

issuance of stay after notice of appeal is filed.

Murray v. Williams, 2017 WL 2469162 (E.D. Tn. 2017) – Request for Stay must be brought in Court that issued Order being appealed.

In re Pertuset, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Rule 8005 provides that Motion for Stay Pending Appeal is to normally be brought in bankruptcy court although moving party can request stay directly from appellate court if movant can show why the relief was not obtained from the bankruptcy court in the first instance.

In re McNerney, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Rule 8005 allows bankruptcy court to suspend or Order the continuation of proceedings in bankruptcy case or make any other appropriate Order so as to protect the rights of the parties.

Global Technovations, Inc. v. Onkyo USA Corp., Case No. 03-5078 (Bankr. E.D. Mi. 2011) – Bankruptcy Court lacks authority to issue stay pending appeal of matter to 6th Circuit Court of Appeals. Stay of matter appealed to Sixth Circuit can be entered only by District Court that issued decision being appealed.

In re Scarborough, 2010 WL 2893626 (3d Cir. 2010) – Court lacks jurisdiction to consider stay pending appeal where court does not have jurisdiction over appeal itself. Debtor appealed Bankruptcy Court decision to dismiss case. Debtor sought stay from Bankruptcy Court which denied Motion. Debtor then sought stay from District Court where appeal was pending, which also denied Motion. Debtor then requested stay from Third Circuit Court. Court dismissed Motion as Circuit Court did not have jurisdiction to rule in appeal pending before District Court.

13.59 Procedure – Rule 8007

Minix v. Stone, 2019 WL 1676007 (E.D. Ky. 2019) – Motion for Stay Pending Appeal must be first sought in Bankruptcy Court unless moving party shows that seeking relief in Bankruptcy Court would be impracticable or that motion was filed in Bankruptcy Court but has not yet been ruled upon or ruled upon the motion without setting forth the reasons for ruling. Motion to hold appeal in abeyance filed in District Court before Bankruptcy Court entered judgment being appealed did not constitute motion to stay judgment and moving party did not show that moving first in Bankruptcy Court would be impracticable. Court would not hold appeal in abeyance pending outcome of appeal of underlying state Court judgment merely because Bankruptcy Court judgment accepting debt from discharge was based on collateral estoppel effect of state Court judgment. State Court judgment had not been altered, modified or stayed pending appeal and remain fully valid and binding and entitled to full collateral estoppel effect.

13.60 Elements of Stay

Bavelis v. Doukas, 2019 WL 5307070 (S.D. Ohio 2019) – Court has broad discretion in deciding whether to stay action pending appeal, taking into account (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; with first two factors holding most importance. Determining potential harm of granting stay versus harm of denying stay, Court will consider substantiality of injury alleged, likelihood of occurrence, and adequacy of proof provided, but injury must be irreparable and injuries in terms of money, time or energy necessarily expended absent stay are not irreparable. Appellant did not evidence any meaningful chance on appeal where issue raised had already been rejected by both Bankruptcy Court and District Court in prior appeal. Debtor did not timely demand jury trial and later amendment of complaint did not re-start time limit where amended complaint did not introduce any new issues of facts and turned on same facts and areas of dispute raised in initial complaint. Appellant did not introduce any evidence on issue of potential harm if stay is not granted and there was on assertion of public interest being implicated in appeal or affected by imposition or denial of stay.

Allcare Medical Services, LLC v. Buzulencia, 2019 WL 4741679 (Bankr. N.D. Ohio 2019) – Party seeking stay pending appeal must demonstrate movant will suffer irreparable harm absent stay; granting stay will not harm others; and stay is consistent with public interests. Trustee did not demonstrate likelihood of success on merits of appeal from Court Order determining that Trustee's rights in Debtor's LLC Membership interest were no greater than Debtor's rights in LLC interest as of petition date and that extent of interest is governed by State law. Trustee also sought to appeal issues that were not raised or decided in Bankruptcy Court and which would not be proper for appeal. Trustee did not make showing of irreparable harm where LLC interest was property of estate and Trustee retained rights to value of LLC interest, where parties were admittedly working in good faith consistent with LLC Operating Agreement. Although opposing party would not likely be damaged if stay is implemented, there was no evidence that imposing stay would advance public interest, where only public interest would be resolving litigation and concluding bankruptcy case as expeditiously as possible.

In re Smith, 2019 WL 3774152 (Bankr. N.D. Ohio 2019) – In deciding motion for stay pending appeal, Court must consider likelihood that party seeking stay will prevail on merits; likelihood that moving party will be irreparably harmed absent stay; prospect that others will be harmed if Court grants stay; and public interest in granting stay. Appeal of order vacating Debtor's voluntary dismissal based on alleged lack of standing of moving party was debatable where record established that movant held recorded assignment of mortgage giving movant sufficient pecuniary interest. Foreclosure proceedings had been ongoing for 14 years. Debtor had filed numerous motions, appeal multiple decisions, and filed multiple separate actions without any Court deciding that movant did not have right to pursue foreclosure. Court also concluded that Debtor does not have absolute right to voluntarily dismiss where Debtor is guilty of misconduct or bad faith as evidenced by fax in this case. Whether moving party will be irreparably harmed depends on substantiality of injury alleged; likelihood of occurrence; and adequacy of proof provided,

with emphasis being on “irreparable”. Motion for stay pending appeal merely alleged potential unnecessary expenditure of resources which do not constitute irreparable harm. Allowing order to remain in place will prevent Debtor from being able to stop foreclosure sale by filing another accuracy petition which constitutes substantial injury, but injury is not irreparable where foreclosure had been pending for 14 years; Debtor had no equity in property; and Debtor’s income rendered implausible any attempt to cure default. Granting stay would magnify harm being suffered by creditor where Debtor was in possession of real estate but not making payments. Appeal did not present any substantial public interest beyond maintaining integrity of bankruptcy system which would not be furthered by imposing stay pending appeal.

In re K&D Industrial Services Holding Co., 2019 WL 2281618 (Bankr. E.D. Mi. 2019) – Party seeking stay of Section 363 Sale Order must show likelihood of success on merits; likelihood that moving party will be irreparably harmed absent stay; prospect that others will be harmed if stay is imposed; and public interest. Fact that issues presented were complex and Court needed week post-hearing to issue decision did not indicate substantial likelihood of success. Cases and authorities cited in Motion were same ones raised in connection with Section 363 Motion

In re Thomas, 2019 WL 1165023 (W.D. Tn. 2019) – Stay pending appeal under Federal Rule of Bankruptcy Procedure 8007 is vested in discretion of Court based on consideration of whether stay applicant has made strong showing of likelihood of success on merits; whether applicant will be irreparably harmed absent stay; whether issuance of stay will substantially injure other parties; and public interest. Mere possibility of success on merits is not sufficient to justify stay. Appellant’s Motion did not demonstrate substantial likelihood of success on merits where order being appealed was order appointing Chapter 11 Trustee which is reviewed for abuse of discretion. Bankruptcy Court found cause to appoint Chapter 11 Trustee based on severity and extent of acrimony between Debtor and creditors and a long and contentious history of litigation between Debtor and creditors warranting appointment of Trustee. Bankruptcy Court found that appointment of Trustee was in best interest of creditors and a state where Chapter 11 case had been pending for three years without Court approval disclosure statement or confirmable Plan; Debtor’s counsel had withdrawn; and Debtor and creditors were engaged in lengthy litigation requiring change of leadership, direction and purpose. Appellant also did not demonstrate that denial of stay would result in certain and immediate harm rather than harm which is speculative or theoretical, including proof that harm has occurred in past and is likely to occur again. Stay pending appeal would leave Debtor in place as Chapter 11 Debtor-in-possession with full statutory powers which could result in harm to other parties without likelihood of progress in Chapter 11 case. Appellant did not demonstrate any public interest that would be served by granting of stay where appointment of Chapter 11 Trustee would move bankruptcy case forward and allow disinterested Trustee to carry out statutory duties thereby furthering judicial objectives.

In re Skymark Properties II, LLC, 2019 WL 1096705 (Bankr. E.D. Mi. 2019) – Court has discretion when considering Motion for Stay Pending Appeal. In considering Motion for Stay Pending Appeal, Court will consider the likelihood that moving party will prevail on merits of appeal; likelihood that moving party will be irreparably harmed absent stay; prospect that others will be harmed if Court grants stay; and public interest. Likelihood of success on appeal is most important factor. While moving party need not always establish high probability of success, probability of success is inversely proportional to amount of irreparable injury that movant will suffer, and movant must always demonstrate more than mere possibility of success regardless of irreparable harm. Harm is not “irreparable” based on money, time or energy necessarily expended in absence of stay; and presence of compensatory or other corrective relief at later date ways against finding of “irreparable harm”. Motion denied where appellant had very low likelihood of success on merits for reasons stated in Court’s written opinion dismissing case. Only “harm” absent stay would be to permit secured creditors to complete foreclosure proceedings has Debtor retained right to contest foreclosure or sale of property at any valid ground under state law and would have ample opportunity outside bankruptcy to preserve equity in property. Stay pending appeal would unduly limit discretion and options of State Court Receiver in exercising judgment, subject to state Court supervision, on how to maximize value of property and would unduly delay creditors from exercising rights under state law to collect debts.

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.

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.

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 supersedeas 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.

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.

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.

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.

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 raised 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.

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.

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.

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.

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.

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 Debtor, and nothing in Section 542 excludes "disputed" property. Any stay would irreparably harm not only 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.

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.

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.

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.

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 the 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.

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.

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.

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.

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.

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.

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.

Silagy v. Protz, 2014 WL 1652426 (Bankr. N.D. Ohio 2014) – Movant must demonstrate likelihood of success on appeal; irreparable harm if 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 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.

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.

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) Debtor's challenges to the foreclosure judgment are outside of the court's jurisdiction and are best addressed by the State Court.

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.

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.

In re Pertuset, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Stay pending appeal requires consideration of likelihood of success on merits of appeal; likelihood that moving party would be irreparably injured if the stay is not granted; prospect that others will be harmed if stay is granted; and public interest in granting or denying stay. Likelihood of success does not require high probability of success but must show, at a minimum, serious questions going to the merits of the case and more than just an assertion of expectation of success. Motion for stay did not evidence likelihood of success on merits where Motion merely reasserted same legal arguments that were considered by court in the first instance. Irreparable harm must be certain and immediate. Generally, resumption of collection activities alone is not irreparable harm. Debtor demonstrated risk of irreparable harm if Order dismissing Chapter 12 case is not stayed, as Debtors face imminent foreclosure of farm and repossession of farm equipment, where several creditors held judgments against Debtors and there was a pending foreclosure action. Risk of loss of farm is beyond normal risk faced in collection activities, where money can be returned to Debtor if dismissal were overturned. Stay would cause harm to creditors who would be further delayed in efforts to collect debts or to enforce judgments entered prior to commencement of bankruptcy case. Creditors have already faced substantial delay in receiving payment and Debtor did not propose collateral or other surety bond to protect against harm resulting from additional delay. While court acknowledged that public policy did not favor dispossessing Debtors from their assets, Court noted that Debtors' conduct in Chapter 12 proceeding evidenced intent to delay and hinder creditors rather than a good faith effort to reorganize and provide fair repayment. Debtors were afforded two opportunities to promulgate confirmable Plan and failed to do so. Public policy did not support stay under

these circumstances.

In re McInerney, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Determination as to whether to enter stay pending appeal requires consideration of (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed absent stay; (3) harm that may be suffered by others if court grants stay; and (4) public interest in granting stay. Factors are not prerequisites but are interrelated considerations that must be balanced. Degree of likelihood of success is inversely proportional to amount of irreparable injury that moving party would suffer without the stay – the greater the harm, the lower the burden of showing likelihood of success. Debtor not likely to prevail on appeal of Order converting case where Notice of Appeal designated only the Order Denying Reconsideration and did not designate the Order of Conversion as an Order on appeal. Even if Appellate Court construed Notice of Appeal as including both the Dismissal Order and the Order Denying Rehearing, the standard on appeal is abuse of discretion, which is very high burden that Debtor was not likely to achieve given bankruptcy court's detailed Order converting the case in the first instance. Debtor failed to demonstrate any irreparable harm if no stay is implemented. Debtor's only argument was that if the case proceeds in Chapter 7, the trustee may compromise claims for less than their true value. Debtor's arguments were mere speculation, particularly where Debtor had lost at State Court on the alleged claim prior to commencement of bankruptcy case, and there was no indication that the Chapter 7 Trustee would compromise the claim in any way. Stay denied.

Asaro v. McClarty, 2012 WL 4903488 (E.D. Mi. 2012) – Whether to issue stay pending appeal depends on: 1) whether applicant has demonstrated a likelihood of success on the merits; 2) whether applicant will be irreparably injured absent a stay; 3) whether issuance of stay will substantially injure other interested parties; and 4) whether public interest would be served by issuing stay. Bankruptcy Court entered Order compelling Debtors to cooperate with the Trustee in the sale and disposition of property of the estate. On appeal, Debtors failed to demonstrate any likely success on merits, as court did not Order sale of property. Debtors did not demonstrate any irreparable injury would result as trustee has not sold, nor attempted to sell, property or assets. Other parties could be injured by delay if trustee is unable to expeditiously market property as delay creates risk of foreclosure or devaluation of property. Public interest would not be served if Debtors were able to continue to refuse to cooperate with or assist trustee.

In re Holstine, 458 BR 392 (Bankr. E.D. MI. 2011) – Stay pending appeal requires demonstration of strong showing of likelihood of success on appeal; irreparable harm if proceedings are not stayed; whether issuance of stay would cause substantial harm to others including appellee; and whether public interest would be served by stay. Appellant did not demonstrate likelihood of success on merits of appeal from Order overruling objection to exemption for workers compensation payments. Workers Compensation award that Debtor had received and deposited into bank account was traceable to payment in compensation for loss of future earnings that is exempt to extent reasonably necessary for support of Debtor and dependents. Section 522(d)(11)(E) is not limited to tort recoveries and does not exclude other sources of replacement income such as workers compensation. Appellant also failed to demonstrate irreparable harm. If Appellant prevails on appeal, Debtor will be required to pay money to appellant. Monetary harm is not irreparable injury, even if delay would allow Debtor to dissipate funds and render Debtor unable to answer to any judgment.

In re Rahim, 2011 WL 833804 (E.D. Mi. 2011) – Motion for stay of dismissal of Chapter 7 case denied. Debtor failed to demonstrate any likelihood of success on merits where Bankruptcy Court dismissed case as abuse where Debtors had income of \$39,000 per month and claimed expenses of \$39,000 per month including 3 homes, 3 luxury automobiles, and expensive private school tuition. Debtors also failed to demonstrate irreparable harm. Possible future collection activities by creditors are not "irreparable" harm. Creditors would suffer substantial harm from further delays in enforcing claims. Public interest would not be furthered where underlying bankruptcy case substantially challenged the integrity of the bankruptcy process.

In re Seidel, 443 BR 411 (Bankr. S.D. Ohio 2011) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Attorney failed to demonstrate basis for stay of Order that required Attorney to disgorge to Debtor's credit card issuer the fees and costs which he received through credit card charge, (2) suspended the "no look fee" for Chapter 13 cases filed by Attorney, (3) required Attorney to complete six hours of bankruptcy ethics instruction satisfactory to the Court, (4) required Attorney to submit to the Court a list of all bankruptcy clients from the last five years who paid attorney's fees or costs using a credit card, and (5) directed the United States Trustee to investigate Attorney's practice to determine whether further action should be taken. Motion for stay denied where attorney failed to demonstrate any of required elements.

Hock v. Stevenson, 2011 WL 2173837 (E.D. Mi. 2011) – Motion for Stay Pending Appeal denied where appellant, Buyer at foreclosure sale, lacked standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. Appellant could not demonstrate any likelihood of success where Appellant did not even have standing to prosecute the appeal.

In re Forum Health, 2011 WL 1680417 (Bankr. N.D. Ohio 2011) – In deciding whether to grant stay pending appeal from earlier Order of bankruptcy court allowing Debtors to voluntarily dismiss their Chapter 11 cases, court would consider the following: (1) likelihood that the party seeking stay would prevail on merits of appeal, (2) likelihood that moving party would be irreparably harmed absent a stay, (3) prospect that others would be harmed if stay were granted, and (4) the public interest in granting a stay; however, these factors were not prerequisites that had to be met, but interrelated considerations that had to be balanced together. Court denied stay where creditors could not prove harm would result if stay was denied and granting stay would have effect of forcing not-for-profit Debtor to remain in case involuntarily in violation s letter and spirit of Bankruptcy Code which

exempts non-profit corporations from involuntary petitions.

In re Greene, 2011 WL 1500120 (Bankr. E.D. Tn. 2011) – Request for Stay is based upon the same factors traditionally considered concerning preliminary injunctions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Creditor could not demonstrate likelihood of success in appeal that voided lien where lien was never properly recorded prior to commencement of bankruptcy case. Creditor also failed to prove irreparable harm where Debtor has not sought permission to sell property. If judgment is reversed on appeal, property will still be subject to Bankruptcy Court jurisdiction for purposes of preserving creditor's alleged mortgage interest.

In re Mains, 451 BR 428 (Bankr. W.D. Mi. 2011) – Stay of proceedings pending appeal is to be determined based on what best protects interests of all parties. Debtor seeking to stay dismissal of Chapter 13 case pending appeal must show strong or substantial likelihood of success; that Debtor will suffer irreparable harm if the proceedings are not stayed; whether the stay would substantially injure other parties; and where the public interest lies. Debtors failed to demonstrate substantial likelihood of success. Although issue of whether Debtors must include Social Security income for funding of Plan has not been conclusively determined in Sixth Circuit, substantial body of case law exists to hold that good faith requires Debtors to contribute Social Security notwithstanding exclusion from CMI calculation.

In re Amir, 2010 WL 3522474 (Bankr. N.D. Ohio 2010) – Debtor's Motion for Stay of BAP decision pending appeal to Sixth Circuit must be presented to BAP for consideration. Bankruptcy court lacks authority to stay BAP opinion pending appeal. To extent Debtor's Motion seeks to stay Bankruptcy Court Order that gave rise to BAP decision and to subsequent appeal to Sixth Circuit, Motion denied where Appellant failed to demonstrate any likelihood of success on merits. Appellant failed to timely file objections to claims. Debtor's belated amended objections failed to proffer evidence or a legal basis to defeat *prima facie* validity of a claim under Rule 3001(f). All of the grounds alleged by Debtor were presented to, and rejected by, the BAP in its August 5, 2010. Absence of a stay of decision disallowing objections to claims will not irreparably harm Debtor where appeal will be decided before any funds are ever distributed to creditors. Public interest would be better served by having case go forward without a stay.

In re Grass, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Bank that admitted it had violated automatic stay did not present any likelihood of success on merits of appeal of Order imposing sanctions for stay violation. Denial of stay posed no risk to Bank where property could not be sold without notice to creditors and approval of court, which would afford Bank opportunity to be heard on issue. Granting of stay would adversely affect Debtor and remaining creditor body as stay would prevent confirmation of Debtor's Chapter 13 Plan and would delay commencement of payments to creditors.

In re Davis, Case No. 10-40065 (Bankr. E.D. Mi. 2010) – Rule 8005 allows court to stay Order pending appeal if appellant has a strong or substantial likelihood of success on appeal and appellant would suffer irreparable harm if the stay is not granted, and where other parties would not suffer substantial injury from stay. Debtor's Motion denied where Motion failed to offer any explanation as to why Debtor did not respond to Creditor's Motion for Relief From Stay, thereby admitting essential elements of request for relief. Debtor's appeal was predicated on argument that sheriff sale was not conducted by a person duly appointed to conduct sales, but Debtor failed to produce any support for this allegation. Debtor would not be prejudiced as effect of Order is only to grant stay relief, and Debtor is free to assert any defenses he has in the State Court proceeding. Granting stay would merely enable Debtor to continue to unnecessarily delay Creditor and increase litigation expenses.

Syllabi v. US Bank, N.A., 2010 WL 2817187 (Bankr. N.D. Ohio 2010) Factors for Court to consider in evaluating Motion for Stay Pending Appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. The movant bears the burden of proof, providing specific facts and affidavit supporting assertions that these factors exist. Defendant's conclusory statement that "it has substantive issues of merit to present on appeal regarding the specific acknowledgment at issue in this adversary proceeding" falls short of demonstrating Defendant is likely to succeed on the appeal. Defendant's failure to show that it is likely to succeed on the appeal is not fatal because the balancing of the factors could still tip in Defendant's favor. Defendant's argument concerning irreparable harm focus on the loss of rights as a secured creditor, more specifically its inability to drive the foreclosure process does not demonstrate harm that is both certain and immediate, rather than speculative or theoretical. If Trustee sells the property while the appeal is pending, Defendant's lien will attach to the proceeds. Only upon final disposition of the appeal will the proceeds be distributed, thereby protecting Defendant's secured status. Defendant's arguments focused on speculation and conjecture, not specific and irreparable harm. The stay could hinder other creditors because there will be no immediate distribution regardless of whether the stay is approved. Delaying the sale could mean a decline in value, either through market forces or deterioration. Any expenses incurred in maintaining or securing the property would be funded by the estate, depleting resources. Motion for Stay denied.

Spring Creek Airpark, Inc. v. Roswell Holding, LLC, 2010 WL 2573745 (W.D. Ky. 2010) - A motion for a stay of the judgment, Order, or decree of a bankruptcy judgment ordinarily be presented to the bankruptcy judge in the first instance. Only after the bankruptcy court has failed to grant the stay or has failed to grant it on terms acceptable to the appellant that the appellant may seek relief in the district court in accordance with the provisions of Rule 8005. Court must consider the same four factors that are

traditionally considered in evaluating the granting of a preliminary injunction - (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. A movant seeking a stay pending review will have greater difficulty in demonstrating a likelihood of success on the merits and must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Movant need not establish a high probability of success on the merits but must movant show serious questions going to the merits. Appellant not entitled to stay of Order Granting Relief From Stay. Decision to lift stay is committed to the discretion of the Court, and will be overturned only upon a showing of abuse of discretion.

Countrywide Home Loans, Inc. v. McDermott, 2009 WL 3259131 (N.D. Ohio 2009) – Appellate Court has authority to stay enforcement of a judgment to preserve the rights of the parties during the pendency of the appeal and to ensure that the Appellate Court can responsibly fulfill its role in the judicial process. A stay is an exercise of judicial discretion and not a matter of right. Court must consider : (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Bankruptcy Court sanctioned creditor who filed Proof of Claim and Objection to Confirmation in Chapter 13 Case notwithstanding that Creditor had satisfied loan more than 18 months prior to the Petition Date. Bankruptcy Court Order required Creditor to submit a four-page Worksheet, created by the bankruptcy judge, whenever Creditor submits a proof of claim in any case before that judge; and to file the same Worksheet as a supplement to all proofs of claim Creditor had filed in previous cases pending on that judge's docket. Creditor made “compelling arguments” that the bankruptcy judge exceeded her authority under any statute and/or federal or local bankruptcy rule to require Creditor to use a Worksheet that arguably amounts to an improper judicial amendment/revision of Official Bankruptcy Form 10. If a stay is not granted and Creditor ultimately prevails on its appeal, irreparable harm will have been suffered by Creditor as Creditor will have been required to implement a new protocol tailored specifically for cases pending before a single bankruptcy judge at considerable cost. Stay will be of relatively short duration as District Court “is committed to resolving the bankruptcy appeal as soon as possible after the briefing is complete”.

Indiana State Police Pension Trust v. Chrysler, LLC., 129 S.Ct. 2275 (2009) – Supreme Court would not stay Order approving sale of assets pending appeal. In determining whether to grant a stay, Court considers whether the applicant has demonstrated (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay. In a close case Court will also balance the equities and assess the relative harms to the parties as well as the interests of the public at large. “A stay is not a matter of right, even if irreparable injury might otherwise result.” Party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

In re Noble International, Ltd., 2009 WL 1607704 (E.D. Mi. 2009) – In determining whether to grant a stay in a bankruptcy appeal, the Court must balance four factors: (i) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (ii) the likelihood that the moving party will be irreparably harmed absent a stay; (iii) the prospect that others will be harmed if the Court grants the stay; and (iv) the public interest in granting the stay. Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time.

13.61 Scope of Stay

In re Noble International, Ltd., 2009 WL 1607704 (E.D. Mi. 2009) – Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time. Stay limited to actual closing of the sale and parties are free to take all steps and perform due diligence and conduct any necessary discovery in effort to prepare for closing.

13.62 Effect of Failure to Obtain Stay – Generally

Keats v. Bullitt County Sanitation District, 2019 WL 5607680 (Bankr. W.D. Ky. 2019) – Federal Rule of Civil Procedure 69, incorporated by reference in Bankruptcy Rule 7069, allows collection of money judgment by execution unless Court directs otherwise. Garnishment must accord with laws of state where court is located subject to provisions of Rule 69. Trustee who held final judgment entitled to garnish funds held in Defendant’s account notwithstanding pendency of appeal as Defendant had not posted bond or otherwise obtained stay of Judgment. State Statute exempting local government from attachment or execution did not apply as Defendant was not city, county, urban-county government, consolidated local government, charter county government, or unified local district, but was instead special purpose governmental entity organized as sanitation district that did not carry out functions integral to state government and did not act in governmental capacity.

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.

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.

13.63 Effect of Failure to Obtain Stay – Mootness

In re Teixeira, 2019 WL 1529309 (Bankr. N.D. Ohio 2019) – Relief based on newly discovered evidence requires exercise of due diligence in obtaining information before trial and that evidence be material and controlling and clearly would have produced different result. Rule 60 cannot be used to reverse or modify order approving sale of property under Section 363 where property is sold to good faith purchaser and party did not appeal sale order or obtain stay. Good faith purchaser is one who purchases assets for value in good faith without notice of adverse claims. Party asserting lack of good faith must demonstrate fraud or collusion between purchaser and seller or other bidders or that purchaser's actions were effort to take grossly unfair advantage of other bidders. Emails between Chapter 7 Trustee, Debtor's bankruptcy counsel and Debtor's state Court counsel in effort by Chapter 7 Trustee to investigate potential undisclosed assets did not constitute collusion. Assuming that emails constituted newly discovered evidence, communications would not have produced different result as Bankruptcy Court afforded full opportunity to any other potentially interested person to submit competitive bids but neither Debtor nor any other party connected with Debtor made any better offers. Although Debtor indicated that he could easily find buyer would be willing to offer more, Debtor did not produce any buyer even after having been given additional time by Court to do so.

Mission Product Holdings, Inc. v. Old Cold, LLC, 879 F.3d 376 (1st Cir. 2018), *Petition for Certiorari Docketed*, ____ US ____ (June 12, 2018) – Section 363(m) renders moot any challenge where sale is to good faith purchaser and is not stayed prior to consummation. Sale to company owned by insiders of Debtor is not per se bad faith but does require heightened level of scrutiny. Bankruptcy Court found no evidence of fraud or collusion. Debtor's marketing efforts were sufficient and appropriate and there was no evidence that insider attempted to exert influence over Debtor after insider resigned from Debtor's management committee before launching bid to purchase assets. Stalking horse bid was negotiated by counsel and issues regarding stalking horse bid funding were resolved prior to auction as purchaser was entitled to credit bid and purchaser's bid was superior to Appellant's. Purchase was for "value" where purchaser bought at fairly conducted auction and paid auction price which is sufficient evidence of value. Fact that purchaser knew that unsuccessful bidder Planned to appeal is not type of adverse claim that would defeat good faith status. Fact that Court in approving sale waived stay and allowed immediate closing did not circumvent Appellant's right to appeal under Section 363 where Rule 6004(h) allows Court to waive stay; Debtor repeatedly gave notice that it needed to close sale immediately and advised that it would seek to have Court waive stay; Debtor had good faith reasons for immediate closing; and Appellant did not object to or request other relief from Bankruptcy Court to preserve right to appeal under Section 363(m).

In re Cooper, 2018 WL 4565150 (S.D.N.Y. 2018) – Appeal of sale of asset is moot under Section 363(m) where transferee purchased in good faith even if purchaser closed with knowledge of pending appeal. Good faith includes more than just sale free from fraud, collusion or bad faith or that purchaser have knowledge of adverse claims. Trustee's transfer of cause of action to Defendants in exchange for release of Defendant claims against Estate is sale of property. Purchaser is "transferee" as defined in Section 101(43). Defendants-purchasers did not act in good faith where Defendants were aware of long detailed knowledge of adverse claims of third parties to which Defendants themselves were targets. Defendants had participated in discovery and doubtlessly analyzed merits of disputed causes of action.

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.

MSCI 2007-IQ Granfile 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 does not 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.

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.

White v. Corcoran, Case No. 15-12354 (E.D. Mi. 2016) – Appeal of Order permitting sale under Section 363 is moot where appellant does not 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.

White v. Corcoran, Case No. 15-11310 (E.D. Mi. 2016) – Appeal of Order permitting sale under Section 363 is moot where appellant does not 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.

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).

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.

Petfinders, 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).

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".

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.

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.

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.

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 does not obtain a stay of an Order that permits a sale of 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.

Karam, Inc. v. BW Holdings, LLC, 2013 WL 3243540 (W.D. Ky. 2013) – Appeal of Order granting relief from stay rendered moot

when property later sold at foreclosure sale. Court lacked any effective relief once property had been sold, as reversal of Order granting relief from stay would not reverse sale or bring property back into bankruptcy estate.

ML-CFC 2006-3 Seasons, LLC, v. Seasons Partners, LLC, Case No. 11-16999 (9th Cir. 2013) – Appeal dismissed as equitably moot where creditor did not obtain stay of Order confirming Chapter 11 Plan where Plan has been substantially consummated and modification of Plan would negatively impact interest of parties not before the court, including interests of investor who infused \$2.5 million into venture in reliance on confirmed Plan.

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

Northcutt v. Leasure, 2013 WL 2458709 (W.D. Ky. 2013) – Appeal of Court Order authorizing sale of assets under Section 363 dismissed as moot where appellant did not request or receive stay of sale Order prior to closing. Appellant’s assertion that property was not property of estate and that sale violated party’s fifth amendment rights was not appealable where party failed to obtain stay. Section 363(m) applies to any attempt to appeal a sale Order regardless of legal basis for the challenge to the sale Order.

Clearview Energy, LLC v. Mammoth Resources Partners, Inc., 2013 WL 1411220 (W.D. Ky. 2013) – Appeal of Court Order authorizing sale of assets under Section 363 dismissed as moot where appellant did not request or receive stay of sale Order prior to closing. Appellant’s assertion that property was not property of estate and that Court lacked ability to approve sale did not constitute basis to appeal Bankruptcy Court’s contrary ruling without obtaining stay of sale Order. Section 363(m) applies to any sale authorized under Section 363 without regard to whether authorization itself was correct or incorrect.

Staker v. Jubber, Case No. 12-091 (10th Cir. BAP 2013) – Appeal of Orders dismissing adversary proceedings dismissed as moot where intervening events rendered Appellate court incapable of rendering effective Order. An appeal is moot where the issues presented are no longer live such that the reviewing court is incapable of rendering effective relief or restoring parties to their original positions. Prior to commencement of bankruptcy case, Debtor sued various parties to quiet title to two parcels of real estate. Actions were pending when Debtor filed chapter 7. Trustee entered into settlements with defendants that required defendants to pay money to the Trustee, and Trustee released any claims estate had against defendants. Court entered Order approving settlement and no party appealed. Thereafter, the Court dismissed the quiet title actions based on the settlement and Debtor appealed. Court lacked ability to enter meaningful relief even if dismissals had been improper, as reversing dismissal Orders would not create any right of Debtor to any further relief. The settlement had become final and, even if the adversary cases were reinstated, court lacked ability to grant Debtor any affirmative relief, as estate released all claims.

Search Market Direct Inc. v. Jubber, Case no. 10-4190 (10th Cir. 2012) – Debtor’s ownership of Internet Domain Name became property of estate upon filing of Chapter 7 petition. Debtor’s purported post-petition sale of Domain Name constituted violation of stay as sale constituted attempt to obtain possession and control of property of estate. Sale of property in violation of stay is void and without effect. Subsequent sale of Domain Name by Trustee pursuant to Section 363 not subject to attack if Order allowing sale is not stayed pending appeal as long as later sale was to buyer acting in good faith. Entity may purchase property in good faith even if the entity knows that an appeal of the sale authorization is pending. Subsequent sale did not render appeal moot where purchaser expressly took title subject to claims and defenses of prior purchaser and pending a ruling on the adversary proceeding in which the prior purchaser’s rights were to be determined. Order allowing the sale also stated that Order was not final until the rights of the estate in the Domain name were determined in the adversary proceeding.

In re Timco, LLC, 469 BR 688 (E.D. Mi. 2012) – Debtor’s appeal of Order remanding removed action to State Court and modifying stay to allow party to seek Order confirming arbitration award rendered moot when Debtor did not obtain stay of Order and State Court confirmed award while appeal was pending. Appeal becomes constitutionally moot when subsequent events result in either appellant receiving the relief sought when it is factually impossible to receive the relief sought. The Order being appealed was to determine whether it was proper to remand case to State Court and to allow State Court to enter judgment. State Court subsequently entered judgment. Appeal could not now grant relief that would prevent entry of that State Court Order. State Court Order became final and non-appealable at a time when the automatic stay remained lifted for that purpose. Nothing the bankruptcy or appellate courts could now do could change that result.

Coleman v. ANMP, 2011 WL 1979855 (9th Cir. 2011) – Appeal of confirmation of Plan of reorganization of Chapter 11 Plan that called for sale of Debtor’s business rendered moot by Section 363 where appellant did not obtain stay of proposed sale pending appeal.

Asset Based Resource Group, LLC v. United States Trustee, Case No. 09-2860 (8th Cir. 2010) – Sale free and clear of liens with liens to attach to proceeds is a sale under Section 363(b) to which Section 363(m) applies. When sale closed without stay pending appeal, appeal must be dismissed as moot where effect of Order reversing the Order approving the sale would affect the validity of the underlying sale itself. Challenge to portion of Order that permitted sale free and clear of liens, if reversed on appeal, would effectively unwind the sale. Appeal dismissed as moot.

In re Hake, Case No. 08-8039 (6th Cir. BAP 2008) – Bankruptcy Court Order to Show Cause why *pro hac vice* status should not be revoked did not become moot merely because Counsel agreed to voluntarily withdraw his *pro hac vice* admission. “A disciplinary action and consequent disqualification may expose counsel to further sanctions by the bar and portends adverse effects upon counsel’s career and public image. The effects of disqualification will linger long after the closing of the case.

The controversy thus remains live and demands consideration. ... [T]he ‘brand of disqualification’ on grounds of dishonesty and bad faith could well hang over his name and career for years to come.” Filing of Motion to Withdraw as Counsel did not moot Court’s Show Cause Order regarding whether counsel had engaged in argumentative, disrespectful, and antagonistic conduct toward bankruptcy Court.

City of Akron v. Akron Thermal, LP, 2009 WL 1707907 (N.D. Ohio 2009) – In determining whether a bankruptcy appeal is equitably moot, Court must weigh: (1) whether a stay has been obtained; (2) whether the Plan has been ‘substantially consummated’; and (3) whether the relief requested would affect either the rights of parties not before the Court or the success of the Plan. Concept of “equitable mootness” is designed to protect parties relying upon the successful confirmation of a bankruptcy Plan from a drastic change after appeal and is designed to protect parties settled expectations and the ability of a Debtor to emerge from bankruptcy. Equitable mootness will not prevent appeal of portions of Confirmation Order where outcome of appeal would not require abandonment of Plan or substantially upset the Plan of reorganization. Thus, appeal could proceed to determine amounts owed under assumed lease where outcome would not result in termination of lease and Court could fashion relief that would not disrupt confirmed Plan. Issues dealing with whether Plan should have been confirmed in the first instance and whether Plan complied with Section 1129 were equitably moot where outcome of appeal would be to overturn confirmation Order and eviscerate the Plan.

Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC, 2009 WL 1617860 (6th Cir. 2009) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363 (m) at a party seeking to appeal any sale of assets must obtain a stay in Order to prevent the sale Order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) applies whenever a party does not obtain a stay from an Order permitting the sale of Debtor’s assets.

Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC, Case No. 09-5817 (6th Cir. BAP 2010) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363(m) at a party seeking to appeal any sale of assets must obtain a stay in Order to prevent the sale Order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) whenever a party does not obtain a stay from an Order permitting the sale of Debtor’s assets.

In re Nashville Sr. Living, LLC, 407 B.R. 222 (6th Cir. BAP 2009). Unstayed Order approving sale to good faith buyer mooted appeal from portion of Order allowing sale of non-Debtor’s interest.

13.64 Effect of Stay

Allstate Insurance Company v. Harris, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant’s counterclaim filed after entry of Order staying further proceedings pending interlocutory appeal would be dismissed, without prejudice to defendant to defendant either filing counterclaim after appeal is resolved or, if defendant believes there is some urgency to file such as a statute of limitations or other time-bar problem, defendant can file motion asking court to make exception to scope of stay pending appeal.

Allstate Insurance Company v. Harris, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant did not violate stay pending interlocutory appeal by filing answer to complaint. Stay Order specifically required defendant to file answer within 14 days of service of amended complaint. Court would add to that deadline additional three days pursuant to Rule 9006 which extended deadline to June 18, the date on which the answer was filed.

Burrage v. Homecomings Financial Network, Inc., 2011 WL 6000794 (Bankr. N.D. Ohio 2011) – Stay pending appeal relieves appellee of obligation to comply with Order being appealed. Appellant who obtained stay pending appeal cannot simultaneously complain that appellant failed to perform as required by the Order being appealed.

13.65 Stay of Other Proceedings

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.

13.66 Supersedeas Bond

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.

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.

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.

13.67 Bond – Alternative Security

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

13.68 Filing Fee - In Forma Pauperis

Scott v. City of Hamtramck, Case No. 18-13096 (E.D. Mi. 2019) – Request to appeal In Forma Pauperis requires that Bankruptcy Court certify that appeal is being taken in good faith. Bankruptcy Court denied Motion to Waive Appellate Filing Fee stating that Bankruptcy Court went through painstaking measures to ensure that trial was fair, and any appeal would be frivolous and not in good faith. Appellee filed Motion to Dismiss which further argued that appeal was frivolous and Court independently determined that appeal was frivolous. Motion to proceed In Forma Pauperis denied.

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.

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.

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.

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.

13.69 Appeal Bond

In re Countrywide Financial Corp. Customer Data Security Breach Litigation, 2010 WL 5147222 (W.D. Ky. 2010) – Federal Rule of Appellate Procedure 7 permits court to condition right to appeal on posting of bond to ensure payment of costs on appeal if appellee prevails. In determining necessity and amount of bond, court must consider (1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.

13.70 Taxable Costs

In re Countrywide Financial Corp. Customer Data Security Breach Litigation, 2010 WL 5147222 (W.D. Ky. 2010) – Prevailing party to appeal may recover taxable costs as specified in 28 USC Section 1920 and Federal Rule of Appellate Procedure 39, including (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a Supersedeas bond or other bond to preserve rights pending appeal; (4) the fee for filing the notice of appeal; (5) marshal and clerk fees; (6) court reporter fees; (7) printing and witness fees; (8) copying fees; (9) docket fees; and (10) compensation of court appointed experts and interpreters. Attorney fees are taxable as costs only if provided for in underlying statutes or contracts on which cause of action is based.

13.71 Attorney Fees

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.

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.

13.72 Sanctions – Frivolous Appeal

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.

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.

Smith v. Silverman, 2011 WL 1901040 (2d Cir. 2011) – Appellate court had authority to impose sanctions for frivolous appeal. Bankruptcy Court and District Court both warned appellant that conduct in litigation and appeal were borderline sanctionable, yet appellant pressed same issue on further appeal to Circuit Court. Sanctions equal to double costs plus additional damages where appellant pursued patently frivolous appeal and forced appellee to defend vexatious litigation.

In re Messina, 2011 WL 2006903 (7th Cir. 2011) – Federal Rule of Appellate Procedure 38 allows Court to award sanctions against appellant who brings frivolous appeal. Debtor's third appeal of same issue, having lost two prior appeals of the same issue, is patently frivolous. Sanctions included award of double attorney fees and costs incurred by appellee.

WMS Motor Sales, Ltd. v. Reese, 2011 WL 1882383 (6th Cir. BAP 2011), *aff'd* 2012 WL 2149752 (6th Cir. 2012) – Court would impose sanctions against attorney who filed frivolous appeal. Appeal from Order denying dischargeability was not timely filed and appeal was dismissed. Attorney then appealed that dismissal. Court held that the appeal of dismissal was frivolous as there

was no basis in the law to allow an untimely filed notice of appeal. Further, appellee wrote letter to court advising that appellee had never authorized attorney to file appeal. Bankruptcy Court properly entered sanctions against attorney for frivolous appeal in the amount of attorney fees expended by appellee in dealing with frivolous appeal. Sections warranted where appeal is wholly without merit; there was no reasonable expectation of altering lower Court Order; or where appeal is result of “sheer obstinacy”.

G. Dismissal

13.73 Voluntary Dismissal

13.74 Mootness

U.S. v. Parish Chemical Company, 2019 WL 81978 (10th Cir. 2019) – Appeal is constitutionally moot where court cannot fashion any meaningful relief. Equitable mootness allows court to decline to hear bankruptcy appeal even where relief can be granted if doing so would be inequitable. Appeal of Order allowing sale of property was constitutionally moot to extent that appeal sought to set aside sale to third party who paid valuable consideration and without notice of defect. However, appeal was not moot to extent that Court ruled that junior lienholder was not entitled to any portion of sale proceeds as Court could award damages against United States for alleged wrongful sale of property to third party.

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.

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.

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.

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.

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.

MSCI 2007-IQ Granfile 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 does not 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.

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.

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.

Village at Knapp’s Crossing, LLC . 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.

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.

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.

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.

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.

In re Marroquin, Case No. 12-1451 (9th Cir. BAP 2013) – Court dismissed appeal of Order denying Debtor leave to file Chapter 13 Petition where Debtor advised court that Debtor no longer sought to file bankruptcy. Given Debtor’s decision, there was no longer live controversy as to validity or enforceability of earlier Court Order barring Debtor from filing for 20 years, or court’s conclusion that Debtor failed to show cause for court to allow filing notwithstanding bar.

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Appellate court lacks jurisdiction when intervening events result in inability of court to enter effective relief. Debtor’s appeal of dismissal of first adversary proceeding rendered moot when Debtor filed second adversary proceeding seeking same relief against same defendant and the second adversary was dismissed for failure to state a claim under Rule 12. Even if court reversed Order dismissing first adversary proceeding, the bankruptcy court had already concluded in second adversary that plaintiff failed to present any colorable claim and that dismissal Order has become final and non-appealable.

Timco, LLC v. T and M Sales Agency, Inc., 2013 WL 150105 (6th Cir. 2013) - Matter is moot for appellate purposes when events occurring while appeal is pending render it impossible for court to grant effective relief. Appeal of Order Lifting Automatic Stay to allow State Court to confirm arbitration award rendered moot once State Court entered its Order, Once State Court confirmed award, Order lifting stay became academic, as even if Order lifting stay was reversed on appeal, that would not set aside Order confirming arbitration award itself. Once stay was lifted, State Court had authority to act. Later determination that stay relief may have been inappropriate does not retract that authority or invalidate what occurred in State Court during time when stay had been lifted.

CSX Transportation, Inc. v. Denardo, 2013 WL 1213067 (E.D. Mi. 2013) – Plaintiff’s claims to recover fraudulent transfers are not moot merely because any recovery would belong to Debtor’s estate and would be distributed to corporate creditors. Although Plaintiff would not receive transfers of funds directly from Defendants, a creditor under State law has standing to pursue recovery of distributions by LLC to members at a time when the LLC is insolvent. Corporate members would be Ordered to refund money to Bankruptcy Estate of LLC for distributions to creditors including Plaintiff.

Siolon v. Allard, 2011 WL 2160267 (E.D. Mi. 2011) – Settlement of issue pending on appeal deprives court of “case or controversy” requiring dismissal of the appeal as moot.

Alvarez v. Smith, Case No. 08-351, ___ U.S. ___ (2009) – United States Constitution permits Federal Courts to decide legal questions only in the context of an actual case or controversy. If at any point during the pendency of the case the “actual controversy” ceases to exist, the Court must dismiss the case. Action becomes moot for appellate purposes when appellate court can no longer fashion effective relief. In action between individuals and State regarding seized property, action became moot

when State returned property to individuals and there were no pending claims for damages. When action becomes moot as a result of the passage of time or “happenstance”, appellate court should dismiss case as moot and also vacate the Order being appealed, in Order to avoid prejudicing any party in the event of future litigation. When case becomes moot as a result of a settlement between the parties, appellate court will not ordinarily vacate lower Court Order as the settlement constitutes a waiver by the losing party of their legal remedies.

B-Line, LLC v. Wingerter, 594 F.3d 931 (6th Cir. 2010) – Lower Court conclusion that creditor violated Rule 9011 is not rendered moot for appellate purposes where Lower Court has elected not to impose sanctions. Mootness results when subsequent events render court unable to grant effective relief. The Lower Court’s conclusion that creditor’s conduct violated Rule 9011 not rendered moot merely because no sanctions are imposed. Finding that creditor violated Rule 9011 has serious and significant consequences for the Creditor including potentially subjecting Creditor to future sanctions and would have necessitated complete restructuring of Creditor’s business operations.

13.75 Equitable Mootness

Todeschi v. Juarez, 2019 WL 3943814 (9th Cir. BAP 2019) – Appeal of Order confirming Chapter 11 Plan is equitably moot where there has been such a chance in circumstances that appellate court lacks ability to grant effective relief. Consummation of Chapter 11 Plan can render appeal equitably moot if confirmed plan so complex that Court cannot unwind transaction and require new plan to be proposed. Confirmation not moot where Creditors requested stay from Bankruptcy Court; although Plan had been consummated, Debtor expended only \$15,000 which included \$5,000 payment to creditors; while reversal would affect third parties, those parties may not be adversely affected and may even benefit if Court reverses confirmation and requires Debtor to increase capital contributions; and Plan was not unreasonably complex and unwinding plan would not be inequitable.

Cobb v. City of Stockton, 909 F.3d 1256 (9th Cir. 2018) – Order confirming Chapter 9 Plan is equitably moot where objecting party does not seek stay, Plan has been substantially consummated; undoing confirmation would unduly burden innocent parties; and bankruptcy court could not fashion relief without undoing confirmed Plan. Equitable mootness even bars consideration on appeal of constitutional issues including alleged wrongful takings in violation of the 5th Amendment. Plan had been substantially consummated when City wired payments to institutional creditors, transferred property, sent checks to former employees, conveyed numerous parcels, assigned leasehold interests, and granted purchase options. Revocation of confirmation would undermine settlements and would have potentially devastating impact on creditors and citizens of City. Appellant’s claim amounted to multi-million dollars which would have considerable impact on City and would require revision to City’s Long Range Plan which was underpinning of Plan.

U.S. v. Parish Chemical Company, 2019 WL 81978 (10th Cir. 2019) – Court declined to extend doctrine of equitable mootness to non-bankruptcy case where Court could readily resolve on merits question presented on appeal.

Dropbox v. Thru, Inc., 2018 WL 5113124 (N.D. Tx. 2018) - Equitable Mootness requires consideration of whether there was stay pending appeal; whether Plan was substantially consummated; and whether relief on appeal would affect rights of parties not before Court or success of Plan. Where appeal raises multiple issues, equitable mootness applies to each specific assignment of error, not entire appeal, and must consider on an individual basis whether particular issue would result in unwinding entirety of Plan. Appeal of interest rate specified in confirmed Plan not equitably moot as Court could adjust interest rate without undoing entire Plan. Appeal of third-party releases not equitably moot where Court could set aside releases without unwinding Plan. Appeal alleging impermissible gerrymandering equitably moot because granting relief would unwind confirmation.

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.

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.

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.

Ochadleus 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.

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.

Germeraad 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.

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

inform of monetary damages that would not disturb Plan or affect reorganized business fresh start.

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 Debtor or successor to Debtor of the business of 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.

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 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.

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 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.

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 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.

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 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.

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 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.

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.

13.76 On Motion by Party

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.

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.

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.

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 does not 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.

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.

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 does not comply with non-jurisdictional rules and requirements. Dismissal of an appeal, however, is rarely an appropriate action. Power to dismiss should not be exercised unless omission arose from negligence or indifference of appellant - where good faith is shown, the court may direct that the omission be corrected by a supplemental transcript or remand the cause for a finding on controverted fact questions. Usual practice is to direct that the omission be corrected.

Stevenson v. Siciliano, Mychalowych, Van Dusen and Feul, P.C., 2010 WL 2671311 (E.D. Mi. 2010) - Rule 8006 requires appellant to file with the Clerk of the Appellate Court a designation of record and statement of issues on appeal within 14 days of filing Notice of appeal. Time limits under Rule 8006 are not jurisdictional. Dismissal of bankruptcy appeal is unjustified where the appellant filed a timely notice of appeal but an untimely designation of record and statement of issues absent evidence of bad faith, negligence or indifference. Case would not be dismissed where designation of record and statement of issues were timely but inadvertently filed with the Bankruptcy Court and error was corrected and designation and statement re-filed in District Court only 2 days later. Delay was minimal, resulted in no prejudice to any party, and was result of good faith error rather than bad faith or negligence.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - Delay in filing Designation of items to be included in the record not basis for dismissal of appeal. Rule 8006 requires designation to be filed within 14 days of the filing of the Notice of Appeal. Party incorrectly calculated time to run from date Clerk of Bankruptcy Court issued Notice of Requirement to File Designation and filed Designation 4 days after the time had expired under Rule 8006 but within 14 days of Bankruptcy Notice. Rule 8001 provides that any action other than timely filing a notice of appeal is not jurisdictional. Failure to timely comply with any other requirement may be a basis for dismissal but does not automatically require dismissal. Court should not dismiss appeal for technical non-compliance unless non-compliance results from negligence or indifference. Delay did not result from negligence or indifference but rather from a reading of the Bankruptcy Court Notice that appeared to require the Designating within 14 days of issuance of that Notice.

13.77 Dismissal – Failure to Pay Filing Fee

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.

13.78 Dismissal – Failure to Prosecute

Dapper v. Board of Trustees, 2019 WL 3208173 (S.D. Ohio 2019) - Appellate Court can dismiss bankruptcy appeal where appellant fails to follow rules or evidence is bad faith, neglect or indifference. 9 months after appellant filed Notice of Appeal, appellants had not designated record, file brief or sought any extension of time. Four months had elapsed since appellee filed motion to dismiss for lack of prosecution yet appellant did not respond. Appellant's failure to make any effort whatsoever to comply with rules warranted dismissal with prejudice.

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.

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.

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.

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.

Dietrich v. Wyndham Worldwide Corp., Case No. 11-4039 (3d Cir. 2013) – District Court properly dismissed appeal where appellant did not file brief for 10 months after filing notice of appeal, and had failed to comply with either long-established deadlines or Orders of the district court, and otherwise acted in bad faith.

Lunan v. Jones, 2013 WL 1693985 (6th Cir. 2013) – Appeal dismissed where appellant repeatedly failed to provide transcript of hearing that produced Order that was the subject of the appeal.

Fujitrans USA v. Barko Enterprises, Inc., 2013 WL 793056 (S.D. Ohio 2013) – Court dismissed appeal where appellant failed to file initial brief notwithstanding multiple extensions of time. Court Order granting final extension set deadline and expressly stated that court would not entertain any further extensions.

Bosch v. First National Bank, Case No. 12-20135 (5th Cir. 2012) – District Court had discretion to dismiss appeal where appellant failed to file a designation of items to be included in record on appeal within 14 days of filing of notice of appeal as required by Rule 8006. Court should not lightly dismiss appeal for failure to comply with Rule 8006, but dismissal was warranted where appellant failed to file designation, failed to provide copies of the Orders being appealed, and filed to Order the transcript of the hearing. Total failure to produce record for appeal warranted dismissal.

Hancock v. McDermott, 2011 WL 1878240 (6th Cir. 2011) – District Court correctly summarily affirmed lower court's decision without consideration of merits. Appellant engaged in a clear pattern of delay and contumacious conduct and a lesser sanction would be insufficient. Appellant did not file any brief in the district court until more than 7 months after filing the notice of appeal; the brief as filed completely disregarded both the district court filing requirements and the bankruptcy rules including being more than 100 pages in length notwithstanding rule limiting initial briefs to 50 pages; appellant ignored district court's first Order to show cause and responded to second Order to show cause with disrespectful remarks and unacceptable explanations for delays; and district court had acted with considerable leniency, giving appellant the opportunity to make proper filings. Summary affirmance by district court was not motivated by failure of technical compliance, but rather by pattern of flagrant non-compliance.

In re Nora, 2011 WL 1395566 (7th Cir. 2011) – Court properly dismissed appeal where appellant failed to file brief after extended delays and repeated extensions of time. Appeal can be dismissed where court finds that appellant is willfully failing to prosecute appeal. Court must balance seriousness of misconduct, potential for prejudice, and possible merits of action. Debtor's failure to file initial brief even after multiple extensions coupled with Debtor's statement that her physical condition may prevent her from ever filing a brief essentially requested indefinite extension of time. Debtor also failed to explain why her physical condition prevented her from submitting a brief when Debtor was simultaneously actively litigating in bankruptcy court and had filed numerous substantive motions in the Bankruptcy case.

French v. Shapiro, Case No. 10-11333 (E.D. Mi. 2011) – Appeal of Order Dismissing Adversary proceeding without prejudice to re-filing upon termination of stay imposed by Bankruptcy Court dismissed as moot. Bankruptcy Court subsequently lifted the stay to permit plaintiff to re-file adversary proceeding. Appellate Court could not provide any meaningful relief where Appellate court could only confirm that plaintiff had the right to file the complaint, as plaintiff is now free from any prohibition against re-filing.

In re Wathen, 2011 WL 9042 (9th Cir. 2011) – Bankruptcy appeals became moot when Bankruptcy Court dismissed underlying bankruptcy case for reasons unrelated to issues on appeal. Appeal dismissed for lack of jurisdiction.

In re Hann, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss appeal sua sponte for lack of subject matter jurisdiction or where the allegations are totally implausible, attenuated, a substantial, frivolous, or devoid of merit.

Hamel v. Lalliss, 2010 WL 1141489 (9th Cir. 2010) - Appellant's failure to provide transcripts of lower court proceedings rendered it impossible to understand basis of bankruptcy Court Order, precluding effective review.

13.79 Disentitlement

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.

13.80 Reconsideration of Dismissal

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

Render v. Render, Adv. No. 11-3414 (Bankr. E.D. Mi. 2012) – Reconsideration of Order of dismissal warranted where dismissal Order was entered in error. Although court dismissed adversary complaint, court intended to reserve jurisdiction to consider

Plaintiff's Motion for Leave to Amend.

Lewis v. McClatchey, 2009 WL 1607773 (S.D. Ohio 2009) – Rule 60 permits Appellate Court to grant relief from Order dismissing appeal where dismissal is based on fraud, misrepresentation or misconduct by opposing party; or where Court lacked jurisdiction over the subject matter or over the parties or if it acted in a manner inconsistent with due process. Unintelligible allegations of alleged fraudulent conduct by purchaser of property from bankruptcy trustee constitute mere disagreements with Court's analysis of purchaser's Motion to Dismiss and do not demonstrate fraud by any opposing party. Motion for Reconsideration failed to allege any viable theory under which the Appellate Court would have lacked jurisdiction over the subject matter or the parties and Movant failed to demonstrate any alleged inconsistency with due process.

13.81 Vacatur

U.S. v. Marcola, 2012 WL 995289 (E.D. Mi. 2012) – When a bankruptcy case becomes moot pending appellate adjudication, the District Court can reverse or vacate the judgment. Vacatur clears the path for future re-litigation by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is appropriate when mootness occurs through circumstances not attributable to the parties or the unilateral action of the party who prevailed in the lower court. Mootness by reason of settlement does not justify vacatur of judgment under review absent equitable or exceptional circumstances. In the typical case in which settlement results in dismissal of the appeal, the parties have settled the dispute involved in the appeal. However, in this case the appeal was rendered moot by dismissal of the underlying case, without compromise of the issue presented on appeal. The pendency of bankruptcy case while the appeal was pending harmed the United States in a different way than the adverse Order appealed to this Court and that was not cured by the dismissal of the underlying case. Vacatur would allow for re-litigation of the issue and avoid the absurd result of maintaining the disputed Order's declaratory ruling while preventing the United States from prosecuting the appeal of the adverse Order because the underlying bankruptcy case was dismissed.

13.82 Settlement During Appeal

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

13.83 Consideration by Lower Court

Pierce v. Wyndham Vacation Resorts, Inc., 92 F.3d 741 (6th Cir. 2019) - Appellate Court will not consider issues not raised before Court below. Creditor filed motion for summary judgment on grounds of judicial estoppel asserting that Debtor did not disclose claims in bankruptcy filing. Debtor responded that any failure to disclose was unintentional. After Court granted summary judgment, and Debtor appealed and sought to argue that causes of action were not part of bankruptcy estate and, therefore, Debtor had no obligation to notify Bankruptcy Court about claims. Debtor did not argue this issue before District Court and forfeited right to make argument at Appellate Court.

Jodway v. Orlans, PC, 2018 WL 6721097 (6th Cir. 2018) – Failure to raise issue at lower court generally waives issue for appeal. However, rule is not absolute and Court can consider limited exception where (i) issue to be raised is one of laws versus one that requires determination of facts; (ii) proper resolution of issue is clear; (iii) failure to take up issue will result in miscarriage of justice or denial of substantial justice; and (iv) parties' right to have issues considered by both District Judge and Appellate Court. Although appellant did not raise at lower court opposing party's alleged non-compliance with "safe harbor" provision of Rule 9011, Appellate Court would consider issue where there was no need for further development of factual record as moving party admitted that it did not serve motion as required by Rule; application of Rule 11 and safe harbor are questions of law and resolution is clear and beyond doubt; and resolving issue would be in interest of justice as lower court imposed sanctions in form of attorney fees and costs although moving party did not comply with safe harbor and should not have been awarded sanctions as matter of law.

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.

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.

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.

Thomas v. Aquil, 2013 WL 781643 (6th Cir. 2013) – Issues not raised at Bankruptcy Court or in District Court are waived and will not be considered on appeal.

Lemaire v. Fannie Mae, 2012 WL 3841295 (E.D. Mi. 2012) – Court will not consider issues not raised in bankruptcy court.

Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.

In re Estate of Gray, 2011 WL 3946729 (E.D. Mi. 2011) - Court will not consider issues not raised in bankruptcy court. Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.

In re Mayer, 41 BR 702 (E.D. Mi. 2011) – Ordinarily an appellate court does not give consideration to issues not raised in the Bankruptcy Court. Further, raising an issue at the Court below does not mean that all arguments related to that issue are preserved. Court may deviate from general rule in exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if appeal presents a particular circumstance warranting departure; or if doing so would serve an overarching purpose other than simply reaching the correct result in this case. Court should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case. Court permitted Debtor to raise additional issues regarding constructive trust where the challenged issues (1) are purely legal, (2) require no further factual development, and (3) have been fully briefed by the parties in their respective appellate pleadings; and a resolution of the contested issue would likely promote finality in the litigation.

Ershowsky v. Freedman, 2011 WL 2078644 (11th Cir. 2011) – Issues not presented to District Court on appeal from Bankruptcy Court Order are waived for purposes of further appeal. Appellate Court will only consider issues raised at lower court. Only exceptions are (1) whether the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) whether the appellant had an opportunity to raise the objection in the trial court; (3) whether the interest of substantial justice is at stake; (4) whether the proper resolution is beyond any doubt; and (5) whether the issue presents significant questions of general impact or great public concern.

B.O.C. Law Group, P.C. v. Carroll, 2011 WL 2148603 (E.D. Mi. 2011) – Appellee may, without taking cross appeal, urge affirmance on any basis appearing in record even if the argument is based on matters overlooked or ignored by the lower court. Party's failure to advance at the lower court an argument raised by the lower court *sua sponte* does not amount to waiver of that issue on appeal.

Gold v. Deloitte & Touche, LLP, Case No. 0814567 (E.D. Mi. 2009) – Appellate Court ordinarily will not consider issues which were not raised and litigated below. Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Although appellate Court can consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry.

13.84 Specification of Issues – Generally

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

Key Bank v. Hartmann, 2013 WL 1312013 (E.D. Ky. 2013) – Issues raised for first time in reply brief on appeal are not properly before the Court.

Thomas v. Aquil, 2013 WL 781643 (6th Cir. 2013) – Issues raised at District Court but not on appeal are considered abandoned and are not reviewable. Passing reference to Chapter 13 Plan unaccompanied by any argument considered waived, as issues adverted to in perfunctory manner unaccompanied by some effort at developed argument are deemed waived.

Leavitt v. Alexander, Case No. 11-1114 (9th Cir BAP 2012) – Appellant's failure to specify issues in Statement of Issues on Appeal waives right to appeal issue. Court lacks jurisdiction to consider issues not stated in Statement of Issues even where parties have otherwise fully briefed issues.

13.85 Specification of Issues – Failure to File

Bell v. McLemore, 2019 WL 652962, *R&R approved and adopted*, 2019 WL 1324598 (M.D. Tn. 2019) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 14 days of filing of notice of appeal. Appeal dismissed where documents were due on October 30, 2018 yet nothing had been filed as of February 15, 2019. Appellant's contention that he was “waiting for instructions from ... District Court on how [he] should proceed” did not allege sufficient basis to explain why Debtor did not comply with time requirements of rules. It is not Court's job to inform parties of filing responsibilities.

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.

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.

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

does not 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.

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.

13.86 Waiver of Issues – Generally

Adelson v. Ocwen Financial Corporation, 2018 WL 7226966 (6th Cir. 2018) – Party who does not file timely objections to Magistrate Judge's Report and Recommendations waives right to appeal. Magistrate Judge warned Plaintiff that failure to object within 14 days would operate to waive any further right to appeal. District Court later struck objections as exceeding page limit and gave Plaintiff opportunity to cure defect but court again struck amended Objections for non-compliance with page limitation as well as spacing and font size issues. Plaintiff demonstrated good faith attempt to cure defects and District Court admittedly conducted *de novo* review notwithstanding lack of objections, warranting exercise of discretion by appellate court to consider merits.

Jodway v. Orleans, PC, 2018 WL 6721097 (6th Cir. 2018) – Failure to raise issue at lower court generally waives issue for appeal. However, rule is not absolute and Court can consider limited exception where (i) issue to be raised is one of laws versus one that requires determination of facts; (ii) proper resolution of issue is clear; (iii) failure to take up issue will result in miscarriage of justice or denial of substantial justice; and (iv) parties' right to have issues considered by both District Judge and Appellate Court. Although appellant did not raise at lower court opposing party's alleged non-compliance with "safe harbor" provision of Rule 9011, Appellate Court would consider issue where there was no need for further development of factual record as moving party admitted that it did not serve motion as required by Rule; application of Rule 11 and safe harbor are questions of law and resolution is clear and beyond doubt; and resolving issue would be in interest of justice as lower court imposed sanctions in form of attorney fees and costs although moving party did not comply with safe harbor and should not have been awarded sanctions as matter of law.

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.

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.

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.

US Trustee v. Bane, 2014 WL 1378313 (4th Cir. 2014) – Party waives issue on appeal when party's initial brief does not address issue.

Connery v. Norsworthy, 2014 WL 1651957 (5th Cir. 2014) – Party who does not address issue in briefs will be deemed to have abandoned issue.

13.87 Standard of Review

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”.

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.

13.88 Certified Questions of State Law

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

13.89 Deadline for Filing

Minix v. Stone, 2019 WL 1676007 (E.D. Ky. 2019) – Court would not hold appeal in abeyance pending outcome of appeal of underlying state Court judgment merely because Bankruptcy Court judgment accepting debt from discharge was based on collateral estoppel effect of state Court judgment. State Court judgment had not been altered, modified or stayed pending appeal and remain fully valid and binding and entitled to full collateral estoppel effect.

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.

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.

Jawara v. SunTrust Bank, 2016 WL 1244717 (M.D. Tn. 2016) – Local rule allows for summary affirmance of any bankruptcy appeal where appellant does not 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.

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.

13.90 Extension of Time to File

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.

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.

13.91 Content

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.

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.

13.92 Limitations on Length

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

13.93 Time for Filing

Bell v. McLemore, 2019 WL 652962, R&R approved and adopted, 2019 WL 1324598 (M.D. Tn. 2019) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 14 days of filing of notice of appeal. Appeal dismissed where documents were due on October 30, 2018 yet nothing had been filed as of February 15, 2019.

Surrarrer v. HSBC Bank, USA, 2018 WL 5255158 (N.D. Ohio 2018) – Rule 8009 requires Appellant to serve designation of items to be included in record. Once designated, record can be corrected only by stipulation of parties; order of Bankruptcy Court; or order of court where appeal pending. Appellant improperly attempted to add items to record by attaching to brief as “supplemental exhibits”. Court struck “exhibits” with direction to Appellant to follow proper procedure.

Romo v. Ramani, Case No. 18-11936 (E.D. Mi. 2018) – Rule 8009 requires Appellant to file and serve designation of record within 14 days after filing notice of appeal or Order granting leave to appeal. Rule 8009(e)(2)(C) that allows party to supplement record with anything omitted from or misstated in record by error or accident on stipulation of parties; by lower court before or after record is transmitted; or by appellate court. Rule 8009(e)(2)(C) does not apply where party does not timely designate record in first instance. Instead Rule 9006(b)(1) allows court to extend time for filing record after time for doing so has otherwise expired where initial failure is due to excusable neglect. Appellant did not demonstrate excusable neglect where justifications were (i) technical issues in Counsel’s office; and (ii) assistant on vacation for 5 days; where technical problems occurred 4 months prior to deadline for record and assistant’s vacation occurred 15 days after record was already past due, such that neither of these factors could have caused delay in filing record.

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 does not 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.

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.

13.94 Disputes – Jurisdiction to Resolve

In re McKenzie, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Bankruptcy court has jurisdiction to resolve disputes regarding contents of record on appeal of Order issued by bankruptcy court.

13.95 Disputes – Generally

In re McKenzie, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Court struck portions of designated record that addressed issues not presented in connection with matter to be resolved or where items were not introduced into evidence at hearing where inclusion would not improve the understanding of the appellate court but would confuse the appeal with an issue that had already been resolved by the Circuit Court in prior appeals. Designation of record should be liberally construed to allow anything that has a connection to the issue on appeal, but this does not require or allow inclusion in record of everything in the bankruptcy case itself.

13.96 Failure to Provide

Gilroy v. Fahl, 2019 WL 5538109 (E.D. Mi. 2019) – Appeal dismissed where Appellant filed Record on Appeal but did not supply to Appellate Court copies of bankruptcy court records notwithstanding extensions of time to do so.

Bell v. McLemore, 2019 WL 652962, R&R approved and adopted, 2019 WL 1324598 (M.D. Tn. 2019) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 14 days of filing of notice of appeal. Appeal dismissed where documents were due on October 30, 2018 yet nothing had been filed as of February 15, 2019.

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.

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.

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 failed 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.

– Local rule allows for summary affirmance of any bankruptcy appeal where appellant does not 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.

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.

13.97 Redaction of Transcript

In re Immanuel, LLC, 2011 WL 1522335 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party’s request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

K. Standards of Review

13.98 *De Novo* Review

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.

13.99 Question of Law

13.100 Question of Fact

Brock v. Hammonds, 2011 WL 2646549 (6th Cir. BAP 2011) - The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed de novo. Under the clearly erroneous standard, the Panel must give deference to the bankruptcy court as the finder of fact. If the court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.

13.101 Mandate After Appeal

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.

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.

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

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018) – Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Debtor's interest in property is determined by State law. Although Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, provision does not elevate Estate's interest to greater standing that Debtor had but for bankruptcy filing. Debtor and spouse owned second home as joint tenants with rights of survivorship. When Debtor passed away post-petition, Debtor's interest in property passed immediately to surviving spouse by operation of law, and Estate no longer had interest in property. Trustee lacked ability after death of Debtor to sell Debtor's interest in property as Debtor no longer had interest that was property of estate. Rule 1016 which allows case to continue following death of Debtor does not alter substantive rights of bankruptcy estate. “Transfer” to spouse was not governed by or limited by Section 363 as that section applies onto to sales of estate interest by Trustee, not transfers by operation of State law. Strong Arm posers under Section 554 did not allow Trustee to avoid transfer to spouse as Section 544 allows trustee to avoid status of creditors, and spouse was not creditor of estate and there was no “transfer” to be avoided as at death Debtor's interest in property ceased to exist and Spouse retained her interest in entire property. Trustee could not assert status as hypothetical lien creditor of Debtor as applicable state law specified that upon death of one joint owner, any liens that may have existed on interest of deceased tenant terminate and co-owner becomes owner free and clear. Trustee could not avoid lien and bona fide purchaser as there was no transfer to avoid.

