee

- (10138) *In re Frankovich*, 2017 WL 2334319 (Bankr. W.D. Mi. 2017) - Federal Rule of Bankruptcy Procedure 5005 requires service on United States Trustee by mail or delivery to an office of the United States Trustee. Electronic transmittal of documents to United States Trustee through Court's ECF program is not equivalent to "service". ECF notice may be in addition to service under national rules, but does not supplant requirement for service. ECF service is sufficient on represented entities who have appeared in a case or proceeding. However, where United States Trustee has not appeared in the case, ECF service is not sufficient to comply with Rule 5005. Motion to Approve Settlement denied where there was no evidence that motion was served on Office of United States Trustee.

25.121 Service by ECF

- (10139) *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).

25.122 Service by Mail

- (10140) *In re Lundy*, 2016 WL 4706044 (Bankr. N.D. Ohio 2016) – Rules allow but do not require court to serve notices by electronic means. While service by mail may not present the "best" means of notice, that does not amount to a lack of notice of due process purposes. Although Debtor would prefer to receive notice electronically, court would not enter order changing computerized noticing system used by court.
- (10141) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Motion filed and served by ECF would not be stricken based on opposing party's alleged failure to receive pleading. Even if party was not ECF participant, party did receive and file response to motion and did not evidence any prejudice based on opposing party's alleged failure to serve motion by mail. However, court did direct that all future pleadings be served on party by mail rather than through ECF procedures. Fact that some districts do provide electronic notice does not make those courts who do not "discriminatory".

25.123 Sanctions

- (10142) *In re Benton*, Case No. 09-36642 (Bankr. E.D. Mi. 2016) – Failure to maintain originally signed document as required by Court's ECF rules does not invalidate electronic filing. Remedy under rules for failure to maintain documents is disgorgement of fees. Lack of original signature may remove evidentiary presumption of appropriateness but does not automatically require striking of document.
- (10143) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or Debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the Debtor, and equity security holders. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that Debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of Debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a Debtor's name to the lists, schedules and statement of financial affairs when Debtor has not actually signed those documents.
- (10144) *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.
- (10145) *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.

N. Habeas Corpus

25.124 Authority to Issue Writ

- (10146) *In re Associated Community Services, Inc.*, Case No. 17-50420 (E.D. Mi. 2017) - Bankruptcy Court lacks jurisdiction to issue a writ of habeas corpus ad testificandum. Bankruptcy Court can issue proposed findings of fact and conclusions of law to District Court on party's request to produce incarcerated person for purposes of trial. District Court has jurisdiction to issue writ based on Bankruptcy Court's Report & Recommendation. In considering whether to grant read, Court will consider whether incarcerated persons physical presence would contribute significantly to fair adjudication; potential danger security risk; need for early determination of matter; and possibility of delaying trial until prisoners released. Court would issue writ where prisoners testimony would contribute significantly to fair adjudication of claims as prisoner had personal knowledge regarding disputed material issues that was unique and not available from other witnesses, and which directly conflicted with deposition testimony of other witnesses raising questions of prisoners and other witnesses credibility. Issue had been fiercely litigated for 3 years, all pretrial matters were concluded and the matter was ready for trial. Prisoner would not be released until January, 2018, such that waiting release would significantly delay trial and increase expenses. Neither party presented any evidence that prisoner posed any security risk.
- (10147) *In re Kerr*, 2016 WL 1578758 (Bankr. N.D. Ohio 2016) – Strong majority of cases conclude that Bankruptcy Court lacks authority to issue writs of habeas corpus. 28 USC Section 2241 grants habeas power to Supreme Court, District Courts and Circuit Courts, and does not include bankruptcy courts. Further, 28 USC Section 2256 would have specifically granted power to Bankruptcy Court but was repealed before it ever took effect. Court could not rely on Section 105 where Court cannot use Section 105 to expand authority that is not otherwise granted by statute.
- (10148) *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.

25.125 Requirements

- (10149) *Atiles-Gabriel v. Commonwealth of Puerto Rico*, Case No. 15-2108 (D.P.R. 2017) - Filing for bankruptcy protection by Governmental Unit does not automatically stay habeas corpus proceedings. Habeas corpus concerns person's liberty and does not seek right to payment or any equitable remedy which would otherwise fall within scope of Section 362. Government's argument that costs of responding to habeas petition would be "gargantuan" did not compare to fundamental liberty interest protected by habeas corpus.
- (10150) *Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court denied habeas petition where Defendant also filed Motion under Rule 78 to dispense with hearing and rule on the issues on the briefs submitted. Defendant already acknowledged that Court could rule without the need for a hearing, making it unnecessary put the government to the extraordinary burden, risk, and expense of transporting the Defendant for a hearing at which even he does not regard his appearance as necessary; the court would not be taking evidence eliminating any need for the Defendant to appear for purposes of testifying; and the court has afforded the Defendant ample opportunity to obtain counsel to represent him in this civil proceeding. Defendant's incarceration undoubtedly hampers his participation in this proceeding, but this is but one of the many consequences of his criminal activity, part of the liberty he lost upon conviction.

O. Mandamus

25.126 Authority to Issue

- (10151) *Ozenne v. Chase Manhattan Bank*, 2016 WL 1169094, 818 F.3d 514 (9th Cir. 2016), reversed en banc on alternate grounds, ___ WL ___ (9th Cir. 2016) – Bankruptcy Appellate Panel lacks authority to issue writ of mandamus. 28 USC Section 1651, the "All Writs Act" extends mandamus power to courts created by Congress. BAP is not created by congress but is creature of the Judicial Council of the Ninth Circuit. En banc, court reversed without addressing constitutional issue, holding that Mandamus Petition challenging Bankruptcy Court's denial of sanctions for alleged violation of stay should have been raise on direct appeal. Mandamus is not substitute for filing timely appeal. Absent appeal, BAP lacked jurisdiction to consider any review, including via mandamus, of the underlying judgment.

P. Choice of Laws and Forum Selection Clauses

25.127 Choice of Laws – Generally

- (10152) *Lloyd's Acceptance Corp. v. Carroll Property Management LLC*, 2018 WL 3132621(W.D. Tn. 2018) - Federal Court must apply choice-of law rules of forum state. Tort claims governed by law state with "most significant relationship" based on needs of interstate and international systems; relevant policies of for him; relevant policies and other interested states; protection justified expectations; basic policies underlying particular field of law; certainty, predictability uniformity result; and ease of determination application of law to be applied. Plaintiff's complaint alleged sufficient contact with Tennessee where are allegedly suffered as a result of defendant's conduct occurred in Tennessee and Tennessee had most significant relationship to litigation.
- (10153) *Kravitz v. LaRocca*, Case No. 17-80180 (Bankr. W.D. Mi. 2018) - Adversary proceeding asserting causes of action under state law applies state law according to controlling decisions of state Supreme Court. Where State Supreme Court has not issued a decision, Court must make best prediction of what State Supreme Court would do if confronted with issue.

- (10154) *PNC Bank. v. Sterba*, Case No 14-60061 (9th Cir. 2017) - In bankruptcy proceedings, federal common law governs choice of law. Although contractual choice of law provision did not expressly include statute of limitations and federal common law would normally use statute of limitations of forum state, Federal Court would apply statute of limitations from non-forum state where bankruptcy case was filed in forum state which had shorter statute of limitations through no fault of creditor. But for bankruptcy filing, any action could have been brought only in non-form state which would have applied longer statute of limitations. Disallowing claim based on Debtor's choice of forum would be wholly unreasonable where Debtor's chosen forum was not one contemplated by forum selection clause in underlying agreement.
- (10155) *Detmore v. JEM Real Estate Preferred Fund I, LLC*, 2016 WL 4727479 (E.D. Mi. 2016) – Courts will traditionally uphold a choice-of-law provision contained in a contract, unless: (1) the chosen state lacks a substantial relationship to the parties or the transaction; (2) there is no reasonable basis for adopting the law of the chosen state; or (3) it “would be contrary to a fundamental policy of [Michigan] which has a materially greater interest than the chosen state in the determination of the particular issue and which... would be the state of the applicable law in the absence of an effective choice of law by the parties. Contract that specified that Ohio law would govern required application of Ohio usury law which has a higher rate of interest allowable than does Michigan. Ohio had substantial relationship to transaction and parties where (1) lender all relevant times resided and was located in Ohio; (2) lender was contacted in Ohio on Debtor's behalf; (3) Debtor was seeking a loan, which would be funded by an Ohio lender; (4) the Loan Documents were prepared in Ohio; and (5) the loan documents were sent to Debtor from Ohio. The fact that Debtor did not physically travel to Ohio to negotiate and execute the Loan Documents is not outcome determinative. Ohio law had reasonable connection to transaction where Ohio law allowed higher interest rate on loans in excess of \$100,000, creating a reasonable basis for the parties to choose Ohio law. Higher interest rate was not contrary to public policy of Michigan. Public policy will be offended where contract itself is illegal, or is the result of oppressive use of superior bargaining power. Michigan's policy concerns regarding usury were not implicated because the creditor was sought out by the Debtor, Debtor was a sophisticated commercial party, and the Debtor was fully aware of what it was getting into when he negotiated and agreed to the terms of the loan. Even if the loan at issue was usurious, the contract is not an illegal contract which is unenforceable in its entirety. While Michigan has an interest in protecting its residents from usurious interest rates, Ohio has an equally strong—or stronger—interest in protecting its residents, particularly when out-of-state Debtors seek funding from its in-state creditors.
- (10156) *Sesquatchie Mountain Creditors v. Detweiler*, 2016 WL 321037 (Bankr. N.D. Ohio 2016) – Federal law governing choice of laws for fraud, breach of contract, and agency, is law of state with most significant relationship to transactions. Tennessee law controlled where cause of action was based on fraudulent statements made in Tennessee regarding sale of property Tennessee. Choice of laws for action to pierce corporate veil is based on law of state of incorporation. As defendant-corporation was incorporated in Ohio, Ohio law governing piercing of veil controlled.
- (10157) *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.
- (10158) *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.

25.128 Binding Effect of State Court Decisions

- (10159) *Horizon Lawn Maintenance, Inc. v. Columbus-Kenworth, Inc.*, 2016 WL 2986263 (E.D. Mi. 2016) – Court must apply State law as determined by State Supreme Court. *If State Supreme Court has not ruled*, Court must predict how State Supreme Court would rule by looking to analogous decisions of the State Supreme Court; decisions of State intermediate Courts of Appeal; positions expressed in a restatement of law; law review commentaries; and decisions from other jurisdictions or the majority rule. Published, on-point decisions issued by the Intermediate Court of Appeals are especially important data but are *not* conclusive, and Court *may* disregard a state intermediate appellate court decision if the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise.
- (10160) *In re Makowka*, Case No. 13-3469 (3d Cir. 2014) – Federal Court applying purely state law is bound by interpretations given to state law by state's highest court. Where highest court has not interpreted state law, Federal Courts must attempt to predict how state's highest court would rule. Federal court must give “due deference” to decisions if intermediate appellate courts but Federal Court is not bound by those decisions and can reach a contrary result if the Federal Court believes that State Supreme Court would rule otherwise or if Federal Court finds state intermediate appellate decisions to be “flawed”.

25.129 Forum Selection Clauses - Enforcement Generally

- (10161) *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.

25.130 Foreclosure Proceedings

- (10162) *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.

25.131 Exemption Statutes

- (10163) *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

25.132 State Law Claims Against Governmental Agency

- (10164) *McClarty v. Hatchett*, Case No. 17-4700 (Bankr. E.D. Mi. 2018) – Fraudulent transfers can be avoided under either Section 548 which creates federal fraudulent transfer law; or by trustee under section 544(b) which gives Trustee power of debtor's creditors under state law. Section 548 "reach back" is only 2 years, while Section 544 looks back as designated in state law, generally longer than 2 years. Section 106 abrogates Sovereign Immunity under Section 544 even though here may not have been any actual creditor who could have brought action against IRS independent of Bankruptcy Filing. Section 544 only requires existence of actual creditor, not that actual creditor would have had right to pursue action against governmental unit. Fraudulent transfer is substantive cause of action arising under existing law including Section 544. Fact that IRS could assert Immunity as defense against suit outside of bankruptcy does not mean that Immunity applies to case brought inside Bankruptcy. Internal Revenue Code does not preempt state fraudulent transfer law. Preemption requires either that congress expressly preempted state law; or that state conduct regulates field that Congress intended be left to Federal Government exclusively, which may be inferred from scheme of federal regulations so pervasive that Congress left no room for State involvement; or where state law actually conflicts with Federal law. Internal Revenue Code collection and refunds or repayments of amounts collected. Trustee's action is not seeking to require IRS to issue refund of taxes paid. Debtor was under control of guardian. Guardian sold assets of Debtor and put proceeds into Guardian's own account and then used proceeds to pay Guardian's personal tax liability. Debtor did not owe IRS any money and had no outstanding tax issues, and Debtor was not seeking refund of taxes paid by Debtor but was instead effort to recover property given to IRS to pay Guardian's taxes. 26 USC Section 7422 which requires exhausting of administrative remedies before instituting action to recover erroneously or illegally assessed or collected taxes did not apply where Action was brought to recover property of Debtor that Debtor had no liability to pay and is not seeking refund of alleged overpayment of tax liabilities.
- (10165) *PNC Bank v. Burtel, Inc.*, 2016 WL 9776587 (E.D. Mi. 2016) – Michigan Unemployment Insurance Agency is state agency entitled to sovereign immunity under 11th Amendment. Action in Federal Court seeking determination that asset purchaser was not successor to seller-corporation for purposes of liability for unpaid unemployment taxes sought to compel State Agency to take action to hold that purchaser was not liable under successor-liability theory violated 11th Amendment protection against Federal Court action requiring dismissal of complaint.
- (10166) *Zazzali v. US*, 869 F.3d 1004 (9th Cir. 2017) – Section 106 waives governmental sovereign immunity both for actions brought under Bankruptcy Code to recover avoidable transfers and brought on derivative basis under State law to recover avoidable transfers. Trustee sought to use State Law that requires actual unsecured creditor would could have brought action at State Law, and allows Trustee to pursue those actions under Section 544. Although Government (in this case, the IRS) would be immune from direct suits under State Law by state law creditor, Trustee is not constrained because Trustee brings action under Section 544 for which sovereign immunity is waived under Section 106. Abrogation of sovereign immunity under Section 106 is absolute and necessarily includes derivative state law claims on which action under Section 544 is based. Trustee need only identify one creditor who, but for sovereign immunity, could have brought avoidance action.
- (10167) *Davis v. West Virginia Tax Department*, Case No. 16-3109 (Bankr. E.D. Va. 2016) – Eleventh Amendment prohibits any action against any State by a citizen of that state in federal court and broadly prohibits entering money judgment against State. Protection extends only to "suits" which are generally determined by degree of coercion exercised by federal court in compelling state to attend and whether resolution or remedy requires jurisdiction over state. If the substance of a bankruptcy proceeding will impact state treasury, it will likely be considered a suit against the state. Section 106 waives sovereign immunity only to extent action is "in rem". Action for turnover is part of essential process of assembling property of the estate and action against state to recover property of the estate is

consistent with principals of creditor equity and essential to core purpose of bankruptcy code and so is not precluded by sovereign immunity. However, action of Trustee sought not only turnover of tax refunds, but sought determination that state actually owed Debtor tax refunds. Until the right to the refund is determined, there is no identifiable and undisputed property of the estate that could give rise to a turnover action. Debtor's entitlement to tax refunds was disputed by state and Federal Court cannot exercise jurisdiction over state to determine that state owes tax refunds to Debtor. If and when State Court determines that tax refunds are owed to Debtor without question, then Trustee can bring action for turnover. Until that time, action seeks to liquidate alleged debt of state which is barred by Sovereign Immunity.

- (10168) *Kohut v. Wayne County Treasurer*, 2015 WL 1598083 (Bankr. E.D. Mi. 2015) – Trustee has authority under Section 544 to bring fraudulent transfer action under Michigan state law. Uniform Fraudulent Transfer Act has 6-year statute to limitations but requires trustee to prove existence of actual pre-petition creditor who could have brought action under Michigan law had bankruptcy not occurred. Although Sovereign Immunity would have precluded any State Court action against Wayne County to recover tax payments made after Debtor was insolvent, Trustee not prohibited from bringing action as Section 106 abrogated sovereign immunity for purposes of Section 544. Although no actual State Court creditor could bring action, that did not preclude Trustee from bringing action where Trustee could otherwise prove existence of actual unsecured creditor and other elements of fraudulent transfer.
- (10169) *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.

25.133 Governmental Agencies and Subdivisions

- (10170) *U.S. v. Hunsaker*, Case No. 16-0386 (D. Ore. 2016), *reversed*, 2018 WL 4122882 (9th Cir. 2018) – IRS violated stay by sending 4 letters to Debtors post-petition threatening collection efforts including garnishment of Social Security benefits. Section 106(a) waives sovereign immunity for violations of Section 362 to extent of damages suffered by Debtor but does not waive sovereign immunity for punitive damages. Damages for emotional distress are actual damages as to which sovereign immunity is waived, acknowledging split with *U.S. v. Torres*, 432 F.3d 20 (1st Cir. 2005). IRS willfully violated stay by continuing to make demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for “emotional distress” allegedly suffered as result of IRS conduct.
- (10171) *Uberoi v. Supreme Court of Florida*, 2016 WL 1552370 (11th Cir. 2016) – Federal Court barred by Sovereign Immunity and *Rooker-Feldman* from reviewing State Court decision denying Debtor's admission to Bar. Florida Supreme Court rejected Debtor's application based on Debtor's prior, failed chapter 13 case. Debtor sued in Federal Court alleging that denial of admission violated Section 525. Case dismissed as Federal Court lacks jurisdiction to review State Court judgment. Complaint clearly intended to challenge State Court judicial proceeding.
- (10172) *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.
- (10173) *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.

25.134 Entity Entitled to Immunity – Native American Tribe

- (10174) *Buchwald Capital Advisors, LLC v. Papas*, 2015 WL 3632202 (E.D. Mi. 2015), *opinion on remand*, 2016 WL 5724765 (Bankr. E.D. Mi. 2016), *aff'd*, 2018 WL 508471 (E.D. Mi. 2018) – Section 106 does not clearly, unequivocally and unmistakably express intent to include Indian Tribes among entities as to which sovereign immunity has been waived. Where tribal charter requires board approval to waive sovereign immunity, nothing short of express approval operates to waive tribal immunity. Tribe's participation in claims allowance and confirmation process does not waive sovereign immunity in adversary proceeding to recover alleged fraudulent transfers.
- (10175) *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.

25.135 Congressional Abrogation

- (10176) *US v. Copley*, Case No. 16-207 (E.D. Va. 2018) – Section 106 waives Governmental Sovereign Immunity regarding relationship between exemption under Section 522 and right of set off under 553.
- (10177) *Buchwald Capital Advisors, LLC v. Papas*, Case No. 14-14103 (E.D. Mi. 2015) – Section 106 does not clearly, unequivocally and unmistakably express intent to include Indian Tribes among entities as to which sovereign immunity has been waived.
- (10178) *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.
- (10179) *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.

25.136 Waiver

- (10180) *Woodcox v. U.S.*, 2018 WL 1832972 (W.D. Ky. 2018) – Federal Tort Claims Act generally does not waive sovereign immunity and is sole vehicle to bring tort claims against United States. 28 USC Section 268(h) waives sovereign immunity for acts or omissions of specific class of investigative or law enforcement officer empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. Head of Program Compliance for Education Department is not officer empowered to search or seize or make arrests. Claims against Education Department employees must be brought within strictures of FTCA.
- (10181) *Buchwald Capital Advisors v. Sault Ste. Marie Tribe of Chippewa Indians*, 2016 WL 5724765 (Bankr. E.D. Mi. 2016), *aff’d*, 2018 WL 508741 (E.D. Mi. 2018) – Native American Tribe cannot waive sovereign immunity either through actions or through contractual provisions. Sovereign Immunity may be waived only by duly adopted resolution of Tribal Council. Tribe’s entering into contractual relationship, even if Tribe receives benefit, does not warrant waiver of sovereign immunity with regard to that contract. Filing of proof of claim in bankruptcy case waives sovereign immunity only to extent of resolution of claims objections and does not waive sovereign immunity for broader purposes such as avoidance actions under Sections 547 and 548. Even if Tribe cause Debtor to file bankruptcy, that does not make Tribe a Debtor for purposes of waiver of sovereign immunity, as waiver is limited only to the actual entity that filed bankruptcy petition.
- (10182) *Bowers v. United States*, 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Section 106 waives sovereign immunity for any governmental unit that files a proof of claim that is property of the estate and arose out of the same transaction or occurrence out of which the claim of the governmental unit arose. Section 106 allows Debtor to bring counterclaim against the governmental unit that files a proof of claim if the property claimed by the Debtor is property of the estate and the Debtor’s claim against the governmental unit arises out of same transaction as claim itself. Debtor’s claim against IRS for money paid to IRS for unpaid taxes met first requirement as Debtor was attempting to recover exempt funds that were paid to IRS prepetition and constitute property of the estate. However, Debtor’s claim did not arise out of same transaction as IRS claim. In determining whether claims arise out of same transaction, court will consider (1) whether there is a logical relationship between the two claims; (2) whether the issues of law and fact are largely the same; (3) whether res judicata would bar a subsequent suit on the counterclaim; and (4) whether substantially the same evidence would support both the claim and the counterclaim. The IRS proof of claim is for 2001, 2006, 2007, 2011, and 2012 tax liabilities. While there is a logical relationship between the IRS claim and the Debtors’ claim for a refund of exempt amounts improperly levied, the factual issues as to the claims are not the same, each claim will require different evidence, and any determination on the IRS’s claim would not apply to bar the Debtors’ pursuit of their claim for a refund of exempt funds.
- (10183) *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.
- (10184) *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.

25.137 Punitive Damages

- (10185) *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. Rule 2004 Examinations

25.138 Parties Entitled to Conduct

- (10186) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Office of United States Trustee has broad authority to participate in bankruptcy case and to conduct Rule 2004 examinations. Lack of pecuniary interest does not deprive US Trustee of standing to conduct examination.
- (10187) *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.

- (10188) *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 an plaintiff in pending State Court fraudulent conveyance action, had standing to conduct financial investigation in his status as a creditor in the case.
- (10189) *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.
- (10190) *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.
- (10191) *In re DeShetter*, 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.

25.139 Authorization by Court

- (10192) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 2004 allows court to authorize discovery and issuance of subpoena in court’s discretion. Subpoena issued by creditor in case directed to Trustee quashed where creditor did not first file Motion for Rule 2004 exam.