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Section 548(a)(1)(A) allows Court to avoid transfer of interest of Debtor in property made within two years before date of filing petition if transfer was made with actual intent to hinder, delay or defraud entity to which Debtor was or became indebted. Section 544 allows Trustee to avoid any transfer of interest in property that is voidable under applicable state law. Ohio Provides Code Section 1336.04 allows Court to set aside transfer made within four years with actual intent to hinder, delay or defraud. Federal and Ohio statutes are substantially similar in terms of rights, remedies and defenses and each require proof of fraudulent intent by preponderance of evidence. Factors to be considered include whether transfer was to close relative; secret transfer; transfer of title without transfer of possession; or grossly inadequate consideration that would raise rebuttable presumption of actual fraudulent intent. Evidence indicated that transferee, Debtor's ex-husband, exerted and continue to exert substantial control over Debtor through financial and physical intimidation. Settlement agreement in divorce action that called for property to be transferred to Debtor's ex-husband was not attempt to defraud Debtor's creditors, but was aimed at Debtor's ex-husband's own financial interests and Debtor acquiesced to avoid Debtor's ex-husband making Debtor's life difficult or attempting to control actions through money and intimidation. Evidence also indicated that Debtors ex-husband refinanced property on which Debtor's ex-husband still owes substantial balance and transfer of property from Debtor and ex-husband to ex-husband individually was done solely to assist ex-husband in refinancing and retaining property, all of which occurred before creditor brought suit for unpaid fees. At time of transfer, Debtor's interest was subject to substantial mortgage as well as terms of divorce and separation orders that require Debtors ex-husband to make all payments for mortgage, taxes, insurance, utilities and other repairs and to receive credit against the sale proceeds to recover those expenses, severely limiting Debtor's share of net proceeds. Factoring expenses into Debtor's one half interest, there was no net value or equity to Debtor's interest such that Debtors transfer of one half interest in property did not result in Debtor transferring anything of value.

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

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018) – Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Debtor's interest in property is determined by State law. Although Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, provision does not elevate Estate's interest to greater standing that Debtor had but for bankruptcy filing. Debtor and spouse owned second home as joint tenants with rights of survivorship. When Debtor passed away post-petition, Debtor's interest in property passed immediately to surviving spouse by operation of law, and Estate

no longer had interest in property. Trustee lacked ability after death of Debtor to sell Debtor's interest in property as Debtor no longer had interest that was property of estate. Rule 1016 which allows case to continue following death of Debtor does not alter substantive rights of bankruptcy estate. "Transfer" to spouse was not governed by or limited by Section 363 as that section applies onto to sales of estate interest by Trustee, not transfers by operation of State law. Strong Arm posers under Section 554 did not allow Trustee to avoid transfer to spouse as Section 544 allows trustee to avoid status of creditors, and spouse was not creditor of estate and there was no "transfer" to be avoided as at death Debtor's interest in property ceased to exist and Spouse retained her interest in entire property. Trustee could not assert status as hypothetical lien creditor of Debtor as applicable state law specified that upon death of one joint owner, any liens that may have existed on interest of deceased tenant terminate and co-owner becomes owner free and clear. Trustee could not avoid lien and bona fide purchaser as there was no transfer to avoid.

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, 12019 WL 2710049 (Bankr. WD. Ky. 2019) - Section 544(a)(3) grants Trustee rights and powers of bona fide purchaser of real property if hypothetical buyer could have obtained bona fide purchaser status as of petition date. Scope of trustee's authority ultimately determined by substantive state law which determines which liens are vulnerable under Section 544. Lis Pendens constitutes constructive notice of potential liens whether or not liens are recorded sufficient to defeat trustee's claim of bona fide purchaser status in later filed bankruptcy case. Section 544(a)(1) provides Trustee with ability to avoid liens which would be subordinate to hypothetical judicial lien attaching on petition date. Recording of Lis pendens operates on forward-looking basis to subject subsequently acquired interests to outcome of litigation. Judicial lien recorded after filing of Lis pendens is eliminated by completion of foreclosure sale. As of petition date, Trustee could not have acquired judicial lien superior to rights of unrecorded mortgage holder where mortgage holder recorded Lis pendens prior to petition.

Firstrust Bank v. Industrial Bank, Case No 17-0156 (Bankr. D. Md. 2018) - Security interest properly perfected as of petition date does not lose perfected secured status where perfection lapses post-petition. If Debtor enters bankruptcy before lapse, security interest survives later lapse. Lapse of senior lien holder's UCC-1 financing statement did not result in senior lien holder becoming unperfected or "vault" 2nd lien creditor into first position. Further, lapse did not render lien invalid as against Trustee as Trustee held status of "hypothetical lien creditor" not good faith purchaser for value as of petition date and junior lien would not "jump" perfected senior lien. Section 362(b)(3) allows, but does not require, filing of continuation statement for lien to remain valid and perfected post-petition.

Harker v. PNC Mortgage Company, 2017 WL 1169615 (Bankr. S.D. Ohio 2017), *aff'd*, 581 BR 500 (6th Cir. BAP 2018), *aff'd*, 2019 WL 1034193 (6th Cir. 2019) - 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 trustee's "lien" versus creditors defectively recorded mortgage.

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 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.

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 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.

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".

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.

Higgason v. Richardson, 2013 WL 5349036 (Bankr. E.D. Ky. 2013) – Trustee entitled to summary judgment avoiding lien on Mobile Home where creditor failed to note lien on certificate of title as required by state law.

Higgason v. Vanderbilt Mortgage & Finance, Inc., Case no. 12-5763 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of Debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which Debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends “must have been intended” by legislature.

Rogan v. Vanderbilt Mortgage & Finance, Inc., 2013 WL 19909497 (Bankr. E.D. Ky. 2013) – Trustee has powers of hypothetical judicial lien creditor. Scope of those powers in particular whether Trustee has interest superior to or subordinate to other liens or interests is determined by state law. Trustee could not avoid properly executed note and recorded mortgage based on later assignment of mortgage but lack of negotiation of note. Although there may be question as to lienholder's ability to enforce lien where lienholder does not also hold note, that is not basis to avoid mortgage under Section 544.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded *lis pendens* prevents trustee from avoiding line using power of hypothetical bona fide purchaser as *lis pendens* constitutes constructive notice of adverse claims. Similarly, properly recorded *lis pendens* prevents hypothetical judgment lien creditor from obtaining rights superior to party recording *lis pendens*. Thus, while lender never recorded mortgage, Trustee could not avoid mortgage as judgment lien creditor where lender recorded *lis pendens* prior to commencement of bankruptcy case.

In re Vickers, 2013 WL 1619814 (Bankr. E.D. Ky. 2013) – Trustee as hypothetical judicial lien creditor can avoid unrecorded and unperfected security interests. Lender's mortgage was properly perfected and was not avoidable where mortgage had been properly recorded by original lender and successor creditor held promissory note endorsed to it in blank. When the note was endorsed in blank and delivered to lender, lender became holder entitled to enforce terms of note. Fact that endorsement is signed with an unintelligible signature does not defeat validity of the endorsement itself. Bank was holder of note and mortgage for at least 2 years pre-petition. Although instrument was endorsed to Bank of New York Mellon, and creditor was now Bank of New York but note was not re-endorsed to Bank of New York, evidence indicated that Bank of New York was the same entity where documents filed with state indicated that Bank of New York Mellon had changed name to Bank of New York. Record was sufficiently clear to establish identity of lender holding the note and mortgage. Any alleged defect in the endorsement as in violation of the trust agreement between lender and the trust beneficiaries did not have any relevance to validity of endorsement as against borrower, even if the endorsement may have been violation of trust agreement, as neither borrower nor Bankruptcy Trustee were parties to the lender's trust instrument.

In re DeGroot, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Trustee's status as hypothetical judgment lien holder has interest superior to statutory lien held by Debtor's ex-wife for unpaid child support. Trustee can collect entire receivable owed to Debtor from ex-wife free and clear of any statutory lien in receivable held by ex-wife to secure payment of future child support.

Rogan v. CitiMortgage, Inc., 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed husband's name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband's later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.

Baker v. General Electric Credit Union, 2012 WL 86778 (Bankr. E.D. Ky. 2012) – Title Certificate that incorrectly named different lender did not operate to perfect lien of correct creditor. Clerk of County Court inadvertently listed lender as “Nissan Motor Acceptance Corporation”. Kentucky law requires lender's name and address to be listed on the Certificate of Title to perfect lien. Lender, General Electric Credit Union, was not named on Certificate of Title and, therefore, lien was unperfected and could be avoided by Trustee.

US Bank, NA v. Barbee, 2011 WL 6141648 (6th Cir. BAP 2011) – Property interests are created and defined by state law. In Kentucky, manufactured home is personalty for which certificate of title is issued in which lien may be perfected solely by notation on certificate of title. State law does allow for conversion of mobile home into fixture by filing an affidavit of conversion, or by creditor obtaining pre-petition State Court judgment converting mobile home to improvement to real property, on which lien would be mortgage recorded in appropriate public records. Debtors did not file affidavit and creditor did not avail itself of option to seek State Court declaration, leaving mobile home “personalty” for purposes of perfection. Lien not recorded on certificate of title could be avoided as unperfected security interest under Section 544.

Gold v. Pasternak, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – Trustee could avoid under strong arm powers a security interest that is not properly perfected. Financing statement must be filed to perfect security interest in inventory. Financing statement must be filed in the name of Debtor. Financing Statement filed under name of Corporation's “registered trade name” is not

filed under Corporate name and is not sufficient under Michigan law. Registration by Corporation of Assumed Name does not make Assumed name the Corporate Name.

Rogan v. Litton Loan Servicing, LP, 2011 WL 4445651 (6th Cir. BAP 2011) – Section 544(a)(1) allows the Trustee to avoid a security interest that is not perfected or is improperly perfected before the bankruptcy petition is filed. Under Kentucky law, a mortgage may not be enforced absent proof of a valid and enforceable debt. Mortgagee who holds mortgage but is not the holder of the underlying note holds unperfected security interest that can be avoided by Trustee. Trustee's complaint alleging that second mortgage holder did not hold note was sufficient to state cause of action, and could be defeated only by affirmative evidence that as of the date of the petition, the mortgage holder was also the holder of the underlying debt. Section 544 cannot be used to attack alleged post-petition transfers of the mortgage and note, as Section 544 applies only to the facts as they exist on the date of filing. Post-petition transfers may be contested, if at all, only as objections to a Proof of Claim.

Vanderbilt Mortgage and Finance, Inc. v. Westenhoefer, 2011 WL 4356358 (E.D. Ky. 2011), *aff'd*, 2013 WL 2301940 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of Debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which Debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends "must have been intended" by legislature.

Higgason v. Vanderbilt Mortgage and Finance, Inc., 2011 WL 4433620 (Bankr. E.D. Ky. 2011), *aff'd* 471 BR 876 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of Debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further, even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which Debtor resided. Trustee avoided lien under Section 544.

Lim v. Anton, Case No. 10-41460 (Bankr. E.D. Mi. 2011) – Trustee could avoid sale of boat where certificate of title was not signed by the seller and the buyer never filed the Bill of Sale with the Coast Guard. Vessel was registered with Coast Guard. Ship Mortgage Act requires any transfer of an interest in a registered vessel to be recorded with the Coast Guard to be perfected. Buyer's attempt to record the transfer with the Coast Guard post-petition would not perfect transfer as recording did not occur within any "safe harbor" period for perfection.

Westenhoefer v. Vanderbilt Mortgage & Finance, Inc., 2011 WL 1984061 (Bankr. E.D. Ky. 2011) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which Debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.

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

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).

Rogan v. Mila, Inc., 2010 WL 3168094 (Bankr. E.D. Ky. 2010) – Trustee attacked validity and enforceability of mortgage where Note was payable to Mila, Inc., but Mortgage defined the mortgagee as MERS. Split between payee of note and named mortgagee did not render mortgage subject to avoidance by hypothetical judicial lien creditor where mortgage was properly recorded prior to the commencement of the bankruptcy case and provided record perfection of the mortgage as a matter of law.

Sovereign Bank v. Hepner, 2010 WL 2816472 (10th Cir. 2010) – State law controls priority of obligations and determines whether trustee status as lien creditor is superior to unrecorded interest. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor attaching the collateral in the meantime. Debtor's bankruptcy filing within that 20-day window would not permit trustee to avoid Bank's security interest which was properly perfected post-petition but within 20-day safe harbor.

Stockton Mortgage Corporation v. 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 Debtor and Northcutt held the property as joint tenants, and one party could not encumber the Property as a single, indivisible estate. Accordingly, the Trustee holds superior title to the extent of that interest.

Johnson v. BAC Home Loans Servicing, L.P., 2010 WL 2667393 (Bankr. E.D. Ky. 2010), *aff'd*, 2011 WL 3608095 (6th Cir. 2011) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by husband and wife that defined "Borrower" only as the Husband did not constitute a grant of the mortgage against Wife's interest in the property. Signature by Wife as "Borrower" does not constitute

identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife's interest in the property, rendering the mortgage avoidable pursuant to Section 544.

Rogan v. CitiMortgage, Inc., 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Mortgage that named MERS as mortgagee not subject to attack by judicial lien creditor where mortgage defined MERS as "nominee" for Lender and granted MERS the power of sale and enforcement. MERS later assignment of mortgage to CitiMortgage was valid where assignment appeared regular on face and MERS passed corporate resolution ratifying signature on assignment. Attached promissory note included blank endorsement converting note into bearer instrument, and transfer of note operated to transfer security interest attached to note by operation of Kentucky law. CitiMortgage held original note endorsed in blank, giving CitiMortgage right to enforce mortgage.

Limor v. First National Bank of Woodbury, 2010 WL 2509176 (6th Cir. BAP 2010) – Bank that held perfected security interest forfeits right of setoff or status as perfected secured creditor when Bank honored check presented by Debtor four days after the filing of the bankruptcy petition, but does not forfeit properly perfected pre-petition security interest. Trustee's ability to defeat security interest under Section 544 is determined by facts as they existed on the date of the petition. Subsequent acts by Creditor could not release or adversely affect status of security interest or Trustee's ability to avoid interest under Section 544. Creditor's security interest should not be prejudiced by post-petition delivery to the Trustee of money or property of the estate. However, turnover or release of funds does waive ability to setoff pursuant to Section 553 as of moment of petition not subject to attack by judicial lien creditor. Subsequent turnover of the funds to the Trustee does not alter the Bank's secured position.

Drown v. Wells Fargo Bank, N.A., 424 BR 315 (Bankr. S.D. Ohio 2010), *aff'd* 2011 WL 1188434 (S.D. Ohio 2011) – Section 544(a)(1) grants each of the Trustees "the status of a hypothetical lien creditor who is deemed to have perfected his interest as of the date of the filing of the bankruptcy petition and also grants the Trustees the power to avoid transfers of property that could be avoided by a judicial lien creditor. Bankruptcy trustee cannot avoid a properly recorded mortgage even if the deed conveying title to the underlying property to Debtor was itself incorrectly executed. Although property transferred by a "defective deed" may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

French v. Luyben, 2009 WL 2169217 (Bankr. N.D. Ohio 2009) – Judgment lien in personal property is deemed perfected when property is seized in execution of judgment. Where seizure of motorcycle did not occur until after bankruptcy petition had been filed, judgment creditor which held as of the moment of the filing only an unsatisfied execution held unperfected security interest as of the date of the filing which was subject to avoidance under section 544(a)(1).

14.3 Trustee as Holder of Unsatisfied Execution

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, creating in lienholder valid, perfected and unavoidable lien, although certificate of title was not amended to show correct lienholder until after commencement of case.

Rogan v. Litton Loan Servicing, LP, 2011 WL

14.4 Trustee as Bona Fide Purchaser

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018) – Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Debtor's interest in property is determined by State law. Although Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, provision does not elevate Estate's interest to greater standing that Debtor had but for bankruptcy filing. Debtor and spouse owned second home as joint tenants with rights of survivorship. When Debtor passed away post-petition, Debtor's interest in property passed immediately to surviving spouse by operation of law, and Estate no longer had interest in property. Trustee lacked ability after death of Debtor to sell Debtor's interest in property as Debtor no longer had interest that was property of estate. Rule 1016 which allows case to continue following death of Debtor does not alter substantive rights of bankruptcy estate. "Transfer" to spouse was not governed by or limited by Section 363 as that section applies onto to sales of estate interest by Trustee, not transfers by operation of State law. Strong Arm posers under Section 554 did not allow Trustee to avoid transfer to spouse as Section 544 allows trustee to avoid status of creditors, and spouse was not creditor of estate and there was no "transfer" to be avoided as at death Debtor's interest in property ceased to exist and Spouse retained her interest in entire property. Trustee could not assert status as hypothetical lien creditor of Debtor as applicable state law specified that upon death of one joint owner, any liens that may have existed on interest of deceased tenant terminate and co-owner becomes owner free and clear. Trustee could not avoid lien and bona fide purchaser as there was no transfer to avoid.

Hardesty v. Horn, 2019 WL 4780759 (Bankr. S.D. Ohio 2019) – Bankruptcy Trustee steps into shoes of hypothetical bona fide purchaser of real property and is clothed with whatever legal rights a bona fide purchaser would possess under state law. Bona Fide Purchaser is one who takes in good faith, for value, without actual or constructive notice of defect. Trustee's actual knowledge of transaction does not control, as outcome is dictated by constructive notice. While unrecorded deed is effective to transfer title, unrecorded deed is not enforceable against BFP. Prior to petition, Debtor executed and delivered to Father a deed that Father did

not record. On petition date, Father held unrecorded deed that was avoidable by Trustee. Father's unsuccessful attempts to have deed recorded does not alter avoidable nature of transfer.

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, 12019 WL 2710049 (Bankr. WD. Ky. 2019) - Section 544(a)(3) grants Trustee rights and powers of bona fide purchaser of real property if hypothetical buyer could have obtained bona fide purchaser status as of petition date. Scope of trustee's authority ultimately determined by substantive state law which determines which liens are vulnerable under Section 544. Lis Pendens constitutes constructive notice of potential liens whether or not liens are recorded sufficient to defeat trustee's claim of bona fide purchaser status in later filed bankruptcy case. Section 544(a)(1) provides Trustee with ability to avoid liens which would be subordinate to hypothetical judicial lien attaching on petition date. Recording of Lis pendens operates on forward-looking basis to subject subsequently acquired interests to outcome of litigation. Judicial lien recorded after filing of Lis pendens is eliminated by completion of foreclosure sale. As of petition date, Trustee could not have acquired judicial lien superior to rights of unrecorded mortgage holder where mortgage holder recorded Lis pendens prior to petition.

Belfance v. Shelton, 2018 WL 5098814 (Bankr. N.D. Ohio 2018) – Section First Modified Pre-Confirmation Chapter 13 Plan allows Trustee to sell property that is property of estate. Trustee could not sell property where evidence indicated that deed transferring property to Debtor was defectively executed and did not operate to convey interest. Debtor held Power of Attorney for Debtor's father who owned real property. Debtor, using POA, transferred property from father to Debtor individually. POA did not specifically authorize Debtor to transfer real property to herself as required by applicable state law rendering alleged transfer void *ab initio*. Trustee could not avoid father's interest in property under Section 544 asked as defect in POA was evident from title records and would have provided constructive notice of potential defect in transfer of property from father to Debtor. Defect in title was not "bona fide dispute" that would allow Trustee to sell property under Section First Modified Pre-Confirmation Chapter 13 Plan(f) as there was no legal dispute that transfer of property to Debtor was void in the first instance. Property was not and never became property of bankruptcy estate.

Harker v. PNC Mortgage Company, 2017 WL 1169615 (Bankr. S.D. Ohio 2017), *aff'd*, 581 BR 500 (6th Cir. BAP 2018), *aff'd*, 2019 WL 1034193 (6th Cir. 2019) – 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.

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.

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".

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.

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.

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.

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.

In re First Mortgage Fund, Inc., 2013 WL 4807164 (E.D. Mi. 2013) – Trustee’s strong-arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender’s rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor’s later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff’s deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.

Gold v. JPMorgan Chase Bank, NA, 2013 WL 3270346 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of Debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgage were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. However, Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor Debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544.

Goddard v. Heldt, Case No. 12-6027 (10th Cir. 2013) – Trustee could not use BFP status to defeat resulting trust held by Debtor’s mother in property where mother was in open and notorious possession of property at time case filed. Years before Debtor filed bankruptcy, mother transferred property into Debtor’s name. Mother purchased the property and made all payments on the property, paid all taxes and insurance, and lived in the property. Transfer was done as estate Planning device. Court ruled that property was subject to a resulting trust in favor of mother. Trustee argued that resulting trust was avoidable as an unrecorded interest subject to Trustee’s power as BFP. Mother’s open and unambiguous possession of property was sufficient under State law to give constructive notice of Mother’s interest, thereby defeating Trustee’s status as BFP.

Field v. Ocwen Loan Servicing, LLC, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee’s strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded lis pendens prevents trustee from avoiding lien using power of hypothetical bona fide purchaser as lis pendens constitutes constructive notice of adverse claims. Trustee could not avoid unrecorded mortgage where lender recorded lis pendens prior to commencement of bankruptcy case.

Rhiel v. Central Mortgage Company, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record lis pendens prior to bankruptcy filing. Properly recorded lis pendens also operates as constructive notice that would have been sufficient to defeat trustee’s status as BFP.

Rogan v. CitiMortgage, Inc., 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed husband’s name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband’s later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.

Bank of America v. Greene, 2012 WL 124278 (E.D. Tn. 2012) – Deed of Trust properly recorded but then inadvertently deleted

from records by error of register of deeds did not provide constructive notice for purposes of defeating Trustee's status as BFP. As a result of the error of the register of deeds, the deed of trust would not have been discoverable by a search of the public records. Striking notice from records is akin to mis-filing in the records, which prevents the instrument from being enforceable against subsequent BFP.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Trustee as hypothetical bona fide purchaser for value takes title clear of unrecorded liens and interests. BFP status does not override constructive notice provisions of state recording statutes. Trustee did not have actual or constructive notice of mortgage where sequence of recording removed mortgage from Debtor's chain of title. Debtor's principal purchased property and executed mortgage to lender. Principal then quit-claimed deed to corporation owned by principal. County clerk recorded documents in incorrect order, such that the deed to the principal and the quit-claim deed to the company were recorded before mortgage given by principal. Mortgage did not appear in Debtor's chain of title and mortgage, at time of recording, appeared to be made by a person who was, at that time, a stranger to title. Inquiry notice can also defeat BFP status if party did not have actual or constructive notice but nonetheless had sufficient facts and information from which actual knowledge can be inferred, even if the facts and information do not disclose the full state of facts and circumstances. Where information known to person would be sufficient cause person of ordinary prudence to make further inquiry, law presumes that party made inquiry and determined true state of facts. Although mortgage sell outside of chain of title for purposes of constructive notice, the deed to the principal and the quit-claim from the principal to Debtor both referenced the mortgage itself. These documents, of which the trustee had constructive notice, contained sufficient information to place trustee on inquiry notice of the existence of the mortgage, sufficient to defeat trustee status as BFP.

Rogan v. Fifth Third Mortgage Company, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

Tibble v. Wells Fargo Bank, N.A., 2001 WL 3583278 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee's standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when Debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated "Lot 6" was actually intended as mortgage on Lot 5.

Ransier v. Countrywide Home Loans, Inc., 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Trustee, as hypothetical bona fide purchaser, avoid transfers to extent that the transfer would not be binding against a bona fide purchaser as a matter of state law.

14.5 Trustee as Unsecured Creditor

Viera v. Gaither, 595 BR 201 (Bankr. D.S.C. 2018) – Section 544 allows Trustee to avoid any transfer that would be avoidable by creditor holding unsecured claim. Trustee relying on Section 544(b) must identify at least one existing unsecured creditor and cannot rely on hypothetical creditor. IRS is actual creditor where IRS holds outstanding unsecured claim for taxes, allowing Trustee to exercise any avoiding powers that would be available to IRS. Federal Debt Collection Practices Act is applicable non-bankruptcy law on which Trustee can base avoidance action. Power is then exercised for benefit of all creditors, such that avoidance is not limited to amount needed to pay IRS. Nothing in Section 544(b) excludes IRS as creditor and FDCPA constitutes applicable law under Section 541(b) because IRS could use that statute to collect outstanding taxes.

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.

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 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.

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.

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.

Still v. Hopkins, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Trustee’s power to bring State Court action under Section 544 depends on existence of actual unsecured creditor who could have brought action as of the commencement of the bankruptcy case. Complaint is not required to identify any specific unsecured creditor to state cause of action, but can allege generally that there is a category of unsecured creditors that could assert the claim. Complaint that alleged that Debtor has “unsecured debt in excess of \$42,330.39” was sufficient to state cause of action under Section 544.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Trustee has power under Section 544 to assert any claims that unsecured creditor could assert under state law. To bring action under state fraudulent transfer statute, Trustee must prove that there is at least one creditor holding an allowable unsecured claim; and that the transfer is voidable under state law.

Bash v. Somerset CPAs, PC, 2012 WL 3202774 (Bankr. N.D. Ohio 2012) – Complaint stated cause of action to recover proceeds that were improperly diverted to other entities controlled by Debtor’s insider for no value. Complaint alleged that Debtor obtained funds from third parties that Debtor was supposed to invest, but instead Debtor entered into series of worthless loans with Debtor’s parent and other related companies. Complaint alleged sufficient facts to demonstrate that Debtor was nothing more than a Ponzi scheme that wrongfully diverted funds for benefit of insiders at expense of investors. Complaint sought to collapse series of transactions that began by Debtor transferring funds to parent corporation which then passed funds to various related third-party entities. Complaint specifically alleged that the Transfers were part of a single, integrated transaction that, taken together, diminished the value of Debtor’s estate. Complaint further alleged that the Transfers were made by Debtor for less than fair consideration or were made by Debtor with actual fraudulent intent and that defendant knew or should have known of Debtor’s scheme. Complaint contained detailed factual allegations that specifically identify fraudulent conduct which, if taken as true, would establish the “actual intent to hinder, delay, or defraud” element of an actual fraudulent transfer claim. The complaint also contains detailed factual allegations as to the transfers at issue being made for less than reasonably equivalent value as well as Debtor’s insolvency. The complaint also contained detailed factual allegations that specifically identify each of the Transfers that the trustee seeks to avoid, including an identification of the recipient, amount and dates of those transfers.

Onkyo USA Corp. v. Global Technovations, Inc., 2011 WL 1299356 (E.D. Mi. 2011), *aff’d* 2012 WL 4017386 (6th Cir. 2012) – Under Section 544(b), Trustee can avoid any transfer of property of Debtor that is avoidable by an unsecured creditor who held a claim. Trustee can file action under Florida state fraudulent transfer statute as long as there was at least one actual unsecured creditor who could have pursued recovery under Florida law.

14.6 Standing – Chapter 13 Trustee

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

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, I2019 WL 2710049 (Bankr. WD. Ky. 2019) - Section 544(a)(3) grants Trustee rights and powers of bona fide purchaser of real property if hypothetical buyer could have obtained bona fide purchaser status as of petition date. Scope of trustee’s authority ultimately determined by substantive state law which determines which liens are vulnerable under Section 544. Lis Pendens constitutes constructive notice of potential liens whether or not liens are recorded sufficient to defeat trustee’s claim of bona fide purchaser status in later filed bankruptcy case. Section 544(a)(1) provides Trustee with ability to avoid liens which would be subordinate to hypothetical judicial lien attaching on petition date. Recording of Lis pendens operates on forward-looking basis to subject subsequently acquired interests to outcome of litigation. Judicial lien recorded after filing of Lis pendens is eliminated by completion of foreclosure sale. As of petition date, Trustee could not have acquired judicial lien superior to rights of unrecorded mortgage holder where mortgage holder recorded Lis pendens prior to petition.

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.

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 5622(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.

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 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.

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.

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).

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).

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 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 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 unavowed and enforceable where trustee does not pursue avoidance.

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.

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.

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".

Mitrano v. US, 2011 WL 4459102 (Bankr. E.D. Va. 2011) – Debtor lacks standing to pursue avoidance action under Section 544. Powers of Debtors are listed in Section 1303. Avoidance powers are not included in powers listed.

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

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

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

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 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.

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 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

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.

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 USC § 548 and/or § 544 during the pendency of bankruptcy proceedings.

14.9 Defenses – Earmarking

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30-day safe harbor provision of section 547(e)(2)(A).

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and 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

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.

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.

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.

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 may constitute reasonably equivalent value.

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.

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.

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.

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.

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 Debtor actually received, and whether the transaction was at arm's length. Debtor who paid \$13 million to acquire assets worth only \$6.9 million did not receive "reasonably equivalent value" for stock acquisition.

Solomon v. Felsner, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor's fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé "gifted" to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit-claimed

property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

14.11 Defenses – Stockholder Distributions

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.

Buchwald Capital Advisors, LLC v. Papas, 2018 WL 509741 (E.D. Mi. 2018), *reversed*, 2019 WL 1770323 (6th Cir. 2019) - Supreme Court decision in *FTI Consulting, Inc. v. Merit Management Group, LP*, ___ US ___, 2018 WL 1054879 (2018) abrogated reasoning used by Bankruptcy Court and District Court. Mere fact that funds were transferred through financial institution is not sufficient for purposes of Section 546(e).

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.

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 brought suit directly against controlling shareholders under state law theories of constructive fraud. Suit not barred by Section 546(e).

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.

Official Committee of Unsecured Creditors v. American United Life Insurance Company, Case No. 12-4720 (2d Cir. 2013) – Payments by Debtor to holders of private placement notes issued by one of Debtor's affiliates were not recoverable as preferences, and payments constituted transfers made in connection with a securities contract within meaning of Section 546(e).

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Trustee's action to avoid preferential transfer under Section 544 is subject to defenses available under applicable state law. Fraudulent transfer based on payments by Corporations will be governed by Michigan Business Corporation Act and not Michigan Fraudulent Transfer Act if the payment constitutes "distribution" under MBCA. "Distribution" is a payment made to or for the benefit of shareholders that is made in respect to the corporate shares. Transfers made to or for the benefit of persons who are not shareholders cannot be "distributions" under MBCA. Payments will be "in respect to corporation's shares" if the distributions are made "in recognition of share ownership". Transfers to Chief Executive Officer and to Directors because of their status as officers and directors are not transfers "in recognition of share ownership" and so are not governed by MBCA.

QSI Holdings, Inc., v. Alford, 2009 WL 1905237 (6th Cir. 2009), *abrogated in* Case Number 18-1167 (6th Cir. 2019) - Supreme Court decision in *FTI Consulting, Inc. v. Merit Management Group, LP*, ___ US ___, 2018 WL 1054879 (2018) abrogated reasoning used by Bankruptcy Court and District Court. Mere fact that funds were transferred through financial institution is not sufficient for purposes of Section 546(e).

14.12 Defenses – Constructive Notice

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, I2019 WL 2710049 (Bankr. WD. Ky. 2019) - Section 544(a)(3) grants Trustee rights and powers of bona fide purchaser of real property if hypothetical buyer could have obtained bona fide purchaser status as of petition date. Scope of trustee's authority ultimately determined by substantive state law which determines which liens are vulnerable under Section 544. Lis Pendens constitutes constructive notice of potential liens whether or not liens are recorded sufficient to defeat trustee's claim of bona fide purchaser status in later filed bankruptcy case. Section 544(a)(1) provides Trustee with ability to avoid liens which would be subordinate to hypothetical judicial lien attaching on petition date. Recording of Lis pendens operates on forward-looking basis to subject subsequently acquired interests to outcome of litigation. Judicial lien recorded after filing of Lis pendens is eliminated by completion of foreclosure sale. As of petition date, Trustee could not have acquired judicial lien superior to rights of unrecorded mortgage holder where mortgage holder recorded Lis pendens prior to

petition.

Harker v. PNC Mortgage Company, 2017 WL 1169615 (Bankr. S.D. Ohio 2017), *aff'd*, 581 BR 500 (6th Cir. BAP 2018), *aff'd* 2019 WL 1034193 (6th Cir. 2019) – 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.

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.

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.

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.

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.

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.

Higgason v. Cantrell, 2013 WL 4777172 (Bankr. E.D. Ky. 2013) – Lien that is not properly perfected under state law does not provide constructive notice for purposes of trustee's strong-arm power. Lien on mobile home may be perfected only by notation on the certificate of title. Mortgage recorded against land on which mobile home resided, which included both land and mobile home, was not perfected as to mobile home by recording in public records only. Mobile home becomes part of the real property only if the mobile home is permanently affixed and the owner surrenders the certificate of title. Where Debtor had permanently affixed mobile home but had not surrendered certificate of title, recording of lien in public records is not proper perfection.

Jahn v. FirstBank, 2013 WL 5347452 (Bankr. E.D. Tn. 2013) – Generally any description is sufficient if the identity of the premises can be established, or if the description furnishes the means of identification, of the property covered by the mortgage reasonable certainty, and without the exercise of arbitrary discretion, which can include a description can be made certain within the terms of the instrument; or is sufficient to allow a surveyor to locate the land establish its boundaries; or by which a party familiar with the locality is able to identify the premises intended to be conveyed with reasonable certainty. Court will declare a deed void for uncertainty of description only where, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by the instrument remains a mere matter of conjecture, or where the description cannot be made applicable to but one definite tract. Deed of trust that contained a mistaken reference to a lot number rather than a condominium unit number was not defective. Deed of trust included correct street address and the Deed of trust referred to the unit deed that correctly identified the property. Deed of trust necessarily referred to some existing tract of land, and its terms can be applied to one tract only.

Higgason v. Porter, 2013 WL 4715685 (Bankr. E.D. Ky. 2013) – Land Contract Vendee acquires equitable interest in property,

while legal title remains in seller. Seller holds security interest in underlying property pursuant to the Land Contract. Security interest is not avoidable by Trustee under strong arm powers where neither Vendor nor Vendee recorded deed, as public records would reflect Vendor as record title holder, providing constructive notice of possible interest that is adverse to interest of Debtor as Vendee.

Northedge v. Beckett, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Recorded quit claim deed that referenced lien created by judgment of divorce constituted constructive notice of existence of lien sufficient to prevent assertion of BFP status. Fact that JOD itself was not recorded or that there was not a separate mortgage recorded did not defeat fact that person reviewing record would find deed that conspicuously referenced lien.

Gold v. JPMorgan Chase Bank, NA, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of Debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgages were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor Debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544.

Field v. Ocwen Loan Servicing, LLC, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee’s strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.

Burks v. Deutsche Bank National Trust Co., 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Chapter 13 Trustee could avoid mortgage where mortgage was not executed in accordance with state law. Mortgage lacked notary clause, which was required by state law for mortgage to be recorded. As such, mortgage was not entitled to be recorded. Fact that mortgage was recorded did not constitute constructive notice in light of defect in execution.

Nelson v. Countrywide Home Loans, Inc., 2012 WL 7991237 (Bankr. S.D. Ohio 2012) – Mortgage signed by Debtor-wife on property solely owned by Debtor-husband validly encumbered wife’s dower interest in property notwithstanding that wife did not also sign the promissory note. Mortgage given to secure obligation of third party is valid as lien against property, but does not create in creditor any right to pursue signor for deficiency. Obligation is limited to potential foreclosure of collateral.

Kellner v. City of Kettering, 2013 WL 618537 (S.D. Ohio 2013) – Recorded mortgage not per se defective for purposes of constructive notice merely because of typographical error in notary clause. Although improperly executed mortgage is not entitled to be recorded and, if recorded, is treated as not being recorded, defect in acknowledgement is not fatal where error appears on face of mortgage and mortgage itself supplies the means of making the correction. Mortgage clearly identified Debtor as the mortgagor. However, notary clause contained an incorrect name as “the above-named mortgagor”. The person named in the notary block was not named anywhere in the mortgage and had no connection to the property, the mortgage, or Debtor. Viewing the document as a whole, there was no doubt that Debtor, rather than person named in acknowledgement, signed Mortgage and personally appeared before notary to acknowledge the signing of the mortgage. Mortgage substantially complied with statutory requirements and is valid and enforceable. Error was so obvious that no third-party purchaser could legitimately claim to be misled as to who acknowledged execution of the Mortgage.

Rogan v. Farmers Home Administration, 2012 WL 3228989 (Bankr. E.D. Ky. 2012) – Mortgage in name of partnership as mortgagor, signed by general partner with authority to do so pursuant to partnership agreement, is properly executed for purposes of notice to defeat status of Trustee as bona fide purchaser. Entity was properly listed as mortgagor and it was not necessary or appropriate for mortgage to list general partner as mortgagor. Although signature did not expressly state that person signing did so in capacity as general partner, law presumes that documents signed by agent are done with intent to bind principal and are acts of the principal. Alleged defects in notary acknowledgement did not defeat notice where statute provided that a document that is recorded is valid for purposes of providing notice even if the document is not acknowledged at all. Any technical defect in the acknowledgement would not prevent recorded mortgage from defeating status as BFP.

Field v. Wells Fargo Home Mortgage, 474 BR 521 (Bankr. S.D. Ohio 2012) – Constructive notice defeats status as bona fide purchaser for value. Under Ohio law, if a lien is not noted on the title, then the purchaser is not bound by the lien. Mortgages noted on title may provide constructive notice of liens, if the legal descriptions in the mortgages sufficiently describe the property. Address shown in mortgage was address for the property in question, but legal description was for separate and distinct parcel. Extrinsic evidence supported finding that mortgage was intended to encumber property at issue and was sufficient to defeat Trustee’s status as bona fide purchaser. Inconsistency in description of property did not render execution of mortgage invalid, where Ohio law does not require a legal description in the mortgage. Accurate non-legal description is all that is required and the

mortgage at issue contained the accurate street address.

Rhiel v. Central Mortgage Company, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record *lis pendens* prior to bankruptcy filing. Properly recorded *lis pendens* also operates as constructive notice that would have been sufficient to defeat trustee's status as BFP.

Mostoller v. Dover Mortgage Company, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Complaint failed to allege any basis to avoid mortgage. Although creditor may have failed to provide documents to Trustee to show perfection of mortgage, review of public records unambiguously established that there was a properly perfected lien and Plaintiff failed to plead any facts to support avoidance of lien. *Rogan v. CitiMortgage, Inc.*, 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Even if Mortgage signed by wife who signed her name and also signed husband's name was defective, trustee not entitled to avoid lien where mortgage was recorded substantially prior to commencement of bankruptcy case and state law provided that if a mortgage is not properly acknowledged or proved but is recorded, the recording constitutes constructive notice to all parties of the recorded instrument.

Richardson v. Deutsche Bank National Trust Co., 2012 WL 1941846 (Bankr. W.D. MI. 2012) – Recording of affidavit of lost mortgage with copy of mortgage attached is sufficient to provide constructive notice of lien, precluding trustee from acquiring status as bona fide purchaser; expressly disagreeing with *Turner-Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi. 2009). Purpose of recording is to put subsequent purchasers on notice, to raise a "red flag" alerting them to a claimed interest in property. Recorded affidavit of lost mortgage provides constructive notice and controls over subsequent purchaser.

Rogan v. Wachovia Mortgage Corp., 2012 WL 1813120 (Bankr. E.D. Ky. 2012) – Notice of *lis pendens* filed prior to commencement of bankruptcy case provided constructive notice to Trustee of claimed interest of lender, precluding status of Trustee as bona fide purchaser for value.

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

Rhiel v. BAC Home Loans Servicing, LP, 448 BR 914 (Bankr. S.D. Ohio), *aff'd* 458 BR 391 (6th Cir. BAP 2011) – Mortgage sufficiently described Debtor-wife as "borrower" for purposes of creating a valid security interest in her half ownership of property. Although the Mortgage defined "Borrower" only as Husband, the signature page of the Mortgage included signatures of both Husband and Wife with "borrower" preprinted under each; both Husband and Wife initialed each page of Mortgage; and Notary block included references to both Husband and Wife. Further, Adjustable Rate Rider attached to the Mortgage defined Borrower as both Husband and Wife. Documents would be construed together to give effect to the intentions of the parties at the time the mortgage transaction was executed.

Rogan v. Fifth Third Mortgage Company, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

Rogan v. American General Home Equity, Inc., 451 BR 421 (6th Cir. BAP 2011) – Inclusion of property description in attachment to mortgage after signatures of borrowers rather than body of mortgage itself and before signatures did not render mortgage invalid, where body of mortgage stated "Exhibit A Legal Description" and mortgage attached legal description denominated "Exhibit A". Statutory requirement that borrower sign mortgage at or near end of document did not abrogate doctrine of incorporation by reference.

Fifth Third Bank v. JPMorgan Chase Bank, N.A., 2011 WL 30770 (W.D. Ky. 2011) – Defect in notary clause did not render mortgage invalid or unenforceable. Under Kentucky statute in effect at time of recording, mortgage recorded is deemed to provide constructive notice regardless of defects in execution.

Wells v. CF Bancorp, Case No. 10-73332 (Bankr. E.D. Mi. 2011) – Recording copy of mortgage with affidavit of lost instrument is not sufficient to perfect mortgage under Michigan law. Michigan law requires recording of the original mortgage bearing original signature of mortgagors. Trustee could avoid mortgage where only copy of mortgage was recorded, leaving mortgage effectively unrecorded.

Hardesty v. CitiFinancial, Inc., 2011 WL 693235 (6th Cir. 2011) – Mortgage execution was not defective so as to be avoidable under Trustee's power as bona fide purchaser where mortgage certification stated that the mortgage was "executed before me" rather than "acknowledged before me". Ohio law requires that notary clause state that the mortgage was "acknowledged before me" or the "substantial equivalent". Acknowledgement requires that person signing appear before the person taking the acknowledgement; that the person acknowledge that he signed the document; that the person signed the document for the purpose stated in the document; and that the person taking the acknowledgement had satisfactory proof of identification of the person signing. In this case, there was no dispute that Debtor signed the mortgage in the presence of the notary who also signed and that Debtor presented satisfactory identification. Additional language in the signature block stated that Debtor examined and read the mortgage and signed of his own free act and deed, satisfying requirement that the document be signed for the purpose stated. Notary clause that referenced "executed" rather than "acknowledged" not so deficient as to allow Trustee to avoid mortgage as bona fide purchaser.

Drown v. Kondaur Capital Corp., 2010 WL 4057814 (Bankr. S.D. Ohio 2010) – Mortgage recorded with defective acknowledgement provides no notice at all of the underlying obligation. Under Ohio law, mortgage must be signed by the mortgagor; the signing must be acknowledged before the notary public; the notary public must certify that acknowledgement; and the notary public must sign his or her name to the certificate of acknowledgement. The person whose signature is being acknowledged must also produce identification at the time of execution. Acknowledgement was not fatally defective where the acknowledgement did not include the name of Debtor but inserted the word "mortgagor" in the two places that called for identification of the party signing, where the mortgage elsewhere defined Debtor by name as the mortgagor. Failure of the notary public to circle the appropriate pronoun (his-her-their) alone did not result in a failure to substantially comply with Ohio law. The harm caused by the failure to circle the appropriate pronoun in this case is minimized because Debtor was the sole mortgagor and the failure to circle the appropriate pronoun would not mislead a subsequent purchaser as to who is acknowledging the Mortgage. Further, lender filed action to foreclose mortgage and obtained judgment of foreclosure prior to commencement of bankruptcy case. Filing State Court action gave rise to *lis pendens* sufficient to place subsequent purchasers on notice and defeat bona fide purchaser status. Even if the mortgage had been defective and of no effect when it was recorded, the *lis pendens* standing alone serves as sufficient notice.

Ransier v. Countrywide Home Loans, Inc., 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Under Ohio law, a mortgage must be properly executed for the recording to be effective. Recording a defective mortgage provides no notice as a matter of law. However, *lis pendens* that arises when mortgage creditor files action to foreclose does give rise to constructive notice sufficient to defeat status of subsequent purchaser as "bona fide purchaser". Although the mortgage was incorrectly executed, when Lender filed State Court action pre-petition to reform the mortgage and then to foreclose the mortgage and had obtained Final Judgment reforming the mortgage and ordering the property sold at foreclosure sale, that suit gave rise to a *lis pendens* that defeats the Trustee's status as bona fide purchaser and renders mortgage unavoidable by Trustee.

Helbling v. Cleary, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Mortgage that was defective where notary block failed to recite the names of the parties whose signatures that were being acknowledged did not constitute constructive notice of the existence of the mortgage for purposes of defeating Trustee's status as Bona Fide Purchaser. However, Bank's mortgage foreclosure complaint filed before commencement of Bankruptcy Case constitutes statutory notice of the pendency of the action and prevents any third party from acquiring an interest superior to that of the Plaintiff, preventing Trustee from acquiring status as Bona Fide Purchaser.

Degrolamo v. SunTrust Mortgage, Inc., 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – Under Ohio law, filing of complaint operates as *lis pendens* preventing any interest from being acquired that would be superior to Plaintiff's title. Bank filed foreclosure proceeding prior to commencement of bankruptcy case. Resulting *lis pendens* prevented Trustee from acquiring status as bona fide purchaser for value.

Menninger v. Mortgage Electronic Registration Systems, Inc., Case No. 09-1097 (Bankr. W.D. Ohio 2010) - To comply with Ohio law, mortgage must be signed by the mortgagor; (2) the signing of the mortgage must be acknowledged before a notary public; (3) the notary public must certify the acknowledgment; and (4) the notary public must subscribe his name to the certificate of acknowledgment. Mortgage invalid as to Debtor-wife where mortgage identified only Debtor husband as the "borrower". Even though Debtor-wife signed the mortgage, there was no predicate language in the mortgage itself to include Debtor-wife as mortgagor.

Felner v. Monticello Banking Co., Case No. 09-1050 (Bankr. W.D. Ky. 2010) - Trustee is not a bona fide purchaser if he has notice of facts which would cause a reasonably prudent person to make a further investigation to ascertain if there is an adverse interest in the property. A bona fide purchaser of real property is put on constructive notice of a prior interest in the property by the presence of a recorded deed or mortgage, acknowledged according to law. Debtor's mortgage given to secure loan to closely held corporation valid and enforceable where Debtor signed personal guaranty of the obligation. That Debtor did not personally sign the note does not control where Debtor did sign the guaranty of the Note. Mortgage was properly executed and recorded. Trustee's complaint to avoid lien dismissed.

Stubbins v. Espenschied, Case No. 08-2266 (Bankr. S.D. Ohio 2010) - Mortgage that was not properly perfected did not provide constructive notice sufficient to defeat Trustee's status as bona fide purchaser. Notary Acknowledgement did not name the party allegedly signing the mortgage as required by state law. Recording of defective mortgage does not constitute "notice" even if mortgage is otherwise properly executed by Debtor and recorded in the Public Records.

Stockton Mortgage Corporation v. Schlarman, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee’s position as bona fide purchaser as of the petition date defeats any attempt by mortgage company to reform mortgage which had been effectively executed. Property was owned jointly by Debtor and a co-owner. However, mortgage was executed only by the co-owner. Although Debtor had repeatedly represented prior to the filing of the bankruptcy case that Debtor had contributed substantial sums to the acquisition and maintenance of the property, mortgage company could not rely on these allegations to defeat superior interest of Trustee as bona fide purchaser as of the date of the petition.

Johnson v. BAC Home Loans Servicing, L.P., 2010 WL 2667393 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable by a bona fide purchaser for value. Mortgage against property owned by husband and wife that defined “Borrower” only as the Husband did not constitute a grant of the mortgage against Wife’s interest in the property. Signature by Wife as “Borrower” does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife’s interest in the property, rendering the mortgage avoidable pursuant to Section 544.

Richardson v. Wells Fargo Home Mortgage, Inc., 421 BR 426 (Bankr. W.D. Mi. 2009) *aff’d*, 2010 WL 3370071 (W.D. Mi. 2010) – Mortgage that failed to reference property lot number or plat number as required by Michigan law left mortgage invalid even though it contained property’s street address. Recording of a defective mortgage does not provide constructive notice as a matter of law so as to defeat the interests of a bona fide purchaser. Michigan law requires all recorded sales, conveyances or mortgages, contain the caption of the Plat and Lot Number on all property located within a platted subdivision.

Helbling v. Oberaitis, Case No. 09-16122 (Bankr. N.D. Ohio 2010) – Defective certificate of acknowledgement in mortgage prevents mortgage from providing constructive notice. Trustee entitled to avoid mortgage as bona fide purchaser.

Miller v. LaSalle Bank N.A., 595 F.3d 782 (7th Cir. 2010) – Mortgage with technically defective acknowledgement that failed to identify individuals who appeared before the notary and executed the mortgage would nonetheless constitute “constructive” notice based on 2007 State Law that provided that recorded mortgage would be sufficient for notice purposes notwithstanding certain technical defects. State law amendment applied to all mortgages recorded in Indiana, regardless of whether the mortgage was recorded before or after the adoption of the 2007 law, as the law indicated an intent to operate retroactively to all mortgages of record, regardless of recording date.

Drown v. National City Bank, 420 BR 414 (6th Cir. BAP 2009), *aff’d*, 2011 WL 2899366 (6th Cir. 2011) – Mortgage was not defective for purposes of Section 544(a)(3) where notary block indicated that mortgage had been signed by both husband and wife, when the mortgage in fact had been signed by wife on her own behalf and also by wife on behalf of husband pursuant to valid power of attorney.

Rogan v. New South Federal Savings Bank, 2009 Fed. App. 001 (6th Cir. BAP 2009) – Mortgage not invalid where notary’s bond was not signed by clerk as required. Nothing on the face of the mortgage indicated that the notary who witnessed the execution of the mortgage may have had a defect in the appointing paperwork. Requiring a borrower or lender to independently verify the credentials of the notary would serve no purpose and would only undermine reliability of public records. Further, alleged defect in paperwork was technical non-compliance – notary had been administered proper oath but the clerk failed to sign the appointing paperwork to confirm that oath. Kentucky state law allows a facially valid acknowledgement to be attached only for fraud or mistake by the notary. Later enacted Kentucky law which provided that instruments otherwise properly recorded would be valid for notice purposes even if not properly acknowledged or proved also supported validity of mortgage.

Drown v. Wells Fargo Bank, N.A., 424 BR 315 (Bankr. S.D. Ohio 2010) – Under Section 544(a)(3), a trustee has the status of a bona fide purchaser of real property from 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 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 Debtor even if the deed conveying title to the underlying property to Debtor was itself incorrectly executed. Although property transferred by a “defective deed” may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

Burden v. CIT Group/Consumer Finance, Inc., 2009 WL 723197 (6th Cir. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Kentucky law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Immediately below the mortgage’s signature block appears the certificate of acknowledgment, which stated: “The foregoing instrument was acknowledged before me this 08 day of MAY, 2001” . The acknowledgment 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 acknowledgment.

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.

DeGironlamo v. Countrywide Home Loans, Inc., 2009 WL 2169049 (Bankr. N.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Further, even if improperly executed mortgage gave rise to an equitable lien in favor of the lender, that unrecorded equitable interest is insufficient to negate the avoiding powers of the trustee under section 544(a)(3).

Daneman v. National City Mortgage Co., 2009 WL 2179128 (Bankr. S.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Failure to identify person signing the mortgage does not “substantially comply” with statutory requirements for recording a mortgage as mortgage failed to contain any indication that Debtor acknowledged the instrument before the notary.

Rieser v. Fifth Third Mortgage Company, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife's name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband's one-half interest. Mortgage effective only as to wife's one-half interest in the property.

Shapiro v. Merchants Bonding Company, Adv. No. 07-4083 (Bankr. E.D. Mi. 2008) – Claim of Lien that is not properly recorded provides neither actual or constructive notice of the lien and, therefore, cannot prevail over subsequently recorded mortgage. The Indemnity Agreement executed by Debtor provided that the Agreement count if recorded, would constitute a consensual lien upon any and all real estate owned by Debtors. Lender recorded a claim of lien but failed to attach a copy of the indemnity agreement. Failure to attach indemnity agreement constituted failure to comply with the contractual requirements for obtaining lien. Therefore, recording claim of lien without attaching Indemnity Agreement did not create a lien as a matter of law. Failure to comply with contractual requirements to obtaining lien could produce neither actual nor constructive notice of any alleged lien. Therefore, creditor's claim was unsecured and subsequently recorded mortgage constituted first lien against the property.

In re Wahl, 407 B.R. 883 (Bankr. S.D. Ohio 2009). Mortgage was invalid under Ohio law and could be avoided by Chapter 7 trustee using the “strong-arm” powers.

In re Cornelius, 408 B.R. 704 (Bankr. S.D. Ohio 2009). Mortgage was defectively acknowledged (because Debtor/mortgagor's name was not on the acknowledgement) and avoidable in Chapter 7 trustee's strong-arm proceeding.

Argent Mortgage Co., LLC. v. Drown, 578 F.3d 487 (6th Cir. 2009) – Trustee cannot set aside a mortgage where, under state law, recorded mortgage was sufficient to give constructive notice of the mortgage to third parties. Under Ohio law, recorded mortgage that contained street address of residential property but not legal description was sufficient to give constructive notice of the mortgage. The mortgage documents, while not containing a formal legal description, indicated that they related to a specific street address. Nothing in the documents indicated that the mortgage company sought a lien on anything less than the full property and the description included a tax identification number that applied to the entire property. Therefore, 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.

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

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 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.

Chase Manhattan Bank, USA, NA v. Taxel, 594 F.3d 1073 (9th Cir. 2010) – Unrecorded mortgage arising out of refinance transaction is avoidable by Trustee under Section 544(a)(3). Debtor refinanced mortgage with same lender. Lender recorded satisfaction of prior mortgage but failed to record new mortgage. Debtor's listing of the unrecorded mortgage in the Bankruptcy Schedules does not provide notice to Trustee sufficient to defeat status as bona fide purchaser. Trustee's status is determined as of moment petition is filed. Schedules filed later, even if filed immediately after the petition, do not alter that status. State law required mortgage to be recorded to constitute constructive notice and unrecorded mortgage is void as against any subsequent purchaser in good faith. Equitable subrogation would not render mortgage unavoidable, as the prior lien was satisfied and revival would work prejudice to creditors and the estate and the Trustee as bona fide purchaser. Further, applicable state law provides that bona fide purchasers have priority even over a creditor holding a claim by equitable subordination.

14.14 Lien Strip of Subordinate Lien

Burks v. Deutsche Bank National Trust Co., 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Fact that Debtor previously stripped off second mortgage on basis that first mortgage debt exceeded value of property was not defense to Trustee's later action to avoid first mortgage under Trustee's strong-arm powers. Although junior mortgage was stripped based on assumption that senior mortgage was valid, at confirmation Trustee and senior lender agreed that confirmation would not affect trustee's right to prosecute strong-arm claim.

14.15 Defenses - Statute of Limitations

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.

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.

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.

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.

In re McKenzie, 2012 WL 4742708 (E.D. Tn. 2012) – Section 544 imposes 2 year statute of limitations. Trustee did not bring action to avoid security interest within 2 years. However, Trustee is not precluded from using avoidance power as affirmative defense to action for relief from stay, as long as Trustee does not seek any further relief beyond defense to stay lift. a trustee, when acting defensively pursuant to § 502(d), can use his avoidance powers even after the statute of limitations has expired.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Statute of Limitations applicable to action under Section 544 to avoid fraudulent transfer is defined by state law. Under Michigan law an action for fraudulent transfer accrues when the transfer occurs regardless of when the damage results. Transfers made within 6 year statute of limitations but made pursuant to contractual agreements made more than 6 years prior to the commencement of the case are not barred by statute of limitations. Each payment of money by a Debtor was a separate “transfer” whether or not the payment was made under a pre-existing contract, and whether or not such contract was “divisible” or not.

14.16 Defenses – Equitable Defenses

Drown v. Dollar Bank, FSB, 437 BR 253 (Bankr. S.D. Ohio 2010) – Trustee in action under Section 544 is not subject to equitable defenses that lender may have had to any action brought by Debtor outside of bankruptcy. Lender could not assert defenses of estoppel by deed, equitable subordination, or “equitable restoration” in defense to action by Trustee. Trustee, as hypothetical bona fide purchaser, takes title free and clear of equitable defenses.

14.17 Defenses – Solvent

14.18 Parties Liable – Transferee

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.

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”

Luria v. ADP, Inc. 593 BR 862 (Bankr. M.D. Fl. 2018) – Initial transferee of avoidable transfer is generally liable for amount or value of fraudulent transfer. “Mere conduit” is judicially created exception. Mere Conduit requires that party receiving transfer act in good faith and as innocent participant unaware of fraudulent nature of funds being transferred; transferee did not have control over funds received; and served as conduit for funds under control of transferor. Conduit not limited to financial institutions and applies to any transferee who does not have control. Payroll company was mere conduit where it received money on behalf of transferor for purposes of processing payroll. Transferor directed distribution of funds to various employees and transferee lacked any ability to make independent decision on who funds were distributed. Funds were deposited into common payroll account used by transferee on behalf of multiple clients, and transferee could use funds in account to cover shortfall by any client. Contractual obligations to follow client instructions sufficient for mere conduit as long as requirements were sufficiently rigid and complied with. There was no evidence that payroll company was aware of fraudulent nature of funds and did not have knowledge of facts that would put payroll company on notice. Evidence indicated that Transferor’s Auditors were not aware of fraud and nothing in corporate books and records, even if available to payroll company, would have disclosed fraud.

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

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

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

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.

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.

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Transfer of property from Debtor- spouses as joint tenants to tenants by entirety 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 entirety. 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 entirety placed property beyond reach of each Debtor's individual creditors, diminishing the assets that those creditors could reach, constituting fraudulent transfer.

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.

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 Debtor retained possession or control of the property transferred; before the transfer was made, Debtor had been sued or threatened with suit; and whether 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.

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.

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.

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, complain 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.

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 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) 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, Debtor had been sued or threatened with suit. (e) The transfer was substantially all of Debtor's assets. (f) Debtor absconded. (g) Debtor removed or concealed assets. (h) The value of the consideration received by Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. (i) 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) Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of Debtor. Reasonably equivalent value draws from the bankruptcy definition. Debtor's spouse is "insider" for purposes of State law.

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.

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 of 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.

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.

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.

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 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

Smith v. SIPI, 501 BR 843 (N.D. Ill. 2013), *affirmed*, 811 F. 3d 228 (7th Cir. 2016) – Chapter 13 Debtor has standing to challenge pre-petition transfer as fraudulent conveyance.

Tujague v. The Castro Family Trust, LLC, 2018 WL 4896896 (Bankr. S.D. Ohio 2018) – Party seeking preliminary injunction must prove substantial likelihood or probability of success on merits; threat of irreparable harm; whether issuance of injunction would cause substantial harm to others; and whether public interest would be served by granting injunction. Court may not issue preliminary injunction where there is no likelihood of success on merits; and irreparable injury must be likely to occur. Cause of action to recover fraudulent transfers belongs to bankruptcy estate and Trustee has sole right to pursue recovery unless cause of action is abandoned, or estate settles or releases cause of action. Derivative standing may be available to creditor if demand was made on Trustee to act; Trustee declined; colorable claim exists which would benefit estate; and Trustee’s inaction was abuse of discretion. Creditor lacks standing to maintain action where bankruptcy estate had not abandoned or released cause of action and there was no evidence that Trustee delegated authority to plaintiff.

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.

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.

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.

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.

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.

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

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.

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

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Section 548(a)(1)(A) allows Court to avoid transfer of interest of Debtor in property made within two years before date of filing petition if transfer was made with actual intent to hinder, delay or defraud entity to which Debtor was or became indebted. Section 544 allows Trustee to avoid any transfer of interest in property that is avoidable under applicable state law. Ohio Provides Code Section 1336.04 allows Court to set aside transfer made within four years with actual intent to hinder, delay or defraud. Federal and Ohio statutes are substantially similar in terms of rights, remedies and defenses and each require proof of fraudulent intent by preponderance of evidence. Factors to be considered include whether transfer was to close relative; secret transfer; transfer of title without transfer of possession; or grossly inadequate consideration that would raise rebuttable presumption of actual fraudulent intent. Evidence indicated that transferee, Debtor’s ex-husband, exerted and continue to exert substantial control over Debtor through financial and physical intimidation. Settlement agreement in divorce action that called for property to be transferred to Debtor’s ex-husband was not attempt to defraud Debtor’s creditors, but was aimed at Debtor’s ex-husband’s own financial interests and Debtor acquiesced to avoid Debtor’s ex-husband making Debtor’s life difficult or attempting to control actions through money and intimidation. Evidence also indicated that Debtors ex-husband refinanced property on which Debtor’s ex-husband still owes substantial balance and transfer of property from Debtor and ex-husband to ex-husband individually was done solely to assist ex-husband in refinancing and retaining property, all of which occurred before creditor brought suit for unpaid fees. At time of transfer, Debtor’s interest was subject to substantial mortgage as well as terms of divorce and separation orders that require Debtors ex-husband to make all payments for mortgage, taxes, insurance, utilities and other repairs and to receive credit against the sale proceeds to recover those expenses, severely limiting Debtor’s share of net proceeds. Factoring expenses into Debtor’s one half interest, there was no net value or equity to Debtor’s interest such that Debtors transfer of one half interest in property did not result in Debtor transferring anything of value.

Textron Financial, Inc. v. Bash, 2019 WL 3290257 (N.D. Ohio 2019) - Section 544 allows Trustee to avoid any transfer that is avoidable under “applicable law”. Ohio version of Uniform Fraudulent Transfer Act allows Creditor to avoid a transfer made within 4 years and with actual intent to hinder, delay or defraud creditor. Transfer is not fraudulent against person who takes in good faith and for reasonably equivalent value. If transfer is avoided, Section 550 allows Trustee to recover property transferred or value of property transferred from initial transferee or mediate or immediate transferee other than immediate or immediate transferee who takes in good faith and without knowledge avoidability of transfer, and any recovery is limited to “single satisfaction” of claim. Debtor who made daily withdrawals from and payments on line of credit could not recover all payments made to lender as doing so would allow Debtor to retain funds received from lender all simultaneously recovering all payments to the lender creating

double recovery. Court Limited any potential recovery to maximum amount outstanding under line of credit at any one time-\$17.5 million-rather than \$316 million paid by Debtor to lender.

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Actual intent to hinder, delay or defraud may be proven by “badges of fraud” including lack of or inadequate consideration; family or close relationship between parties; retention of possession, benefit or use of property; financial condition of party to be charged both before and after transaction; existence or cumulative effect of pattern or series of transactions or course of conduct after incurring debt and after onset of financial difficulties; and general chronology of events and transactions under inquiry. Summary judgment is generally inappropriate unless all reasonable inferences defeat claims of one side. Summary judgment warranted where transactions were loans and loan guarantees and there was no evidence of intent to hinder, delay or defraud creditors but were refinancing of pre-existing debt at a longer-term and lower interest rate. Court may consider “confidential relationship” as badger fraud only where facts justify assumption that transaction occurred under conditions that one party exercise dominion over other party; or that one party proposed degree of trust and confidence in other party such that other party was bound to act in good faith and due regard with interest to the opposing party. Evidence did not indicate any control over Debtor by creditors..

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.

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.

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. 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.

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.

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.

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 mount 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”.

Silagay 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.

Kirshner v. Fitzsimons, 2017 WL 82391 (S.D.N.Y. 2017) – Cause of action to set aside fraudulent transfer based on allegations that 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.

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 Debtor retained possession or control of the property transferred; before the transfer was made, Debtor had been sued or threatened with suit; and whether 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 of pending suit and transfer of assets to entity that allowed Debtor continued use and access evidenced actual intent to hinder, delay and defraud creditors.

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 an 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 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, Debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of Debtor; (6) Whether Debtor absconded; (7) Whether Debtor removed or concealed assets; (8) Whether the value of the consideration received by Debtor was reasonably equivalent to the value of the asset transferred or the obligation incurred; (9) Whether 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 Debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of 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 Debtor as a beneficiary and purchasing home in name of trust. Debt that supposedly was owed by Debtor to mom was not consideration for the \$30,000 transfer where debt had been discharged in 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 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.

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.

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 was 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.

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.

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) 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, Debtor had been sued or threatened with suit; (5) The transfer was of substantially all Debtor’s assets; (6) Debtor absconded; (7) Debtor removed or concealed assets; (8) The value of the consideration received by Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) 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) Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of 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. 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.

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.

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.

Wiand 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.

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.

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.

TTOD Liquidation, Inc. v. Lim, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Actual fraud for purposes of Section 548 focuses on intent of 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 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.

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 unmaturing future obligation and allowing Debtor to pay that at expense of current creditors.

DWR International, Inc. v. Job, 2013 WL 1438035 (S.D. Ohio 2013) – Transfer can be avoided under Uniform Fraudulent Transfer Statute if made either with actual intent to hinder, delay or defraud creditors; or if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether 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, Debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of Debtor; (6) Whether Debtor absconded; (7) Whether Debtor removed or concealed assets; (8) Whether the value of the consideration received by Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether 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 Debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of 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.

Degrolamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularity the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of “badges of fraud” including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices.

Steed v. Hawkins, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can recover any transfers made where Debtor had actual intent to hinder, delay or defraud creditors. Defendant liable for recovery of grossly inflated salary and extravagant payments and gifts received from Debtor. Debtor operated a Ponzi scheme, and used portion of proceeds to pay defendant extravagant salary. Debtor knew at the time that Debtor would be unable to repay investors and that Debtor would eventually collapse. Debtor's knowledge that future investors would not receive payments was sufficient to establish actual intent to defraud those investors.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Actual fraud turns on “badges of fraud” including secrecy of transaction, inadequate consideration, close relationship between parties, transferor's continued relationship with the transferred

property, and transferee's knowledge of transferor's financial difficulties. Prior finding in action under Section 727 that Debtor did not act with actual intent to defraud collaterally stopped Trustee from arguing actual fraud in action under Section 548.

U.S. v. Krause, 2011 WL 1206178 (10th Cir. 2011) – Debtor's transfer of property to children's trusts was fraudulent transfer. Using "badges of fraud" (1) a relationship between the grantor and grantee; (2) the grantee's knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantee's part that the contract was the grantor's last asset subject to execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures, Court found that transfer was to Debtor's wife who then transferred them to trust for no consideration and after Debtor knew that IRS had commenced audit and had already disallowed certain deductions. Trustee was Debtor's brother and Debtor retained operational control over assets in trusts including using assets in trusts to pay Debtor's personal expenses.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition with actual intent to hinder, delay or defraud creditors. Debtor ran Ponzi scheme in which Debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the Ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work; and also received checks and cash from Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00, a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal Ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property made with "intent to hinder, delay or defraud creditors" Debtor had been contemplating bankruptcy for a number of months and believed that transfer of property to "paramour" was only way to keep property out of hands of Debtor's creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any debt.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on actual fraud must be plead with specificity pursuant to Federal Rule of Civil Procedure 9. When a plaintiff's intentional fraudulent transfer claim is premised on a Debtor's actual intent "to defraud," plaintiff must plead the "circumstances constituting fraud" with particularity including (1) the date of the transfer; (2) the amount of the transfer (or if the transfer was of property other than money, the property that was transferred and its value); (3) the name of the transferor; (4) the name of the initial transferee; and (5) the consideration paid.

14.26 Actual Intent to Hinder, Delay or Defraud – Ponzi Scheme

Pergament v. Marina District Development Co., 2018 WL 5018654 (E.D.N.Y. 2018) – Transfers made in furtherance of Ponzi scheme are presumed to be transfers to hinder, delay or defraud creditors. Payments do not have to be payments to earlier investors and can include payments to third parties as long as payments are in furtherance of scheme. Plaintiff sufficiently alleged that funds paid by Ponzi principal to Casino as gambling wagers and repayments on Casino lines of credit were "in furtherance" where Plaintiff alleged that Ponzi principal intended to use gambling winnings to repay investors and keep scheme going.

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

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Transfer is constructively fraudulent under Section 548(a)(1) where Debtor received less than reasonably equivalent value and was either insolvent on date of transfer or became insolvent as result of transfer. "Value" includes property or satisfaction or securing of present or antecedent debt and requires Court to compare value of property transferred with that which is received by Debtor in exchange for transfer. Debtor's transfer of one-half interest in property to Debtor's ex-husband pursuant to final judgment of divorce was not constructively fraudulent. Final judgment of divorce required Debtor's ex-husband to sell property but also require ex-husband to maintain all expenses, with ex-husband entitled to recoup expenses for mortgage payments, taxes, utilities and insurance from proceeds. By time Debtor's ex-husband refinanced property, property was valued at \$400,000, encumbered by mortgage of \$274,000 plus ex-husband had incurred expenses exceeding \$193,000 to which Debtor's ex-husband was entitled to recoup before distributing any proceeds. Taking into account mortgage balance plus sums 02 ex-husband for maintenance of property, there was no equity left for Debtor to receive at

time she transferred interest to ex-husband.

Keates v. Bullitt County Sanitation District, 2019 WL 1965917 (Bankr. W.D. Ky. 2019) – Transfer is constructively fraudulent where Debtor received less than reasonably equivalent value and was insolvent on the date of the transfer or became insolvent as a result of the transfer. Debtor received little or no value in exchange for transfer of \$14,000 to defendant in exchange for Debtor's oral agreement to hook up sewer lines where defendant did not connect systems even though defendant had capacity to do so. Debtor was insolvent due to catastrophic failure of wastewater disposal system resulting in millions of dollars' worth of general unsecured claims.

Gocha v. Downs, 2019 WL 654295 (Bankr. W.D. Mi. 2019) – Reasonably Equivalent Value is question of fact based on facts and circumstances of particular case. Court must first determine whether Debtor received any value in exchange for transfer. If so, Court must determine whether value received was "reasonably equivalent". Debtor did not receive value in exchange for deposit of funds withdrawn from Debtor's retirement account into account owned solely by Debtor's spouse where there was no enforceable agreement between Debtor and spouse to use funds to purchase new home nor any other agreement by spouse to provide any benefit to Debtor. Subsequent use of funds to purchase home did not provide value to Debtor where home was titled solely in spouse's name and home was not purchased in exchange for value provided but was, at most, completion of unperformed promise to provide future support.

Simon v. Short, 2019 WL 442296 (Bankr. E.D. Mi. 2019) – Constructive fraud under Section 548 requires transfer of interest of Debtor in property within two years preceding date of filing of petition where Debtor received less than reasonably equivalent value and is either insolvent on date of transfer or became insolvent as result of transfer. Value includes satisfaction or securing of present or antecedent debt. Whether obligation is "debt" is determined by state law. Michigan Compiled Laws Section 566.35 allows avoidance of transfer to creditor whose claim arose before transfer was made if Debtor did not receive reasonably equivalent value and Debtor was insolvent or became insolvent. Requirements under Section 566.35 are essentially same as requirements under Section 548. As for payments made in connection with executed promissory notes, notes conclusively established that funds advanced by defendant to Debtor were loans and that payments by Debtor to defendant were repayment of loans constituting reasonably equivalent value. Remaining advances constituted capital contributions, repayment of which is not transfer on account of antecedent debt.

Geltzer v. Oberlin College, 2018 WL 6333588 (Bankr. S.D.N.Y. 2018) – Gifts and cash payments to adult child are not for reasonably equivalent value.

Caruso v. Clemmens, 2018 WL 5793853 (E.D. Ky. 2018) – Constructive fraudulent transfer requires proof of transfer of property of Debtor for less than reasonably equivalent value and that Debtor either was insolvent when made or became insolvent as a result; and that person from whom transfer is to be recovered was beneficiary of transfer. Corporation did not receive any value for payments by Debtor for purchase of horses bought by corporate president and trustee of president's children's trust and Corporation did not acquire any interest in or have any business reason to purchase horses. However, funds paid to third party as "finder's fee" for assisting corporate Debtor in obtaining financing for operations. Record was insufficient on summary judgment to determine whether payments were reasonably equivalent absent evidence of services performed and benefit received.

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.

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 facts 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.

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.

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) 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.

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.

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.

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.

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.

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 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.

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.

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 transfer or became insolvent as a result of transfer. Circumstances regarding alleged 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 produced no documents or other evidence to support existence of transfer.

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.

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 Debtor received less than reasonably equivalent value, determined by comparing value of property transferred by Debtor to value of what Debtor received.

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) 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, Debtor had been sued or threatened with suit; (5) The transfer was of substantially all Debtor's assets; (6) Debtor absconded; (7) Debtor removed or concealed assets; (8) The value of the consideration received by Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) 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) Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of 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.

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.

TTOD Liquidation, Inc. v. Lim, 2014 WL 554532 (Bankr. E.D. Mi. 2014) - Fraudulent transfer must be of property of 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.

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) - Debtor's pre-petition payments to law firm as payment for services rendered to Debtor's closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where Debtor is not also responsible for payment, do not amount to reasonably equivalent value.

Lingham Rawlings, LLC v. 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 Debtor in exchange; and whether Debtor was insolvent at time of transfer.

Degirolo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers.

Steed v. Hawkins, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can avoid any transfer that is made for less than reasonably equivalent value where Debtor was insolvent or rendered insolvent as a result of the transfer. Debtor's compensation paid to primary employee substantially exceeded the reasonable value of services provided. Defendant received payments for compensation and bonuses of approximately \$500,000 while reasonable salary for services rendered during defendant's 10 month employment would have been no more than \$68,000.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. "Value" includes property or satisfaction of an antecedent debt". Court will compare value of property transferred to value of what Debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because 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.

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 Debtor within two years of filing for bankruptcy if 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 Debtor was an unreasonably small capital; (III) intended to incur, or believed that Debtor would incur, debts that would be beyond 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 Debtor was insolvent failed to state cause of action and would be dismissed with leave to amend.

Smith v. SIPI, LLC., 2010 WL 2899118 (7th Cir. 2010) – State Tax Deed sale did not vest title in purchaser until recordation of tax deed after expiration of statutory redemption period, at which point the deed becomes effective against bona fide purchaser as a matter of state law. Section 548(d)(1) applies only when the transfer become effective against a bona fide purchaser more than two years prior to the commencement of the bankruptcy case. Bankruptcy petition filed less than two years after recording of deed rendered transfer avoidable as a fraudulent transfer.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(B) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition where 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 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.

Valley City Steel, LLC v. Liverpool Coil Processing Inc., 2009 WL 2017787 (6th Cir. 2009) – Plaintiff in constructive fraudulent transfer action must present affirmative proof of the value of the property transferred in order to support allegations that property was transferred for less than reasonably equivalent value. Where plaintiff is unable to establish value of property transferred, defendant is entitled to judgment as a matter of law.

Collins & Aikman Corp. v. Valeo, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Motion for Summary Judgment denied where evidence presented raises questions of whether Debtor received any value in exchange for the transfers or whether that value, if any, was "reasonably equivalent".

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property not constructively fraudulent. Transferee, Debtor's live-in "Paramour" constituted "insider"; Debtor retained possession of property after transfer had occurred; transfer

made while the property was involved in litigation; and Debtor was insolvent at time of transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on constructive fraud is not required to be plead with specificity. Complaint needs only to state short and Plan statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff's claim and the grounds upon which it rests. Federal Rule 9 does not apply to action for constructive fraud because transferee is not accused of an act of fraud or deception; conduct and mental state of the transferee is irrelevant.

14.28 Constructive Fraud – Private School or College Tuition

Geltzer v. Oberlin College, 2018 WL 6333588 (Bankr. S.D.N.Y. 2018) – Parent who pays college expenses for minor child receives reasonably equivalent value by discharging duty to provide child's education. Court will not look behind particular college chosen or weigh whether adequate education could have been provided at lower cost. However, college expenses paid after child attains age of majority lack reasonably equivalent value as parent has no legal duty to provide education. Value requires transfer of property or satisfaction of antecedent debt, neither of which result from payment of adult child's college expenses. Likelihood that children will be self-sufficient and productive members of society, or "psychic and other intangible benefits" from knowing that children are able to care for themselves while laudable, is not "value".

Pergament v. Brooklyn Law School, 595 BR 6 (E.D.N.Y. 2019) – Fraudulent transfer can be recovered from initial transferee witohtu regard to transferee's good faith. Subsequent transferees are liable only to extent transferee took for value and in good faith. Initial transferee is first person or entity to exercise control over property and right to put money or property to transferee's own purpose. Transferee who is defined as one who has no dominion or control over assets and can do nothing more than transmit funds to third party is not "transferee". Tuition payments made for adult children while children could still withdraw and receive refund are not transfers to or for benefit of College. College did not acquire any interest in or right to funds until drop-add period expired. Until that point, College was holding funds for benefit of child and not for College's own account and College could not take or use funds for its own purposes until directed to do so by Parent or Child and then funds were applied directly to Child's account. College was mere conduit as to pre-paid tuition expenses. If children withdrew from College, funds would have been returned to Child who could use them as Child pleased. However, payments made after Child registered for classes and that were not refundable did not implicate "mere conduit" because College received funds for its own use and benefit.

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.

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.

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.

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.

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 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 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 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.

14.29 Transfer of Property of Debtor

Lim v. Manuel, 2019 WL 4010388 (Bankr. E. D. Mi. 2019) – Debtor’s pre-petition transfer to spouse of accrued Social Security payments is potentially avoidable. Although Social Security benefits never became part of estate, transfer may nonetheless be avoidable as constructively fraudulent. Question depends on whether transferred funds were intended to be used for Debtor’s care and were needed to provide for Debtor’s maintenance, as opposed to being outright gift to Debtor’s spouse. Record was not sufficient for summary judgment purposes where there was genuine issue of material fact whether transferred funds were used for Debtor’s basic care or maintenance or constituted a gift which would be avoidable. Fact that Debtor’s spouse co-mingled funds with her own funds does not defeat exempt status if funds remain readily available and have not been converted into some other permanent investment. If funds were used were intended to be used for Debtor’s care and maintenance, funds would retain statutory protection as long as funds are readily traceable.

Gocha v. Downs, 2019 WL 654295 (Bankr. W.D. Mi. 2019) – Transfer includes any direct or indirect, absolute or conditional, voluntary or involuntary, disposing of property or interest in property, defined as property that would have been part of Debtor’s estate had not been transferred prior to bankruptcy. Debtor transferred property by withdrawing funds from retirement account and depositing funds into account solely in spouse’s name.

Hayduk v. Burke, 2018 WL 5472002 (Bankr. E.D. Tn. 2018) - Validly executed disclaimer of interest applies retroactively effective as of the date of death. Debtor disclaimed interest in state pre-petition such that divestment of property interest occurred prior to bankruptcy estate gaining any interest in right to disclaim. Bankruptcy Trustee cannot recover property that Debtor would have obtained but for execution of disclaimer. Disclaimer cannot be “fraudulent conveyance” as disclaimer did not result in any transfer of property of Debtor. Disclaimer of inheritance allows interest to pass as if person disclaiming had predeceased decedent. Any portion of estate that Debtor stood to inherit vested directly in next named beneficiaries with movant not holding any legal or equitable interest in probate estate. Whether disclaimer was properly executed at state law is matter for determination by State Probate Court and fall squarely within probate exception to federal jurisdiction. To extent complaint sought to invalidate disclaimer, case dismissed for lack of federal jurisdiction.

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.

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. Government’s interest in safeguarding loan proceeds was countervailing federal interest that would permit Court to determine ownership by reference to federal law.

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.

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.

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.

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”.

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*.

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 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”.

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.

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. Treasury 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.

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.

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.

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.

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 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.

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 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.

TTOD Liquidation, Inc. v. Lim, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Fraudulent transfer must be of property of 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.

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 Debtor or of Debtor's interest in property. Property transferred was not property of Debtor. Debtor embezzled funds from employer and used those funds to pay Debtor's creditors. However, the checks to the creditors were issued directly from corporate accounts and payable directly to the creditor. Debtor never had the funds and never had an interest in the funds, as the funds passed directly from employer to creditor. As such, payments to creditors using funds embezzled from employer were not avoidable as fraudulent transfers. Embezzler does not acquire any title to or interest in embezzled funds as a matter of state law.

The White Family Companies, Inc. v. Slone, 2013 WL 3925820 (6th Cir. 2013) – Fraudulent transfer action requires that property transferred have been property of 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. 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 Debtor. Although the money had been deposited into the trust account, the check that had been entrusted to 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 Debtor when the deposited check bounced, and the funds in the trust account were the proceeds of this "loan" and belonged to Debtor. Debtor's forwarding of those funds to the lender constituted a constructively fraudulent transfer of property of the estate.

White Family Companies, Inc. v. Dayton Title Agency, Inc., 468 BR 258 (S.D. Ohio 2012) – Funds that had been deposited in Debtor/real estate title agency's Interest on 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.

Stathopoulos v. Alford, Case No. 11-12353 (11th Cir. 2012) – To be avoidable, property transferred must have been property of 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 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 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.

14.30 Time of Transfer

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”.

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

14.31 Payments Under Employment Contracts

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Payments made under employment agreement made more than 2 years prior to commencement are not avoidable even if payments themselves were made fewer than 2 years prior. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Execution of separate “Severance Agreement” at termination of employment did not create new or distinct severance obligation where Severance Agreement merely restated terms of original Employment Agreement regarding amount and timing of severance payments.

14.32 Transfer of Property of Estate

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.

14.33 Particular Transfers Avoidable

Sikirica v. Wettach, 2013 WL 1289149 (Bankr. W.D. Pa. 2013) – Debtor’s deposit of paychecks into joint account with spouse, made after Debtor had been sued, were partially fraudulent to extent of the amount deposited that was not thereafter used to pay household or personal expenses of Debtor.

In re Neal, 478 BR 261 (6th Cir. BAP 2012) – Bankruptcy Court could revisit property distribution in domestic relations case to determine if allocation of assets is fraudulent transfer. Where one party received assets of value grossly disproportionate to value of assets received by other, transfer is avoidable under Section 548.

Janvey v. Democratic Senatorial Campaign Committee, Inc., Case No. 11-10704 (5th Cir. 2012) – Receiver could recover from various Democratic and Republican campaign committees as fraudulent transfers under state UFTA campaign contributions. Federal Campaign Finance laws do not preempt fraudulent transfer statutes. (Interestingly, there is no indication in the opinion that the campaign committees contended that the contributor received “reasonably equivalent value”).

Sweet v. Chambers, Adv. No. 11-3071 (Bankr. E.D. Mi. 2012) – Complaint alleged cause of action under Sections 548 and 550. Complaint alleged that Debtor was conspiring with defendants by having promissory notes prepared from defendants to Debtors with the intent of reassigning those notes to Debtor’s wife for no consideration.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) and 548(a)(1)(B) permitted the trustee to avoid transfers to Debtor’s “significant other”. Debtor ran Ponzi scheme in which Debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the Ponzi as well as to support Debtor’s extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to Debtor’s company that provided any economic benefit that was reasonably equivalent to the transfers from Debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from 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.

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.

Bash v. Sun Trust Banks, Inc., 2008 WL 3271090 (6th Cir. 2008) – Debtor’s use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor’s interest in property sufficient to sustain a cause of action for state law fraudulent conveyance. Debtor’s ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being “property of the estate” notwithstanding creditor’s argument that the funds actually belonged entirely to the co-account holder.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor’s closely held corporation to Debtor’s significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Corporation was Debtor’s alter ego where Debtor frequently commingled his funds with corporation’s and treated corporation’s debts as Debtor’s individual debts. Debtor put corporation’s cash into Debtor’s accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor’s transfer to “paramour” of one-half interest in Debtor’s real property was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer

14.34 Particular Transfer– Perfection of Security Interest

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.

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.

14.35 Particular Transfers – Tax Sales

Hampton v. Ontario County, 588 BR 671 (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.

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.

Smith v. SIPI, 501 BR 843 (N.D. Ill. 2013), *affirmed*, 811 F. 3d 228 (7th Cir. 2016) – 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. Court distinguished prior 10th and 5th Circuit decisions as particular states in those cases produced true competitive bidding that could rise above amount of tax lien and generate bids more closely resembling reasonably equivalent value; while procedure in 7th Circuit auctioned tax certificate, not property itself, for amount of taxes plus costs. There is no competitive bidding and no possibility of “overbid”. If property owner does not later redeem, certificate holder could obtain title merely by applying for it with no actual bidding or sale.

14.36 Particular Transfers Not Avoidable

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.

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 USC § 548 and/or § 544 during the pendency of bankruptcy proceedings.

Kohut v. Rigney, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex-husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest Debtor of interest in property.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor quit-claimed one-half interest in real property to “paramour” in order to allow paramour to refinance property and pay off prior mortgage that was in foreclosure was not fraudulent transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieve Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

14.37 Reasonably Equivalent Value

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.

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.

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.

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Transfer of property from Debtor-spouses as joint tenants to tenants by entirety 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 entirety. 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 entirety placed property beyond reach of each Debtor's individual creditors, diminishing the assets that those creditors could reach, constituting fraudulent transfer.

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 entirety deprived individual creditors of any remedy against property.

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.

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.

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 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.

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.

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.

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.

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.

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.

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 Debtor received in exchange for transfer as of the date of the transfer by 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).

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.

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.

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.

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.

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.

Wells v. THB America, 2014 WL 5324095 (Bankr. E.D. Mi. 2014) – in order to determine whether Debtor received reasonably equivalent value for the assets that it transferred in this larger transaction, the Court must consider the value of everything that Debtor transferred, and the value of every benefit, direct and indirect, that 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.

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.

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 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.

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.

14.38 Reasonably Equivalent Value – Generally

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Reasonably equivalent value is factual finding requires determination as to whether there was significant disparity between market value of what Debtor gave and what Debtor received. Court must first determine whether Debtor received any value in exchange and if so, must then determine whether value was reasonably equivalent. Dollar for dollar reduction in debt is reasonably equivalent. Value can be in form of indirect economic benefit where value is given to 3rd party but indirectly comes back into Debtor's hands or where 3rd party otherwise conveys economic benefit on Debtor by preserving Debtor's net worth. Debtor's payments to creditor were constructively fraudulent where Debtor was one of 10 related entities that used common cash management system and repaid loans to one entity by creating additional debt of 2nd entity.

14.39 Employment Bonuses

Jalbert v. Flanagan, 2019 WL 2051005 (Bankr. D. Del. 2019) - Discretionary Employment Bonuses paid by company at time when company is failing are not per se fraudulent conveyances. Company Employment Manual allowed company to make discretionary cash bonus payments to employees in good standing even where manual lacks any metrics to determine whether particular employee "earned" bonus. Bonuses will be presumed to be "reasonably equivalent value" absent evidence that Debtor did not receive any benefit, with a direct or indirect, tangible or intangible. Trustee did not present any evidence that employees had not honestly, competently and diligently perform their jobs, that bonuses were excessive, or that bonuses were not market-based. Reasonable inferences that employer paying bonus believes that bonus converse value on employer by building loyalty, enhancing morale, and preventing best employees from leaving employment.

14.40 Reasonably Equivalent Value – Gambling Losses

Pergament v. Marina District Development Co., 2018 WL 5018654 (E.D.N.Y. 2018) – Transfer not constructively fraudulent where transferee gave reasonably equivalent value in good faith. Recipient of property must either convey property in exchange or discharge antecedent debt; exchange must be fair equivalent; and exchange must be in good faith. Knowledge by recipient that funds may have been product of illegal *Ponzi* scheme does not constitute lack of good faith where transferee did not participate in fraudulent conduct. Money obtained by *Ponzi* principal and used to gamble at Casino not constructively fraudulent as Casino gave fair value for transfers (entertainment value of gambling and possibility of winning) and Casino had no contact with or involvement in *Ponzi* scheme.

14.41 Domestic Relations

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Section 548(a)(1)(A) allows Court to avoid transfer of interest of Debtor in property made within two years before date of filing petition if transfer was made with actual intent to hinder, delay or defraud entity to which Debtor was or became indebted. Section 544 allows Trustee to avoid any transfer of interest in property that is voidable under applicable state law. Ohio Provides Code Section 1336.04 allows Court to set aside transfer made within four years with actual intent to hinder, delay or defraud. Federal and Ohio statutes are substantially similar in terms of rights, remedies and defenses and each require proof of fraudulent intent by preponderance of evidence. Factors to be considered include whether transfer was to close relative; secret transfer; transfer of title without transfer of possession; or grossly inadequate consideration that would raise rebuttable presumption of actual fraudulent intent. Evidence indicated that transferee, Debtor's ex-husband, exerted and continue to exert substantial control over Debtor through financial and physical intimidation. Settlement agreement in divorce action that called for property to be transferred to Debtor's ex-husband was not attempt to defraud Debtor's creditors, but was aimed at Debtor's ex-husband's own financial interests and Debtor acquiesced to avoid Debtor's ex-husband making Debtor's life difficult or attempting to control actions through money and intimidation. Evidence also indicated that Debtors ex-husband refinanced property on which Debtor's ex-husband still owes substantial balance and transfer of property from Debtor and ex-husband to ex-husband individually was done solely to assist ex-husband in refinancing and retaining property, all of which occurred before creditor brought suit for unpaid fees. At time of transfer, Debtor's interest was subject to substantial mortgage as well as terms of divorce and separation orders that require Debtors ex-husband to make all payments for mortgage, taxes, insurance, utilities and other repairs and to receive credit against the sale proceeds to recover those expenses, severely limiting Debtor's share of net proceeds. Factoring expenses into Debtor's one half interest, there was no net value or equity to Debtor's interest such that Debtors transfer of one half interest in property did not result in Debtor transferring anything of value.

Limor v. Anderson, 2019 WL 1418698 (6th Cir. BAP 2019) - 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. Record was insufficient to establish for summary judgment purposes that Debtor was insolvent where only evidence presented was Debtor's bankruptcy schedules filed more than one year after transfer of property in question; and list of assets in Dissolution Agreement that did not indicate that list of assets was complete or that Debtor did not own, before, during or after break up with domestic partner, that Debtor brought assets into relationship that remained with her or that Debtor acquired assets after dissolution but before transfer of property. List of assets also omitted 50% ownership in one parcel property. Although Debtor's liabilities of petition date substantially exceeded value of assets, that does not establish that Debtor was insolvent on date of transfer that occurred more than one year prior. Using one year gap between transfer date and petition date stretches analysis past breaking point. Bankruptcy schedules will be evidence of insolvency if made relatively proximate in time to transfer in question, but gap of more than one year eliminated any reasonable inference.

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.

14.42 Reasonably Equivalent Value – Lien Securing Pre-Existing Indebtedness

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.

Tavener 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.

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.

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Reasonably equivalent value has two separate inquiries: (1) did Debtor receive anything that can be properly be considered ‘value;’ and (2) was that value reasonably equivalent to what was transferred. Distribution of assets under voluntary marital separation agreement constitutes a transfer of value where Debtor transferred entire interest in marital home that had substantial equity. Ex-spouse’s alleged waiver of right to receive child support did not constitute “value” for fraudulent transfer purposes as value includes money or property or satisfaction an existing debt, but does not include any unperformed promise to furnish support. Further, facts indicated that even if Debtor was required to pay support, there was no reason to believe that support would ever be paid as Debtor had been convicted of multiple crimes and sentence to lengthy prison term, and Debtor’s former employer held criminal restitution judgment against Debtor. Any obligation to pay support would have been illusory and does not constitute value.

Suhar v. Bruno, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave Debtor’s unsecured creditors worse off because Debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by Debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by Debtor to ex-spouse of amount of spouse's share of marital debt.

Wojcik v. Hudson Funding, LLC, 2013 WL 3525708 (N.D. Ohio 2013) – Determining reasonably equivalent value is a question of fact and considerable latitude must be allowed to the trier of facts. Complaint stated cause of action for fraudulent transfer where Debtor purchased accounts receivable and resold those to related entities for no profit, while retaining servicing duties in exchange for only 25% of collection amounts, effectively allowing purchasing entity to retain 75% of receivables for doing nothing. Complex business relationships between Debtor and purchaser precluded dismissal at early stages of case.

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered to Debtor’s closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where Debtor is not also responsible for payment, do not amount to reasonably equivalent value.

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Debtor and her mother entered into sale of Debtor’s interest for reasonably equivalent value where mother paid Debtor \$35,000 for property that appraised, at most, for \$30,000. Even if the deed was not recorded at that time, the transfer was for a price that was reasonably equivalent for purposes of Section 548.

Barbacci v. Mikstay, 2013 WL 3878165 (Bankr. N.D. Ohio 2013) – In determining reasonably equivalent value, court must first determine what value, if any, Debtor received; and then determine whether the value is reasonable. Value can consist of payments or consideration paid to third party rather than Debtor directly, if the consideration lands in Debtor’s hands or produces some economic benefit to Debtor such that Debtor’s economic status and net worth have been preserved. Debtor sold corvette for \$3,000 cash plus purchaser’s agreement to waive unpaid wage claim against Debtor’s wholly owned business. Court was unable to determine from the record whether the value received by the business fell within indirect benefit rule or whether consideration was reasonably equivalent for purposes of summary judgment.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Reasonably equivalent value requires comparison of value that Debtor gave up with value received by Debtor. Dollar-for-dollar equivalent is not required, but focus is on whether estate was depleted. If transfer does not leave unsecured creditor worse off, Debtor received reasonably equivalent value and transfer is not fraudulent. Value includes either property or satisfaction of antecedent debt. Debtor received value of management services performed by defendant. Satisfaction of accrued liability for management services based on employment contract constitutes reasonably equivalent value to extent of outstanding balance. Loans made by defendant to Debtor that were repaid constituted reasonably equivalent value. Balance of funds did not appear to have been repayment of antecedent obligations and would be constructively fraudulent. Where court also found that some of the transfers were also preferential, court would use care to ensure that court did not award double recovery for same transfers.

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Later payment of severance was in

fulfillment of earlier, unavoidable obligation under employment agreement. Payment of pre-existing enforceable obligation constitutes “reasonably equivalent value” rendering payments not avoidable as fraudulent transfers.

Steed v. Hawkins, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Defendant has burden of proof on issue of reasonably equivalent value and good faith. Although defendant produced evidence that she received transfers in good faith as compensation for services rendered, defendant did not produce evidence of actual value of services rendered. Trustee’s expert testified that reasonable value of services rendered would be less than \$70,000, while defendant received total compensation of more than \$500,000.00. Transfers avoided to extent amount transferred exceeded reasonable value of services.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. “Value” includes property or satisfaction of an antecedent debt”. Court will compare value of property transferred to value of what Debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because Debtor, and consequently the estate, received an amount reasonably equivalent to what it paid, no fraudulent transfer occurred. Debtor did not receive any value from transfer of money to Debtor’s son. Debtor sold her home and paid \$150,000 of the proceeds to Debtor’s son. Debtor’s son then purchased a new condominium unit in his name alone, using the \$150,000 contributed by Debtor plus \$50,000 of son’s money. Condo was titled in name of son alone and Debtor held no interest in that unit. Son’s promise that Debtor could live in the unit during Debtor’s lifetime was not “value” in the form of property or satisfaction of debt and did not provide any benefit to creditors who were harmed as a result of the transfer.

Southeast Waffles, LLC v. United States Department of Treasury, 2011 WL 6155719 (6th Cir. BAP 2011) – Prepetition payment of tax penalties to IRS cannot be constructively fraudulent. Payments reduced Debtor’s obligation on a dollar-for-dollar basis, providing reasonably equivalent value to support transaction. That payments were applied to penalties and not to tax liability itself did not change conclusion that payment reduced Debtor’s total tax liability by the corresponding amount.

Stevenson v. Leonard Turowski & Son Funeral Home, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if made for reasonably equivalent value. Transfer made to pay off antecedent debt is for reasonable equivalent value to the extent that the debt is satisfied in an amount equal to the amount of the payment.

Walls v. Cocchini, 2011 WL 2747377 (Bankr. E.D. Tn. 2011) – Transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to Debtor in exchange for such transfer or obligation. Courts generally compare the value of the property transferred with the value of what Debtor received to ascertain whether there was a reasonably equivalent value, although a dollar-for-dollar equivalent is not required. Investors in Ponzi scheme who receive partial return of invested amounts in 90 days pre-petition are not liable for receipt of preferential transfers. In Ponzi schemes, investors will be liable for preferences only to the extent investor received payments in excess of the principal invested.

Gold v. Marquette University, Case No. 10-4608 (Bankr. E.D. Mi. 2011) – “Value” flowing to third party can constitute reasonably equivalent value to Debtor if the consideration ultimately ends up in Debtor’s possession or confers an economic benefit on Debtor such that 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 Debtor. Although Debtor may have felt moral obligation to pay tuition, Debtor lacked any legal obligation to do so. Items such as “peace of mind” that son will have college education that and provide opportunities to son that he would not have absent college education is insufficient to constitute economic benefit to Debtor.

Weir v. Chadwick, 2010 WL 3724823 (Bankr. E.D. Tn. 2010) – Action to recover under State Uniform Fraudulent Transfer Act for “constructive fraud” requires proof that Debtor, as transferor, did not receive reasonably equivalent value. In determining whether value is reasonably equivalent, focus should be placed upon the consideration received by Debtor rather than the value given by the transferee to determine the net effect of the transfers on Debtor’s estate and the funds available to unsecured creditors. As long as the unsecured creditors are no worse off because Debtor, and consequently the estate, has received an amount 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. Debtor transferred Debtor’s interest in residence to Family Limited Partnership allegedly in exchange for interest in partnership and forgiveness of pre-existing debt owed to other members of partnership. Summary Judgment denied where Court was not able to determine value of Debtor’s fractional ownership interest in house that was transferred or the value of the either the partnership interest received or the debts allegedly satisfied.

Solomon v. Felsner, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor’s fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé “gifted” to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit- claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was “consideration for [Debtor’s] subsequent execution of the quitclaim deed”. Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor’s ability to pay, as required by Florida law.

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”.

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.

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.

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”.

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.

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.

14.44 Secured Claims – Novation

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.

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.

14.45 Insolvency

Limor v. Anderson, 2019 WL 1418698 (6th Cir. BAP 2019) - 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. 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. Record was insufficient to establish for summary judgment purposes that Debtor was insolvent where only evidence presented was Debtor’s bankruptcy schedules filed more than one year after transfer of property in question; and list of assets in Dissolution Agreement that did not indicate that list of assets was complete or that Debtor did not own, before, during or after break up with domestic partner, that Debtor brought assets into relationship that remained with her or that Debtor acquired assets after dissolution but before transfer of property. List of assets also omitted 50% ownership in one parcel property. Although Debtor’s liabilities of petition date substantially exceeded value of assets, that does not establish that Debtor was insolvent on date of transfer that occurred more than one year prior. Using one year gap between transfer date and petition date stretches analysis past breaking point. Bankruptcy schedules will be evidence of insolvency if made relatively proximate in time to transfer in question, but gap of more than one year eliminated any reasonable inference.

Caruso v. Clemmens, 2018 WL 5793853 (E.D. Ky. 2018) – Insolvency is based on Balance sheet. Record indicated that Debtor had liabilities far in excess of assets and the had been without adequate capitalization from day it was formed. Insolvency can be based either on “going concern” value or liquidation value. If company is going out of business, “going concern” value is not proper standard.

Russell v. Harper, 2017 WL 4220396 (Bankr. E.D. Tn. 2017) – Insolvency is not element of action to recover actual fraudulent transfer.

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 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.

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.

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.

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 than 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.

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 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 Debtor was not insolvent at the time of the transfer may be considered exempt property that cannot be considered in determining whether Debtor was insolvent at the time of the transfer.

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".

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.

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.

Paris v. SSAB Enterprises, Inc., 2014 WL 5595113 (Bankr. E.D. Tn. 2014) –

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.

Richardson v. Checker Acquisition Corp., 2013 WL 3279791 (Bankr. W.D. Mi. 2013) – Transfer is constructively fraudulent if transfer is for less than reasonably equivalent value and Debtor is insolvent at the time of, or becomes insolvent as a result of, the transfer. Insolvency is based on comparison of fair value of assets and sum of debts. Transfer generally equates to balance sheet approach, although balance sheet usually does not carry assets on current value basis and may not include all liabilities. Only debts that meet definition of "claim" under Section 101(5) are included in calculation. Debtor's potential liability for withdrawal from multi-employer pension Plan is not a claim where Debtor had not actually withdrawn from the pension Plan as of the date of the petition.

Hebling v. Wagner, 2013 WL 392450 (Bankr. N.D. Ohio 2013) – Debtor's bare assertion of solvency at time of transfer is insufficient to defeat action for fraudulent transfer where balance sheet compiled by Trustee indicated that Debtor's liabilities exceeded assets as of the date of the transfer by more than \$29,000.00.

Newton v. Sims, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made when Debtor was insolvent or that Debtor became insolvent as a result of the transfer. Insolvent is defined using balance sheet test – whether assets exceeded liabilities excluding value of preferences, fraudulent conveyances and exemptions. Debtor became insolvent as a result of transfer of \$145,000 where, prior to transfer, Debtor had assets totaling \$162,000 versus liabilities of \$121,000. After transfer, Debtor's assets dropped to only \$17,000, far less than liabilities which remained at \$121,000. Thus, transfer rendered Debtor insolvent and further evidenced that Debtor did not receive reasonably equivalent value.

14.46 Defenses – Charitable Giving

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.

14.47 Defense – Securities Settlement Payments

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".

14.48 Defense – Leveraged Buyout

QSI Holdings Inc. v. Alford, 571 F.3d 545 (6th Cir. 2009) – Section 546(e) precludes Trustee from recovering from shareholders payments made as part of a leveraged buyout of 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.

14.49 Defense – Forward Contract Payment

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.

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).

14.50 Defense – Wrongful Conduct of Debtor

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

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy trustee is not in privity with Debtor. Alleged wrongdoing of 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 Debtor and its employees impermissibly attribute to the Trustee the wrongdoing of 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).

14.51 Defense – Earmarking

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a

new creditor and 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.

14.52 Defense – Prepetition Return of Money to Third Party

U.S. v. Moyer, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals' personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. Where IRS pre-petition refunded to the corporate principal amounts that were deemed "overpayments" of taxes based on principal's amended tax return, Chapter 7 Trustee is not entitled to also recover the amount of those payments. IRS had no discretion regarding the tax refund, and IRS never had dominion and control over the amount of the overpayment. The IRS was a mere conduit for the payment of the refund to principal and IRS was not a transferee at all, much less an initial or mediate transferee, with respect to the amount of the refund.

14.53 Defense – Good Faith and Value

Pergament v. Marina District Development Co., 2018 WL 5018654 (E.D.N.Y. 2018) – Transferee who takes in good faith and for value may retain the property transferred or retain lien on assets. Good faith is affirmative defense that is not proper for disposition at Rule 12(b) stage. Issue is fact intensive defense. Complaint states cause of action where complaint states that Defendant knew or should have known that transferred funds were product of illegal activity.

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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

14.54 Defense – Equitable Grounds

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.

14.55 Defense – Transfer of Potentially Exempt Assets

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.

14.56 Statute of Limitations

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Section 548 avoids transfer made within 2 years of date of petition. Debtor’s endorsement and delivery of check to ex-husband occurred five years before bankruptcy filing. Any assertion of actual or constructive fraudulent transfer under Section 548 is time barred. Under Ohio law, statute of limitations is four years from date of transfer or, if later, one year after transfer or obligation was or reasonably could have been discovered. Transfer occurred more than four years before Debtor filed bankruptcy and Debtor’s attorney, a creditor in Debtor’s bankruptcy case, was aware of transfer at time transfer occurred. Creditor discovered, or in exercise of reasonable care, could have discovered allegedly fraudulent transfer more than one year before Debtor files for bankruptcy precluding application of one-year discovery window.

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.

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.

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 statute 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.

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.

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 LLCs sole member, as filing by member did not constitute an order for relief as to LLC, which is separate legal entity.

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.

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.

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.

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 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.

Fitzpatrick v. King of Hearts, Inc., 2012 WL 1565129 (Bankr. E.D. Mi. 2012) – Where Trustee brings avoidance action under state law pursuant to Section 544, state statute of limitations applies to state cause of action and limitation contained in Section 547 or 548 apply to federal cause of action. Complaint was timely where complaint was filed more than 2 years after commencement of bankruptcy but within State statute of limitation 5-year period. To the extent complaint contained counts under Section 548, those counts were barred by 2-year statute and would be dismissed.

Midway Motor Sales, Inc. v. Flynn, 2009 WL 1940719 (6th Cir. BAP 2009) – Trustee can bring avoidance action within time permitted under Section 546(a) even if that period is longer than normally available under applicable state law.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) –Quit-claim deed recorded more than 2 years prior to Debtor’s Bankruptcy Petition was outside statute of limitations under Section 548. Action could still be prosecuted under Ohio law which had 4-year statute of limitations if the transfer occurred with actual intent to hinder, delay or defraud creditors. Although “paramour” constituted “insider”; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer; Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt. However, Debtor’s later transfer to paramour of remaining one-half interest was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

Gold v. Deloitte & Touche, LLP, Case No. 0814567 (E.D. Mi. 2009) – Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Appellate Court ordinarily will not consider issues which were not raised and litigated below. Although appellate Court does have authority to consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry. Accordingly, appellate Court would not consider doctrine in affirming dismissal of fraudulent transfer action based on the applicable statute of limitations.

14.57 Damages

Textron Financial, Inc. v. Bash, 2019 WL 3290257 (N.D. Ohio 2019) - Section 544 allows Trustee to avoid any transfer that is voidable under “applicable law”. Ohio version of Uniform Fraudulent Transfer Act allows Creditor to avoid a transfer made within 4 years and with actual intent to hinder, delay or defraud creditor. Transfer is not fraudulent against person who takes in good faith and for reasonably equivalent value. If transfer is avoided, Section 550 allows Trustee to recover property transferred or value of property transferred from initial transferee or mediate or immediate transferee other than immediate or immediate transferee who takes in good faith and without knowledge avoidability of transfer, and any recovery is limited to “single satisfaction” of claim.

Debtor who made daily withdrawals from and payments on line of credit could not recover all payments made to lender as doing so would allow Debtor to retain funds received from lender all simultaneously recovering all payments to the lender creating double recovery. Court limited any potential recovery to maximum amount outstanding under line of credit at any one time-\$17.5 million-rather than \$316 million paid by Debtor to lender.

Gocha v. Downs, 2019 WL 654295 (Bankr. W.D. Mi. 2019) – Trustee entitled to recover \$10,000 which Debtor constructively fraudulently transferred to spouse. Although total amount transferred by Debtor to spouse exceeded \$30,000, recovery limited to amount requested by Trustee in Trial Brief. Allowing Trustee to recover any amount in excess of \$10,000 we constitute “trial by ambush close quote where pleadings and Trial Brief placed defendant on notice that Trustee sought to avoid only \$10,000 transfer.

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.

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.

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.

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.

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.

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.

Silgay v. Morris, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Damages for alleged fraudulent transfer of marital home as part of property settlement agreement would be measured by value of property received, less reasonable costs of sale of the one half of the property defendant received in the transfer. Defendant could not reduce transfer by costs of sale of Defendant’s one half of the property he already owned prior to the transfer.

Daff v. Wallace, Case no. 12-1513 (9th Cir. BAP 2013) – When transfer is avoided and property is brought back into estate, Trustee takes same title as Debtor would have had as of commencement of the bankruptcy case had the transfer never occurred. Debtor fraudulently transferred residence to her daughter. After the transfer, a judgment creditor properly recorded a judgment lien against all real property owned by Debtor. The lien did not attach to the residence as Debtor did not own it as of the date of the recording. Debtor thereafter filed for bankruptcy. When the Trustee successfully recovered the property, the Trustee did so subject to the recorded judgment lien. Had the property not been transferred, the judgment lien would have attached to Debtor’s interest upon recording, and would not have constituted an otherwise avoidable transfer standing alone. Debtor had sufficient equitable interest in property that had been fraudulently transferred that judgment lien could attach to, and that interest predated bankruptcy filing and acquisition of interest by trustee.

Suhar v. Bruno, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave Debtor’s unsecured creditors worse off because Debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by Debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital

debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by Debtor to ex-spouse of amount of spouse's share of marital debt.

Hagan v. Classic Products Corp., Case No. 11-80417 (Bankr. W.D. Mi. 2011) – Remedy in action to avoid transfer has two elements, judgment avoiding the transfer and judgment awarding damages. Court would decline to enter default judgment that avoided the transfer but failed to include award of damages, with instructions to submit new proposed Final Judgment containing both types of relief.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Pursuant to Section 550(a), Court can award judgment for the amount of money that is fraudulently transferred. Where the fraudulent transfer consisted of property, Court can enter judgment either for the return of the property itself or for the value of the property. Where the property transferred included an automobile that had subsequently been traded in, a diamond ring that had allegedly been stolen, and furniture that was subsequently sold, Court could not order the return of the property, and so entered money judgment against Defendant for the value of the property at the time of the fraudulent transfer.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) – Debtor and "significant other" entitled to "net" transfers of money from significant other to Debtor against funds transferred by Debtor to significant other to determine total amount of funds allegedly fraudulently transferred. Over year preceding filing of case, significant other gave more money to Debtor than Debtor gave to significant other, constituting "reasonably equivalent value" for transfers from Debtor to significant other. Debtor's transfers into significant other's bank account were used to pay Debtor's share of ongoing household expenses. Significant other's use of these funds to pay household expenses constitutes reasonably equivalent value.

Slone v. Lassiter, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor's transfer to paramour of one-half interest in real property was avoidable fraudulent transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

14.58 Damages – Setoff by Defendant

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".

14.59 Complaint

In re Rathore, 2012 WL 2131133 (E.D. Mi. 2012) – In action based on Michigan's version of Uniform Fraudulent Transfer Act, complaint to avoid alleged fraudulent transfer must include as defendant the party allegedly making the transferor. Action brought solely against transferee and that did not also join alleged transferor properly dismissed by State Court for failure to join necessary party.

14.60 Parties Liable – Initial Transferee

Textron Financial, Inc. v. Bash, 2019 WL 3290257 (N.D. Ohio 2019) – Section 544 allows Trustee to avoid any transfer that is voidable under "applicable law". Ohio version of Uniform Fraudulent Transfer Act allows Creditor to avoid a transfer made within 4 years and with actual intent to hinder, delay or defraud creditor. Transfer is not fraudulent against person who takes in good faith and for reasonably equivalent value. If transfer is avoided, Section 550 allows Trustee to recover property transferred or value of property transferred from initial transferee or mediate or immediate transferee other than immediate or immediate transferee who takes in good faith and without knowledge avoidability of transfer, and any recovery is limited to "single satisfaction" of claim. Debtor who made daily withdrawals from and payments on line of credit could not recover all payments made to lender as doing so would allow Debtor to retain funds received from lender all simultaneously recovering all payments to the lender creating double recovery. Court Limited any potential recovery to maximum amount outstanding under line of credit at any one time-\$17.5 million-rather than \$316 million paid by Debtor to lender.

Smith v. SIPI, 501 BR 843 (N.D. Ill. 2013), *affirmed*, 811 F. 3d 228 (7th Cir. 2016) – Initial transferee is first transferee in chain of title and has no defense to liability under Section 550. Purchaser of tax lien that later allowed party to obtain title to property was Initial transferee. County tax collector did not acquire title to or interest in property but was facilitatory for the tax sale, merely offering property for sale.

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 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.

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 over all 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).

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 541. 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*.

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.

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.

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.

14.61 Mediate and Immediate Transferee of Initial Transferee

Rajala v. Husch Blackwell, LLP, 2019 WL 3941079 (Bankr. D. Kn. 2019) - Trustee can recover property transferred or value of transfer from immediate or mediate transferee of initial transferee. Mediate transferee liable for value received by transferee even if transferee did not receive transferred property but instead proceeds of transferred property. Debtor conveyed property related entity for no value. Transferee sold property and paid \$2 million to transferee's attorneys. Bankruptcy Trustee sought to recover funds from Law firm alleging that funds were the result of the fraudulent transfer. Court concluded that Section 550 reference to "value" broad enough to encompass proceeds received from disposition of property that was acquired in fraudulent transfer. Court considered and rejected contrary authority in *Lassman v. Santosusso*, 2015 WL 1510566 (Bankr. D. Mass. 2015)(Section 550 does not extend recover to proceeds of property itself).

Caruso v. Clemmens, 2018 WL 5793853 (E.D. Ky. 2018) – Recipient of transfers was not immediate transferee where funds were wired from Debtor to third party entity. Although Defendant was one-third owner of recipient corporation that did not make defendant a transferee and did not show that transfers were intended to benefit defendant. Defendant did not receive funds, there was no evidence that Defendant was intended beneficiary of transfer, and there was no evidence that Corporate transferee was anything other than separate legal entity or that there was some basis to pierce corporate veil.

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 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.

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.

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.

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.

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.

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.

14.62 Parties Liable – "Mere Conduit"

Pergament v. Brooklyn Law School, 595 BR 6 (E.D.N.Y. 2019) – Fraudulent transfer can be recovered from initial transferee with regard to transferee's good faith. Subsequent transferees are liable only to extent transferee took for value and in good

faith. Initial transferee is first person or entity to exercise control over property and right to put money or property to transferee's own purpose. Transferee who is defined as one who has no dominion or control over assets and can do nothing more than transmit funds to third party is not "transferee". Tuition payments made for adult children while children could still withdraw and receive refund are not transfers to or for benefit of College. College did not acquire any interest in or right to funds until drop-add period expired. Until that point, College was holding funds for benefit of child and not for College's own account and College could not take or use funds for its own purposes until directed to do so by Parent or Child and then funds were applied directly to Child's account. College was mere conduit as to pre-paid tuition expenses. If children withdrew from College, funds would have been returned to Child who could use them as Child pleased. However, payments made after Child registered for classes and that were not refundable did not implicate "mere conduit" because College received funds for its own use and benefit.

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.

14.63 Parties Liable – Non-Transferees

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

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

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

14.65 Generally

Dougherty v. Security Credit Union, 2019 WL 2529362 (Bankr. E.D. Mi. 2019) – Section 542 allows Court to order turnover of property of estate. Funds were not property of estate where funds were garnished by creditor during period where bankruptcy case was dismissed. Chapter 13 case dismissed at expiration of Plan as Debtor had not completed plan. Creditor began garnishing following dismissal. Chapter 13 reinstated 9 months later and creditor stopped garnishment. Although Chapter 13 sweeps into property of estate all property acquired after commencement of Chapter 13 case, Section 1306 could not sweep in property acquired while case was dismissed and that did not constitute property of Debtor no date of reinstatement. Debtor's interest in garnished funds terminated automatically when funds were delivered to garnish creditor. Reinstatement of case does not have retroactive effect as to property of estate.

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 were 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.

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 entireties 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.

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. Trustee who avoided transfer of property by Debtor to Debtor and husband as tenants by entireties could not recover property itself where Debtor claimed entireties interest exempt and there were no objections to exemptions filed. Once entireties exemption was established, Debtor's interest in property could not be made subject to Debtor's individual creditors and avoidance of transfer that created entireties 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.

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.

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.

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.

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.

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.

14.66 Jurisdiction

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.

14.67 Parties

14.68 Procedure

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.

In re Donato, 2011 WL 6057551 (Bankr. N.D. Ohio 2011) – Avoidance actions must be brought by adversary proceeding. Debtor’s Motion for Turnover of Funds Garnished Pre-petition denied even where creditor failed to file answer or otherwise respond.

In re Reynolds, Case No. 09-79550 (Bankr. E.D. Mi. 2010) – Debtor’s Motion for Turnover of funds garnished pre-petition denied. Turnover action must be brought by Adversary Proceeding pursuant to Rule 7001.

D. Preferences

14.69 Standing to Bring Action

In re McDuffy, 2019 WL 1797252 (Bankr. E.D. Mi. 2019) – Section 522(h) allows Debtor to avoid transfers that are otherwise avoidable by Trustee if Trustee does not attempt to avoid those transfers and Debtor could have exempted property if transfer had been avoided. Requirements are met where Debtor claims exemption in property and Trustee does not object to exemption.

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.

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.

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 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.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 1107 grants to DIP power to prosecute adversary to avoid transfers under Section 547.

Johnston v. City of Middletown, 484 BR 698 (Bankr. S.D. Ohio 2013) – Debtor in no-asset Chapter 7 lacks standing to bring preferential transfer action. Section 522(h) grants standing to Chapter 7 Debtor only to extent property could have been exempted. Debtor did not claim exemption in allegedly preferential transfer. Otherwise, Section 547 expressly limits application to the Trustee and not to Debtor. Trustee’s no asset report did not give Debtor ability to pursue action that trustee chose not to pursue.

Jahn v. Carley Jewels, LLC, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – Trustee’s Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

Jahn v. Joeb Enterprises, LLC, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – Trustee’s Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

In re Reep, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Debtor has standing to obtain refund of money recovered by Trustee as alleged preferential transfer. Prior to filing, Debtor borrowed money from her Mother to pay student loan creditor. After petition was filed, Trustee made demand on student loan creditor for refund of apparently preferential transfer and student loan creditor returned the funds. Debtor then brought action against Trustee asserting that the transfer to the student loan creditor was not preferential under the Earmarking Doctrine. Court first concluded that transfer was protected by Earmarking Doctrine and so was not avoidable. Court then held that Debtor had standing to recover from the Trustee the funds that were returned to him in error by the creditor.

14.70 Standing – Chapter 13 Trustee

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.

14.71 Preference Versus Fraudulent Transfer

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.

14.72 Procedure

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.

In re Berry, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Preferential Transfer denied without prejudice. Action to avoid preferential transfer pursuant to Section 547 must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2).

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Complaint to avoid preferential transfers is not required to itemize each allegedly preferential transfer and can allege just a summary or total of the alleged preferences. Complaint needs only to state short and plain statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff’s claim and the grounds upon which it rests.

14.73 Transfers to “Insiders”

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Transfer is avoidable as preference if transfer occurred on or within 90 days before the date of the filing of the bankruptcy petition; or between 90 days and one year if creditor at time of transfer was “insider”. Minority stockholder of Debtor who did not have power of control or governance, could not control actions of Debtor unilaterally, and Debtors operating agreement required all decisions to be made by majority of stockholder interests was not sufficient to make creditor “insider” of Debtor..

Jalbert v. Flanagan, 2019 WL 2051005 (Bankr. D. Del. 2019) – Section 101(31) provides that if Debtor is Corporation, “insider” includes directors and officers of Debtor as well as persons in control of Debtor. Defendants held corporate titles of Senior Vice Presidents creating presumption that defendants were officers and insiders. Question at Motion to Dismiss stage is not whether defendants were, in fact, insiders, but whether complaint contained sufficient factual allegations that employee who holds “senior vice president” title is insider.

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.

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.

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 Debtor, directed work performance, and directed payment of 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 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.

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 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 Debtor's financial affairs than Debtor's other creditors, and to influence or control, at least in part, Debtor's actions; and to know that a Debtor is contemplating bankruptcy to allow insider to step ahead of other creditors by demanding payment and then influencing the timing of 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.

Jahn v. Char, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Section 547 "lookback" extends to one year where transferee was "insider". transferee must constitute an insider at the time the transfer was made, and that it is not enough that the transferee be an insider at the time the transfer was arranged. Although recipient was "insider" of corporation at time of execution of Employment Agreement that gave rise to severance payments, recipient had terminated relationship with corporation prior to receipt of severance payment. Therefore, recipient no longer constituted "insider" for purposes of Section 547. Payments under Employment Agreement made outside of 90 days but within one year constituted payments made beyond "lookback" and were not avoidable.

Gold v. Rubin, 2011 WL 3734912 (Bankr. E.D. Mi. 2011) – Defendant's status as second cousin of Debtor's corporate president does not make defendant an insider for purposes of Section 547. Section 101(45) defines "relative" as related within third degree as determined by common law. Under Michigan law, one determines degree of relation by starting at either of the persons claiming relationship, counting up to the common ancestor, and then down to the other person, with each step being one "degree". Common relative was great-grandparent, resulting in three degrees of separation up and another three degrees down.

14.74 Parties Liable – Initial Transferee

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.

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.

In re Foley, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Garnishor of Debtor's income pre-petition liable for amount garnished where garnishment constituted preferential transfer. Because garnishor was also Debtor's sister, garnishor liable for all funds garnished within one-year pre-petition.

Wells Fargo Home Mortgage, Inc. v. Lindquist, 592 F.3d 838 (6th Cir. 2010) – Trustee can recover preferential transfer from initial transferee or from any intermediate or mediate transferee of the initial transferee. Creditor could not avoid liability for avoided mortgage merely because creditor had assigned the mortgage to a third party. Although the third party may also be liable, Trustee is permitted to choose the defendant.

14.75 Mediate and Immediate Transferee of Initial Transferee

In re McDuffy, 2019 WL 1797252 (Bankr. E.D. Mi. 2019) - Section 550(b) provides that preference may not be recovered from immediate or mediate transferee of initial transferee if transferee takes for value in good faith and without knowledge of avoidability of transfer. Creditor liable for full amount of prepetition garnishment although creditor's attorney retained portion of garnished funds as payment of fees. Creditor received full amount garnished whether amount was paid to creditor was retained by attorney to satisfy creditors obligation for attorney fees.

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.

Liquidating Trustee of App Fuels Creditors v. Bowie Resources, LLC, 2012 WL 1854285 (Bankr. E.D. Ky. 2012) – Section 550 allows recovery of avoidable transfer against initial transferee and against any immediate or mediate transferee from the Initial Transferee. However, transfer is not avoidable against mediate or immediate transferee if transfer was in good faith, for value including satisfaction of present or antecedent debt, and without knowledge of avoidability of transfer; or from any subsequent transferee. Knowledge of the avoidability of the transfer will be inferred where transferee knew facts that would lead reasonable person to believe that transfer was avoidable, but transferee is not required to initiate investigation where there are no such facts. Party to litigation received allegedly avoidable settlement payment and used portion of proceeds to pay party's attorney. Chapter 11 Liquidating Trustee brought action against attorneys to recover funds alleging that attorneys were immediate transferees of the initial transferee. Evidence did not indicate existence of any facts that should have caused attorneys to question alleged avoidability of settlement payment and attorneys had no actual knowledge that settlement payment may have been avoidable. Good faith of attorneys in receipt of funds operated as complete bar to any action to recover funds from attorneys.

Stevenson v. Genna, Case No. 09-5490 (Bankr. E.D. Mi. 2010), *aff'd* Case No. 10-11353 (E.D. Mi. 2010) – Section 550 allows the Trustee to recover an avoidable transfer from the initial transferee or any immediate or mediate transferee but prohibits recovery from an immediate or mediate who takes for value, including satisfaction of a present or antecedent debt, in good faith and without knowledge of the avoidability of the transfer. Knowledge of possible bankruptcy filing, without more, is not “knowledge of the avoidability of the transfer”. Law firm was not “initial transferee” of proceeds recovered on a writ of garnishment where the Law firm received funds on behalf of client and deposited the funds in the Firm Trust Account pending further order of the State Court. State Court then ordered that a portion of the funds be paid to the Law firm and the balance to the Plaintiff, resulting in Law firm being an “immediate transferee”. Funds are not recoverable from Immediate transferee where initial transferee gave funds to immediate transferee in good faith and without intent to hide or shield funds from recovery by Trustee and the transfer is otherwise not tainted by fraud; or if the Law firm had been unequivocally advised that Debtor was filing bankruptcy, rather than merely considering filing and at a time when the parties were engaged in good faith settlement negotiations. Law firm received money for payment of attorney fees owed and apparently received money in good faith. Transfer of funds to Law firm not avoidable under Section 547 and Section 550.

14.76 Parties Liable – “Mere Conduit”

Luria v. ADP, Inc. 593 BR 862 (Bankr. M.D. Fl. 2018) – Initial transferee of avoidable transfer is generally liable for amount or value of fraudulent transfer. “Mere conduit” is judicially created exception. Mere Conduit requires that party receiving transfer act in good faith and as innocent participant unaware of fraudulent nature of funds being transferred; transferee did not have control over funds received; and served as conduit for funds under control of transferor. Conduit not limited to financial institutions and applies to any transferee who does not have control. Payroll company was mere conduit where it received money on behalf of transferor for purposes of processing payroll. Transferor directed distribution of funds to various employees and transferee lacked any ability to make independent decision on who funds were distributed. Funds were deposited into common payroll account used by transferee on behalf of multiple clients, and transferee could use funds in account to cover shortfall by any client. Contractual obligations to follow client instructions sufficient for mere conduit as long as requirements were sufficiently rigid and complied with. There was no evidence that payroll company was aware of fraudulent nature of funds and did not have knowledge of facts that would put payroll company on notice. Evidence indicated that Transferor's Auditors were not aware of fraud and nothing in corporate books and records, even if available to payroll company, would have disclosed fraud.

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.

14.77 Damages

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.

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.

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.

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.

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.

14.78 Elements – Generally

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.

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.

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 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.

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.

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

Debtor who was indebted to the transferee.

Gold v. Lippincott-Ace Electric Co., 2012 WL 4468530 (Bankr. N.D. Ohio 2012) – Transfer is preferential if there is transfer of Debtor's interest in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by Debtor before such transfer was made; (3) made while Debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Defendant has been supplier of equipment to Debtor and accrued large debt. Within 30 days prior to commencement of bankruptcy, Debtor made 2 large payments to defendant. There was no doubt that Debtor made payments or that payments were on account of antecedent debt. Because transfers were within 90 days of filing, Debtor was presumptively insolvent and defendant offered no evidence to rebut this presumption. However, Plaintiff failed to demonstrate that defendant received more than defendant would have had the transfer not been made and the creditor had been paid through Debtor's bankruptcy. Bankruptcy case was in its infancy and there was possibility that amount that would ultimately be distributed to creditors would exceed amount actually paid to defendant.

Swope v. Grove, 2012 WL 4435117 (Bankr. N.D. Ohio 2012) – Section 547(b) allows Trustee to avoid any transfer of property of Debtor to creditor on account of antecedent debt while Debtor was insolvent, and within 90 days of petition if transferee is not an insider, and where transfer allows creditor to receive more than the creditor would have received in Chapter 7 had the transfer not happened. Debtor owed Defendant a debt pursuant to an agreement settling Defendant's sexual harassment lawsuit and the payment was on account of an antecedent debt. The transfers of money in Debtor's checking account constituted transfers of an interest of Debtor in property. Defendant received more than she would have received had the transfers not been made and she received her pro rata share of the property of the estate under Chapter 7. Defendant received full payment of Defendant's claims against Debtor while creditors in Debtor's Chapter 7 case will not receive full payment and had the transfers not been made, Defendant's pro rata share of the bankruptcy estate would have been far less than the total amount paid by Debtor in settlement of Defendant's claims against it. However, record did not show that transfer occurred within 90 days of petition or that Debtor was insolvent as of the date of the transfer. Settlement statement that showed date on which defendant received her money from her attorney's trust account did not establish the date on which the checks written by Debtor cleared his bank. A transfer for preference purposes occurs when the check clears the drawee bank. Absent evidence that Debtor's checks cleared the bank within the relevant 90-day window, Trustee failed to meet burden of proof on all elements of action.

Degiralamo v. McIntosh Oil Co., 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Under Ohio state law, preference action requires “(1) a sale, conveyance, transfer, mortgage, or assignment made by a Debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged “design to prefer” by alleging that sales of fuel at below market prices resulted in Debtor's inability to pay suppliers, leading to involuntary petition.

Guinn v. Lester, 2012 WL 71013 (Bankr. E.D. Tn. 2012) – Lookback period is one year for transfers to insiders. Debtor's payments to father for pre-existing loans subject to one-year lookback period. However, insolvency is presumed only for the 90 days preceding the petition, even for transfers to insiders. For transfers made more than 90 days before the petition, Trustee bears burden of proving that Debtor was, in fact, insolvent on the date of each transfer. Reference to Debtor's schedules is unavailing as those reflect only Debtor's financial picture on date of petition and not on dates of transfers.

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

Soto-Rios v. Banco Popular de Puerto Rico, Case No. 10-2270 (1st Cir. 2011) – Mortgage not avoidable as preference even where mortgage deeds were not recorded as of the date of 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 Debtors' property would take the property subject to the mortgagee's interest in 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 USC sec. 547(b).

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to Debtor's father was avoidable as preference. Transfer was in payment of prior loan that Debtor used to purchase automobile. Although Debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy

estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.

Simon v. JPMorgan Chase Bank, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – In Michigan, perfection of interest in real property occurs upon recording. Notice of Lis Pendens recorded within 90 days of commencement of case avoidable as preference where lender failed to record mortgage.

Kohut v. Rigney, 2011 WL 2693662 (E.D. Mi. 2011) – Divorce judgment rendered in 1998 operated to transfer title to assets to ex-wife. Ex-wife's recording of deed in 2007 was not a transfer because, as of the date of recording of the ex-wife was not a creditor of Debtor. Under Michigan law, a divorce award of real property has the same effect as a quit claim deed, passing all the estate which the grantor could lawfully convey by a deed of bargain and sale. When the divorce judgment awarded ex-wife the Michigan property, and Debtor signed a quit claim deed, Debtor effectively transferred all of his interest in the property to ex-wife. Failure to record the deed created an unnecessary cloud on title, but did not change the character of the transaction between the parties. As of date of divorce judgment and quit claim deed, ex-wife ceased to have any claims against Debtor, so recording of deed could not have been preferential.

Antioch Company Litigation Trust v. Morgan, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Complaint to recover preferential transfers failed to state cause of action where complaint failed to allege date on which transfer occurred.

Minefee v. Perchka-Marion, 2011 WL 66104 (Bankr. W.D. Ky. 2011) – Section 547 creates rebuttable presumption that Debtor was insolvent during 90 days prior to commencement of case. Plaintiff did not overcome presumption of insolvency by affidavit alleging that Debtor spend significant sums of money on illegal drugs.

Gocha v. Cooper, Case No. 09-80349 (Bankr. W.D. Mi. 2010) – Transfer will be avoidable under Section 547 only if transfer is payment for antecedent debt. Agreement for payment entered into prior to bankruptcy filing constitutes “claim” and holders of claim are “creditors” for purpose of bankruptcy case. Debtors borrowed money from parents to construct improvements to their house, with the provision that when Debtors sold the house, they would repay the loans. Debtors later defaulted on mortgage and withdrew money from 401-k loan to repay loan from parents. Although property was never sold, at the time of the repayment, parents had enforceable right to payment even if that right was contingent on future events. Debtors’ repayment of that obligation within 90 days prepetition constituted payment of an antecedent debt which could be recovered under Section 547.

Jahn v. Carley Jewels, LLC, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – “Consignment” transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

Jahn v. Joeb Enterprises, LLC, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – “Consignment” transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

In re Foley, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Funds garnished by Debtor's sister during year preceding bankruptcy filing were recoverable where there was no dispute that Debtor was, at all times, unable to pay debts as they came due and had liabilities in excess of assets, and garnishment permitted creditor to recover more than creditor would have received in Chapter 7 as Chapter 7 estate was administratively insolvent.

Helbling v. Cleary, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. Filing of suit to foreclose mortgage constituted lis pendens which perfects the on the date foreclosure proceedings were commenced, which was within 90 days of commencement of case.

In re Miller, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor's financial statements are not dispositive but are admissible evidence as statements against interest. Summary judgment denied where financial information left genuine issue of material fact as to Debtor's solvency on date of transfer.

In re Williams, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer of an interest of Debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by Debtor before such transfer was made; (3) made while Debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables the creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

Boyd v. Petrie, 430 BR 453 (Bankr. W.D. Mi. 2010) – To prevail on a preference avoidance claim, the Bankruptcy Trustee must

establish a transfer of an interest of Debtor in property; (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by Debtor before such transfer was made; (3) made while 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 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, Debtor and Ms. Petrie were divorced and 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 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.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.

Himmelspach v. Hunter, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of Debtor's interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while Debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation.

Wells Fargo Home Mortgage, Inc. v. Lindquist, 592 F.3d 838 (6th Cir. 2010) – "Transfer" of property pursuant to unrecorded mortgage is deemed to "occur" as the moment prior to filing. Post-petition attempt to belatedly record mortgage does not alter status of mortgage as unperfected as of the moment of filing.

Countrywide Home Loans v. Dickson, 427 BR 399 (6th Cir. BAP 2010), *aff'd* 2011 WL 3768684 (6th Cir. 2011) – Lender's lien against Manufactured Home would be avoided as preferential where Lender did not record the lien on the title to the Manufactured Home either by filing an affidavit of conversion of the Manufactured Home to real property or by recording the lien on the certificate of title. "Perfection" did not occur as a matter of public record until the State Court entered its Judgment imposing lien on Manufactured Home, which occurred less than 90 days prior to the commencement of the case. The *lis pendens* did not operate to perfect the transfer as a *lis pendens* does not create or perfect a lien under Kentucky State Law. The "transfer" would have the effect of allowing lender to recover 100% of the claim in a Chapter 13 case that provided for less than 100% of their allowed claims.

Shapiro v. Art Leather, Inc., Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct "hypothetical Chapter 7 case" to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

Kohut v. New Century Mortgage Corp., Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed "recorded" under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a from 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.

14.79 Elements – Transfer of Property

Davidson v. Barstad, 2019 WL 2479311 (Bankr. D. Mont. 2019) – Transfer of interest in property is broadly interpreted but does not include State Court decision ordering specific performance of contract for sale and purchase of real estate. Debtors agreed to transfer their interest in property when they executed buy-sell agreement but Debtors did not consummate transfers and instead refused to close. Specific performance judgment does not itself affect transfer of realty but compels recalcitrant party to transfer property consistent with underlying obligation. Court's order for Debtor to transfer property is not itself transfer and cannot constitute "preference".

Robert L. Dawson Farms, LLC v. Meherrin Agricultural & Chemical Co., Case No. 18-0127 (Bankr. E.D.N.C. 2019) - Preferential transfer must involve property of Debtor. Transferring Entity merged into sister entity prior to filing of Chapter 11 ceased to exist, leaving sister entity as sole filing Debtor. Transfers made by Transferring Entity could not be avoided in bankruptcy of sister entity notwithstanding merger of companies. Transferring entity did not file bankruptcy and successor entity does not succeed to rights of merged company in preference claim. Property transferred in no way involved Debtor or Debtor's property and transfer could not have been on account of antecedent debt owed by Debtor as Debtor had no obligation owed to transferee as of date of transfer.

Corzin v. Emergency Medical Transport Inc., 2018 WL 4719037 (Bankr. N.D. Ohio 2018) - Preferential transfer requires that property transferred have been property of Debtor at time of transfer. Debtor owed funds related to attendance at paramedic school. Debtor's father-in-law agreed to pay debt on behalf of Debtor in order to stop Court ordered garnishment proceedings. Debtor's father-in-law went to bank, purchased cashier's check from father-in-law's soul funds, payable to defendant. Father-in-law gave cashier's check to Debtor who delivered it to defendant's attorney. Debtor did not have property interest in cashier's check as cashier's check is contract between issuing bank and named payee that bank will pay amount stated on face of instrument from bank's own funds and liability for payment rests solely on issuing bank. When bank honored cashier's check, bank was not transferring funds were property of Debtor, but was instead transferring funds belonging to bank. Transfer did not diminish Debtor's estate or deplete assets which would otherwise have been available for creditors. Debtor had no control over funds used to pay debt. Funds were originally property of father-in-law and became property of bank when father-in-law purchased cashier's check. Although physical check may have passed through Debtor's hands, check never became property of Debtor. Decision to advance funds was solely that of father-in-law and not result from coercion or force exercised by Debtor that would amount to Debtor having indirect control over either funds used to purchase cashier's check or check itself.

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.

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.

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.

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.

Slobodian v. U.S., Case No. 15-2833 (3d Cir. 2016) – Property transferred must be property of 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.

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.

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh'g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Delay in recording deed caused transfer of property to occur as of date of recording. Debtor sold property to mother years prior to

commencement of case but mother did not record deed until shortly before filing. Court rejected Debtor's argument that Debtor held property in trust for mother based on lack of recording of deed where there was no express trust ever created or intended. Debtor could not assert resulting trust as there was no evidence that at time of sale, the parties intended to create a trust but failed to actually do so. Debtor also could not assert a constructive trust as constructive trusts are used to prevent fraud or unjust enrichment, and facts of transaction did not reflect either fraudulent conduct by Debtor or that Debtor would be unjustly enriched; and there has not been any State Court determination of a constructive trust and Bankruptcy Court will not impose constructive trust in the first instance as doing so disrupts goal of ratable distribution.

Burden v. Richardson, 2013 WL 2370720 (Bankr. E.D. Ky. 2013) – Clear and convincing evidence indicated that real property was owned by Debtor in trust for mother. Debtor purchased property in own name, using funds provided by mother for down payment and financing balance. Mother made all mortgage payments and three years after closing, mother made large lump sum payment to pay off mortgage.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 547 allows Trustee or DIP to recover property or value of property transferred. "Transfer" is any direct or indirect, absolute or conditional, voluntary or involuntary, action or method of disposing of or parting with property or an interest in property. Checks written by corporation within 90 days of commencement of bankruptcy case were "transfers" made for purposes of repaying prior debt.

14.80 Elements – Perfection of Security Interest

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).

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.

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.

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.

Luper v. Valueland Auto Sales, Inc., 2017 WL 7912003 (Bankr. S.D. Ohio 2017) - Section 547 allows Chapter 7 Trustee to avoid transfer of 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.

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.

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.

Mason v. Ocwen Loan Servicing, LLC, 2013 WL 4052905 (Bankr. E.D. Ohio 2013) – Lien against property that is not perfected as of petition date is deemed to constitute transfer immediately before the date of the petition. Unrecorded lien became perfected by recording of *lis pendens* at commencement of foreclosure action and entry of foreclosure judgment as part of litigation. When foreclosure judgment was subsequently vacated, *lis pendens* lost effect of perfection and mortgage remained unperfected when Debtor later filed for bankruptcy. Whether mortgage would otherwise appear in chain of title did not defeat preferential nature of transfer as actual notice or lack of actual notice of the mortgage is not element of preference litigation.

Gold v. JPMorgan Chase Bank, NA, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of 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.