25.140 Scope

- (10193) *In re Great Lakes Commnet*, 2016 WL 6081100 (Bankr. W.D. Mi. 2016) – Rule 2004 is proper vehicle to investigate possible causes of action that can be brought on behalf of estate. Fact that discovery may also be relevant if an adversary proceeding is filed does not preclude use of Rule 2004. Once adversary proceeding is filed, parties are limited to discovery rules. Committee request for 2004 exam of potential target of litigation appropriate where litigation had not yet been commenced, discovery was reasonably targeted to narrow possible causes of action to ensure that stated actions have merit and to allow committee to file streamlined complaint; discovery warranted to determine whether there are defenses such as statute of limitations that could be present such that committee would adjust cause of action to eliminate claims for which valid defenses exist; and information sought was within pleading standards of federal rules and need to plead plausible causes of action including heightened standards for fraud.
- (10194) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Scope of examination under Rule 2004 is very broad, going beyond discovery normally permitted by Rule 26 and venturing into areas that amount to fishing expedition. Only limits are that requesting party just show good cause for the examination, and examination must not be used for purposes of abuse or harassment and must be relevant to basic inquiry. Good cause requires showing that person taking examination demonstrates that examination is reasonably necessary for protection of legitimate interests.
- (10195) *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.
- (10196) *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.
- (10197) *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.
- (10198) *In re DeShetter*, 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.

25.141 Location of Examination

- (10199) *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.

25.142 Motion for Examination – Mootness

- (10200) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Mootness can operate as jurisdictional bar to request to take examination under Rule 2004. Action is generally considered moot when underlying cause of action is settled. However, if issue is capable of repetition but evades review because challenged actions are too short in duration to be fully litigated prior to cessation or expiration and there is a reasonable expectation that same complaining party will be subjected to same action in further, court can permit examination notwithstanding settlement of action.

25.143 Motion for Examination – Granted

- (10201) *In re Great Lakes Comnet*, 2016 WL 6081100 (Bankr. W.D. Mi. 2016) – Rule 2004 is proper vehicle to investigate possible causes of action that can be brought on behalf of estate. Fact that discovery may also be relevant if an adversary proceeding is filed does not preclude use of Rule 2004. Once adversary proceeding is filed, parties are limited to discovery rules. Committee request for 2004 exam of potential target of litigation appropriate where litigation had not yet been commenced, discovery was reasonably targeted to narrow possible causes of action to ensure that stated actions have merit and to allow committee to file streamlined complaint; discovery warranted to determine whether there are defenses such as statute of limitations that could be present such that committee would adjust cause of action to eliminate claims for which valid defenses exist; and information sought was within pleading standards of federal rules and need to plead plausible causes of action including heightened standards for fraud.

25.144 Motion for Examination – Denied

- (10202) *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.

25.145 Federal Writs of Execution

- (10203) *Hauk v. Valdiva*, 2014 WL 5100090 (Bankr. E.D. Mi. 2014) – Bankruptcy court can issue writ of execution arising out of adversary proceeding only directed to US Marshall Service. Plaintiff’s attempt to include in the writ both the US Marshall and State Sheriff or Deputy Sheriff exceeded court’s ability to issue writ. Court struck reference to Sheriff or Deputy Sheriff before signing writ.

XXVI. Sanctions

A. Authority to Impose

26.1 Sanctions Generally

- (10204) *Briggs v. Reed*, Case No. 17-1143 (8th Cir. 2018) - Bankruptcy Court has jurisdiction to enter sanctions for contempt where party deliberately makes deceptive and misleading representations to Court. Bankruptcy Court ordered counsel to disgorge all fees received in bankruptcy case. Counsel represented to Bankruptcy Court that counsel received no fees and worked for free. Counsel did not produced documentation to support counsel's allegations and Court concluded that counsel made deliberately deceptive and misleading representations to Court and imposed sanctions including barring counsel from Bankruptcy Court for six months. Bankruptcy Court, as Article I Court, has jurisdiction to impose sanctions where matter at issue stems from bankruptcy itself. Bankruptcy Court sanctions based on earlier order calling for disgorgement. All sanctions orders flowing from disgorgement "arose in" bankruptcy case and did not implicate common-law claim.
- (10205) *Lowe v. Ransier*, 2018 WL 1279277 (6th Cir. BAP 2018) – Court can award fees for prosecuting fee application where request is based on Court's contempt power rather than Section 330. Court's authority to fashion remedy for contempt includes broad ability to not only coerce compliance but to compensate party harmed. Court's power to sanction arises from inherent authority of court as well as Section 105. "American Rule" that provides that parties bear own attorney fees does not prevent award of attorney fees in contempt action as award is not based on "prevailing party" but is based on Court's inherent authority to sanction contemptuous conduct. Bankruptcy Court's 50-page order amply supported award of attorney fees in excess of \$90,000 resulting from contemptuous conduct.
- (10206) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 827799 (E.D. Mi. 2018), *Motion for Reconsideration Denied*, 2018 WL 1168979 (E.D. Mi. 2018) – Sanctioned parties had sufficient notice of pending Motion for Sanctions yet failed to file response or appear and defend. Parties had reasonable notice even though case number on Motion filed in Adversary Case bore incorrect case number and incorrectly assumed Court would strike Motion. Error in case caption was immaterial where motion listed correct parties and correct court; caption listed adversary proceeding case number; number for main bankruptcy was off by single digit; and Court's electronic filing system delivered motion to parties with trailer at bottom of each page that identified motion as having been filed he adversary proceeding. Sanctioned parties could not have had uncertainty as to proceeding in which motion was filed and knew or reasonably should have known that motion was filed in adversary proceeding. Party not named in Sanctions Motion, not personally served with Sanctions Motion, and neither counsel nor party to adversary proceeding that gave rise to sanctions motion nonetheless subject to sanctions where party was already determined to be alter ego of party who was named and already determined that party was responsible for named party's conduct including vexatious litigation; and non-named party filed pleadings asserting arguments on behalf of party for whom non-party was alter ego, further indicating that non-named party identified with and closely aligned himself with party. Court had authority under Rule 9011 as well as inherent authority to sanction non-party where non-party participates in or controls vexatious conduct.
- (10207) *Edmondson v. Gordon*, Case No. 16-8014 (6th Cir. BAP 2017) – Bankruptcy Court has contempt power based on Section 105 and can enter order finding party in contempt where alleged contempt nor had knowledge of order which is said to violated; alleged Contempt nor did in fact violate order; and order violated with specific and definite. Bankruptcy Court entered order directing non-debtor third-party to turnover to bankruptcy estate \$173,000 in estate funds which have been improperly paid to third-party after commencement of bankruptcy case. Third-party violated ruling by failing to turnover funds as required by order. Bankruptcy courts finding that appellant was declared to be in contempt was not abuse of discretion. Once contempt is found, Court has wide discretion in determining amount of sanctions. However, party against whom sanctions may be awarded must have sufficient notice of possibility that sanctions can be imposed as well as opportunity to respond. Contempt Show Cause Order served upon third-party was directed Third-party to appear did not warn of the possibility of monetary sanctions even if party did appear for hearing. Order only stated that if party failed to "comply" with directive of order to appear for show cause hearing, Debtor's failure to comply could result in sanctions. Third-party was not provided opportunity to respond to amount of sanctions and Court did not provide for adequate procedure for determining reasonableness and calculation of sanction. Court considered affidavit submitted by moving party without third-party being given opportunity to examine counsel who filed the affidavit as to fees or otherwise raise issues or controvert fees asserted in affidavit. Minimal requirement of due process of required third-party have notice and opportunity to be heard on issues including whether all of fees charged were appropriate as sanctions, whether all fees were incurred as a result of Third-party's conduct for which he was found in contempt, and opportunity to cross-examine party who made affidavit asserting hours expended. Case remanded to Bankruptcy Court for determination of amount of sanction after providing reasonable notice and opportunity to respond.
- (10208) *Blue Cross Blue Shield of North Carolina v. Jemsek Clinic, PA*, Case No. 16-1030 (4th Cir. 2017) - Sanctions must not be disproportionate to severity of party's conduct. Bankruptcy Court has authority to dismiss action with prejudice as sanction only in most egregious case after weighing degree of wrongdoer's of culpability; extent of clients blameworthiness if conduct is committed by attorney; prejudice to judicial process and administration of justice; prejudice to victim; availability of other sanctions to rectify wrong; and public interest. Failure of Blue Cross to disclose injunction, while wasting time and resources of parties and Court, did not warrant most extreme sanction available. Party primarily response for loss of counterclaims was defendant as defendant had adequate notice of Florida's settlement and had opportunity to opt out of settlement which would have eliminated injunction against continued prosecution of counterclaims. While Blue Cross may have been culpable, causing Bankruptcy Court to waste some resources dealing with enjoined counterclaims, Blue Cross's claims were still properly before Court and actions did not impair Court's ability to adjudicate those claims. Blue Cross conduct did not appear to cause undue prejudice to defendant where it was defendant's conduct that caused the defendant to lose right to prosecute counterclaims. Less severe sanctions were available to adequately compensate for actual harm caused by Blue Cross and deter similar conduct in future. Public policy strongly favors deciding case on merits, a preference which is not overcome given absence of prejudice or any connection between Blue Cross conduct and claims against defendant. Court could properly award attorney's fees in connection with adversary proceeding for services performed after entry of injunction, but Court abused discretion by awarding fees for services performed prior to entry of injunction at point when Blue Cross had every right to defend itself against counterclaims.

26.2 28 USC §1927

- (10209) *Church Joint Venture, LP v. Grusin*, 2018 WL 286116 (6th Cir. 2018) – Section 1927 allows Court to impose sanctions against party who multiplies proceedings unreasonably and vexatiously. Sanctions would be warranted if attorney knows or reasonably should know that claim is frivolous or that litigation tactics needlessly obstruct litigation of non-frivolous claims. Sanctions require less than subjective bad faith but more than negligence or incompetence. Attorney’s filing of two motions and supporting affidavits was not sufficient to constitute type of frivolity for Section 1927; and attorney consistently asserted correctness of matters raised in motions. Attorney was inexperienced and filings were more likely done in good faith rather than through vexatious conduct.
- (10210) *Lei v. Yan*, Case No. 15-60019 (9th Cir. 2017) – Bankruptcy courts do not have authority to award sanctions under 28 USC Section 1927 because bankruptcy courts are not “Courts of the United States” as defined in 28 USC Section 451.
- (10211) *Blixseth v. Yellowstone Mountain Club*, Case No. 12-35986 (9th Cir. 2017) - Party awarded attorney fees under “fee-shifting” provision in contract or statute may also recover attorney fees and attempting to collect fees awarded pursuant to “fee-shifting” provision. 28 USC Section 1927 is “fee-shifting” provision allowing award of fees-on-fees. Thus, party is entitled to recover cost of establishing right to and amount of attorney’s fees to be awarded under Section 1927.
- (10212) *White v. Corcoran*, Case No. 16-11188 (E.D. Mi. 2017) - Bankruptcy Court has power to the awards sanctions under 3 sources. 28 USC Section 1927 allows Court to impose sanctions against party who multiplies proceedings unreasonably and vexatiously, where counsel falls short of obligations owed by member of bar to Court which cause additional expense to opposing party. Sanctions under Section 1927 may be issued only in against an attorney, not a *pro se* litigant. Court also has authority to impose sanctions on under rule 9011 which requires that party filing paper certify that paper is not being presented for improper purpose such as to harass or cause unnecessary delay or needless increasing cost of litigation. Sanctions under rule 9011 may be issued on request of the parties or the Court may impose sanctions on own initiative by entering order describing specific conduct that appears to violate Rule 9011 and directing attorney or party to show cause. Third source of sanction power is 11 USC Section 105 which grants Court inherent power to issue sanctions where party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Sanctions under Section 105, unlike Section 1927, require a finding of bad faith or recklessness. Bankruptcy Court properly impose sanctions where Debtor persisted in arguing issues before Court where Court had previously issued Orders which had been affirmed in 2 separate appeals, and Debtor repeatedly attempted to block Trustee’s effort to sell various parcels of real property to extent that Court issued Order restraining Debtor from interfering with administration of estate and, particularly, restraining Debtor from entering into real property which the Trustee was attempting to sell. After Trustee filed Motion for Sanctions, Debtor filed Motion for Stay of Determination of Sanctions stating that Debtor would like to more fully investigate grievance procedures against both Trustee and US Office of the Trustee, Department of Justice, as well as Trustee’s attorney. Court concluded that Debtor’s threat to instigate mass grievance procedures were impermissible attempts to harass Trustee resulting in unnecessary delay and increasing cost of administration under both Section 1927 and Rule 9011.
- (10213) *In re Sharkey*, 2017 WL 633322 (Bankr. E.D. Mi. 2017) – 28 USC Section 1927 allows Court to impose sanctions when attorney multiplies proceedings in case unreasonably and vexatiously. Standard to be applied is whether attorney objectively false short of obligations owed by member of Bar to Court, causing additional expenses to opposing party. Sanctions may be imposed without finding that lawyer subjectively knew conduct was inappropriate, but imposition of sanctions requires something more than negligence or incompetence. While actions of counsel in filing multiple amended claimed exemptions multiplied the proceedings, there was no indication that Debtor’s counsel knew or should have known that actions were frivolous or needlessly obstructed litigation of nonfrivolous claims. Claims of exemptions were ultimately unsuccessful but were not frivolous where factual record, arguments and exemptions claimed Involved over course of several hearings over several months spanning both Chapter 7 and Chapter 13 phases of case.
- (10214) *Montedonico v. Blasingame*, 2016 WL 6575045 (6th Cir. BAP 2016) – Section 1927 allows court to sanction attorney who unreasonably and vexatiously multiplies proceedings. Purpose is to deter dilatory practices and punish aggressive tactics that far exceed zealous advocacy. Conduct must be more than negligent or incompetent and must evidence some element of intent or bad faith , or at minimum when attorney pursues claim that attorney knows or reasonably should know is frivolous. Sanctions reversed where court found that conduct fell below minimum standard of care and professionalism but did not find that attorney acted with any subjective bad faith or intent to abuse litigation process. Only pleadings identified by Bankruptcy Court were Response to Motion for Summary Judgment which is normal part of litigation process, and affidavits submitted in support of Motion to Alter Judgment which are also normal part of litigation process, neither of which were designed to multiply the litigation process. Although pleadings raised issues that were easily dispensed with by court, that does not indicate either intent to abuse process or that arguments were plainly frivolous.
- (10215) *Grossman v. Wehrle*, 2016 WL 3268743 (6th Cir. 2016) – Bankruptcy Court is “Court of the United States” under Section 1927. Section 1927 authorizes bankruptcy court to enter sanctions against attorney who needlessly and vexatiously multiplied litigation. Attorney hired to represent claimant discovered shortly after appearing in case that claimant had altered documents on which claim was based to make it appear that Debtor was indebted to claimant when loans were in fact, made to individuals who were principals of the Debtor. Even after learning that the documents on which counsel relied were false, counsel continued to litigate validity of claim for 4 years, including dozens of filings in bankruptcy court, District Court and Circuit Court of Appeals. Recovery of sanctions is not limited by “lodestar” method even where sanctions include compensation to opposing party for attorney fees and costs, as sanctions are not limited to actual harm to party but include any amount necessary to deter conduct. Sanctions also included compensation to creditors who, because of counsel’s repeated attempts to litigate validity of claim, were forced to wait for 3 years for final distributions from bankruptcy estate, and counsel must have known that multitudinous and repetitive filings would needlessly delay distribution to legitimate claimants and erode funds available for distribution. Sanctions can be reduced if opposing party could have terminated action earlier by filing motion for summary judgment. But where counsel’s theory of the validity of the claim kept changing, Trustee’s attempt to piecemeal file dispositive motions would only have further delayed proceedings and increased costs and losses by legitimate claimants. Conduct throughout proceeding was vexatious conduct designed to delay, multiply and increase costs of proceedings. It was not any one particular filing or action, but the pervasive and constant

behavior over four plus years that warranted sanctions.

- (10216) *Castellanos Group Law Firm, LLC v. FDIC*, Case No. 15-036 (1st Cir. BAP 2016) – Vexations lawsuit statute allows court to impose sanctions against entire law firm as a whole, and is not limited to sanctions against particular attorney. Court split with Sixth, Seventh and Ninth Circuits in holding that reference in statute to “attorney” and persons “admitted to conduct cases” do not exclude entire firms.
- (10217) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Section 1927 allows court to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (10218) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Court can award attorney fees as sanction against party who unnecessarily or vexatiously multiplies proceedings unreasonably. Party “vexatiously multiplies” litigation by pursuing claim that is frivolous or where litigation tactics needlessly obstructs litigation of non-frivolous claims; or where attorney engages in some sort of conduct that, from an objective standpoint, fall short of the obligations owed by member of bar to the court and that causes additional expense to other party. While plaintiff’s case may have been weak, evidence did not indicate that action was frivolous; and mutual discovery disputes between parties did not indicate that Plaintiff’s actions during discovery were cause of any vexatious delays.
- (10219) *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.
- (10220) *Hayes v. Internal Revenue Service*, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – IRS cannot be sanctioned for filings made in District Court.
- (10221) *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.
- (10222) *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.
- (10223) *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.
- (10224) *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.

26.3 Inherent Authority of Court

- (10225) *In re Beiter*, 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Court has inherent authority to punish contempt where party violates definite and specific Court order requiring party to perform or refrain from performing and acted with knowledge of Court order. Creditor’s alleged failure to turn over property does not constitute contempt as neither Section 541 nor Section 1306 creates any injunction or impose any

affirmative obligation on creditor, violation of which may serve as basis for finding of contempt. “Deem Current” Order requires mortgage holder to adjust loan balance to reflect balance delineated in original loan amortization schedule as of final payment date, with any amount in excess of that including alleged arrearages, costs, fees and interest being discharged. Deem Current Order can be enforced by Court through contempt proceedings including award of compensatory, non-compensatory and punitive sanctions. Violation of Deem Current Order is separate from discharge injunction. Complaint alleged that Defendant knowingly or willfully did not comply with Deem Current Order by not reviewing Plaintiff’s Mortgage Loan amortization schedule to ensure that principal balance was changed reflect principal balance in original amortization schedule.

- (10226) *In re Lane*, 2018 WL 4210234 (Bankr. W.D. Ky. 2018) – Court has inherent authority to award sanctions where creditor’s conduct amounts to abuse of process, defined as ulterior purpose and willful act not proper in regular conduct of proceeding. Creditors filed second adversary seeking to revoke confirmation after Court had previously dismissed first adversary seeking same relief on same grounds. Creditor initially objected to confirmation and objection was overruled. Creditor then filed Motion to set aside confirmation order on same grounds as original objection and Motion was denied. Creditor then filed second motion again seeking to litigate same issues.
- (10227) *In re Denny*, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Court has inherent authority to impose sanctions where lawyers do not comply with State Rules of Professional Conduct or do not comply with requirements of Code. Attorney is “debt relief agency” where attorney provides legal representation to assisted person in exchange for payment of money. Attorney must provide disclosures to assisted persons and execute written contract with assisted person. Attorney must then perform all services promised to assisted person; cannot make false statements in bankruptcy filings; and may not misrepresent services attorney will provide. Attorney violated Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee where attorney had received filing fees from Debtors but had used money for other purposes and Debtors had not requested to pay filing fee in installments and were not aware of that option. Attorney did not make installment payments from funds given to attorney resulting in dismissal of at least one case. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules; and other required papers and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors had failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527 four debt relief agency. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.
- (10228) *In re Gates*, Case No. 18-0301 (Bankr. E.D. Va. 2018) – Court has inherent authority to regulate conduct of attorneys who practice before it. Attorney’s repeated conduct amounted to abuse of Courthouse Security officials and was disruptive, abusive and undignified. Attorney suspended from appearing before Bankruptcy Court for 6 months and barred from entering Courthouse for same period. Attorney can move for readmission after suspension expires.
- (10229) *Lowe v. Ransier*, 2018 WL 1279277 (6th Cir. BAP 2018) – Court can award fees for prosecuting fee application where request is based on Court’s contempt power rather than Section 330. Court’s authority to fashion remedy for contempt includes broad ability to not only coerce compliance but to compensate party harmed. Court’s power to sanction arises from inherent authority of court as well as Section 105. “American Rule” that provides that parties bear own attorney fees does not prevent award of attorney fees in contempt action as award is not based on “prevailing party” but is based on Court’s inherent authority to sanction contemptuous conduct. Bankruptcy Court’s 50-page order amply supported award of attorney fees in excess of \$90,000 resulting from contemptuous conduct.
- (10230) *In re Fierke*, 567 BR 322 (Bankr. W.D. Mi. 2017) – Lender’s “sluggishness” in releasing security interest as required under terms of confirmed Plan did not warrant sanctions where although lender released lien more than 30 days after completion of Chapter 13 Plan, lender released lien sufficiently prior to Debtor’s post-Chapter 13 sale of property to allow sale to occur without delay. Although Court has authority under both Section 105 and “inherent powers”, Court will exercise those powers with restraint and discretion and will shift attorney fees as sanctions only one party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Lender’s conduct did not indicate the sort of vexatious, one for oppressive conduct that would warrant sanctions. Although lender’s actions were sluggish and perhaps ill-advised, there was no evidence of bad faith. Further, Chapter 13 Plan as confirmed allowed Debtor to move under Rule 7070 for Order declaring lien to be released providing relief more closely tailored to problems incurred in delay of release of security interest.
- (10231) *Blue Cross Blue Shield of North Carolina v. Jemsek Clinic, PA*, Case No. 16-1030 (4th Cir. 2017) - Bankruptcy Court has inherent power to sanction conduct has necessary to preserve the integrity of judicial process and resources needed to resolve disputes in orderly and expeditious manner. Federal Court may use inherent sanctioning power when party shows bad faith by delaying or disrupting litigation or by hampering enforcement of Court Order. Party undermines integrity of judicial process by using a Court’s resources to litigate claims it knows or suspects another Court has already resolved or enjoined, and it is abuse of litigation process for client to conceal from Court fact that opponent’s claims have been enjoined. Sanctions warranted against Blue Cross for failing to disclose that counterclaims brought against it had been enjoined by Court Order in Florida in class-action litigation to which defendant was party. Blue Cross had duty not to waste Bankruptcy Court time and resources by litigating counterclaims it knew or suspected had been enjoined. Blue Cross knew about Florida Court injunction well before lawyers informed Bankruptcy Court and knew or suspected that several of the counterclaims shared common nucleus of facts and asserted same legal theories as were present in Florida litigation. Blue Cross offered no credible explanation for why it kept silent until after parties had engaged in extended, and expensive, litigation.
- (10232) *Carroll v. Abide*, Case No. 16-30966 (5th Cir. 2017) – Bankruptcy Court has inherent power to sanction party or attorney when necessary to achieve orderly and expeditious disposition of docket. Power must be exercised only if essential to preserve authority of Court and sanction chosen must employ the least possible power adequate to deter future conduct. Court must make specific finding of bad faith in order to

impose sanction under inherent power. Court has authority to impose sanctions on pro se litigants. Record warranted imposition of sanctions where party engaged in conduct intended to harass and delay. Party repeatedly attempted to litigate issues that have been conclusively resolved against them or that they had no standing to assert. By their unsupported and multiple attempts to remove Trustee, party unnecessarily increased cost and delay of litigation. Party refused to comply with bankruptcy process ultimately requiring contempt order against party and party's daughter, yet daughter remained undeterred, persisting in unsupported filings and eventually resulting in a second motion for contempt for failure to pay attorney's fees as previously ordered. Record demonstrated that party acted in bad faith. Sanction included award of attorney's fees in the amount of \$49,432 incurred by trustee in responding to parties bad faith conduct and imposed preflight injunction precluding party from filing any future litigation without Court authorization.

- (10233) *Michael's Enterprises of Virginia, Inc. v. Branch Banking and Trust Co.*, Case No. 15-1807 (4th Cir. 2016) – Bankruptcy court properly imposed sanctions against Debtor, Debtor's president/sole shareholder, and attorney for filing Chapter 11 petition for improper purpose.
- (10234) *In re Grove*, 2016 WL 825392 (Bankr. E.D. Mi. 2016) – Sanctions under Court's inherent authority are appropriate only where party has willfully disobeyed Court Order or acts in bad faith, vexatiously, wantonly, or for oppressive reasons, and for purpose of delaying or harming opposing party. While creditor's Notice of Mortgage Payment Change may have been withdrawn as inaccurate, there was no evidence that Notice was sent for purposes of harassing or causing harm to Debtor.
- (10235) *Armstrong v. Commissioner of Social Security*, 2015 WL 1476398 (E.D. Mi. 2015) – Court does not have inherent authority to impose sanctions against a lawyer for shoddy or unprofessional practice unless counsel [1] advances claims that were meritless, [2] knew or should have known this, and [3] motive for filing the suit was for an improper purpose such as harassment. There are rules and statutes that address such conduct, and the authority to sanction counsel is conditioned on satisfaction of the elements of the various remedial and punitive provisions which did not apply in this case. While counsel's practices were not consistent with counsel's duties, counsel asserted potentially meritorious case and there was no evidence that action was taken in bad faith or for purposes of harassment of defendant. However, Court would turn a blind eye to counsel's conduct in this case, which apparently replicates his activity in many other cases in this district. Instead, Court would refer lawyer to the Chief Judge of the district for the institution of disciplinary proceedings under the applicable local rules. Counsel employed a superficial, cut-and-paste, template approach to fulfilling his professional duty to substantively brief the issues presented for this Court's most serious consideration and determination, as the brief filed in this case is almost identical to the dozens, if not hundreds, of other briefs that he has filed with this Court. Other judges in this district had previously red-flagged counsel's conduct and at least one Magistrate had previously recommended that the Court invoke its inherent powers to fine counsel in an effort to curb his conduct.
- (10236) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Court has inherent authority to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (10237) *Jacques v. JPMorgan Chase*, 2015 WL 58646 (W.D. Mi. 2015) – Court has inherent authority to award sanctions where party's conduct amounts to bad faith. Further, action based on RESPA would allow plaintiff to recover attorney fees if plaintiff was successful, indicating that defendant should be able to recover fees if action is not substantially justified. Plaintiff continued to bring multiple actions against Chase under RESPA although plaintiff knew that Chase was not servicer and was not liable to plaintiff as a matter of law.
- (10238) *Leonard v. Piccirilli*, Case No. 13-1330 (9th Cir. BP 2014) – Bankruptcy Court has inherent authority and authority under Section 105 to impose sanctions. Inherent authority includes ability to sanction broad range of conduct while civil contempt is designed to remedy violation of specific order. Court must make specific and explicit finding of bad faith or willful misconduct before imposing sanctions under inherent authority.
- (10239) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Court can award attorney fees as sanction where party proceeds in bad faith. Bad faith requires that claims advanced were meritless; counsel knew or should have known that claims were meritless; and that suit was filed for improper motive such as harassment. While plaintiff's case may have been weak, evidence did not indicate that action was frivolous; and mutual discovery disputes between parties did not indicate that Plaintiff's actions during discovery were frivolous for purposes of imposing sanctions.
- (10240) *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.
- (10241) *In re Montegudo*, 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.

- (10242) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff'd* 2014 WL 3452292 (6th Cir. 2014) - 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.
- (10243) *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).
- (10244) *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.
- (10245) *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.
- (10246) *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.
- (10247) *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.
- (10248) *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.
- (10249) *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.
- (10250) *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.

- (10251) *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”.
- (10252) *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.

26.4 Section 105

- (10253) *In re Beiter*, 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Court has authority under Section 105 to punish contempt where party violates definite and specific Court order requiring party to perform or refrain from performing and acted with knowledge of Court order. Creditor’s alleged failure to turn over property does not constitute contempt as neither Section 541 nor Section 1306 creates any injunction or impose any affirmative obligation on creditor, violation of which may serve as basis for finding of contempt.
- (10254) *In re Lane*, 2018 WL 4210234 (Bankr. W.D. Ky. 2018) – Repeated frivolous and meritless filings constitute bad faith and justify sanctions under Section 105. Creditor’s conduct amounted to abuse of process, defined as ulterior purpose and willful act not proper in regular conduct of proceeding. Creditors filed second adversary seeking to revoke confirmation after Court had previously dismissed first adversary seeking same relief on same grounds. Creditor initially objected to confirmation and objection was overruled. Creditor then filed Motion to set aside confirmation order on same grounds as original objection and Motion was denied. Creditor then filed second motion again seeking to litigate same issues.
- (10255) *In re Denny*, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Congress vested bankruptcy courts with power to enforce rules and prevent abuse of process. Attorney violated 11 USC Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules and other required papers; and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors but failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527. Attorneys conduct also violated applicable Rules of Professional Conduct regarding handling of client funds; duty of candor to Court; and duty to provide competent representation. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.
- (10256) *In re Gates*, Case No. 18-0301 (Bankr. E.D. Va. 2018) – Court has authority under Section 105 to regulate conduct of attorneys who practice before it. Attorney’s repeated conduct amounted to abuse of Courthouse Security officials and was disruptive, abusive and undignified. Attorney suspended from appearing before Bankruptcy Court for 6 months and barred from entering Courthouse for same period. Attorney can move for readmission after suspension expires.
- (10257) *Jackson Masonry, LLC v. Ritzen Group, Inc.*, 2018 WL 1636085 (Bankr. M.D. Tn. 2018) – Section 105 cannot be used to create jurisdiction where none otherwise exists. Confirmation of Plan generally terminates Court’s jurisdiction regarding post-confirmation issues. Once bankruptcy court confirms plan of reorganization, debtor may go about its business without further supervision or approval, and Debtor also is without protection of bankruptcy court and may not come to bankruptcy judge every time something unpleasant happens. “Formerly a ward of the court, the debtor is emancipated by the plan of reorganization.” Neither Plan nor Disclosure Statement required creditor to remove *lis pendens* upon confirmation of Plan. Court lacked jurisdiction to require creditor to do so. Proper remedy under State law is to demand creditor release *lis pendens* and if creditor does not do so, to seek relief in State Court.
- (10258) *Lowe v. Ransier*, 2018 WL 1279277 (6th Cir. BAP 2018) – Court can award fees for prosecuting fee application where request is based on Court’s contempt power rather than Section 330. Court’s authority to fashion remedy for contempt includes broad ability to not only coerce compliance but to compensate party harmed. Court’s power to sanction arises from inherent authority of court as well as Section 105. “American Rule” that provides that parties bear own attorney fees does not prevent award of attorney fees in contempt action as award is not based on “prevailing party” but is based on Court’s inherent authority to sanction contemptuous conduct. Bankruptcy Court’s 50-page order amply supported award of attorney fees in excess of \$90,000 resulting from contemptuous conduct.
- (10259) *Gharib v. Casey*, Case No. 16-55007 (9th Cir. 2017), *rehg and reh en banc denied*, (9th Cir. May 8, 2018) – Bankruptcy Court has civil contempt power under Section 105. Civil contempt is designed to induce compliance and must provide method for contemnor to perform obligation and purge contempt. Debtor properly held in contempt for failing to turnover assets of Debtor to Chapter 7 Trustee notwithstanding Court Orders to do so. Court had authority to order contemnor imprisoned and to add \$1,000 per day fine for each day that

contemnor failed to turnover assets, as contemnor could purge by compliance. However, due process concerns may require after some point for court to conclude that further incarceration will not induce compliance and that further incarceration may instead become punitive, which would require contemnor's release from prison.

- (10260) *In re Tucker*, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Codebtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Codebtor stay. Wife filed individual Chapter 13 petition. Post-petition, power company sued husband for Bill owed by husband and wife, and then began garnishing husband's salary. Husband twice notified power company of bankruptcy proceeding and Codebtor stay at power company continued garnishment. Garnishment cause Debtor to miss Plan payments and mortgage payments. Court concluded that Section 105 Allows Court to impose sanctions as appropriate to carry out and give meaning to Section 1301. Court awarded \$1500 for "emotional upset and needless stress" and \$1400 in attorney fees.
- (10261) *In re Junk*, 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Section 105 of the Bankruptcy Code allows the Court to enjoin suits in State Court if the failure to enjoin suits would adversely affect bankruptcy estate. Court would approve injunction against Debtor's continuing to pursue State Court relief against mortgage company where any continued action by Debtors would interfere with a settlement of claims reached between Chapter 7 Trustee and mortgage company and approved by Bankruptcy Court.
- (10262) *Edmondson v. Gordon*, Case No. 16-8014 (6th Cir. BAP 2017) – Bankruptcy Court has contempt power based on Section 105 and can enter order finding party in contempt where alleged contempt nor had knowledge of order which is said to violated; alleged Contempt nor did in fact violate order; and order violated with specific and definite. Bankruptcy Court entered order directing non-debtor third-party to turnover to bankruptcy estate \$173,000 in estate funds which have been improperly paid to third-party after commencement of bankruptcy case. Third-party violated ruling by failing to turnover funds as required by order. Bankruptcy courts finding that appellant was declared to be in contempt was not abuse of discretion. Once contempt is found, Court has wide discretion in determining amount of sanctions. However, party against whom sanctions may be awarded must have sufficient notice of possibility that sanctions can be imposed as well as opportunity to respond. Contempt Show Cause Order served upon third-party was directed Third-party to appear did not warn of the possibility of monetary sanctions even if party did appear for hearing. Order only stated that if party failed to "comply" with directive of order to appear for show cause hearing, Debtor's failure to comply could result in sanctions. Third-party was not provided opportunity to respond to amount of sanctions and Court did not provide for adequate procedure for determining reasonableness and calculation of sanction. Court considered affidavit submitted by moving party without third-party being given opportunity to examine counsel who filed the affidavit as to fees or otherwise raise issues or controvert fees asserted in affidavit. Minimal requirement of due process of required third-party have notice and opportunity to be heard on issues including whether all of fees charged were appropriate as sanctions, whether all fees were incurred as a result of Third-party's conduct for which he was found in contempt, and opportunity to cross-examine party who made affidavit asserting hours expended. Case remanded to Bankruptcy Court for determination of amount of sanction after providing reasonable notice and opportunity to respond.
- (10263) *White v. Corcoran*, Case No. 16-11188 (E.D. Mi. 2017) - Bankruptcy Court has power to the awards sanctions under 3 sources. 28 USC Section 1927 Allows Court to impose sanctions against party who multiplies proceedings unreasonably and vexatious late, where counsel fall short of obligations owed by member of bar to Court which cause additional expense to opposing party. Sanctions under Section 1927 may be issued only in against an attorney, not a *pro se* litigant. Court also has authority to impose sanctions on under rule 9011 which requires that party filing paper certify that paper is not being presented for improper purpose such as to harass or cause unnecessary delay or needless increasing cost of litigation. Sanctions under rule 9011 may be issued on request of the parties or the Court may impose sanctions on own initiative by entering order describing specific conduct that appears to violate Rule 9011 and directing attorney or party to show cause. Third source of sanction power is 11 USC Section 105 which grants Court inherent power to issue sanctions where party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Sanctions under Section 105, unlike Section 1927, require a finding of bad faith or recklessness. Bankruptcy Court properly impose sanctions where Debtor persisted in arguing issues before Court where Court had previously issued Orders which had been affirmed in 2 separate appeals, and Debtor repeatedly attempted to block Trustee's effort to sell various parcels of real property to extent that Court issued Order restraining Debtor from interfering with administration of estate and, particularly, restraining Debtor from entering into real property which the Trustee was attempting to sell. After Trustee filed Motion for Sanctions, Debtor filed Motion for Stay of Determination of Sanctions stating that Debtor would like to more fully investigate grievance procedures against both Trustee and US Office of the Trustee, Department of Justice, as well as Trustee's attorney. Court concluded that Debtor's threat to instigate mass grievance procedures were impermissible attempts to harass Trustee resulting in unnecessary delay and increasing cost of administration under both Section 1927 and Rule 9011.
- (10264) *In re Fierke*, 567 BR 322 (Bankr. W.D. Mi. 2017) – Lender's "sluggishness" in releasing security interest as required under terms of confirmed Plan did not warrant sanctions where although lender released lien more than 30 days after completion of Chapter 13 Plan, lender released lien sufficiently prior to Debtor's post-Chapter 13 sale of property to allow sale to occur without delay. Although Court has authority under both Section 105 and "inherent powers", Court will exercise those powers with restraint and discretion and will shift attorney fees as sanctions only one party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Lender's conduct did not indicate the sort of vexatious, one for oppressive conduct that would warrant sanctions. Although lender's actions were sluggish and perhaps ill-advised, there was no evidence of bad faith. Further, Chapter 13 Plan as confirmed allowed Debtor to move under Rule 7070 for Order declaring lien to be released providing relief more closely tailored to problems incurred in delay of release of security interest.
- (10265) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – Bankruptcy Court cannot require State Court to enter QDRO directing distributions of funds from Debtor's divorced spouse's retirement account to trustee and to bankruptcy estate. Bankruptcy Court generally avoids invasions into family law matters. Further, Section 105 does not permit Court to take actions which are prohibited by other statutes. ERISA allows QDRO only to create or recognize right of "alternate payee" defined as spouse, former spouse, child or other dependent a participant who has been recognized by domestic relations order.

- (10266) *Carroll v. Abide*, Case No. 16-30966 (5th Cir. 2017) – 11 USC Section 105 affords Court authority to issue any order, including civil contempt order, necessary or appropriate to carry out provisions of Bankruptcy Code. Court has authority to enjoin future filings if party has history of litigation including vexatious, harassing or duplicative lawsuits; party did not have good faith basis for pursuing litigation or simply intended to harass; party's conduct imposed burden on the Courts and other parties resulting from the party's filings; and Court lacked any adequate alternative sanctions. Court has authority to impose sanctions on pro se litigants. Record warranted imposition of sanctions where party engaged in conduct intended to harass and delay. Party repeatedly attempted to litigate issues that have been conclusively resolved against them or that they had no standing to assert. By their unsupported and multiple attempts to remove Trustee, party unnecessarily increased cost and delay of litigation. Party refused to comply with bankruptcy process ultimately requiring contempt order against party and party's daughter, yet daughter remained undeterred, persisting in unsupported filings and eventually resulting in a second motion for contempt for failure to pay attorney's fees as previously ordered. Record demonstrated that party acted in bad faith. Sanction included award of attorney's fees in the amount of \$49,432 incurred by trustee in responding to parties bad faith conduct and imposed prefilng injunction precluding party from filing any future litigation without Court authorization.
- (10267) *Grossman v. Wehrle*, 2016 WL 3268743 (6th Cir. 2016) – Section 105 authorizes bankruptcy court to enter sanctions against attorney who needlessly and vexatiously multiplied litigation. Attorney hired to represent claimant discovered shortly after appearing in case that claimant had altered documents on which claim was based to make it appear that Debtor was indebted to claimant when loans were in fact, made to individuals who were principals of the Debtor. Even after learning that the documents on which counsel relied were false, counsel continued to litigate validity of claim for 4 years, including dozens of filings in bankruptcy court, District Court and Circuit Court of Appeals. Recovery of sanctions is not limited by "lodestar" method even where sanctions include compensation to opposing party for attorney fees and costs, as sanctions are not limited to actual harm to party but include any amount necessary to deter conduct. Sanctions also included compensation to creditors who, because of counsel's repeated attempts to litigate validity of claim, were forced to wait for 3 years for final distributions from bankruptcy estate, and counsel must have known that multitudinous and repetitive filings would needlessly delay distribution to legitimate claimants and erode funds available for distribution. Sanctions can be reduced if opposing party could have terminated action earlier by filing motion for summary judgment. But where counsel's theory of the validity of the claim kept changing, Trustee's attempt to piecemeal file dispositive motions would only have further delayed proceedings and increased costs and losses by legitimate claimants. Conduct throughout proceeding was vexatious conduct designed to delay, multiply and increase costs of proceedings. It was not any one particular filing or action, but the pervasive and constant behavior over four plus years that warranted sanctions.
- (10268) *In re Tench*, 2016 WL 2858792 (6th Cir. BAP 2016) – Rule 3002 sets deadline for filing proof of claim. There is no authority in Chapter 13 to extend deadline. Rule 9006 does not permit extension of deadline that has already expired. Court cannot allow late filed claim on "general equitable principals" and Section 105 does not allow Court to ignore clearly specified deadline and allow late claim. Equitable tolling also does not provide basis to ignore Rule 3002 deadlines. Further, creditor failed to establish basis for equitable tolling where failure to meet deadline was result of creditor's negligence, where creditor had notice of bankruptcy case 6 weeks before running of bar date but did not make effort to determine bar date until after bar had passed. Creditor had ample time to file claim and failure to do so was due to creditor's own negligence, which does not meet the requirement of diligence on the part of the creditor to warrant equitable tolling.
- (10269) *Federal National Mortgage Company v. Meeko*, Case No. 15-1200 (D. Or. 2016) – Section 105 is not independent basis for relief that contradicts specific section of Code. Court cannot in name of equity ignore specific statutory mandates. Court could not set aside confirmation order in Chapter 13 because relief would be inconsistent with more specific statute, Section 1330.
- (10270) *Miller v. Mathis*, 2016 WL 1569329 (Bankr. E.D. Mi. 2016) – Section 105 does not give Court power to create private cause of action where none expressly exists unless plaintiff is member of class for whose special benefit the statute was enacted; there is indication of legislative intent to create or deny a remedy; whether an implied cause of action would be consistent with underlying purpose of legislative scheme; and whether cause of action is one relegated to state law such that it would be inappropriate for federal court to imply cause of action. Ultimate issue is whether Congress intended to create private cause of action, and private cause of action will not be implied lightly or haphazardly. Debtor's duty to file schedule of changes in income and expenses is intended primarily to benefit creditors to evaluate whether Debtor should be in Chapter 13 rather than Chapter 11 and to evaluate exemptions that are based on reasonably necessary for support of Debtor or dependent. While information is helpful to trustee, trustee is not member of class that is primarily intended to benefit. Cooperation with trustee, while helpful to trustee, is intended to benefit creditors by allowing trustee to collect, liquidate and administer assets and pay claims. Similarly, duty to surrender property to trustee is intended to benefit creditors, not trustee. Nothing in Section 521 demonstrates any legislative intent to create cause of action by trustee against Debtor for violation of those duties. Court provides other adequate remedies including dismissal or conversion, orders compelling performance, sanctions including monetary relief to induce Debtor to perform duties, and denial of or revocation of discharge.
- (10271) *In re Grove*, 2016 WL 825392 (Bankr. E.D. Mi. 2016) – Sanctions under Section 105 are appropriate only where party acts in bad faith. While creditor's Notice of Mortgage Payment Change may have been withdrawn as inaccurate, there was no evidence that Notice was sent for purposes of harassing or causing harm to Debtor where attached documentation indicated a legitimate basis for the initial Notice. While notice and attachments may have been "sloppy and incomprehensible", that does not amount to finding of bad faith for purposes of awarding attorney fees.
- (10272) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or Debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the Debtor, and equity security holders. Court sanctioned attorney where counsel filed Petition, Schedules and SOFA bearing Debtor's electronic signature although Debtor had never signed any the original documents. Counsel's application for retention failed to disclose that Counsel was owed \$150,000 for pre-petition attorney fees, creating conflict and lack of disinterestedness. Counsel's disclosure of compensation and Statement of Financial Affairs failed to disclose payments by Debtor to attorneys of \$2,000 per

month for each of the 12 months preceding commencement of the case, and undisclosed payments created yet another conflict between Debtor and attorney. Attorneys repeatedly failed to properly file documents via the ECF procedures resulting in multiple deficiency notices. Counsel failed to file required documents including 1) had not timely filed the monthly operating report required for April 2015; (2) a Substantial/Controlling Interest Report as required by Rule 2015.3 and as requested in an email to counsel and again at the meeting of creditors; (3) amended Statement of Financial Affairs and schedules to correct and include information as requested during the meeting of creditors; and (4) information required by the United States Trustee regarding bank account statements as requested at the initial Debtor conference, again in two separate emails, and once more at the meeting of creditors. Counsel failed to timely submit Cash Collateral Order, waiting until 5 days after court entered order directing that order be submitted, and by time order was submitted it did not provide sufficient notice of the continued hearing and rendered it impossible for creditors to receive adequate notice. Counsel filed other motions and requested expedited hearings on one day notice. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that Debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of Debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a Debtor's name to the lists, schedules and statement of financial affairs when Debtor has not affixed his original signature to those documents.

- (10273) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Section 105 does not provide basis for court to set aside discharge where creditor did not timely file adversary proceeding to object to discharge or to except debt from discharge. Section 105 cannot be used where application would be inconsistent with other provisions of Code or Rules.
- (10274) *Sutter v. Saxon Mortgage Services, Inc.*, Case No. 06-3150 (Bankr. E.D. Mi. 2015) – Section 105 allows court to enter orders to carry out provisions of bankruptcy code. Section 105 could not be used to impose sanctions based solely on State law, and not on any provision of the code.
- (10275) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Section 105 allows court to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (10276) *Law v. Siegel*, 134 S.Ct. 1188 (2014) – Section 105 affords court authority to carry out provisions of Code, but court cannot use section 105 to contravene specific statutory sections. Court attempted to surcharge Debtor's claimed exemption to pay for trustee fees and expenses in pursuing avoidance of fraudulent, non-existent mortgage. Section 522(k) provides that exempt equity is not liable for payment of administrative fees or expenses including trustee's attorney fees in uncovering an avoiding fraudulent mortgage. Absent objection to exemption, exemption was allowed and there is no statutory authority allowing exempt assets to be invaded for payment of debts or expenses other than specific matters listed in Section 522(o), which does not include administrative expenses of Chapter 7 estate. Court Order surcharging exemptions using Section 105 as authority directly contradicted Section 522(k) and would be reversed.
- (10277) *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.
- (10278) *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.
- (10279) *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).
- (10280) *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.
- (10281) *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.

- (10282) *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.