14.81 Elements – Lack of Reasonably Equivalent Value

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.

14.82 Elements – To or For Benefit of Creditor

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 of 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.

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 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.

14.83 Elements - Antecedent Debt

Davidson v. Barstad, 2019 WL 2479311 (Bankr. D. Mont. 2019) – Section 547 requires that transfer be on account of antecedent debt owed by Debtor. Contract vendee is not “creditor” where creditor prepetition received judgment entitling him to specific

performance of land sale contract. Equitable remedy for breach of performance is “claim” only if underlying breach gives rise to right to payment. Purchaser, having elected equitable remedy of specific performance, is not entitled to payment from Debtor and does not have claim. Transfer of property pursuant to specific performance judgment is not transfer on account of antecedent debt.

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.

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.

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.

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.

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 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.

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.

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.

Porter v. Mahmoud, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered for Debtor prior to commencement of case were preferential transfers. Debtor’s argument that payments were retainer for future services did not avoid conclusion that payments were preferential where law firm admitted that it did not hold the payment in trust but applied it to Debtor’s pre-existing balance.

Suhar v. Agree Auto Services, Inc., 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when Debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed on that car and agreeing to include the deficiency on the prior car in the financing of the new car. Debtor purchased a new car at a price of \$6,488 plus the deficiency on the prior car of \$4842.15, for a total “purchase price” of the new car of \$11,970.00, with a down payment of \$3,518.50 and the balance financed. Payment on deficiency was payment on account of antecedent debt that allowed creditor to receive more than creditor would have received in Chapter 7 proceeding.

Pryor v. New York State, Department of Taxation and Finance, 2013 WL 1856459 (Bankr. E.D.N.Y. 2013) – Payment of income taxes is not preferential if payment is made by date on which payment can last be made without penalty. Taxes are considered due on the last date on which payment can be made, so payment of taxes before that date are not on account antecedent debt. Debtor who obtained extension of time to file return had until extended due date to pay taxes in timely manner.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is made on account of antecedent debt where payments are made in connection with a debt that precedes the allegedly preferential transfer. Debt is incurred on the first date on which Debtor becomes legally obligated to repay. Corporation's payment to principal of sums in repayment of loans and in payment of deferred compensation were payments on account of antecedent debt.

14.84 Elements – Insolvency

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Insolvency is presumed for any transfer made on or during the 90 days immediately preceding filing of petition. Corporate Debtor is insolvent when financial condition is such that some of debts exceeds value of all property and is "balance sheet" insolvent.

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.

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.

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.

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.

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 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, 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.

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.

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.

14.85 Elements – Timing of Transfer

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.

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.

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.

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.

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.

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.

14.86 Elements – Timing of Transfer – “Insider”

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.

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 Debtor, directed work performance, and directed payment of 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 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 Debtor, the bank is not thereby an insider because there is no control of the day-to-day decision making of 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.

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 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.

14.87 Elements – Timing of Transfer – Garnishment

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.

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

Isaacs v. DBI-ASG Coinvestor Fund III, LLC, 2019 WL 2710049 (Bankr. WD. Ky. 2019) - Foreclosure judgment occurring within 90 days of commencement of bankruptcy case based on mortgage recorded or lien perfected more than 90 days prepetition is not avoidable because foreclosure judgment does not create priority position over and above unsecured creditors that did not already exist. Secured creditor will not receive more through foreclosure than secured creditor would have received had property been liquidated in hypothetical Chapter 7 proceeding.

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Unless estate is sufficient to provide 100% distribution, any unsecured creditor who received payment during preference. It will receive more than it would have received under Chapter 7 liquidation. Creditors who hold security interest are entitled to receive consideration equal to value of collateral or to recover collateral and prepetition payments may be avoidable only if creditor receives proceeds in excess of value of secured claim. Creditors did not hold secured claims against Debtor where only collateral for loans consisted of equipment not owned by Debtor but owned by entities related to Debtor; and even if collateral was owned by Debtor, alleged valuation of collateral did not take into account liens or encumbrances.

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.

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 line 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.

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

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.

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.

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.

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.

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.

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.

14.89 Element – Intent

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.

14.90 Setoff as Preference

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.

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 Debtor exceeds the amount of the mutual debt owed to 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.

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.

14.91 Defenses – *De Minimis* Transfers

Andrews v. Indirect Purchaser Class, 2019 WL 3331604 (Bankr. E.D. Mi. 2019) – Trustee may not avoid transfer, if the aggregate value of the transfers is less than \$6825.00 if Debtor has primarily consumer debts and aggregate value of transfers is less than \$600; or if Debtor has debts that are not primarily consumer debts, if the aggregate amount of the transfers is less than \$6425.00. “Consumer debt” is debt incurred by individual primarily for persona, family, or household purposes. Non-business debt is not automatically consumer debt; there is interstitial category of debt that is neither consumer nor business. Consumer debts for taxes are almost without exception held to be non-consumer debts as (1) tax debt is “incurred” differently than consumer debt as debt is not voluntary on behalf of taxpayer, (2) consumer debt is incurred for personal or household purposes, while taxes are incurred for public purpose, (3) taxes derive from earning money, while consumer debt derives from consumption, and (4) consumer debt usually involves extension of credit. Sanctions imposed under Rule 9011 and other punitive damages are not consumer debts. Debtor’s total schedule debt consisted of taxes owed to IRS and State, and sanctions judgment under Rule 9011 and 28 USC Section 1927 based on Debtor’s vexatious use of system. Debts are not voluntary and were not of personal, family or household purposes. Transfer not avoidable as total amount of garnishment was less than *de minimis* amount for Debtor who owed primarily non-consumer debt.

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.

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 the minimum 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.

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.

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.

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.

Sheppard v. Speck, 2014 WL 6611661 (Bankr. E.D. Mi. 2014) – Whether preferential transfer is within *de minimus* 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 minimus* exception inapplicable.

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.

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

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 CC one financing statement on November 21, well within 30 day safe harbor of Section 547(c)(3)(B).

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 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 Debtor to acquire such property; and (iv) in fact used by Debtor to acquire such property; and (B) that is perfected on or before 30 days after 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.

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.

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.

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

Jones v. Citizens Bank, Adv. No. 11-2168 (Bankr. E.D. Mi. 2012) – Transfer otherwise avoidable under Section 547 is not avoidable if Debtor has debts that are not primarily consumer debts, and aggregate value of property transferred or affected by transfer is less than \$5,850.00. Vehicle was repossessed and sold at auction in sale that produced active competitive bidding with a successful bid of \$4,000.00. Even if auction price was a little below market, there was no evidence that successful bid was more than \$1,850 less than actual value. Although Debtor valued vehicle at \$6,800 because of its excellent condition, there was nothing in the record to support that valuation. Testimony of owners is viewed with skepticism. And Debtor’s own testimony established that vehicle depreciated at a rate of \$1,000 per year, which would produce value of approximately \$5,000.00. Court did not use auction price, but factored in other items that could possibly have affected value, but nothing in the record would have supported value greater than \$5,850.00.

14.94 Domestic Support Obligation Payments

In re Dennis, 2019 WL 2636825 (7th Cir. 2019) - Section 547 (c)(7) excepts from avoidable preferential transfers any bona fide payment of a debt for domestic support obligation. Debtor’s obligation to return overpayment by state of benefits paid for minor child is not “domestic support obligation”. “Domestic Support Obligation” is one owed to or recoverable by a spouse, former spouse or governmental unit that is in the nature of alimony, maintenance or support. State benefits were provided to help Debtor’s support child and fit definition of “domestic support obligation”. However, obligation to repay overpayments of benefits is not a domestic support obligation. Fact that Genesis of obligation overpayment of domestic support obligation benefits does not transform refund itself into domestic support obligation. State received avoidable preferential transfer when State, less than 90 days preceding commencement of case, seized Debtor’s tax refund and attempt to recoup overpayment.

14.95 Defenses – Earmarking

Feldman v. People First Federal Credit Union, 2019 WL 2067360 (Bankr. E.D. Pa. 2019) – Earmarking defenses available to both pre-petition transfers under Section 547 and post-petition transfers under Section 549. Earmarking doctrine holds that funds borrowed from third-party for specific use of paying designated creditor and that are actually used to pay that creditor are not “property of estate” such that payment to first creditor is not transfer of Debtor’s property. Earmarking requires existence of agreement between new lender and Debtor that new funds will be used to pay specific antecedent debt; that funds are in fact used to pay designated debt; and that transaction as a whole does not diminish Debtor’s estate. Funds withdrawn from retirement account pre-petition and deposited into attorney trust account for purposes of paying mortgage creditor constituted property of estate where funds were still in attorney trust account as of petition date. First element of earmarking doctrine could not be met because no new lender existed.

Motors Liquidation Trust Company v. JPMorgan Chase Bank, NA, Case No. 09-0504 (Bankr. S.D.N.Y. 2019) – Earmarking defense applies where Debtor receives money to pay off preexisting loan and funds are used for that purpose; and must not diminish Debtor’s estate. DIP financing that allowed Debtor to pay off disputed secured debt did not require use of funds to retire obligation. Where Debtor borrows money on secured basis to pay off unsecured debt, transfer diminishes estate to extent of value of collateral provided. DIP financing was secured loan used to pay off unsecured debt preventing application of earmarking defense.

Cage v. Hardy Rawls Enterprises, LLC, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through “seller financing”. Debtor would then pool the contracts and sell those to an investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that Debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using Debtor’s own funds in comingled account. If Debtor repossessed and sold car, Debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by Debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. Evidence did not indicate that particular funds received by Debtor from any particular source were “earmarked” or were in any way used other than as Debtor’s own property. Lump sum payments to investor within 90 days of filing were avoidable preferences.

In re Reep, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Earmarking is an equitable doctrine created to except transfers

borrowed from but directed by a third party to a creditor, for the benefit of 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 Debtor, is not property of 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 Debtor even if the funds pass through 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 Debtor.

MBNA America Bank v. Meoli, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called "convenience checks" as preferential transfers. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to sue those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. "Earmarking" applies only where the borrowed funds used to discharge the debt are specifically earmarked by the lender for payment to a designated creditor. Here, the funds were not restricted by Lender to be paid solely to MBNA to be credited against Debtor's credit card debt. The checks could have been used to transfer balances, pay bills, make a purchase, or get extra cash. In such an instance, Debtor possessed sufficient control over the funds to determine where they would go once the credit was accessed.

Yoppolo v. MBNA America Bank, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. Debtor controlled disposition of the funds and determined to use those funds to pay first lender. Issuer of convenience check did not direct or require that the funds be paid to first lender, rendering earmarking doctrine is inapplicable.

In re Wells, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question.

American Home Mortgage Investment Corp. v. Lim, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Fact that mortgage was given as part of the refinancing of an existing mortgage did not protect mortgage from avoidance under "earmarking" doctrine. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).

Chase Manhattan Mortgage Corp. v. Shapiro, 530 F.3d 458 (6th Cir. 2008) –Earmarking doctrine requires agreement between a new creditor and 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.

14.96 Defenses – Administrative Expenses

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).

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.

14.97 Defenses – Payments for Fines and Penalties

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.

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 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 Debtor is left with non-dischargeable debts post-bankruptcy.

14.98 Defenses – Contemporaneous Exchange of Value

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 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.

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.

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.

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.

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.

Suhar v. Agree Auto Services, Inc., 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when Debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed on that car and agreeing to include the deficiency on the prior car in the financing of the new car. To be contemporaneous, both Debtor and creditor must intend that the transfer be contemporaneous exchange; exchange must, in fact, be contemporaneous; and exchange must be for new value. Payment of deficiency on prior car was not contemporaneous exchange for new value, where purchase price of new vehicle was \$6,931.34 but total price including deficiency balance was more than \$11,000.00. Value received by Debtor was limited to value of new vehicle. Any additional sums paid were paid on account of antecedent debt for which Debtor did not receive any new value and which served to diminish the Chapter 7 estate.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer for or on account of an antecedent debt owed by Debtor before such transfer was made. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

14.99 Defenses – New Value

Steege v. Canon, USA, Inc., 2019 WL 220229 (Bankr. E.D. Il. 2019) – New Value defense requires creditor to give new value that is not secured by avoidable security interest and that did not result in payment by Debtor to Creditor that would itself be avoidable. Majority of Courts hold that new value does not need to remain unpaid. Minority view, adopted by 7th circuit, requires that new value remain unpaid as of petition date. Court found itself constrained by Seventh Circuit precedent while recognizing that majority view appears to be more consistent with plain language of Statute.

Kaye v. Blue Bell Creameries, Inc., 899 F.3d 1178 (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.

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.

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.

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.

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.

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.

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.

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

In re Appalachian Oil Co., Inc., 2012 WL 4754675 (Bankr. E.D. Tn. 2012) – “New Value” defense protects otherwise avoidable transfer where the creditor extended new value in exchange for payment. To extent new value is extended, the preference is repaid to the estate. Creditor must establish that following payment by Debtor, (1) the creditor gave new value to Debtor; (2) the new value was unsecured, and (3) 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 Debtor’s estate.

14.100 Defenses – Liquidation Amount in Chapter 7

Reed v. PLT Construction Company, Inc., Case No. 18-3186 (Bankr. N.D. Tx. 2019) – Payment to contractor who held inchoate lien did not result in contractor receiving more than contractor would have received in Chapter 7 as building had value in excess of amount owed. Parties agreed that contractor had right to file mechanics lien as of the date of payment. Fact that creditor at time of payment could have perfected lien and payment not been paid prevents payment from being avoided. Although contractor previously signed Line Release, release specifically stated that upon payment, Contractor released lien rights. Lien rights were not released until payment some months later such that as of the payment date, lien rights still existed.

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to Debtor’s father was avoidable as preference. Transfer was in payment of prior loan that Debtor used to purchase automobile. Although Debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made. Debtor’s subsequent reaffirmation of obligation to father does not change fact that as of petition date, claim was unperfected secured claim that would not be recognized in Chapter 7.

In re Miller, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been

perfected and the case had been liquidated under Chapter 7. Debtor's financial statements are not dispositive but are admissible evidence as statements against interest.

Shapiro v. Art Leather, Inc., Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

14.101 Defenses – Ordinary Course of Business

Spradlin v. East Coast Miner, LLC, 2019 WL 2295680 (Bankr. E.D. Ky. 2019) – Ordinary Course of Business defense requires that transfer was made in ordinary course of business or financial affairs of Debtor and transferee; or that transfer was made according to ordinary business terms. Defenses intended to protect recurring customary credit transactions incurred and paid in ordinary course of business. Record contained material disputes of fact precluding entry of summary judgment.

Harris v. Guardian Live Insurance Company, 2019 WL 913354 (Bankr. M.D. Ga. 2019) – Ordinary course defense requires that Debtor incur debt in ordinary course of business and that repayment was made in ordinary course of business of financial affairs of Debtor and transferee or was made according to ordinary business terms. Court must first determine whether debt was incurred by Debtor in ordinary course of business. First time transfer can fall within ordinary course exception if transferee shows that debt would be considered as occurring ordinarily between similarly situated parties. Question is whether transaction is out of ordinary course for person in Debtor's position and whether Debtor complied with terms of contractual arrangement. 2nd step is to then determine whether repayment was in ordinary course of business. 3rd step is that to then determine whether payment by Debtor comported with standards of conduct in industry. Where parties have extensive history of credit transactions, express agreement furnishes most informative evidence to consider ordinariness. For one time transfers, Court uses object of standard prevailing in applicable industry. Payment by disability company to Debtor was in ordinary course of dealings as disability company's business was to ensure and Debtor was named insured and payment was in ordinary relation to other business dealings between creditor and similarly situated consumers timing, amount and manner of payment as well as circumstances under which payment was made all indicate that transfer was ordinary. Where Debtor received over payment of benefits, industry-standard is that insurers routinely attempt to recover overpayment. Defendant presented evidence that usual course of business in group disability industry was to provide insured with the option of receiving full benefits subject to claim for recovery if insured later receives Social Security disability income. Contract between Debtor and disability insurer specifically required repayment of overpaid benefits; and timing and manner of Debtor's repayment when judged against surrounding circumstances complied with standard industry practice of insurance company issuing statement and Debtor make payment. Debtor made payment approximate 16 days after demand by insurer which constituted reasonable time for performance. Fact that letter from insurer to Debtor indicated that if Debtor did not make payment, insurer may pursue legal recourse did not change payment into one not in ordinary course of business as insurers demand letter was not unusual practice. Insurer did not send multiple demand letters threatening legal action; did not refuse future performance unless Debtor made payments; did not attempt to change terms of contract; did not threaten collection activities are imposition of liens; and had not previously sent demand letters. Letter sent by insurer contained no threat of litigation and any reference to potential litigation would have been merely stating the obvious that if Debtor did not make payment, insurer may pursue other remedies. Letter did not imposed arrests and there was no evidence that Debtor felt pressure regarding possibility of lawsuit in making decision to pay one creditor rather than other creditors.

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 bounced 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.

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.

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.

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.

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 "payment of a debt" such that granting of security interest cannot fall within scope of Section 547(c)(2).

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 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.

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 on 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.

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.

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 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.

Mason v. Clark, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Sale of property by Debtor to mother was not in ordinary course of business where neither Debtor nor mom in the ordinary course of business bought or sold real estate; and the six year delay in recording deed after date of sale was not on ordinary business terms.

Lingham Rawlings, LLC v. Gaudiano, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is in ordinary course of business where transfer is made in ordinary course of business of Debtor and transferee; or is made on ordinary business terms. After BAPCPA, tests are administered in the disjunctive – transfer is in ordinary course if either test is met. Whether transfer is ordinary course based on business transactions between Debtor and transferee is subjective determination, while determination as to whether transfer is made on ordinary business terms is objective standard based on normal commercial practices in the industry in general. Subjective analysis considers length of time involved in the preference period transaction; whether amount 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.

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 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 Debtor and the transferee. Analysis must examine the payment from Debtor’s perspective. Wire transfers from Debtor to Virginia Lottery Commission to pay for lottery tickets were within ordinary business terms. Debtor originally made payment to Lottery commission by EFT transfers but, after Debtor had experienced financial difficulties and Tennessee Lottery Commission terminated relationship with Debtor, Debtor changed to payments by wire transfers. In doing so, Debtor went out of its way to ensure that Virginia Lottery was paid immediately to avoid cut-off in ability to sell tickets with stated intention of going back to normal ticket payment processing when finances stabilized. Wire transfers were outside parties’ ordinary course of business dealings. Wire transfers were unusually activities and resulted in payment being made a day earlier than past dealings. Change was more than mere change in method by which payments were made and reflected change in Debtor’s past practice because of current financial conditions. As for payment according to ordinary business terms, Court does not have to find industry standard for payments. Rather, court should determine whether transaction is so unusual as to render it an aberration in the relevant industry. Regulations from other state lotteries indicated that payment by wire transfer is acceptable, or even mandated, method of payment. Virginia regulations provided for payment by wire transfer after a check or draft is dishonored, and regulations allowed Virginia Lottery to designate any other form of payment beyond EFT.

Cage v. Hardy Rawls Enterprises, LLC, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through “seller financing”. Debtor would then pool the contracts and sell those to an investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that Debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using Debtor’s own funds in comingled account. If Debtor repossessed and sold car, Debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by Debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. There was no evidence that this method of transacting business was either in the ordinary course of the motor vehicle financing arena nor that this particular method was within normal course of business between Debtor and investor, particularly where method of dealing with funds was directly contrary to requirements of contract between Debtor and investor. Lump sum payments to investor within 90 days of filing were avoidable preferences.

Davis v. Barcom, Inc., 2012 SL 37547 (Bankr. E.D. Tn. 2012) – Ordinary Course of Business defense designed to protect customary credit transactions incurred and paid in ordinary course of business of Debtor and transferee. Court must consider history of the parties’ dealings, timing, amount at issue, and circumstances of transaction. Court will normally refer to contractual terms compared to dates of transfers, but defendant can rebut presumption with evidence that late payments were in the normal course of business between the parties. Invoices required payment within 60 days of issuance. Parties had only one transaction prior to transfers at issue, and that was more than 25 months prior to commencement of the case, precluding any finding of “history of late payments”. Payments made more than 91 days and as many as 109 days after invoice were not in the ordinary course of business between parties.

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Ordinary Course of Business is a transaction incurred and paid in the ordinary course of business of Debtor and the transferee and focuses on transfers that are routine and not atypical. Father’s loan of money to Debtor/daughter to purchase car and later repayment of that loan by Debtor were not ordinary course. Father did not regularly loan money to daughter. Father obtained money by cash advance on his credit card and Debtor repaid part of loan from proceeds of a bonus, neither of which were “ordinary course of business” for the parties. Family relationship does not necessarily defeat “ordinary course of business” but does raise burden of proof to show that loan was actually ordinary course of business and not just a moral obligation.

Stevenson v. Leonard Turowski & Son Funeral Home, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if (A) made in the ordinary course of business or financial affairs of 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.

Gardner v. Recovery Services International, Inc., 585 BR 864 (Bankr. E.D. Ky. 2002) – 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.

14.102 Defenses – Short Term Loans or Equity Contributions

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.

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.

14.103 Defenses – Constructive Notice

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.

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.

14.104 Defenses – Duly Conducted Foreclosure Sale

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”.

14.105 Defenses – Payment of Domestic Support Obligation

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.

14.106 Statute of Limitations

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

14.107 Defenses – Assumed Contract

In re ASPC Corp., 2019 WL 2082155 (Bankr. S.D. Ohio 2019) – Assumption and assignment of executory contract or unexpired lease results in complete defense to preference claim against other party . Assumption of contract bars recovery of preferential transfers made under contract.

14.108 Particular Transfers – Tax Sales

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.

14.109 Particular Transactions – Avoidable

Luper v. Valueland Auto Sales, Inc., 2017 WL 7912003 (Bankr. S.D. Ohio 2017) - Section 547 allows Chapter 7 Trustee to avoid transfer of 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

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 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

Parker v. Lewis, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to Debtor's father was avoidable as preference. Transfer was in payment of prior loan that Debtor used to purchase automobile. Although Debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.

Brock v. Branch Banking and Trust Co., Case No. 08-5088 (6th Cir. 2010) – Purchase Money Security Interest avoidable under section 547 where the security interest is not properly perfected until more than 20 days after the security interest attached. Lender could not rely on a 20 day "safe harbor" provided by section 547(c)(3) where the security interest was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk's office nine days after the financing transaction occurred, two-week delay by clerk in uploading security interest for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as or when the required paperwork and fees are submitted to the clerk.

MBNA America Bank v. Meoli, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called "convenience checks" as preferential transfers.

Yoppolo v. MBNA America Bank, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. Economic substance of transaction was same as if the bank handed Debtor the currency which Debtor then used to pay the debt.

In re Wells, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred.

In re Ohio Business Machines, Inc., 2008 WL 3271090 (6th Cir. 2008) – Debtors use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor's interest in property sufficient to sustain a cause of action for preferential transfers. state law fraudulent conveyance. Debtor's ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being "property of the estate" notwithstanding creditor's argument that the funds actually belonged entirely to the co-account holder.

Rieser v. Fifth Third Mortgage Company, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced

only the Wife's name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband's one-half interest. Therefore, mortgage as to husband's undivided one-half interest deemed to have occurred immediately prior to the commencement of the case, rendering mortgage an avoidable preferential transfer.

14.110 Particular Transfers – Not Avoidable

Kohut v. Rigney, Case No. 07-6287 (Bankr. E.D. Mi. 2011) – Divorce judgment in 1998 conveyed ex-husband's property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife 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.

In re Williams, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor. Post-petition turnover of Debtor's State Tax Refund to creditor not avoidable where the writ of garnishment was served on the State more than 90 days pre-petition.

Himmelspach v. Hunter, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of Debtor's interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while 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 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 Debtor as "Jon Wardin" instead of Debtor's legal name, "Jonathan P. Wardin" was not sufficiently misleading that a party conducting a reasonable search would not locate the Financing Statement. As the creditor held valid security interest, any payments to the creditor up to the value of the collateral could not be preferential as a matter of law, as the transfers did not permit the creditor to receive more than the creditor would have received in a hypothetical Chapter 7 case.

Fitzpatrick v. Toyota Motor Credit Corp., 2009 WL 2971762 (Bankr. E.D. Tn. 2009) – A secured claim is deemed perfected according to and at the time dictated by State law. Under Tennessee law, a lien in a motor vehicle is perfected when by delivery to the department or the county clerk of the existing certificate of title, if any, title extension 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.

St. James, Inc. v. Cananwill, Inc., Adv. No. 07-6329 (Bankr. E.D. Mi. 2009) – Transfer of Debtor's right to a refund of unearned premiums paid for Debtor's insurance policies were subject to creditor's security interest. Creditor's receipt of those premiums could not constitute preferential transfer. Creditor provided financing to Debtor for payment of insurance premiums. Security Agreement executed by Debtor and creditor expressly assigned to creditor the right to receive any unearned premiums or other amounts with respect to the policies assigned as security. Creditor's right to receive unearned premiums is vested at the time the policies are funded by the creditor. Creditor's right to receive refunds does not constitute an attempt to assign a mere contingent or future right to unearned insurance premiums. Premium Finance Agreement was governed by M.C.L. Sections 500.1501 – 500.1514 which expressly authorize and permit the creation of a perfect security interests in the right to receive unearned premiums.

Kohut v. New Century Mortgage Corp., Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed "recorded" under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

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

14.111 Particular Transfers – Tax Sales

Hackler v. Arianna Holdings Company, LLC, 2019 WL 4309510 (3d Cir. 2019) - Pre-petition transfer of Debtor’s real estate resulting from tax foreclosure procedures can be avoided as preference. Preference requires transfer to or for benefit of creditors; for or on account of antecedent debt; made while Debtor was insolvent; made within 90 days before filing a petition or between 90 days and one year if creditor was insider; and that enables creditor to receive more than creditor would have received in a Chapter 7 proceeding. Transfer was made to tax certificate holder for debt that arose before bankruptcy petition, while Debtors were insolvent, and within 90 days of petition date. Transfer conveyed personal worth \$335,000 where creditor held claim of \$45,000. Supreme Court’s decision in *BFP v. Resolution Trust*, does not control as that case applied Section 548, not Section 547. Further, *BFP* involved non-collusive mortgage foreclosure sale conducted in conformance with applicable state law, such that purchase price would be considered reasonably equivalent value. Section 547 does not include term “reasonably equivalent value” and state tax sale procedures allow public to bid only on rate of interest to be paid on unpaid taxes without any actual auction of property itself. Mortgage foreclosures entail different considerations and tax sale foreclosures.

14.112 Claim Following Avoidance of Transfer

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

14.113 Elements

Eisenberg v. Toledo-Lucas County Port Authority, 2018 WL 2094300 (Bankr. N.D. Ohio 2018), *affd*, 2019 WL 1768144 (6th Cir. BAP 2019) – 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.

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.

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 First Modified Pre-Confirmation Chapter 13 Plan. 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.

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.

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.

Gold v. Nova World International, LLC, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Under Section 549(a), the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case; and that is not authorized under the Code or by the court. There are three requirements for avoidance under Section 549(a): (1) a transfer of property of the estate; (2) that occurred after the commencement of the case; and (3) that was not authorized by any provision of the Bankruptcy Code or by the court.

In re Wengerd, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Trustee ordinarily can avoid transfer of property of the estate that occurs after commencement of the case and that was not authorized by Order of Court.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to Debtor after the filing of the case for goods purchased on a "cash on delivery" basis were avoidable transfers under Section 549.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor's "significant other" which she used to purchase a house. Judgment entered against "significant other" for \$225,000 transferred post-petition.

Buckeye Check Cashing, Inc., v. Meadows, 396 BR 485 (6th Cir. 2008) - Property of estate consists of all legal or equitable interests of 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 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.

14.114 Jurisdiction

Icenhower v. Diaz-Barba, 22014 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.

14.115 Defenses

Richardson v. McCollins, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Defense under Section 549(b) did not apply as transfer by Debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Defendant can assert as defense a right of set off to the extent of

counterclaims brought by defendants against Trustee or Estate. Defendants' argument is essentially a defense to the avoidance claim, that the transfers of tobacco by Debtor to Joseph Irving may not be avoided because the Trustee authorized Debtor to sell tobacco on behalf of the estate. If the Defendants are correct that the Trustee authorized 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 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 Debtor constitutes a breach of a contract that 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 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 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 Debtor and good faith on the part of the transferee are irrelevant to the application of this section. Defense based on Tennessee Consumer Protection Act requires proof that (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated. Trustee is not bound by actions of Debtor. Debtor's conduct cannot constitute unfair and deceptive trade practice by Trustee.

Barbacci v. Wengerd, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Section 549(c) prevents avoidance of post-petition transfer of real property where the transferee is a good faith purchaser without knowledge of the commencement of the case; the transfer is for fair equivalent value; and the Trustee had not recorded a copy of the bankruptcy petition with the county recorder of deeds. Bankruptcy Petition is not a "complaint" for purposes of Ohio statute that provides that a complaint acts as a *lis pendens* for purposes of placing parties on record notice. Even if a complaint in an Adversary Proceeding would comply with Ohio law and constitute a *lis pendens*, the transfer happened before any adversary proceedings were filed.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods.

14.116 Defenses – Transfers Approved by Court

Eisenberg v. Toledo-Lucas County Port Authority, 2018 WL 2094300 (Bankr. N.D. Ohio 2018), *aff'd*, 2019 WL 1768144 (6th Cir. BAP 2019) – 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.

14.117 Defenses – Statute of Limitations

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 Debtor's interest in the property free and clear of the lien.

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 Debtor, not the defendant, that caused delay in discovery by trustee.

14.118 Defenses - Involuntary Petitions

Gold v. Nova World International, LLC, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In

involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.

14.119 Particular Transfers Avoidable

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.

Richardson v. McCollins, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Evidence indicated that property had been transferred by Debtor to defendant after Debtor filed for relief under Chapter 11. Debtor scheduled property in Schedule A at outset of case and paid taxes and upkeep and other expenses on the property post-petition. Further, evidence indicated that Debtor did not deliver the deed to the defendant until post-petition. Transfer of property by deed is not effective until deed is delivered by transferor and accepted by transferee, regardless of stated date on deed itself. Defense under Section 549(b) did not apply as transfer by Debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).

Ray v. Irving, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Amended complaint stated cause of action. Complaint described in sufficient detail transfers to the Defendants that took place after 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 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 Debtor and to retain the proceeds of the sales without paying the proceeds to Debtor. Insider's actions in selling assets and retaining proceeds constituted action to obtain possession and control of property of estate in violation of Code.

Browning v. Dyno Nobel, Inc., 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for goods sold to Debtor after the filing of the case for goods purchased on a "cash on delivery" basis were avoidable transfers under Section 549.

Steed v. Morgan, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor's "significant other" which she used to purchase a house. Judgment entered against "significant other" for \$225,000 transferred post-petition.

14.120 Particular Transfers Not Avoidable

Rushton v. Bank of Utah, Case no. 11-098 (10th Cir. BAP 2012) – Action to recover property transferred post-petition in violation of automatic stay dismissed where recovery would not produce any net benefit to the estate. At time of petition, bank had number of loans to Debtor secured by pledge of Certificate of Deposit. Post-petition, and in violation of stay, Bank set off against CDs in partial payment of loan. Trustee brought action against Bank to recover amount of CD, alleging that bank's setoff was improper post-petition transfer. Court held that if the transfer is set aside, the parties must be restored to their prior positions, which would leave the bank with a security interest in the certificate of deposit that was not sufficient to pay the loan in full. Restoration of the CD to the estate would not leave estate with any equity or interest in the CD as the amount of the loans exceeded the value of the CD.

In re Fleming, 424 BR 795 (Bankr. W.D. Mi. 2010) – Trustee cannot recover property from Debtor pursuant to Section 549 where 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.

14.121 Persons Liable – Debtors

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.

14.122 Persons Liable - Transferees

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.

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.

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”.

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 Debtor and has dominion or control over the property.

F. Reformation of Loan Documents

14.123 Standing

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – As a matter of State law, one who does not hold the Mortgage is not entitled to bring an action to reform the Mortgage. Acquisition of the Mortgage after commencement of an action to reform the mortgage cannot cure a lack of standing in the first instance. In Bankruptcy, however, where the Trustee brought the action, the Defendant can bring as a defense a request for reformation of the mortgage to clarify the ownership and extent of the lien. Standing in Bankruptcy Court is not limited by State Court, and Bankruptcy Court will construe standing as appropriate to adjudicate merits of claims before it.

14.124 Requirements

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 benefitted 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.

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.

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.

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.

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.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court of equity can reform instrument or deed where it fails to reflect true intention of parties., where error resulted from mutual mistake or where one party’s mistake was induced by fraud of other party. Plaintiff failed to allege any defects or mistakes in the deed or mortgage themselves, but only in the process by which those documents were recorded. Reformation cannot be used to correct recording errors.

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – Reformation of a mortgage is governed by State law

where the property is located. Ohio law permits reformation of a mortgage where there is an error, omission or other defect by reason of inadvertence of an officer, party, person or “body corporate”. The mortgage can be reformed to give effect to the true, manifest intention of the parties. The fact that the error was made by the party now seeking reformation does not defeat the ability of the Court to reform the instrument.

14.125 Statute of Limitations

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.

14.126 Laches

DeGirolamo v. U.S. Bank, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) - Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. Although more than two years passed from the execution of the mortgage to the institution in State Court to reform the mortgage, there was no evidence as to when the creditor actually discovered the error or any other evidence of undue delay. Further, the Trustee cannot demonstrate any prejudice resulting from the delay as Trustee would have been required to deal with the issue whether the Creditor had brought the action earlier or later. Absent evidence of undue delay and prejudice, Creditor’s claim for reformation was not barred by laches.

G. Effect of Avoidance

14.127 Preservation for Benefit of Estate

In re Andrews, 2019 WL 4780445 (Bankr. S.D. Ohio 2019) - Funds recovered from avoidance of preferential transfer under Section 550 become property of bankruptcy estate that must be distributed to holders of allowed claims, subject to Debtor’s rights to claim the avoided funds as exempt. State law allowed Debtor to exempt 75% of wages. Creditor pre-petition garnished the 25% nonexempt portion of wages. Trustee did not recover funds which Debtor could have exempted had transfer not occurred as Debtor already exempted full 75% of allowable wages. Portions recovered by Trustee were non-exempt portion of Debtor’s earnings and Debtor lacked any other basis to claim exemption for 25% of wages that were otherwise non-exempt.

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.

Tibble v. Wells Fargo Bank, N.A., Case No. 10-80005 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee’s standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when Debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated “Lot 6” was actually intended as mortgage on Lot 5. Avoided mortgage is preserved for benefit of estate.

Smith v. U.S. Bank, 2010 WL 3277795 (Bankr. E.D. Ky. 2010) – Avoidance of unrecorded security interest in mobile home did not vest mobile home in Debtor free and clear of avoided lien. Avoided lien is preserved for the benefit of the estate and the estate has full power and authority to enforce the lien.

In re Neal, 424 BR 235 (Bankr. E.D. Mi. 2010) – Unrecorded Mortgage avoided by Chapter 7 Trustee under Section 544 does not affect relative priority of lien. Avoidance only transfers ownership of the mortgage from the mortgagee to the Trustee, who has full authority to then enforce the mortgage. Trustee can either foreclose the mortgage or, alternatively, exercise power to sell property of the estate. The mortgage as avoided preserves its status vis-à-vis Debtors’ claimed exemptions. Where the mortgage is superior to the exemptions, the Trustee is entitled to full satisfaction of the mortgage before remitting to Debtors the value of the exemptions.

14.128 Damages

Rodriguez v. Daimler Chrysler Financial Americas, LLC, Case No. 09-1332 (10th Cir. 2010) – Section 551 permits Trustee to avoid security interest and preserve interest for benefit of estate. Section 550 permits the Trustee to recover either the property transferred or the value of the property transferred. Although Section 550 and section 551 are not mutually exclusive, Court will not award relief under Section 550 where avoidance of lien under Section 551 is adequate to make the estate whole. Relief under Section 550 is appropriate where avoidance of lien does not produce recovery for estate, such as where underlying property has been destroyed or sold. Lender whose lien was avoided could not also be charged with value of the lien itself as doing so would amount to a double recovery for the estate.

14.129 Good Faith Purchaser – Section 550 Lien

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.

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

Solomon v. Duncan, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use Rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee

B. Particular Orders

15.2 Confirmation Order

Travelers Indemnity Co. v. Bailey, 129 S.Ct. 2195 (2009) – Debtor's confirmed Chapter 11 Plan included release of Debtor's insurers and precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves, Where Court's Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final, terms were binding on all parties even if the Confirmation Order included provisions that, had an objection been raised to confirmation, would have prevented confirmation. An order which became final is no less preclusive in effect merely because the attack on the order is based on the Court's alleged lack of underlying subject matter jurisdiction – "[e]van subject-matter jurisdiction ... may not be attacked collaterally." Confirmation Order which included provision had long become final and could not be collaterally attacked.

Storey v. Pees, Case No. 07-8049 (6th Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is res judicata and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard 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

Solomon v. Duncan, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

Lewis v. McClatchey, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Proper procedure for contesting validity of Bankruptcy Court Order approving sale of property is by appeal of that order within 10 days of entry. Court lacked jurisdiction over sale once sale order became final without any timely appeal and could not be collaterally attacked in adversary proceeding.

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

15.4 Criminal Convictions

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

Stone v. Minix, 2019 WL 267778 (Bankr. E.D. Ky. 2019) – State Court Judgment finding that Debtor committed battery against Plaintiff collaterally estopped Debtor in denying facts determined in Judgment. Debtor not permitted to avoid estoppel effect by asserting that judgment was obtained through “improper means” or that evidence presented at State Court was insufficient. Arguments as to validity of State Court Order must be addressed to State Court. Bankruptcy Court would not disregard State Court judgment based on alleged lack of service where State Court judgment made specific findings that service was proper and that Court had jurisdiction to enter Judgment. Relief from alleged error of fact or law adjudicated in State Court must be addressed in State court either in Court that entered judgment or by appropriate appeal to State appellate Courts.

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

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.

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.

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.

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.

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.

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 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.

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.

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.

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.

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

In re Jones, 2019 WL 4593388 (S.D. Ohio 2019) – Bankruptcy Court properly dismissed case on Motion of Trustee where Debtor’s schedules were incomplete, inaccurate and not factually correct; and Debtor did not produce information requested by Trustee on numerous occasions.

In re Faulkner, 2019 WL 4555984 (Bankr. E.D. Mi. 2019) – Local Bankruptcy Rule 9024-1(c) allows, but does not require, that Court reinstate case where default that resulted in dismissal has been or can be cured. Party seeking reinstatement must still demonstrate grounds for relief from order dismissing case under Local Rule 9024-1 and Federal Rule of Civil Procedure 60. Debtor’s motion to reinstate case denied where case was dismissed because Debtors did not pay filing fee and did not appear for hearing on Order to Show Cause why case should not be dismissed for failure to pay filing fee. Motion to Reinstate did not demonstrate any palpable defect by which Court and parties were misled or that different disposition of case must result. Motion did not establish excusable neglect or any other valid ground for relief from order as motion did not indicate why filing fee had not been paid or why Debtors did not appear. Default that caused dismissal was not and could not be cured as case was dismissed because filing fee was not paid by deadline set and no party appeared for show-cause hearing. While filing fee was paid after hearing, there could be no “cure” for failure to appear at the show cause hearing. To extent that case was dismissed due to bookkeeping error by Debtor’s attorney, error must be attributable to Debtor’s for purpose of determining whether mistake was excusable. Lawyer errors amounting to action or inaction that leads to successful malpractice suits do not qualify as “mistake” or “excusable neglect”. Debtor’s attorney did not check to see whether filing fee had been paid. Had attorney done so, attorney would have known that filing fee had not been paid and that Debtors were required to intentional cause hearing. Failure of Debtor’s attorney to make quick and easy check is neglect that is not excusable.

In re Porter, 2019 WL 1313823 (Bankr. E.D. Mi. 2019) – 11 USC Section 350 Allows Court to reopen case to administer assets, accord relief to Debtor, or for other cause. Decision to reopen is within Bankruptcy Court’s sound judgment determined on case-by-case basis considering equities with eye toward principals which underlie bankruptcy code. The longer time since closing case, the greater the burden of demonstrating cost to reopen. Motion to reopen to file adversary complaint to determine dischargeability of student loan debts denied where motion alleged that undue hardship arose after closing of Debtor’s bankruptcy case and Debtor waited more than 5 years after closing of case to attempt to reopen. Need for finality and prospect of perpetual Bankruptcy Court jurisdiction overcame any alleged change in financial circumstances given passage of time. Court could not make determination regarding financial circumstances that existed at time petition was filed in Debtor’s financial circumstances subsequent to entry of discharge order not relevant.

Mendoza v. Montoya, 2019 WL 442380 (10th Cir. BAP 2019) – Court has discretion to reopen case but has duty to do so when there is prima facie proof that case has not been fully administered. Reopening case does not have any substantive effect but allows parties to request additional substantive relief. Case reopened to allow Debtor to disclose previously undisclosed personal injury claim and to amend Schedule C to exempt claim.

In re Hodges, 2018 WL 5255220 (Bankr. W.D. Mi. 2018) – Reopening case is ministerial act that does not affect substantive rights but instead makes federal forum available on showing of cause to grant additional relief. Creditor established cause to reopen by

alleging that Creditor did not have notice of case in time to seek determination under Section 523(c) that claim was excepted from discharge. Section 523(c) allows Complaint be filed at any time and recognizes the case can be reopened without payment of reopening fee under Rule 4007.

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.

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.

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.

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.

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.

In re Voza, 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.

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.

In re Ryan, Case No. 09-1604 (Bankr. D. Hawaii 2016) – Reopening of case is appropriate to accord relief to 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.

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.

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.

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.

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.

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.

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.

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.

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.

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. *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.

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.

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 Debtor or for purposes of executing a reaffirmation agreement.

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.

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.

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 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 and corporation could not have maintained any cause of action against competitor.

In re Trombley, 2013 WL 4417425 (E.D. Mi. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to Debtor, or for other cause. Court correctly denied motion to reopen where request to reopen was for purposes of rearguing matters that were already adequately addressed in prior order that had not been appealed. Party cannot use reopening of case to collaterally attack otherwise final and non-appealable orders.

In re Hoffman, 2013 WL 3155591 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Newell, 2013 WL 3049296 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Parthemore, 2013 WL 3049291 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Sadoski, 2013 WL 2481532 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.

In re Owsley, 2013 WL 2352604 (Bankr. E.D. Tn. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to Debtor, or for other cause. Reopening case grants no relief. Court should only reopen case where moving party demonstrates compelling reason to do so. The longer the time between closing and the motion to reopen, the more compelling the reason must be. Court should not reopen case where court cannot grant effective relief to moving party. Pre-BAPCPA version of Section 523(a)(5) allowed for discharge of domestic support obligations only where the debt, while denominated as child support, was in fact not such; or where the debt had been assigned to an entity other than a governmental entity Debtor's pre-petition child support obligation had been assigned to the state for purposes of recovering amounts advanced to former spouse constituted obligation assigned to governmental unit that was not dischargeable. Treatment of obligation as unsecured in confirmed plan did

not make debt dischargeable at end of Plan. Personal liability for unpaid child support is unaffected by discharge in Chapter 13 case. Nothing in the plan purported to determine dischargeability of debt. Plan merely addressed how debt would be paid during term of plan. Court would not reopen case for purposes of allowing Debtor to bring contempt action against State where debt had not been discharged and State actions were, therefore, not violation of discharge injunction. Reopening would be futile act as Debtor was not entitled to any relief.

In re Wright, Case No. 12-47606 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied as court lacked ability to grant meaningful relief. Reaffirmation Agreement must be made before discharge. Reaffirmation agreement indicated it was signed by parties well after entry of discharge. As such, reaffirmation agreement was unenforceable as a matter of law.

In re Collum, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit Debtor to file certificate regarding post-petition financial management course, contingent on Debtor's payment of fee to re-open case.

Smyth v. Edamerica, Inc., Case No. 11-8035 (6th Cir. BAP 2012) – Section 350 allows court to reopen case to grant relief to Debtor. Court will not reopen case where court lacks ability to grant additional relief or where reopening would be pointless. Debtor's Motion to Reopen Chapter 7 Case to declare student loans to be discharged denied as court could not grant effective relief. Fact that Debtor listed student loans on Schedule F and received discharge does not discharge student loans where Debtor did not file adversary proceeding and did not otherwise request finding of undue hardship. Debtor's reliance on *Espinosa* misplaced, as *Espinosa* was Chapter 13 case that turned on confirmation of plan, neither of which occurred in this Chapter 7 case.

In re Cooper, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to Debtor or for other "cause". Case would be reopened to allow Debtor to complete financial management education course and file certificate, at which point Debtor would be entitled to discharge. However, to extent Debtor sought to reopen case to add omitted creditor, case was closed as no asset case. Therefore, the court could not grant any additional relief and motion, to that extent, denied as unnecessary.

In re Mausolf, Case No. 11-58499 (Bankr. E.D. MI. 2012) – Motion to Reopen Bankruptcy Case to File Reaffirmation Agreement denied. Section 542 requires reaffirmation agreement to be signed before entry of discharge. Reaffirmation Agreement Debtor sought to file was signed by Debtor more than 3 months after entry of the discharge and signed by creditor 4 months after entry of discharge could not constitute enforceable reaffirmation agreement. Therefore, there was no reason to reopen the case.

Republic Bank & Trust Co. v. Hutchinson, 444 BR 728 (W.D. Ky. 2011) – Court has jurisdiction to reopen closed Chapter 7 case to administer previously undisclosed asset. Creditor has standing to request reopening if creditor can prove existence of unadministered asset.

In re Hopkins, 2011 WL 1542079 (Bankr. E.D. Tn. 2011) – Court clerk erroneously closed case prior to filing of final report or discharge of trustee. Case would be reopened to allow Trustee to continue to liquidate assets and pursue recoveries for unsecured creditors.

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

In re R & D Contracting, LLC, Case No. 02-43540 (Bankr. E.D. Mi. 2008) - Court clerk closed case prematurely while there was a pending fee application. Court reopened case for purposes of adjudicating fee application.

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

16.3 Reopening Case – Conditional Reopening

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

G&H Custom Homes, LLC v. Carter, 2019 WL 1878030 (Bankr. E.D. Mi. 2019) – Rule 60(b)(3) allows Court to reopen adversary proceeding and set aside final judgment where judgment is based on fraud, misrepresentation or misconduct of opposing party. Plaintiff was unlicensed general contractor. Under state law, unlicensed contractor is prohibited from engaging in business and prohibited from bringing or maintaining action for collection of compensation or placing liens. Plaintiff's complaint sought payment for compensation which was plainly unlawful under state law. Plaintiff sought judgment to except debt from discharge which would not be precluded by state law. However, adversary proceeding also sought entry of money judgment. Plaintiff

engaged in fraud by knowingly misrepresenting material fact or concealing material fact by deliberately misrepresenting to Debtor the status of plaintiff's license and obtained judgment by concealing the status of plaintiff's license and by testifying at Rule 60 motion hearing that plaintiff was licensed when record indicated that plaintiff was not licensed company.

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.

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

Grant v. Grander, 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

In re Hodges, 2018 WL 5255220 (Bankr. W.D. Mi. 2018) – Reopening case is ministerial act that does not affect substantive rights but instead makes federal forum available on showing of cause to grant additional relief. Creditor established cause to reopen by alleging that Creditor did not have notice of case in time to seek determination under Section 523(c) that claim was excepted from discharge. Section 523(c) allows Complaint to be filed at any time and recognizes the case can be reopened without payment of reopening fee under Rule 4007.

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.

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.

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.

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.

In re Brady, 2012 WL 3870441 (Bankr. N.D. Ohio 2012) – Reopening fee must be paid when reopening case, unless waived by court. Court can waive fee to permit complaint under Rule 4007; or when Debtor alleges violation of discharge injunction; or when reopening is necessary to correct administrative error. Debtor’s request to reopen case to deal with judicial liens recorded immediately before filing is not an action to deal with the discharge but is merely attempt to remedy Debtor’s pre-petition oversight for failing to avoid the liens during the case. Debtor did not allege that creditor did anything that would constitute violation of discharge injunction.

In re Russ, Case No. 12-44482 (Bankr. E.D. MI. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied where reopening case would serve no purpose. Under Section 524(c)(1), reaffirmation agreement must be made before granting of discharge under Section 727. Record indicated that reaffirmation agreement was not signed by both Debtor and creditor prior to entry of discharge. Therefore, Court could not approve reaffirmation agreement even if case were re-opened.

In re Kissinger, 2011 WL 2632856 (Bankr. W.D. Mi. 2011) – Court could not waive filing fee to reopen case to allow Debtor to file Certificate of Financial Management Class. Guidelines promulgated by Judicial Conference specifically prohibit waiving filing fee to reopen a case where the court declined to enter a discharge because Debtor failed to certify completion of financial management program. Court would give Debtor additional time to pay the filing fee and have case reopened.

In re Gibson, Case No. 10-63612 (Bankr. E.D. Mi. 2010) - Debtor’s Motion to pay filing fee to reopen case in installments denied as unnecessary. Case will not be reopened unless and until Debtor pays the filing fee and Court will not consider any other motions filed in the case until case is re-opened. Order permitting Debtor to pay filing fee in installments would be of no effect.

In re Baumler, 2010 WL 3585412 (Bankr. N.D. Ohio 2010) – Waiver of filing fees is specifically addressed by 28 USC Section 1930(f). Subsection (f)(1) does not apply to fee to reopen case as that fee is not a fee “payable to the clerk upon the commencement of a case under chapter 7”. Subsection (f)(2) grants a bankruptcy court authority to waive other filing fees for in forma pauperis Debtors. Court would not grant a waiver where reopening was necessary to deal with a judgment lien that was recorded prior to the bankruptcy filing and could have been addressed before the case closed. Debtors failed to produce evidence that Debtors would meet the standards for proceeding in forma pauperis where one year passed since the case was filed and Debtors’ financial situation has most likely changed.

In re Arini, Case No. 04-74744 (Bankr. E.D. Mi. 2010) – Request to waive filing fee to reopen case denied. Motion failed to state any legal basis on which Court could waive filing fee in connection with a Motion to Reopen Case.

In re Scales, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Court lacked authority to waive filing fee to re-open case where Court did not waive initial filing fee and Debtor paid that fee.

In re Kinsey, Case No. 09-34245 (Bankr. N.D. Ohio 2009) – Motion to Waive Filing Fee to Re-open Case for purposes of filing post-petition Certification regarding post-petition financial management course denied. Party seeking substantive relief required to pay filing fee before case can be re-opened. Judicial Conference generally prohibits waiver of the filing fees due upon filing a motion to reopen a case except where reopening is necessary either to correct an administrative error by the clerk or the court itself or to commence an action relating to discharge. Court can waive the filing fee if a Debtor qualifies for in forma pauperis status under 28 USC § 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 Debtor’s size.

In re Matthews, Case No. 09-51127 (Bankr. E.D. Mi. 2009) - Court lacks authority to waive filing fee in connection with Motion to Reopen Case.

In re Isquith, Case No. 08-66945 (Bankr. E.D. Mi. 2009) - Debtor who seeks to reopen case for purpose of filing Certificate of Financial Management Course must pay filing fee before case can be reopened.

XVII. Post-Petition Financial Management Education

A. Requirement

17.1 Generally

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual Debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A Debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.2 Waiver of Requirement

In re 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.

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.

In re Graham, Case No. 09-59610 (Bankr. E.D. Mi. 2012) – Court would excuse deceased Debtor from financial management requirement. Section 109(h)(4) allows excusal where Debtor is “disabled”. Death is “ultimate disability”.

White v. Glennville Bank, 2011 WL 3426166 (Bankr. S.D. Ga. 2011) – Debtor who died before completing post-petition Debtor education program not entitled to discharge. There is no “death” exception to Section 1328(g)(1).

In re DiMarco, Case No. 08-46204 (Bankr. E.D. Mi. 2011) – Motion to Excuse Debtor From Compliance with Instructional Course Concerning Personal Financial Management Course based on death of Debtor denied without prejudice as filed by a person without standing. Motion was filed by attorney. At death of Debtor, attorney’s authority to act terminated. Motion must be signed by personal representative of Debtor’s estate, as the only person with authority to act on behalf of Debtor.

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) – Debtor’s completion of a Financial Management Court can be waived only if (1) the United States Trustee determines for a particular judicial district that a waiver of the course is appropriate; or (2) if Debtor is incapacitated by mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; or is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing; or (3) is on active military duty in a military combat zone. Debtor’s incarceration in a correctional facility does not constitute any of the three grounds for waiver. If Debtor cannot complete the Financial Management course while incarcerated, Debtor can, after being released, move the Court to reopen the case to file the statement regarding the financial management course, at which time Debtor could receive the discharge.

17.3 Attendance by Person Other Than Debtor

In re Ebert, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Duty to attend post-petition financial management class is non-delegable duty. Purpose of course is to help Debtor avoid financial difficulties in the future. Allowing third party to attend in lieu of Debtor defeats that purpose. Debtor-husband could not attend financial management course on behalf of Debtor-wife by acting under “power of attorney”. Wife’s failure to attend financial management course leaves her ineligible for discharge.

B. Failure to Obtain

17.4 Closing Case Without Discharge

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

In re Amos, 08-54842 (Bankr. E.D. Mi. 2009) - Case closed without discharge due to Debtor's failure to file required Certification of Completion of Post-petition Instructional Course Concerning Financial Management. Court would grant relief and enter the discharge upon Debtor filing Motion to Reopen Case and paying \$260 filing fee.

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

In re Denger, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual Debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A Debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.5 Reopening Closed Case

In re Szczepanski, 2019 WL 1028495 (Bankr. E.D. Mi. 2019) – Motion to Reopen to file Financial Management Certificate denied where Motion was filed 15 months after case closed. Court will consider (1) whether there is reasonable explanation for failure to comply; (2) whether request was timely; (3) whether fault lies with counsel; and (4) whether creditors are prejudiced. Motion did not allege any reason why Debtor did not complete course and file Certificate in timely manner or why Debtor waited 15 months to file Motion to Reopen. Creditors would be prejudiced by having discharge sprung on them 15 months after closing of case.

In re Moore, 2018 WL 5748732 (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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

In re Collum, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit Debtor to file certificate regarding post-petition financial management course, contingent on Debtor’s payment of fee to re-open case.

In re Cooper, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to Debtor or for other “cause”. Case would be reopened to allow Debtor to complete financial management education course and file certificate, at which point Debtor would be entitled to discharge.

XVIII. Judicial and Trustee Immunity

A. Judicial Immunity

18.1 Generally

Mavrakis 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.

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.

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.

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.

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

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

In re Rogan, Case No. 16-21469 (Bankr. D. Ct. 2017) – Chapter 13 Trustee is entitled to quasi-judicial immunity which prevents service of writ of execution on Bankruptcy Trustee. Common-law and 19th century antecedents of modern Bankruptcy Trustee were entrusted with both administrative and adjudicatory functions and Trustee exercises discretion that is functionally comparable to that exercised by Judge. Issue involved disbursing Debtor’s Plan payments which is one of many statutory duties charged to Trustee and is inextricably linked with Court’s function in Chapter 13 bankruptcy process.

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.

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.

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

In re Rogan, Case No. 16-21469 (Bankr. D. Ct. 2017) – *Barton* doctrine prohibits commencement of legal proceedings against Trustee for actions taken in Trustee’s official capacity must leave his first obtained from Bankruptcy Court and appointed Trustee. Doctrine is jurisdictional in nature and failure to seek leave of appointing Court bars exercise of subject matter jurisdiction in any third-party suit. Only appropriate remedy is to order cessation of improper action. Creditor did not obtain leaving Bankruptcy Court before filing garnishment proceedings seeking to execute on funds in possession of Trustee. Execution was of no legal force or effect.

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.

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.

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.

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.

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.

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.

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.

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.

In re McKenzie, 2013 WL 4046289 (E.D. Tn. 2013) – Party seeking to institute litigation against bankruptcy trustee in non-bankruptcy forum must apply to the appointing court for leave to file suit. Complaint filed in State Court alleging that Trustee acted outside scope of authority did not obviate need for bankruptcy court permission to file suit. Creditor compounded error by failing to dismiss State Court Action after bankruptcy court denied permission to prosecute that action. Creditor's actions in commencing action and actions in failing to dismiss constituted contempt of the bankruptcy court for which sanctions were appropriate. Further, trustee has quasi-judicial immunity for any actions taken in course and scope of role as trustee, and trustee has the right to raise that defense without seeking prior relief from the bankruptcy court on the issue of course and scope. Trustee's action against defendants to recover money, while unsuccessful, was undoubtedly undertaken as representative of and on behalf of estate for purposes of immunity.

Lunan v. Jones, 489 BR 711 (Bankr. E.D. Tn. 2013) – Chapter 7 trustee is entitled to broad immunity for suits when acting within scope of authority and pursuant to Court Order. All actions taken by trustee were pursuant to bankruptcy Court Orders, and Trustee is provided absolute immunity in carrying out the terms of Court Orders. Further, under *Barton* doctrine, Bankruptcy court must give prior approval before party can sue Chapter 7 Trustee in non-bankruptcy forum for actions taken by Trustee in official capacity and within trustee's authority as officer of court. State Court complaint clearly fell within *Barton* standard as contesting Trustee's actions in seizing and selling assets pursuant to orders of court and within official capacity and authority as officer of court and consistent with primary duty of Chapter 7 trustee to collect and reduce to money property of the estate.

Anderson v. Banks, 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. However, actions taken by attorneys as counsel for Debtor are not entitled to immunity. Where attorneys for Debtor subsequently become attorneys for Trustee following appointment of trustee, attorneys are entitled to immunity only for actions taken in capacity as

attorney for Trustee. Court must evaluate each allegedly wrongful action to determine scope of authority when action taken to determine whether counsel is immune.

Anderson v. Banks, 2012 WL 1851007 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of 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 if actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.

Bowers v. Banks, 2012 WL 3597389 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune.

Bowers v. Banks, 2012 WL 1717857 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. Trustee is not entitled to immunity because his actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.

Smith v. Silverman, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit Debtor to file action against chapter 7 trustee and trustee's attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee's decision not to pursue actions were well within scope of business judgment.

Warren Investments, Inc. v. General Casualty of Wisconsin, Case No. 10-7092 (Bankr. E.D. Mi. 2011) *aff'd*, 2011 WL 3319864 (E.D. Mi. 2011) – Chapter 7 Trustee is liable in personal capacity only for willful and deliberate acts. Proposed Amended Complaint that sought to allege gross negligence of trustee did not state cause of action for willful and deliberate act and would be dismissed.

18.5 *Barton* Doctrine – Limitations

In re Rogan, Case No. 16-21469 (Bankr. D. Ct. 2017) – *Barton* doctrine prohibits institution of legal proceedings against Trustee without Bankruptcy Court permission unless action results from any acts or transactions in carrying on business connected with property of the bankruptcy estate; or where Trustee's actions are completely outside scope of Trustee's official capacity and authority such as by seizing property that is not properly part of bankruptcy estate. Execution on funds held by Trustee is not within either exception. Chapter 13 Trustee does not conduct business other than to perform administrative tasks necessarily incidental to consolidation, preservation and liquidation of estate. Any alleged failure to comply with state Court execution is not beyond scope of Trustee's duties where Trustee's actions involved collection and disbursing funds received on behalf of bankruptcy estate which unquestionably falls within scope of duties as Chapter 13 Trustee and disbursement of funds is acting in furtherance of Trustee's duty.

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.

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.

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.

In re Vistacare Group, LLC, 678 F.3d 218 (3d Cir. 2012) – Party seeking to file action in non-bankruptcy forum against bankruptcy trustee for acts done in official capacity must first obtain leave of bankruptcy court under *Barton* doctrine. A judgment against a trustee would be satisfied out of trust property without regard to rights of other creditors, leaving the party bringing suit the ability to obtain an advantage over other claimants. Although *Barton* has not been expressly codified, 28 USC Section 959 allows suits against trustees for actions in carrying on business connected to trust property. By implication, any action against a trustee other than for actions in carrying on business require prior court approval. Court approval warranted where Plaintiff demonstrated that the claims to be brought were “not without foundation”. Plaintiff alleged that Trustee's sale of undeveloped lots violated Land Use Restrictions and caused damage to Plaintiff who also owned lots in development. Once plaintiff demonstrates colorable basis for suit, bankruptcy court is not required to consider Trustee's possible defenses to action and may defer consideration of those defenses to the non-bankruptcy court.

Dash v. Winnecour, 2011 WL 6019222 (W.D. Pa. 2011) – Action by former Debtor alleging trustee failed to timely make payments on mortgage was improperly filed in District Court. Action was integrally related to bankruptcy case administration and fell within core jurisdiction of bankruptcy court. Action could be pursued only in bankruptcy court which appointed trustee absent consent of appointing court to action in another forum.

Grant, Konvalinka & Harrison, P.C. v. Still, 471 BR 884 (E.D. Tn. 2012), *aff'd* 2013 WL 2274006 (6th Cir. 2013) - *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Trustee's prosecution of State Court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee's duty to collect and reduce to money the property of the estate and to investigate financial affairs of Debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a Debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple State Court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

Grant, Konvalinka & Harrison, P.C. v. Banks, 2011 WL 3439081 (Bankr. E.D. Tn. 2011) – *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Limited exception applies only to actions taken by Trustee in carrying on business connected with property of the estate, but does not apply to actions taken while administering the estate or in preserving, holding or liquidating assets. In determining whether to permit action to be prosecuted in non-bankruptcy forum, bankruptcy court should consider: 1. Whether the acts or transactions relate to the carrying on of the business connected with the property of the bankruptcy estate. If the proceeding is under 28 USC 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 Debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a Debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple State Court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

Grant, Konvalinka & Harrison, P.C. v. Banks, 2011 WL 3585622 (Bankr. E.D. Tn. 2011) *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.

Cappuccilli v. Lewis, Case No. 10-11690 (E.D. Mi. 2010) – Creditor violated *Barton* doctrine by filing suit in State Court against Chapter 7 Trustee’s attorney without prior approval of Bankruptcy Court.

Unencumbered Asset Trust v. Hampton-Stein, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) – Supreme Court’s decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the “Barton Doctrine”) requires leave of the bankruptcy Court before instituting an action in a non-bankruptcy forum against a trustee, for acts done in the trustee’s official capacity and within the trustee’s authority as an officer of the Court. Barton Doctrine encompasses acts by counsel or others performing as functional equivalent of trustee or where they act at the direction of the trustee for the purpose of administering the estate or protecting its assets. Action seeking to hold agents of Liquidating Trust liable for actions taken in official capacities as the Court-approved trustee of the Chapter 11 Debtor’s liquidating trust are entitled to protection under the Barton Doctrine. Counsel for trustee is also Court appointed officer who represents the estate is also protected by Barton Doctrine.

Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.), 426 B.R. 282 (Bankr. S.D. Ohio 2009) – Party may not commence state action against bankruptcy court appointed trustee without prior consent of Bankruptcy Court under the Barton Doctrine. Court will presume that court appointed trustee is acting within the scope of authority unless the party bringing the action processes information rebutting that presumption at the time of commencement of the State Court action. Where State Court plaintiff needed additional discovery concerning scope of authority of the court appointed trustee, State Court plaintiff must either file action Enid the Court that appointed the trustee or obtain permission from that court to commence the action elsewhere. Failure to do so will result in entry of a permanent injunction against plaintiff pursuing the action in any court other than the court that appointed the trustee in the first instance. Party who commences action in State Court in violation of Barton Doctrine can be held liable for damages incurred by other parties to action as a result of having to defend a State Court action. Further, court that appointed trustee can enter permanent injunction against prosecution of action in any from other than appointing court where State Court action seeks to hold Trustee liable for actions taken after commencement of bankruptcy case.

In re Amir, 2009 WL 1748701 (Bankr. N.D. Ohio 2009) – Creditor’s State Court action against Trustee to determine title to property which is alleged to be property of estate barred under Barton doctrine. Trustee cannot be sued without leave of Bankruptcy Court for actions taken in administration and liquidation of estate. Party who continues to pursue litigation after being advised that actions are prohibited liable for sanctions including attorney fees.

In re National Century Financial Enterprises, Inc., 407 B.R. 895 (Bankr. S.D. Ohio 2009). Preliminary injunction against prosecution of adversary defendant’s State Court action against Chapter 11 trustee and Debtor’s counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

C. Creditor Committee Immunity

18.6 Generally

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

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

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 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.

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 Debtor. Debtor's representations that the mortgage was valid and enforceable was materially false. Although statements did not adversely affect creditors, as creditors received 100% dividends in Chapter 13 case, actions nonetheless sought to defeat the purposes of the code by ignoring and usurping Trustee's exclusive power to administer estate. Case remanded for consideration as to whether fraud produced any actual injury to any third party to support Lower Court's enhancement at sentencing.

U.S. v. Moser, Case No. 10-3288 (10th Cir. 2011) – Conviction for bankruptcy fraud upheld on appeal. Evidence established that Debtor failed to disclose assets in Chapter 7 proceeding or in Chapter 13 proceeding instituted following discharge in Chapter 7. In Chapter 7, Defendant failed to disclose a sub-lease agreement and an option to purchase real property (valued at \$1.5 million) to the chapter 7 trustee, and Debtor claimed on his SOFA a transfer of property (coins and stamps) worth \$125,000, even though the property was later returned to him because it was, in reality, only pledged collateral, not a transfer. In later Chapter 13, Defendant did not initially disclose his interest in the coins or stamps, but later amended his SOFA to include a transfer of the coins and stamps valued at \$10,000. Defendant convicted on multiple counts of failing to disclose assets in schedules and at multiple Section 341 meetings. Although each failure to disclose was based on same assets, each non-disclosure was separate violation and subject to conviction on multiple counts.

U.S. v. Spurning, Case No. 10-31128 (5th Cir. 2011) – Debtors, husband and wife, convicted of several counts of bankruptcy crimes, including concealment of bankruptcy assets, false oaths in bankruptcy filings and, for Husband only, bankruptcy fraud. Court rejected Wife's argument that she could not be held criminally liable for Husband's concealment. There was more than enough evidence for a reasonable jury to find that Wife ratified her Husband's acts and omissions, because she never objected her Husband's statements at the 341 meeting and clearly knew about, and even benefited from, the concealed assets. Husband's conviction for fraudulently answering Trustee's question reversed because the trustee's question was sufficiently ambiguous to allow a reasonable jury to find Husband's answer to be true. Wife's testimony during trial that she understood the answer to be false at the time and yet did not offer to correct the false statement supported conviction. Husband's attempt, although unsuccessful, to conceal fraudulent scheme allowed conviction for bankruptcy fraud. "Just because he failed [to conceal his scheme] does not mean he did not try."

U.S. v. James, 2010 WL 4513799 (S.D. Ohio 2010), *aff'd* 2012 WL 3608612 (6th Cir. 2012) – False statements in bankruptcy petition constitutes violation of 18 USC Section 152. Defendant's argument that false statements in petition cannot constitute false statements in a bankruptcy case as there is no case in existence until the petition is filed, and that only post-petition statements can constitute bankruptcy fraud, rejected by Court. Signing Bankruptcy Petition constitutes verification under oath that the statements are true and correct.

U.S. v. Hyatt, Case No. 08-12610 (11th Cir. 2010) – Debtors' repeated bankruptcy filings did not match information disclosed on Debtors' tax returns. Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Jury rejected defense that falsehoods were mistakes; that they lacked criminal scienter; that they had wrongly "guesstimated" their income; or their attorneys had made scrivener's errors. Omissions included failing to disclose tens-of-thousands of gambling winnings

U.S. v. Boulware, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling constituted knowingly and fraudulently making a false declaration, certification, verification, and statement under penalty of perjury in violation of 18 USCA § 152(3).

U.S. v. Hayat, Case No. 09-10296 (5th Cir. 2010) – Debtor's failure to disclose unexpired lease in bankruptcy schedules constituted bankruptcy fraud sufficient to enhance criminal sanctions in related conviction for bank fraud and wire fraud.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Debtor and spouse engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings.

19.2 Failure to Disclose Names

US v. Marston, Case No. 11-2100 (1st Cir. 2012) – Debtor's failure to disclose two different names under which Debtor had obtained credit cards constituted fraud. Debtor stole the identities of two acquaintances and obtained credit cards in those two names. Debtor did not disclose either of those names in the petition where Debtor is required to list all names used in the prior 6 years. Debtor "used" the names to obtain credit. Debtor's failure to disclose those names constituted bankruptcy fraud.