26.5 Rule 9011

- (10283) *In re Lane*, 2018 WL 4210234 (Bankr. W.D. Ky. 2018) – Sanctions under Rule 9011 are warranted where creditor’s conduct amounts to abuse of process, defined as ulterior purpose and willful act not proper in regular conduct of proceeding. Creditors filed second adversary seeking to revoke confirmation after Court had previously dismissed first adversary seeking same relief on same grounds. Creditor initially objected to confirmation and objection was overruled. Creditor then filed Motion to set aside confirmation order on same grounds as original objection and Motion was denied. Creditor then filed second motion again seeking to litigate same issues.
- (10284) *Jodway v. Orlans, PC*, 2018 WL 1570303 (E.D. Mi. 2018) – Sanctions under Rule 11 are appropriate where pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or good faith argument for the extension, modification or reversal of existing law, or (3) interposed for improper purpose such as harassment or delay. Conduct is reviewed using objective standard of reasonableness, but Court must avoid using hindsight and should test conduct based on what was reasonable to believe at time pleading, motion, or other paper was submitted. In determining nature and amount of sanctions, court must (a) consider what is necessary to deter same or similar conduct which can include compensating victim for attorney fees; (b) analyze whether movant mitigated expenses and refrained from expending unnecessary effort; and (c) third, assess party’s ability to pay. Plaintiff’s conduct in repeatedly instituting litigation amounted to conduct designed to harass and oppress. Plaintiffs first filed suit contesting validity of mortgage in 2008. In almost ten years, diverse and substantial number of courts have rejected mortgage-related claims, largely on same grounds. Lacking any new way to assert claims against lender, Plaintiffs seek to delay foreclosure by suing opposing counsel. Sanctions including \$5,000 in attorney’s fees and costs, and requirement obtain approval of Court before instituting any new litigation are necessary to deter filing additional baseless claims regarding mortgage. Defendants did not expend unnecessary effort in responding to Complaint, and Plaintiffs can pay the sanction as demonstrated by ability to secure the \$649,000 mortgage loan.
- (10285) *Schwab, Inc. v. Huntington National Bank*, 2018 WL 1305422 (Bankr. N.D. Ohio 2018) – Sanctions under Rule 9011 are limited to what is sufficient to deter repetition of conduct or comparable conduct by others similarly situated and may include directives of nonmonetary nature, order to pay penalty into court, or order directing payment to movant of reasonable attorneys’ fees and other expenses incurred as direct result of violation. Sanctions can include fees of “in house” counsel if amount requested is reasonable. However, where in-house counsel is not actively involved in litigation but instead serves as liaison between Attorney and Client, and outside counsel has responsibility for conduct of case, Court will adjust or reduce fees accordingly. Sanctions Motion must be filed in Court in which allegedly wrongful conduct occurred. “Safe harbor” provision requires 21 days’ notice before filing Motion under Rule 9011. Where intervening circumstances prevent responding party from mitigating or withdrawing pleading, Court can adjust or deny sanctions as appropriate. Bankruptcy Court would not award sanctions for matters occurring at either BP or Circuit Court of Appeals as Bankruptcy Court was not “Court” in which wrongful conduct occurred. Court denied request for fees for in-house counsel where counsel did not have active role in litigation and compensating in-house counsel created serious risk of double compensation. Court can consider mitigating factors such as length of time attorney has practiced; whether attorney is in good standing in one or more jurisdictions; whether attorney has history of disciplinary action, reprimand, sanction or similar action; and impact on attorney and firm based on financial wherewithal of firm. Sanction request reduced from \$508,000 to \$16,000 to reflect reasonable fee and suitable deterrent effect.
- (10286) *Keeper of the Word Foundation v. Charles H. Brown Trust*, 2018 WL 827799 (E.D. Mi. 2018), *Motion for Reconsideration Denied*, 2018 WL 1168979 (E.D. Mi. 2018) – “Safe harbor” provision of Rule 9011 requires party to serve notice on party to be sanctioned of conduct considered sanctionable and providing party 21 days to correct or withdraw pleading. Movant complied with safe harbor by mailing to opposing party a letter and draft sanctions motion on March 6, and filing Motion for Sanctions on April 4, more than 21 days after sending safe harbor letter where opposing party had not corrected or withdrawn sanctionable pleading.
- (10287) *Church Joint Venture, LP v. Grusin*, 2018 WL 286116 (6th Cir. 2018) – Party requesting sanctions must comply with 21-day safe harbor provision of Rule 9011. Absent compliance with safe harbor, Court can impose sanctions only where conduct alleged is filing of a petition. So-called “de facto attorney” responsible for errors in Schedules not subject to sanctions as de facto counsel did not sign or file petition. While de factor counsel may have been involved in preparing documents and may have been source of errors and omissions, fact is that he did not sign or file petition and there is no authority under Rule 9011 for Court to use inherent power against attorney who did not sign petition.
- (10288) *In re Ayoub*, 2017 WL 4161110 (E.D. Mi. 2017), *appeal after remand*, 2018 WL 2228174 (Bankr. E.D. Mi. 2018) – Automatic stay applies only to Debtor and does not stay actions against Debtor’s wholly owned corporation. Debtor’s adversary proceeding alleging that creditors violated stay by pursuing state court litigation and by blocking Debtor’s ability to collect debts allegedly owed to Debtor and to pierce corporate veil was frivolous as all actions were directed against corporations and assets solely owned by corporasants. Fact that Debtor was sole shareholder of corporations did not convert action into one against Debtor personally or one within scope of stay. Court properly determined that sanctions were appropriate against Debtor and counsel for filing frivolous action under Rule 9011. However, Court should have rescheduled hearing on amount of sanctions where Debtor’s attorney missed originally scheduled hearing because he was dealing with father’s terminal illness that wreaked havoc on attorney’s personal and professional life. While Court’s desire to rule on amount of sanctions

was understandable given imminent retirement of Judge, balance of equities tipped in favor of resetting hearing where there was no evidence that successor judge would have been unable to fashion appropriate relief.

- (10289) *White v. Corcoran*, Case No. 16-11188 (E.D. Mi. 2017) - Bankruptcy Court has power to the awards sanctions under 3 sources. 28 USC Section 1927 Allows Court to impose sanctions against party who multiplies proceedings unreasonably and vexatious late, where counsel fall short of obligations owed by member of bar to Court which cause additional expense to opposing party. Sanctions under Section 1927 may be issued only in against an attorney, not a *pro se* litigant. Court also has authority to impose sanctions on under rule 9011 which requires that party filing paper certify that paper is not being presented for improper purpose such as to harass or cause unnecessary delay or needless increasing cost of litigation. Sanctions under rule 9011 may be issued on request of the parties or the Court may impose sanctions on own initiative by entering order describing specific conduct that appears to violate Rule 9011 and directing attorney or party to show cause. Third source of sanction power is 11 USC Section 105 which grants Court inherent power to issue sanctions where party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Sanctions under Section 105, unlike Section 1927, require a finding of bad faith or recklessness. Bankruptcy Court properly impose sanctions where Debtor persisted in arguing issues before Court where Court had previously issued Orders which had been affirmed in 2 separate appeals, and Debtor repeatedly attempted to block Trustee's effort to sell various parcels of real property to extent that Court issued Order restraining Debtor from interfering with administration of estate and, particularly, restraining Debtor from entering into real property which the Trustee was attempting to sell. After Trustee filed Motion for Sanctions, Debtor filed Motion for Stay of Determination of Sanctions stating that Debtor would like to more fully investigate grievance procedures against both Trustee and US Office of the Trustee, Department of Justice, as well as Trustees attorney. Court concluded that Debtor's threat to instigate mass grievance procedures were impermissible attempts to harass Trustee resulting in unnecessary delay and increasing cost of administration under both Section 1927 and Rule 9011.
- (10290) *In re Lockhart*, 2017 WL 187560 (Bankr. W.D. Ky. 2017) – Rule 9011 Allows Court to impose sanctions against party filing petition, pleading, Motion or other paper for improper purpose. “Improper purpose” is objective test that may be inferred when effect of pleading or motion is to delay proceedings or to manipulate bankruptcy process. Debtor and Debtor's counsel admitted that Chapter 13 petition was filed solely to delay State Court proceedings in which Debtor had been ordered to pay a domestic support arrearage or go to jail for contempt of Court. Debtor's Chapter 13 plan was not confirmable on its face and Debtor's counsel acknowledge that sole purpose for filing was to obtain more time to prepare and file pleadings in State Court action to modify domestic support obligation. Debtor did not appeal State Court Order holding him in contempt, instead hiring bankruptcy counsel to file plan that provided for payments to domestic support obligation Creditor in amounts substantially less than the amounts owed by the State Court. Bankruptcy Court does not have jurisdiction to modify orders previously entered by State Court and Bankruptcy Court lacked jurisdiction to alter amount of domestic support obligation payment absent consent of the creditor. State Court Order required payments far in excess of amounts proposed in chapter 13 plan evidencing lack of good faith in filing of petition and established “beyond doubt” that petition was delay tactic. In awarding sanctions under Rule 9011, Court must consider both frivolous notice and improper purpose on sliding scale, where the more compelling showing as to one element requires less decisive need for showing of second element. Debtor's Chapter 13 filing could not benefit Debtor in any respect other than time to pursue additional litigation in State Court, amounting to improper manipulation of bankruptcy code constituting impermissible purpose and frivolous. Debtor who filed bankruptcy petition solely to circumvent State Court Order of contempt, with no ability to promulgate a confirmable Chapter 13 plan, sanctioned \$5793.75 representing creditors attorney's fees that resulted from Chapter 13 filing.
- (10291) *Montedonico v. Blasingame*, 2016 WL 6575045 (6th Cir. BAP 2016) – Party must comply with safe harbor provision of Rule 9011 before seeking sanctions. Only exception is where filing petition itself is violation of Rule 9011(b). Court could not sanction attorney where attorney did not sign petition that allegedly violated Rule 9011. Although petition was allegedly “ghost written” by attorney and attorney later advocated in favor of Debtors based on representations in petition, schedules and SOFA, that did not amount to attorney “signing” the petition for purposes of Rule 9011.
- (10292) *Lnu v. Federal National Mortgage Association*, 2016 WL 4978425 (E.D. Mi. 2016) – Safe Harbor provision of Rule 9011 must be complied with before party can request sanctions under Rule 9011. Defendant admittedly did not send notice or provide 21 days to allow plaintiff to correct alleged deficiency. Party cannot circumvent safe harbor by filing request that Court issue Show Cause under Court's independent authority under Rule 9011. Sanctions denied but Court would impose bar to any subsequent filings without leave of court.
- (10293) *Baker v. Harrington*, Case No. 15-2384 (1st Cir. 2016) – Attorney sanctioned for making arguments that were legally unsupportable and did not have any good faith basis for extension or modification of existing law. Attorney had significant experience in bankruptcy over a number of years but had developed reputation for misleading pleadings and had been sanctioned at least 3 prior times for making statements that were legally or factually unsupportable, each of which carried “hefty” financial penalty. Sanctions order required attorney to enroll in and attend in person (not on-line) a one semester, 3 credit hour class on legal ethics or professional responsibility at an ABA accredited school, to be completed within 13 months.
- (10294) *Saia v. Flying J, Inc.*, 2016 WL 1715196 (W.D. Tn. 2016), *aff'd* 2017 WL 6398013 (6th Cir. 2017) – Rule 11 allows court to impose sanctions where pleading (1) is presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) raises claims, defenses, and other legal contentions are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions lack evidentiary support or will likely have evidentiary support; or (4) denials of factual contentions are not warranted on the evidence. While rule allows imposition of sanctions directly on party, court must consider whether party should be held accountable for his part in violation Rule 11 and to make sufficient inquiry to determine whether sanctions should be imposed on the party or the attorney. Courts will generally decline sanctions on represented party unless party misrepresents facts during depositions or at trial. Pro se parties are not immune for Rule 11 but courts should take into account special circumstances that arise in pro se situations and will decline sanctions unless party has filed multiple frivolous claims. Sanctions were not warranted against party where pleadings were prepared an signed by former counsel and it was former counsel, not party, who designed theories of case embodied in complaint. Opposing party served former counsel with “safe harbor” letter under Rule 11

- prompting counsel to withdraw, but did not serve party directly after counsel withdrew. Circumstances of case did not warrant sanctions against party for pleading prepared and signed by former attorney and would not serve Rule 11's deterrent purpose.
- (10295) *In re Chaban*, 2015 WL 10791900 (E.D. MI. 2016) – Grant or denial of sanctions under Rule 9011 is vested in sound discretion of Bankruptcy Court. Court abuses discretion by basing decision on erroneous conclusion of law; makes findings of fact that are clearly erroneous; or makes a decision that is unreasonable, arbitrary or fanciful. Court did not abuse discretion in denying motion without prejudice where outcome of sanctions motion was at least partly impacted by outcome of pending appeal, and moving party had right to refile motion after prior appeal was concluded. Court's decision to deny without prejudice pending outcome of appeal was prudent manner for proceeding.
- (10296) *In re Grove*, 2016 WL 825392 (Bankr. E.D. MI. 2016) – Rule 9011 requires party to request sanctions in separate motion that will describe the specific conduct alleged to violate Rule. Court will not award sanctions where party never filed a Motion. While party may have grounds for seeking sanctions, court cannot do so on *ore tenus* motion for fees.
- (10297) *Harger v. Jones*, 2016 WL 825906 (6th Cir. BAP 2016) – Court lacks authority to award attorney fees as sanction under Rule 9011 on *sua sponte* basis. Rule 9011(c)(2) allows court on *sua sponte* basis to award sanctions including monetary penalty into court in amount sufficient to deter further conduct, but attorney fees as sanction may be awarded only on motion of party.
- (10298) *In re Polyurethane Foam Antitrust Litigation*, 2015 WL 7313403 (N.D. Ohio 2015) – Sanctions are appropriate where party files pleading with no factual basis or for improper purpose. Party filed claim as class member when there was no factual basis for that statement and party's own documents demonstrated that party was not class member. Further, party filed claim and made other statements for purposes of inducing defendant to make contributions to non-profit organization with which party was involved, which was not proper purpose but was little more than effort to extort money to which party was not entitled. Court imposed sanctions on its own initiative based on party's actions which burdened the class settlement process by filing frivolous pleadings but increased litigation costs for class defendants thereby reducing funds which would have been available for proper class members. Party had filed same objection in other class action cases involving the same issues and was repeatedly rejected, leaving party with no reason to believe that objection would have been successful in this case. Sanctions in sum of \$10,000 were appropriate where amount awarded was nowhere near fees and costs incurred by opposing parties but reflected party's financial condition and ability to pay and was sufficient to deter repeat frivolous conduct.
- (10299) *Penn, LLC v. Prosper Business Development Corp.*, 773 F.3d 764 (6th Cir. 2014) – Motion for sanctions under Rule 11 must be served on opposing party before dismissal of underlying action. Defendant sent Rule 11 safe harbor letter to plaintiff but took no further action for 6 months. Defendants then filed motion to dismiss case which was granted by court. Thereafter, defendants served the Rule 11 Motion. Court denied sanctions, noting that purpose of safe harbor is to allow party to withdraw offending pleading. If moving party fails to move for sanctions until after case dismissed, purposes of rule would be thwarted.
- (10300) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Party who failed to comply with safe harbor provisions of Rule 9011 not entitled to recovery.
- (10301) *Young v. Young*, 2014 WL 944846 (8th Cir. BAP 2014) – Court had inherent authority to sanction attorney for false statements in Chapter 13 Plan and certification regarding domestic support obligations. Although attorney knew that Debtor was behind on post-petition support payments, attorney stated in plan that support obligations were "pre-petition" and that Debtor would "continue to pay" post-petition obligations. Attorney also filed false certification that Debtor was current on post-petition obligations. Attorney knew representations were false when made and lacked either factual or legal support. Court suspended attorney for six months.
- (10302) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. MI. 2014) – Rule 9011 allows court to impose sanctions against plaintiff's counsel for false representations or factual contentions during trial that lack evidentiary support or are not supported by existing law or a good faith extension or modification of existing law. Defendant's motion for sanctions based on Plaintiff's allegation of improper contact between Defendant and translator denied where alleged misrepresentation was not made in petition, written motion or other paper, but were oral statements made in court. Further, Plaintiff's allegation were not only reasonable but indisputable showed some effort by defendant to influence or change translator's testimony. Communication was improper and Plaintiff's raising of the issue was not improper. Defendant's Motion appeared more calculated to be another opportunity for defendant to contest court's conclusion that third party translation would be stricken as inaccurate and unreliable.
- (10303) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. MI. 2013) – Rule 11 sanctions may be imposed where a reasonable inquiry would have disclosed that the pleading is not well grounded in fact; is not warranted by existing law or an extension or modification of existing law; or is interposed for an improper purpose. The reasonable inquiry is not a one-time obligation and the parties have an ongoing obligation to review and re-evaluate pleadings. Party seeking sanctions must serve the motion and opposing party has 21 days to correct or withdraw the challenged paper. Failure to comply with safe harbor provision is fatal to any request for sanctions even if the party against whom sanctions are sought does not raise issue. County was entitled to sanctions where complaint sought damages against State Court judge based on alleged errors in rulings, as the judge was entitled to absolute judicial immunity for actions; and action sought to contest validity of State Court Orders in violation of Rooker-Feldman. Sanctions properly imposed against party's attorney under Rule 11 including attorney fees incurred in defending the action.
- (10304) *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.
- (10305) *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, van 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.

- (10306) *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.
- (10307) *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.
- (10308) *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.
- (10309) *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 he provisions were not confirmable and lacked any good faith basis to believe that the plan could be confirmed, warranting sanctions under Rule 9011.
- (10310) *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.
- (10311) *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.
- (10312) *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.
- (10313) *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.

- (10314) *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.”
- (10315) *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.
- (10316) *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.
- (10317) *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.
- (10318) *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.
- (10319) *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.
- (10320) *Proctor v. Educational Credit Management Corp.*, 2010 WL 4919670 (Bankr. S.D. Ohio 2010) – Plaintiff’s conduct in pursuing second complaint against Debtor was unreasonable where plaintiff had previously filed identical complaint against same defendant and lost the prior action on Summary Judgment. Sanctions appropriate under Rule 11. Sanctions should be measured by goal of deterrence and must impose the least severe sanction that is likely to deter. Motion to Dismiss clearly identified complaint as offending pleading and plaintiff was repeatedly informed by letter that the complaint needed to be dismissed or sanctions would be sought. Defendant sufficiently identified pleading that Defendant contended should be withdrawn. Sanctions can include all attorney fees incurred after identification of the offending pleading, including fees incurred in discovery, that are naturally incurred as a result of defending the suit. It is not necessary for party to provide an expert witness regarding the reasonableness of its attorney’s 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 from 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.
- (10321) *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.
- (10322) *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.

- (10323) *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.
- (10324) *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.
- (10325) *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.
- (10326) *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.
- (10327) *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”.
- (10328) *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.
- (10329) *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.
- (10330) *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 of 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.
- (10331) *In re Wingerter*, 2008 Fed App 0014P (6th Cir. BAP 2008) *reversed* 594 F.3d 931 (6th Cir. 2010) – 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.

26.6 Section 526

- (10332) *In re Denny*, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Court has authority under Section 526 to impose sanctions on “debt relief agency” that violates provisions of Sections 526 through 528. Attorney is “debt relief agency” where attorney provides legal representation to assisted person in exchange for payment of money. Attorney must provide disclosures to assisted persons and execute written contract with assisted person. Attorney must then perform all services promised to assisted person; cannot make false statements in bankruptcy filings; and may not misrepresent services attorney will provide. Attorney violated 11 USC Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee where clients had paid attorney sufficient funds to pay filing fee but used money for other purposes resulting in dismissal of at least one case. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules and other required papers; and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors had failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527 for debt relief agency. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney ordered to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

26.7 All Writs Act 28 USC §1651

- (10333) *Carroll v. Abide*, Case No. 16-30966 (5th Cir. 2017) – Court has authority to enjoin vexatious litigants under All Writs Act, 28 USC Section 1651. Court has authority to enjoin future filings if party has history of litigation including vexatious, harassing or duplicative lawsuits; party did not have good faith basis for pursuing litigation or simply intended to harass; party’s conduct imposed burden on the Courts and other parties resulting from the party’s filings; and Court lacked any adequate alternative sanctions. Court has authority to impose sanctions on pro se litigants. Record warranted imposition of sanctions where party engaged in conduct intended to harass and delay. Party repeatedly attempted to litigate issues that have been conclusively resolved against them or that they had no standing to assert. By their unsupported and multiple attempts to remove Trustee, party unnecessarily increased cost and delay of litigation. Party refused to comply with bankruptcy process ultimately requiring contempt order against party and party’s daughter, yet daughter remained undeterred, persisting in unsupported filings and eventually resulting in a second motion for contempt for failure to pay attorney’s fees as previously ordered. Record demonstrated that party acted in bad faith. Sanction included award of attorney’s fees in the amount of \$49,432 incurred by trustee in responding to parties bad faith conduct and imposed prelifting injunction precluding party from filing any future litigation without Court authorization.

26.8 Failure to Seek Concurrence

- (10334) *Liberty Mutual Insurance Co. v. Devere Construction Co.*, 2016 WL 4800796 (E.D. Mi. 2016) – Moving party adequately requested concurrence before filing Motion for Reconsideration where moving party requested concurrence at 12:35 on August 3 and filed the Motion at 3:00. Responding party had several hours’ warning and while initial e-mail did not contain detailed explanation of grounds for motion it did indicate that movant was seeking to reconsider prior order and later e-mails sent before filing of motion did.
- (10335) *In re Birmingham Cosmetic Surgery, PLLC*, Case No. 14-58784 (Bankr. E.D. Mi. 2015) – Counsel’s failure to request concurrence before filing Motion as required by Local Rule 9014-1(g) does not require denial of motion where it appears that concurrence would not have been granted and enforcing the rule would waste judicial time and resources. However, counsel is reminded that failure to comply with local rules in the future may result in sanctions.

26.9 Frivolous Removal

- (10336) *Hamilton County Treasurer v. Nesbitt*, 2016 WL 7732239 (S.D. Ohio 2016) – District Court has jurisdiction to impose sanctions against defendant who seeks to remove action from State Court to Federal Court on frivolous grounds. Sanctions warranted where same defendants improperly attempted to remove action to Federal Court on multiple occasions, notwithstanding prior Court rulings that removal was improper. Although non-removing party had not yet appeared in the case and arguably had not suffered actual damages from improper removal, record indicated that defendants deliberately flouted Court’s prior ruling by filing second, nearly identical Notice of Removal, warranting sanctions of at least \$100.

26.10 Attorney Fees

- (10337) *Blue Cross Blue Shield of North Carolina v. Jemsek Clinic, PA*, Case No. 16-1030 (4th Cir. 2017) - Sanctions must not be disproportionate

to severity of party's conduct. Bankruptcy Court has authority to dismiss action with prejudice as sanction only in most egregious case after weighing degree of wrongdoer's of culpability; extent of clients blameworthiness if conduct is committed by attorney; prejudice to judicial process and administration of justice; prejudice to victim; availability of other sanctions to rectify wrong; and public interest. Failure of Blue Cross to disclose injunction, while wasting time and resources of parties and Court, did not warrant most extreme sanction available. Party primarily response for loss of counterclaims was defendant as defendant had adequate notice of Florida's settlement and had opportunity to opt out of settlement which would have eliminated injunction against continued prosecution of counterclaims. While Blue Cross may have been culpable, causing Bankruptcy Court to waste some resources dealing with enjoined counterclaims, Blue Cross's claims were still properly before Court and actions did not impair Court's ability to adjudicate those claims. Blue Cross conduct did not appear to cause undue prejudice to defendant where it was defendant's conduct that caused the defendant to lose right to prosecute counterclaims. Less severe sanctions were available to adequately compensate for actual harm caused by Blue Cross and deter similar conduct in future. Public policy strongly favors deciding case on merits, a preference which is not overcome given absence of prejudice or any connection between Blue Cross conduct and claims against defendant. Court could properly award attorney's fees in connection with adversary proceeding for services performed after entry of injunction, but Court abused discretion by awarding fees for services performed prior to entry of injunction at point when Blue Cross had every right to defend itself against counterclaims.

26.11 Punitive Damages

- (10338) *In re Hancock*, 2018 WL 3203383 (Bankr. N.D. Ohio 2018) – Section 524 allows Court to impose sanctions for violation for discharge injunction. Action is brought as one for contempt, and requires proof that creditor violated definite and specific order of Court that required creditor to perform or not perform particular at and that Creditor knew of Court Order. Contempt does not require proof of intent to violate Discharge injunction. Creditor can defend by demonstrating inability to comply with Court Order. Once contempt established, Debtor can recover sanctions including actual damages and attorney fees but not punitive damages. Creditor violated discharge injunction where post-discharge creditor continued to contact Debtor for purpose of inducing payment. Creditor conduct persisted even after Debtor's counsel sent letter advising Creditor to cease contact. Court would award attorney fees if \$800 but would not impose punitive damages as punitive damages are not properly awarded in civil contempt proceeding and Court lacks jurisdiction to impose criminal sanctions including punitive damages.
- (10339) *Leonard v. Piccirilli*, Case No. 13-1330 (9th Cir. BP 2014) – Bankruptcy Court has inherent authority and authority under Section 105 to impose sanctions. However, Court does not have authority under either inherent authority or contempt to impose significant punitive damages. Party being sanctions must have ability to reduce or avoid find through compliance.
- (10340) *In re John Richards Homes Bldg. Co.*, 2013 WL 6097548 (6th Cir. 2013) – While court had authority to do so under Section 105 and court's inherent authority, punitive sanctions must be limited to those that are necessary or appropriate to deter future conduct, and must be done on prospective basis, not to punish past conduct but to influence future conduct. Punitive damage award of more than \$2 million was serious non-compensatory punitive measure that was beyond authority of court.

26.12 Discharge Injunction

- (10341) *In re Hancock*, 2018 WL 3203383 (Bankr. N.D. Ohio 2018) – Section 524 allows Court to impose sanctions for violation for discharge injunction. Action is brought as one for contempt, and requires proof that creditor violated definite and specific order of Court that required creditor to perform or not perform particular at and that Creditor knew of Court Order. Contempt does not require proof of intent to violate Discharge injunction. Creditor can defend by demonstrating inability to comply with Court Order. Once contempt established, Debtor can recover sanctions including actual damages and attorney fees but not punitive damages. Creditor violated discharge injunction where post-discharge creditor continued to contact Debtor for purpose of inducing payment. Creditor conduct persisted even after Debtor's counsel sent letter advising Creditor to cease contact. Court would award attorney fees if \$800 but would not impose punitive damages as punitive damages are not properly awarded in civil contempt proceeding and Court lacks jurisdiction to impose criminal sanctions including punitive damages.
- (10342) *Bahnsen v. Discover Financial Services, Inc.*, 2016 WL 1135573 (Bankr. N.D. Ohio 2016) – Violation of discharge injunction is remedied through contempt proceedings which can be instituted by motion. Person who was not Debtor in bankruptcy case cannot maintain action for contempt against creditor for alleged attempts to collect debt post-discharge. To extent injunction may have been violated as to Debtor, non-Debtor does not assert his own legal rights but is resting claim on legal rights of Debtor; non-Debtor would not have suffered any damages personally as opposed to derivative of Debtor's rights. Debtor who alleges violation of discharge injunction must show that the creditor (i) violated the discharge injunction and (ii) did so with knowledge that the injunction was in place. Letters and demand notice addressed only to non-Debtor who was also alleged obligor on account did not violate discharge injunction even if mailed to non-Debtor at address he shared with Debtor-wife. Record was unclear as to whether phone calls made by debt collectors were directed to Debtor or solely to non-Debtor spouse. If collection efforts were directed solely to non-Debtor spouse, then creditor did not violate discharge injunction even if non-Debtor spouse was not legally obligated on debt and non-Debtor spouse lacked protection of discharge injunction and efforts to collect from non-Debtor cannot violate discharge injunction as to Debtor.
- (10343) *Nichols v. Roosen, Varchetti & Oliver, PC*, 2015 WL 5936335 (E.D. Mi. 2015) – Sixth Circuit does not recognize private cause of action for violation of discharge injunction. Correct remedy is contempt proceeding in court that entered discharge in first instance.
- (10344) *West v. Home Savings & Loan*, 2015 WL 3962569 (Bankr. N.D. Ohio 2015) – There is no private right of action for alleged violation of discharge injunction. Remedy for violation is through contempt proceedings commenced by motion filed in the main bankruptcy case, not through a separate adversary proceeding. However, court would not dismiss adversary complaint where remedy requested was contempt as doing so would elevate from over substance, and defendant is afforded more, not less, due process protection in adversary case. Defendant could not identify any prejudice that would result from action proceeding as adversary proceeding and even if case was dismissed, plaintiff

would just file motion for contempt thereby starting proceedings anew. Complaint fairly alleged that defendant was scheduled as creditor, that plaintiff's personal liability was discharged, and that defendant continued efforts to collect past due payments. Plaintiff must prove that alleged contemnor had knowledge of order which he is said to have violated, that contemnor did in fact violate order, that order violated was specific and definite, that conduct was willful. Willful does not require bad faith or wrongful intent, only that the party, with knowledge of the discharge injunction, committed an intentional act that violated injunction.

- (10345) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Lender violates discharge injunction by filing proof of claim in second bankruptcy case for debt that was discharged in first case. Remedy is sought through motion for contempt. Complaint alleging violation of discharge injunction dismissed without prejudice to Debtor filing motion for contempt.
- (10346) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Proper remedy for alleged violation of discharge injunction is through motion for contempt. Section 524 does not provide separate private right of action that can be pursued in adversary proceeding. However, court would not dismiss adversary proceeding as doing so would merely elevate from over substance, as adversary proceeding was brought in court that issued discharge and would hear any motion for contempt.
- (10347) *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.
- (10348) *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.
- (10349) *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.
- (10350) *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.
- (10351) *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.
- (10352) *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.
- (10353) *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.
- (10354) *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.
- (10355) *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.
- (10356) *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.
- (10357) *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 my Motion rather than by Adversary Proceeding. Adversary dismissed for lack of jurisdiction.

- (10358) *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.
- (10359) *Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.
- (10360) *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.
- (10361) *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.

26.13 Injunction Against Filing

- (10362) *Carroll v. Abide*, Case No. 16-30966 (5th Cir. 2017) – Bankruptcy Court has inherent power to sanction party or attorney when necessary to achieve orderly and expeditious disposition of docket. Power must be exercised only if essential to preserve authority of Court and sanction chosen must employ the least possible power adequate to deter future conduct. Court must make specific finding of bad faith in order to impose sanction under inherent power. Court also has authority to enjoin vexatious litigants under All Writs Act, 28 USC Section 1651. 11 USC Section 105 affords Court authority to issue any order, including civil contempt order, necessary or appropriate to carry out provisions of Bankruptcy Code. Court has authority to enjoin future filings if party has history of litigation including vexatious, harassing or duplicative lawsuits; party did not have good faith basis for pursuing litigation or simply intended to harass; party’s conduct imposed burden on the Courts and other parties resulting from the party’s filings; and Court lacked any adequate alternative sanctions. Court has authority to impose sanctions on pro se litigants. Record warranted imposition of sanctions where party engaged in conduct intended to harass and delay. Party repeatedly attempted to litigate issues that have been conclusively resolved against them or that they had no standing to assert. By their unsupported and multiple attempts to remove Trustee, party unnecessarily increased cost and delay of litigation. Party refused to comply with bankruptcy process ultimately requiring contempt order against party and party’s daughter, yet daughter remained undeterred, persisting in unsupported filings and eventually resulting in a second motion for contempt for failure to pay attorney’s fees as previously ordered. Record demonstrated that party acted in bad faith. Sanction included award of attorney’s fees in the amount of \$49,432 incurred by trustee in responding to parties bad faith conduct and imposed prefiling injunction precluding party from filing any future litigation without Court authorization.

26.14 Contempt – Generally

- (10363) *Forson v. Nationstar Mortgage, LLC*, 2018 WL 1635231 (Bankr. S.D. Ohio 2018) – Creditor that attempts to collect discharged debt is in contempt of bankruptcy court and court can impose sanctions under Bankruptcy Code Section 105. Plaintiff must prove by clear and convincing evidence that defendant (i) violated discharge injunction; (ii) with knowledge that injunction was in place. Creditor violated Discharge Injunction where, after entry of Order determining mortgage to be current and entry of Discharge Order, Creditor sent billing statements alleging that Debtor was delinquent in payments. Prior Order determined that (a) all pre-petition arrearage claims had been paid in full through confirmed Chapter 13 Plan; (b) all regular, post-petition mortgage payments were made by Trustee on a timely basis; (c) mortgage obligation was deemed current; and (d) Creditor directed to adjust loan balance to reflect balance delineated in the original amortization schedule, with any amounts in excess of that balance discharged. Although Debtor made all post-discharge payments in timely manner, creditor continued to send letters and mortgage statements to Plaintiff indicating Loan was delinquent including: (1) monthly mortgage payment in amount of \$936.29; (2) past due payments in amount of \$2,821.74; (3) lender paid expenses in amount of \$4,137.01; (4) unapplied funds balance in amount of \$994.76; and total amount due of \$6,900.28, and stating that there was additional fee if payment was not received by date certain. Second letter sent one month later continued to assert that Plaintiff had not made payments on Mortgage Loan including past due amount of \$3,580.16, and Plaintiff had to pay total past due amount plus any other amounts that would come due by date and how Plaintiff could make payment and what to expect when calling Defendant to do so. Letter stated that if Plaintiff did not make full payment Creditor could accelerate debt, and foreclosure and sell property and that default and any legal action may be reported by Defendant to one or more local and national credit reporting agencies. Letter designed to encourage if not coerce payment from Plaintiff. Eight months later, when Plaintiff attempted to make mortgage payment, Creditor rejected payment with letter again indicating that loan was in default; Creditor later called Debtor and alleged that Debtor needed to immediately pay more than \$8,000 although Plaintiff was current with mortgage loan and Creditor neither disputed this nor provided evidence to contrary leading to conclusion that request for Plaintiff to pay \$8,109.41 must have included fees and costs that were discharged in Plaintiff’s bankruptcy case. Creditor had actual knowledge of both Order Deeming Mortgage Current and Discharge Order where Creditor was active participant in Chapter 13 case; Defendant was

scheduled as secured creditor in Plaintiff's Chapter 13 case; seven days post-petition, attorneys for Defendant filed Request for Service of Notice; Defendant filed proof of claim; and both Mortgage Order and Discharge Order were mailed to Defendant at Noticing Address. Creditor also admitted that Plaintiff called Defendant and advised that he had received discharge in bankruptcy. Creditor mailed letter to Plaintiff specifically stating that it had updated Plaintiff's account file to reflect the discharge. Creditor's actions constitute violation of Discharge Injunction warranting sanctions for contempt of court. *In re Roberson*, 2018 WL 1276729 (E.D. Mi. 2018) – Motion for Contempt requires clear and convincing evidence that alleged contemnor violated definite and specific order of court requiring contemnor to perform or refrain from performing particular act with knowledge of the Court's Order. Once the movant establishes his prima facie case, the burden shifts to the contemnor who may defend by coming forward with evidence showing that he is *presently* unable to comply with the court's order and that party took all reasonable steps within its power to comply. Sanctions Order required Creditor to pay Debtor's attorney fees in specified amount by date certain. Although Creditor appealed Sanctions Order, Creditor did not obtain stay of order. Debtor's Motion for Contempt based on Creditor's failure to pay amount by specified deadline granted and additional fees awarded at rate of \$100 per day until awarded amount paid. Although Court likely would have granted stay if Creditor posted appropriate security, no such request had been filed and no bond posted, leaving Sanctions Order fully enforceable.

- (10364) *King & Ballow v. Thompson*, 2017 WL 6803430 (M.D. Tn. 2017) – Contempt requires clear and convincing evidence that alleged contemnor violated definite and specific order of court requiring him to perform or refrain from performing specific act with knowledge of Court order. Non-movant can avoid contempt by showing that he is presently unable to comply notwithstanding taking all reasonable steps to comply. Sanctions warranted where party repeatedly did not comply with Court Orders compelling discovery and did not appear at the hearing on the Motion notwithstanding Court's clear Order requiring party to appear even if discovery had been provided.
- (10365) *In re Madden*, 2017 WL 5514351 (Bankr. W.D. Mi. 2017) – Contempt power ensures that judicial mandates are authoritative and not advisory. Court held Debtors in contempt where Debtors repeatedly refused to comply with turnover orders. Court provided Debtors with one last chance to turnover assets before issuing arrest warrants.
- (10366) *In re Taylor*, Case No. 16-21506 (Bankr. E.D. Mi. 2017) – State Department of Corrections violated both stay and discharge injunction by continuing to deduct from Debtor's prison account funds to pay pre-petition federal and state court filing fees. Debtor seeking recovery for contempt must demonstrate that alleged contemnor had knowledge of order said to be violated; alleged contempt did in fact violate order; and order violated was specific and definite. Willfulness is not element of contempt and intent to disobey is irrelevant, except that any request for punitive damages must show that contemnors actions were particularly egregious and punitive damages are necessary to deter future conduct. Debtor demonstrated that State had notice of bankruptcy filing and continued to debit prison account which constituted violation of both automatic stay (pre-discharge) and discharge injunction (post-discharge). Damages awarded in the amount of \$87.72 deducted from account plus \$26.58 in costs for bringing the Motion.
- (10367) *Glieberman v. BR North 223, LLC*, 2017 WL 1365409 (E.D. Mi. 2017) – Finding of contempt lies within sound discretion of Court and is reviewed for abuse of discretion. Contempt requires evidence of a violation of a definite and specific order of Court requiring party to perform or refrain from performing particular act with knowledge of the Court order. Once the moving party establishes prima facie case, alleged contempt not may defend by coming forward with evidence showing that he is unable to comply with Court order. Party had adequate notice and opportunity to respond to requests for contempt where Court order setting hearing provided party with opportunity to file response to contempt motion and provided opportunity to present evidence at hearing on contempt motion. Contemnor never sought dissolution of order shortening time for the hearing, never requested an adjournment of the hearing, never requested more time to prepare a response, never complained about lack of due process, and did not offer any evidence to Bankruptcy Court to rebut movements prima facie case of contempt. Moving party presented substantial competent evidence that Debtor was in control of at least 24 entities yet failed to provide requested documentation from any of those entities. Debtor failed to come forth with any evidence showing that he is unable to comply with Court order. Contempt order for failure to produce requested documentation affirmed.
- (10368) *Beiter v. Chase Home Finance, LLC*, 2016 WL 3884789 (S.D. Ohio 2016) – Upon entry of discharge, automatic stay terminates and is replaced by discharge injunction under Section 524. Section 524 does not contain private cause of action for damages. Instead, enforcement is through contempt proceedings. Although contempt proceedings are ordinarily brought by Motion under Rule 9014 and Rule 9020, there is no prohibition against instituting adversary proceeding. Adversary proceeding affords more procedural protection than does contested matter instituted by motion. District Court had jurisdiction over Class Action where putative class was limited to Debtors who obtained discharges in bankruptcy cases filed in the District. While court cannot enforce orders of other courts through contempt proceedings, all orders entered in bankruptcy cases within District are orders of the District Court in that district. District Court is not being asked to review or enforce order of any other District Court. However, to extent class certification sought to include bankruptcy cases from other districts, court lacked jurisdiction to consider those cases. It would be an affront to the other courts to have District Court with no connection to case enforce or attempt to enforce Court Orders.
- (10369) *Gold v. Wojcik*, 2016 WL 3876385 (N.D. Ohio 2016) – Party is in contempt when party knowingly makes representations to court that are demonstrably false and then fails to comply with clear Order of Court to turnover funds. Party cannot contest contempt proceedings based on alleged infirmity in turnover order where party did not appeal turnover order itself. Contempt proceedings are not opportunity for collateral attack on order that moving party is allegedly violating.
- (10370) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Party alleging that another party is in contempt of Court Order must bring request for contempt in court that entered the order allegedly violated. District Court would not consider motion for contempt where order allegedly violated was entered by bankruptcy court in unrelated matter.

26.15 Contempt – Civil

- (10371) *In re Wagner*, Case No. 17-20394 (Bankr. E.D. Mi. 2018) – Civil contempt is remedial, seeking to compel or course obedience to Court order or compensate party for another's noncompliance with Court order. Party seeking contempt order must establish (one) alleged

contemnor had knowledge of order said to be violated; (2) alleged contemnor violated order; and order violated with specific and definite. Contempt not appropriate where moving party did not demonstrate violation of any particular Court order. To extent movant (Chapter 13 Trustee) sought sanctions for violation of automatic stay, Debtor and Creditor previously reached agreement by which creditor paid damages including attorney's fees and costs and reached settlement with United States Trustee at specifically preserved Debtor's right to recover damages, there was no basis for award of additional fees in favor of Chapter 13 Trustee as either a remedy for contempt or Section 105. Sanctions for violation of automatic stay are provided for in Section 362(k) which is more specific and governs in lieu of general provisions of Section 105.

- (10372) *Gharib v. Casey*, Case No. 18-55027 (9th Cir. 2018) – Bankruptcy Court has jurisdiction to enter civil contempt including imprisonment where imprisonment is designed to course compliance. Bankruptcy Court does not have power of criminal contempt. At some point, civil contempt ceases to be coercive and becomes punitive, at which point Bankruptcy Court loses jurisdiction. Contempt had not ceased to be coercive where Debtor had been imprisoned for more than 3 years as a result of series of shady transfers to various shell companies effectively transferring Debtor's entire net worth to unknown foreign investors and Debtor had made no effort to recover property or surrender property to Trustee. Passage of time, standing alone, does not convert sanction from civil to criminal.
- (10373) *In re Denny*, 2018 WL 1788025 (Bankr. E.D. Ky. 2018) – Attorney in contempt for failing to forward payment Chapter 13 and instead using funds for own personal and business expenses. lawyer cannot use a client's funds for his own purposes and against the client's instructions even for a few days, hours or minutes. Attorney withdrew funds from account on day following deposit and thereafter never had sufficient funds in account to equal amount taken. Attorney actions harmed Debtor as Debtor had at least two additional payroll withholdings to pay off Chapter 13 case and Debtor expended funds to hire replacement counsel. Attorney ignored specific court orders to immediate turnover funds to Chapter 13 Trustee but took 13 days to do so; and did not turnover to Chapter 13 account statements to show accounting for deposits and withdrawals of funds. Sanctions include indefinite suspension from Bankruptcy Bar; referral to District Court; and referral to State Bar Association.
- (10374) *Lowe v. Ransier*, 2018 WL 1279277 (6th Cir. BAP 2018) – Court can award fees for prosecuting fee application where request is based on Court's contempt power rather than Section 330. Court's authority to fashion remedy for contempt includes broad ability to not only coerce compliance but to compensate party harmed. Court's power to sanction arises from inherent authority of court as well as Section 105. "American Rule" that provides that parties bear own attorney fees does not prevent award of attorney fees in contempt action as award is not based on "prevailing party" but is based on Court's inherent authority to sanction contemptuous conduct. Bankruptcy Court's 50-page order amply supported award of attorney fees in excess of \$90,000 resulting from contemptuous conduct.
- (10375) *Gharib v. Casey*, Case No. 16-55007 (9th Cir. 2017) – Bankruptcy Court has civil contempt power under Section 105. Civil contempt is designed to induce compliance and must provide method for contemnor to perform obligation and purge contempt. Debtor properly held in contempt for failing to turnover assets of Debtor to Chapter 7 Trustee notwithstanding Court Orders to do so. Court had authority to order contemnor imprisoned and to add \$1,000 per day fine for each day that contemnor failed to turnover assets, as contemnor could purge by compliance. However, due process concerns may require after some point for court to conclude that further incarceration will not induce compliance and that further incarceration may instead become punitive, which would require contemnor's release from prison.
- (10376) *In re Daher*, 2016 WL 874748 (Bankr. N.D. Ohio 2016), *judgment entered* 2016 WL 889242 (Bankr. N.D. Ohio 2016), *aff'd*, 2016 WL 3876385 (N.D. Ohio 2016) – Attorney held in civil contempt for failing to turnover funds held IOLTA account pursuant to agreed order, for more than two years after subsequent Bankruptcy Court Order directing turnover of the funds. Attorney finally admitted that he took the money out of the IOLTA account in violation of clear terms of prior agreed order that required funds to remain in account pending further order of court. Attorney refused to provide any information regarding dates on which he withdrew funds from account or whether he delivered any funds to Debtor notwithstanding Court Orders to disclose that information. Had attorney complied with Court Orders, Chapter 7 estate would have received more than \$32,000 of proceeds. Sanctions awarded in that amount plus \$8760 for Trustee's attorney fees, plus additional \$100 per day for every day funds are not paid over.
- (10377) *In re Daher*, 2015 WL 10059062 (Bankr. N.D. Ohio 2015) – Civil contempt is warranted where clear and convincing evidence indicates that party violated definite and specific order of court requiring him to perform or refrain from performing specific act. Goal is to encourage compliance in prompt manner and to coerce party into doing what court previously ordered. Sanctions may be employed to coerce compliance and to compensate for damages caused by non-compliance, including monetary fines as compensation as well as fines that can be purged by compliance. Attorney held in contempt for violating Court Orders that required attorney to retain funds in trust account and to disburse specific amounts to specific parties. Record indicated the orders for turnover of funds were definite and specific, prohibiting attorney from withdrawing funds from trust account other than as directed by order of court, yet attorney withdrew funds without court permission for attorney's personal use. Attorney could not disregard order merely because he disagreed with it and attorney knew he had no basis to claim a charging lien or other interest in the funds. Attorney ordered to pay funds as previously directed within 14 days, failing which additional fines of \$50 per day would be imposed and to reimburse Chapter 7 Trustee for attorney fees that would not have been incurred but for attorney's failure to turn over funds as ordered.
- (10378) *Modern Plastics Corp. v. Tibble*, 2015 WL 6768627 (Bankr. W.D. Mi. 2015) – Civil contempt is available to enforce payment of sanction award. Court must first determine that party against whom contempt is sought has ability to comply with order. Sanctioned party initially sought to avoid contempt by stating that party lacked financial ability to pay award in full but offered monthly payment plan. Before hearing on contempt could occur, responding party filed supplemental response proposing to post supersedes bond pending appeal. Supplemental response indicated that party had ability to pay but wanted to do so only on its own terms. Party did not obtain stay pending appeal and has engaged in gamesmanship designed to avoid payment of sanctions. Proposed payment does not moot contempt proceedings. Party ordered to pay sanction award in full within 7 days. If award not paid, additional sanctions would accrue at \$200 per day until paid. Court would also award moving party additional attorney fees and costs to compensate for expenses incurred in contempt proceedings.