19.3 Failure to Disclose Assets

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

US v. Carver, Case No. 12-3026 (6th Cir. 2012) – Conviction for concealing assets in bankruptcy in violation of 18 USC Section 152(1) requires proof that bankruptcy proceeding existed; defendant concealed interest in property from trustee or creditors; concealed interests belonged to the estate; and defendant acted knowingly and fraudulently. Conviction for making false oath in violation of 18 USC Section 152(2) requires proof that there was bankruptcy proceeding; defendant made or caused to be made a false declaration of statement under penalty of perjury; declaration related to some material matter; declaration was false; and defendant made declaration knowingly and fraudulently. Evidence indicated that Debtor owned extensive wine collection that defendant failed to disclose in schedules. Debtor testified at the Section 341 meeting that he had sold the collection and no longer had any of the wine inventory. However, after commencement of case, Debtor caused a third party to sell a part of the wine collection and remit more than \$195,000 in proceeds to third parties including more than \$119,000 to Debtor's future wife.

19.4 Failure to List Creditors

US v. Marston, Case No. 11-2100 (1st Cir. 2012) – Schedules require Debtor to list all creditors and claims including contingent and unliquidated claim. Debtor fraudulently failed to disclose credit card issuers on cards obtained fraudulently by Debtor using stolen identities of acquaintances. Debtor's statement that she thought that fraudulent use of credit card created liability of person whose identity was stolen but did not create liability of Debtor to the card issuer was unavailing. Upon fraudulent use of cards, Debtor incurred some legal liability to the issuer, whether in fraud, contract or restitution. However, Government did not prove amounts owed to creditors, if any, without which government could prove that omitted card issuers were actual creditors.

19.5 Alteration or Destruction of Documents

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

19.6 Sanctions

U.S. v. Hyatt, Case No. 08-12610 (11th Cir. 2010) – Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Wife sentenced to 12 months and Husband to 60 months in prison and ordered \$4,020,243.22 in restitution.

U.S. v. Boulware, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling sentenced to 15 to 21 months in jail.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Debtor who engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings, sentenced to 10 years in prison and ordered not to have contact with spouse for 24 months as condition of spouse's probation.

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

United States v. Johnson, 2009 WL 1707484 (N.D. Ohio 2009) - Defendant sentenced to three years of probation, six months of location monitoring, payment of restitution in the amount of \$14,745.05, and other terms and conditions, as a result of her plea of guilty to one count of concealing assets in bankruptcy.

19.7 Statute of Limitations

U.S. v. Sanders, 2019 WL 4061670 (E.D. Ky. 2019) – Statute of Limitations for criminal prosecution for Bankruptcy Fraud is 5 years and begins to run when crime is complete. Where crime is deemed "continuous", statute runs from date on which crime either stops being continuous or a statute specifically indicates when crime is "complete". Offenses will not be considered continuing unless statute explicitly says or crime is of nature that Congress must have intended it to be continuing. Concealment of assets in contemplation of bankruptcy is continuing offense and crime is considered complete when debtor is discharged or discharge is denied. When Chapter 11 case of corporate debtor is converted, no discharge is possible and statute runs from date of conversion. Prior to placing corporation into Chapter 11, Defendant transferred large amount of assets from corporation to Defendant personally in effort to conceal those assets from creditors and did not disclose assets or transfer in Chapter 11 filings. While Chapter 11 was pending, concealment was discovered and Court appointed Chapter 11 Trustee and later converted case to Chapter 7. Concealment "continued" until conversion date and criminal charges were filed within 5 years of conversion rendering charges timely.

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

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 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

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Gramm-Leach- Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information. The E-Government Act of 2002, 44 USC Section 3501 *et. seq.* directs adoption of rules by Courts to protect privacy.

B. Information Considered "Personally Identifiable"

20.2 Account Numbers

In re Chubb, 426 BR 695 (Bankr. E.D. Mi. 2010) – Utility company account number constituted "personally identifiable information" that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.

C. Remedies

20.3 Disclosure in Proof of Claim

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

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) – Disclosure of "personally identifiable information" is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

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

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing "personally identifiable information". Gramm Leach-Bliley Financial Modernization Act, 15 USC §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 Debtor has suffered any harm by the creditor's filings.

20.4 Injunctive Relief

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

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.

Lentz v. Bureau of Medical Economics, 405 BR 893 (Bankr. N.D. Ohio 2009) – Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, does not provide private right of action and Court will not imply one in light of clear provisions of Act. Bankruptcy Code Section 105 does not authorize Court to create private right of action unless a private right of action otherwise exists in connection with another section of the Code.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Debtor does not have private right of action against creditor who files proof of claim which includes “personally identifiable information” as defined in 11 USC Section 101(41A). Section 107 of the Bankruptcy Code, entitled “Public access to papers”; Federal Rule of Bankruptcy Procedure 9037 which requires “personally identifiable information” be redacted from papers filed with the Court; the Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, which imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information; and the E-Government Act of 2002, 44 USC Section 3501 *et. seq.* which directs adoption of rules by Courts to protect privacy; do not individually or collectively create a private cause of action for disclosure of “personally identifiable information”.

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 USC §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 Debtor has suffered any harm by the creditor's filings.

20.6 Contempt

In re Robinson, 2013 WL 1313564 (Bankr. N.D. Ohio 2013) – Bankruptcy Court has jurisdiction to enforce Court Orders through contempt, where order requires defendant to take specific action but defendant fails to do so. However, Judgment in question was standard judgment in non-dischargeability action that awarded damages and declared amount to be non-dischargeable. Contempt is not available as a remedy for mere failure to pay money as ordered in Final Judgment.

In re Moohaven Dairy, LLC, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed, that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of Debtor. Counsel's continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available.

French v. American General Financial Services, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Court will not use civil contempt power to punish disclosure of personally identifiable information absent clear and convincing evidence that the offending party “violated a definite and specific order of the Court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the Court's order”. Contempt action may lie under Section 105 if Debtor can prove that creditor filed a proof of claim disclosing “personally identifiable information” willfully or in deliberate disregard of Federal Rule of Bankruptcy Procedure 9037.

Bailey v. Salyersville National Bank, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 USC §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 Debtor has suffered any harm by the creditor's filings.

20.7 Redaction from Transcript

In re Immanuel, LLC, Case No. 10-11585 (Bankr. W.D. Mi. 2011) – Court's Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party's request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

XXI. Real Estate Settlement Procedures Act

A. Generally

21.1 Statutory Authority

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.

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 .

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

Camaj v. US Bank, NA, 2016 WL 11472337 (E.D. Mi. 2016) – Causes of action based on alleged pre-petition violations of RESPA, TILA, wrongful foreclosure and quiet title became property of bankruptcy estate upon commencement of case. Debtor lacks standing to bring claims. Trustee is proper party in interest to assert claims.

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.

Roes v. Specialized Loan Servicing, 2018 WL 3636543 (E.D. Tn. 2018) – 12 CFR Section 1024.35 addresses servicer’s 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

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 servicer 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

King v. Bank of America, NA, 2019 WL 3292184 (N.D. Ohio), *report and recommendations adopted*, 2019 WL 3290333 (N.D. Ohio 2019) – Statute of Limitations under RESPA is 3 years from date of violation. Cause of action based on alleged defective assignment of note and mortgage arose on date on which assignment was recorded in public records which was more than 5 years prior to commencement of case. Complaint dismissed..

Nino v. Flagstar Bank, FSB, 2018 WL 1556235 (E.D. Mi. 2018), *aff’d*, 2019 WL 1057082 (6th Cir. 2019) – 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.

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.

21.5 Consumer versus Business Transactions

Lanton v. Ocwen Loan Servicing, LLC, 2018 WL 4030540 (S.D. Ohio 2018) – RESPA is consumer protection statute and damages related to business endeavor are not recoverable. Where only actual damages alleged resulted from denial of loan to purchase business assets for wholly owned Corporation, plaintiffs had no recoverable damages under RESPA. Absent evidence of actual damages, statute precluded award of statutory or “additional” damages.

B. Qualified Written Request

21.6 Defined

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 where letter included owner’s 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”.

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.

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.

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.

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.

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.

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.

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.

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.

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

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 not 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.

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from a borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Qualified Written Request includes a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

Conley v. Central Mortgage Co., 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – A QWR is any written correspondence, other than a notice on a payment coupon or payment media, and includes or enables the servicer to identify the name and account of the borrower and includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provide sufficient detail to the service or regarding other information sought by the borrower.

21.7 Address for Mailing Qualified Written Request

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.

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.

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.

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.

21.8 Servicer's Duty to Respond

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.

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 drinks 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.

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 USC § 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Tann v. Chase Home Finance, LLC, 2011 WL 3799841 (E.D. Mi. 2011) – RESPA authorizes a borrower of a federally related mortgage loan to submit a qualified written request (QWR) to a lender seeking correction of an account believed to be in error or requesting specific information pertaining to the servicing of a loan. Lender must acknowledge the borrower's request within twenty days and substantively respond to the inquiry within sixty days by providing the information requested or an explanation why the information is unavailable; or the lender may make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Mortgage servicer is required to respond to requests for information. Loan servicing is defined as receiving scheduled periodic payments from borrower pursuant to terms of a loan and making payments in principal and interest payments received from borrower. Loan servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Servicer must make any appropriate corrections in the account and advise borrower of corrections and provide borrower with a written explanation or clarification that includes a statement of the reasons that the servicer believes the account is correct and provides the name and telephone number for borrower to contact.

Conley v. Central Mortgage Co., 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. A servicer must provide a written response acknowledging receipt of the QWR within 20 days. Servicer has 60 days to conduct an investigation and either make appropriate corrections and notify the borrower of those corrections; or provide a written statement of the reasons the service or believes the account is correct; or provide a written statement indicating reasons why that information is not available.

21.9 Damages

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – RESPA complaint must allege facts showing that damages occurred as a result of alleged violation. Lenders alleged failure to respond to written request for information, first of which was filed two days after expiration of redemption, defeated any argument that lender's failure to respond caused actual damages. Bare allegation that plaintiff incurred litigation expenses, lost time and inconvenience, late fees or denial of credit were not actual costs or expenses "as a result of the alleged violations" or that any damages might be traceable to lender's conduct.

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.

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.

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.

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.

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.

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.

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.

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.

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

21.10 Notice of Assignment, Sale or Transfer of Servicing

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from a borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – RESPA requires notification to the borrower in writing of any assignment, sale or transfer of the servicing of a loan, to be provided within 15 days of the date of the transfer. Complaint dismissed where it alleged no facts that would show violation of this requirement and where it appeared from complaint that Chase was the original lender and servicer.

21.11 Loss Mitigation

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – Borrower is permitted private cause of action for alleged violation of RESPA only for violations under 12 CFR Section 1024.41. No other sections of Regulation X provide for private cause of action. Section 1024.41 requires that lender, upon receipt of complete loss mitigation package (defined as application for which servicer has received all information that servicer requires from borrower to evaluate application) requires servicer to review loss mitigation application promptly; and notify borrower in writing within five days after receiving application that servicer has determined that loss mitigation application is either complete or incomplete and, if incomplete, advising borrower of additional information needed to make loss mitigation package complete. Complaint at least arguably stated cause of action where complaint alleged that plaintiff submitted lost mitigation application although complaint did not allege that loss mitigation application was “complete” but does allege that plaintiff provided lender with all documentation required. However, plaintiff did not plausibly allege damages from lenders alleged pursuit of foreclosure while simultaneously evaluating loss mitigation. RESPA permits two forms of damages, actual money damages and statutory damages for pattern or practice of noncompliance. Plaintiffs vague allegation that lender engaged in pattern or practice of noncompliance with no specific facts to support allegation is not sufficient to sustain cause of action and plaintiff did not allege any particular basis for actual damages requiring dismissal of complaint.

Wright v. Ocwen Loan Servicing, LLC, 2019 WL 3714522 (E.D. Mi. 2019) – Regulations promulgated under 12 CFR Section 1024.21 do not create private cause of action. Regulation X grants private cause of action when loan servicer does not take required steps after receiving loss mitigation application. Relief is limited to actual damages and precludes equitable relief. Complaint must make more than they claim of actual damages it must allege damages that are traceable to defendant's conduct. If complaint does not explain how damages are traceable to defendant's conduct, complaint should be dismissed.

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

21.12 Rescission

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

21.13 Vacating Sale

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.

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.

21.14 Loan Modification

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.

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.

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.

21.15 Parties Liable

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.

21.16 Pleading Requirements

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.

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.

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.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

Lessl v. CitiMortgage, Inc., 2011 WL 4351673 (E.D. Mi. 2011) – Owner’s written request for escrow statement constituted Qualified Written Request under RESPA. Lender must acknowledge request within 20 days and respond substantively within 60 days. Complaint dismissed where owner alleged violation of RESPA but did not allege any actual damages from the violation.

21.17 Actual Damages

Wright v. Ocwen Loan Servicing, LLC, 2019 WL 3714522 (E.D. Mi. 2019) – Regulations promulgated under 12 CFR Section 1024.21 do not create private cause of action. Regulation X grants private cause of action when loan servicer does not take required steps after receiving loss mitigation application. Relief is limited to actual damages and precludes equitable relief. Complaint must make more than they claim of actual damages it must allege damages that are traceable to defendant’s conduct. If complaint does not explain how damages are traceable to defendant’s conduct, complaint should be dismissed.

Lanton v. Ocwen Lan Servicing, LLC, 2018 WL 4030540 (S.D. Ohio 2018) – RESPA is consumer protection statute and damages related to business endeavor are not recoverable. Where only actual damages alleged resulted from denial of loan to purchase business assets for wholly owned Corporation, plaintiffs had no recoverable damages under RESPA. Absent evidence of actual damages, statute precluded award of statutory or “additional” damages.

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.

In re Garza, 2012 WL 4738651 (Bankr. S.D. Tx. 2012) – Creditor who fails to provide annual RESPA reconciliation waives any right to recover the resulting deficiency. Analogizing to Rule 3002.1, court ruled that creditor’s failure to provide notice of payment changes in years 2008, 2009 and 2010 precluded creditor from recovering shortfall in payments that resulted. However, creditor’s failure to comply could not provide basis for sanctions against creditor as rule did not apply in 2008, 2009 or 2010 and creditor had no reason to know at that time that Rule would later be adopted that would require notices.

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Even if lender violated RESPA by failing to identify the holder of original note, plaintiff did not allege any actual or statutory damages as a result of violation, requiring dismissal of complaint.

Tann v. Chase Home Finance, LLC, 2011 WL 3799841 (E.D. Mi. 2011) – Damages flowing from a RESPA violation are limited to a borrower’s actual damages plus additional damages up to \$1000 if the borrower shows the lender engaged in a pattern and practice of committing violations. Complaint that alleged only that Plaintiff sent QWR to lender and that Plaintiff thereafter called lender multiple times did not demonstrate factual basis for violation of RESPA. Further, allegations of complaint demonstrated that lender acknowledged receipt of letter within 20 days, and sent the plaintiff a substantive response letter within the 60-day response time allowed by the statute that included most of the information requested, as well as an explanation

regarding why some information was not included and contact information if the plaintiff had any further concerns. Dispute over status of mortgage, standing alone, is not violation of RESPA.

21.18 Exemplary Damages

Lanton v. Ocwen Loan Servicing, LLC, 2018 WL 4030540 (S.D. Ohio 2018) – RESPA is consumer protection statute and damages related to business endeavor are not recoverable. Where only actual damages alleged resulted from denial of loan to purchase business assets for wholly owned Corporation, plaintiffs had no recoverable damages under RESPA. Absent evidence of actual damages, statute precluded award of statutory or “additional” damages.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. RESPA applies only to loan servicers. Action against lender for failure to respond to QWR fails to state cause of action and must be dismissed. Remedy against servicer who fails to comply include actual damages plus “any additional damages” not to exceed \$1,000 pursuant to Section 2605(e) if the borrower can prove pattern or practice of non-compliance. Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

21.19 “Pattern or Practice of Non-Compliance”

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.

21.20 Injunctive Relief

Wright v. Ocwen Loan Servicing, LLC, 2019 WL 3714522 (E.D. Mi. 2019) – Regulations promulgated under 12 CFR Section 1024.21 do not create private cause of action. Regulation X grants private cause of action when loan servicer does not take required steps after receiving loss mitigation application. Relief is limited to actual damages and precludes equitable relief.

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

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

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.

22.3 Property Encumbered

Riehl v. Bank of New York Mellon, 2019 WL 2018271 (6th Cir. BAP 2019) - Failure to identify signatory by name within body of mortgage does not render mortgage unenforceable against signatory’s in rem rights. Mortgage properly signed, initialed and acknowledged by signatory who is not otherwise named within document itself does not invalidate mortgage. Parol evidence is always admissible to determine intent when ambiguities exist within mortgage instrument. Mortgagor must sign mortgage and officially acknowledge mortgage before authorized official and mortgagor is presumed to pledge his entire interest in property absent language within document itself that states otherwise. As long as mortgagor’s signature is legible, mortgagor’s name need not appear elsewhere in the mortgage for purposes of validity. Although text of document did not name signatory, placement of signature and initials suggested that signatory also pledged interest in property. Parol evidence, including depositions, affidavits and mortgage itself, supported finding that mortgage encumbered interest of both named mortgagor and signatory not specifically named in mortgage. Both parties mortgaged interests in property at acquisition and nothing in record suggested that lender as part

of refinancing agreed to reduce collateral by 50%. Closing agent provided with specific instructions requiring both parties to sign paperwork and mortgage itself recognize that any borrower who co-signs mortgage is intending to encumber signatory's interest.

B. Foreclosures

22.4 Homestead

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.

22.5 Statute of Limitations

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.

22.6 Standing to Foreclose

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Donaldson v. US Bank, NA, 2013 WL 4744805 (E.D. Mi. 2013) – Based on Michigan Compiled Laws 600.3204(1)(d), foreclosing party must either be an owner of or have an interest in the indebtedness, or be a loan servicer. Where Bank was indisputably loan servicer, standing to foreclose did not depend on whether underlying instrument had ever been assigned to Bank.

In re First Mortgage Fund, Inc., 2013 WL 4807164 (E.D. Mi. 2013) – Trustee's strong arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender's rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor's later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff's deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor Debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544. Allegedly defective assignment does not render mortgage invalid. Assignment of mortgage does not transfer any interest in underlying real property, such that assignment does not need to be recorded to be effective.

Nachar v. PNC Bank, NA, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Lender retains right to foreclose mortgage after underlying note is discharged in bankruptcy, but cannot pursue borrower personally.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Assignment of mortgage without note has no impact on validity of mortgage, particularly where there is no evidence that mortgagor faces double liability.

Hargrow v. Wells Fargo Bank, NA, Case No. 12-709 (6th Cir. 2012) – Mortgagee has standing to pursue foreclosure even if note has been assigned to separate holder. Mortgage identified MHA Financial as the lender to whom the note was payable, but MERS as the mortgagee. Note was later assigned to Ohio Savings Bank and mortgage to Wells Fargo. Wells Fargo commenced foreclosure proceedings although it was not the holder of the note. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Mortgage can be assigned without corresponding assignment of the underlying debt. Mortgage granted to MERS the power of sale, and mortgage was properly assigned to Wells Fargo with the assignment being properly recorded.

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

22.7 Refusal to Foreclose

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 Debtor of the discharged debt. Lender was not demanding that Debtors pay debt in full to obtain release of lien and offered to release lien through settlement or short sale, which provided ability of Debtor to sell property and indicated intent by creditor to recover no more than value of collateral.

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

In re 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.

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 First Modified Pre-Confirmation Chapter 13 Plan where none of the conditions under Section First Modified Pre-Confirmation Chapter 13 Plan 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".

22.8 “Securitization”

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.

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.

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.

22.9 State Law Procedures

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.

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.

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.

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.

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.

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.

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.

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.

Hargrow v. Wells Fargo Bank, NA, Case No. 12-709 (6th Cir. 2012) – Under Michigan law, failure to comply with statutory requirements for foreclosure by sale results in the sale being voidable. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Chain of title must reflect any assignments of the mortgage. However, chain of title does not have to reflect any record of actual holder of note.

McRary v. Jarrard, 2011 WL 3566279 (E.D. Mi. 2011) – Michigan law permits non-judicial foreclosure only if lender has not instituted proceedings at law to enforce the underlying obligation. Lender violated statute when lender initiated non-judicial foreclosure process after Debtor had filed adversary proceeding to determine validity of debt and lender asserted affirmative defense of "set off". Asserting defense of set off constituted attempt by lender to recover on note triggering prohibition against non-judicial foreclosure.

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

In re Finley, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff's foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff's sale by filing "Affidavit Expunging Sheriff's Deed" was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgagor's 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.

22.10 Conversion to Judicial Foreclosure – MCL 600.3101

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – Court lacks inherent authority to convert non-judicial foreclosure into judicial foreclosure, particularly where request comes two days after expiration of redemption period.

22.11 Chain of Title – MCL 600.3204

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.

22.12 Timing of Sale – MCL 600.3220

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 created 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.

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.

22.13 Posting Notice of Sale – MCL 600.3208

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.

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.

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.

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.

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.

22.14 Publication – MCL 600.3212

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.

22.15 Perfection of Mortgage

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.

22.16 Redemption

In re Mapp, 2019 WL 913043 (Bankr. W.D. Ky. 2019) – Upon completion of foreclosure sale prepetition, purchaser at sale obtains equitable ownership of property subject only to Debtor's bare legal title and right of redemption which becomes property of estate protected by automatic stay until right of redemption expires under applicable state law. Once period for redemption expires, property is no longer property of estate. Filing of Chapter 13 petition post-sale but before expiration of redemption does not stay running of redemption period.

In re Mapp, 2018 WL 6519358 (Bankr. W.D. Ky. 2018) – Property is not property of bankruptcy estate where foreclosure sale had completed prior to filing of bankruptcy petition. Post-foreclosure, Debtor retains bare legal title coupled with right of redemption that is property of estate. However, right of redemption does not allow Debtor to reverse acceleration or cure default. Right of redemption does not prevent title from passing. Automatic stay does not prevent toll running of statutory period of redemption. Expiration of redemption terminated any residual claim Debtor had to property.

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 denied*, 2018 WL 2876736 (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.

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.

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.

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.

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.

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”.

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.

Yates v. U.S. Bank, N.A., 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer's determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer's denial of a loan modification.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on 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.

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.

22.17 Expungement of Sale

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.

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 apprises parties that mortgage has not been discharged and remains in force and effect. Expungement affidavit effectively voids sheriff sale.

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. Mortgagor’s 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.

22.18 Assignment of Mortgage – Validity

In re Smith, 2019 WL 3183565 (Bankr. N.D. Ohio 2019) - Record contained adequate evidence that creditor had standing to seek dismissal of Chapter 13 case. Although creditor made technical change in name from “US Bank National Association, as Trustee, successor-in-interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association” to “US Bank NA, successor Trustee to Bank of America, NA, successor in interest to LaSalle Bank National Association”, change was distinction without a difference. Record contained assignments of mortgage that established chain of title from LaSalle Bank to US Bank evidencing U.S. Bank standing to enforce note and mortgage.

Wilcoxson 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.

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.

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.

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.

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.

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.

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.

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.

Conlin v. Mortgage Electronic Registration Systems, Inc., 714 F.3d 355 (6th Cir. 2013) –

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.

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.

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.

Bridge v. Ocwen Federal Bank, 2013 WL 4784292 (N.D. Ohio 2013) – Debtor could not contest right to foreclose based on alleged defect in assignment between original lender and assignee. Assignee had and presented original, endorsed note. Debtor could not allege any credible risk that Debtor would be required to "double pay". Assignor admitted fact of assignment and did not assert any challenge to the assignment. Record disclosed no confusion concerning promissory note.

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

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Assignment of mortgage is not conveyance of any interest in property. Assignment that was allegedly defective as not executed in accordance with state law regarding mortgages or transfers of interest in property was valid and enforceable by assignee.

22.19 Assignment of Mortgage – Recording

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.

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.

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.

22.20 Assignment of Mortgage – Splitting Note and Mortgage

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.

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.

Spadafore v. Aurora Loan Servicing, LLC, 564 Fed. Appx. 168 (6th Cir. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.

Dye v. Wells Fargo Home Mortgage, 2014 WL 1908285 (E.D. Mi. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.

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.

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.

22.21 Assignment of Mortgage – Securitizing Trusts

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.

22.22 Assignment of Mortgage – Standing to Contest

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 Debtor.

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.

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.

Slorp 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Robinson v. Select Portfolio Servicing, Inc., 522 Fed. Appx. 309 (6th Cir. 2013) – Person who is not party to alleged assignment of note and mortgage lacks standing to contest validity of assignment.

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

Kreitzer v. Household Realty Corp., 489 WL 6998 (Bankr. S.D. Ohio 2013) – Debtor lacks standing to contest allegedly defective assignment of mortgage. Assignment is private contract between assignor and assignee to which Debtor is not party.

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

Ogle v. BAC Home Loans Servicing, LP, Case no. 11-05540 (S.D. Ohio 2012) – Debtor lacked standing to contest foreclosure based on alleged defective assignments of mortgage. Borrower's repayment obligations under the loan documents remains unaffected and unaltered by validity or invalidity of assignment, and there was no dispute as between assignor and assignee as to validity of assignment.

Bank of New York Mellon Trust Co. v. Unger, 2012 WL 1567192 (Ohio App. 2012) – Borrower lacked standing to contest validity of assignments or to invalidate mortgage based on alleged invalidity of assignment. Assignments did not in any way alter borrower's obligations under the note and mortgage. Any alleged defect in the assignments did not cause any harm to borrower as alleged defect did not expose them to any greater harm or loss beyond scope of mortgage and note.

22.23 Contest of Mortgage Foreclosure Pre-Sale – Ripeness

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 no 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.

22.24 Contest of Mortgage Foreclosure Post-Redemption

Fuller v. JPMorgan Chase Bank, NA, 2019 WL 5586906 (W.D. Mi. 2019) - Michigan Compiled Laws Section 600.3236 provides that once redemption expires, all of mortgagor's rights in property are extinguished. Statutory redemption under Section 600.3240 may not be extended absent clear showing of fraud or irregularity in the foreclosure process itself. Complaint seeking to enjoin foreclosure sale filed after expiration of redemption did not state cause of action where complaint did not allege any fraud or irregularity or that defendants engaged in any act that prevented plaintiff from stopping sheriff sale or curing default. Michigan statute that precluded foreclosure where mortgage or requested loan modification and lender had not completed loan modification review was repealed in 2014 and could not be applicable to foreclosure sale occurred 2018.

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – After expiration of statutory redemption, Court can set aside foreclosure sale only on clear showing of fraud or irregularity and that property owner would have been in better position to preserve interest in property absent noncompliance with statute. Gen. allegation that lender did not properly calculate amount due; that lender accelerated without prior notice to borrower; and that lender pursued foreclosure while simultaneously considering loan modification did not constitute grounds to set aside foreclosure. Plaintiff did not allege that any of four prerequisites for foreclosure had not occurred – plaintiff defaulted on mortgage, no action had been commenced on note at time of foreclosure proceeding, which was properly recorded, and lender was servicer and mortgagee of record. Alleged error in properly calculating amount due does not constitute fraud. Evidence indicated that lender had given proper notice of default and plaintiff did not allege prejudice where there was no evidence that plaintiff would have been in position to reinstate loan prior to sheriff sale. Pursuit of loan modification while simultaneously proceeding with foreclosure is not irregularity in foreclosure process. Irregularity, if any, relates to loan modification process which does not support setting aside foreclosure sale.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 violation 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

Connolly v. Deutsche Bank National Trust Co., 2013 WL 4084742 (E.D. Mi. 2013), *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.

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

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – Homeowner has standing to bring action contesting validity of

foreclosure sale where action is brought within statutory redemption period and does not lose that standing upon expiration of redemption. Homeowner is the last legal owner of the property and has a continuing right to lawful ownership and possession based on defects in the foreclosure process.

22.25 Standing to Contest – Robosigning

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.

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.

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.

22.26 Foreclosure Fraud – “Excessive” Bid

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 require a “fair market value” bid.

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.

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.

22.27 Foreclosure Fraud Generally

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – After expiration of statutory redemption, Court can set aside foreclosure sale only on clear showing of fraud or irregularity and that property owner would have been in better position to preserve interest in property absent noncompliance with statute. Gen. allegation that lender did not properly calculate amount due; that lender accelerated without prior notice to borrower; and that lender pursued foreclosure while simultaneously considering loan modification did not constitute grounds to set aside foreclosure. Plaintiff did not allege that any of four prerequisites for foreclosure had not occurred – plaintiff defaulted on mortgage, no action had been commenced on note at time of foreclosure proceeding, which was properly recorded, and lender was servicer and mortgagee of record. Alleged error in properly calculating amount due does not constitute fraud. Evidence indicated that lender had given proper notice of default and plaintiff did not allege prejudice where there was no evidence that plaintiff would have been in position to reinstate loan prior to sheriff sale. Pursuit of loan modification while simultaneously proceeding with foreclosure is not irregularity in foreclosure process. Irregularity, if any, relates to loan modification process which does not support setting aside foreclosure sale.

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.

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.

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.

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.

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.

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.

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 apparent validity of the sale by taking steps to protect its interest in the property. Affidavit of expungement of earlier sale is sufficient to expunge prior sheriff deed and to restore property and mortgage to full force and effect.

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

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

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

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

able to redeem property or otherwise prevent loss of property through foreclosure process.

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

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

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on 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.

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.

22.28 Forgery of Mortgage

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.

22.29 Standing to Object – Lack of Interest in Property

Harris v. Wells Bank, NA, 2019 WL 3080764 (W.D. Tn. 2019) - Following death of borrower, only estate represented by lawfully appointed executor or administrator has authority to act on behalf of borrower. Plaintiff, borrower’s spouse, lacks standing to act on behalf of late husband’s estate where it plaintiff did not own the property encumbered and did not sign either the note or mortgage and was not intended to third-party beneficiary of note and mortgage. Even if plaintiff had been properly appointed executor, plaintiff may not appear pro se if estate has beneficiaries and creditors other than plaintiff. Complaint indicated that late husband’s estate had multiple errors precluding plaintiff from proceeding pro se.

Rider v. Wells Fargo Bank, 2018 WL 4701714 (E.D. Mi. 2018) - Person who is neither party to note nor party to mortgage has standing to bring action for alleged wrongful foreclosure.

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 of mortgage on 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.

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.

22.30 Standing to Contest – Notice of Foreclosure Sale

Fuller v. JPMorgan Chase Bank, NA, 2019 WL 5586906 (W.D. Mi. 2019) - Michigan Compiled Laws Section 600.3236 provides that once redemption expires, all of mortgagors rights in property are extinguished. Statutory redemption under Section 600.3240 may not be extended absent clear showing of fraud or irregularity in the foreclosure process itself. Complaint seeking to enjoin foreclosure sale filed after expiration of redemption did not state cause of action were complaint did not allege any fraud or

irregularity or that defendants engaged in any act that prevented plaintiff from stopping sheriff sale or curing default. 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. Michigan statute that precluded foreclosure where mortgage or requested loan modification and lender had not completed loan modification review was repealed in 2014 and could not be applicable to foreclosure sale occurred 2018.

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.

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.

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.

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.

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.

22.31 Standing to Contest – Other Grounds

Camaj v. US Bank, NA, 2016 WL 11472337 (E.D. Mi. 2016) – Causes of action based on alleged pre-petition violations of RESPA, TILA, wrongful foreclosure and quiet title became property of bankruptcy estate upon commencement of case. Debtor lacks standing to bring claims. Trustee is proper party in interest to assert claims.

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.

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.

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.

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.

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.

22.32 Deficiency Claims

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.

In re Black, 2014 WL 690159 (Bankr. E.D. Mi. 2014) – Lender may have violated Michigan statutory prohibition against deficiency judgments where 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.

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

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*.

22.34 Effect of Sale – Junior Interests

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

22.35 Default – Death of Borrower

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

Brown v. Asset Acceptance, LLC, 2018 WL 6011934 (W.D. Mi. 2018) – Standing requires that plaintiff suffered injury in fact that is invasion of legally protected interest; injury is concrete and particularized and actual or imminent; causal connection between injury and alleged wrongdoing; and injury can be redressed. Statutory violation without actual damages is sufficient to support standing where defendant’s conduct is exact type of conduct that statute was intended to prohibit. While bare procedural violation does not satisfy injury-in-fact requirement, where conduct implicates conduct which Congress specifically identified, injury is

sufficiently specific and concrete. Congress enacted FDCPA to prohibit abusive debt collection practices including using language or symbols on envelope other than debt collectors address. Use of envelope that allowed phrase “judgment Debtor” to be exposed through window was exact type of conduct FDCPA intended to prevent and invaded plaintiff’s right to privacy conferred by FDCPA.

White v. Portfolio Recover Associates, LLC, 2018 WL 52642567 (E.D. MI. 2018) – Accepted Offer of Settlement under Rule 68 results in dismissal of case. Pendency of request for Class Action Certification does not prevent suit from becoming moot upon settlement. Settlement by lead plaintiff does not render case moot only if class has been certified before settlement is accepted.

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.

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.

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.

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

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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.

Camaj v. US Bank, NA, 2016 WL 11472337 (E.D. Mi. 2016) – Causes of action based on alleged pre-petition violations of RESPA, TILA, wrongful foreclosure and quiet title became property of bankruptcy estate upon commencement of case. Debtor lacks standing to bring claims. Trustee is proper party in interest to assert claims.

23.2 Class Action

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

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – “Debt collector” is any person who uses instrumentality of interstate commerce or mails in business, principal purpose of which is collection of debts, or who regularly collects or attempts to collect debts through instrumentalities of interstate commerce.

Dumas v. GC Services, LP, 2019 WL 529260 (E.D. Mi. 2019) – US Government protected from actions under FDCPA by sovereign immunity. FDCPA specifically excludes from definition of “debt collector” any officer or employee of United States or any State who is collecting or attempting to collect debt in performance of official duties. Courts have uniformly concluded that FDCPA does not contain any waiver of sovereign immunity.

Holloway v. JTM Capital Management, LLC, 2019 WL 1040851 (N.D. Ohio 2019) – Person who collects debts owed to that person is not “debt collector” within scope of FDCPA. Complaint stated cause of action where Complaint alleged that Defendant’s principal business is collection of debts owed to third parties. While later proofs may disprove allegation, allegation was sufficient to state cause of action.

Obduskey v. McCarthy & Holthus, ___ US ___, 139 S.Ct. 1029, 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Party seeking to enforce security interest is “debt collector” but Section 1692a(6) limits applicability of FDCPA for enforcement of security interests to specific provisions of Section 1692f(6). Attorney mailed borrower letter indicating that foreclosure proceedings would be brought, disclosing amount of loan, and identifying creditor, as required by applicable state law. Borrower responded with letter invoking Section 1692g(b) requirement of FDCPA that consumer disputes amount of debt. Attorney did not stop collection and instead continue with nonjudicial foreclosure action. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b) and is not required to stop collections upon receipt of dispute letter and is not liable for continuing foreclosure proceedings after receipt of dispute letter.

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.

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.

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.

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.

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.

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.

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.

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.

Henson v. Santander Consumer USA, Inc., 137 S.Ct. 1718 (U.S. 2017) – Fair Debt Collection Practices Act applies only to third-parties collecting debts owed to different creditor. Purchaser of debts from original creditor and who has thereafter owned debts outright 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.

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 from 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.

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.

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.

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.

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.

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”.

Washington v. Roosen, Varchetti & Oliver, PPLC, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – FDCPA applies to attorneys who regularly engage in consumer debt collection activity, even where activity is limited to State Court litigation. Mere filing of complaint without possession of all documents necessary to prove claim is not deceptive practice. However, FDCPA does apply to statements and allegations contained in State Court pleadings and is not limited to out-of-court communications. Plaintiff asserting a claim under the Fair Debt Collection Practices Act (FDCPA) for a debt collector’s false or misleading statements in connection with the collection of a debt must establish that: (1) the Plaintiff is a consumer, as defined by the FDCPA; (2) the debt arises out of a transaction primarily for personal, family, or household purposes; (3) the Defendant is a debt collector, as that phrase is defined by the FDCPA; and (4) the Defendant violated one of the prohibitions listed in the FDCPA with respect to false or misleading statements. Whether statements in State Court pleadings are mis-leading 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.

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.

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.

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 who ought to be treated as debt collectors from those who ought to be treated as creditors: Defendant is not removed from scope of FDCPA merely by calling itself a mortgage servicer. Complaint sufficiently alleged that loan was in default when acquired by Ocwen to cause Ocwen to be “debt collector” for purposes of FDCPA.

Greer v. Gateley, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – FDCPA applies only to those who meet the statutory definition of “debt collector”, which turns on whether the person “regularly” attempts to collect debts. Business that principally focuses on

enforcement security interests but who does not otherwise regularly attempt to collect debts is exempt from FDCPA except for Section 1692f(6) which prohibits taking or threatening to take property where there is no lawful right to possession or whether there is no intention to take property. Deed of Trust holder was not debt collector as only role was to enforce security agreement after default and there were no allegations that Deed of Trust holder took or threatened to take any action that would violate 1692f(6).

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.

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.

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.

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

Obduskey v. McCarthy & Holthus, ___ US ___, 139 S.Ct. 1029, 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Party seeking to enforce security interest is “debt collector” but Section 1692a(6) limits applicability of FDCPA for enforcement of security interests to specific provisions of Section 1692f(6). Attorney mailed borrower letter indicating that foreclosure proceedings would be brought, disclosing amount of loan, and identifying creditor, as required by applicable state law. Borrower responded with letter invoking Section 1692g(b) requirement of FDCPA that consumer disputes amount of debt. Attorney did not stop collection and instead continue with nonjudicial foreclosure action. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b) and is not required to stop collections upon receipt of dispute letter and is not liable for continuing foreclosure proceedings after receipt of dispute letter.

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.

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.

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.

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 who ought to be treated as debt collectors from those who 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.

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.

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.

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.

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.

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.

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.

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 – Nonjudicial Foreclosure

Thompson v. Five Brothers Mortgage Company Services and Securing Inc., 2019 WL 2051798 (W.D. Mi. 2019) – Entity engaged solely in non-judicial foreclosure proceeding is not “debt collector” for general purposes of FDCPA. Party is subject only to restrictions under 15 USC Section 1692f(6). Foreclosing mortgage is exercise of contractual right to recover collateral which is separate from and independent of collection of underlying debt. Defendant retained by foreclosing creditor after expiration of redemption to clean out property was not “debt collector” as actions were, at best, related to non-judicial foreclosure; defendant was not engaged in interstate commerce; and activities were at best routine post-foreclosure behavior not plausibly related to debt collection.

Obduskey v. McCarthy & Holthus, ____ US ____, 139 S.Ct. 1029, 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Party seeking to enforce security interest is “debt collector” but Section 1692a(6) limits applicability of FDCPA for enforcement of security interests to specific provisions of Section 1692f(6). Attorney mailed borrower letter indicating that foreclosure proceedings would be brought, disclosing amount of loan, and identifying creditor, as required by applicable state law. Borrower responded with letter invoking Section 1692g(b) requirement of FDCPA that consumer disputes amount of debt. Attorney did not stop collection and instead continue with nonjudicial foreclosure action. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b) and is not required to stop collections upon receipt of dispute letter and is not liable for continuing foreclosure proceedings after receipt of dispute letter.

23.6 Attorney as Debt Collector

Reyes v. Steeg Law, LLC, 2019 WL 258068 (5th Cir. 2019) - whether law firm is “debt collector” and number of lawsuits filed in collection; percentage of time debt collection activities consume; share of total lawsuits filed dedicated to debt collection; number of creditor-clients and firm’s relationship with them and frequency and nature of non-collection work; and number of firm attorneys and other employees dedicated to debt collection. Law firm engaged in condominium and real estate not “debt collector” where firm sent 36 letters in one year preceding commencement of case and work related to those letters was not large part of firm’s overall practice. Court rejected bright line rule joining 2d Circuit, 6th Circuit and 10th Circuit.

23.7 Debt Collector as Creditor

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.

23.8 Relationship to Bankruptcy Code – Pre-Emption

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 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 Debtor.

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.

23.9 Statute of Limitations

King v. Bank of America, NA, 2019 WL 3292184 (N.D. Ohio), *report and recommendations adopted*, 2019 WL 3290333 (N.D. Ohio 2019) - Court may dismiss complaint under Rule 12 where allegations in complaint affirmatively show that claim is time-barred. Statute of Limitations under FDCPA is one year from date of violation. Complaint arose out of pre-foreclosure actions and culminated with filing in 2011 of foreclosure action. Claim accrued when lender, allegedly without standing to do so, initiated foreclosure action which was more than 6 years prior to commencement of District Court litigation.

Rotkiske v. Klemm, 89 F.3d 422 (3d Cir. 2018), *cert granted*, 139 S.Ct. 1259 (2019) – Whether one year statute of limitations under FDCPA is subject to “discovery rule” that statute of limitations does not commence until Plaintiff knows or reasonably should know of violation?

Sprouse v. Ditech Financial, LLC, 2019 WL 405634 (E.D. Tn. 2019) - Statute of Limitations under FDCPA is one year from date on which violation occurs. Plaintiffs claim arising out of foreclosure notices arose on date on which plaintiff first received notice. Action brought 13 months after receipt of first notice barred by statute of limitations.

Smith v. Nationstar Mortgage, LLC, 2018 WL 6131847 (6th Cir. 2018) – State Law that extends statute of limitations to allow plaintiff to re-file lawsuit that has been dismissed for reasons other than on merits does not apply to Federal law that contains its own statute of limitations. FDCPA statute of limitations is one year. Plaintiff’s action, brought more than one year after alleged violation barred even though action brought within one year extension period afforded under state law.

Jodway v. Orlans, PC, 2018 WL 1570303 (E.D. Mi. 2018), *affirmed*, 2018 WL 6721097 (6th Cir. 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

23.10 Statute of Limitations – Equitable Tolling

Sprouse v. Ditech Financial, LLC, 2019 WL 405634 (E.D. Tn. 2019) – Sixth Circuit has not yet held that FDCPA permits equitable tolling of statute of limitations.

Jodway v. Orlans, PC, 2018 WL 1570303 (E.D. Mi. 2018), *affirmed*, 2018 WL 6721097 (6th Cir. 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.

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.

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.

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.

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.

23.11 “Communication” Defined

Holloway v. JTM Capital Management, LLC, 2019 WL 1040851 (N.D. Ohio 2019) – FDCPA prohibits communication with third party in effort to collect debt other than with Debtor, Debtor's attorney, a consumer reporting agency and the creditor. Purpose is to protect Debtors from harassment, embarrassment, loss of job or denial of promotion. Communication to third party poses little threat unless it inspires third party to reveal potentially embarrassing or harmful information to third parties. Communication to third party without mentioning Debtor or revealing debt is not communication, but if communication includes information regarding debt or provides information or details, Debtor may be harmed bringing communication into scope of FDCPA. Communication to Credit Reporting Agency, while primarily seeking information from Agency, communicated to Agency that information was sought for purpose of collection, bringing communication into scope of FDCPA.

Tyler v. Fabrizio & Brook, PC, 2019 WL 1002591 (E.D. Mi. 2019) – Whether letter is “communication” within scope of FDCPA depends on whether purpose of letter is to induce payment by Debtor. Although letter stated that “you owe \$27,036.78), letter also included paragraph in bold font and all upper case letters that if Debtor had been discharged in bankruptcy, letter was informational and not intended as attempt to collect debt. Letter was not primarily about money owed but was instead primarily notice that foreclosure proceedings were being commenced. Letter was not required step to foreclose mortgage was instead courtesy to Debtor to advise that foreclosure proceedings were about to start, with its primary purpose to inform. Lender did not explicitly ask for payment; did not provide due date for payment; did not include payment coupon; and did not provide address to which payment could have been mailed. Letter did not order, or even ask, Debtor to make payment to stave off foreclosure. Disclaimer was in bold and all capital letters and was most conspicuous content of letter.

Scott v. Trott Law, PC, 2019 WL 169237 (6th Cir. 2019) – Foreclosure of Mortgage by Advertisement qualifies as “initial communication” requiring debt collector to send Fair Debt Letter within five days of initial communication containing specific information about debt, intention to collect debt, and Debtor's rights, unless published notice also contains that information. Debtor then has 30 days within which to dispute the validity of debt and demand verification of debt during which time debt collector must cease collection activities until debt collector provides verification.

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.

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.

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.

Thebert v. Potestivo & Associates, PC, 2017 WL 3581322 (E.D. Mi. 2017) – Posting of foreclosure notice is plausibly a communication as it is intended to 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.

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.

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.

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.

23.12 Public Communication – 15 USC Section 1692c(b)

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 intended to 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.

23.13 “Consumer Debts”

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – Obligation is “consumer debt” where plaintiff is a natural person allegedly obligated to pay a debt that was used for personal purposes.

Pasley v. Biggs, 2019 WL 328725 (Bankr. W.D. Ky. 2019) – FDCPA does not apply to efforts to collect non-consumer debt. Whether obligation is consumer or business in nature depends on transaction from which debt arose including Debtor’s intended use of loan proceeds, even if actual use differs from original intent. Debt was clearly business in nature where loan proceeds were used for business purposes, real estate involved in transaction was not borrower’s residence, and equipment pledged as securing included all equipment necessary to operate commercial laundromat. Fact that borrower was personally liable does not convert transaction into consumer transaction.

Lanton v. Ocwen Loan Servicing, LLC, 2018 WL 4030540 (S.D. Ohio 2018) – FDCPA is consumer protection statute and damages related to business endeavor are not recoverable. Where only actual damages alleged resulted from denial of loan to purchase business assets for wholly owned Corporation, plaintiffs had no recoverable damages under FDCPA. Absent evidence of actual damages, statute precluded award of statutory or “additional” damages.

Shockley v. Portfolio Recovery Associates, LLC, 2018 WL 5726190 (E.D. Ky. 2018) – “Consumer” defined in 15 USC Section 1692(a)(3) is any natural person obligated or allegedly obligated to pay any debt. Complaint stated cause of action where complaint alleged that plaintiff was natural person allegedly obligated to pay debt to creditor who allegedly transmitted information to consumer reporting agencies as outstanding even though plaintiff disputed debt as discharged in bankruptcy.

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”.

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.

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.

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.

23.14 “Consumer Debts” Defined

Pasley v. Biggs, 2019 WL 328725 (Bankr. W.D. Ky. 2019) – FDCPA does not apply to efforts to collect non-consumer debt. Whether obligation is consumer or business in nature depends on transaction from which debt arose including Debtor’s intended use of loan proceeds, even if actual use differs from original intent. Debt was clearly business in nature where loan proceeds were used for business purposes, real estate involved in transaction was not borrower’s residence, and equipment pledged as securing included all equipment necessary to operate commercial laundromat. Fact that borrower was personally liable does not convert transaction into consumer transaction.

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 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.

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 persona, 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.

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.

23.15 “Person” Defined

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.

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.

23.16 Eviction Proceedings

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.

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.

Todaro v. Reimer, Arnovitz, Cherek & 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 sot recover possession were not accompanied by any demand for payment of money.

23.17 Garnishment Proceedings

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.

23.18 Bankruptcy Court Jurisdiction

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.

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.

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 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 Debtor.

23.19 Complaint – Generally

Thompson v. Midland Funding, LLC, 2019 WL 1342787 (E.D. Ky. 2019) – FDCPA is strict liability statute. Plaintiff does not need to prove defendants a knowledge or intent and does not have to have suffered actual damages. Courts consider defendants alleged conduct through the lens of “least sophisticated consumer” which ensures protection of all consumers including naïve and trusting or protecting debt collectors against liability for bizarre or idiosyncratic interpretations of collection efforts. Plaintiff must prove only one violation to recover.

Pasley v. Biggs, 2019 WL 328725 (Bankr. W.D. Ky. 2019) – Plaintiff must prove that (1) he was object of collection activity arising from consumer debt, (2) defendant is debt collector within meaning of the statute, and (3) defendant engaged in a prohibited act or omission under the FDCPA.

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.

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 USC § 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.

23.20 Venue for Action to Collect Debts

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 least 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.

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.

23.21 Arbitration

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 to 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.

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.

23.22 Sovereign Immunity

Dumas v. GC Services, LP, 2019 WL 529260 (E.D. Mi. 2019) – US Government protected from actions under FDCPA by sovereign immunity. FDCPA specifically excludes from definition of "debt collector" any officer or employee of United States or any State who is collecting or attempting to collect debt in performance of official duties. Courts have uniformly concluded that FDCPA does not contain any waiver of sovereign immunity.

B. Allowed and Prohibited Actions

23.23 Initial Communication

Peterson v. Capital Management Services, LP, FDCPA strict liability statute that prohibits debt collector from making false, deceptive or misleading representation or means in connection with collection of debt including threat to take action that cannot legally be taken. Debt collector violated Section 1692e by sending debt validation letter after Debtor had commenced bankruptcy, even though debt collector was unaware of bankruptcy filing at time letter was sent. Debt collector can assert bona fide error defense where a violation was unintentional and collector maintains procedures reasonably adapted to avoid error. Debt collectors who do not perform independent investigation may avail themselves of bona fide error defense. Evidence insufficient at summary judgment to determine whether collector's mailing of letter fell within bona fide error defense.

Scott v. Trott Law, PC, 2019 WL 169237 (6th Cir. 2019) – Foreclosure of Mortgage by Advertisement qualifies as "initial communication" requiring debt collector to send Fair Debt Letter within five days of initial communication containing specific information about debt, intention to collect debt, and Debtor's rights, unless published notice also contains that information. Debtor then has 30 days within which to dispute the validity of debt and demand verification of debt during which time debt collector must cease collection activities until debt collector provides verification.

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.

Zemcekis 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.

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.

23.24 Location Information

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.

23.25 Enforcement of Security Interest Generally

Glazer v. Chase Home Finance, LLC, 704 F.3d 453 (6th Cir. 2013) – Mortgage foreclosure constitutes “debt collection” activity within scope of FDCPA and person pursuing enforcement is “debt collector”. There is no exception in FDCPA for efforts to collect debt merely because debt is secured by mortgage.

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.

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.

23.26 Enforcement of Security Interest Post-Bankruptcy

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.

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.

23.27 Verification of Debt

Garner v. Select Portfolio Servicing, Inc., 2019 WL 1503128 (E.D. Mi.), *report and recommendations adopted*, 2019 WL 4267591 (E.D. Mi. 2019) – Section 1692g requirement to provide validation of debt is triggered only upon Debtors timely request to mortgages servicer. Evidence did not indicate that Debtor ever made demand on mortgage servicer and further demonstrated that mortgage servicer validated loan at least 4 separate times, and there was no evidence that verifications did not fulfill obligations under Section 1692g.

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – Section 1692g requires debt collector either in initial communication or within five days after initial communication to provide written notice of right to dispute debt and collectors obligation to verify debt in writing within 30 days and to cease collection activities until creditor has provided requested verification. Creditor violated act by not providing written notice within five days of initial phone call resulting in harassment and depression as well as confusion, worry and emotional distress.

Obduskey v. McCarthy & Holthus, ____ US ____, 139 S.Ct. 1029, 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Party seeking to enforce security interest is “debt collector” but Section 1692a(6) limits applicability of FDCPA for enforcement of security interests to specific provisions of Section 1692f(6). Attorney mailed borrower letter indicating that foreclosure proceedings would be brought, disclosing amount of loan, and identifying creditor, as required by applicable state law. Borrower responded with letter invoking Section 1692g(b) requirement of FDCPA that consumer disputes amount of debt. Attorney did not stop collection and instead continue with nonjudicial foreclosure action. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b) and is not required to stop collections upon receipt of dispute letter and is not liable for continuing foreclosure proceedings after receipt of dispute letter.

Garner v. Select Portfolio Servicing, Inc., 2019 WL 1503128 (E.D. Mi.), *report and recommendations adopted*, 2019 WL 4267591 (E.D. Mi. 2019) – Debt collector must provide consumer with written notice listing amount of debt; name of creditor to whom debt is owed; statement that unless consumer disputes validity of debt within 30 days, debt will be assumed to be valid; statement that if consumer notifies debt collector in writing within 30 days, debt collector will obtain verification; and if requested by consumer, debt collector will provide name and address of original creditor. If consumer notifies debt collector in writing that debt is disputed, collector must cease collection until verification is provided to consumer. Plaintiff did not allege and did not produce any documentation that plaintiff sent debt validation letter to defendant and did nothing more than recite language of statutory provision.

Scott v. Trott Law, PC, 2019 WL 169237 (6th Cir. 2019) – Foreclosure of Mortgage by Advertisement qualifies as “initial communication” requiring debt collector to send Fair Debt Letter within five days of initial communication containing specific information about debt, intention to collect debt, and Debtor’s rights, unless published notice also contains that information. Debtor then has 30 days within which to dispute the validity of debt and demand verification of debt during which time debt collector must cease collection activities until debt collector provides verification. Debt collector violated FDCPA where collector had published Notice for one week prior to receiving dispute letter, but did not prevent notice from running three following consecutive weeks; by posting notice at plaintiff’s home after receipt of dispute letter; by not canceling share sale. Advertisement, home posting and share sale where activities necessary to satisfy Michigan law and constitute continued collection activity. Requirement that debt collector cease collection to the requires collector to stop subsequent newspaper publications, stop home posting from occurring, and stop share sale from taking place. Fact that activities were set motion prior to receipt of dispute letter does not obviate creditors requirement to prevent further actions being taken by third parties at direction of debt collector.

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.

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.

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 transaction 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.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – FDCPA provides civil cause of action against any debt collector who does not 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.

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.

Zemckis 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.

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.

23.28 False or Misleading Statements – Section 1692e

Samples v. Medcredit, Inc., 2019 WL 2409676 (M.D. Tn. 2019) – Section 1692g(a)(2) requires creditor to include enough information to allow least sophisticated consumer to identify party to whom debt is owed. Collection letter insufficient where letter did not explicitly identify creditor as either original or current creditor but merely stated that accounts listed below have been placed for collection. Letter included 2 different account numbers but did not identify creditor associated with account number. Least sophisticated consumer would not be able to deduce creditors name to whom debt is owed given lack of either identity of creditor or any indication of defendants relationship with creditor. Consumers may construe notice to mean that consumer now owes debt to debt collector itself and cannot be expected to know that debt collector under FDCPA cannot also be a creditor.

Holzman v. Malcolm S. Gerald & Associates, 2019 WL 1495642 (11th Cir. 2019) – whether communication is false or misleading is determined by “least-sophisticated consumer” standard where consumer is presumed to have only rudimentary amount of information about world but requires consumer to be willing to read collection notice with some care and has an objective component to prevent liability for bizarre or idiosyncratic interpretations by preserving quotient of reasonableness. Generally, whether collection letter is deceptive or misleading to least-sophisticated consumer is fact question for jury. Communication will be false or misleading if communication falsely represents character, amount or legal status of debt or if communication threatens any action that cannot legally be taken or is not intended to be taken. Express threat of litigation is not required as long as one can reasonably infer implicit threat. Letter requesting payment of time-barred debt may be misleading where letter contains offer to “resolve” debt combined with deadline to accept payment offer and warning that offer may not be renewed. Language could plausibly deceive or mislead unsophisticated consumer as to legal status of debt. Further, by urging Debtor to “take advantage” of offer, letter might have caused unsophisticated consumer to believe that debt was legally enforceable and by announcing deadline, letter created some urgency for Debtor to act. Language could lead unsophisticated first reader to conclude that he is being presented with an ultimatum and that failure to accept proposal would result in legal action.

Garner v. Select Portfolio Servicing, Inc., 2019 WL 1503128 (E.D. Mi.), *report and recommendations adopted*, 2019 WL 4267591 (E.D. Mi. 2019) – Section 1692e prohibits false, deceptive or misleading representations or means in connection with collection of debt and includes list of specific actions which are prohibited. Plaintiff did not identify any false, deceptive or misleading representation made by defendant and could not produce any documentation that supported claim that defendant committed such acts. Plaintiff continue to rely on previously rejected argument that defendant was not servicer alone which does not constitute violation of Section 1692e.

Smith v. Nationwide Collection Agencies, Inc., 2019 WL 670092 (E.D. Mi. 2019) – Section 1692e(8) prohibits communicating or threatening to communicate credit information which is known or should be known to be false including failure to communicate that debt is disputed. There is no specific language or form consumer must use for disputing debt. Consumer must prove that consumer reported dispute to credit reporting agency and that agency did not correctly update information. Evidence did not support finding that plaintiff sent dispute letter. Plaintiff's complaint attached on signed copy of alleged dispute letter but there was no affidavit or verified complaint or any other evidence that plaintiff actually mailed letter or that credit reporting agency received letter. Although credit reporting agency remarked one of allegedly disputed accounts as disputed, that did not support inference that credit reporting agency received letter from plaintiff where credit reporting agencies records indicated that it received notification from separate credit reporting agency.

Smith v. Nationstar Mortgage, LLC, 2018 WL 6131847 (6th Cir. 2018) – Section 1692e prohibits materially false or misleading statements, defined as tending to mislead or confuse lease sophisticated consumer; and that are made with purpose of inducing payment. Lender's notice that borrower had been denied a loan modification; lender's notice of default in payments; and lender's imposition of property inspection fee were not were not communication to induce payment and Plaintiff did not demonstrate that any statement was false or misleading.

Finley v. Nationstar Mortgage, 2018 WL 6445691 (E.D. Mi. 2018) – Section 1692e prohibits false or misleading statements in effort to collect debt. Statement must be made in connection with collection of debt, defined as “animating purpose of communication” must be to induce payment. Statements sent by Mortgage company after Debtor had obtained discharge in bankruptcy were not misleading where purpose was not to induce payment but was to provide information regarding status of mortgage account which constitutes lien on property. Statement was captioned “INFORMATIONAL”; statements merely identified total mortgage debt and amount needed to bring mortgage current. Statement stated in bold language that where Debtor received discharge in bankruptcy, statement was for informational purpose and not attempt to collect debt. Payment coupon was conspicuously noted, “VOLUNTARY PAYMENT COUPON” and clarified that Nationstar was not seeking to collect debt but was offering information that Debtor would need to avoid possible foreclosure.

Shockley v. Portfolio Recovery Associates, LLC, 2018 WL 5726190 (E.D. Ky. 2018) - FDCPA Section 1692e(8) prohibits communicating or threatening to communicate credit information which is known to be false including failure to communicate that debt is disputed. Plaintiff must be “consumer” as defined by FDCPA; debt must arise out of transaction that was primarily for personal, family or household purposes; defendant must be “debt collector” as defined in FDCPA; and plaintiff must prove that defendant communicated information to third party that defendant knew or should have known was false. Complaint stated cause of action where complaint alleged that plaintiff was natural person allegedly obligated to pay debt to creditor who allegedly transmitted information to consumer reporting agencies as outstanding even though plaintiff disputed debt as discharged in bankruptcy

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.

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 data 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.

Sparks v. EquityExperts.Org, LLC, 2018 WL 3387245 (E.D. Mi. 2018), *aff’d*, Case No. 18-2378 (6th Cir. 2019) – 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.

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 Plaintiffs 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.

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”.

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 to Dismiss.

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.

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.

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.

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.

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 from debt collector and there was no evidence that omission would lead to confusion by unsophisticated consumer.

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.

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. 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.

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.

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.

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.

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.

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.

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.

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”.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

23.29 Communication With Represented Consumer

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.

23.30 Communication to Third Party

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – Section 1692c(b) prohibits communication in connection with collection of debt with any person other than consumer, consumer’s attorney, credit reporting agency if permitted by law, creditor, attorney for creditor, and attorney for debt collector. Debt collector may also acquire location information about consumer but must not state that consumer owes debt. Complaint stated cause of action where plaintiff alleged that defendant contacted plaintiff’s relatives and stated that plaintiff Odette. “Location information” exception did not apply as defendant had adequately located plaintiff as demonstrated by frequent communications. Natural consequences of defendant’s actions was to harass, worry and embarrass plaintiff sufficient to support liability under Section 1692c(b).

Brown v. Asset Acceptance, LLC, 2018 WL 6011934 (W.D. Mi. 2018) – Standing requires that plaintiff suffered injury in fact that is invasion of legally protected interest; injury is concrete and particularized and actual or imminent; causal connection between injury and alleged wrongdoing; and injury can be redressed. Statutory violation without actual damages is sufficient to support standing where defendant's conduct is exact type of conduct that statute was intended to prohibit. While bare procedural violation does not satisfy injury-in-fact requirement, where conduct implicates conduct which Congress specifically identified, injury is sufficiently specific and concrete. Congress enacted FDCPA to prohibit abusive debt collection practices. Section 1692f(8) prohibits language or symbols on envelope other than debt collectors address. Use of envelope that allowed phrase "Judgment Debtor" to be exposed through window was exact type of conduct FDCPA intended to prevent and invaded plaintiff's right to privacy conferred by FDCPA.

Thompke v. Fabrizio & Brook, PC, 261 F.Supp.3d 798 (E.D. Mi. 2017) – Section 1692f(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.

Walker v. Fabrizio & Brook, PC, 2017 WL 5068340 (E.D. Mi. 2017) – Section 1692f(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.

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.

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 intended to 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.

23.31 Unfair or Unconscionable Means – Section 1692f

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – Section 1692e(2) prohibits false representation of character, amount or any legal status of debt, as determined by "least sophisticated consumer" standard. Complaint stated cause of action where plaintiff alleged that defendant continued to demand payment after debt had been discharged in bankruptcy and after plaintiff subsequently paid off debt. Defendant also falsely stated that plaintiff could be liable for attorney's fees. Defendants are repeated misrepresentations cause Debtor to make payments on debt despite fact that Debtor was discharged and resulted in Debtor feeling anxious, unable to sleep, disruption of family life and plaintiff compulsively checking police department records for warrants in her name due to defendants threats.

Thompson v. Midland Funding, LLC, 2019 WL 1342787 (E.D. Ky. 2019) – FDCPA prohibit use of unfair or unconscionable means to collect or attempt to collect debt, including collection of any amount not authorized by agreement creating debt or permitted by law; or any false, deceptive or misleading representation or means in connection with collection of debt including threat to take action that cannot legally be taken. Filing collection lawsuit outside statute of limitations is not violation of Section 1692f(1) as that subsection is limited to situations where plaintiff is challenging amount of debt to be collected rather than overall validity of debt or method of collection. However, filing state Court lawsuit to collect time-barred debt violates Section 1692e as constituting a threat to take action which cannot legally be taken.

Thompson v. Five Brothers Mortgage Company Services and Securing Inc., 2019 WL 2051798 (W.D. Mi. 2019) – Section 1692f prohibits threatening or to threatening to take any nonjudicial action to affect dispossession of property if there is no present right to possession; there is no present intention to take possession; or property is exempt by law from dispossession. Lender and lenders contractor hired to clean out property after expiration of redemption did not violate Section 1692f as lender had present intention to take possession; property was not exempt; and lender had present right to possession of property. Share sale had been completed and redemption period had run, and lender was able to obtain entry without breach of peace. Contractor was acting on behalf of party entitled to possession as a matter of law even though lender had not sought state Court order awarding possession. Summary possession proceeding is one method to enforce right of possession but does not preclude other lawful methods including self-help.

Holzman v. Malcolm S. Gerald & Associates, 2019 WL 1495642 (11th Cir. 2019) – Whether communication is false or misleading is determined by "least-sophisticated consumer" standard where consumer is presumed to have only rudimentary amount of information about world but requires consumer to be willing to read collection notice with some care and has an objective

component to prevent liability for bizarre or idiosyncratic interpretations by preserving quotient of reasonableness. Generally, whether collection letter is deceptive or misleading to least-sophisticated consumer is fact question for jury. General practice of attempting to collect time-bar debt is not per se unfair or unconscionable. Although statute of limitations may provide defense to claim, is not automatically unlawful for collector to seek payment.

Garner v. Select Portfolio Servicing, Inc., 2019 WL 1503128 (E.D. Mi.), *report and recommendations adopted*, 2019 WL 4267591 (E.D. Mi. 2019) – Section 1692f prohibits unfair or unconscionable means to collect debt and includes list of specifically prohibited actions. Plaintiff did not allege any extreme actions or produce evidence of any unfair or unconscionable means. Plaintiff admitted that she never made loan payment to defendant; defendant never sent information on postcard; defendant never called family members or plaintiff simpler; and defendant never threatened her or family members with bodily harm.

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.

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.

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 charges 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.

Thompke v. Fabrizio & Brook, PC, 261 F.Supp.3d 798 (E.D. Mi. 2017) – Section 1692f(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.

Walker v. Fabrizio & Brook, PC, 2017 WL 5068340 (E.D. Mi. 2017) – Section 1692f(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.

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 1692f.

23.32 Arrest or Imprisonment

Grimm v. GPG Processing, LLC, 2019 WL 3821788 (S.D. Ohio 2019) – Section 1692e(4) prohibits any representation or implication that nonpayment of debt will result in arrest or imprisonment unless such action is lawful and debt collector intends to take such action. Defendant violated Section 1692e(4) by threatening to have Debtor arrested for "check fraud" if Debtor did not make payments on debt. Debt had been discharged in bankruptcy rendering such threats unlawful. Further, plaintiff sufficiently alleged that defendant never had any real intention of filing suit or pressing criminal charges although plaintiff believed defendant would do so at time threats were made resulting in confusion, worry and emotional distress.

23.33 Threats – Section 1692e(5)

Thompson v. Midland Funding, LLC, 2019 WL 1342787 (E.D. Ky. 2019) – FDCPA prohibit use of unfair or unconscionable

means to collect or attempt to collect debt, including collection of any amount not authorized by agreement creating debt or permitted by law; or any false, deceptive or misleading representation or means in connection with collection of debt including threat to take action that cannot legally be taken. Filing collection lawsuit outside statute of limitations is “threat to take any action that cannot legally be taken” in violation of FDCPA as lawsuit constitutes “threat” to collect debt to which creditor was not legally entitled.

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.

23.34 Fraud

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.

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.

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.

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.

23.35 Harassment – Section 1692d

Garner v. Select Portfolio Servicing, Inc., 2019 WL 1503128 (E.D. Mi.), *report and recommendations adopted*, 2019 WL 4267591 (E.D. Mi. 2019) – Section 1692d prohibits conduct, natural consequence of which is to harass, press or abuse any person. Plaintiff did not allege any harassing, oppressive or abusive action and admitted that defendant never threatened physical violence; plaintiff never spoke with anyone from defendant on phone; and no one from defendant ever used foul language. Defendant’s actions in engaging foreclosure by advertisement does not constitute “sale of debt” within meaning of Section 1692d(4).

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.

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.

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”.

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.

23.36 Disputed Debts

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).

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.

23.37 Filing Proof of Claim

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 does not attach necessary documentation, proper remedy is to object to claim. Adversary proceeding for FDCPA violation dismissed for failure to state cause of action.

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.

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 Debtor. Filing a proof of claim is not an attempt to induce payment by Debtor but is, at most, a request to participate in bankruptcy claims allowance process.

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.

23.38 Proof of Claim – Time Barred Debts

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.

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.

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.

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.

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.

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.

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 of 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 as 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

23.39 Discharge Injunction

Goad v. MCT Group, 2014 WL 2211690 (9th Cir. 2014) – Debtor cannot bring FDCPA action based on alleged violation of discharge injunction.

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.

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.

23.40 Non-Dischargeable Debts

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.

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.

23.41 Adversary Proceedings

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.

23.42 Collection Efforts Not Permitted by Law – Section 1692f

Sparks v. EquityExperts.Org, LLC, 2018 WL 3387245 (E.D. Mi. 2018), *aff’d*, Case No. 18[-2378 (6th Cir. 2019) – 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.

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.

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.

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 statue 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.

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.

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.

23.43 Collection Efforts Not Permitted by Law – Usury

Dettore 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 Debtor, Debtor was a sophisticated commercial party, and 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.

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.

23.44 Collection Efforts Permitted by State Law

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 USC § 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.

23.45 Garnishment

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.

23.46 Language, Symbols or Account Numbers on Envelope

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.

23.47 Credit Reporting

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.

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 does not 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.

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

23.48 Standing to Sue

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.

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

23.49 Parties Liable

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.

23.50 Actual Damages

Grimm v. GPG Processing, LLC, 2019 WL 4508921 (S.D. Ohio 2019) – FDCPA allows award of actual damage in addition to statutory damages. Debtor entitled to actual damages measured by amounts paid by Debtor to creditor after Debtor had received discharge of Debt. Creditor, following Debtor's discharge in Bankruptcy, called Debtor at least 6 times, threatening criminal prosecution for non-payment and representing that there were outstanding warrants for Debtor's arrest; Creditor called Debtor's Mother-in-Law and threatened to have Debtor arrested and accused Mother-in-Law of aiding and abetting. Threats caused Debtor to pay Creditor more than \$1100 on discharged debt

23.51 Emotional Distress

Grimm v. GPG Processing, LLC, 2019 WL 4508921 (S.D. Ohio 2019) – FDCPA allows damages for emotional distress. Debtor entitled to award where creditor, following Debtor's discharge in Bankruptcy, called Debtor at least 6 times, threatening criminal prosecution for non-payment and representing that there were outstanding warrants for Debtor's arrest; Creditor called Debtor's Mother-in-Law and threatened to have Debtor arrested and accused Mother-in-Law of aiding and abetting. Threats caused Debtor to be “beaten down by the fear caused by the constant threats” over debts; Debtor believed Creditor's threats regarding criminal charges; due to Defendants' actions, Debtor would check online to make sure no bench warrants were issued; Debtor panics when she receives phone call from out-of-state number or number she does not recognize; Debtor would go through nights where she

would get only three hours of sleep; Debtor would call her husband while he was at work, crying, because Debtor was receiving these phone calls threatening jail time; Debtor's husband had to talk Debtor down; Defendants' actions have caused stress to her, her husband, and other family members; Debtor's Mother-in-Law paid Creditor to get Plaintiff to calm down; Plaintiff testified that due to Creditor's conduct, she has increased anxiety, has gained 30 pounds, has lost sleep, and began routinely checking sheriff's department website for arrest warrants; Debtor had to increase medication due to increased anxiety and begin therapy; and Debtor is constantly anticipating additional calls from Creditor which have caused stress her relationship with husband. Contacts between Creditor and Debtor's Mother-in-Law were inherently degrading where Creditor told Mother-in-Law that Debtor had defaulted on debt, that Debtor had committed crime; and Debtor would be prosecuted criminally. Evidence amply demonstrated both existence and nature of emotional distress resulting from Creditor's conduct, warranting \$15,000 in damages.

23.52 Statutory Damages

Grimm v. GPG Processing, LLC, 2019 WL 4508921 (S.D. Ohio 2019) – FDCPA allows statutory damages of up to \$1,000 per proceeding. Debtor entitled to full amount where creditor, following Debtor's discharge in Bankruptcy, called Debtor at least 6 times, threatening criminal prosecution for non-payment and representing that there were outstanding warrants for Debtor's arrest; Creditor called Debtor's Mother-in-Law and threatened to have Debtor arrested and accused Mother-in-Law of aiding and abetting. Threats caused Debtor to pay Creditor more than \$1100 on discharged debt. Number and nature of contacts warranted maximum statutory damage amount.

Lanton v. Ocwen Lan Servicing, LLC, 2018 WL 4030540 (S.D. Ohio 2018) – FDCPA is consumer protection statute and damages related to business endeavor are not recoverable. Where only actual damages alleged resulted from denial of loan to purchase business assets for wholly owned Corporation, plaintiffs had no recoverable damages under FDCPA. Absent evidence of actual damages, statute precluded award of statutory or "additional" damages.

Shockley v. Portfolio Recovery Associates, LLC, 2018 WL 5726190 (E.D. Ky. 2018) – 15 USC Section 1692k(a) allows Court to award actual damage sustained; statutory damages not to exceed \$1000; and costs and attorney's fees. In determining amount of statutory damages, Court must consider frequency and persistence of noncompliance by debt collector; nature of noncompliance; and extent to which noncompliance was intentional. Plaintiff's Motion for Default Judgment did not contain sufficient information for Court to evaluate factors or determined statutory damages, thus requiring evidentiary hearing.

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.

23.53 Punitive Damages

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.

23.54 Attorney Fees

Grimm v. GPG Processing, LLC, 2019 WL 4508921 (S.D. Ohio 2019) – FDCPA allows award of reasonable attorney fees and costs to prevailing party. Amount determined by "lodestar" based on reasonable hourly rate times reasonable number of hours. Both hourly rates ranging from \$225 to \$250 for attorney and \$50 for paralegal were reasonable. Total hours expended of 45.98 also reasonable. Total fees awarded of \$10,134.50.

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 reasonable 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

23.55 Good Faith Reliance

Sprouse v. Ditech Financial, 2019 WL 405634 (E.D. Tn. 2019) - Trustee under Deed of Trust not liable for good faith reliance on information provided by borrower or secured party. Trustee could not be held liable for scheduling foreclosure sale even after receiving documentation from borrower including proof of payments. Trustee has no liability to assess legitimacy of lender's claims or borrower's defenses. Plaintiff did not allege that Trustee acted in bad faith in relying on information provided by lender. Trustee had no duty to determine status of loan or accuracy of amount of indebtedness.

23.56 Bona Fide Error

Thompson v. Midland Funding, LLC, 2019 WL 1342787 (E.D. Ky. 2019) – Bona fide error defense requires collector to show that violation was unintentional; was result of bona fide error; and that collector maintain procedures to avoid error. Bona fide error defense is not available where debt collector misinterprets legal requirements of FDCPA or for mistaken interpretation of state statute of limitations even where state law regarding appropriate limitations period was unsettled at time of collection action.

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.

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.

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.

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.

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.

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.

23.57 Substantial Compliance

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 Debtor did not act the collector would presume the debt to be valid.

23.58 Unclean Hands

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.

23.59 Michigan Regulation of Collection Practices Act

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

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”.

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

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.

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

Mullin v. Southeast Bank, 2019 WL 1055762 (M.D. Tn. 2019) – Modification Agreement that does not change payment amount or interest rate is not “refinance” for which TILA disclosures are required. Terms about which Plaintiffs complain were set in 2011 Renewal Agreement that included TILA disclosures and any action on the Renewal would be barred by statute of limitation. Modification agreement did not constitute new loan under circumstances where lender knew borrower could not afford repayment.

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

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 does not 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

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

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

Larkins v. Fifth Third Mortgage Company, 2019 WL 1767346 (S.D. Ohio 2019) – Section 1639g requires mortgage servicer to provide accurate payoff balance within 7 days from receipt of written request from, or on behalf of, borrower. Request made to creditors foreclosure counsel is not creditor, servicer or assignee. If loan is in bankruptcy or foreclosure, creditor is not required to provide payoff within 7 days but must provide payoff within reasonable time. Receipt of request for payoff by creditors foreclosure counsel does not constitute receipt of request by creditor and does not trigger 7 day time limit. Counsel was not agent of creditor for purposes of providing payoff information and did not have access to creditors internal systems or information necessary to generate payoff. Creditor first received request “on behalf of” borrower when the creditors foreclosure counsel forwarded request to creditor. Creditor complied with Section 1639g by providing response to creditors foreclosure counsel 5 business days after receipt of request to forward to borrower. Further, response sent to borrower’s counsel 11 days after borrower’s counsel first made request to creditor’s counsel reasonable where loan was in foreclosure and any delay in transmitting information resulted from request being sent by borrower’s counsel to creditor’s counsel which necessitated multiple steps to obtain information, rather than having borrowers make request directly to creditor.

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

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 does not 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.

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

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – Statute of Limitations under TILA and Regulation Z is one year. Plaintiff did not contest that cause of action was brought more than one year after servicer allegedly did not inform plaintiff that servicing of loan had been transferred. Plaintiff's request to equitably toll statute of limitations did not plead or prove that that Defendant took affirmative steps to conceal cause of action or that plaintiff could not have discovered cause of action despite due diligence.

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.

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.

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.

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 does not 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.

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.

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

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.

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).

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.

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.

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.

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.

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.

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 require only that borrower "notify" lender, and does not require institution of litigation to constitute "notice".

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.

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.

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.

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.

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".

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 does not provide notification is liable to borrower for actual damages plus statutory damages of double the finance charge but not less than \$400 nor more than \$4000. Complaint is sufficient if it alleges that transfer took place and the owner was not notified. Owner does not need to allege specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Complaint stated cause of action for violation of Regulation Z where complaint alleged that lender failed to notify borrower of change in ownership of mortgage. Although complaint did not allege any specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 444450 (N.D. Ohio 2013) – TILA has one year statute of limitations for damage actions. Plaintiff signed mortgage in 2007 and brought action in 2012, well beyond statute, requiring dismissal of claim. Limitation period for rescission is 3 days or in some cases up to three years but does not apply to residential

transaction by which borrower acquired or initially constructed Debtor's residence. As plaintiff borrowed the money for purposes of acquiring the residence, plaintiff lacked any right to rescind and could not maintain action based on alleged refusal to rescind. Rescission also requires that plaintiff restore the creditor to the position that the creditor held before the rescinded transaction – that is plaintiff must return to the creditor the principal amount borrowed. Plaintiff's action did not propose to repay lender but merely requested that plaintiff be awarded title to the property free and clear, which is not a remedy available under TILA.

Gale v. First Franklin Loan Services, Case No. 09-16498 (9th Cir. 2012) – TILA requires loan servicer who is also assignee of the loan to provide to the borrower, upon written request, the name, address and telephone number of the owner of the obligation. Debtor's action dismissed because defendant, First Franklin, was not a servicer or an assignee, but was the original creditor itself. Although 2009 amendments to TILA would require all servicers, not just servicer-assignees, to respond to inquiries, change did not help Debtor where loan pre-dated amendment to TILA and, in any event, First Franklin was not a servicer.

Assasepa v. JPMorgan Chase Bank, 2012 WL 88162 (S.D. Ohio 2012) – Complaint failed to state cause of action for violation of Truth in Lending. Complaint made vague allegations but failed to specify any facts that could constitute cause of action under TILA. Complaint did not provide any specifics with regard to the dates of any of the alleged occurrences, much less the dates of the TILA violations. Plaintiff did not identify any document or reference any specific incident from which this Court can determine when the alleged TILA violations occurred. Plaintiff's "Notice of Right to Rescind" did not allege when the alleged TILA violation occurred. As it is impossible to discern from plaintiffs' allegations when the alleged TILA violations occurred, the Court cannot determine whether the TILA claim is barred by the statute of limitations.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – TILA imposes certain disclosure requirements in connection with loan secured by "principal residence" and allows for rescission within 3 days of consummation of transaction or delivery of necessary forms and disclosures, whichever occurs later; provided that the right of rescission expires three years of date of consummation even if disclosures are never provided. TILA action brought 4 years after consummation of transaction dismissed as beyond statute of limitations.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – Borrower's right to rescind is subject to three year statute of limitations from date of execution of promissory note. 15 USC Section 1635 precludes any claim for equitable tolling of the statute of limitations. Balance of claims under TILA are subject to one-year statute of limitations pursuant to 15 USC Section 1640(e), but this statute is subject to equitable tolling. Fraudulent concealment to support equitable tolling requires that 1) defendant concealed the conduct that constitutes the cause of action; 2) defendant's concealment prevented plaintiff from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action. Where the doctrine of fraudulent concealment is applied, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation. Plaintiff's failure to plead fraud with particularity precluded court from finding equitable tolling of statute of limitations. TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

Hill v. Tribeca Lending Corp., Case No. 09-2214 (3d Cir. 2010) – Federal Truth in Lending statute, 15 USC Section 1601, does not apply to loan principally for business, not consumer, purposes. Borrower re-financed home to obtain funds to infuse into borrower's struggling business. Although collateral was borrower's home, the loan was primarily for business or commercial purposes which is excluded from the requirements of TILA.

XXV. Other Causes of Action

A. Generally

25.1 Tortious Interference with Contract

Rider v. Wells Fargo Bank, 2018 WL 4701714 (E.D. Mi. 2018) - Complaint “inartfully” stated cause of action for unjust enrichment where Debtor included creditor in Chapter 13 bankruptcy Plan and during Chapter 13 case, creditor received and accepted \$74,972.08 from Chapter 13 Trustee although Debtor had not signed note or mortgage and had no claim or debt owed to creditor. Creditor admittedly received and retained payments from Chapter 13 Trustee although creditor had no legally enforceable obligation against Debtor.

Lanton v. Ocwen 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.

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

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

25.2 Innocent or Negligent Misrepresentation

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 statement were not part of transaction and did not give rise to the contract itself.

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.

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

Irwin v. Frankenmuth Credit Union, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor borrowed money from third party to repay loan from Credit Union, which resulted in loan being paid in full. Third party then threatened Credit Union with litigation when Credit Union declined to advance additional funds to Debtor, which would have been used by Debtor to generate resources to repay third party. Credit Union settled with third party and attempted to charge the cost of that settlement back against 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

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.

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

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

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

25.4 Conversion

Simon v. Singhal, 2019 WL 1878029 (Bankr. E.D. Mi. 2019) - Conversion is wrongful exercise of dominion over another's personal property into not love or inconsistent with other persons rights and includes any conduct inconsistent with owners of property rights. Money is treated as personal property and may be converted if there is obligation to keep intact and deliver specific money in question and money can be identified. Intangible personal property can be subject of conversion. Contract between Debtor and third party required third party to pay Debtor directly for services provided establishing that money was Debtor's property. Defendant, Debtor's manager, directed third parties to remit payments to entities other than Debtor and constituted distinct act of domain wrongfully exerted where Debtor's Board of Directors were not advised of and did not authorize direction to pay third party. Redirecting of payments from third-party to entities other than Debtor constituted common-law conversion. Separate cause of action for statutory conversion requires that defendant employed converted property for purpose personal to defendants interest. Although evidence indicated that defendant committed common-law conversion, there was no evidence that Debtor employed right to payment or payments themselves for defendant's personal interest.

Zellers v. DiPaolo, 2019 WL 469366 (Bankr. N.D. Ohio 2019) – Conversion is wrongful exercise of dominion over property to the exclusion rights of owner or withholding possession under claim inconsistent with owner's rights. Moving party must prove ownership or right to possess property at time of conversion; conversion by wrongful act or disposition of plaintiff's property rights; and damages. If conversion is premised on unlawful retention, plaintiff must establish a demand for return of property which was refused. Conversion can apply to intangible rights where there are specifically identified monies at issue. Funds must be specifically identified, held in trust or withheld by person knowing fiduciary duty. Identification must be possible and there must be obligation to deliver specific money in question. Relationship of Debtor and creditor is not obligation to return identical money and cannot support action for conversion. Complaint sufficiently identified monies at issue were funds allegedly converted were proceeds of lease agreement of property owned by Debtor, lease extension proceeds for property owned by Debtor, and funds which were intended to be delivered to Debtor. Debtor had sufficient property rights as funds belonged to Debtor pursuant to contracts entered into on behalf of Debtor; Debtor's principal committed wrongful act when he allowed transfer of sums to third parties instead of Debtor; Debtor's principal acknowledged that Debtor did not have bank account in his name when transfers were made and did not provide indication that transfers were for authorized purposes in best interest of Debtor; and that Debtor's principal wrongfully relinquished Debtor's property rights to proceeds. Damages measured by amount of funds converted totaling \$130,000.

Embraer Aircraft Maintenance Services, Inc. v. Aerocentury Corp., 2018 WL 1172957 (M.D. Tn. 2018) – Whether borrower committed conversion by selling property subject to Plaintiff Celine without paying a lien in full if sale renders lien either legally or practically unenforceable. Sale of property to unwitting bona fide purchaser against whom lien could not be enforced would likely be sufficient to support claim of conversion. If buyer did have notice, buyer took subject to lien and totality of circumstances may support conversion if the sale and surrounding events made repossession and sale of property impractical such as by co-mingling or making it prohibitively difficult to locate.

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.

Hagan v. Baird, 2015 WL 6152959 (Bankr. W.D. Mi. 2015), *aff'd*, 2018 WL 480356 (W.D. Mi. 2018), *aff'd*, 2019 WL 125664 (6th Cir. 2019) – 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.

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.

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.

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.

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.

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 from 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.

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

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

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

25.5 Breach of Fiduciary Duty

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.

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 directors 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

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.

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.

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.

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.

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.

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 from of loan to corporation.

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.

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

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

25.7 Legal Malpractice

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.

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

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 lack of arm's-length relationship. Court would pierce corporate veil and hold Debtor personally liable for corporation's 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.

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.

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.

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.

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.

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 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 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.

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 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) lack of 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.

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.

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.

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 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 Debtors that justifies the imposition of personal liability.

Blight v. Watson, 468 BR 242 (Bankr. W.D. Ky. 2012) – To pierce corporate veil, creditor must prove that corporation was influenced by owners; that there was such a unity of ownership and interest that separateness ceased to exist; and that recognizing the corporate existence would sanction fraud or promote injustice. Corporation must be mere instrumentality of shareholder, that shareholder used control over corporation to defraud or harm creditor, and that refusing to set aside corporate existence would subject creditor to unjust loss. Corporate veil would not be set aside where Debtor, a 50% shareholder of corporation, was not involved in the day-to-day operations and did not maintain corporate books and records. Debtor's involvement in corporation was limited to unloading supplies when shipments arrived and occasionally working in the office doing filing as needed. Contract was between creditor and corporation. There was no evidence that Debtor treated corporate assets as her own. Fact that Debtor was 50% shareholder and was a director of the corporation was not sufficient to disregard corporate existence.

In re Geiger, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) – Under Ohio law, corporate veil will be pierced where it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Party seeking to pierce veil must prove that shareholder used his control over corporation in such a manner as to defraud the third parties. Mere control over a corporation is not in itself a sufficient basis for shareholder liability. Plaintiff must prove "egregious shareholder misdeeds" and "egregious wrongs" and "extreme shareholder misconduct". Court would not pierce corporate veil where there was no evidence of intent to mislead or defraud creditors, notwithstanding that corporation did not follow virtually any other corporate formalities: there are no officers, no corporate bank accounts, no liability insurance with the corporation as the insured party, no corporate books or minutes of corporate meetings, no business stationery; most of the assets used in the Corporation's business are titled in Debtor's name; all monies from the business are deposited into Debtor's personal account, from which corporate and personal obligations are paid. Debtor receives revenue from operation of the business in his name, as well as invoices for business expenses; and there is minimal separation of Corporate and personal affairs.

Brennan v. Slone, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Factors in deciding whether to disregard the corporate fiction under the *alter ego* theory include: (1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of 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

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.

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.

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

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 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

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

Torp v. United States, 2018 WL 4510287 (W.D. Mi. 2018) – Anti-Injunction act prohibits federal Court from entering injunction to stop current or future tax assessments are collection activity or to require return of garnished wages. Only exception is where it is clear under no circumstances could government ultimately prevail and equity jurisdiction otherwise exists. Plaintiff’s complaint seeking declaration that plaintiff is not obligated to pay taxes and injunction against government from attempting to assess or collect taxes barred by Anti-Injunction Act.

Patel v. Citibank Corp., 2019 WL 409661 (E.D. Mi. 2019) - Temporary Injunction is extraordinary remedy to protect status quo pending final resolution of lawsuit. Court must consider whether movant has strong likelihood of success on merits; whether movant would suffer irreparable injury absent injunction; whether injunction will cause substantial harm to others; and whether public interest is served by issuance of injunction. Alleged further and continual harm to plaintiff’s credit score, credit limits and ability to conduct business caused by defendant’s debt collection and debt reporting are not irreparable.

Tujague v. The Castro Family Trust, LLC, 2018 WL 4896896 (Bankr. S.D. Ohio 2018) – Party seeking preliminary injunction must prove substantial likelihood or probability of success on merits; threat of irreparable harm; whether issuance of injunction would cause substantial harm to others; and whether public interest would be served by granting injunction. Court may not issue preliminary injunction where there is no likelihood of success on merits; and irreparable injury must be likely to occur. Cause of action to recover fraudulent transfers belongs to bankruptcy estate and Trustee has sole right to pursue recovery unless cause of action is abandoned, or estate settles or releases cause of action. Derivative standing may be available to creditor if demand was made on Trustee to act; Trustee declined; colorable claim exists which would benefit estate; and Trustee’s inaction was abuse of discretion. Creditor lacks standing to maintain action where bankruptcy estate had not abandoned or released cause of action and there was no evidence that Trustee delegated authority to plaintiff. Plaintiff did not demonstrate lack of adequate remedy at law where cause of action was to recover money damages and there was no evidence that defendant was effectively judgment proof. Preliminary injunction to freeze defendant’s assets would be inequitable as defendant’s principals were completely without funds due to State Court Restraining Order leaving principals without funds to pay current living expenses and granting program injunction would further aggravate financial condition. Protecting potential assets for bankruptcy estate and pursuing opportunities for Trustee to collect judgment promotes public interest considerations did not outweigh lack of likelihood of success.

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.

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.

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.

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.

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.

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 no 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.

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 authorized injunctions against state law receivership proceedings and case did not involve such overwhelming complexity as to prevent State Court proceedings from granting effective relief.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Kagel v. Irwin, Case No. 13-80218 (Bankr. W.D. Mi. 2013) – Court would not enjoin sale of property owned by County Treasurer pursuant to a previously held tax foreclosure sale. Property had been sold at tax sale and statutory redemption period expired. Absent an order setting aside the tax deed sale, Debtors held at best a bare right of possession which would remain protected by sale, but had no interest in title to property that would prevent sale by tax deed purchaser. Debtors are not precluded from seeking to set aside tax sale or from filing action for damages, neither of which would be adversely affected by resale of property as long as Debtors act promptly. Further, evidence indicated that tax deed holder would be harmed by injunction as property would likely be sold at a later date at a lower price; and public interest was better protected by having finality in tax deed sales.

Adams v. Wilmington Finance/AIG, 2013 WL 1774639 (E.D. Mi. 2013) – Standard for permanent injunction is same as for a preliminary injunction, except that movant must show actual success on merits, rather than mere likelihood of success. Court also considers whether: (1) movant would suffer

irreparable harm absent injunction; (2) remedies available at law, such as monetary damages, are inadequate; (3) balance of hardships between parties favors equitable remedy; and (4) requested injunction would serve public interest. Court has power under All Writs Act, 28 USC Section 1651(a), to enjoin party from filing suit. Pre-filing orders are extreme and should be rarely used, and cannot be used to prevent party from commencing actions in State Court unless necessary to protect federal Court Order or jurisdiction. Court would enter injunction precluding party from commencing any further actions in State Court where party's claims have been repeatedly rejected in multiple actions in the Federal Courts. Party's current complaint merely attempts to re-litigate claims already adjudicated and to add unrelated plaintiffs, unrelated defendants, and unrelated claims to complaint.

Edwards v. JP Morgan Chase Bank, 2013 WL 1632560 (E.D. Mi. 2013) – Injunction is remedy, not cause of action. Count of complaint that sought injunction independent of any substantive cause of action would be dismissed for failure to state claim. Injunctions are extraordinary remedies that will be granted only if required to do justice; there is no adequate remedy at law; and there exists a real and imminent danger of irreparable injury. Court will consider whether movant has shown strong likelihood of success on merits; whether movant will suffer irreparable harm if injunction is not entered; whether issuance of injunction would cause harm to opposing party; and whether injunction is in the public interest. Plaintiff failed to demonstrate basis for injunction to prevent foreclosure where plaintiff failed to allege either that plaintiff had redeemed the property or that plaintiff had otherwise resolved any monetary defaults.

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.

Hutton v. GMAC Mortgage, LLC, 2012 WL 5252314 (E.D. Mi. 2012) – Injunction is equitable remedy and is not, itself, a cause of action. Complaint seeking injunction without alleging underlying breach or cause of action dismissed.

In re Lundeen, 442 BR 659 (Bankr. S.D. Ohio 2011) – Anti-injunction act, 28 USC 2283, prohibits Bankruptcy Court from enjoining city or state from commencing or continuing criminal proceeding in State Court. Exception that allows court to enter injunction to protect court's exercise of jurisdiction does not apply as case was ready to be closed and continuation of criminal proceeding would not impact progress of case. Section 105 does not provide authority to enter injunction in violation of Anti-injunction act. Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against Debtor. Criminal proceedings against Debtor affected only Debtor and would not result in any judgment against any third party.

Homes v. Vilsack, 2011 WL 1453819 (W.D. Mi. 2011) – Debtor whose house was about to be sold at foreclosure sale demonstrated cause for Temporary Restraining Order.

Turchan Technologies Group, Inc. v. Internal Revenue Service, Case No. 10-4315 (Bankr. E.D. Mi. 2010) – Party seeking preliminary injunction must demonstrate (i) likelihood of success on merits; (ii) irreparable harm if the injunction is not granted; (iii) probably that granting injunction will not cause irreparable harm to others; and (iv) whether public interest is advanced by injunction. In action seeking to enjoin IRS from collection of taxes, 26 USC Section 7421(a) requires clear demonstration that there are no circumstances under which the United States will prevail in tax collection efforts and that collection activities will irreparably harm the taxpayer. Debtor not entitled to injunctive relief where Debtor admittedly failed to make tax deposits required by Debtor's confirmed Chapter 11 plan. IRS actions in attempting to collect priority tax claims provided for in Chapter 11 plan were proper and appropriate after Debtor defaulted and IRS provided notice of default as required by Confirmation Order, and all steps taken by IRS were permitted by the Confirmation Order. Plaintiff's likelihood of success on merits of claims against IRS were “zero”, mandating denial of injunctive relief.

Saleh v. Bank of America, N.A., 427 BR 415 (Bankr. S.D. Ohio 2010) – Automatic stay does not extend to third party co-obligors. Debtor can request injunction against actions against third party, and Court has authority to grant injunctive relief under Section 105. However, requests for injunctive relief that would effectively extend the stay to a non-Debtor are viewed with a great deal of skepticism. Although action against third party, Debtor's wholly owned corporation, would produce adverse consequences, Debtor did not demonstrate any reason why the corporation could not file its own bankruptcy. Further, extending the stay via injunction in a Chapter 13 proceeding would contravene the express provisions of Section 1301 which provide for a co-Debtor stay in very limited circumstances. Debtor and corporation did not share such an identity of interests that the legal separation could be ignored. Corporation kept separate records and accounts and filed separate tax returns from Debtor. Corporation owned assets separate from those owned by Debtor including real property adjacent to corporation's principal place of business, accounts, inventory, equipment and a liquor license.

Unencumbered Asset Trust v. Hampton-Stein, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) – When considering motion for preliminary injunction, Court must balance four factors: (1) whether movant has a strong likelihood of success on the merits, (2) whether movant would suffer irreparable injury without the injunction, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by the issuance of the injunction. Trustee, trustee's principal, and counsel for trust, demonstrated strong likelihood of success on the merits of claim that adversary defendant violated Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the “Barton Doctrine”) doctrine, which required leave of bankruptcy Court to bring state-court action against bankruptcy trustees or trustee's functional equivalents for acts done in their official capacity and within their authority as Court officers where plaintiffs action sought to hold defendants liable for actions in liquidating Debtors assets which constitute actions within the official capacities and authority as officers of bankruptcy Court. Irreparable injury requires more than possibility of some remote future injury. Defendant demonstrated irreparable injury where litigation in non-bankruptcy forum as Defendants would be distracted from their duties and non-Bankruptcy forum litigation could lead to an order that effectively sets aside the underlying Bankruptcy proceeding and threatens to directly contravene the Confirmation Order and transactions effectuated thereunder. Public interest served where preliminary injunction protects the integrity of Debtor's bankruptcy estate and the bankruptcy process. Public interest is served by allowing bankruptcy Courts to retain control over the administration of the bankruptcy estates.

Travelers Indemnity Co. v. Bailey, 129 S.Ct. 2195 (2009) – Debtor’s confirmed Chapter 11 Plan included release of Debtor’s insurers from any and all claims, demands, allegations, duties, liabilities and obligations which have been or could have been or might be asserted by any person against any of the insurance companies. Scope of provision in Chapter 11 Plan precluded subsequent actions not only against Debtor, but also precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves or which are otherwise not derivative of Debtor’s wrongdoing, where Court’s Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final.

In re National Century Financial Enterprises, Inc., 407 B.R. 895 (Bankr. S.D. Ohio 2009) - Preliminary injunction against prosecution of adversary defendant’s State Court action against Chapter 11 trustee and Debtor’s counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

25.13 Tax Injunction Act and Section 505

Hackler v. Arianna Holdings Company, LLC, 2019 WL 4309510 (3d Cir. 2019) – TIA prohibits Court from enjoining, suspending or restraining assessment, levy or collection of tax under state law. TIA does not prevent Bankruptcy Court from setting aside tax sale as avoidance action affects only collection of taxes, and does not constitute Bankruptcy Court attempt to enjoin, suspend or restrain assessment or otherwise determine amount of taxes.

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.

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.

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.

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 expeditions 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 sol 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.

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

Poole v. Federal National Mortgage Association, 2019 WL 1468062 (6th Cir. 2019) – Declaratory judgment action under Federal Rule of Civil Procedure 57 allows Court to declare existence or non-existence of any right, duty, power, liability, privilege, disability or immunity, or any fact upon which Eagle relations depend. Court appropriately issue declaratory judgment in favor of defendant where plaintiff sought declaratory judgment to determine validity of mortgage modification and effect of potential breach. Declaratory judgment clarified and settled legal relations and obligations between plaintiff and defendant, clarifying that mortgage modification was valid and that lender had right to foreclose if plaintiff did not pay determined to reinstatement some.

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.

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

Torp v. United States, 2018 WL 4510287 (W.D. Mi. 2018) - Declaratory Judgment Act prohibits Court from entering declaratory judgment as to parties obligation to pay taxes except in cases seeking tax-exempt status or cases involving bankruptcy proceedings. Court lacked jurisdiction over complaint seeking declaratory judgment that plaintiff is not obligated to pay federal taxes which did not implicate either tax-exempt status or bankruptcy relief.

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 plaintiff's prior bankruptcy discharge discharged federal tax liabilities which United States seeks to enforce.

25.16 Quiet Title

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – Quiet title action under MCL 600.2932 allows plaintiff claims any right in, title II, equitable title to, interest in or right to possess land to bring action against any other person who claims or my claim interest inconsistent with plaintiff's interest and if plaintiff establishes title, defendant shall be ordered to release all claims to property. Plaintiff did not establish title to subject property where property had already been sold at foreclosure sale and redemption had run at which point plaintiff lost any claim to any, right, title or interest in the property.

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.

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.

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.

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.

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.

McKeever v. Mortgage Electronic Registration Systems, 2010 WL 996474 (E.D. Ky. 2016) – Complaint seeking to quiet tile 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

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.

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.

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

Nathan v. Feiger & Feiger, PC, 2019 WL 1505238 (E.D. Mi. 2019) – Recoupment allows defendant to assert defendants own claim against plaintiff

growing out of same transaction and may be raised as either affirmative defense or counterclaim. Recoupment claims are not barred by statute of limitations where main action is timely.

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.

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.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

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

25.19 Federal Debt Collection Practices Act

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 Debtor in which 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

Bowman v. Art Van Furniture, Inc., 2018 WL 6445389 (E.D. Mi. 2018) – TCPA prohibits pre-recorded telephone solicitations to landline telephones absent consent of the recipient. Robo-calls from Defendant to Plaintiff advising of special deals and ability to win prizes violated TCPA. Settlement of class action approved. Notice of class action settlement but be best notice practicable under circumstances including individual notice to any class member who can be reasonably identified. Class plaintiff mailed notice to all known physical addresses and any known valid e-mail addresses, effectively reaching at least 90% of all class members, meeting minimum standards for due process. Notice was also provided under Class Action Fairness Act (CAFA) to all attorneys general of United States, each State, the District of Columbia, and all territories. Settlement was fair and reasonable where there was no evidence of fraud or collusion between parties giving rise to presumption that settlement is fair. Settlement was negotiated by experienced counsel with assistance of highly qualified mediator. Parties fully explored factual allegations and exchanged preliminary factual details allowing Plaintiff to make informed decision regarding settlement, such that settlement was product of serious, informed and non-collusive negotiation. Litigation would be complex and would extend for years and number of class members could be catastrophic for Defendant if matter is not settled. Although parties did not engage in formal discovery, parties exchanged sufficient information to evaluate risks and benefits of continue litigation. Significant legal and factual issues remained creating risks of litigation and settlement provided both monetary and prospective relief to parties. Although class contained more than 1 million members, only 348 opted out and only 3 objected. Settlement promoted public interest given class size and efficient administration of justice.

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.

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.

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.

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.

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.

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.

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

Washington v. Equifax, 2019 WL 3366113 (M.D. Tn. 2019) - FCRA requires consumer reporting agency to provide to customer description of procedure used to determine accuracy and completeness of information including business name and address of any furnisher of information contacted in connection with information and telephone number of furnisher if reasonably available. Plaintiff did not contend that credit reporting agency erroneously reported bankruptcy or that credit reporting agency did not provide information about procedure used to determine accuracy of information. Credit reporting agency explained that it obtained public records from Court through computer research service and provided address and phone number for relevant Bankruptcy Court. Credit reporting agency statement that it obtained public records from local, state and federal courts was not inaccurate. FCRA also requires consumer reporting agency to clearly and accurately disclose to consumer all information in consumers file; and may truncate first 5 digits of Social Security number only on request of consumer. Court could not determine at Motion to Dismiss stage whether credit reporting agencies truncating of consumer account number is reasonable procedure to protect consumers information or whether truncating results in credit reporting agency not reporting entire account number as it appears in agency’s file.

Hamilton v. Equifax Information Services, LLC, 2019 WL 3864742 (E.D. Mi. 2019) – On receipt by credit reporting agency of dispute from consumer, FCRA requires “furnisher” of information to conduct investigation; review information provided by consumer reporting agency; report results of investigation to consumer reporting agency and report all inaccuracies to all consumer reporting agencies which may have received inaccurate information; and correct inaccuracies in information provided. If information is inaccurate or incomplete or cannot be verified, furnisher of information must modify that item of information; delete that item of information; or permanently block reporting of that information. Reporting is accurate if it is technically accurate or accurate on its face even if information might nonetheless be misleading or incomplete in some request. Credit reporting agency accurately reflected plaintiff’s Chapter 7 bankruptcy is discharged and deeming accounts “included in the bankruptcy” to demonstrate that account was discharged. Even if “included in bankruptcy” was somehow insufficient, report was not inaccurate as report that Debtor’s Chapter 7 was discharged and that identified accounts were included were both accurate. “Accuracy” means that information reflects terms of and liability for account; consumers performance and conduct with respect to account; and identifies the appropriate consumer. Credit report indicated that creditors had no account or past due balance and that Debtor had received Chapter 7 discharge or technically accurate on their face. Plaintiff did not demonstrate that reporting was in fact misleading as plaintiff must allege more than information is misleading as to plaintiff personally and must provide more than mere speculation that notation is misleading to 3rd parties. Belief that creditor could be misled by report is not sufficient for violation of FCRA.

Dumas v. GC Services, LP, 2019 WL 529260 (E.D. Mi. 2019) – US Government protected from actions under FCRA by sovereign immunity. Recognizing split of authority, Court concluded that nothing in FCRA waives sovereign immunity.

Washington v. Equifax, 2019 WL 2443126 (M.D. Tn. 2019) – FCRA requires credit reporting agency to clearly and accurately disclose to consumer all information in file at time of request on request of consumer must truncate first five digits of SSN. Credit Reporting Agency that always truncates SSN does not comply with FCRA as disclosure is not disclosure of all information in file.

Butt v. FD Holdings, LLC, 2019 WL 2387111 (E.D. Mi. 2019) – FCRA imposes duty on consumer reporting agency to use reasonable procedures to assure maximum possible accuracy. Showing of inaccuracy alone does not create liability absent failure to follow reasonable procedures to assure maximum accuracy concerning individual about whom information relates. Plaintiff must prove that credit reporting agency reported inaccurate information about plaintiff; credit reporting agency either negligently or willfully did not follow reasonable procedures; plaintiff was injured; and credit reporting agency's conduct was proximate cause. Credit reporting agency discharges obligations when information contained in report is accurate on its face. Credit reporting agency report was not inaccurate were reflected that creditors debt remained outstanding. Debtor filed for relief under Chapter 7 but did not schedule or notice creditor such that creditors debt was not discharged. Plaintiff's bankruptcy counsel presented multiple filings that were incomplete and inaccurate which produced plaintiff's subsequent credit reporting problem undermining validity of FCRA claim.

Smith v. Trans Union, LLC, 2019 WL 2074594 (E.D. Mi. 2019) – 15 USC Section 1681s-2(b) applies to furnishers of information to credit reporting agencies and requires that upon notice of dispute regarding completeness or accuracy of information, furnisher must conduct investigations; review all relevant information; report results of investigation to credit reporting agency; report any inaccuracies; and correct any inaccuracies. Plaintiff must prove existence of inaccuracy. In determining whether information is inaccurate, Court uses "technically accurate" or "accurate on its face" approach. Liability does not flow automatically from incorrect reporting, but instead requires proof of failure to follow reasonable procedures to assure maximum possible accuracy using reasonably prudent person standard. Notation in creditor report that account was "included in bankruptcy" is not misleading where accounts were included in bankruptcy; accounts were reported with no current or past due balances; had accounts not been discharged or been reaffirmed, accounts would report past due balance; and report included dates accounts were closed with notation "Chapter 7 bankruptcy". Phrase "included in bankruptcy" is not inaccurate or misleading where bankruptcy has been discharged and phrases "included in bankruptcy" and "discharged in bankruptcy" are used interchangeably. Evidence indicated that reporting agency conducted appropriate investigation as required by 15 USC Section 1681i. Plaintiff did not allege any facts to indicate that reinvestigation was insufficient but only complained that credit reporting agency did not detect or correct any alleged inaccuracy where creditor report contained no inaccurate information.

Chandler v. Peoples Bank & Trust Co. of Hazard, 2018 WL 1473800 (E.D. Ky. 2018), *aff'd*, Case No. 18-5361 (6th Cir. 2019) – 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. Creditor's alleged failure to report payments as timely not actionable for payments made under contemplated Reaffirmation Agreement prior to execution and filing of Reaffirmation 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.

Molero v. Jackson Financial, Inc., 2018 WL 4510351 (W.D. Mi. 2018) – Complaint containing allegations on "information and belief" that credit reporting agency provided notice to furnisher does not state claim upon which relief can be granted. Plaintiff can readily determine whether credit reporting agency contacted defendant furnisher and consumer is entitled to receive description of procedure used to determine accuracy and completeness of information including business name and address of any furnisher of information. Plaintiff granted opportunity to amend complaint to allege specific facts regarding furnisher's receipt of notice from consumer reporting agency.

Blanch v. Trans Union, LLC, 333 F.Supp.3d 789 (M.D. Tn. 2018) – FCRA imposes duty on credit Bureau, on receiving report that consumer disputes accuracy or completeness of information, to investigate and if needed correct report of any inaccurate or incomplete information. Entity furnishing information to credit Bureau, upon being notified of by Bureau of dispute, must investigate dispute, review relevant information, report results to credit Bureau, if information is incomplete or inaccurate, report those results to all other credit bureaus, and if disputed item cannot be verified, item must be modified, deleted or blocked. Information is "accurate" if it reflects terms of and liability for account; reflects consumer's performance and other conduct with respect to account; and identifies appropriate consumer. False information about consumer is clearly inaccurate and failure to report discovery of false information to other credit bureaus would violate FCRA; or information that is accurate but provides information in such a manner as to create materially misleading impression. Report may include that account was discharged in bankruptcy as long as report reflects a zero-balance due, and report that mortgage loan account had been closed with a zero balance was not false or inaccurate. Reported information was not inaccurate where creditors were reporting accounts as "Chapter 13 Bankruptcy" with account balance of zero. There was no dispute that accounts were closed and Debtor did not dispute that personal obligation to pay was discharged by bankruptcy or that creditors made any effort to compel further payments.

Shockley v. Portfolio Recovery Associates, LLC, 2018 WL 5726190 (E.D. Ky. 2018) – FCRA, 15 USC Section 1681s-2(b) requires furnishers of consumer credit information to provide accurate information and to investigate when they receive notice of dispute from consumer reporting agency. Plaintiff must show that furnisher of consumer credit information received notice from consumer reporting agency, not directly from plaintiff, that credit information is disputed; and that after receiving notice, furnisher of information acted with reckless disregard performing duties. After receiving notice of credit dispute, FCRA requires furnisher of information to conduct reasonable investigation that is more than a merely cursory review with respect to the disputed information including all relevant information provided by consumer reporting agency and to report results of investigation to consumer reporting agency. If investigation finds that credit information is incomplete or inaccurate, furnisher must report results to all consumer reporting agencies and modify, delete, or permanently block reporting of inaccurate or incomplete information. Complaint adequately alleged cause of action were complaint alleged that defendant furnished credit information to consumer reporting agency; that plaintiff disputed debt with consumer reporting agency; that consumer reporting agency notified defendant of dispute; and that creditor did not take note of dispute or report any results of any subsequent investigation. Plaintiff may recover statutory damages in an amount between \$100 and \$1000. Amount of statutory damages is within discretion of Court requiring evidentiary hearing.

Blanch v. Trans Union, LLC, 2018 WL 4561248 (M.D. Tn. 2018) – FCRA imposes duty on entity that provides information about consumer credit history, on receipt of report that consumer disputes accuracy or completeness, to investigate and, if needed, correct inaccuracies or incomplete information. 15 USC 1681s-2 imposes five distinct duties; investigate dispute; review relevant information; report results to consumer reporting

agency; if information is incomplete or inaccurate, report results to all other consumer reporting agencies; and if disputed item is found inaccurate or cannot be verified, to modify, delete or block item. Information is “accurate” if information reflects terms of and liability for account; reflects consumers performance and other conduct with respect to account; and identifies appropriate consumer. False information is by definition inaccurate, but correct information can be inaccurate if information is provided in such a manner as to create materially misleading impression. Credit report can include that account was discharged in bankruptcy as long as report shows zero balance due to reflect that consumer is no longer liable on discharged debt. Notation on report “Chapter 13 Bankruptcy; Acct Info Disputed By Consumr; Account Included In Bankruptcy; Account Closed by Credit Grantor; Account Balance: \$0” accurately reflected status of accounts. Fact that credit report did not include the word “discharged” did not make reporting inaccurate.

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 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.

Stroohmeyer 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 receive 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.

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.

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.

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.

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.

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.

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.

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.

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 USC § 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 USC § 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.

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.

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 where 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.

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 is 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.

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.

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.

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.

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 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.

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.

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.

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.

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.

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.

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.

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.

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 1681(a)(1)(A) requires a credit reporting agency to investigate any dispute and either update or delete information as determined by the investigation within 30 days of receipt of notification; and to advise consumer of results of investigation within 5 days after completion of investigation. Plaintiff failed to present any evidence that agency either negligently or willfully failed to investigate. Plaintiff also failed to state action against creditor where plaintiff did not allege that creditor spread any inaccurate information about plaintiff, where evidence indicates that information on credit report accurately reflected plaintiff’s status as authorized user and reported the balance due on the account.

Giovanni v. Bank of America, NA, 2013 WL 1663335 (N.D. Cal. 2013) – Lender does not violate FCRA by reporting late payments while Debtor is in bankruptcy. Discharge in bankruptcy does not change underlying fact that during the bankruptcy, Debtor’s account was delinquent.

Evans v. Mercedes Benz Financial Services, LLC, 2011 WL 2936198 (E.D. Mi. 2011) – FCRA contains no provision requiring creditors to report the mere filing of a bankruptcy petition to credit reporting agencies. Creditor did not violate FCRA by continuing to report default on debt prior to entry

of discharge.

Kowall v. GMAC Mortgage, LLC, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Fair Credit Reporting Act, 15 USC Section 1681b, prevents person from obtaining credit report for improper purpose. Plaintiff must prove that there was a consumer report as defined; defendant obtained or used it; and did so with no statutorily permissible purpose. Complaint that alleged that defendant obtained credit report without proper purpose stated cause of action and would survive Motion to Dismiss.

25.22 Equal Credit Opportunity Act

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).

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.

CB 2010 LLC v. Ithaca Coatings, 2013 WL 2250168 (E.D. Mi. 2013) – ECOA prohibits creditors from discriminating on the basis of sex or marital status, or on basis of race, color, religion, national origin or age. Statute and regulations enacted under it prohibit creditor from requiring signature of applicant’s spouse or other person if the borrower meets the creditor’s standards for creditworthiness for the amount and terms of credit requested. Statute is unclear as to whether it applies to commercial loans, although nothing in terms limit it to consumer transactions. Guarantee that waived any defenses given to guarantors other than actual payment and performance waived any claims or defenses under ECOA. Guarantee confirmed that waiver was knowingly and voluntarily made and there was no evidence that waiver was procured by frauds, duress, lack of consideration or mutual mistake.

Simmerman v. Ocwen Financial & Mortgages Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) – ECOA applies only to “creditors” involved in the original loan closing. ECOA does not apply to assignees who were not involved in the original loan closing. Defendant who acquired loan from original mortgage company after transaction had closed was not “creditor” to whom the ECOA applied.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – ECOA, 15 USC Section 1691(e), prohibits discrimination against any applicant with respect to any credit transaction. ECOA has two-year statute of limitations from date of alleged violation. Terms of loan were clearly disclosed when loan closed and any alleged violation occurred at closing. Action brought more than two years after closing barred.

25.23 Credit Repair Organizations Act

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

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

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

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

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

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

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.

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 charges 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.

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.

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.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Tennessee Consumer Protection Act provides private right of action for person who suffers financial loss as a result of unfair or deceptive acts or practices, Plaintiff must demonstrate that defendant engaged in act or practice that is unfair or deceptive and that plaintiff suffered a loss of money, property or thing of value as a result. Lender's actions in pursuing foreclosure and debt-collection, even in context of loan modification, are not transactions within scope of TCPA. TCPA does not apply to loan modification activities. Note and Deed of Trust established payment terms and obligations, and lender is under no obligation to offer loan modification or other reductions in payments. Statements regarding loan modifications are related to terms of the loan itself.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Action under state consumer protection act is held to higher pleading standard and must set forth specific fraudulent or deceptive acts rather than general allegations. Debtor's general allegations that Bank drafted Debtor's account twice in one month for mortgage payments did not plead with requisite specificity as complaint did not allege any particular date or month in which double payments were drafted or how any double draft would constitute an unfair or deceptive practice. Lender's alleged failure to cooperate in loan modification process; alleged delay in advising Debtor of adverse decision on loan modification request; and alleged refusal to honor promise to modify loan that was later withdrawn by lender; were not unfair and deceptive practices as there is no cause of action under consumer protection act related to loan modifications as those are considered to arise out of the extension of credit which is beyond scope of statute.

McRary v. Jarrard, 2011 WL 3566279 (E.D. Mi. 2011) – Action violates MCPA, Section 445.901, when action favors party taking action and causes probability of confusion or misunderstanding of legal rights and obligations of other party. Lender violated MCPA by sending notice of non-judicial foreclosure sale after lender had asserted defense of set-off in adversary filed by Debtor to determine validity of debt. Lender's notice incorrectly stated that "no legal or equitable proceedings had been instituted to recover the debt" which caused likelihood of confusion regarding status of action in violation of MCPA.

25.30 Michigan Motor Vehicle Sales Act

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 Michigan Regulation of Collection Practices Act – MCL Section 445.252

Fuller v. JPMorgan Chase Bank, NA, 2019 WL 5586906 (W.D. Mi. 2019) – Discussions concerning potential loan modification and communications regarding foreclosure do not fall within scope of MRCPA.

25.32 Michigan Consumer Mortgage Protection Act – MCL Section 445.1634

Fuller v. JPMorgan Chase Bank, NA, 2019 WL 5586906 (W.D. Mi. 2019) – Michigan Consumer Mortgage Protection Act does not include private cause of action. Statute allows for enforcement only by commissioner of insurance and financial services, attorney general, or county prosecutor.

25.33 Conspiracy

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.

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.

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.

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.

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Action under 42 USC Section 1985 for alleged conspiracy to deprive person of equal protection of law must assert some racial or otherwise class-based invidious discriminatory animus. Action that alleged only that Defendant continued with foreclosure proceedings did not allege any discriminatory animus and would be dismissed. Common law conspiracy requires two or more persons, through concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means. Conspiracy requires not only proof of the concerted action, but also of some underlying tort that conspiracy accomplished or attempted. Complaint filed to allege any underlying tort; therefore, complaint could not state cause of action for conspiracy.

25.34 Racketeer Influenced and Corrupt Organizations Act (RICO)

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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”.

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.

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.

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.

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.

25.35 Intentional Infliction of Emotional Distress

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.

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.

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.

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.

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.

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.

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.

Brown v. Orlans Associates, PC, 2013 WL 1506016 (E.D. Mi. 2013) – Intentional infliction of emotional distress requires (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Intentional infliction of emotional distress requires conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, and does not include conduct that is mere insult, indignity, threat, annoyance, petty oppression, or other triviality. Plaintiff's complaint for allegedly wrongful foreclosure fail to demonstrate that Law Firm's conduct was extreme or outrageous.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Intentional infliction of emotional distress requires: (1) intentional or reckless conduct; (2) conduct that is so outrageous that it is not tolerated by civilized society; and (3) conduct results in serious mental injury. Breach of contract is not by itself actionable as outrageous conduct. Plaintiff's action against lender dismissed where basis of action was Lender's refusal to modify mortgage under HAMP. Running of foreclosure notices may have caused embarrassment, but notices were not outrageous or beyond bounds of decency.

25.36 Negligent Infliction of Emotional Distress

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.

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.

25.37 Defamation

Doe v. Rhodes College, 2016 WL 11612213 (W.D. Tn. 2016) – Statements made in course of judicial proceeding that are relevant and pertinent to issues involved are absolutely privileged and cannot be predicate for action for libel, slander or invasion of privacy. "Judicial proceeding" includes any hearing before any tribunal which performs a judicial function, whether public or not, and includes proceedings of administrative officers, boards and commissions that have power of discretion in applying law to facts. Testimony given to Honors College Board involving allegations academic fraud constituted judicial proceeding where hearing was conducted by panel of 12 students who heard evidence and applied Honor Code to expel student. Honor Council operated under codified pre-defined standards including procedures designed to insure fairness including written notification of complaint of misconduct and hearing; formal charge letter containing nature of violation and names of accusers; hearings are recorded and minutes kept; accused is entitled to be present and hearing evidence presented; accused is afforded opportunity present evidence and witnesses; all witnesses are placed under oath; and accused is entitled to appeal decision to Faculty Appeals Committee.

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.

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.

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.

25.38 Invasion of Privacy

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.

25.39 Constitutional Claims – Generally

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.

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.

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.

Williams v. Federal National Mortgage Ass’n, 2013 WL 5445883 (E.D. MI. 2013) – FNMA is not “state actor” for purposes of fifth amendment due process claims. Action alleging violation of constitutional right of due process based on non-judicial foreclosure sale dismissed with prejudice.

FHLMC v. Shamoon, 922 F.Supp.2d 641 (E.D. Mi. 2013) – Freddie Mac was not converted into state action when Federal Housing Finance Agency became its conservator, precluding action alleging due process and equal protection violations based on Freddie Mac's purchase or property at foreclosure sale. Freddie Mac was private corporation and FHLMC, as conservator, merely stepped into shoes of Freddie Mac.

Lopez v. Bank of America, 920 F.Supp.2d 798 (W.D. Mi. 2013) – FNMA is not governmental agency and did not become one when FHFA was appointed conservatory, precluding borrower's claim that FNMA violated 5th Amendment rights by using foreclosure by advertisement.

Hermiz v. FHLMC, 2013 WL 3353928 (E.D. Mi. 2013) – FNMA is not governmental agency and is not required to use judicial foreclosure process. Michigan's non-judicial foreclosure process is sufficient for due process purposes and FNMA can validly use non-judicial foreclosures.

Kapla v. FNMA, 485 BR 136 (Bankr. E.D. Mi. 2012), *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.

25.40 Slander of Title

Buttermore v. Nationstar Mortgage, LLC, 2017 WL 2306446 (E.D. Mi. 2017) – Slander of Title, whether brought under common law or under MCL Section 565.108, requires that plaintiff show that defendant maliciously published false statements that disparaged plaintiff's right in property resulting in special damages malice is not inferred merely from filing in valid lien absent evidence that defendant knowingly filed in valid lien with intent to cause injury. Complaint did not allege that recording of mortgage amounted to any malicious statement, warranting dismissal of complaint.

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.

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.

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.

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.

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.

25.41 Malicious Prosecution

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 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.

25.42 Abuse of Process

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.

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 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.

B. Mediation

25.43 When Appropriate

In re St. James Incorporated, Case No. 07-48680 (Bankr. E.D. Mi. 2009) – Creditor's Motion to Appoint Mediator denied where certain parties were

unwilling to participate in mediation and because mediation did not appear likely to be fruitful and would not serve a useful purpose.

25.44 Confidentiality

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.

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 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.

25.45 Settlement

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.

25.46 Sanctions

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 bring 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.

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

25.47 Procedure

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.

In re Bowlson, Case No. 08-44081 (Bankr. E.D. Mi. 2011) – Motion for Expedited Hearing denied where exigency was result of Debtor’s or counsel’s failure to act in timely manner. Debtor failed to demonstrate exigency for Motion to Incur Debt to purchase new vehicle where Debtor’s lease of her prior vehicle expired more than 2 months prior to filing the instant Motion. Plan confirmed more than 2 years earlier acknowledged that lease being assumed would expire in October, 2010, leaving Debtor and counsel with a full two years’ knowledge that lease would expire.

In re Miles, Case No. 09-78811 (Bankr. E.D. Mi. 2010) - Debtor’s Motion for Expedited Hearing on Motion to Modify Conditions of Order Imposing Stay denied where Motion was filed too late to hold a hearing. The requested hearing date would give less than two-days’ notice to creditors and the Trustee and no reason was given why Motion was filed so late where Debtor had known about circumstances motivating the hearing for some time.

In re Elliott, Case No. 09-50231 – Motion for Expedited Hearing denied without prejudice where Debtor’s underlying motion failed to include the statement of concurrence as required by local bankruptcy rule 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

25.48 Grounds

PNC Equipment Finance v. Mariani, 2018 WL 6584123 (6th Cir. 2018) – 28 USC Section 455(a) requires judge to recuse in any proceeding in which impartiality might reasonably be questioned. Standard is objective one, based on whether reasonable, objective person knowing all circumstances would question judge's impartiality. Motion alleged that Judge's husband received offer from Plaintiff to settle aviation related loans at significant discount which may cause Judge to be partial toward Plaintiff in this action. However, Plaintiff in this action made same offer to defendant for his aviation loans and evidence indicated that Plaintiff made same offer to multiple other people in multiple other, unrelated transactions; and there was no evidence the Judge's spouse had any outstanding loans or other business relationships with Plaintiff. Defendant's Motion did not contain any specific information such as identity of person who allegedly told defendant of relationship between Judge's spouse and Plaintiff; that Judge was aware that Plaintiff forgave spouse's debt; or that there was any connection between forgiveness of spouse's debt and status of Judge as Federal Judge. Record did not contain any evidence by which reasonable, objective person would conclude that Judge was not impartial.

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.

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.

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 defendant's unhappiness that it has to defend merits of complaint is not grounds for recusal under 28 USC Section 455.

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 bench, 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.

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 nor 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.

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.

Dumas v. JPMorgan Chase Bank, 2013 WL 1703379 (E.D. Mi. 2013) – Magistrate judges must recuse themselves when their impartiality might reasonably be questioned, based on reasonable, objective person, knowing all of the circumstances; and must be based on extra-judicial events, and not from proceedings in the particular case or prior related cases. Party seeking to recuse judge may file affidavit setting forth facts and reasons for belief that judge is not impartial at which point the judicial officer involved must take no further action in the case. Plaintiff's request for recusals denied where plaintiffs' based motion on comments and discussions on record during hearing regarding settlement. Judge's expression of displeasure with plaintiff's refusal to consummate settlement agreement or statements indicating that Judge does not think highly of Plaintiff's claims are not extrajudicial statements that support recusal. There was no evidence in the record that the Judge "strong-armed" Plaintiffs into settling, where Plaintiffs were experienced litigants who have participated in a number of lawsuits. Judge's comments may have been "pointed and unvarnished" but did not amount to bias or impartiality.

Morris v. Paine, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor filed Motion to disqualify all of the Bankruptcy Judges in Tennessee and also the Chapter 13 Trustee and his staff attorney alleging that "they are not judges, they are "criminals dressed in black, including the officers of the clerks", reigning terror upon the people of this state and are hereby forever disqualified from this and any other case that has to deal with Jimmy Marcell Morris for their failure to be impartial, unbiased and do fair & honest service and case fixing; abandonment of oath & duty in the bankruptcy court". Debtor's complaint in this Chapter 11 case arose out of Debtor's prior sequential failed Chapter 13 cases, the most recent of which was dismissed based on Debtor's failure to file the credit counseling certificate, failure to submit a plan that was feasible, and failure to file a plan that met liquidation. Debtor's current adversary proceeding joined all of the judges and Chapter 13 Trustee as defendants, alleging that the defendants acted together against him in proceeding over and dismissing his cases, confirming no stay was in effect as to the Smyrna Property, and failing to pursue the alleged violations of the Fair Debt Collection Practices Act. Debtor sought relief under 10 USC § 333, 11 USC § 523(a)(6), Federal Rule of Bankruptcy Procedure 7001(6), 18 USC §§ 1346 and 1918, 42 USC § 2000d, the Eleventh Amendment to the U.S. Constitution, and fraud.

LaBankoff v. United States Trustee, Case No. 09-1300 (9th Cir. BAP 2010) – Party asserting judicial bias has an exceptionally heavy burden to overcome a presumption of honesty and integrity in the Judge. Bankruptcy Court comments to *pro se* Chapter 11 Debtor that Debtor had failed to comply with procedural requirements of case and that Court did not believe that Debtor could confirm a plan while entering order giving Debtor 120 days to attempt confirmation were observations were consistent with Court's duty to advise that Debtor's lack of legal knowledge, as demonstrated by his multiple mistakes made thus far in the case, would inevitably lead to expenses and aggravation for all concerned, and that disaster was] looming. Comments signal bankruptcy court's sympathetic concern for Debtor, and its willingness to exercise its discretion by affording Debtor time to propose and confirm a proper plan, or to at least secure competent legal advice. Disqualification based on "extrajudicial sources" is implicated when Court's bias originates outside the courtroom and must result in an opinion on the merits on some basis other than what the judge learned from participating in the case. Nothing in the record indicated that Judge had any personal interest, financial or otherwise, in this case. There is also no indication in the record that the bankruptcy judge's opinions expressed in the transcripts or written documents were based on any information or events other than those originating in the bankruptcy court proceedings. Disqualification for "pervasive bias" is based on events that occur within the proceeding are particularly strong and clearly indicate judge's inability to render fair judgment. Bankruptcy Court was not hostile or antagonistic toward Debtor. Although Court would have been warranted in dismissing case earlier, Judge afforded Debtor one last opportunity to either confirm plan or hire competent counsel. This act of discretion by the bankruptcy court is not consistent with a pattern of deep-seated antagonism against Debtor.

LaBankoff v. GMAC Mortgage, LLC., Case No. 09-1294 (9th Cir. BAP 2010) – Record failed to disclose any evidence of bias. Comments made by a court in the course of judicial proceedings are rarely sufficient to establish bias requiring recusal. "Extrajudicial source" rule is implicated when bias originates outside the courtroom. Bankruptcy judge had no personal interest, financial or otherwise, in this case and there was no indication that the bankruptcy judge's opinions, expressed during hearings or in written memoranda in the case, were based on any information or events originating outside the bankruptcy court proceedings. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. This pervasive bias arises when a judge's favorable or unfavorable disposition toward a party, although stemming solely from the facts adduced or the events occurring at trial, nonetheless becomes so extreme as to indicate the judge's clear inability to render fair judgment.

U.S. v. Diekemper, Case No. 09-2081 (7th Cir. 2010) – Defendant in prosecution for bankruptcy fraud failed to raise issue of recusal before trial court. 28 USC Section 455 requires bias concerns to be raised either before the trial judge or promptly thereafter by writ of mandamus upon becoming aware of alleged bias. Judicial bias concern can be raised between trial and sentencing if bias did not become known until trial's cessation. Further, mere fact that trial judge forms negative opinion of litigant during proceeding is not bias for purposes of recusal. Recusal appropriate only where Court voices opinions that display a deep-seated favoritism or antagonism that would make fair judgment impossible. Trial Court's statement that defendant is "manipulative, narcissistic, and twisted," similarly is a reflection of the facts before the district court. This statement further served to explain why the judge imposed the sentence that he did and did not evidence improper bias.

In re Hake, Case No. 08-8039 (6th Cir. BAP 2008) – Judge can be required to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Judge shall disqualify himself where Judge has personal bias or prejudice concerning a party or personal knowledge of the disputed evidentiary fact. Judicial rulings alone almost never constitute a valid basis for bias or partiality. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the proceedings or prior proceedings do not constitute a basis for bias or partiality unless Judge displays a deep-seated favoritism or antagonism that would make fair judgment impossible. Judicial remarks during course of trial that are critical or disapproving of or even hostile to counsel, the parties or their cases ordinarily do not support a bias or partiality challenge unless comments reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Motion for recusal properly denied where record did not demonstrate that Judge's opinion of counsel was derived from an extrajudicial source or that Judge possessed such a high degree of antagonism as

to make fair judgment impossible. Spirited exchanges between Judge and counsel do not rise to level of antagonism necessary to mandate recusal.

Rhiel v. Hook, 2009 BR 2182602 (Bankr. E.D. Mi. 2009) - Bankruptcy Judge may be disqualified from presiding over particular proceeding or contested matter or, if appropriate, from presiding over the case as a whole. Judge should recuse himself when impartiality might reasonably be questioned or where Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Standard for recusal is an objective one: whether a reasonable person with knowledge of all facts would conclude that the Judge's impartiality might reasonably be questioned. Extrajudicial Source Doctrine is invoked when the Judge forms opinions of the litigants based on information learned outside the course of judicial proceedings. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for bias or partiality. Pervasive Bias Exception requires recusal when Judge forms a favorable or unfavorable opinion so extreme that fair judgment appears impossible. Adverse ruling on evidentiary matter accompanied by comment regarding truthfulness of defendant's testimony does not reflect deep-seated antagonism sufficient to require recusal. Adverse decision on one issue in Bankruptcy case does not demonstrate antagonism or detract from impartiality.

In re Johnson, 408 B.R. 123 (Bankr. S.D. Ohio 2009). Bankruptcy judge's recusal was not required on "extra judicial source" theory, since an evidentiary hearing before the court is not "extra judicial". And a single comment on the party's previous testimony, in ruling against the party, was not sufficient for recusal based on "pervasive bias" theory.

25.49 Appeal of Order

Friendly Finance Service v. Dorsey, Case No. 12-30018 (5th Cir. 2012) – Denial of Motion to Disqualify is not appealable final order, is not subject to collateral order doctrine, and is not appealable interlocutory order. Party must wait for entry of final judgment to appeal judge's refusal to recuse.

E. Sealing Court Papers, Records and Proceedings

25.50 Section 107 and Federal Rule 5

In re Sims, Case No. 19-40257 Bankr. E.D. Mi. 2019) – Section 107 provides that papers filed in accuracy case are public records open to examination. Section 107(b) allows Court to enter order to protect trade secrets, confidential research, developments or commercial information, or to protect a person from scandalous or defamatory matter. Party seeking to seal documents bears heavy burden of overcoming strong presumption in favor of public access. Debtor's motion to file document under seal alleged only that document was "personal document" to Debtor and family and Debtor requested that document not be made public. While Debtors concerns are understandable, those concerns were not sufficient to overcome presumption in favor of public access.

In re Buckeye Activewear, LLC, 2019 WL 541922 (Bankr. N.D. Ohio 2019) – Section 107(b) and Rule 9037 provide authority to Court to seal bankruptcy filed with respect to scandalous or defamatory matter contained in paper filed in case, or to otherwise seal, restrict access to or redact documents if warranted. However, Courts have strong presumption in favor of openness and sealing or redacting warranted only in rare circumstances. Alleged Debtor did not meet standard to seal file on involuntary petition filed against alleged Debtor and later dismissed. Motion did not cite legal authority and did not include evidence of harms allegedly caused by free public access to Court file. Non-specific and speculative concerns do not overcome presumption of access. Further, sealing file would restrict public access through Pacer but would not affect multiple websites that routinely mine and independently publish court data, such that sealing court docket would be exercise in futility.

Phibbs v. Revenue Recovery Corp., 2017 WL 10439789 (E.D. Tn. 2017) – Rule 26 allows court to enter protective order to permit parties to designate discovery they wish to be kept confidential. Practice is acceptable at discovery stage, before material enters judicial record. Once information is submitted to court, public has strong interest in obtaining information contained in public record and only compelling reason justifies non-disclosure. Even then, redaction is preferred to wholesale sealing of documents. Naked assertion that documents contain "business related material" and disclosure would have potential to cause economic harm to Defendant insufficient to overcome high burden to seal records.

Energy Conversion Devices Liquidation Trust v. Ovonyx, Inc., 2019 WL 267779 (Bankr. E.D. Mi. 2019) - Motion to seal audio recordings and transcripts of hearings must demonstrate good cause for extraordinary relief. Court is strongly disinclined to seal or shield from public access audio recordings of hearings or trial. Court is open to public and courts normal practice is to post audio recordings of every hearing and trial held consistent with strong presumption in favor of public access. Motion to seal was too general and assertions and did not adequately demonstrate cause for Court to take extraordinary step of eliminating public access to courtroom, hearings or audio recordings.

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.

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.

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.

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.

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.

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.

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.

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Federal Rule 5 allows court, for cause, to require redactions of information or limit or prohibit non-party's access to documents. Movant must make particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one. References in Plaintiff's pleadings to grievances filed by Plaintiff against Defendant's attorneys would be sealed where the grievances have not been investigated or substantiated by Grievance Commission, and information contained in pleadings was potentially inflammatory.

In re Creighton, 2013 WL 1751297 (Bankr. N.D. Ohio 2013) – Section 107 requires all papers filed in bankruptcy case to be public records but allows the Court to seal pleadings to extent necessary to protect trade secrets or confidential information; or to protect person from scandalous or defamatory matter contained within a paper. Information in court file is scandalous where material in file would cause a reasonable person to alter their opinion of a party based on statements in the pleadings. Statements and information that is true cannot be scandalous or defamatory. Debtor failed to demonstrate that access to bankruptcy documents were cause of harm. Debtor was a public-school teacher. Debtor alleged only that Debtor had been experiencing incessant ridicule from several students, parents, and even fellow teachers, solely because of her bankruptcy filing. The ridiculers became aware of Mrs. Creighton's previous bankruptcy only because her filings are public records, and thus, readily accessible over a multitude of sources, including the internet. The constant, invasive, and ubiquitous nature of the ridicule has caused Debtor severe emotional distress, and threatened her job performance and, ultimately, her ability to earn a living. Debtor's distress was not product of any particular bankruptcy pleading, but as a result of the way people used information about bankruptcy. Even if the court were to order that Debtor's name be redacted from the bankruptcy case, this would relate only to Pacer and not to other sources of information or to the general knowledge that Debtor had filed for bankruptcy. Debtor failed to demonstrate any causal connection between any particular document or allegation in the bankruptcy filing and any alleged harm suffered by Debtor. While unintended secondary consequence is negative publicity, that is regrettable but is not a basis for sealing a file.

F. Rehearing or Reconsideration

25.51 Motion for Amended or Additional Findings of Fact – Rule 52

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.

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

25.52 Motion for Reconsideration – Rule 54(b)

Henry v. Casey, 2019 WL 1220774 (Bankr. E.D. Tn. 2019) – Court has authority under common law as well as Rule 54 to reconsider interlaboratory orders and reopen any part of case before entry of final judgment. Court may modify, or rescind, interlock Tory orders, where there is intervening change in controlling law; new evidence available; or need to correct clear error or prevent manifest injustice. Rule 7024 allows party to intervene as matter of right taking into consideration timeliness of motion; movements substantial legal interests; impairment of movant's ability to protect interest absent intervention; and inadequate representation of interest by existing parties. Plaintiffs lawsuit based on partnership liability encroached on prior settlement and sale orders tuition bankruptcy Trustee was party. Plaintiff sought to relitigate issues giving Trustee significant legal interest in creating potential legal liability and no other party to case could present same defenses as those available to Trustee. Plaintiff's subsequent amendment to complaint which dropped certain claims did not compel reconsideration of Court's prior order where plaintiff's complaint continued to seek same substantive relief against same parties.

Marshall v. Stern, 2019 WL 410324 (9th Cir. 2019) – District Court ruling on Rule 60(b) Motion in non-core matter is ruling on Report and Recommendation from Bankruptcy Court and is not District Court exercising bankruptcy appellate jurisdiction. District Court entered judgment pursuant to original jurisdiction in bankruptcy matter and Ninth Circuit had jurisdiction over appeal under 28 USC Section 1291 as appeal from final decision of District Court. Jurisdiction was not based on 28 USC Section 158(d) which limits Appellate jurisdiction to final judgment, orders or decrees.

Toledo v. CSX Transportation Inc., 2018 WL 4923362 (E.D. Tn. 2018) – Rule 54 allows Court to reconsider any Order that resolves rights and liabilities of fewer than all parties but does not end action as to claims or parties at any time before entry of judgment adjudicating all claims and all parties' rights. Reconsideration is contrary to Court's desire for finality and will be granted only in rare and unusual circumstances. Motions are analyzed under same framework as Motions under Rule 59(e) to alter or amend judgment. Motion must be filed with 28 days of entry of order to be reconsidered. Motion was untimely where Court granted partial summary judgment more than 90 days before Trustee sought reconsideration and was time barred.

25.53 Motion to Amend Versus Motion for Relief From Judgment

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.

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Motion filed within 14 days after entry of order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59.

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Motion filed within 14 days after entry of Order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59; while Motion made 14 days or later is considered Motion for Relief From Judgment under Rule 9024 and Federal Rule 60.