- (10379) *Bavelis v. Doukas*, 2015 WL 4620031 (Bankr. S.D. Ohio 2015) – Sanctions for contempt can include award of attorney fees and costs incurred as a result of contemptuous conduct. Defendant’s conduct required filing of two separate motions for orders to show cause and movant was required to engage in extensive litigation to obtain compliance with Court Orders. Although defendant may have eventually complied with Court Order, that does not purge defendant’s conduct prior to compliance or avoid award of attorney fees and costs incurred up through the date of compliance. Plaintiff demonstrated that number of hours expended in obtaining compliance was reasonable and documentation provided sufficient detail to enable Court to determine with high degree of certainty that time was actually and reasonably spent.
- (10380) *Bavelis v. Doukas*, 519 BR 737 (Bankr. S.D. Ohio 2014) – Court has inherent authority to enforce orders through civil contempt proceedings. Civil contempt is designed to be remedial by coercing compliance with Court Order and compensating the injured party for losses sustained. Civil contempt requires proof that the party willfully violated a specific provision of a Court Order. Defendant acted in contempt of court when defendant, with full knowledge of injunction precluding transfers of assets and requiring defendant to provide “unfettered” access to financial books and records, nonetheless assigned a \$2.3 million judgment to a third party with the accompanying right to credit bid at foreclosure sale, and third party purchased property at the foreclosure sale; and defendant refused to provide copies of any documents in response to proper request.
- (10381) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Assuming party violated bankruptcy Court Order by bringing separate cause of action against non-Debtor defendants, party cured contempt by voluntarily withdrawing claim, rendering motion for contempt moot.
- (10382) *In re Hibbits*, Case No. 14-50304 (Bankr. E.D. Mi. 2015) – Court would not enter finding of contempt against Debtor for alleged failure to abide by orders of court where Chapter 7 trustee filed “no asset” report, Debtor had obtained discharge, and case was ready to be closed. There was no legitimate reason for court to consider contempt motion or to keep the case open any longer than necessary.
- (10383) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015), *aff’d*, 2016 WL 344971 (M.D. Tn. 2016) – Court can grant new trial on some or all issues, and can take additional testimony, amend findings of fact and conclusions of law, and direct entry of new judgment. Granting relief under Rule 59 is vested in sound discretion of Bankruptcy Court. Settlement and release between plaintiff and defendant does not render unenforceable court’s prior rulings requiring defendant to correct records, and where defendant failed to do so after having ample opportunity to do so, court properly held defendant in contempt. Actual damages for contempt include out of pocket expenses including attorney fees and costs incurred in prosecuting motion for contempt. Court has authority to award mild non-compensatory punitive damages, to extent necessary or appropriate to enforce Code, and only where there is nefarious or malevolent conduct. Punitive damages appropriate where Debtor had to bring three separate adversary proceedings to force defendant to comply with Court Orders, and defendant consistently failed to comply with discovery requests and was sanctioned for failure to abide by discovery rules. Even after court entered order directing creditor to correct records, it took more than one full year to correct records. Defendant’s consistent disregard of bankruptcy laws and Court Orders warranted finding of contempt and imposition of sanctions.
- (10384) *In re Chase*, Case No. 13-1402 (Bankr. W.D. Mi. 2015) – Civil contempt motion requires proof by clear and convincing evidence that alleged contemnor violated a definite and specific order of court requiring to perform or refrain from performing a particular act or acts with knowledge of the Court Order. Court Order that permitted Debtor to apply for Michigan Hardest hit funds did not require Debtor’s mortgage lender to accept those funds to bring mortgage current. Mortgage company cannot be held in contempt for refusal to accept hardest hit funds where there was no Court Order that required lender to accept funds.
- (10385) *Southern v. Tate*, 2014 WL 5320570 (Bankr. S.D. Ga. 2014) – Bankruptcy court has power to use contempt to coerce Debtor to comply with Court Orders and can order incarceration pending compliance where Debtor has ability to comply, has continued to refuse to do so, and lesser sanctions have failed. Debtor must have ability to purge contempt and obtain release from sanctions. If sanctions are for definite term or cannot be mitigated, sanctions are considered criminal in nature and beyond Bankruptcy Court authority.
- (10386) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Proper remedy for alleged violation of discharge injunction is through motion for contempt. Section 524 does not provide separate private right of action that can be pursued in adversary proceeding. However, court would not dismiss adversary proceeding as doing so would merely elevate from over substance, as adversary proceeding was brought in court that issued discharge and would hear any motion for contempt.
- (10387) *In re Green*, 2014 WL 1089843 (Bankr. N.D. Ohio 2014) – Court has inherent powers and authority under Section 105 to enforce compliance with Court Orders. Contempt requires proof that contemnor violated definite and specific order of court which required performance or non-performance of an act, and that the contemnor have knowledge of the order. Willfulness or intent to disobey are not elements of action. Contemnor may defend by showing inability to comply. Lender in contempt for failure to appear pursuant to an order to appear and show cause why it should not be held in contempt of the Order confirming Plan. Lender had knowledge of order to appear and show cause as clerk mailed order to lender through its registered agent and also at lender’s principal office, and Post Office did not indicate that mail was undeliverable. Order specifically required lender to appear and explain why, when it was maintaining an insurance escrow for Debtor, it also force placed insurance on property.
- (10388) *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.
- (10389) *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.

- (10390) *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.
- (10391) *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.
- (10392) *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.
- (10393) *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.
- (10394) *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.
- (10395) *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.
- (10396) *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.
- (10397) *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.
- (10398) *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.
- (10399) *In re Moser*, Case No. 05-38518 (Bankr. S.D. Ohio 2010) – Court has authority to issue contempt sanctions pursuant to Section 105. Purpose of civil contempt is to coerce compliance with a Court Order and to compensate the complainer for its losses. Moving party must prove by clear and convincing evidence that the respondent violated a Court Order that was clear and unambiguous and that required responded to perform or refrain from performing a specific act. Court Order sealing particular document is not an order to respondent to refrain from publishing, discussing or using the document in court proceedings. Respondent's reference to the sealed document in an appellate brief did

not violate any specific Court Order precluding dissemination or citation.

- (10400) *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.
- (10401) *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.

26.16 Contempt – Criminal

- (10402) *US v. Hills*, 2013 WL 4832797 (E.D. Mi. 2013), *order denying judgment of acquittal*, 2014 WL 234349 – 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. Evidence supported finding that defendant willfully disobeyed five separate orders of Bankruptcy Court.
- (10403) *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.

26.17 Show Cause

- (10404) *In re Pelican Industries S-Corp.*, Case No. 12-56463 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on Debtor's failure to comply with order of court is Motion for Order holding creditor in contempt.
- (10405) *In re Hibbits*, Case No. 14-50304 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on Debtor's failure to comply with order of court is Motion for Order holding creditor in contempt.
- (10406) *In re Hunt*, Case No. 11-41803 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on creditor's failure to comply with order of court is Motion for Order holding creditor in contempt.
- (10407) *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).
- (10408) *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.

26.18 Defense – Bad Faith and Unclean Hands of Moving Party

- (10409) *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 shot 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.

HONORABLE STEVEN W. RHODES
CONSUMER BANKRUPTCY SEMINAR

November 12, 2018

Case Law Update

Hon. James Boyd
Laura Genovich
Thomas DeCarlo

Tax Claims - Stay and Discharge Issues

In re Thal, 2018 WL 2182304 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 “super discharge”.

U.S. v. Hunsaker, Case No. 16-0386 (D. Ore. 2016), *reversed*, 2018 WL 4122882 (9th Cir. 2018) – Section 106(a) waives sovereign immunity for violations of Section 362 to extent of damages suffered by Debtor but does not waive sovereign immunity for punitive damages. Damages for emotional distress are actual damages as to which sovereign immunity is waived.

Contempt

Lorenzen v. Taggart, 888 F.3d 438 (9th Cir. 2018), cert petition filed, ____ US ____ (2018) – Does good faith belief that action does not violate discharge injunction preclude finding creditor in contempt even if discharge injunction did apply and creditor's belief was unreasonable.

IRS v. Murphy, 892 F.3d 29 (1st Cir. 2018) – Creditors alleged reasonable belief that that was not discharge is not defense to action for contempt for violation of discharge injunction?

Suhar v. Gray-Morgan, 2018 WL 3956614 (Bankr. N.D. Ohio 2018) – Section 727(d)(3) allows Court to revoke discharge if Debtor refuses to obey lawful Order of Court pursuant to Section 727(a)(6). Standard is one of civil contempt which does not require willful or intentional refusal to obey Court Order.

Automatic Stay

In re Fisher, Case No. 18-45089 (Bankr. E.D. Mi. 2018) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense or to attempt to use stay unfairly as shield to avoid unfavorable result.

Passive Retention

Peterson v. Nu2u Auto World, 2018 WL 5729907 (D.N.J. 2018) – Adopted “minority” approach. Passive retention does not violate stay.

Davis v. Tyson Prepared Foods, Inc., 2018 WL 5045613 (10th Cir. 2018) – Passive retention does not violate Section 362(a)(3) or (4).

In re Shannon, 2018 WL 4293239 (Bankr. N.D. Ill. 2018) – Passive retention of impounded automobile for unpaid parking tickets violates automatic stay. City’s refusal to return car on request violated at least three provisions of automatic stay, Sections 362(a)(3); 362(a)(4); and 362(a)(6).

In re Peake, 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *Notice of Appeal Filed*, ____ WL ____ (N.D. Ill. 2018) - Passive retention of impounded automobile for unpaid parking tickets violates Section 362(a)(3). Creditor must return collateral on request of Debtor.

Exemptions – Section 522(g)

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017), *affirmed*, 589 BR 594 (W.D. Mi. 2018) – Section 522(g) allows Debtor to exempt property that is recovered by Trustee if initial transfer by debtor was not voluntary or involve concealment of property.

In re Sharp, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits Debtor’s ability to exempt recovered property to property that was not initially voluntarily transferred.

In re Hill, 2017 WL 1458860 (Bankr. W.D. Mi. 2017) – Debtor’s payment to Court Officer to avoid execution is not voluntary where Court Officer was acting pursuant to Seizure Order entered by State Court; Court Officer arrived at Debtor’s residence with intent to seize personal property; and Court Officer afforded Debtor opportunity to pay \$4000 cash in lieu of having property seized.

Exemptions – Amendments

In re Palmer, Case No. 12-33124 (Bankr. E.D. Mi. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until case is closed. Rule 9006 allows Court to extend any time in court’s discretion where failure to act was result of excusable neglect.

In re Mendoza, 2018 WL 889346 (Bankr. D.N. Mex. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until the case is closed. If case is reopened after closing, courts have adopted three different interpretations of Rule 1009. Court concluded that amendment allowed if failure to claim exemption before case dismissed is result of excusable neglect.

Exemptions – Objections

Moyer v. Rosich, 2018 WL 1614214 (Bankr. W.D. Mi. 2018) – Rule 4003(b)(1) imposes short and unforgiving 30-day deadline for “garden variety” objection to exemptions. Rule 4003(b)(2) allows objection at any time prior to one year after closing of case if Debtor fraudulently asserted claim of exemption. Objecting party must show that facts do not support the claim of exemption and that the Debtor knew, *at the time Debtor claimed exemption*, that facts did not support that claim, and that Debtor subjectively intended to deceive trustee and creditors.

Exemptions – Liens Impairing

William F. Sandoval Irrevocable Trust v. Taylor, 899 F.3d 1126 (10th Cir. 2018) – In evaluating potential lien avoidance of jointly owned property where only one owner files bankruptcy, impairment calculation uses value of other liens on property corresponding to Debtor's percentage of ownership rather than full amount of lien. Calculation begins with value of Debtor's interest in property and subtracts percentage of other liens, not total lien amount, joining First, Third and Ninth Circuits.

Exemptions – Administrative Expenses

Corcoran v. Holley, 2018 WL 5318223 (E.D. Mi. 2018) (appeal after remand) – Trustee cannot offset exemptions to pay administrative expenses. Debtor properly asserted tenants in the entirety exemption as to residence. If trustee liquidates asset, trustee must turnover to debtors 100% of the proceeds remaining after payment of valid liens.

Chapter 7 Trustee Fees

In re Bartlett, 2018 WL 4521227 (Bankr. D. Mass. 2018) – Section 326 does not preclude award of compensation to Chapter 7 Trustee where case converts to Chapter 13 before Trustee collects assets or makes distributions. Section 326 limits Trustee compensation in case under Chapter 7.

Sharkey v. Stevenson & Bullock, PLC, 2017 WL 5476486 (E.D. Mi. 2017) – Creditor who makes substantial contribution to Chapter 13 case by objecting to exemptions in case initially filed Chapter 7 that ultimately forced Debtor to convert and pay 100% to creditors entitled to administrative expense claim.

Utilities

In re Garigan, 2017 WL 3669509 (Bankr. E.D. Mi. 2017) – Section 366 prevents utility from refusing or discontinuing service based on debt owed to utility for services rendered pre-petition. However, utility can refuse or disconnect service if Debtor does not, within 20 days of commencement of the case, furnish a deposit or other security for service post-petition. Debtor has obligation to pay deposit within 20 days and fact that utility does not contact Debtor to obtain deposit does not prevent utility from disconnecting service after 20 days if no deposit is paid.

Voluntary Retirement Contributions

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

In re Reyes, Case no. 15-45618 (Bankr. E.D. Mi. 2015) – Debtor is not permitted to deduct voluntary retirement contributions in calculating disposable income over objection of creditor or Trustee.

In re Rogers, Case No. 12-32558 (Bankr. E.D. Mi. 2012) – Debtors cannot exclude post-petition voluntary retirement contributions in calculating disposable income.

Rule 7004

In re Drobney, 583 BR 700 (Bankr. W.D. Mi. 2018) – “Federally Insured Depository Institution” includes FDIC insured institutions as defined in section 3(c)(2) of the Federal Deposit Insurance Act; and credit union insured by FCUA. Rule 7004 requires service by certified mail directed to named officer of institution; or to attorney who has already appeared in Bankruptcy case. Plan that proposed to cram down lien held by Federally Insured Depository Institution could not be confirmed where Certificate of Service indicated service by first class mail only.

In re Nicholas, 2018 WL 799152 (Bankr. N.D. Iowa 2018) - Rule 7004 requires service on the Internal Revenue Service by mail to the United States Attorney for the district in which the matter is pending and by mail on the Attorney General of the United States.

In re Clevinger, 2018 WL 4223251 (Bankr. N.D. Ohio 2018) - Rule in effect prior to December 1, 2017 required service of Objection on last address designated by creditor, not address listed on Proof of Claim. Rule 3007 as amended effective December 1, 2017, requires service on claimant by first-class mail to person most recently designated on claimant's original or amended proof of claim as the person to receive notice at the address indicated.

Late Filed Claims

In re Benner, Case No. 15-31477 (Bankr. N.D. In. 2018) (vacated at request of parties) – Rule 3002 requires claims to be filed within 90 days (now 70 days) from date first set for meeting of creditors. Claim filed on 91st day is untimely. Section 502 which states that a filed claim is deemed allowed applies only to timely filed claims. Claim filed beyond claims bar date is not valid claim and cannot be paid through Chapter 13 Plan as untimely filed proof of claim cannot be allowed. Trustee should not have made distributions to secured creditor notwithstanding that Chapter 13 Plan provided for such payments.

Claims – Late Filed – Rule 3001(c)(6)

In re Schaller, Case No. 17-54117 (Bankr. E.D. Mi. 2018) – Prior to December 1, 2017, there was no basis for a Court in Chapter 13 to allow claim filed after claim bar date. Rule 3002(c)(6) added new exception where Debtor does not file a matrix identifying creditors and creditor does not have reasonable opportunity to file claim after learning of case. Although case pre-dated December 1, 2017, and Rule revision normally applies only to cases filed after effective date of rule, Advisory Committee notes indicated that Court had discretion to apply rule even in cases filed before December 1.

In re Lovo, 2018 WL 1568692 (Bankr. S.D. Fl. 2018) – Insufficient notice of filing is not cause to extend time to file proof of claim in Chapter 13 case. Authority to extend time in Chapter 13 is limited to exceptions specifically identified in Rule 3002(c). Rule 3002(c)(6) which expands exceptions to bar date for cases in which creditor received insufficient notice does not apply to Chapter 13 cases filed before December 1, 2017.

Claims – Late Filed - Protective Claims

In re Norton, 2017 WL 354320, 2017 Bankr. LEXIS 197 (Bankr. N.D. Tex. 2017) – Court can allow late filed claim where Debtor files claim on behalf of creditor under Rule 3004, and Debtor's failure to file by the deadline is due to excusable neglect. While Courts cannot extend deadline under Rule 3002 which limits Court's ability to extend deadlines to specific situations identified in Rule 3002, Rule 3004 does not have that limitation. Rule 9006 applies and allows Court to extend deadline for excusable neglect which is equitable standard based on all relevant circumstances including danger of prejudice to the Debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Informal Proof of Claim

Houston Bluebonnett, LLC v. JPMorgan Chase Bank, Case No. 17-3270 (S.D. Tx. 2018) – To constitute informal proof of claim in Chapter 11 case, document must be in writing, writing must contain demand by creditor on Debtor's estate, writing must express intent to hold Debtor liable, informal proof of claim must be filed with Court, and based on facts of case it would be equitable to allow claim.

Chapter 13 – Confirmation of Plan

In re Shelton, 2018 WL 4404631 (Bankr. N.D. Ill. 2018) – Silence by secured creditor who is not being treated as required by Section 1325(a)(5) is not “Acceptance” of treatment.

Briggs v. Johns, 2018 WL 4690394 (W.D. La. 2018) – Bankruptcy Court lacks authority to sua sponte deny confirmation of Plan. Espinosa applies only to self-executing provisions of Code. Section 1325(b) applies only when Trustee or creditor raises objections. Absent objection, Court lacks power to deny confirmation merely because Court believes Debtor is not contributing all disposable income.

Discharge – Completion of Plan Payments

Davis v. Holman, 2018 WL 5633989 (D. Kan. 2018) – Bankruptcy Court lacks discretion to deny discharge on completion of plan payments even though Debtor’s misconduct curing course of case would have constituted cause for dismissal.

Discharge – Direct Pay Secured Debt

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill. 2018) – Adopting minority approach, Debtor entitled to discharge where Debtor made all payments required to be made to Chapter 13 Trustee even if Debtor did not make all direct mortgage payments.

Kessler v. Wilson (Matter of Kessler), 655 Fed. Appx. 242 (5th Cir. 2016) Discharge can be granted only if all payments required by the Plan are made. Post-petition arrears on direct pay mortgage claim means Debtor did not make all payments required by Plan. Debtor not eligible for discharge

Rooker-Feldman

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, 2018 WL 3453360 (6th Cir. 2018) - *Rooker-Feldman* doctrine prevents Federal Court from acting as Court of Appeals for state Court judgment. Doctrine is applied on a “claim-by-claim” basis.

In re Philadelphia Entertainment & Development Partners, 879 F.3d 492 (3d Cir. 2018) -

“Ride Through”

In re McCray, 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must “not retain possession”. Debtor who proposed to “pay and stay” did not propose to reaffirm or redeem. Debtor’s attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

Eligibility/Student Loans

In re Pratola, 578 B.R. 414 (Bankr. N.D. Ill. 2017), *reversed*, 2018 WL 4181498 (N.D. Ill. 2018) – Section 109(e) contains eligibility standards and mandates dismissal or conversion if debts exceed limits. Court does not have equitable power or discretion to allow case to continue where Debtor is not eligible.

In re Petty, 2018 WL 1956187 (Bankr. E.D. Tx. 2018) – Section 109(e) limit eligibility under Chapter 13 to Debtors with non-contingent, liquidated unsecured debts of less than \$394,725.00. Although Section 109 is not jurisdictional and may be waived, Court lacked authority ignore provisions when timely raised.

In re Fishel, 2018 WL 1870368 (Bankr. W.D. Wis. 2018) – Section 109(e) is not jurisdictional but sets in motion series of events that allows court to dismiss case at later date. Section 1307 is discretionary and provides that court may dismiss or may convert but does not require dismissal or conversion. While lack of eligibility may constitute cause for dismissal Court is not required to dismiss where dismissal would be absurd or would produce result beyond scope of abuse which Congress was attempting to address

“Private” Student Loans

McDaniel v. Navient Solutions, LLC, 2018 WL 4620632 (Bankr. D. Colo. 2018) – Private “Tuition Assistance” loans were not excepted from discharge under Section 523(a)(8)(A)(i) as loans were not made or guaranteed by governmental unit or non-profit; private loans did not constitute “educational benefit, scholarship or stipend” under Section 523(a)(8)(ii); and loans did not constitute “qualified education loans” under Section 523(B) as loans were not “qualified education loans”. Obligation is not “education loan” or “student loan” merely because obligation is labeled as such unless loan meets one or more criteria set forth in Section 523(a)(8).

Student Loans – Treatment

In re Quinn, 2018 WL 3012900 (Bankr. E.D. Mi. 2018) – Allowing separate classification of student loans coupled with favorable treatment helps Debtors and is also consistent with congressional intent to protect fiscal health of student loan programs. However, favorable treatment of student loans, even as long-term debt under Section 1322(b)(5) cannot unfairly discriminate.

Undue Hardship

Pierson v. Navient, 2018 WL 4849658 (Bankr. N.D. Ohio 2018) – *Brunner* requires that Debtor be unable to maintain, based on current income and expenses, minimal standard of living if forced to repay loans; additional circumstances exist such that state of affairs is likely to persist for significant portion of repayment period; and Debtor has made good faith efforts.

Appellate Standing

In re Pointe North, 890 F.3d 1188 (9th Cir. 2018) - Failure to object/appear does not affect pecuniary interest and standing for purposes of appeal.

In re Wrightwood Guest Ranch, 896 F.3d 1109 (9th Cir. 2018) - Agreed with *Pointe North* but also said that the appellants had forfeited their claims.

Attorney Fees

In re Cooper, 2018 WL 3202996 (Bankr. E.D. Mi. 2018) - Neither Section 330 nor Rule 2016 sets deadline by which the application must be filed. Application filed three days after Debtor voluntarily dismissed Chapter 13 case was timely. Fees constituted appropriate administrative expense of Chapter 13 estate.

Howard v. Derham-Burk, 2018 WL 2107787 (9th Cir. BAP 2018) - Attorney fees for services incurred during the course of Chapter 13 case that remain unpaid as of entry of discharge are discharged under Section 1328.

In re Freeman, 2018 WL 4362045 (Bankr. E.D. Mi. 2018) – Bankruptcy Court can order disgorgement of previously paid fees under Section 329 where fees awarded exceed reasonable value of services provided.