25.54 Orders Subject to Relief – Final Orders

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Rule 9023 allows court to alter or amend final orders. Partial Summary Judgment, which does not conclude judicial labors and is not a final order, is not subject to alteration under Rule 9023.

25.55 Orders Subject to Relief – Non-Final Orders

Long John Silver's, Inc. v. Nickelson, 2013 WL 1797442 (W.D. Ky. 2013) – Court has authority to reconsider interlocutory orders under court's common law powers and under Rule 56(b). Court will reconsider interlocutory order as justice requires, based on (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. Newly discovered evidence is evidence that was unattainable prior to entry of the prior order. Agreements that either pre-existed entry of order or were concocted following entry of 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.

25.56 Standing to Bring Rule 60 Motion

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.

25.57 Waiver of Issues

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.

25.58 Standard of Review

In re White, Case No. 13-21977 (Bankr. E.D. Mi. 2019) – Local Bankruptcy Rule 9024-1 requires Motion for Reconsideration to be filed within 14 days of entry of Order and requires proof that Court and parties were misled by palpable defect, the correction of which would result in different disposition. Defect is "palpable" if it is clear error of law; newly discovered evidence; intervening change in controlling law; or correction is needed

to prevent manifest injustice. Court's Order referencing amended objections filed by Debtor-Husband was not erroneous where record reflected that amended exemptions has been filed and not withdrawn, and in any event amended exemptions did not change prior exemptions and Court's reference had no practical effect on Debtor-Husband's claimed exemptions. Motion did not demonstrate either a palpable error or that correction of the alleged error would change disposition of case.

In re Faulkner, 2019 WL 4555984 (Bankr. E.D. Mi. 2019) – Local Bankruptcy Rule 9024-1(c) allows, but does not require, that Court reinstate case where default that resulted in dismissal has been or can be cured. Party seeking reinstatement must still demonstrate grounds for relief from order dismissing case under Local Rule 9024-1 and Federal Rule of Civil Procedure 60. Debtor's motion to reinstate case denied where case was dismissed because Debtors did not pay filing fee and did not appear for hearing on Order to Show Cause why case should not be dismissed for failure to pay filing fee. Motion to Reinstate did not demonstrate any palpable defect by which Court and parties were misled or that different disposition of case must result. Motion did not establish excusable neglect or any other valid ground for relief from order as motion did not indicate why filing fee had not been paid or why Debtors did not appear. Default that caused dismissal was not and could not be cured as case was dismissed because filing fee was not paid by deadline set and no party appeared for show-cause hearing. While filing fee was paid after hearing, there could be no "cure" for failure to appear at the show cause hearing. To extent that case was dismissed due to bookkeeping error by Debtor's attorney, error must be attributable to Debtor's for purpose of determining whether mistake was excusable. Lawyer errors amounting to action or inaction that leads to successful malpractice suits do not qualify as "mistake" or "excusable neglect". Debtor's attorney did not check to see whether filing fee had been paid. Had attorney done so, attorney would have known that filing fee had not been paid and that Debtors were required to intentional cause hearing. Failure of Debtor's attorney to make quick and easy check is neglect that is not excusable.

Parks Legacy v. Nathan, Case No. 18-11586 (E.D. Mi. 2018) – Party seeking rehearing or reconsideration must show palpable defect by which Court and parties were misled, the correction of which requires a different disposition. Party did not file notice of appeal within 14 days as required and Court dismissed appeal. Motion for Rehearing did not allege any palpable defect in Court's Order Dismissing Appeal.

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.

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.

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.

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.

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.

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.

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.

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Courts generally will not grant motions for rehearing or reconsideration that merely present same issues ruled upon by court either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties were misled and that correcting the defect will result in a different disposition. Defect is palpable if it is obvious, clear, unmistakable or plain. Motion denied where motion restated same arguments made at initial hearing.

Sandweiss Law Center, PC v. Kozlowski, 2013 WL 396255 (E.D. Mi. 2013) – A motion for reconsideration will be granted only if the moving party identifies "a palpable defect by which the court and the parties ... were misled" and demonstrates that correcting the defect "will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3). A "palpable defect" is one that is "obvious, clear, unmistakable, manifest or plain." Motion that does not identify any defect, but merely reargues matters previously considered, will be summarily denied.

Overstreet v. Joint Facilities Management, LLC, Case No. 11-51141 (5th Cir. 2012) – District Court did not abuse discretion in denying Rule 59 Motion to Alter or Amend Judgment where Motion did not establish either a manifest error of law or fact; or present newly discovered evidence. Motion merely reasserted arguments and allegations initially presented to court.

Tweedie v. Semeniuk, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Under Rule 9023 and Federal Rule 59, moving party must show clear error of law, newly discovered evidence, an intervening change in the controlling law, or a need to prevent manifest injustice; such that a different disposition of the matter must result from correction of the error. Local Rule 9024-1 requires that the moving party demonstrate a palpable error by which the court and the parties have been misled. A palpable defect is one that is clear, unmistakable, manifest or plain. Mere assertion of error or that order needs to be corrected, or re-argument of matters previously considered by the court, without more, is not sufficient.

25.59 Scope of Relief

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.

25.60 Grounds – Rule 54 and 7054

Henry v. Casey, 2019 WL 1220774 (Bankr. E.D. Tn. 2019) – Court has authority under common law as well as Rule 54 to reconsider interlaboratory orders and reopen any part of case before entry of final judgment. Court may modify, or rescind, interlock Tory orders, where there is intervening change in controlling law; new evidence available; or need to correct clear error or prevent manifest injustice. Rule 7024 allows party to intervene as matter of right taking into consideration timeliness of motion; movements substantial legal interests; impairment of movant's ability to protect interest absent intervention; and inadequate representation of interest by existing parties. Plaintiffs lawsuit based on partnership liability encroached on prior settlement and sale orders tuition bankruptcy Trustee was party. Plaintiff sought to relitigate issues giving Trustee significant legal interest in creating potential legal liability and no other party to case could present same defenses as those available to Trustee. Plaintiff's subsequent amendment to complaint which dropped certain claims did not compel reconsideration of Court's prior order where plaintiff's complaint continued to seek same substantive relief against same parties.

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 Judgement 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.

25.61 Grounds – Rule 59 and 9023 Generally

In re Basrah Custom Design, Inc., 2019 WL 2202742 (Bankr. E.D. Mi.), *rehearing denied*, 2019 WL 2521122 (Bankr. E.D. Mi. 2019) – Motion for Reconsideration must demonstrate that Court and parties were misled and that different disposition would result from correction. Motion may not merely re-argue issues argued before Order issued. Orders were not erroneous or constitute abuse of discretion where Bankruptcy Court orders were based on factual findings made by state court pre-petition as to which parties were collaterally estopped.

Wigger v. State Treasurer, 2019 WL 1975845 (Bankr. W.D. Mi. 2019) - Relief under Rule 9023 requires party to establish clear error of law, newly discovered evidence, intervening change in controlling law, or need to prevent manifest injustice. Motion merely re-argued matters argued prior to entry of Order and raised additional arguments which could and should have been made before entry of order.

Comerica Bank v. Shaman, 2018 WL 6504380 (E.D. Mi. 2018) – Motion for Reconsideration should be granted only when party demonstrates palpable defect by which Court and parties have been misled and correcting defect will result in different disposition of case. Leave to amend complaint granted where only amendment was to change name of defendant from “Living Trust” to “Revocable Trust”. Amendment related back to filing of original complaint where change in defendant’s name was unknown to plaintiff and defendant continued to use name “Living Trust” prior to commencement of litigation. Allegations arose out of conduct, transactions and occurrences set out in original complaint and asserted same general conduct and general wrong. Amendment would not result in surprise or prejudice to defendant’s who were fully aware of accurate name of defendant and error was blamed at least in part on defendant’s conduct in repeatedly referring to trust by outdated name. Action sought to enforce judgments entered into companion cases by setting aside allegedly fraudulent transfers where all transfers were part of same scheme to shield assets and beneficiaries of “Living Trust” were same as beneficiaries for “Irrevocable Trust”. Movant did not demonstrate palpable defect, that Court or parties were misled, or that Court otherwise abused discretion in permitting amendment to complaint.

In re Clotheir, 2018 WL 5116327 (Bankr. W.D. Tn. 2018) – Relief is warranted under Rule 59 where motion is made within 14 days of entry of order from which relief is sought and there is clear error law; new evidence; intervening change and controlling law; or need to prevent manifest injustice. Court’s ruling that Debtor’s tax returns were last due more than 3 years preceding commencement of case was erroneous where Court did not take into account tolling provisions of Section 507(a)(8). Although IRS did not specifically cite tolling provision in “hanging paragraph” of Section 507(a)(8), Court cannot ignore plain statutory language. When applied, the tolling provision supported IRS assertion of priority claim such that prior Court judgment in favor of Debtor was erroneous and must be reversed.

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.

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% contract rate of interest to 1.8% federal judgment rate.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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".

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.

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.

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.

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.

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.

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.

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.

Maas v. Northstar Education Finance, Inc., Case No. 12-80384 (Bankr. W.D. Mi. 2013) – Party seeking reconsideration or relief from prior order must demonstrate newly discovered evidence or some change in controlling law, or that prior order results in "manifest injustice". Motion that merely restated issues presented in original hearing and on which Debtor had ample opportunity to dispute did not raise new issues but was merely a re-hash of arguments made, or that should have been made, before order entered.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 2251168 (N.D. Ohio 2013) – Motion brought within 28 days of entry of order is motion under Rule 59. To prevail, party must prove a clear error of law; newly discovered evidence; an intervening change in controlling law; or need to prevent manifest injustice. Plaintiff's Motion for reconsideration of order dismissing complaint failed to allege anything other than issues previously raised and rejected.

Armstrong v. Internal Revenue Service, Case No. 11-1554 (9th Cir. BAP 2013) – Rule 59 motion should not be granted absent highly unusual circumstances, the court is presented with newly discovered evidence, committed clear error, or there is an intervening change in controlling law. Motion must not rehash same arguments made the first time and must not assert new legal theories or facts that could have been asserted at the initial hearing. Motion that merely contended that court failed to set forth specific findings of fact or conclusions of law was insufficient to warrant rehearing. Further, rehearing was properly denied where court announced one legal basis for ruling that was incorrect, but ruling was supported by separate legal basis and was correct, even if the wrong legal basis was stated.

In re Walterhouse, Case No. 11-32645 (Bankr. E.D. Mi. 2012) – Rule 59 motion must demonstrate error of law, newly discovered evidence, intervening change of controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case. Court's order denying motion to dismiss not erroneous. Debtor's testimony that he 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.

In re Johnson, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9023 is not merely opportunity to reargue matters previously

addressed. Motion requires proof of clear error of law, newly discovered evidence, or intervening change in controlling case law, or to avoid manifest injustice. Motion failed to demonstrate basis for relief from Order dismissing case for failing to appear at a Show Cause hearing resulting from Debtor's failure to pay filing fees in this case plus two of Debtor's 4 prior filings. Debtor failed to demonstrate error in Court's denial of Motion for Continuance of Hearing. Motion for Continuance did not provide sufficient facts to establish that Debtor was unable to appear. Motion alleged only that Debtor had a doctor's appointment, with no explanation as to when Debtor made the appointment or why it could not be changed to a different time or different date. Debtor had history of multiple filings, each of which exhibited a pattern of delay and Debtor still had not paid filing fees. Motion did not evidence any manifest error of law, mistake of fact or other material reason that would support rehearing. Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.

In re Hardy, 2011 WL 2112020 (Bankr. N.D. Ohio 2011) – Chapter 7 trustee failed to demonstrate basis for reconsideration under Rule 59 of Court's Order Dismissing Chapter 7 Case. Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in the controlling law, or to prevent manifest injustice. A motion for reconsideration is not designed to give a dissatisfied litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal. Trustee's argument that creditors would fare better in Chapter 7 was considered and rejected in dismissing case in first instance. Trustee failed to produce any new evidence to demonstrate that dismissal was result of clear error or change in controlling law.

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

In re Harvey Goldman & Co., Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Rule 9024-1 precludes Motion for Rehearing or Reconsideration based on the same issues previously litigated. Motion is not an opportunity to retry the case just because the party does not like the outcome. Motion must demonstrate palpable defect by which the Court was misled and also show that a different disposition of the case must result from a correction thereof. Motion that does nothing more than re-argue the same evidence and testimony as was presented at trial does not warrant relief under Rule 59.

25.62 Clear Error of Law

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 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.

25.63 Grounds – Rule 60 and 9024 Generally

G&H Custom Homes, LLC v. Carter, 2019 WL 1878030 (Bankr. E.D. Mi. 2019) – Rule 60(b)(3) allows Court to reopen adversary proceeding and set aside final judgment where judgment is based on fraud, misrepresentation or misconduct of opposing party. Plaintiff was unlicensed general contractor. Under state law, unlicensed contractor is prohibited from engaging in business and prohibited from bringing or maintaining action for collection of compensation or placing liens. Plaintiff's complaint sought payment for compensation which was plainly unlawful under state law. Plaintiff sought judgment to except debt from discharge which would not be precluded by state law. However, adversary proceeding also sought entry of money judgment. Plaintiff engaged in fraud by knowingly misrepresenting material fact or concealing material fact by deliberately misrepresenting to Debtor the status of plaintiff's license and obtained judgment by concealing the status of plaintiff's license and by testifying at Rule 60 motion hearing that plaintiff was licensed when record indicated that plaintiff was not licensed company.

G&H Customs, LLC v. Carter, 2018 WL 4566243 (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.

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.

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.

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.

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.

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 plain. 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.

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.

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.

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.

Duran v. Mortgage Electronic Registration Systems, Inc., 2013 WL 2251168 (N.D. Ohio 2013) – Burden for relief under Rule 60 is significantly higher than standard applicable to Rule 59 Motions. While Rule 59 allows relief for any reason previously sufficient for reasons that have been granted in suits in equity. Rule 60 is limited to specified circumstances listed in Rule 60. Motion that fails to identify any particular subsection under which relief is requested and fails to allege any facts that support relief under any subsection but merely seeks to reargue same points previously raised and rejected would be denied.

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

In re Johnson, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.

In re Bing Construction Company, Case No. 11-57853 (Bankr. E.D. Mi. 2011) – Motion for Reconsideration denied for failure to allege any changed circumstances or error in prior Order. Creditor failed to file affidavits or other response to Debtor's Motion to Reject Contract as allowed and directed

by Order of Court. Court granted Debtor's Motion. Creditor's failure to file response within time allowed by Court does not warrant reconsideration of underlying order.

In re Sharfnter, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor's Motion for Reconsideration of Order Dismissing Case failed to demonstrate any palpable defect by which the Court was misled. Debtor's Petition Cover Sheet was not signed. Court issued Notice of Deficiency, in response to which Debtor filed yet another unsigned Cover Sheet. Court issued another Notice of Deficiency, and Debtor failed to respond and case was dismissed. Six months later, Debtor filed a Motion to Reopen Case, that also was not signed. Court issued another Notice of Deficiency and Debtor did not respond, and Motion to Reopen was stricken. Four months later, Debtor filed yet another Motion to Reopen Case. Motion did not allege any defect given Debtor's repeated failures to address issues raised in Court's numerous Notices of Deficiency.

Meoli v. Hoffman, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Defendants who failed to respond to complaint seeking to deny discharge under Section 707 and allowed default judgment to be entered could not demonstrate basis for relief under Rule 60(b)(6). Rule 60(b)(6) requires party to demonstrate extraordinary or exceptional circumstances not present in any of the other five subsections of Rule 60(b). Defendants failed to offer any explanation for failure to plead or respond in adversary proceeding, precluding relief under Rule 60.

In re Faraj, Case No. 10-76937 (Bankr. E.D. Mi. 2011) – Debtor's Motion to Reinstate Chapter 13 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake that may have resulted in dismissal was caused by Debtor's counsel and is attributable to Debtor for purposes of Rule 60, and Motion failed to allege any basis to determine that counsel's errors were "excusable".

JP Morgan Chase Bank, N.A. v. Taylor, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration of Order Granting Plaintiff's Motion for Summary Judgment construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Court was aware of Defendant's response to Motion for Summary Judgment in granting Motion. Defendant's Counsel's pending Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff's Motion and Motion for Reconsideration failed to offer any explanation as to why response was not timely filed.

In re Stewart, Case No. 10-52347 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Chapter 7 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file Chapter 7 Means Test from until three weeks after the deadline and two weeks after the case was dismissed.

In re Adams, Case No. 07-59818 (Bankr. E.D. Mi. 2010) - Debtor's Amended Motion to Reopen Case construed as motion to reopen case and for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion not filed within reasonable time as required by Rule 60(c) where Motion filed more than one year after order dismissing case.

In re Evans, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to obtain credit counseling prior to commencement of case, rendering Debtor ineligible for relief.

In re Grass, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – Second Motion for Stay Pending Appeal is treated as Motion for Reconsideration under Rule 9023 and Federal Rule 59. Motion denied where Motion failed to allege any of the established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion merely sought to reargue same issues and facts argued in first Motion for Stay Pending Appeal.

In re Price, Case No. 10-41890 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to timely file numerous documents as outlined in Notice of Deficient Filing within time permitted by Court.

In re Smith, Case No. 10-42015 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed for failure to file matrix or Declaration Under Penalty of Perjury for Debtor Without an Attorney within time permitted by Court.

In re Penland, Case No. 09-64082 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order.

J.L. Gisalson, III, Trust v. Mehlhose, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable

neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.

In re Turchan Technologies Group, Inc., Case No. 09-67671 (Bankr. E.D. Mi. 2010) - Motion for Reconsideration of Order Denying Debtors Motion to Approve Compromise of Claims construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Creditor lacks standing to seek rehearing of Order on Motion to Approve Compromise as only Debtor has standing to file that Motion and so only Debtor has standing to seek rehearing. Motion to Approve Compromise denied where creditor failed to appear at hearing and Motion for Rehearing failed to offer any justification.

In re McKenzie, Case No. 10-46513 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file corrected Rule 2016(b) statement within time permitted by court; and Motion contained several typographical errors including wrong Judge's name in caption and Motion requested the court to reschedule the confirmation hearing although the case was a proceeding under Chapter 7.

In re Leach, Case No. 10-45468 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file upload matrix or to file schedules, statement of financial affairs, or means test from.

In re Schweitzer, Case No. 10-65115 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where Debtor failed to file Chapter 7 Means Test form.

In re Scales, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Motion to Reopen Case denied where Motion was unnecessary. Discharge includes unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled. Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to Debtor that Debtor did not already receive.

In re Bailey, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Rule 59 does not contain express grounds for amending a judgment. Generally, a Rule 59(e) motion will only be granted only for: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Debtor's Motion that merely restated arguments that were rejected, without any new evidence or change in the law, will be denied.

Ausilio v. US, 2010 WL 2868821 (E.D. Mi. 2010) - Court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties have been misled and also show that correcting the defect will result in a different disposition of the case.

In re Szymanski, Case No. 10-53553 (Bankr. E.D. Mi. 2010) – Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Chapter 12 proceeding dismissed as to Debtor-wife where Credit Counseling Certificate indicated that she received credit counseling only after case filed, although Debtor-husband received counseling prior to commencement of case. Each Debtor must obtain credit counseling. Failure to do so mandates dismissal under Section 109(h).

In re Hall, Case No. 10-53494 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 24 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

In re Lyons, Case No. 07-43671 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled. Debtor's Motion to Reopen Case to add creditor denied where Motion was unnecessary. Although Creditor was not included in the schedules, unscheduled debts are discharged in a no asset case to the same extent as if they had been discharged. Re-opening case would produce no benefit to Debtor that Debtor did not already receive.

In re Harris, Case No. 10-55770 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Set Aside Order of Dismissal and to Extend the Time for Filing Documents construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 34 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

In re Alva, Case No. 10-55780 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where numerous documents were not timely filed.

In re Champney, Case No. 10-57311 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtors were not eligible for relief because Debtors failed to obtain credit counseling within 180 days prior to commencement of case. ECF records showed case filed on May 26 at 11:10 a.m. and credit counseling certificate indicated that the briefing occurred on May 26 at 2:55 p.m., almost 4 hours later.

In re Williams, Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to Debtor that Debtor did not already receive.

In re Jenkins, Case No. 08-59973 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to Debtor that Debtor did not already receive.

Allan Falk, P.C. v. Mirch, Case No. 03-4196 (Bankr. E.D. Mi. 2010) - "Adversary Proceeding Plaintiff's Motion to Entry of an Order Re-Opening This Adversary Proceeding and for Entry of an Order Reinstating This Court's April 8, 2010 Order of Contempt and for Other Relief Directed Against Adversary Proceeding Defendant" denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction of the error. Motion also failed to establish excusable neglect under Rule 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024. Neglect or error by counsel is attributable to the party for purposes of determining whether neglect or mistake was excusable. Adversary proceeding had been repeatedly closed and reopened because of inactivity by Plaintiff. Motion failed to demonstrate any reason to set aside most recent dismissal.

Hagan v. Goldstein, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Reconsideration of judgments and orders is available only in three limited circumstances: (1) in cases involving newly discovered evidence which could not have been discovered prior to entry of the order under review; (2) in cases involving changes in controlling law; and (3) to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Nor are motions for reconsideration appropriate merely to let the losing party supplement the evidentiary record that was before the court. Defendant's Motion for Reconsideration that merely sought to supplement record with additional bank statements would not warrant relief, particularly where materials, even if considered, would not have altered outcome of Motion for Summary Judgment; and Defendant's alleged hospitalization which Defendant claimed left her unable to respond to the Motion for Summary Judgment was not raised by Defendant or counsel prior to entry of judgment.

In re Dexter, Case No. 10-42155 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file creditor matrix and numerous other required documents were blank and failed to contain any required information including the Statistical Summary; Schedules I and J; Statement of Financial Affairs; and Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.

In re Farah, Case No. 09-59067 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion was also untimely filed. Rule 60(b) requires motion for reconsideration to be brought within a reasonable time. Debtor waited over six months after Court dismissed case to file Motion and failed to present any good excuse or explanation or delay.

In re Wesson, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file correct statement of social security number and failed to file Credit Counseling Certificate; Statement of Financial Affairs; Statistical Summary; Summary of Schedules; Chapter 7 Means Test; and Chapter 13 Plan, nor did Debtor file a motion for an extension of the April 5, 2010 deadline prior to deadline established in Court's Notice of Deficiency.

In re Sinanovic, Case No. 10-44217 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to pay filing fee within time set by Order of Court and neither Debtor nor counsel appeared at hearing on Order to Show Cause.

Persall v. Citibank, Case No. 09-44381 (Bankr. E.D. Mi. 2009) – Motion to Set Aside Order Dismissing Adversary and Request for Reinstatement construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect

under Federal Rule 60(b) or any other valid ground for relief from order. Motion for Reconsideration filed 11 weeks after entry of Order of Dismissal was not filed within a reasonable time as required by Rule 60(c). Plaintiff filed Motion for Default Judgment but failed to submit proposed Order notwithstanding Court Order requiring submission of an Order by specific date. When the Order was submitted, it did not comply with requirements of Court Guideline 12 and Court again requested submission of Order that complied with Court requirements. Plaintiff never submitted another order, resulting in dismissal of adversary.

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

Orlanski v. American Bank, Case No. 10-4880 (Bankr. E.D. Mi. 2010) – Plaintiff’s Ex Parte Motion to Reopen Adversary Complaint for Purposes of Filing an Amended Proof of Service construed as Motion for reconsideration of Order Dismissing Adversary Proceeding. Motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Allegations also did not establish excusable neglect under Rule 60(b)(1) or Bankruptcy Rule 9024. Dismissal of adversary proceeding was without prejudice, allowing Plaintiff to file a new adversary proceeding.

Visteon Corp. v. Collins & Aikman Corp., Case No. 07-13714 (E.D. Mi. 2009) – A party that seeks reconsideration of a Bankruptcy Court ruling must “demonstrate a palpable defect by which the Court and the parties have been misled,” and “show that a different disposition of the case must result from a correction thereof.” To establish a “palpable defect,” the moving party generally must point to “(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Court would not grant reconsideration of Order Confirming Chapter 11 Plan where party seeking reconsideration never objected to confirmation in the first instance. Creditor alleged that prior to the confirmation hearing, Debtor “promised” to include certain provisions in the Plan but never actually included those provisions. Creditor failed to object to confirmation or otherwise complain prior to confirmation about any alleged omitted provisions or agreements. Creditor failed to allege any “palpable defect” where Creditor had full notice of the terms of the Plan, a full opportunity to object to the Plan, and a full opportunity to participate at the confirmation hearing, but failed to raise those issues prior to confirmation. Although a court can grant rehearing for “excusable neglect”, excusable neglect does not include the failure to timely file a pleading even where that failure is the result of misplaced reliance on other parties or other strategic miscalculations.

In re Barnett, Case No. 08-70815 (Bankr. E.D. Mi. 2009) - "Request for Bankruptcy Reinstatement" treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 19 days after bankruptcy petition filed in violation of Section 109(h)(1).

Sims v. US Bank Home Mortgage, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Motion to Reconsider Order Regarding Improper Service of Summons and Complaint treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

In re Haines, Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted and had failed to file the missing documents even as late as the date of filing of the Motion to Reinstate.

In re Lasenby, Case No. 08-47560 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration must demonstrate "palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof." Motion failed to demonstrate palpable defect as Motion only alleged that Court did not give affidavit appropriate weight in determining underlying action.

In re Brewster, Case No. 08-61818 (Bankr. E.D. Mi. 2009) - Motion to Reopen Bankruptcy Case considered as Motion for Rehearing, denied where Debtor was not eligible to be Debtor because Debtor received pre-bankruptcy credit counseling more than 180 days prior to the commencement of the case. Fact that Debtor received counseling after the case was filed did not solve lack of eligibility when the case was initially commenced.

In re Davis, Case No. 08-69676 (Bankr. E.D. Mi. 2009) - Motion to Reconsider Re-opening Case constituted a Motion for Rehearing. Motion failed to demonstrate a palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Allegations in the Motion did not establish excusable neglect or any other valid ground for relief from the order dismissing the case.

In re Hicks, Case No. 09-41591 (Bankr. E.D. Mi. 2009) (unreported decision) - Motion failed to demonstrate palpable defect but which the Court and parties were misled or that a different disposition of the case must result from a correction thereof. Debtors obtained credit counseling more than 180 days prior to the commencement of the case, leaving Debtors ineligible for relief pursuant to Section 109(h)(1). Debtors obtaining new counseling after the case was commenced does not cure the lack of eligibility at the time case was commenced.

In re Webster, Case No. 05-85963 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Dismissing Chapter 13 Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction thereof. Motion also failed to establish any substantive basis for relief from the Order under Federal Rule of Civil Procedure 60(b); Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor's failure to file a plan modification or to seek a hardship discharge in the two months between the service of a Notice of Default and the ultimate dismissal of the case without cause for the delay prevents Debtor from seeking a hardship discharge post- dismissal.

In re McMahon, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Motion for Reconsideration of Order Dismissing Case denied where Motion failed to demonstrate any palpable defect and failed to allege any facts showing that the dismissal order was erroneously entered. Debtor did not allege that he had cured the default in payments in a timely manner as required by the Trustee's Notice of Default.

In re Rahman, Case No. 09-47242 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 11 days after bankruptcy petition filed in violation of Section 109(h)(1).

In re Depew, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Dismissal of Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not obtain credit counseling until after case filed. Debtor failed to demonstrate any basis for a waiver of credit counseling or authority to obtain post-petition counseling as Debtor failed to comply with Section 109(h)(3) and failed to file a Motion for Approval of Certification of Exigent Circumstances as required by Local Rule 1007-6.

In re Paris, Case No. 09-56564 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied where Motion failed to demonstrate palpable defect or that a different result would occur from a correction. Motion for Reconsideration of Order regarding payment of filing fees in installments moot where case dismissed in interim based on Debtor's failure to pay filing fees. Rehearing also not appropriate where Motion sought only authority to pay the filing fees in installments and did not seek to waive filing fees in their entirety and Debtor failed to pay the filing fees in any event.

In re Parent, Case No. 09-55888 (Bankr. E.D. Mi. 2009) - Court denied Motion to Vacate Order Dismissing Chapter 7 Case where Motion failed to allege any palpable defect or that a different disposition would occur from a correction; and failed to allege any substantive basis for relief under Federal Rule of Civil Procedure 60(b)(1), Federal rule of Bankruptcy Procedure 9024, or any other substantive basis for relief. Case was dismissed because counsel failed to file required documents within 15 days of the petition date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to Debtor, for purposes of determining whether any such neglect or mistake was excusable..."

In re United Robotics, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Court denied Motion for Reconsideration of Order Enforcing Automatic Stay where Motion failed to demonstrate any palpable defect by which the Court and the parties have been misled. Creditor's Motion merely reargued matters previously argued in response to Debtor's Motion for Order Enforcing Automatic Stay and which had been fully considered by Court in entering Order in the first instance. Legal arguments raised in Motion for Reconsideration did not compel the Court to reach a different conclusion as a matter of law.

In re Culbert, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Motion to Reinstate Chapter 7 bankruptcy construed as Motion for Reconsideration. Motion denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Rhodes, Case No. 09-43128 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtor's case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Little Rock Baptist Charity Care Center, Inc., Case No. 08-69445 (Bankr. E.D. Mi. 2009) – "Request for New Hearing Date for Debtor's Motion for Summary Judgment and Objection to Claim" treated as Motion for Reconsideration of Order Granting Debtor's Motion for Summary Judgment and Sustaining Debtor's Objection to the Claim of Interest of Joseph M. Wright". Motion failed to demonstrate a palpable defect by which the Court and parties have been misled or that a different disposition of the case must result from a correction thereof. Further, Motion did not allege any excusable neglect under Federal Rule of Civil Procedure 60(b)(1) or Federal Rule of Bankruptcy procedure 9024 or any other valid ground for relief. Debtor and counsel both had actual notice of the hearing date but failed to appear for the hearing and failed to demonstrate any excuse for the failure.

In re Williams, Case No. 04-40824 Bankr. E.D. Mi. 2008) - Debtor's Motion to Reinstate Chapter 13 Proceeding construed as a Motion for Reconsideration of Order Dismissing Case or, alternatively, a Motion for Relief from the Order Dismissing Case. Motion denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel in failing to respond is generally attributable to Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

In re McGill, Case No. 04-67742 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Reconsideration of Order Dismissing Case denied as Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof; and Motion failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Order of dismissal was properly entered when Debtor failed to comply with terms of Court Order adjourning a hearing on the Trustee's Motion to Dismiss.

In re Cantor, Case No. 05-65812 (Bankr. E.D. Mi. 2008) – Motion for Relief From Order, construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure

60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order.

In re Bell, Case No. 08-57409 (Bankr. E.D. Mi. 2009) - "Motion for Relief From The Judgment Dismissing Case Under FRCP 60(b)(1) & (6)", construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable effect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order. Debtor failed to be 100% paid in plan payments by agreed deadline. Debtor was also at fault for not scheduling payday lender as creditor in the first instance. But for Debtor's failure to schedule payday lender, lender would not have obtained money from Debtor's bank account as alleged which caused Debtor's inability to make plan payments as agreed.

In re Sandhu, Case No. 08-57203 (Bankr. E.D. Mi. 2008) - "Motion to Reopen Case and File Certificate of Counseling" denied as motion failed to demonstrate that any purpose would be served by re-opening case. Debtor did not receive credit counseling until 12 days after bankruptcy petition filed in violation of Section 109(h)(1).

In re Hutchinson, Case No. 08-59442 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Relief from Order Dismissing Chapter 13 Case for Failure to Comply With Order" denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel as alleged in Motion is generally attributable to Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

In re Walker, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Court denied Motion to waive filing fee where schedules indicated that Debtor had sufficient exempt assets from which to pay the filing fee. Debtor's letter did not dispute this finding. Further, Debtor's schedules also indicated that Debtor has tax refunds totaling over \$4000 all of which are claimed as exempt. Court's earlier determination that Debtor not eligible for fee waiver was correct.

In re Thomas, Case No. 08-57989 (Bankr. E.D. Mi. 2008) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 26 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

In re Ayres, Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).

In re Mathson Industries, Inc., Case No. 09-42894 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Trustee served creditor with a copy of the Motion to Approve Sale and provided the required 20-day notice. Creditor filed no objection to the sale motion until it filed the Motion for Reconsideration over one month after the objection deadline passed and 10 days after the order was entered.

Attard v. American Home Mortgage Services, Inc., Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Order denying Motion for Summary Judgment correctly entered where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

In re Lyons, Case No. 08-43750 (Bankr. E.D. Mi. 2009) - Motion to Reopen and Waive Reopening Fee denied where Court had denied prior Motion to Waive Filing Fee and the filing fee still had not been paid.

In re Camacho, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 13 Case constituted Motion for Reconsideration of Order dismissing case. Motion denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records. Debtor's Motion to Reinstate did not present any excuse for failure by Debtor that was prejudicial to creditors.

In re Bacevicius, Case No. 08-66257 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Debtor did not file a Bankruptcy Petition Cover Sheet until three weeks after case dismissed and never filed a Certificate of Credit Counseling, making it impossible for Court to determine if Debtor was even eligible for relief. Vague allegation that required documents were not timely filed due to a "computer problem" does not constitute grounds to set aside dismissal.

In re Maiuri, Case No. 08-69430 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Further, Motion was untimely where Motion was not filed until more than 60 days after entry of Order dismissing

case and failed to allege any good excuse for delay.

In re Rusch, Case No. 08-69518 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to address filing deficiencies after being advised that several documents including Means Test from, Schedules, Statement of Financial Affairs and Credit Counseling Certificate had not been filed is not "cause" to reinstate case.

In re Thornton, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - "Objections to Order Dismissing Debtors' Bankruptcy and Motion to Vacate Order" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Case was dismissed at the time of the confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.

Greenhill v. Beneficial Michigan, Inc., Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - "Motion To Reopen Case On The Grounds That The Default Which Caused the Dismissal Has Been Or Can Be Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and has offered no excuse or explanation for failure.

In re Zia, Case No. 09-55685 (Bankr. E.D. Mi. 2009) - "Emergency Motion for Reconsideration Due to Procedural Defect, to Vacate Order for Relief From the Automatic Stay, and to Reinstate Stay as Default on Which Entry of the Order Was Based Has Been Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor, for purposes of determining whether any such neglect or mistake was excusable.

In re Smith, Case No. 09-40132 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Statement of Social Security Number and Petition did not reflect signatures of either Debtor or Debtor's Attorney resulting in dismissal of case and Debtor failed to correct these deficiencies within time permitted by Court.

In re Johnson, Case No. 09-43191 (Bankr. E.D. Mi. 2009) - Letter to Court treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee in prior, dismissed case and failed to file a Matrix in this case and failed to cure these defects within time permitted by Court.

In re Rutherford, Case No. 09-51427 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee after Court entered Order denying Motion to Waive Filing Fee notwithstanding ample notice and opportunity.

In re Harris, Case No. 09-60790 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy for Failure to File a Matrix treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Certificate of Budget and Credit Counseling and signed Bankruptcy Petition Cover Sheet within time allowed required dismissal of case.

In re Dittman, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration Pursuant to F.R.B.P 9024 treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Court denied Motion to Extend Automatic Stay and Court now lacks authority to extend stay as hearing cannot be completed within 30 days of commencement of case. Therefore, even if Movant demonstrated grounds for relief, Court could not grant effective relief.

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

In re Henderson, Case No. 09-55303 (Bankr. E.D. Mi. 2009) - Debtor's "Reinstatement Letter" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file credit counseling certificate and failed to file Schedules D, F, G and H and Debtor's Schedules E, I and J were blank.

In re Brock, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Denying Motion to Extend Automatic Stay denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a

correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to attend the hearing based on alleged "internal office scheduling error" did not demonstrate cause to set aside Order. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

25.64 Excusable Neglect

In re Faulkner, 2019 WL 4555984 (Bankr. E.D. Mi. 2019) – Local Bankruptcy Rule 9024-1(c) allows, but does not require, that Court reinstate case where default that resulted in dismissal has been or can be cured. Party seeking reinstatement must still demonstrate grounds for relief from order dismissing case under Local Rule 9024-1 and Federal Rule of Civil Procedure 60. Debtor's motion to reinstate case denied where case was dismissed because Debtors did not pay filing fee and did not appear for hearing on Order to Show Cause why case should not be dismissed for failure to pay filing fee. Motion to Reinstate did not demonstrate any palpable defect by which Court and parties were misled or that different disposition of case must result. Motion did not establish excusable neglect or any other valid ground for relief from order as motion did not indicate why filing fee had not been paid or why Debtors did not appear. Default that caused dismissal was not and could not be cured as case was dismissed because filing fee was not paid by deadline set and no party appeared for show-cause hearing. While filing fee was paid after hearing, there could be no "cure" for failure to appear at the show cause hearing. To extent that case was dismissed due to bookkeeping error by Debtor's attorney, error must be attributable to Debtor's for purpose of determining whether mistake was excusable. Lawyer errors amounting to action or inaction that leads to successful malpractice suits do not qualify as "mistake" or "excusable neglect". Debtor's attorney did not check to see whether filing fee had been paid. Had attorney done so, attorney would have known that filing fee had not been paid and that Debtors were required to intentional cause hearing. Failure of Debtor's attorney to make quick and easy check is neglect that is not excusable.

In re Bennett, 2018 WL 4677438 (Bankr. E.D. Mi. 2018) – Section 502 (j) allows Court to reconsider order for "cause". "Cause" generally requires showing sufficient for purposes of reconsideration under Rule 59 and Rule 60. Creditor's claim disallowed where creditor did not file response to objection but instead filed amended claim which fully addressed issues raised in initial objection. Amended claim is not "response" to objection to claim notwithstanding that creditor in good faith intended amended claim to give Debtors precisely what Debtors said in original objection was missing from original proof of claim. Whether neglect is excusable depends on (1) danger of prejudice to other party; (2) length of delay and potential impact; (3) reason for delay; (4) whether delay was within reasonable control of late parties; and (5) whether late party acted in good faith. Creditor's failure to respond to objection to claim constituted neglect where procedures and rules were clear. Neglect was excusable as Debtors did not argue any prejudice where bank claim was for debt that Debtors listed on Schedules as undisputed and owing such that Debtors have admitted all along they owe debt in amount claimed by bank. Bank acted properly in filing Motion just 5 days after Court entered Order and at time when Debtor's Chapter 13 case was still at pre-confirmation stage. Bank's neglect did not cause any material delay in prosecution of case. Bank believed that Amended Proof of Claim that attached all documentation requested by Debtor's original objection would be sufficient to resolve objection. Bank's belief that written response to Objection was unnecessary because bank gave Debtors what Debtors wanted constituted plausible explanation. Debtors did not present any evidence of bad faith by bank. Even though bank did not follow proper procedure, bank did not disregard Objection. More than 2 weeks before written response to Objection was due, bank filed Amended Proof of Claim which gave Debtors precise information which Debtors sought in filing objection. Bank acted promptly and in good faith despite incorrect understanding of proper procedures. Motion for relief from order disallowing claim granted.

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.

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.

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.

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).

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.

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 of 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.

25.65 Meritorious Defense

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.

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.

25.66 "Curing Defect" - Local Rule 9024-1(c)

In re Faulkner, 2019 WL 4555984 (Bankr. E.D. Mi. 2019) – Local Bankruptcy Rule 9024-1(c) allows, but does not require, that Court reinstate case where default that resulted in dismissal has been or can be cured. Party seeking reinstatement must still demonstrate grounds for relief from order dismissing case under Local Rule 9024-1 and Federal Rule of Civil Procedure 60. Debtor's motion to reinstate case denied where case was dismissed because Debtors did not pay filing fee and did not appear for hearing on Order to Show Cause why case should not be dismissed for failure to pay filing fee. Motion to Reinstate did not demonstrate any palpable defect by which Court and parties were misled or that different disposition of case must result. Motion did not establish excusable neglect or any other valid ground for relief from order as motion did not indicate why filing fee had not been paid or why Debtors did not appear. Default that caused dismissal was not and could not be cured as case was dismissed because filing fee was not paid by deadline set and no party appeared for show-cause hearing. While filing fee was paid after hearing, there could be no "cure" for failure to appear at the show cause hearing. To extent that case was dismissed due to bookkeeping error by Debtor's attorney, error must be attributable to Debtor's for purpose of determining whether mistake was excusable. Lawyer errors amounting to action or inaction that leads to successful malpractice suits do not qualify as "mistake" or "excusable neglect". Debtor's attorney did not check to see whether filing fee had been paid. Had attorney done so, attorney would have known that filing fee had not been paid and that Debtors were required to intentional cause hearing. Failure of Debtor's attorney to make quick and easy check is neglect that is not excusable.

25.67 By Court *Sua Sponte*

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

25.68 Defect in Notice

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.

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.

In re Hoskins, Case No. 08-62613 (Bankr. E.D. Mi. 2009) – Order Converting Case to Chapter Thirteen vacated. Debtor filed Notice of Motion but failed to file Certificate of Service evidencing timely notice on all creditors and parties in interest.

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

25.69 Rule 60(a) - Clerical Error

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.

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.

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.

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.

In re Merkl, Case No. 06-48377 (Bankr. E.D. Mi. 2008) - Order Granting Relief From Stay vacated pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(a) where order was entered as a result of clerical error. Debtor filed response to Motion for Relief but clerk failed to enter response into docket in timely manner, resulting in Order Granting Relief From Stay by default.

In re Eatmon, Case No. 07-65731 (Bankr. E.D. Mi. 2008) - Application for Attorney Fees erroneously filed in wrong case and Order erroneously entered in that case. Order contained wrong case number and was signed by Judge not assigned to that case. Order Awarding Attorney Fees vacated pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024 as entered through clerical error.

Americredit Financial Services, Inc. v. Burgess, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) – Order dismissing adversary case entered in error and would be set aside. Clerk inadvertently issued two separate notices of initial scheduling conference. Court’s dismissal for failure of plaintiff to appear for the first of those scheduling conferences was result of error of Court.

In re Vogel, Case No. 08-60317 (Bankr. E.D. Mi. 2009) - Order granting relief from stay entered after case had been closed without discharge would be vacated. Case had already been closed when Motion for Relief filed but creditor had not filed Motion to Reopen Case. Order Granting Relief entered in error sufficient to warrant relief under Rule 60.

25.70 Rule 60(b)(1) - Mistake, Inadvertence, Surprise or Excusable Neglect

Zellers v. DiPaolo, 2019 WL 4896939 (Bankr. N.D. Ohio 2019) – Rule 60(b)(1) allows Court to set aside Order that results from mistake, inadvertence, surprise or excusable neglect on Motion brought within one year of entry of Order. Rule is not intended to give party second chance to present new evidence or offer proof. However, Court’s grant of summary judgment at very early stage of case, fact that summary judgment was based on different theory that the one advanced in Complaint (although Court had afforded parties opportunity respond to new theory and Defendant did not do so), fact that Defendant proceeded pro se, and limited record presented basis to set aside default. Setting aside judgment would not prejudice Plaintiff as Plaintiff retained full right to prosecute case and setting aside judgment will allow Defendant to present evidence as to defenses. Court acted prematurely by granting summary judgment based solely on complaint and amended answer.

Little v. Delaware Steel Company of Pennsylvania, 2019 WL 2273641 (Bankr. W.D. Ky. 2019) – Rule 55 Allows Court, for cause, to set aside entry of default. Rule 60 (B) allows Court to set aside final judgment after default. Factors to be considered are whether culpable conduct of defendant led to default; whether defendant has meritorious defense; and whether plaintiff would be prejudiced. Culpability is determined based on mistaken, inadvertence, surprise or excusable neglect. Whether neglect is “excusable” is equitable determination taking into account all relevant circumstances. Defenses “meritorious” if there is some possibility that the outcome would be contrary to result achieved by default and if defense is legally sufficient, regardless of likelihood of success, defense will be considered meritorious. “Prejudice” requires more than mere delay such as loss of evidence or discovery difficulties. Defendant’s failure to timely respond to complaint was neglectful act rather than intentional act. Defendant’s actions and not timely respond or excusable where both parties were negotiating in good faith and actively working towards resolution of case and defendant was reasonably led to believe that plaintiff would not move for default judgment absent some indication that settlement discussions had ended. Plaintiff did not respond to defendant’s counterproposal but instead filed motion for default judgment with no notice or warning to defendant and less than two months after deadline for initial response to complaint. While plaintiff was under no legal obligation to notify defendant of need to file answer, defendant understandably believed that it would have received some sort of signal from plaintiff. Defendant’s assertion of new value in form of goods and services received after payment of pre-petition transfers, and defendant’s assertion of “ordinary course of business” if successful, would reduce or eliminate exposure on preference claims. Delay in filing answer was less than two months; case primarily relied on documentation already in parties possession; and there was no showing that setting aside default would prejudice plaintiff.

McDermott v. Mayes, Case No. 18-4401 (Bankr. E.D. Mi. 2019) – Rule 60(b)(1) allows Court to grant relief from final judgment based on mistake, inadvertence, surprise or excusable neglect. In determining whether to set aside default judgment, Court considers whether Debtor’s culpable conduct led to default; whether Debtor has meritorious defense; and whether moving party will be prejudice. Debtor must demonstrate that default was product of mistake, inadvertence, surprise or excusable neglect before Court will turn to issues of meritorious defense and prejudice. Motion for relief from default denied where Debtor’s conduct led to entry of default. Debtor made no effort to answer complaint or otherwise advanced litigation, amounting to deliberate disregard of proceedings. Debtor’s alleged inability to afford attorney does not alter Debtor’s responsibility to appear and defend. Debtor had adequate notice of action but did not appear through counsel were on her own behalf. Absent showing of excusable neglect, motion to set aside default without need to consider either meritorious defense or prejudice.

Wamer Properties, LLC v. Taylor, 2019 WL 1013315 (E.D. Mi. 2019) - Relief from Order based on “mistake” or “excusable neglect” requires Court to make equitable determination based on all relevant circumstances including danger of prejudice to Debtor, length of delay and potential impact on proceedings, reason for delay including whether it was within reasonable control of moving party, and whether moving party acted in good faith. Creditor’s filing of proof of claim which erroneously listed the debt is \$10,210.85 rather than total unpaid amount of \$55,000 did not constitute “mistake” or “excusable neglect”. Granting creditor relief would have significant prejudicial impact on Debtor who waived right to pursue causes of action against creditor for violation of stay; attempt to amend proof of claim one year after filing of applicable proposed claim and entry of Confirmation Order amounted to extreme delay; granting relief would have monumental effect on judicial proceedings that had terminated one year earlier; and reason asserted for need to amend claim was completely within control of creditor for which creditor must be held accountable. Confirmed Plan controlled amount owed to secured creditor where prior to confirmation of Plan, creditor filed proof of claim for arrearages owed on land contract but Order Confirming Plan provided that creditor’s claim would be allowed in amount stated on proof of claim to be paid “in accordance with duly filed and allowable proof of claim”. Confirmation Order further indicated that Debtor waived claims against creditor for violations of automatic stay. Order Confirming Plan is binding on Debtor and creditor. Court did not re-write land contract but merely memorialized what parties bargained for and agreed to regarding amount owed by Debtor and violations of stay by creditor. Creditor’s attempt to amend proof of claim to increase amount owed was untimely where amended claim was not filed until more than one year after initial proof of claim was filed and almost 1 year after Order Confirming Plan was entered. Creditor does not have right to amend proof of claim after Order Confirming Plan has been entered and allowing creditor to do so would result in unfair prejudice to holders of unsecured claims.

In re Haggerty, 2019 WL 169198 (Bankr. W.D. Mi. 2019) – Debtor could not prevail on argument of “mutual mistake” as request to reconsider claim filed more than one year after entry of order allowing claim in violation of Rule 60(b)(5); and there was no evidence that creditor was mistaken about whether his claim would be paid under Chapter 13 as required by settlement agreement and Court order. Motion effectively asked Court to edit settlement of confirmation objection to excise portions that Debtor now regrets, which does not constitute basis for reconsideration of claim under Section 502.

White v. Johnson, 2018 WL 6167891 (E.D. Mi. 2018) - Setting aside default judgment is within discretion of Bankruptcy Court and will not be reversed absent definite and firm conviction that Bankruptcy Court committed clear error of judgment such as application of incorrect legal standard, misapplication of legal standard, or reliance on clearly erroneous findings of fact. Rule 60(b)(1) allows Court to set aside default judgment on grounds of mistake, inadvertence, surprise or excusable neglect. If moving party can demonstrate mistake, inadvertence, surprise or excusable neglect, Court will then consider whether non-defaulted party would be prejudiced; whether defaulted party has meritorious defense; and whether culpable conduct of defaulted party led to default. Debtor did not show mistake, inadvertence, surprise or excusable neglect where Debtor was served with complaint in adversary proceeding, engaged in settlement negotiations, received motion for default judgment and received copy of default judgment. All pleadings were mailed to address of record with Bankruptcy Court. Debtor has obligation to supply Bankruptcy Court with change of address under Rule 4002(5). Debtor’s culpable conduct in failing to keep Court apprised of Debtor’s actual address directly led to entry of default judgment constituting culpable conduct precluding relief under Rule 60(b)(1). Rule 60(b)(6) allows Court to set aside default judgment for any other reason that justifies relief, but applies only in exceptional and extraordinary circumstances. Debtor’s motion to set aside default judgment did not make any showing of exceptional circumstances where defendant was properly served with complaint it chose not to respond until after judgment had entered and creditor begin collection proceedings.

In re Bonfiglio, 2018 WL 5295879 (6th Cir. BAP 2018) - Relief under Rule 60(b)(1) requires Court to consider whether mistake was result of neglect that is excusable. If party seeking relief sustains burden of excusable neglect, then Court will consider prejudice opposing party and whether claim or defense is meritorious. Court does not need to consider prejudice or meritorious claim unless moving party first establishes excusable neglect. Out-and-out lawyer blunders, strategic miscalculations or misinterpretations of law do not qualify as “mistake” or “excusable neglect”. Creditor’s Failure to Respond to Motion to Avoid Lien did not constitute excusable neglect. Although parties were engaged in negotiations regarding valuation of property, creditor’s assumption that matter would be resolved or that Court would set hearing did not excuse party from filing response to Motion, or Seeking Extension of Time to Respond to Motion, by deadline specified by Court. Creditor knew by deadline for filing response that matter had not been resolved, no agreed order had been submitted, no hearing had been scheduled and no request for extension of time had been filed. Creditor’s lack of response was a strategic misjudgment or blunder that does not amount to excusable neglect.

In re Bennett, 2018 WL 4677438 (Bankr. E.D. Mi. 2018) – Section 502 (j) allows Court to reconsider order for “cause”. “Cause” generally requires showing sufficient for purposes of reconsideration under Rule 59 and Rule 60. Creditor’s claim disallowed where creditor did not file response to objection but instead filed amended claim which fully addressed issues raised in initial objection. Amended claim is not “response” to objection to claim notwithstanding that creditor in good faith intended amended claim to give Debtors precisely what Debtors said in original objection was missing from original proof of claim. Creditor’s lack of response did not constitute “mistake” under Rule 60(b)(1) as mistake in interpreting legal procedure is not “mistake” for purposes of Rule 60(b)(1).

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.

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.

In re Smallwood, 2017 WL 10526143 (Bankr. S.D. Ohio 2017) – “Mistake, inadvertence, surprise, or excusable neglect “is intended to provide relief where party has made excusable mistake or attorney has acted without authority; or judge has made substantive mistake of law or fact. Debtor’s alleged “mistake” by trusting that employer would make payments to Chapter 13 Trustee be a payroll deduction order is not type of mistake Rule 60(b)(1) was intended to address. Rule 60(b)(1) does not extend to actions of individuals or entities who are not parties.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.

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.

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.

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) – Excusable neglect requires that the judgment be obtained based on party’s neglect which is excusable under the circumstances. Defendant’s Motion denied where neglect was the fault of Defendant, based on Defendant’s fault in not responding to properly filed and noticed Motion for Summary Judgment. Defendant’s erroneous assumption that summary judgment would not be entered as long as parties were engaged in settlement negotiations lacked any basis in law and could not support setting aside judgment.

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Motion for reconsideration of Order remanding cases to State Court did not state grounds under Rule 60(b)(1). Motion alleged that State Courts “have no respect for the statutes or constitution” and rule “in a rogue fashion”. However, Plaintiff did not present any evidence to support the claim and did not point to any specific mistake of law or clear error of judgment in the Order for Remand.

In re Smith, 467 BR 122 (Bankr. W.D. Mi. 2012) – Motion to Set Aside Discharge Order for purposes of allowing Debtor to file reaffirmation agreement did not demonstrate mistake or excusable neglect. Debtor’s statement of intentions filed at commencement of case indicated intent to reaffirm mortgage debt. Debtors misunderstanding of deadlines within which to accomplish reaffirmation agreement was not excusable neglect.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(1) allows relief from judgment or order that is the result of mistake, inadvertence, surprise or excusable neglect. Inquiry is essentially equitable one, taking into account all relevant circumstances, including danger of prejudice, length of delay, impact on proceedings, reason or the delay, whether delay was within reasonable control of moving party, and whether moving party acted in good faith. Party seeking relief must demonstrate either (1) that the party made an excusable litigation mistake or that the attorney in the litigation acted without authority; or (2) that the judge made a substantive mistake of law or error of fact in the final judgment or order. Court will consider (1) whether the party seeking relief is culpable; (2) whether opposing party would be prejudiced; and (3) whether party seeking relief has meritorious defense. Party’s conduct is “culpable” where it displays either an intent to thwart judicial proceedings or a reckless disregard for effect of conduct on proceedings. Rule is not designed to relieve counsel of consequences of decisions deliberately made, and clients are generally held accountable for acts and omissions of their attorneys. Motion to set aside order denied. Debtor, through its managing member, entered into settlement agreement that required Debtor to transfer property to lender. Movant, a non-managing member, was unaware of bankruptcy filing or settlement until after order entered. Although movant was not culpable, lender would be prejudiced if order was set aside, property was not transferred to lender for less than adequate value, movant failed to demonstrate any meritorious claim, and though managing member lacked authority to unilateral file bankruptcy petition, there was no excusable neglect by managing member in signing quitclaim deed or by Debtor’s attorney in preparing and filing bankruptcy petition.

25.71 Rule 60(b)(2) - Newly Discovered Evidence

Walker v. RDR Real Estate, 2018 WL 1341649 (6th Cir. 2018) – Newly discovered evidence is evidence that was not 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.

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.

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.

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.

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.

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.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – To set aside order based on newly discovered evidence, movant must demonstrate that it exercised due diligence in obtaining information and that the evidence is material and controlling and clearly would have produced a different result had the information been presented prior to entry of the order. Evidence must not be merely cumulative or impeaching. Although movant, a non-managing member of Debtor, was not aware of bankruptcy filing or settlement agreement that called for transfer of property to lender and, had non-managing member known of these events he would not have agreed to these actions, his lack of knowledge was due in part to his own express consent and implied acquiescence for more than a decade during which the managing member was solely responsible for Debtor’s operations and management without input or assistance from non-managing member, and managing member was, for all intents and purposes, in full control of business operations of Debtor.

In re Grady, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Motion for Rehearing based on newly discovered evidence must demonstrate that (1) the new evidence was not discovered until after judgment and that movant was excusably ignorant of the facts at the time of trial despite due diligence; (2) the evidence discovered must be of a nature that would probably change the outcome of the case; and (3) the evidence must not be merely cumulative or impeaching. Debtor did not exercise due diligence to obtain the “newly discovered” documents where Debtor did not make any formal discovery requests in an effort to obtain the documents prior to the evidentiary hearing and failed to request an adjournment of the evidentiary hearing to allow the documents to be obtained once their existence was disclosed at the hearing. Party’s lack of diligence in conducting discovery insufficient grounds for a new trial.

25.72 Rule 60(b)(3) - Fraud, Misrepresentation or Misconduct

In re Smith, 2019 WL 2406940 (Bankr. N.D. Ohio 2019) - Debtor’s bad conduct may warrant loss of right to voluntarily dismiss. Section 1307 not meant or intended to vitiate courts inherent duty to guard against jurisdictional abuse or misuse and manipulation of bankruptcy process. Debtor must not be allowed unhampered right to file case, gain benefit of stay, then dismiss when opportune, where conduct evidences pattern of abuse. Courts need to maintain integrity of bankruptcy system and prevent abuse outweighs Debtors absolute right to dismiss. Court would grant lender’s motion to set aside voluntary dismissal under rule 60(b)(3) where record indicated that Debtor committed deliberate act which adversely impacted fairness of legal proceeding. Debtor filed the case to interrupt Sheriff sale with no intent to prosecute case. Debtor’s residence had been subject to foreclosure suit for 14 years; lender obtained foreclosure judgment in state Court in 2007; Debtor engaged in repeated bankruptcy filings to stop multiple foreclosure sales; Debtor’s most recent bankruptcy case filed in 2017 one day prior to scheduled foreclosure sale; most recently bankruptcy case stopped sale

scheduled for same day. Timing of bankruptcy filings indicated Debtor used bankruptcy filings merely to stop foreclosure sales. Debtor's multiple bankruptcy cases were all dismissed prior confirmation. Debtor paid a total to Chapter 13 Trustee and all prior cases of only \$500 which was refunded to Debtor at dismissal. No creditor has benefited from any of the filings; most recent case was only case where Debtor filed schedules and Plan; and Debtor's ability to confirm a Plan was unlikely where Debtor had monthly net income of \$3800 and a mortgage arrearage in excess of \$693,000. Reinstatement would be for specific, limited purpose to grant creditor in rem relief to which creditor was legally entitled to preclude further stays of foreclosure sales in event Debtor re-files bankruptcy in future.

G&H Custom Homes, LLC v. Carter, 2019 WL 1878030 (Bankr. E.D. Mi. 2019) – Rule 60(b)(3) allows Court to reopen adversary proceeding and set aside final judgment where judgment is based on fraud, misrepresentation or misconduct of opposing party. Plaintiff was unlicensed general contractor. Under state law, unlicensed contractor is prohibited from engaging in business and prohibited from bringing or maintaining action for collection of compensation or placing liens. Plaintiff's complaint sought payment for compensation which was plainly unlawful under state law. Plaintiff sought judgment to except debt from discharge which would not be precluded by state law. However, adversary proceeding also sought entry of money judgment. Plaintiff engaged in fraud by knowingly misrepresenting material fact or concealing material fact by deliberately misrepresenting to Debtor the status of plaintiff's license and obtained judgment by concealing the status of plaintiff's license and by testifying at Rule 60 motion hearing that plaintiff was licensed when record indicated that plaintiff was not licensed company.

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.

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).

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.

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.

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.

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".

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment of fact when there is a duty to disclose, done to induce another to act to his detriment. Defendant failed to demonstrate that summary judgment was product of fraud by opposing counsel, where Defendant alleged only that she believed that a party should not be permitted to file a summary judgment motion while settlement negotiations are on-going. Party may file summary judgment motion at any time, and Defendant did not point to any representation by Plaintiff that Plaintiff would withhold filing a motion while settlement negotiations are ongoing.

Prentice v. Residential Funding, LLC, 2013 WL 1663868 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment where disclosure is required, done to induce another to act. Plaintiff must present clear and convincing evidence of questionable behavior that affect fairness of litigation. Plaintiff's Motion for Reconsideration of Order for Remand alleged that Defendant's attorneys impaired Plaintiff's rights through fraud but failed to allege any substantive evidence that material facts were misrepresented or that the fairness of the proceedings was compromised.

Bellanti v. Land Escape Outdoor Maintenance, LLC, 2012 WL 3237933 (E.D. Mi. 2012) – Court properly reconsidered order dismissing adversary proceeding as sanction for failure to comply with order compelling discovery. Counsel filed notice of no response without informing court that between date of service of motion and date of certificate, opposing party paid the discovery sanctions. Conduct of counsel created a false impression

that creditor had totally failed to comply with prior Court Order, an impression on which bankruptcy court relied in granting extreme discovery sanction of dismissal. Fraud for purposes of Rule 60 includes deliberate omissions when response is required by law, or when non-moving party has volunteered information that would be misleading without omitted material.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(3) allows court to set aside order that is product of fraud, misrepresentation or misconduct. Actions cannot be unintentional. Moving party must show that adverse party committed deliberate act that adversely affected fairness of proceeding or prevented movant from fully and fairly litigating their case. Even if adverse party acted recklessly or deliberately, motion will be denied where misconduct had no prejudicial effect on movant. Agreed Order approving settlement agreement and transfer of property from Debtor to lender would be set aside on basis of Debtor's managing member's misrepresentations where managing member, in willful disregard of Debtor's Articles of Incorporation, filed bankruptcy petition without consent of non-member and expressly misrepresented to Debtor's attorney that non-managing member had knowledge of, and presumably consented to, bankruptcy filing, and in order to further these 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.

25.73 Rule 60(b)(3) - Fraud on the Court

Channel Outdoor, Inc. v. Thomas, 2018 WL 6990593 (Bankr. W.D. Tn. 2018) - Although "unclean hands" based on fraud on Court may be defense to nondischargeability action, fraud requires more than witness committing perjury and requires attack on basic function of judicial system. Debtor did not demonstrate that any alleged false testimony had any impact on outcome of case where state Court judgment was entered by default by virtue of which Debtor admitted all factual allegations in complaint regardless of truth of those allegations. While it may be possible to commit fraud against Court by lying in complaint, proper remedy was for Debtor to litigate in state Court and defend. By allowing default to be entered, Debtor admitted as true any lie that creditors may have told.

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".

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".

25.74 Rule 60(b)(4) – Void Judgment

Laying v. Rael, 2018 WL 6437559 (10th Cir. 2018) – Review of Order denying Motion for Reconsideration under Rule 60(b)(4) is reviewed *de novo*. Bankruptcy Court had authority to order property sold pursuant to terms of confirmed Chapter 11 Plan and did not act without jurisdiction in ordering sale or directing disbursement of proceeds.

In re Haggerty, 2019 WL 169198 (Bankr. W.D. Mi. 2019) – Court has wide discretion. Order is "void" where order results from jurisdictional defect, violation of due process or statutory or public policy basis for avoiding judgment. Court unequivocally had jurisdiction over objection to claim and parties had ample notice and opportunity to be heard, presenting no constitutional or jurisdictional defects.

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.

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 of 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.

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.

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.

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.

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.

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.

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.

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).

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.

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.

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.

In re Leigh, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to

set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. Rooker-Feldman resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under Rooker-Feldman to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and State Court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind State Court determinations of validity and amount of lien which is precluded by Rooker-Feldman.

PHH Mortgage Corp. v. Corzin, 2012 WL 4023440 (N.D. Ohio 2012) – Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction is so glaring as to constitute a total want of jurisdiction or where no arguable basis for jurisdiction existed. Complaint to avoid lien is core proceeding within scope of court jurisdiction. Although complaint did not specifically challenge validity of lien, complaint did ask for sale of property with the court to determine extent and priority of liens, and requiring any party claiming to hold a lien to file a response to the complaint.

25.75 Rule 60(b)(5) – Reversal of Earlier Judgment

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.

25.76 Rule 60(b)(5) – Inequitable Result From Prospective Application

In re Haggerty, 2019 WL 169198 (Bankr. W.D. Mi. 2019) – Section 502(j) allows Court to reconsider allowance or disallowance of claim for cause based on equities of case. Court generally applies rubric of Rule 60(b) over which Court has wide discretion. Order is “void” were order results from jurisdictional defect, violation of due process or statutory or public policy basis for avoiding judgment. Court unequivocally had jurisdiction over objection to claim and parties had ample notice and opportunity to be heard, presenting no constitutional or jurisdictional defects. Allowance or payment of creditors claim where personal liability had been discharged in prior Chapter 7 case did not impose personal liability on Debtor where Chapter 13 case is completely voluntary and nothing in Court Order purported to waive discharge or revive personal liability. Discharge of personal liability did not “satisfy” claim in subsequent case where parties in subsequent cases stipulated that claim would be allowed and paid as general unsecured claim. There were no extraordinary or exceptional circumstances which would warrant setting aside prior Order Allowing Claim. Debtor could not prevail on argument of “mutual mistake” as request to reconsider claim filed more than one year after entry of order allowing claim in violation of Rule 60(b)(5); and there was no evidence that creditor was mistaken about whether his claim would be paid under Chapter 13 as required by settlement agreement and Court order. Motion effectively asked Court to edit settlement of confirmation objection to excise portions that Debtor now regrets, which does not constitute basis for reconsideration of claim under Section 502.

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.

25.77 Rule 60(b)(5) - Equitable Relief

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.

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.

In re Cislo, 2012 WL 4325647 (Bankr. E.D. Mi. 2012) – Rule 60(b)(5) allows court to set aside judgment where applying the judgment prospectively is no longer equitable. Court denied Debtor’s Motion for Entry of Judgment which Court construed as Motion for Relief From Judgment Denying Discharge Under Section 727. Denial of Discharge was based on Debtor’s repeated failures to produce documentation to the Trustee, notwithstanding multiple orders and hearing compelling Debtor to produce documents and Debtor’s multiple failures to produce documents by deadlines established by court, even when given additional time to do so after expiration of deadlines. Court acknowledged Debtor’s family difficulties and difficulties with alcohol abuse and incarceration, and lauded Debtor’s attempts to put his life back on track, but equities as a whole did not warrant relief from order, particularly where many other Debtors facing the same hardships are able to comply with requests of Trustee and Orders of Court.

25.78 Rule 60(b)(6) - “Catchall” Provisions

In re Elder, 2019 WL 2428752 (Bankr. W.D. Ky. 2019) - Motion to Redeem must be served on creditor at proper address. Although Debtor’s petition and a matrix listed correct address for creditor, Motion to Redeem was served on address for creditor shown on certificate of title. Debtor not permitted to simply pick out its own value without documentation or support and have Order entered that was not served on creditor at address listed in petition. Order granting redemption vacated and creditor’s Objection to Motion to Redeem set for separate hearing.

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.

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.

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.

In re Smallwood, 2017 WL 10526143 (Bankr. S.D. Ohio 2017) – Motion to Re-open Chapter 13 Case warranted relief under Rule 60(b)(6). Rule 60(b)(6) authorizes Court to set aside order if Court determines, in sound discretion, that substantial justice would be served and that exceptional or extraordinary circumstances exist that are not covered by remaining provisions of Rule 60(b). Dismissal based on Chapter 13 Debtors missed Plan payments would constitute genuine injustice and impose undue hardship. Chapter 13 case was filed to allow Debtor to avoid foreclosure. Debtor missed payments because she spent \$500 and lost roughly 6 hours of work searching for guardianship for special needs son and incurred \$10,000 for funeral expenses for Debtor’s ex-husband. Although Debtor had no legal obligation to pay funeral expenses, Debtor had sincerely felt moral obligation to assist in child’s father’s funeral arrangements to ensure a decent burial. Debtor has increased income and can afford to make payments and plan can complete within 5 years of confirmation. Absent relief, Debtor and children would suffer extreme and undue hardship by losing home to foreclosure, and creditor retains full rights in event Debtor does not make payments and case is dismissed again.

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).

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).

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).

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.

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.

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).

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.

In re Ivens 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.

US v. Fullwood, 2013 WL 1774717 (E.D. Mi. 2013) –

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – “Catchall” provision of Rule 60(b)(6) applies only in extraordinary circumstances which are not addressed in any of the 5 preceding sections of Rule 60(b). Relief will be granted only in extreme circumstances where principals of equity mandate relief. Movant’s request to set aside agreed order dismissing bankruptcy and directing Debtor to transfer property alleged bases that fell within scope of four other subsections of rule, precluding relief under the catchall provision.

25.79 Failure to File Response

In re Juarez, Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion for Rehearing of Order Awarding Attorney Fees denied. Order entered after creditor failed to timely file a responsive pleading. Creditor’s response only indicated that creditor did not receive the Motion on the date the Motion was filed, but did not establish that the Motion was not received at all. Motion failed to offer any explanation for failure to respond. Motion also failed to evidence any meritorious defense where Motion for Reconsideration admitted that funds were garnished post-petition in violation of stay and failed to return funds to Debtor.

25.80 Time for Bringing Motion

In re Smallwood, 2017 WL 10526143 (Bankr. S.D. Ohio 2017) - Motion to Reopen Case under Rule 60(b) does not require that appeal be filed if time for doing so has not elapsed prior to filing motion. Moving party can either launch direct appeal or seek relief under Rule 60. Better practice is to bring matter to attention of trial Court to provide trial Court opportunity to correct mistakes and avoid expense and delay involved in appeal.

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.

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.

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.

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.

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.

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).

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).

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.

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.

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.

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.

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.

Haney v. Educational Credit Management Corp., 2012 WL 3683533 (E.D. Ky. 2012) – Motion for Reconsideration constitutes motion to alter or amend judgment that must be filed within 14 days of entry of the order to which the motion is directed. Motion filed 21 days after entry of order must be denied as untimely.