Property of Estate – Product Liability Claims

Davis v. Nasuti, 2018 WL 2223076 (Bankr. N.D. Ga. 2018) – Personal injury claim is property of estate if claim is sufficiently rooted in pre-bankruptcy past. Cause of action for product liability for defective medical device arose when device implanted, even if Debtor was unaware of any issues and had no problems with device pre-petition. Discovery is not relevant to when cause of action arises, but ties only to Statute of Limitations.

Mendelsohn v. Ross, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) – Whether cause of action is property of Chapter 7 estate depends on whether cause of action is sufficiently rooted in pre-bankruptcy events. Cause of action based on failed medical device was post-petition even though medical device was implanted and all facts giving rise to cause of action occurred pre-petition. Cause of action does not arise until Debtor knows of cause of action, which occurred when device failed post-petition.

Denial of Discharge False Oath – 727(a)(4)

Siewe v. Locci, 2018 WL 2111076 (11th Cir. 2018) – False Oath can include false testimony given under oath in connection with adversary proceeding to except debt from discharge. Debtor “knowingly and fraudulently made false oath in connection with the adversary proceeding” warranting denial of discharge.

Denial of Discharge – Bad Timing – 727(8)

In re Holloway, Case No. 18-51115 (Bankr. E.D. Mi. 2018) – Debtor is not eligible for discharge in Chapter 7 where Debtor received discharge in prior Chapter 7 in case commenced within 8 years before the date of filing of petition in current case. Debtor not eligible for discharge where prior case filed on August 10, 2010 and current case filed August 10, 2018, 8 years to day after Debtor filed prior Chapter 7.

Denial of Discharge – Chapter 11

Um v. Spokane Rock I, 2018 WL 4371030 (9th Cir. 2018) – Section 1141(d)(3) denies discharge to Debtor if Plan provides for liquidation of all or substantially all property of estate; Debtor does not engage in business after consummation of Plan; and Debtor would be denied discharge under Section 727. Section 1141(d)(3) applies equally to individual and corporate Debtors.

Student Loans – Defined

Ramani v. Romo, Case No. 17-2107 (Bankr. E.D. Mi. 2018) – “Student Loan” is defined as educational benefit overpayment alone made, insured or guaranteed by governmental unit or made under program funded in whole or in part by governmental unit or nonprofit institution; or obligation to repay funds received as educational benefit, scholarship or stipend; or any other educational loan that is qualified education loan. “Qualified education loan” also includes any indebtedness used to refinance qualified education loan other than indebtedness owed to person related to taxpayer.

Duties of Trustee

New Products Corporation v. Tibble, 2016 WL 245908 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 4216081 (W.D. Mi. 2017), *aff'd*, 2018 WL 1916216 (6th Cir. 2018) – Trustee has duty to protect assets consistent with ordinarily prudent person in conduct of private affairs under similar circumstances and with a similar object in view. Trustee does not have duty to protect asset where liens on asset far exceed value, as any money expended would solely benefit secured creditor while depleting the few assets of estate.

Pre-Petition Credit Counseling

In re Wilson, 2018 WL 528 88 90 (Bankr. N.D. Ohio 2018) – Debtor “substantially complied” with requirement for credit counseling. Evidence indicated that Debtor completed counseling prior to commencement of case but Debtor was unable to obtain certificate of completion due to record-keeping error by credit counseling provider.

Bankruptcy Fraud

U.S. v. Williams, 2018 WL 2709457 (7th Cir. 2018) – Serial bankruptcy petitions to avoid foreclosure can constitute bankruptcy fraud. Multiple Chapter 13 bankruptcy filings in bad faith constitute fraud. Debtor's sentenced to 47 months in prison where claims increased from first filing to last filing by \$193,000, justifying finding that losses resulting from fraud exceeded \$150,000.

**HONORABLE STEVEN W. RHODES
CONSUMER BANKRUPTCY SEMINAR**

November 12, 2018

Case Law Update

Hon. James Boyd
Laura Genovich
Thomas DeCarlo

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Tax Claims - Stay and Discharge Issues

In re Thal, 2018 WL 2182304 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 “super discharge”. Debtor’s Plan proposed to pay IRS priority claim in full. IRS filed priority claim for balance due as of petition date and Debtor paid that claim in full during Chapter 13 case. After discharge, IRS levied against Debtor’s Social Security to recover unpaid post-petition interest and Debtor sought sanctions for violation of discharge injunction. While taxes themselves would not have been dischargeable, Section 1322(a)(2) requires only that Debtor pay all priority tax debt in full in deferred cash payments. Section 1322 does not require deferred cash payments to include interest or have present value as of date of confirmation equaling total amount of priority claim. Chapter 13 provides unique ability to pay tax liability without penalties and interest normally associated with tax debt. IRS willfully violated discharge injunction. Court ordered IRS to return all funds taken from Debtor post discharge but could not award damages or attorney fees unless Debtor exhausted administrative remedies under 26 USC Sections 7430 and 7433; and Court lacks jurisdiction to award punitive damages as waiver of sovereign immunity under Section 106 specifically excludes punitive damages.

U.S. v. Hunsaker, Case No. 16-0386 (D. Ore. 2016), *reversed*, 2018 WL 4122882 (9th Cir. 2018) – IRS violated stay by sending 4 letters to Debtors post-petition threatening collection efforts including garnishment of Social Security benefits. Section 106(a) waives sovereign immunity for violations of Section 362 to extent of damages suffered by Debtor but does not waive sovereign immunity for punitive damages. Damages for emotional distress are actual damages as to which sovereign immunity is waived, acknowledging split with *U.S. v. Torres*, 432 F.3d 20 (1st Cir. 2005). IRS willfully violated stay by continuing to made demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for “emotional distress” allegedly suffered as result of IRS conduct.

Contempt

Lorenzen v. Taggart, 888 F.3d 438 (9th Cir. 2018), cert petition filed, ____ US ____ (2018) – Does good faith belief that action does not violate discharge injunction preclude finding creditor in contempt even if discharge injunction did apply and creditor’s belief was unreasonable?

IRS v. Murphy, 892 F.3d 29 (1st Cir. 2018) – Creditors alleged reasonable belief that that was not discharge is not defense to action for contempt for violation of discharge injunction. Section 524 does not require that violation be “willful”, only that actions be taken intentionally and with knowledge of the existence of discharge. IRS violated discharge injunction in attempting to collect debts allegedly excepted from discharge under Section 523(a)(1)(A) based on Debtor’s alleged willful invasion of tax liabilities. Debtor brought adversary proceeding in Bankruptcy Court seeking declaration that that had been discharged and the Bankruptcy Judge granted summary judgment in favor of Debtor. Debtor then set sanctions for violation of discharge injunction and IRS alleged that any violation was based on good faith but mistaken belief that taxes have not been discharged. First Circuit concluded that good faith does not allow creditor to escape consequences of intentional violation of discharge injunction.

Suhar v. Gray-Morgan, 2018 WL 3956614 (Bankr. N.D. Ohio 2018) – Section 727(d)(3) allows Court to revoke discharge if Debtor refuses to obey lawful Order of Court pursuant to Section 727(a)(6). Standard is one of civil contempt which does not require willful or intentional refusal to obey Court Order. Plaintiff must only prove that Debtor had knowledge of Order; Debtor violated Order; and Order was specific and definite. Evidence established that Debtor had knowledge of Order directing turnover where Debtors response to adversary complaint confirmed that Debtor had knowledge. Debtor admittedly did not turn over funds as ordered and turnover Order was specific and definite as to amount to be turned over. Once moving party establishes prima facie case of contempt, Debtor has obligation to explain non-compliance. Impossibility or inability to comply notwithstanding all reasonable efforts is valid defense to action to revoke discharge but must be supported by evidence to explain noncompliance. Mere assertion of inability to comply without supporting evidence demonstrating efforts taken to comply is not sufficient.

In re Fisher, Case No. 18-45089 (Bankr. E.D. Mi. 2018) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense or to attempt to use stay unfairly as shield to avoid unfavorable result. Debtor did not list mortgage holder as creditor and mortgage holder, unaware of bankruptcy, continued to foreclose, acquired title at auction, and after expiration of redemption, sold property to third party without notice of bankruptcy filing.

Debtor unreasonably withheld notice of bankruptcy from mortgage holder where Debtor who allegedly was unaware of existence of mortgage would have been able to discover existence of mortgage by either cursory review of title history or review of foreclosure notices. Bank would be prejudiced if Debtor raised stay as defense as both foreclosure and third-party sale would be unwound subjecting creditor to potential claim by purchaser.

Passive Retention

Peterson v. Nu2u Auto World, 2018 WL 5729907 (D.N.J. 2018) - Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals hold that creditor violates automatic stay by not affirmatively and immediately return qualifying property of debtor seized pre-petition. Tenth and District of Columbia Circuit Court of Appeals find no violation of automatic stay if creditor merely maintains status quo in effect at time of petition. Court adopted minority position that passive retention for purposes of preserving status quo is not violation of stay. Section 362(a)(3) prevents “act to exercise control”, not merely exercise of already existing control. Had congress meant to impose affirmative duty to return property, it could have done so. Minority rule still prohibits creditors from taking post-petition action that would give them possession or control over property and allows for bankruptcy court to distribute assets to all claimants in orderly and just manner and allows damages for wrongful post-petition conduct. Debtor may move for turnover of property before a bankruptcy court that can consider creditor’s defenses to turnover. Affirmative duty exists to return property where creditor makes demand such as demand for proof of insurance and debtor complies with creditor’s request.

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

In re Peake, 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *Notice of Appeal Filed*, ____ WL ____ (N.D. Ill. 2018) - Passive retention of impounded automobile for unpaid parking tickets violates Section 362(a)(3). Section

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

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

Exemptions – Section 522(g)

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Section 522(g) allows Debtor to exempt property that is recovered by Trustee if initial transfer by debtor was not voluntary or involve concealment of property. Transfer of property from debtor- spouses as joint tenants to tenants by entireties was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. However, property as a whole was already property of estate and avoidance of entireties status did not amount to "recovery" of property. Recovery requires bringing into estate property that was not property of estate as of commencement of case, either by avoiding transfer of title held by third party or by avoiding lien and preserving lien for benefit of estate, effectively bringing into estate the lien itself. Accordingly, debtors could exempt property even after entireties was avoided as there was no "recovery" of property and as such Section 522(g) did not apply.

In re Sharp, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – In general, property of estate and Debtor's exemptions are both determined on petition date. Debtor cannot exempt property transferred by Debtor pre-petition as Debtor did not have any interest in that property as of the petition date and so the property did not become property estate. Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits

Debtor's ability to exempt recovered property to property that was not initially voluntarily transferred. Evidence indicated that pre-petition, Debtor voluntarily conveyed property to Debtor's mother, ostensibly to assist in obtaining homeowners insurance.

In re Hill, 2017 WL 1458860 (Bankr. W.D. Mi. 2017) – Section 522(g) allows a Debtor to claim an exemption in property which is recovered by the Trustee if the Debtor could have exempted the property had the property might not been transferred and the transfer was not a voluntary transfer by Debtor. If the Trustee avoids a voluntary transfer by the Debtor, Debtor is not entitled to claim to exemption in the recovered property. Transfer is “voluntary” if it is unconstrained by interference, not compelled by another's influence, done by design, intention or purpose, and with knowledge of essential facts. Involuntary transfers include transfers by operation of law such as execution of judgment, repossession or garnishment. Debtor's payment to Court Officer to avoid execution is not voluntary where Court Officer was acting pursuant to Seizure Order entered by State Court; Court Officer arrived at Debtor's residence with intent to seize personal property; and Court Officer afforded Debtor opportunity to pay \$4000 cash in lieu of having property seized. Fact that Debtor paid cash to Court Officer to avoid seizure does not make transfer voluntary. Court Officer waited at Debtor's residence while funds in amount necessary to satisfy payment demand were obtained; Court Officer followed Debtor to bank and waited in parking lot while Debtor cashed check to make payment; and Court Officer intended to carry out Seizure Order and was not going to depart empty-handed.

Exemptions – Amendments

In re Mendoza, 2018 WL 889346 (Bankr. D.N. Mex. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until the case is closed. If case is reopened after closing, courts have adopted three different interpretations of Rule 1009. One interpretation is that Rule 1009 prohibits amending exemptions in reopened cases. A second interpretation allows amendments freely as a matter of course in both open and reopened cases. The third line conditions right to amend after reopening on showing that failure to amend before case closed is due to excusable neglect. Court adopted third interpretation, finding that second interpretation renders rule's limitation on closing case illusory. Rule 9006 allows court to extend deadline to take any act if failure to act within time permitted is result of excusable neglect. Debtor did not offer any evidence to show excusable neglect to allow Debtor to

exempt proceeds of pre-petition personal injury action where Debtor did not disclose cause of action at any time before Trustee filed report of no distribution and Court closed case. Debtor offered no justification why Debtor did not properly disclose cause of action when required or any attempt to amend Schedules or disclose and exempt cause of action until after cause of action was discovered by US Trustee and Court reopened case to allow Trustee to administer cause of action.

In re Palmer, Case No. 12-33124 (Bankr. E.D. Mi. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until case is closed. Rule 9006 allows Court to extend any time in court’s discretion where failure to act was result of excusable neglect. Rule 1009 does not require automatic rejection of amendment in re-opened case, nor do rules allow amendments freely to be made in re-opened case. Result allows Court to avoid harsh result of prohibiting amendment outright while requiring Debtor to justify late filing.

Exemptions – Objections

Moyer v. Rosich, 2018 WL 1614214 (Bankr. W.D. Mi. 2018) – Rule 4003(b)(1) imposes short and unforgiving 30-day deadline for “garden variety” objection to exemptions. Rule 4003(b)(2) allows objection at any time prior to one year after closing of case if Debtor fraudulently asserted claim of exemption. Rule 4003(b)(2) does not create independent grounds for objecting to exemption and objection must be based on some other provision of the Bankruptcy Code or State Law that limits exemptions. Objecting party must show that facts do not support the claim of exemption and that the Debtor knew, *at the time Debtor claimed exemption*, that facts did not support that claim, and that Debtor subjectively intended to deceive trustee and creditors. Although Debtor’s ability to claim exemption resulted from fraudulent transfer of asset in first instance, Debtor did not “fraudulently” assert exemption where Debtor accurately described interest in Bankruptcy Schedules as Debtor’s principal residence; accurately listed interest as of petition date as tenants in entirety; and claimed exemption under applicable state law. While creation of exemption itself may have been fraudulent transfer, there was no indication that claimed exemption itself was fraudulent. Further, Court had previously entered Order disallowing exemption to extent of joint claims and Debtor paid joint claims consistent with that Order. Prior Order had preclusive effect where it had not been set aside, preventing Trustee from now arguing that property was not entirety property entitled to exemption.

Exemptions – Liens Impairing

William F. Sandoval Irrevocable Trust v. Taylor, 899 F.3d 1126 (10th Cir. 2018) – In evaluating potential lien avoidance of jointly owned property where only one owner files bankruptcy, impairment calculation uses value of other liens on property corresponding to Debtor’s percentage of ownership rather than full amount of lien. Calculation begins with value of Debtor’s interest in property and subtracts percentage of other liens, not total lien amount, joining First, Third and Ninth Circuits.

Exemptions – Administrative Expenses

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

Chapter 7 Trustee Fees

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

Sharkey v. Stevenson & Bullock, PLC, 2017 WL 5476486 (E.D. Mi. 2017) – Creditor who makes substantial contribution to Chapter 13 case by objecting to exemptions in case initially filed Chapter 7 that ultimately forced Debtor to convert and pay 100% to creditors entitled to administrative expense claim. Debtors originally filed Chapter 7. Attorney for Chapter 7 Trustee objected to exemptions and Debtor converted to Chapter 13. On conversion, Attorney for Chapter 7 Trustee became creditor in Chapter 13 case. Attorney for Chapter 7 Trustee substantially contributed as Chapter 7 would have provided no

distribution to creditors but for Attorney's efforts in having exemption disallowed and disallowance resulted in 100% repayment plan. Section 503(b)(3)(D) is not explicitly limited to Chapter 9 and 11 and does not prevent administrative awards for substantial contributions in Chapter 7 or 13.

Utilities

In re Garigan, 2017 WL 3669509 (Bankr. E.D. Mi. 2017) – Section 366 prevents utility from refusing or discontinuing service based on debt owed to utility for services rendered pre-petition. However, utility can refuse or disconnect service if Debtor does not, within 20 days of commencement of the case, furnish a deposit or other security for service post-petition. Debtor has obligation to pay deposit within 20 days and fact that utility does not contact Debtor to obtain deposit does not prevent utility from disconnecting service after 20 days if no deposit is paid. Debtor's Motion to prevent utility from disconnecting services acknowledged that Debtor did not pay deposit or even attempt to pay deposit or have any other contact with utility for more than 3 months, and then only after Debtor received shutoff notice. Utility acted within statutory right to shut off utilities without violating Stay or Section 366.

Voluntary Retirement Contributions

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

In re Reyes, Case no. 15-45618 (Bankr. E.D. Mi. 2015) – Debtor is not permitted to deduct voluntary retirement contributions in calculating disposable income over objection of creditor or Trustee.

In re Rogers, Case No. 12-32558 (Bankr. E.D. Mi. 2012) – Debtors cannot exclude post-petition voluntary retirement contributions in calculating disposable income.

Rule 7004

In re Drobney, 583 BR 700 (Bankr. W.D. Mi. 2018) – “Federally Insured Depository Institution” must be served as specified in Rule 7004(h). The term “insured depository institution” includes FDIC insured institutions as defined in section 3(c)(2) of the Federal Deposit Insurance Act; and credit union insured by FCUA. Rule 7004 requires service by certified mail directed to named officer of institution; or to attorney who has already appeared in Bankruptcy case. First class mail is not sufficient. Plan that proposed to cram

down lien held by Federally Insured Depository Institution could not be confirmed where Certificate of Service indicated service by first class mail only.

In re Nicholaus, 2018 WL 799152 (Bankr. N.D. Iowa 2018) - Rule 7004 requires service on the Internal Revenue Service by mail to the United States Attorney for the district in which the matter is pending and by mail on the Attorney General of the United States. Debtor served IRS at the address listed in the Proof of Claim. Service was not sufficient for the Court to acquire personal jurisdiction over the IRS, even though the IRS admitted that it actually received the Objection.

In re Clevinger, 2018 WL 4223251 (Bankr. N.D. Ohio 2018) - Rule in effect prior to December 1, 2017 required service of Objection on last address designated by creditor, not address listed on Proof of Claim. Rule 3007 as amended effective December 1, 2017, requires service on claimant by first-class mail to person most recently designated on claimant's original or amended proof of claim as the person to receive notice at the address indicated. Objection mailed to incorrect address does not render Order void if notice was reasonably calculated under circumstances to apprise interested parties of pendency of action and afford opportunity to object. Creditor did not deny receipt of Debtor's objection to claim and Court's Notice of Objection to Claim issued by clerk was sent by United States mail addressed to address in proof of claim, address in first notice of change of address and address in second notice of change of address and Court did not receive any of the mail returned as undeliverable. Even if Debtor's Objection was served on incorrect address, Court's notice was served on correct address and afforded ample time for creditor to respond such that service complied with constitutional due process requirements.

Late Filed Claims – Effect

In re Benner, Case No. 15-31477 (Bankr. N.D. In. 2018) (vacated at request of parties) – Rule 3002 requires claims to be filed within 90 days (now 70 days) from date first set for meeting of creditors. Claim filed on 91st day is untimely. Section 502 which states that a filed claim is deemed allowed applies only to timely filed claims. Claim filed beyond claims bar date is not valid claim and cannot be paid through Chapter 13 Plan as untimely filed proof of claim cannot be allowed. Trustee should not have made distributions

to secured creditor notwithstanding that Chapter 13 Plan provided for such payments.

Claims – Late Filed – Rule 3001(c)(6)

In re Schaller, Case No. 17-54117 (Bankr. E.D. Mi. 2018) – Prior to December 1, 2017, there was no basis for a Court in Chapter 13 to allow claim filed after claim bar date. Rule 3002(c)(6) added new exception where Debtor does not file a matrix identifying creditors and creditor does not have reasonable opportunity to file claim after learning of case. Debtor's original matrix did not include creditor although Debtor and Creditor were engaged in pre-petition litigation of claims and counterclaims. Creditor first learned of bankruptcy 10 days before bar date when creditor's state court attorney received e-mail from Debtor's state court attorney advising that counsel had just learned of bankruptcy case and that scheduled hearing needed to be adjourned. Creditor's state court counsel advised Creditor who hired Bankruptcy Attorney to investigate and file claim. Creditor filed claim 30 days later, 20 days after bar date. Creditor was not included on matrix preventing creditor from receiving timely notice, and creditor did not have reasonable opportunity to file claim before expiration of bar date. Although case pre-dated December 1, 2017, and Rule revision normally applies only to cases filed after effective date of rule, Advisory Committee notes indicated that Court had discretion to apply rule even in cases filed before December 1. Claim allowed as timely filed under Rule 3002(c)(6).

In re Lovo, 2018 WL 1568692 (Bankr. S.D. Fl. 2018) – Insufficient notice of filing is not cause to extend time to file proof of claim in Chapter 13 case. Authority to extend time in Chapter 13 is limited to exceptions specifically identified in Rule 3002(c). Rule 3002(c)(6) which expands exceptions to bar date for cases in which creditor received insufficient notice does not apply to Chapter 13 cases filed before December 1, 2017.

In re Norton, 2017 WL 354320, 2017 Bankr. LEXIS 197 (Bankr. N.D. Tex. 2017) – Court can allow late filed claim where Debtor files claim on behalf of creditor under Rule 3004, and Debtor's failure to file by the deadline is due to excusable neglect. While Courts cannot extend deadline under Rule 3002 which limits Court's ability to extend deadlines to specific situations identified in Rule 3002, Rule 3004 does not have that limitation. Rule 9006 applies and allows Court to extend deadline for excusable neglect which is equitable standard based on all relevant circumstances including danger of prejudice to the Debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within

the reasonable control of the movant, and whether the movant acted in good faith. Debtor listed creditor in original Schedules and treated creditor in Chapter 13 Plan. The Trustee made distributions to creditor for over 18 months consistent with terms of Plan. Debtor made all Plan payments and there was no question of Debtor's good faith. Trustee did not issue Trustee's Recommendation Concerning Claims which fell outside the norms of the District and TRCC which is normally filed by Trustee is intended to serve as reminder to counsel that claim needs to be filed. Oversight by Trustee in not issuing TRCC and by Debtor's counsel in not filing claim at earlier time were of little practical impact as Trustee had been paying mortgage company all along and Credit Union did not oppose Debtor's late-filing of proof of claim.

Informal Proof of Claim

Houston Bluebonnett, LLC v. JPMorgan Case Bank, Case No. 17-3270 (S.D. Tx. 2018) – To constitute informal proof of claim in Chapter 11 case, document must be in writing, writing must contain demand by creditor on Debtor's estate, writing must express intent to hold Debtor liable, informal proof of claim must be filed with Court, and based on facts of case it would be equitable to allow claim. Creditors and Debtor had been litigating for years prior to commencement of Chapter 11 case. One creditor had obtained judgment and second creditor had obtained a finding of liability, although Court had not yet fixed damages. On filing Chapter 11, Debtor removed State Court actions to Bankruptcy Court. Removal of cases to Bankruptcy Court constituted a written demand on Debtor's estate. Pleadings from State Court provided adequate notice of basis of claim even though pleadings did not assert specific amount of damages. Pleadings showed creditor intended to hold Debtor liable. Notices of removal were sufficient to satisfy requirement of filing with Bankruptcy Court. Allowing informal Proof of Claim would be equitable where to impacted creditors were only non-insider creditors and one of whom had obtained a judgment for the petition, such that disallowing claims would be "extremely harsh".

Chapter 13 – Confirmation of Plan

In re Shelton, 2018 WL 4404631 (Bankr. N.D. Ill. 2018) – Silence by secured creditor who is not being treated as required by Section 1325(a)(5) is not "Acceptance" of treatment. Section 1325(a)(5) is only provision in Chapter 13 that requires creditor to "accept" treatment which must mean more than

mere failure to object. Plan that proposed lower initial payment to secured creditors to allow counsel to be paid, with payments to secured creditors increasing after counsel's fees have been paid in full, violates requirement of equal monthly installments under Section 1325 (a)(5). Provision of Section 1326 allows for payment of attorney's fees before or at time of payment to creditors does not override equal monthly installment requirement of Section 1325(a)(5). In cases where there are no secured creditors, Section 1326 allows payment to attorney to occur before payment to unsecured creditors; when there are secured creditors, proposing lower initial payments, thereby delaying payments to secured creditors, cannot occur without consent of secured creditors. Plan sought to delay payment to secured creditors without attempt to procure creditor acceptance, heightens risks born by delay creditors solely to reduce risk and accelerate payment to counsel. Proposed Plan prioritizes counsel's desire to be paid over best interest of Debtor as delay in payment leaves secured debt unpaid for longer time, such that if Debtors case is dismissed, Debtor could be in worse position; and delay in confirming Plan to accrue funds to pay counsel's fees increases risk that preconfirmation default may occur. Risks and harms borne by Debtor are for no reason other than to prefer payment to counsel and is inconsistent with obligations to creditors of fundamental fairness

Briggs v. Johns, 2018 WL 4690394 (W.D. La. 2018) – Bankruptcy Court lacks authority to sua sponte deny confirmation of Plan. Espinosa requirement that Court review Plan to ensure compliance with Code applies only as to self-executing provisions of Code but does not require Court to ferret out every possible objection to confirmation. Self-executing provisions are those that apply without judicial involvement such as determination that debt survives discharge under Section 523(a)(8). Section 1325(b) governs Debtor's obligation to remit 100% of disposable income and is prefaced by "if the trustee or the holder of an allowed unsecured claims objects" such that objection is required to trigger Court's duty to review disposable income component of plan. While Court does have duty to sua sponte evaluate Debtor's good faith, that does not allow Court to deny confirmation based solely on Court's calculation of disposable income Good faith requires consideration of all facts of case including reasonableness of proposed plan; whether plan shows intent to abuse spirit of code; whether debtor intends to effectuate plan; whether there is evidence of misrepresentation, unfair manipulation or other inequities; whether case was part of underlying scheme of fraud with intent not to repay; whether plan reflects debtor's ability to pay; and whether creditor has objected.

Discharge – Completion of Plan Payments

Davis v. Holman, 2018 W: 5633989 (D. Kan. 2018) – Bankruptcy Court lacks discretion to deny Debtor discharge upon completion of Plan payments even though Debtor’s misconduct during course of case would have constituted cause for dismissal. Section 1328(a) says Court “shall” grant discharge of Debtor completes Plan payments, while Section 1307(c) says Court “may” dismiss. Court cannot exercise equitable powers to invade Debtor’s right to discharge upon completion of Plan payments, even where Debtors demonstrated disregard for bankruptcy process and abused provisions, purposes and spirit of Chapter 13 by withholding information regarding increased income, nondisclosure of bank accounts, and incurring debt without Trustee’s consent, all in violation of Plan and confirmation order.

Discharge – Direct Pay Secured Debt

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill. 2018) – Adopting minority approach, Debtor entitled to discharge where Debtor made all payments required to be made to Chapter 13 Trustee even if Debtor did not make all direct mortgage payments. Court cited long history of permitting discharges where all payments to Trustee are made even if direct payments on secured debts are not made. Definition of “all payments under the Plan” as including direct payments on secured debts is of “recent vintage” and it is not clear from language of statute whether direct payments are “payments under Plan”. Rule 3002.1 was not intended as impetus for dismissal without discharge but was instead intended to benefit Debtors by better ensuring fresh start. Interpreting all payments under Plan to mean all payments to trustee is consistent with Section 1329 which allows modification before completion of payments under the Plan, which is understood to be when Debtor pays to trustee full amount required by confirmed Plan. Section 1322 prohibits Plan from requiring payments over more than 60 months. Long term debt paid direct by Debtor necessarily extends beyond 60 months and so cannot be a payment under Plan. Remedy for secured creditor is not to deny discharge but to seek stay relief.

Kessler v. Wilson (Matter of Kessler), 655 Fed. Appx. 242 (5th Cir. 2016) Discharge can be granted only if all payments required by the Plan are made. Post-petition arrears on direct pay mortgage claim means Debtor did not make all payments required by Plan. Debtor not eligible for discharge.

Rooker-Feldman

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, 2018 WL 3453360 (6th Cir.

2018) - *Rooker-Feldman* doctrine prevents Federal Court from acting as Court of Appeals for state Court judgment. Doctrine is applied on a “claim-by-claim” basis. State Court Judgment of foreclosure precluded later Bankruptcy Court consideration of whether mortgage was enforceable as relief effectively asks Bankruptcy Court to vacate State Court judgment and clearly identifies State Court judgment as source of plaintiff’s injury. Bankruptcy Court would be required to reach conclusion precisely opposite from that reached by State Court on issue of whether mortgage lien attached. However, *Rooker-Feldman* does not preclude bankruptcy courts use of Section 544 “Strong-arm” power to avoid mortgage that was not perfected. Issue of whether mortgage is unperfected and avoidable is separate from issue of whether mortgage was valid in first instance. Determining avoidability under Section 544 does not require Court to review State Court conclusion that mortgage was valid as mortgage can be avoided even assuming that State Court correctly determined that mortgage constituted valid lien on real estate. State Court order made no findings regarding perfection as none were necessary to State Court judgment.

Philadelphia Entertainment. 879 F.3d 492

“Ride Through”

In re McCray, 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must “not retain possession”. Debtor who proposed to “pay and stay” did not propose to reaffirm or redeem. Debtor’s attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

Eligibility/Student Loans

In re Pratola, 578 B.R. 414 (Bankr. N.D. Ill. 2017), *reversed*, 2018 WL 4181498 (N.D. Ill. 2018) – Section 109(e) contains eligibility standards and mandates dismissal or conversion if debts exceed limits. Court does not have equitable power or discretion to allow case to continue where Debtor is not eligible. Student loan debt is included in calculation of unsecured debt and resulted in Debtor having debt in excess of Section 109 limits.

In re Petty, 2018 WL 1956187 (Bankr. E.D. Tx. 2018) – Section 109(e) limit eligibility under Chapter 13 to Debtors with non-contingent, liquidated

unsecured debts of less than \$394,725.00. Although Section 109 is not jurisdictional and may be waived, Court lacked authority ignore provisions when timely raised. Student loan debt is non-contingent and liquidated unsecured debt and cannot be ignored in determining eligibility.

In re Fishel, 2018 WL 1870368 (Bankr. W.D. Wis. 2018) – Section 109(e) is not jurisdictional but sets in motion series of events that allows court to dismiss case at later date. Section 1307 is discretionary and provides that court may dismiss or may convert but does not require dismissal or conversion. While lack of eligibility may constitute cause for dismissal Court is not required to dismiss where dismissal would be absurd or would produce result beyond scope of abuse which Congress was attempting to address. Debtor could make payments proposed in Plan and while Debtor has significant student loan debt, that debt would survive discharge. Allowing case to proceed is consistent with Congressional intention that Debtors who can pay portion of debt in Chapter 13 should be required to do so. Best interests of Debtor, estate, and creditors best served if Debtor permitted to pursue confirmation of her Chapter 13 Plan. Literal interpretation of statute would lead to absurd result where Debtor had no option. Debtor was above-median income with disposable income available to pay creditors and would not be able to rebut presumption of abuse leading to dismissal; but Chapter 13 attempt to repay some amounts raises argument that Debtor is ineligible for Chapter 13 relief. Only remaining option would be Chapter 11 which is inordinately expensive and cumbersome for consumer Debtor; would likely result in significant portions of funds that would otherwise be available to creditors being paid in administrative expenses and U.S. Trustee quarterly fees; additional formalities of Chapter 11, including disclosure statement and balloting, and attorney's fees, would eat up substantial amounts that would otherwise be available to creditors; which is neither in best interests of Debtor nor creditors.

Private Student Loans

McDaniel v. Navient Solutions, LLC, 2018 WL 4620632 (Bankr. D. Colo. 2018) – Private “Tuition Assistance” loans were not excepted from discharge under Section 523(a)(8)(A)(i) as loans were not made or guaranteed by governmental unit or non-profit; private loans did not constitute “educational benefit, scholarship or stipend” under Section 523(a)(8)(ii); and loans did not constitute “qualified education loans” under Section 523(B) as loans were not “qualified education loans”. Obligation is not “education loan” or “student loan” merely because obligation is labeled as such unless loan meets one or

more criteria set forth in Section 523(a)(8). Word “loan” is not used in Section 523(a)(8)(A)(ii) but is used in both sections 523(a)(8)(A)(i) which encompasses educational benefit overpayment or loan made, insured or guaranteed by governmental unit or nonprofit institution; and Section 523(a)(8)(B) which encompasses “qualified education loans”. Court would not stretch phrase of Section 523(a)(8)(A)(ii) regarding “obligation to repay funds received” to include loans where Section 523(a)(8)(A)(ii) references only educational benefits, scholarships or stipends. Student loan creditor violated discharge injunction by attempting to collect student loans which were correctly scheduled in Debtor’s Chapter 13 case and treated as general unsecured claims in Debtor’s Chapter 13 Plan. Student loan creditor violated discharge injunction by attempting to collect student loans which were correctly scheduled in Debtor’s Chapter 13 case and treated as general unsecured claims in Debtor’s Chapter 13 Plan.

Student Loans – Treatment

In re Quinn, 2018 WL 3012900 (Bankr. E.D. Mi. 2018) – Allowing separate classification of student loans coupled with favorable treatment helps Debtors and is also consistent with congressional intent to protect fiscal health of student loan programs. However, favorable treatment of student loans, even as long-term debt under Section 1322(b)(5) cannot unfairly discriminate. Whether treatment unfairly discriminates is based on totality of circumstances. One consideration that supports favorable treatment is to not force Debtor into default during term of Plan. Debtors’ Plan would result in continuing default student loan creditor would be paid as long-term debt and would receive between \$850 per month and \$1112 per month, but would remain in default on student loans because contractual obligation was \$1894 per month. If Debtors’ Plan is approved, student loan creditors would receive all available funds with general unsecured creditors receiving no distribution. Over the term of Debtor’s Chapter 13 Plan, Debtors would reduce the principal balance on the student loan by only \$215. If student loans are not separately classified, Debtors would owe \$6006 more than the petition date. Slight benefit to Debtors does not offset discriminatory impact on unsecured creditors, particularly where Debtor would remain in default of student loans yet remaining unsecured creditors would receive nothing. Chapter 13 Plan that diverted 100% of Plan funding to student loan creditors with no meaningful payment to remaining unsecured creditors unfairly discriminated. **Note: After Court issued opinion, Debtor modified Plan to pay minimum dividend to unsecured creditors of 10% of allowed claims (for a total**

distribution of approximately \$3000) following which Court confirmed Chapter 13 Plan.

Undue Hardship

Pierson v. Navient, 2018 WL 4849658 (Bankr. N.D. Ohio 2018) – *Brunner* requires that Debtor be unable to maintain, based on current income and expenses, minimal standard of living if forced to repay loans; additional circumstances exist such that state of affairs is likely to persist for significant portion of repayment period; and Debtor has made good faith efforts. Debtor demonstrated inability to pay or total household income was \$1161 per month for a household of 3; plaintiff's home lacked basic amenities such as functioning furnace and stove; Debtor had medical problems and no health insurance; and Debtor "wore his only nice shirt to Court". Fact that Debtor was engaged in Income Contingent Repayment Plan which had a zero-dollar payment did not preclude finding of financial hardship where participation in IBR is neither automatic nor permanent and loan extends over substantial period of time. Given plaintiff's tenuous living conditions and medical circumstances, annual administrative compliance cannot be shrugged off or taken for granted. Further, plaintiff had been told that participation in IBR had been terminated and Debtor was told he could not reapply. Further, at end of IBR, Debtor would be faced with large taxable income for forgiveness of debt which Debtor would have no ability to pay. Debtor's financial circumstances were likely to be permanent where Debtor had limited earning potential; and was only able to obtain employment doing yardwork and lawn care, auto-parts and grocery store stocking, cashier and sales associate at 7-Eleven; Debtor failed reading class preventing him from completing post-secondary education; Debtor struggled with learning disabilities and bipolar manic depressive disorder but has attempted to work whatever jobs he could obtain. Debtor could not be forced to move to a new location which would force Debtor to abandon his wife and his home; and last time Debtor attempted to do so, he ended up living out of his car. Even if Debtor was able to obtain additional employment, his monthly income would barely exceed \$2000 which is not sufficient to maintain a family of 3 particularly where additional income would likely reduce food assistance benefit that Debtor currently receives. Whether Debtor made good faith efforts to repay loan determined by whether Debtor's failure to repay loan is from factors beyond Debtor's reasonable control; whether Debtor has realistically used all available financial resources to repay loan; whether Debtor is using best efforts to maximize earning potential; length of time after loan first becomes due before

Debtor seeks to discharge debt; and percentage of student loan debt in relation to Debtor's total indebtedness. Plaintiff's inability to repay loans was not result of any fact or within his control. Notwithstanding dire financial circumstances, Debtor began making monthly \$5 payments to prevent wages being garnished and income tax refunds being seized. Plaintiff had attended college 20 years earlier leaving no opportunity for Debtor to read benefit of education. Debtor filed bankruptcy to address judgment against him by former landlord and resulting wage garnishments and while discharges to the loan would improve financial condition, that was not motivating factor in filing bankruptcy in first instance.

Appellate Standing

In re Pointe North, 890 F.3d 1188 (9th Cir. 2018). Failure to object/appear does not affect pecuniary interest and standing for purposes of appeal.

In re Wrightwood Guest Ranch, 896 F.3d 1109 (9th Cir. 2018): Agreed with *Pointe North* but also said that the appellants had forfeited their claims.

Attorney Fees

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

Howard v. Derham-Burk, Case No. 17-1064 (9th Cir. BAP 2018) - Attorney fees for services incurred during the course of Chapter 13 case that remain unpaid as of entry of discharge are discharged under Section 1328. After Debtor received discharge, attorney filed fee application primarily related to services in connection with Notice of Final Cure, and sought to recover fees directly from Debtor outside bankruptcy. Plan provided for payment of attorney's fees and costs as administrative expenses over life of Plan and included supplemental fees and expenses for services through term of Chapter 13 case. Although services did not relate to ongoing performance under Plan, services were necessary to ensure that lender did not undermine Debtor's

ability to obtain fresh start. Attorney could have modified Plan to arrange for and obtain compensation by alternate means before entry of discharge but did not do so. Although Debtor is not prevented from voluntarily paying approved fees, Counsel cannot require Debtor to make payments on discharged administrative expense claim.

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

Property of Estate – Product Liability Claims

Davis v. Nasuti, 2018 WL 2223076 (Bankr. N.D. Ga. 2018) – Personal injury claim is property of estate if claim is sufficiently rooted in pre-bankruptcy past. Cause of action for product liability for defective medical device arose when device implanted, even if Debtor was unaware of any issues and had no problems with device pre-petition. Discovery is not relevant to when cause of action arises, but ties only to Statute of Limitations. One year after Debtor filed Chapter 7, device broke, and Debtor made claim against manufacturer which settled for \$147,000. Proceeds of settlement were property of estate

which must be turned over to Trustee for distribution. *Compare Mendelsohn v. Ross*, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) reaching contrary conclusion involving same medical device.

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

Denial of Discharge False Oath – 727(a)(4)

Siewe v. Locci, 2018 WL 2111076 (11th Cir. 2018) – False Oath can include false testimony given under oath in connection with adversary proceeding to except debt from discharge. Creditor filed claim based on promissory note and filed complaint to except debt from discharge. Debtor defended, asserting that he owed creditor only \$9000 and that signature on note was forged. Bankruptcy Court found that Debtor lied multiple times in testifying that he did not signed note where 2 other witnesses testified at trial that they saw Debtor signed note; handwriting expert testified that signature was “probably” Debtor’s; and bank records show that creditor advanced at least part of loan to Debtor. Bankruptcy Court did not commit error in finding that Debtor “knowingly and fraudulently made false oath in connection with the adversary proceeding” warranting denial of discharge.

Denial of Discharge – Bad Timing – 727(8)

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

Denial of Discharge – Chapter 11

Um v. Spokane Rock I, 2018 WL 4371030 (9th Cir. 2018) – Section 1141(d)(3) denies discharge to Debtor if Plan provides for liquidation of all or substantially all property of estate; Debtor does not engage in business after consummation of Plan; and Debtor would be denied discharge under Section 727. Section 1141(d)(3) applies equally to individual and corporate Debtors. Debtors not eligible for discharge where Plan was “liquidating Plan” under which Plan Administrator would liquidate all estate assets other than assets which Debtors exempted. Fact that Debtors would retain membership interests in various limited liability companies did not amount to retention of property where membership interests were worthless because Plan required sale of all assets of LLCs leaving LLCs as worthless shells. Debtors would no longer engage in business where Debtors would no longer work for or continue in business which Debtors had operated prepetition but would instead become employees of entirely unrelated businesses owned and operated by other parties. Requirement that Debtor “engage in business” requires that Debtor at least continue to be engaged in business which is owned by Debtor, not merely employment in someone else’s business. Debtors conceded that Debtors would not be eligible for discharge under Section 727. As such, Debtors not eligible for discharge under Section 1141.

Student Loans – Defined

Ramani v. Romo, Case No. 17-2107 (Bankr. E.D. Mi. 2018) – “Student Loan” is defined as educational benefit overpayment alone made, insured or guaranteed by governmental unit or made under program funded in whole or in part by governmental unit or nonprofit institution; or obligation to repay funds received as educational benefit, scholarship or stipend; or any other educational loan that is qualified education loan. 26 USC Section 221 defines “qualified education loan” as any indebtedness incurred by taxpayer solely to pay qualified higher education expenses incurred on behalf of taxpayer, spouse or dependent; paid or incurred within reasonable period of time before or after indebtedness is incurred; and attributable to education furnished during period for which recipient was eligible student. “Qualified education loan” also includes any indebtedness used to refinance qualified education loan other than indebtedness owed to person related to taxpayer. 26 USC Section 267 defines “related” as brothers, sisters, spouse, ancestors and lineal descendants. Collateral estoppel applies in dischargeability proceedings and

bars re-litigation of issue where new action is between same parties or privies; earlier proceeding led to valid final judgment; issue in question was actually and necessarily determined in prior proceeding; and parties had full and fair opportunity to litigate issues. Prior State Court judgment in favor of Plaintiffs and against Defendant conclusively determined that obligation from Defendant to Plaintiffs arose out of Plaintiffs refinancing Defendant's student loan indebtedness; and conclusively determined that Plaintiffs were Defendant's in-laws which are not included in definition of "related". State Court judgment resulted from action between same parties. Complaint in state Court action alleged all facts necessary to establish judgment as well as all elements under Section 523(a)(8) and 26 USC Section 2221(d)(1). Defendant had full and fair opportunity to litigate issues but failed to do so resulting in default judgment.

Duties of Trustee

New Products Corporation v. Tibble, 2016 WL 245908 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 4216081 (W.D. Mi. 2017), *aff'd*, 2018 WL 1916216 (6th Cir. 2018) – Trustee has duty to protect assets consistent with ordinarily prudent person in conduct of private affairs under similar circumstances and with a similar object in view. Trustee should not spend money that would otherwise go to unsecured creditors to prop up collateral of particular creditor. Trustee does not have duty to protect asset where liens on asset far exceed value, as any money expended would solely benefit secured creditor while depleting the few assets of estate. Trustee not liable to secured creditor for diminution in value of building where, after Chapter 7 filed, Trustee did not secure building, allowing "scrappers" to remove wires, steel beams, piping, light fixtures, plumbing fixtures, furnaces and support columns. As of petition date, building value was less than half of what was owed on secured claim. Although "scrapping" undoubtedly adversely affected value of property, trustee not liable for failure to secure where only secured creditor would have benefitted at expense of unsecured creditors and secured creditor had other remedies available to it including stay relief and motion to compel abandonment for creditor to protect its rights.

Pre-Petition Credit Counseling

In re Wilson, 2018 WL 528 88 90 (Bankr. N.D. Ohio 2018) – Debtor "substantially complied" with requirement for credit counseling. Evidence indicated that Debtor completed counseling prior to commencement of case but Debtor was unable to obtain certificate of completion due to record-keeping error by credit counseling provider. Section 521 requires only that

Debtor certify that Debtor has completed course but does not require certificate that that Debtor actually received prepetition counseling. Evidence indicated that Debtor obtained prepetition counseling and filed Section 521 certificate describing services received. Evidence did not warrant dismissal of case where record included no indication that Debtor filed case in bad faith; Debtor filed Section 521 certification asserting that Debtor received prepetition counseling only to later discover that credit counseling agency did not properly record completion of counseling; and that Debtor took all reasonable steps to comply with statutory requirement. Debtor's Section 521 certification confirmed that Debtor received counseling within 180 days prior to commencement of the case and record provided no indication that any party would be prejudiced by allowing case to proceed. Case presented "unique" equitable factors where Debtor had done her best to comply with requirements including actually receiving counseling.

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

Bankruptcy Fraud

U.S. v. Williams, 2018 WL 2709457 (7th Cir. 2018) – Serial bankruptcy petitions to avoid foreclosure can constitute bankruptcy fraud. Debtor filed five separate Chapter 13 petitions to stop condominium Association from proceeding with addiction. In each case, Debtor file Chapter 13 petition but did not file completing documents and did not make payments. Debtor also temporarily transferred title of unit to friend for no consideration who then filed his own Chapter 13 petition which was also dismissed. Multiple Chapter 13 bankruptcy filings in bad faith constitute fraud. Debtor's sentenced to 47 months in prison where claims increased from first filing to last filing by \$193,000, justifying finding that losses resulting from fraud exceeded \$150,000. For purposes of sentencing enhancement, losses not limited to those suffered by condominium Association because fraudulent bankruptcy filings automatically precluded other creditors from collecting debts.