In re Gibson & Epps, LLC, 468 BR 279 (Bankr. E.D. Tn. 2012) – Motion must be brought within reasonable time following entry of order that is subject of motion. Reasonableness depends on length and circumstances of delay, prejudice to opposing party as a result of delay, and circumstances warranting relief. One year time limit is in addition to, and not in lieu of, requirement that relief be sought in reasonable time, and if reasonable time happens to be less than one year, then movant must seek relief by earlier date. Motion by non-managing member of Debtor filed in reasonable time. Although member first sought relief in State Court and filed Rule 60 motion only after losing in State Court, and motion was brought 16 months after order was entered which could be prejudicial to other party to agreed order who had, by time of motion, been in possession of Debtor’s property for 14 months, any prejudice was outweighed by fraud perpetrated by Debtor’s managing member who failed to notify non-managing member of bankruptcy filing, apparently intentionally prevented non-managing member from receiving notices from the court, and failed to notify movant of execution of settlement agreement with lender or execution of quit claim deed transferring property of Debtor.

In re Sharfnter, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor’s Motion for Reconsideration of Order Dismissing Case not filed within reasonable time. Debtor waited until six months after case was dismissed to file a Motion to Reopen Case, that was stricken by the Court as it was not signed. Debtor waited more than four additional months to file second Motion to Reopen Case. Motion to Reopen Case filed 11 months after dismissal is not filed within reasonable time.

Meoli v. Hoffman, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1) - (3) must be brought within one year of entry order from which relief is sought. Motion under Rule 60(b)(4) – (6) must be brought within reasonable time, not limited to one year.

In re Harvey Goldman & Co., Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Bankruptcy rule 9024-1 requires any motion for reconsideration to be filed within 14 days of entry of Order. Court lacked authority to extend deadline based on alleged “technical failure” with ECF that prevented filing of document. Court would extend time moving party waited until last minute to file Motion and then was prevented from doing so by ECF shutdown. Although Court had previously announced that ECF filing would be down for approximately 3 hours and yet moving party waited until 10:40 p.m. on last date to file Rule 59 motion and then attempted to do so only during the previously published shut down of ECF, the inaccessibility of the ECF system warranted extension to next business day for filing Motion.

In re Bailey, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Motion for Reconsideration was filed within 14 days after entry of the Exemption Order, the Court will consider the Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure (incorporated by Rule 9023 of the Federal Rules of Bankruptcy Procedure).

25.81 Conditional Grant of Motion

In re Real America, Inc., 2012 WL 1965667 (Bankr. N.D. Ohio 2012) – Rule 60 allows court to condition of grant of rehearing on “just terms”. Court Order granting rehearing required Debtor to reimburse creditor attorney fees and costs and rectifying monetary prejudice resulting from Debtor’s default in the terms of the agreed cash collateral order and lender’s costs for actions taken in reliance on order granting relief from stay based on Debtor’s default. Debtor required to pay stated amount by specific date, failing which the order granting stay would be re-imposed and motion for relief from that order would be finally denied.

25.82 Stay Pending Disposition

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

25.83 Limitations – *Rooker-Feldman*

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.

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.

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.

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.

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.

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.

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*.

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.

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,

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

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*.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Wheeler v. Federal National Mortgage Assn., 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court Order of eviction. Invalidation of foreclosure sale would directly attack validity of foreclosure, requiring court to reverse State Court judgment.

In re Sinta, 2013 WL 1946185 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court Order of eviction. Debtor filed Chapter 13 to prevent eviction following foreclosure sale and expiration of redemption. Bankruptcy Court granted stay relief and Debtor appealed. Court refused to stay eviction proceedings as Federal court lacks jurisdiction to review State Court eviction order.

In re Leigh, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. *Rooker-Feldman* resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under *Rooker-Feldman* to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed

in judicial proceeding and State Court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind State Court determinations of validity and amount of lien which is precluded by Rooker-Feldman.

Kellner v. Fifth Third Bank, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Rooker-Feldman prevents federal court from engaging in what amounts to appellate review of State Court proceedings. Rooker-Feldman precludes federal courts other than Supreme Court from considering whether State Court judgment was unconstitutional or violated federal law. However, Rooker-Feldman does not prevent federal court from considering matters that are independent of the State Court Order itself, even if federal claims deny legal conclusion previously reached by State Court. Further, doctrine does not apply to third parties not in privity with parties to State Court action. Bankruptcy Court not precluded by Rooker-Feldman from considering whether lender had properly perfected lien on property based on prior State Court final judgment of foreclosure. Trustee was asserting independent grounds under Section 544 to avoid lien which did not challenge correctness of State Court judgment that, as between parties, lien was valid and enforceable. Further, Trustee is not in privity with Debtor at State Court level.

Young v. Fannie Mae, 2013 WL 12842332 (N.D. Ohio 2013) – Rooker-Feldman doctrine precludes Federal review of State Court decisions even if challenges allege that State Court action was unconstitutional. Federal review of State Court judgments is limited to Supreme Court. Unsuccessful party in State Court case is precluded from seeking what amounts to appellate review of State Court Order by federal court. Cause of action based on alleged wrongful foreclosure precluded by Rooker-Feldman where State Court had entered final judgment foreclosing mortgage.

Sandweiss Law Center, PC v. Kozlowski, 2013 WL 396255 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court Orders. Plaintiff's actions against Debtor which alleged only that State Court divorce judgment improperly distributed marital assets sought merely to overturn State Court judgment in violation of *Rooker-Feldman*.

Rugiero v. Dinardo, 2012 WL 4800059 (6th Cir. 2012) – *Rooker-Feldman* precludes Federal court review of State Court Orders and judgments that are rendered prior to commencement of bankruptcy case. However, *Rooker-Feldman* does not preclude Federal Court review of efficacy and validity of State Court actions taken after commencement of bankruptcy case. Federal Court could exercise properly invoked concurrent jurisdiction to determine whether obligation is non-dischargeable Domestic Support Obligation notwithstanding State Court judgment entered post-petition that declared the obligation to be domestic support.

In re Kaid, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Federal Court is barred by Full Faith and Credit Act, 28 USC 1738, from looking behind or disregarding State Court judgment. Where State Court had already entered judgment in favor of creditor on guarantee of corporate obligation, Bankruptcy Court precluded from finding that creditor lacked standing to assert claim. Creditor had sold the note and mortgage but retained the guarantee, and then instituted litigation to collect on the guarantee and State Court entered judgment. *Rooker-Feldman* precluded Bankruptcy Court from reconsidering whether creditor had standing to enforce the guarantee or whether severance of guarantee from note and mortgage precluded enforcement by original creditor.

Assasepa v. JPMorgan Chase Bank, 2012 WL 88162 (S.D. Ohio 2012) – Rooker-Feldman doctrine stands for the proposition that parties who lose in State Court may not seek federal court review of the state-court proceedings. Rooker-Feldman does not preclude federal review if the plaintiff presents an independent claim even if predicate of federal claim denies legal conclusion that State Court has reached. If the source of the injury is the State Court judgment, then Rooker-Feldman precludes review. If the source of the injury is some other source, such as the actions of a third party, then plaintiff can maintain an independent cause of action. Plaintiff's complaint alleged violations of federal law including TILA and RESPA throughout the foreclosure process and that lender committed fraud by using "robo-signed" documents. Any injury plaintiff may have suffered is not the result of the foreclosure judgment itself, but of the processes and conduct throughout the loan and foreclosure process. Thus, actions may not be precluded by Rooker-Feldman.

Rugiero v. Dinardo, 2012 WL 4800059 (E.D. Mi. 2011) – Rooker-Feldman precludes Bankruptcy Court from reconsidering correctness of State Court judgment. State Court had concurrent jurisdiction to determine whether obligation owed to creditor was non-dischargeable domestic support obligation under exception to automatic stay. Rooker-Feldman precludes Bankruptcy Court from reconsidering or reviewing that conclusion.

In re Mayer, 41 BR 702 (E.D. Mi. 2011) – *Rooker-Feldman* is implicated when a plaintiff complains of being injured by a State Court decision. *Rooker-Feldman* is not implicated simply because a party attempts to litigate an issue in federal court that has already been litigated in State Court. Where a federal plaintiff presents some independent claim, even if that claim denies a legal conclusion that a State Court has reached in a case to which he was a party, *Rooker-Feldman* does not prevent Federal Court from asserting jurisdiction. Court will then look to state law to determine whether the defendant prevails under principles of preclusion. Action to avoid alleged preferential transfer of property, created when State Court imposed constructive trust, was not attack on validity of Final Judgment but only sought to determine effect of judgment in light of principals of bankruptcy law. Debtor's attack on provision of Divorce Judgment that purported to impress constructive trust was attack on prohibited by *Rooker-Feldman*. However, where Divorce Judgment was not clear as to whether specific property was subject to constructive trust, Bankruptcy Court can review matter to determine whether Divorce Judgment was sufficient to impose constructive trust.

Edwards v. Thornton, 2011 WL 134894 (6th Cir. 2011) – Action alleging violation of automatic stay violated *Rooker-Feldman*. Defendant transferred property pursuant to State Court Final Judgment. Court precluded from considering argument that underlying State Court judgment was void as Federal Court lacks subject matter jurisdiction to review validity of State Court judgment. Attack is not one on method used to enforce judgment, but on validity of judgment itself, which is matter which Federal Court cannot collaterally review.

Miller v. Deutsche Bank National Trust Co., 2011 WL 1807015 (10th Cir. BAP 2011) – Debtor prohibited from contesting lender's standing to enforce mortgage where issues had previously been addressed by State Court in proceeding to confirm non-judicial foreclosure sale.

Essek v. Vanderbilt Mortgage, Inc., 2011 WL 97716 (E.D. Ky. 2011) – *Rooker-Feldman* precludes District Court action for damages resulting from State Court foreclosure proceeding.

In re Bunting, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – *Rooker-Feldman* doctrine prohibits party losing in State Court from seeking what in substance would be appellate review of the State Court judgment in Federal Court based on the claim that the State Court judgment violates the loser's federal rights or claims based on alleged State Court errors in construing federal law or constitutional claims. State and federal claims need not be identical as long as the relief requested in federal court would effectively reverse the State Court decision or void its ruling. Bankruptcy

Court precluded from looking behind State Court divorce judgment that resulted from long and extensive trial proceedings and multiple appellate proceedings including determination of amounts owed by Debtor to ex-spouse. However, Court is not precluded for reviewing Debtor's claim of credits owed and offsets to the judgment amount using standards set under Rule 3001.

Willis v. Chase Home Finance, LLC., 2010 WL 3430712 (N.D. Ohio 2010) – *Rooker-Feldman* doctrine prohibits Federal Court from reviewing propriety of State Court judgment of foreclosure. Where federal relief can only be predicated upon a conviction that the State Court was wrong, action constitutes a prohibited appeal of the State Court judgment. *Rooker-Feldman* doctrine precludes a district court's jurisdiction where the claim is a specific grievance that the law was invalidly or unconstitutionally applied in plaintiff's particular case as opposed to a general constitutional challenge to the state law applied in the state action.

In re Perkins, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - *Rooker-Feldman* does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as restful of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit Debtor certain amounts, and failed to account for payments made by Debtor.

Jones v. Federal National Mortgage Association, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - *Rooker-Feldman* prohibits Federal Court review of the proceedings already conducted by lower tribunal to determine whether it reached its result in accordance with law and applies to interlocutory orders and judgments of lower State Courts. If the State Court decision is the source of the injury, the doctrine bars jurisdiction in Federal court. If, on the other hand, the plaintiff presents some independent claim, albeit one that denies a legal conclusion that a State Court has reached then Federal Court has jurisdiction subject to state law determination principles of preclusion. State Court denial of Motion to Dismiss based on alleged lack of standing does not preclude Federal Court from considering standing as State Court Order determined only that complaint stated cause of action and did not constitute final order on issue.

Williams v. Franklin Towers Homeowners Association, Inc., Case No. 08-55109 (9th Cir. 2010) - *Rooker-Feldman* prohibits Federal Court appellate review of State Court Order denying Motion to disqualify judge.

Madera v. Ameriquest Mortgage Co., 586 F.3d 228 (3d Cir. 2009) – *Rooker-Feldman* doctrine prevents Chapter 13 Debtor's action to rescind mortgage under TILA where State Court has already issued Judgment of Foreclosure. *Rooker-Feldman* prevents Federal Court for exercising appellate jurisdiction over State Court judgments. Rescission action effectively seeks finding that mortgage was invalid which would negate effect of foreclosure judgment in State Court. In foreclosing mortgage, State Court expressly or implicitly deemed mortgage valid.

Hunt v. LAJ, Inc., 2009 WL 2601921 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a "new" claim based on the treatment in the confirmed Plan. Creditor's action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.

Hamilton v. Herr, 540 F.3d 367 (6th Cir. 2008) - *Rooker-Feldman* doctrine prevents Federal Court from looking behind State Court judgment and acting as "super-appellate Court" for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, *Rooker-Feldman* does not preclude Bankruptcy Court from entering orders to enforce discharge. "State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court's discharge order." Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void *ab initio*. If the debt was not discharged pursuant to the bankruptcy Court's discharge order, then the state-Court judgment was not a modification of the discharge order and the *Rooker-Feldman* doctrine would bar federal-Court jurisdiction.

25.84 Limitations – Jurisdictional Priority

Silagy 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

25.85 Generally

In re McFadden, 477 BR 686 (Bankr. N.D. Ohio 2012) – Court has extremely limited authority with regard to 341 meetings. Meetings under § 341 are within the authority of the United States Trustee. Court cannot preside over or attend 341 meetings by statutory mandate. Meetings are administrative in nature, not adjudicatory. Purpose is to allow creditors and trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. Creditor's examination of Debtor is not unfettered. If Debtor believes that the questions are beyond the scope permitted, or unduly repetitious, Debtor may object and even refuse to answer, and chapter 7 panel trustee given time constraints in conducting 341 meetings.

25.86 Excusal of Attendance

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.

25.87 Compelling Attendance

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 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.

25.88 Use of Transcript in Later Proceedings

In re Avery, 594 B.R. 655 (Bankr. S.D. Miss. 2018). Transcript of Section 341 Meeting is not “deposition” that can be used as evidence in an adversary proceeding. First Meeting of Creditors is broad in nature and lacks safeguards and protections of the discovery rules. Any agreement between the parties to the use of the transcript was not evident from the record, and the court was unable to determine from the record whether use of the transcript would result in any prejudice to debtor.

I. Discrimination

25.89 Section 525

Ashmeade v. Citizens Bank, 2018 WL 3093963 (S.D.N.Y. 2018) – Section 525 prohibits employers from taking adverse employment action against Debtor “solely” because of bankruptcy filing. Minority of courts interpret “solely” as playing a significant role. Majority of courts interpret “solely” to mean there is no other factor beside plaintiff’s bankruptcy that contributed to employers discriminatory decision. Debtor stated cause of action where Debtor alleged that he experienced discriminatory practices and treatment, special considerations, investigations, confidential withholdings and subsequently unfounded penalty of termination solely because of bankruptcy filing. Debtor plausibly alleged that determination in one erroneous timesheet which occurred after confidential information into bankruptcy filing and at time when Debtor had no other disciplinary history or record of poor performance was “mere pretext”.

Edwards v. City of Ferguson, 2018 WL 6920374 (Bankr. E.D. Mo. 2018) – Refusal to reinstate license is not illegal discrimination under Section 525 where refusal to reinstate license is not “solely because she is a Debtor” where city had suspended license long before bankruptcy filing when Debtor refused to pay outstanding fines. Section 525 does not cure Debtors traffic violations and does not require city to reinstate driver’s license without payment of fines. City may violate stay if it takes additional action to collect such as attempting to enforce arrest warrant.

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

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.

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.

Ellis v. Dep’t of Homeland Security, 2013 WL 3480259 (Bankr. D. Colo. 2013) – Department of Homeland Security did not violate Section 525 by denying renewal of security clearance where “bad debt” threshold required DHS to determine whether security clearance should be revoked. Debtor can retain clearance by demonstrating that Debtor is in Chapter 13 and is performing under Plan. Delay in renewing clearance was not due solely to Chapter 13 filing, but resulted from Debtor’s failure to timely provide documentation to DHS showing that Debtor’s was performing under plan.

In re Mead, 2013 WL 64758 (Bankr. E.D.N.C. 2013) – IRS discriminated against Debtor when IRS refused to abide by pre-petition Offer in Compromise. Prior to commencement of bankruptcy, Debtor entered into OIC to repay liabilities in the reduced amount of \$4,000, to be paid in four quarterly installments. IRS accepted the offer and Debtor made one payment before filing bankruptcy. IRS filed claim in Debtor’s case for full tax liability and Debtor objected. IRS could not disregard OIC merely because Debtor filed bankruptcy, as IRS would not revoke OIC under similar circumstances for non-bankrupt taxpayer. Congress prohibited all discriminatory treatment based solely on bankruptcy filing, and that would include any effort by IRS to revoke OIC based on bankruptcy filing.

Myers v. Toojay’s Management Corp., 640 F.3d 1278 (11th Cir. 2011) – Bankruptcy Code’s antidiscrimination provision does not prohibit a private employer from denying employment to an individual on the ground that he is or has been in bankruptcy; although subsection (a) of the provision

expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, subsection (b), which applies to private employers, is conspicuously different, in that it forbids the private sector from discriminating against those persons who are already employees but says nothing about denying employment because of bankruptcy.

Burnett v. Stewart Title, Inc., 2011 WL 754152 (5th Cir. 2011) - Section 525(a) specifically prohibits denial of employment based on bankruptcy only with respect to governmental employers, private employer can refuse to hire solely based on Chapter 13 case.

Rea v. Federated Investors, 2010 WL 5094250 (3d Cir. 2010) – Antidiscrimination provision of Section 525 does not prohibit private employer from discriminating against prospective employee on basis of prior bankruptcy filing. Although Section 525(a) prohibits a governmental agency from denying employment based on bankruptcy, Section 525(b) which applies to private employers does not contain that provision. Section 525 only prohibits private employers from discriminating against Debtors who are already employed.

Davis v. Crumbley Backhoe Service, Case No. 09-16031 (11th Cir. 2010) – Section 525 does not apply to conduct that occurred prior to the commencement of the bankruptcy proceeding. Section 525(b), which prohibits discrimination in employment, applies only to “an individual who is or has been a Debtor” and does not apply to an individual who “will be” a Debtor at the time of the alleged discrimination. Debtor terminated from employment prior to filing bankruptcy has no cause of action against Employer under Section 525

In re Richard, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Section 525 applies only to governmental units. A governmental unit is generally limited to the United States; States; Commonwealths; Districts; Territories; municipalities; foreign states; or other foreign or domestic government. “Government” does not include any entity that owes its existence to state action such as the granting of a charter or license. Otherwise private entity can be “government” if it carries out some governmental function or if there is a significant entwinement with governmental policies, management and control. Merely receiving public money and being subject to governmental control is not enough. Inquiry is whether the private entity is performing traditional and important governmental functions and whether there is evidence of entwinement with governmental policies, management or control. Lender which is member of Farm Credit Association, an independent agency of the executive branch that serves US agricultural interests, is sufficiently entwined with the US Government policies, management and control qualifies as governmental unit. However, lender’s refusal to pay patronage dividend does not seriously affect Debtor’s livelihood or the “fresh start”, which is the measure for whether actions constitute discrimination within Section 525. Further, implementation of standard practices and procedures that apply to all customers generally do not constitute discrimination in violation of Section 525 as the decision does not single out Debtor for adverse treatment based on the discharge.

J. Consolidation

25.90 Authority to Substantively Consolidate Cases

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.

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.

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 Debtor’s property, and is accomplished thru the application of Section 542 regarding turnover and Section 502(j) regarding treatment of claims as dictated by equities of case. When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Section 105 is statutory grant of authority for the Court to exercise equitable remedies including substantive consolidation over non-Debtor parties. Bankruptcy Code creates an overriding federal interest in the equitable and efficient distribution of a Debtor’s property among its creditors which is consistent with purpose of substantive consolidation. Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Section 105 is statutory authority on which Court can substantively consolidate cases and includes ability to consolidate non-Debtor and Debtor entities. However, substantive consolidation is extraordinary remedy to be used sparingly, as doctrine expressly disregards legal separateness of otherwise legally distinct entities.

25.91 Standing to Request Substantive Consolidation

First State Bank of East Detroit v. Welsh, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Although Creditor lacked standing to seek substantive consolidation, Trustee’s later intervention in adversary proceeding and joinder in creditor’s request resolved standing issues.

In re Cyberco Holdings, Inc., 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Creditor lacks standing to seek substantive consolidation. Consolidation has its roots in Section 542 regarding turnover of property. Creditors do not have any direct right to seek relief under Section 542, as those powers are reserved to the estate. Even if Court could authorize derivative standing, Court would not do so where there was no evidence that Trustees had avoided pursuing whatever rights their respective estates would have had to take control of property of the estate.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

25.92 Grounds for Substantive Consolidation

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.

In re Newman, 2017 WL 2589318 (Bankr. E.D. Tn. 2017) – Creditor of only one joint Debtor is entitled to payment only from 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.

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.

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 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 Co-Debtor. 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.

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.

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.

First State Bank of East Detroit v. Welsh, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Complaint failed to state cause of action for substantive consolidation of Debtor with non-Debtor entities where complaint alleged only in conclusory terms that it was impossible segregate assets and liabilities of Debtor and the non-Debtor entities. Court would permit Trustee additional time to investigate and amend complaint if Trustee determined further prosecution of adversary complaint appeared warranted.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation requires a substantial identity between entities to be consolidated and that consolidation avoid some harm or produce some benefit. Benefit must "heavily" outweigh harm that would result from consolidation. Court will substantively consolidate non-Debtor entity with Debtor only where either: (i) 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 Debtor and the non-Debtor entity sought to be consolidated are so hopelessly scrambled and commingled that it is impossible to separate them and tell them apart thereby resulting in harm to all creditors. That two companies conduct joint board meetings or use consolidated financial statements is not sufficient to warrant substantive consolidation.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation is employed in cases where the interrelationships of 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.

25.93 Effect of Substantive Consolidation

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.

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.

In re Appalachian Fuels, LLC, 2013 WL 1694769 (6th Cir. BAP 2013) – Substantive consolidation is employed in cases where the interrelationships of Debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. In any consolidated case, there is implicit in the Court's decision to consolidate the conclusion that the practical necessity of consolidation to protect the possible realization of any recovery for the majority of the unsecured creditors far outweighs the prospective harm to any particular creditor.

In re Cyberco Holdings, Inc., 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

Simon v. ASIMCO Technologies, Inc., Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling assets and liabilities to produce common fund to satisfy creditors of consolidated entities. A cause of action for substantive consolidation is not the same as a cause of action to pierce a corporate veil, nor is it the same as a cause of action to determine whether, under state corporate law, there is a basis to find that two or more corporations are alter egos of one another.

Gold v. Winget, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities and claims of creditors against separate Debtors morph to claims against the consolidated survivor

25.94 Substantive Consolidation – Non-Debtor entities

Leslie v. Mihranian, 2019 WL 4252115 (9th Cir. 2019) – Party seeking to substantively consolidate Debtor with estates of various non-debtors must provide notice to all creditors of putative consolidated non-debtor. Substantive consolidation requires that either creditors deal with entities as single economic unit without relying on separate identity in extending creditor; or affairs of debtor and non-debtor entity are so entangled that consolidation would benefit all creditors. Aim of substantive consolidation is fairness to all creditors which requires notice to all creditors and opportunity participate so Court can determine whether consolidation is truly fair; and substantive consolidation affects substantive rights of creditor who should have opportunity to be heard. Notice to target non-debtor company is not sufficient because creditors must be given opportunity to demonstrate that creditor did not rely on debtor and non-debtor as single unit in making lending decisions.

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.

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) 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 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.

25.95 Procedural (Administrative) Consolidation

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 to 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.

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

25.96 Duty to Cooperate with Trustee

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.

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 Debtor of whether the information relates to exempt assets, whether the information relates to property of the estate and whether, in Debtors’ opinion, the information is interesting.

In re Neal, 424 BR 235 (Bankr. E.D. Mi. 2010) – Debtor has a duty to cooperate with the Trustee in the performance of Trustee’s duties. Debtor who occupied house that was property of the estate refused to cooperate with the Trustee in the marketing of the property. Court Ordered Debtor to vacate the property immediately to permit Trustee to market and sell the property.

25.97 Schedules and Statements

Swanigan v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Debtor seeking bankruptcy protection must file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of 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.

25.98 Change of Address

Conopoc, Inc. v. Sadeghi-a, 2019 WL 1282811 (Bankr. E.D. Mi. 2019) –Rule 4002 imposes on Debtor continuing duty to file notices of address change. Any alleged failure to receive timely notice was entirely Debtor’s own fault and is not excusable. Granting relief would interfere with Court’s ability to expediently resolve summary judgment motion and would result in prejudice to plaintiff were case was scheduled for trial in less than one month. Motion also did not assert any meritorious defense even if Motion had been granted.

White v. Johnson, 2018 WL 6167891 (E.D. Mi. 2018) - Setting aside default judgment is within discretion of Bankruptcy Court and will not be reversed absent definite and firm conviction that Bankruptcy Court committed clear error of judgment such as application of incorrect legal standard, misapplication of legal standard, or reliance on clearly erroneous findings of fact. Rule 60(b)(1) allows Court to set aside default judgment on grounds of mistake, inadvertence, surprise or excusable neglect. If moving party can demonstrate mistake, inadvertence, surprise or excusable neglect, Court will then consider whether non-defaulted party would be prejudiced; whether defaulted party has meritorious defense; and whether culpable conduct of defaulted party led to default. Debtor did not show mistake, inadvertence, surprise or excusable neglect where Debtor was served with complaint in adversary proceeding, engaged in settlement negotiations, received motion for default judgment and received copy of default judgment. All pleadings were mailed to address of record with Bankruptcy Court. Debtor has obligation to supply Bankruptcy Court with change of address under Rule 4002(5). Debtor’s culpable conduct in failing to keep Court apprised of Debtor’s actual address directly led to entry of default judgment constituting culpable conduct precluding relief under Rule 60(b)(1). Rule 60(b)(6) allows Court to set aside default judgment for any other reason that justifies relief, but applies only in exceptional and extraordinary circumstances. Debtor’s motion to set aside default judgment did not make any showing of exceptional circumstances where defendant was properly served with complaint it chose not to respond until after judgment had entered and creditor begin collection proceedings.

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 “knew” 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.

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.

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.

25.99 Incompetent Debtor - Appointment of “Next Friend”

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.

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 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

25.100 Chapter 7 Proceeding

In re Rutledge, Case No. 10-61031 (Bankr. E.D. Mi. 2010) – Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court’s subject matter jurisdiction or statutory authority to approve or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

In re Spanski, Case No. 10-52452 (Bankr. E.D. Mi. 2010) - Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court’s subject matter jurisdiction or statutory authority to approve or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

25.101 Chapter 11 Proceeding

In re Shamoun, Case No. 10-66172 (Bankr. E.D. Mi. 2011) – Debtor’s Motion for Court to Abstain from Approving or Disapproving Mortgage Modification denied. Any mortgage loan modification would necessarily require modification of the Plan under Section 1127(e) which requires Court approval.

25.102 Chapter 13 Proceeding

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.

In re Wofford, 2011 WL 2200611 (Bankr. W.D. Wis. 2011) – Loan modification agreement negotiated by Chapter 13 Debtors and lender whose claim was secured solely by interest in real property that was Debtors' home did not have to be approved by bankruptcy court in order to be effective, and bankruptcy court would not grant lender's request for advisory opinion on propriety of modification solely to provide comfort to lender.

In re Alva, Case No. 10-58152 (Bankr. E.D. Mi. 2010) – Motion to approve loan modification is in essence a request for a plan modification as Motion sought to change treatment of Class 2 and Class 4 creditor. Relief must be requested in from of Plan Modification.

In re Kipling, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – Motion to approve loan modification is in essence a request for a plan modification. Court would deny Motion where record was incomplete and proposed modification did not appear to advance purposes of Chapter 13.

25.103 Breach of Contract

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Williams v. Federal National Mortgage Ass’n, 2013 WL 5445883 (E.D. MI. 2013) – Debtor could not maintain action for breach of agreement to modify loan where Debtor admittedly did not make trial modification payments as required and otherwise never complied with conditions of loan modification proposal.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Trial Loan Modification is not binding contract to enter into permanent loan modification. Trial modification contains conditions that, if met, trigger formation of contract to permanently modify loan. Failure to fulfill conditions excuses lender from any obligation to enter into permanent modification. Plaintiff’s complaint did not allege that plaintiff had met all conditions and court would not infer that plaintiff met necessary conditions. Statement that plaintiff was told by defendant that he would receive a modification was not sufficient to sustain cause of action where terms of Trial modification had not been fulfilled and lender had no obligation to proceed with permanent modification.

25.104 Breach of Good Faith and Fair Dealing

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.

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.

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.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Implied covenant does not create new rights or obligations and cannot be used to circumvent or alter terms of the agreement. Bank's failure to offer loan modification is not breach of duty of good faith or fair dealing where Bank was under no duty to offer a loan modification or to assist plaintiff in avoiding foreclosure. Loan documents clearly laid out obligations regarding timely mortgage payments and bank's rights to proceed with foreclosure. Bank's actions that enforced rights afforded under the contract could not lack good faith or breach any duty of fair dealing.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Where court has already determined that there was no independent, valid contract between parties, plaintiff could not maintain cause of action for breach of implied covenant.

25.105 Negligence

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.

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.

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.

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.

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.

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.

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.

25.106 Fraud

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – To maintain action for fraud, complaint must allege that defendant made false statements of fact on which plaintiff relied. Complaint failed to state cause of action for fraud in connection with unsuccessful loan modification where complaint alleged that Defendant offered a loan modification that Plaintiff rejected. There was no evidence that defendant misrepresented the availability of a loan modification and defendant offered a loan modification that plaintiff rejected because of the specific terms of the modification.

Pugh v. Bank of America, 2013 WL 3349649 (W.D. Tn. 2013) – Elements of a fraud claim are (1) an intentional misrepresentation of material fact; (2) the misrepresentation was made ‘knowingly,’ ‘without belief in its truth,’ or ‘recklessly without regard to its truth or falsity’; (3) the plaintiff reasonably relied on the misrepresentation and suffered damages; and (4) the misrepresentation relates to an existing or past fact, or a promise of future action without the present intention to carry out the promise. Allegations that lender made inconsistent statements regarding whether plaintiffs were eligible for a loan modification do not rise to level of intentional misstatements. Fact that information is inconsistent or inaccurate, without more, does not speak with sufficient particularity and with a sufficient factual basis to support an inference that the information was conveyed with intent to defraud.

Nachar v. PNC Bank, NA, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Trial loan modification is not contract or promise by lender for permanent loan modification. Lender's promise to review request for loan modification does not create any enforceable obligation or basis for claim of promissory estoppel.

Edwards v. JP Morgan Chase Bank, NA, 2013 WL 1632560 (E.D. Mi. 2013) – Action for fraudulent or negligent misrepresentation requires that Defendant made a material representation, (2) that was false, (3) that Defendant knew was false, or that was made recklessly, without any knowledge of its truth, (4) that Defendant made it with the intention that Plaintiff would act upon it, and (5) the Plaintiff acted in reliance upon it, and (6) suffered damages. Lender did not make fraudulent statements when lender indicated that it would proceed with loan modification and provided documents to Plaintiff, but plaintiff would not agree to terms proposed.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Fraud requires (1) intentional misrepresentation of material fact; (2) knowledge of falsity or made with reckless disregard for truth; (3) reasonable reliance on the representation; and (4) misrepresentation involves a past or existing fact. Promise of future action is not fraudulent unless made with no intent to carry out promise at time promise made. However, inconsistent and contradictory statements by lender could amount to fraud. Lender made contradictory statements regarding a possible loan modification. One line of communication discussed eligibility for a modification, requested more information to continue moving the process forward, stated that the loan had been sent to underwriting for modification, and recognized that 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 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 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.

25.107 Tortious Interference with Contractual Relationship

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.

25.108 Troubled Asset Relief Program (TARP)

Reeder v. BSI Financial Services, Inc., 2018 WL 6737425 (W.D. Tn. 2018) – Bank's acceptance of TARP funds is no defense to collection action. TARP does not create express or implied private right of action against non-governmental entities.

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.

25.109 Michigan Hardest Hit Program

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.

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.

25.110 Homeowners Assistance Mortgage Program (HAMP)

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Starkey v. JPMorgan Chase Bank, 2013 WL 6669268 (S.D. Ohio 2013) – HAMP does not create private right of action, expressly rejecting *Corvello*.

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.

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.

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – HAMP does not provide for a private right of action based on the lender's failure to offer a loan modification that is acceptable to the borrower. Plaintiff also failed to establish any contractual agreement between lender and plaintiff to modify the loan, where lender extended loan modification to Plaintiff but Plaintiff declined to accept the proffered modification.

Yates v. U.S. Bank, N.A., 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer's determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer's denial of a loan modification.

In re Yarbrough, 2013 WL 1500583 (Bankr. S.D. Ohio 2013) – While Court may lack jurisdiction to require lender to enter into HAMP loan modification, Court has jurisdiction to enter order compelling Creditor to file a report that details all actions including dates, which have been taken to process Debtor's loan modification requests; to state whether the lender recommended approval of the loan modification; if the lender did not recommend approval, to state the factual, regulatory and legal basis for denial and including copies of all relevant documents; and if the loan modification has been approved the terms of the loan modification offered to Debtor. Court reserved jurisdiction to enforce terms of Order by contempt.

CitiMortgage, Inc. v. Crawford, 2013 WL 1225387 (S.D. Ohio 2013) – Offer of trial loan modification is not contractual agreement for permanent loan modification. Trial loan modification documents state that the permanent modification becomes effective only when both parties sign final loan modification documents. Lender's acceptance of payments during trial loan period does not waive requirement for completed loan modification process or execution of final documents. HAMP loan modification is not enforceable under concept of promissory estoppel. Estoppel requires a clear and unambiguous promise; reliance on that promise; reliance that was reasonable and foreseeable; and damages caused by that reliance. Trial Loan Modification program did not have clear and unambiguous promise to modify loan where Agreement contained a number of conditions that had to occur before borrower would be considered for permanent loan modification. At best, Trial Loan Modification indicated that lender would consider a loan modification if borrowers fulfilled all obligations and that any modification would not be valid until signed by both parties. Borrowers could not have reasonably relied on any supposed promise where much of the language of the Trial Loan program is conditional.

Jenkins v. JPMorgan Chase Bank, NA, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Offer of Trial Loan Modification under HAMP is not an offer for a permanent loan modification at end of trial period. Lender rejected permanent loan modification as Debtors did not qualify for HAMP loan modification as of the end of the trial period. Plaintiff did not allege that Lender's conclusion that Debtors were not eligible was incorrect or that creditor otherwise rejected the loan modification on some improper basis. However, Creditor may have breached terms of Trial Loan Modification by continuing to send notices of foreclosure although terms of Trial Loan Modification stated that lender would suspend foreclosure proceedings as long as Debtors made the required trial payments. Lender continued the foreclosure process including commencement of foreclosure action prior to advising Debtors that Debtors were not eligible for a permanent loan modification.

Adams v. Mortgage Electronic Registration Systems, Inc., 2012 WL 95332 (E.D. Mi. 2012) – There is no private right of action under HAMP.

Lessl v. CitiMortgage, Inc., 2011 WL 4351673 (E.D. Mi. 2011) – Owner had no cause of action under either HAMP or Section 600.3205c where mortgage holder offered owner a loan modification which owner declined. Mortgage holder is not required to reduce principal balance to amount shown in appraisal, particularly where Owner contends that property had significantly higher value. Although loan modification at value somewhat higher than the appraised amount may have been "shrewd", lender was not unreasonable in using a higher principal value than owner would accept. Further, HAMP discussions did not give rise to cause of action for promissory estoppel or misrepresentation. Statements regarding future conduct cannot 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.

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.

25.111 National Mortgage Settlement

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.

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.

25.112 National Housing Act (NHA)

Shirk v. JPMorgan Chase Bank, N.A., (Bankr. S.D. Ohio 2010) – National Housing Act and its attending regulations do not expressly or implicitly create private right of action to mortgagors for mortgagee's noncompliance with the NHA or NHA regulations.

25.113 Home Owners Loan Act

Tolliver v. Bank of America, 464 BR 720 (Bankr. E.D. Ky. 2012) – Home Owners Loan Act ("HOLA") applies only to loans which are held by federally insured depository institutions. Although originating lender was a financially chartered savings and loan, the loan had been subsequently sold and assigned to an entity which is not federally insured, particularly where factual allegations supporting complaint were directed solely to ask of the defendant in adding on allegedly unreasonable additional fees, costs and charges that were unrelated to any act of the originating savings and loan.

25.114 Home Ownership Equity Protection Act (HOEPA)

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.\

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Home Ownership and Equity Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date.

Famatiga v. Mortgage Electronic Registration Systems, Inc., 2011 WL 3320480 (E.D. Mi. 2011) – 15 USC Section 1639 prohibits lender from extending credit recklessly and without regard to ability to repay. Statute of limitations runs one year from date of transaction.

25.115 USDA Rural Housing Service

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.

25.116 Michigan Compiled Laws Section 600.3205

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.

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.

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.

Breadiy 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.

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.

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.

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.

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.

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.

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.

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.

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 Plaintiff’s 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.

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.

Lopez v. Bank of America, 920 F.Supp.2d 798 (W.D. Mi. 2013) – Borrower was not prejudiced by lender’s failure to serve written notice apprising borrower of right to request loan modification meeting, where borrower admittedly defaulted on loan, she received notice of the default, and was aware of the scheduled foreclosure sale.

Connolly v. Deutsche Bank National Trust Co., 2013 WL 4084742 (E.D. Mi. 2013), *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.

Smith v. First Indiana Bank, 2013 WL 3946015 (E.D. Mi. 2013) – Section 600.3205 allows foreclosure by advertisement where lender offers a loan modification and borrower rejects the proffered modification. Statute does not restrict lender’s ability to foreclose where borrower rejects the offered modification.

Rugiero v. Flagstar Bank, FSB, 2013 WL 1316910 (E.D. Mi. 2013) – Cause of action for failure to comply with mediation requirement of Section 600.3205c is conversion of non-judicial foreclosure to judicial foreclosure. Any remedy under Section 600.3205c(8) must be exercised prior to foreclosure sale. Once sale occurs, property owner has no right to conversion of foreclosure proceeding or any other remedy under Section 600.3205c.

Bowden v. American Home Mortgage Servicing, Inc., 2013 WL 195672 (6th Cir. 2013) – Section 600.3205(b) required Debtor seeking mortgage modification mediation to contact housing counselor within 14 days after a list is provided. Debtor did not contact a counselor within allowed time. Debtor’s failure to comply with statutory requirement was fatal to Debtor’s cause of action. Although lender did, in fact, enter into discussions about a possible loan modification, those discussions did not waive Debtor’s failure to comply with statutory requirements or allow Debtor to maintain action for alleged statutory violations.

Akinwusi v. Federal Home Loan Mortg. Corp., 2013 WL 1282018 (E.D. Mi. 2013) – Complaint failed to state cause of action for alleged violation of Section 600.3205c where complaint alleged that Debtor requested mediation, creditor sent request for documentation to Debtor, but Debtor never returned documents. Failure to provide documents would not trigger requirement for mediation process. Further, remedy under Section 600.3205c is to prevent foreclosure by notice and to require judicial foreclosure. Plaintiff’s failure to file complaint until after sale occurred, redemption expired, and title had passed left court without authority to set aside sale or to restore title to Plaintiff.

25.117 Statute of Frauds

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.

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.

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.

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.

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.

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.

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.

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.

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.

Mullins v. FNMA, 2013 WL 5707798 (E.D. Mi. 2013) – Statute of frauds prevents enforcement of oral promises to modify loan where agreement was not evidenced in writing. State law precludes enforcement of any oral promise to renew, extend, modify or permit delay in repayment or performance of loan unless evidenced by writing signed by the lender. Statute of frauds prevents not only action for alleged breach of promise, but also any action under promissory estoppel.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Oral promise to modify loan is barred by statute of frauds where state law prohibited enforcement of any oral contract for transfer of interest in land including any alleged contract to make or grant mortgage; and prohibited enforcement of any oral agreement to extend, renew, alter or supplement any agreement or commitment to lend money. Alleged oral modification is commitment to modify agreement or commitment to lend, within scope of statute of frauds. Although partial performance can constitute exception to statute of frauds, partial performance is purely equitable doctrine where plaintiff can show acts and conduct of the defendant that amount to representation that defendant would stand by agreement and not avail himself of statute of frauds to escape performance and plaintiff relied on that representation in continuing to perform plaintiff’s obligations. Complaint did not allege any representations or statements by lender that would constitute waiver of statute of frauds or any inducement to plaintiff to continue to perform based on alleged oral promise.

25.118 Estoppel

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.

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.

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.

Flinktote 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.

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.

25.119 Promise to Adjourn Foreclosure Sale

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.

25.120 Fair Labor Standards Act

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

25.121 Electronic Filing Required

Bajas v. Wahrman, Case No. 10-5831 (Bankr. E.D. Mi. 2010) - Defendant’s Answer to Adversary Complaint stricken where Defendants filed paper copy of answer without permission to file in traditional paper from.

25.122 Electronic Filing Excused

25.123 Original Signature

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.

25.124 Electronic Signature

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.

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, 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.

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.

25.125 Service on United States Trustee

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.

25.126 Service by ECF

Cyrnek v. Oliva, 2018 WL 5279493 (Bankr. N.D. Ill. 2018) - Bankruptcy Rules 4001 and 4003 contain specific requirements for sufficient service. Rule 4007(c) does not provide specific requirements for service of Motions to Extend Time to file objections to dischargeability. Motion for Extension of Time does not require service consistent with Rule 7004. Motion to Extend must comply with service requirements of Rule 7005 and must be served only on opposing counsel. Where party is represented by attorney, electronic service on attorney is sufficient and is complete on transmission. Electronic service provides notice to defendant’s attorney sufficient to meet due process requirements.

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).

25.127 Service by Mail

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.

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”.

25.128 Sanctions

In re Pina, Case No. 18-15928 (Bankr. S.D. Fl. 2019) – Attorney suspended for 2 years and referred to grievance committee where attorney repeatedly filed schedules and SOFAs that were not reviewed or signed by clients. Attorney then made bad faith effort to conceal by not turning over to Court

documents requested as part of Court's investigation.

In re Benton, Case No. 09-36642 (Bankr. E.D. Mi. 2016) – Lack of originally signed document as required by Court's ECF rules does not invalidate electronic filing. Remedy under rules for lack of documents is disgorgement of fees. Lack of original signature may remove evidentiary presumption of appropriateness but does not automatically require striking of document.

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, 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.

Schaffner v. US Trustee, 485 BR 130 (E.D. Ky. 2012) – Attorney disbarred for allowing third party to use attorney's ECF filing information and failure to supervise employee. Attorney hired former client, a convicted felon, to prepare bankruptcy documents. Employee filed using attorney's ECF information, with only cursory supervision. Employee began to accept fees and pocket money and failed to comply with code, resulting in actual and threatened dismissals. Attorney failed to keep accurate records; failed to ensure that clients were provided receipts for payments; and failed to deposit money into trust account. Attorney disregarded interest of clients and effectively trafficked in law license and ability to use electronic case filing. Disbarment was both necessary and appropriate sanction.

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

N. Habeas Corpus

25.129 Authority to Issue Writ

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 writ, 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.

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.

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.

25.130 Requirements

Atilas-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.

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

25.131 Authority to Issue

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 raised on direct appeal. Mandamus is not a substitute for filing a 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

25.132 Choice of Laws – Generally

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 forum state; relevant policies and other interested states; protection of justified expectations; basic policies underlying particular field of law; certainty, predictability, uniformity of result; and ease of determination of application of law to be applied. Plaintiff’s complaint alleged sufficient contact with Tennessee where it allegedly suffered as a result of defendant’s conduct occurred in Tennessee and Tennessee had most significant relationship to litigation.

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.

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-forum 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.

Dettore 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 Debtor, Debtor was a sophisticated commercial party, and 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.

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.

LeBlanc v. Bank of America, NA, 2013 WL 3146829 (W.D. Tn. 2013) – Where Federal Court has jurisdiction over portions of action as federal questions, court has supplemental jurisdiction over related State Court actions. Federal court exercising supplemental jurisdiction must apply law of forum state to same extent State Courts would do so if action was pending there. For diversity jurisdiction cases, federal court applies state law, including choice-of-law provisions. Loan agreements and other contractual relationships between plaintiff and defendant were all executed in Tennessee and Tennessee had most significant relationship with cause of action. As such, Tennessee law could control state law issues.

Saab Auto, AB v. General Motors Co., 2013 WL 3013677 (E.D. Mi. 2013) – In diversity action, choice of law is governed by law of forum state. Generally speaking, tort claim filed in Michigan is governed by Michigan law unless there is a rational reason to use law of some other jurisdiction. Where there is no conflict in laws between two different forums, court will not make choice of laws decision and will apply law of forum state. In litigation between US Company and Swedish company, Sweden has interest under Sweden law because Sweden has interest in protecting citizens and Swedish companies. However, Michigan’s interests were at least as substantial, as action involves Michigan corporation with contacts throughout the State. Proper balance supported application of Michigan law.

25.133 Binding Effect of State Court Decisions

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.

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”.

25.134 Forum Selection Clauses - Enforcement Generally

ImagePoint, Inc. v. BFS Retail & Commercial Operations, LLC, 2013 WL 2457900 (E.D. Tn. 2013) – 28 USC Section 1404 requires transfer of case where contract between parties contains valid forum selection clause. Although forum selection clauses are not dispositive, forum selection clauses will be enforced unless enforcement is unfair or unreasonable. Where valid forum selection clause exists, burden is on plaintiff to show why clause should not be enforced and action transferred. In determining whether to transfer a case under § 1404(a), in addition to considering the forum-selection clause, the Court must consider (1) the convenience of witnesses; (2) the location of relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Enforcement was not inconvenient where some witnesses were located in Tennessee and others in Illinois, the chosen forum. Operative facts did not control where dispute was between Tennessee company and Illinois Company about work that occurred in various states. Clause included “any litigation” between the parties, which was broad enough to encompass both contract and quantum meruit claims. Although plaintiff has fewer resources than defendant, that is not basis to disregard otherwise valid forum selection clause.

25.135 Foreclosure Proceedings

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Evaluating force and effect of mortgage foreclosure action, outcome is determined by law of state in which property is located, notwithstanding separate forum selection clause in Promissory note. Note executed in Wisconsin with Wisconsin law stated as controlling did not control outcome or effect of foreclosure of property located in Michigan.

25.136 Exemption Statutes

Comfort Control Supply Company, Inc. v. Smith, Case No. 07-80005 (Bankr. W.D. Mi. 2011) – Law of foreign state will control garnishment issued by Michigan Bankruptcy Court where Debtor lives in foreign state and funds to be garnished would be exempt under law of foreign state. Post-discharge collection efforts on Consent Judgment holding debt to be non-dischargeable. After the discharge, Debtor moved to Colorado but was unable to secure employment and applied for and received unemployment compensation. Creditor obtained Writ of Garnishment from Bankruptcy Court and garnished Debtor's bank accounts. Debtor objected to attempt to garnish funds that were derived from unemployment compensation based on Colorado statute exempting unemployment funds. Colorado has sufficient interest in having its exemption law applied to overcome presumption that Michigan law should apply. Funds received and traceable to unemployment compensation exempt from Michigan garnishment. Funds that were co-mingled and could not be traced to unemployment versus some other source were not exempt.

Q. Governmental Sovereign Immunity

25.137 State Law Claims Against Governmental Agency

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.

PNC Bank v. Burttek, 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.

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.

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.

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.

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.

25.138 Bankruptcy Claims Against State

Commonwealth of Pennsylvania v. Berger, 2019 WL 5310145 (W.D. Pa. 2019) – Adversary action to strip wholly unsecured tax lien is not precluded by sovereign immunity or by Eleventh Amendment. Action is not action against state but is *in rem* proceeding outside scope of Eleventh Amendment. Exercise of Bankruptcy Court jurisdiction does not normally interfere with State sovereignty even where State’s interests are affected; and sovereign immunity not implicated by proceedings ancillary to bankruptcy court’s exercise of *in rem* jurisdiction. Lien stripping falls within bankruptcy court’s *in rem* jurisdiction and lien stripping does not result in recovery of monetary damages or any other affirmative relief against the State. Lien is property interest rather than *in personam* claim, leaving Section 506 as an appropriate vehicle by which debtor could determine which claims must be paid through a Chapter 13 plan. Adversary action to determine State’s rights based on tax lien analogous to discharge of student loan debt and the avoidance of preferential transfers which Supreme Court has held do not trigger sovereign immunity.

25.139 Governmental Agencies and Subdivisions

Dumas v. GC Services, LP, 2019 WL 529260 (E.D. Mi. 2019) – United States enjoys sovereign immunity and cannot be sued without its consent. Waiver requires express Congressional action and will not be implied, and scope of waiver will be strictly construed. Federal government cannot waive sovereign immunity by acting through third party to collect debt. US Government protected from actions under FDCPA by sovereign immunity. FDCPA specifically excludes from definition of “debt collector” any officer or employee of United States or any State who is collecting or attempting to collect debt in performance of official duties. Courts have uniformly concluded that FDCPA does not contain any waiver of sovereign immunity. US Government protected from actions under FCRA by sovereign immunity. While FCRA broadly defines “person” to include government and provides for enforcement against “any person”, language is not sufficient to constitute waiver of sovereign immunity where statute taken as whole is ambiguous and reading “person” to include federal government for all purpose under FCRA would lead to unusual result by subjecting United States to criminal penalties; investigations by Federal and State officials; and would permit punitive damages. Recognizing split of authority, Court concluded that nothing in FCRA waives sovereign immunity.

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.

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.

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 Debtor, Debtor may bring a counterclaim against the government if (1) the property that Debtor claims is the property of the estate, and (2) Debtor’s claim arises out of the same transaction or occurrence as the government’s claim. Debtor’s action against IRS based on alleged wrongful seizure of post-petition tax refund to satisfy pre-petition tax claim did not “arise out of the same transaction” as gave rise to IRS claim. IRS claim was based solely on pre-petition taxes and pre-petition conduct. Nothing IRS did or did not do, or that Debtor did or did not do, after commencement of the case could affect or be considered part of Debtor’s pre-petition tax liability or the claim filed for that liability.

Fugate v. Greeneville Light & Power System, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – Sovereign immunity is available only to arms of the state. Federal law determines whether an entity is an arm of the state. Whether a governmental entity is an “arm of the state” entitled to assert Eleventh Amendment sovereign immunity, as distinguished from a “political subdivision,” which is not immune, is governed by four factors: (1) the state’s potential liability for a judgment against the entity; (2) the language employed by State Courts and state statutes to describe the entity, as well as the degree of control and veto power which the state has over the entity; (3) whether state or local officials appoint the entity’s board members; and (4) whether the entity’s functions fall under the traditional purview of state or local government. The potential liability of the State for the judgment is the “foremost factor.” Where the programs are designed to serve a specific local community weighs against characterizing it as an arm of the state, rather than a political subdivision, agency is more likely to be characterized a political subdivision than an arm of the state. Municipality owned Electric Company was not “arm of the state” where there was no evidence that the State could be held to answer for a judgment against the Electric Company. Further, Electric Company was designed to serve a specific local community – the Town of Greenville.

25.140 Governmental Employees

Endres v. Northeast Ohio Medical University, Case No 18-3825 (6th Cir. 2019) – Governmental employee entitled to qualified immunity in action for damages where alleged right of Plaintiff that was infringed is not “clearly established”. However, governmental immunity does not prevent issuance of injunctive relief against governmental employee.

Moran v. Rogers, Case No. 18-4180 (6th Cir. 2019) – Appellate Court has jurisdiction over otherwise interlocutory appeal where appeal is denial of summary judgment based on qualified immunity. Qualified immunity is complete defense that where applicable saves governmental official from being sued and burdens of litigation. Appellate Court will not consider appeal where denial of summary judgment is based on disputed material facts or issue is whether record contains sufficient evidence to warrant resolution by finder of fact. Court can consider appeal where alleged “factual issues” on which Lower Court relied to deny Summary Judgment are blatantly contradicted by record such as video evidence that flatly contradicts Plaintiff’s version of events such that no reasonable jury could believe Plaintiff’s version of facts. Where evidence is conflicting but there is no evidence that one side’s evidence is blatantly false, Appellate Court will decline to exercise jurisdiction. Court lacked jurisdiction where District Court’s ruling was “fact-based” and presented genuine issues of material fact that were not blatantly and demonstrably false.

Ermold v. Davis, Case No. 17-6119 (6th Cir. 2019) – Sovereign Immunity shields governmental employee while acting behalf of State. Employee acting on behalf of individual local governmental unit within state entitled to qualified immunity if employee acted when Plaintiff’s right to act was not clearly established. Whether person is acting on behalf of State or Local Government turns on State’s potential liability for judgment; how state law refers to official; who appointed official; who pays official; degree of state control over official; and whether functions fall within traditional purview of State or Local Government. In considering role of Clerk of Court who refused to issue marriage licenses, State Law was silent on who pays official or State’s potential liability, as Clerks of Court are entirely self funded using fees received from both State and Local sources. And if County paid judgment, funds would have both State and Local sources. State Constitution refers to County Clerk as county officials; and State Law generally characterizes Court Clerks as county officials, as clerks are elected by county residents, and in event of vacancy local County Judge or County executive appoints replacement. However, Clerks ultimately are State employees as only State can discipline Clerks; and in issuing marriage licenses, State has absolute jurisdiction over marriage and all things related to marriage; entitling Clerk to Sovereign Immunity from suit in official capacity. However, whether Clerk is entitled to immunity in personal capacity depends on whether clerk entitled to qualified immunity arising based on denial of rights, and depends on whether rights were “clearly established”. Plaintiff adequately demonstrated right to marry; that Clerk tasked with issuing marriage licenses refused to do so; and that Plaintiffs otherwise qualified for license. Right was clearly established at time Clerk acted, as Supreme Court had previously ruled that right to marry was fundamental and that 14th amendment prohibits denial of right based on same-sex status,

Crowley v. Anderson County, Case No. 18-5862 (6th Cir. 2019) – Government officials are entitled to qualified immunity from suits for civil damages if conduct does not violate clearly established law of which reasonable person would have known. Each defendant’s liability is assessed based on defendant’s own conduct and did not conduct of others. Absent evidence that multiple defendants were engaged in conspiracy with shared conspiratorial objective. Evidence presented did not demonstrate any conspiracy between government officials to violate plaintiff’s rights. Government officials conduct in turning over potential criminal proceeding to prosecutors office based on truthful assertions of fact entitles government official to qualified immunity absent evidence that government official wrongfully interfered with or influenced decision on whether to prosecute. Government official prepared and all contained accurate information and turned memo over to prosecutor but did not participate in any subsequent investigation or prosecution. Officials later interviewing testifying at trial is passive or neutral participation that was either deceptive nor unlawful.

Cahoo v. SAS Analytics, Inc., 2019 WL 922221 (6th Cir. 2019) - Qualified immunity generally shields governmental officials performing discretionary functions as long as conduct does not violate clearly established statutory or constitutional rights. Qualified immunity gives ample room for mistake in judgment and protects all but plainly incompetent or knowing violations of law. Court must determine whether (i) conduct violated constitutional right (ii) and that right is clearly established. Right is clearly established if contours are sufficiently clear that reasonable official would understand that what he is doing violates that right. There does not need to be case directly on point as long as existing precedent provides fair warning that constitutional question is beyond debate. Qualified immunity does not protect individual state employees for from due process claims where defendant violated constitutionally protected right of due process where defendant’s new severe problems and inaccuracies in state computer system it did nothing to address inaccuracies and continued to enforce invalid determinations. Defendant’s conduct deprived plaintiffs of private interest with no procedural safeguards and no right to hearing. Plaintiffs did not establish plausible equal protection claim where plaintiffs did not demonstrate any disparate treatment of similarly situated individuals that burdened a fundamental right, targeted suspect class, or had no rational basis. Plaintiffs did not allege that they were singled out by government for discriminatory treatment.

25.141 Entity Entitled to Immunity – Native American Tribe

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), *aff’d*, 2019 WL 922658 (6th Cir. 2019) – 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.

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.

25.142 Congressional Abrogation

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.

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), *aff’d*, 2019 WL 922658 (6th Cir. 2019) – Section 106 does not clearly, unequivocally and unmistakably express intent to include Indian Tribes among entities as to which sovereign immunity has been waived.

Fugate v. Greeneville Light & Power System, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – States surrendered their sovereign immunity when they ratified the Bankruptcy Clause in the Constitution. Congress has authority to enact bankruptcy legislation that treats states and state agencies in the same way as other creditors.

In re Platinum Oil Properties, LLC, 465 BR 621 (Bankr. D.N.M. 2011) – 11 USC Section 106 expressly abrogated sovereign immunity for all governmental units including “foreign or domestic government”. Native American tribe constitutes “other foreign or domestic government”. Tribe is bound by terms of confirmed Chapter 11 plan.

25.143 Waiver

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.

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), *aff’d*, 2019 WL 922658 (6th Cir. 2019) – 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 caused 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.

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 Debtor is property of the estate and 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 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 Debtors’ pursuit of their claim for a refund of exempt funds.

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

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Governmental sovereign immunity has been abrogated with respect to action to determine amount or legality of any tax, and any fine or penalty relating to a tax. Sovereign Immunity is also waived if the governmental unit files a proof of claim for any claim against the governmental unit arising out of the same transaction or occurrence, which includes determination of tax debts where the IRS filed a proof of claim. Bankruptcy Court can adjudicate post-discharge dispute between IRS and Debtor concerning amount of admittedly non-discharged tax debt.

25.144 Punitive Damages

In re Shelbyville Road Shoppes, LLC, 2013 WL 646470 (Bankr. W.D. Ky. 2013) – Bankruptcy Code Section 106 waiver of sovereign immunity limits abrogation to issuance of orders, processes or judgments but expressly excludes punitive damages. Complaint against state alleging fraud and seeking punitive damages barred to the extent of the request for punitive damages.

R. Rule 2004 Examinations

25.145 Pending Adversary Proceedings

In re Eastlake Investments, LLC, Case No. 19-42309 (Bankr. E.D. Mi. 2019) – Pending adversary proceeding is not bar to Rule 2004 exam. Court has discretion to deny request for Rule 2004 Exam where there is pending adversary, but Court would not limit Rule 2004 Exams in this case where parties had already spent considerable time arguing about what discovery Chapter 7 Trustee would be able to obtain under Rule 2004, leading to lengthy and

detailed Order outlining scope of Rule 2004 Exam.

25.146 Parties Entitled to Conduct

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.

In re Underwood, 457 BR 635 (Bankr. S.D. Ohio 2011) – United States Trustee is party in interest entitled to conduct Rule 2004 Exam to determine whether creditor violated discharge injunction by failing to adjust mortgage records to reflect that Debtor was current.

In re Rapoport, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Any party in interest can request an examination under Rule 2004. Party in interest is anyone who has a financial state in the proceedings. Creditor, a State Court appointed receiver and plaintiff in pending State Court fraudulent conveyance action, had standing to conduct financial investigation in his status as a creditor in the case.

In re Michalski, 449 BR 273 (Bankr. N.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents relating to components of Creditor's Proof of Claim in Debtors' case. UST does not have to articulate a basis to dispute the Proof of Claim before exercising his right to conduct a Rule 2004 examination.

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents. Settlement between Debtor and creditor of Motion for Sanctions based on creditor's alleged violation of automatic stay did not render moot the subject of the UST examination. UST has interest in investigating the policies and actions of creditor regarding the accuracy, preparation and filing of proof of claim.

In re DeShetler, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents.

25.147 Authorization by Court

In re Cambridge Analytica, LLC, 2019 WL 2486745 (Bankr. S.D.N.Y. 2019) – Rule 2004 allows examination of any entity related to ask, conduct or property or liabilities and financial condition of Debtor or any matter which may affect administration of estate. Court has discretion to grant request for Rule 2004 exam and will deny request where purpose of exam as to abuse or harass; where adversary proceeding or contested matter is commenced such that discovery should be pursued under applicable Federal Rules of Civil Procedure; or where party seeks to use exam in pending litigation outside of bankruptcy Court. Creditor's request for examination under Rule 2004 was for purpose of obtaining discovery for use in state Court action against the non-Debtor. Creditor had not previously done business with Debtor and became creditor only by purchasing nominal claim. Allowing examination would incentivize purchase of nominal claims in bankruptcy cases solely to pursue outside litigation agendas to detriment of Debtor and estate through cost of compliance.

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.

25.148 Scope

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.

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.

In re Underwood, 457 BR 635 (Bankr. S.D. Ohio 2011) – Rule 2004 exam should be limited so as to not be more disruptive and costly to the party being examined than the benefit to be achieved by the discovery. On creditor's examination, party seeking to take exam must show good cause, generally requiring evidence that the examination is necessary to establish a claim or that denial of the examination would result in undue hardship or injustice. Examination into lender's alleged failure to adjust mortgage records at conclusion of Chapter 13 proceeding properly requested information about specific Debtor's loan history and communications between lender and Debtor post-discharge. However, broad request for generally corporate policies regarding processing of payments and transfer of mortgage accounts from various mortgage servicers to this lender were excessive where UST made only vague allegations that information could lead to discovery of policies that are "in violation of the law" but did not specify any particular law or how the bankruptcy court would have jurisdiction to address those issues. Requests crossed line into full scale investigation of a non-Debtor's private affairs without any serious attempt to connect them to this specific bankruptcy case.

In re Michalski, 449 BR 273 (Bankr. N.D. Ohio 2011) – Document requests that covered Creditor's internal policies and procedures represent the highest potential for intrusion into private business affairs and require a higher level of good cause before disclosure will be required. UST did not state sufficient cause for production of generally applicable policies and procedures because the Subpoena was issued in support of the Rule 2004 examination relating only to Debtors; and did not demonstrate good cause for the production of the agreements between Creditor and third parties engaged in default servicing, property inspection and property preservation.

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – Although extremely broad, the scope of Rule 2004 is not unlimited. the Court can limit the scope

of the exam where the harm to the party to be examined greatly outweighs those of the examiner such that the examination should be quashed or limited. UST's request for production of documents and for an examination limited to documents, policies and procedures that relate to Debtor's account is not open-ended examination but instead is carefully tailored to those documents, policies and procedures.

In re DeShetler, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – Rule 2004 examination is not permitted for matters not related to the financial condition of a Debtor or a Debtor's estate. Upon a creditor objection, the examiner must establish “good cause,” taking into consideration the totality of the circumstances, including the importance of the information to the examiner and the costs and burdens on the creditor. Section 586 is broad enough to allow the UST to monitor the claims process, including through the investigation of proofs of claim filed by creditors, to assist in his duty of monitoring the progress of cases. Issues, with proofs of claims filed by mortgage lenders, affect the administration of cases. The level of good cause required to be established by the UST will vary depending on the potential intrusiveness involved. UST is entitled to review the original Note and any such documents that establish creditor as the holder of the Note under the Ohio Uniform Commercial Code and the date on which creditor came into possession of the original Note. To the extent that the “contemporaneously-kept transactional mortgage loan history on 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 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.

25.149 Location of Examination

In re Davis, 452 BR 610 (Bankr. E.D. Mi. 2011) – General rule is that depositions of corporate agents and officers should be taken at the principal place of business. Court would limit examination to the extent that the examination would take place in the district of creditor's principal place of business, or telephonically on terms to be agreed upon by the parties.

25.150 Motion for Examination – Mootness

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.

25.151 Motion for Examination – Granted

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.

25.152 Motion for Examination – Denied

In re Hale, Case No. 11-33589 (Bankr. E.D. Mi. 2012) – Chapter 7 Trustee's Motion for Examination pursuant to Rule 2004 denied as unnecessary. Party to whom Rule 2004 Exam was directed was already party in action against Debtor in California to which Trustee, as Trustee, was already a party. Discovery could be fully obtained in the course of the California action and Trustee failed to demonstrate that adequate discovery could not be obtained through requests in California action. Ultimate outcome of litigation would be determined by California action where Court had already lifted the stay to allow California case to continue and staying the parallel adversary proceeding filed in Bankruptcy case. Rule 2004 is designed to allow Trustee to gather preliminary information, but once litigation is undertaken, discovery is governed by rules of court in which case was pending. Rule 2004 could not be used to circumvent applicable discovery rules.

25.153 Federal Writs of Execution

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.

S. Section 105

25.154 Generally

In re Renegar Golf, LLC, 2019 WL 3318139 (6th Cir. BAP 2019) - Section 105 provides Court with equitable powers. Attempt to circumvent adversary proceeding would deprive defendants of due process. Section 105 does not allow Court to override explicit mandate of other sections of bankruptcy code but merely confers authority to carry out provisions of code. Court would not use Section 105 to award damages to one creditor against alleged insider-creditors where remedy must be sought through adversary proceeding. Attempt to circumvent adversary proceeding would deprive defendants of due process.

XXVI. Sanctions

A. Authority to Impose

26.1 Sanctions Generally

Buckner v. Powers, 2019 WL 482022 (S.D. Ohio 2019) – Fact that Plaintiff filed action *pro se* does not preclude imposition of sanctions for filing clearly frivolous complaint. Sanctions include monetary award to be paid to Court and imposition of bar against future filings based on or arising out of claims alleged in this or prior civil actions.

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.

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.

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.

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.

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 wrongdoers of culpability; extent of client's 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

In re Carroll, Case No. 14-5844 (Bankr. W.D. Mi. 2019) – Bankruptcy Court is "Court of the United States" within scope of 28 USC Section 1927 against attorney who unreasonably and vexatiously multiplies proceedings. Sanctions are warranted when attorney objectively fall short of obligations

owed by members of bar to Court and which results in additional expense to opposing party. Attorney need not have subjective bad faith but sanctions require more than negligence or incompetence, such as where attorney knowingly disregards risk that he will needlessly multiply proceedings or that attorney reasonably should know that claim is frivolous. Sanctions must be applied carefully so as to not chill that was advocacy while deterring overzealous advocacy and must be tailored to compensate, not just deter. Attorney did not multiply proceedings by responding to opposing counsel's earlier fee petition or to opposing counsel's motion to convert proceeding. Counsel did not multiply proceedings by taking action or by failing to take action and although opposing party ultimately prevailed, counsel's arguments were colorable and largely premised on clients sworn statements and documentary evidence. Failure to redact opposing counsel's driver's license number, while perhaps discourteous, was not vexatious or likely to multiply proceedings.

Frank v. Fife, 2019 WL 4254751 (Bankr. E.D. Mi. 2019) - Section 1927 allows Court to sanction attorney or other person admitted to conduct cases who multiplies proceedings unreasonably and vexatiously in amount to appropriately compensate opposing party for excess costs, expenses and attorney fees reasonably incurred. Hourly rate would be limited to amount actually charged by counsel although reasonable hourly rate would have been significantly higher as statute requires reimbursement of expenses incurred, not expenses which potentially could have been incurred.

Indirect Purchaser Class v. Andrews, 2019 WL 3361226 (Bankr. E.D. Mi. 2019) - Section 1927 allows Court to sanction any attorney or other person admitted to conduct cases in Court who multiplies proceedings unreasonably and vexatiously. Sanctions may include award of excess costs, expenses and attorney fees reasonably incurred because of the parties conduct. Court can also sanction pro se litigants under Section 1927. Evidence indicated that defendant continued to use vexatious tactics in effort to extort payoff from plaintiff or as delay tactic to prolong coercion efforts. Defendant delayed case far too long and ignored orders of both District Court and rulings from Sixth Circuit. Sanction would include amount of interest that has been lost to plaintiff due to defendants frivolous filings. Defendant also willfully and intentionally refused to appear for discovery notwithstanding repeated warnings that sanctions could be imposed and filed written pleadings refusing to appear and refusing to produce any documents as ordered.

Glassman v. Feldman, 597 BR 448 (Bankr. E.D. N.Y. 2019) – Section 1927 Allows Court to sanction attorney who multiplies proceedings unreasonably and vexatiously. Section 1927 does not provide a basis to sanction non-attorney pro se litigant, but does permit imposition of sanctions on licensed attorney who chooses to proceed pro se. Debtor who was licensed attorney not subject to sanctions under Section 1927 where Debtor did not appear pro se and was at all times represented by attorney licensed to practice in Bankruptcy Court. Merely because fact that party is licensed attorney does not subject party to liability under Section 1927 where party is not acting as attorney.

Nathanson v. Fife, Case No. 18-11509 (E.D. Mi. 2019) - 28 USC Section 1927 allows Court to sanction attorney who multiplies proceedings unreasonably and vexatious even absent conscious impropriety. Inquiry is not whether attorney acted in bad faith, but whether Debtor knew or reasonably should have known that claim was frivolous or that tactics would needlessly obstruct litigation. Award requires less than subject of bad faith but more than mere negligence or incompetence. Bankruptcy appeal is frivolous only if results are obvious or argument is wholly without merit. While Court disagreed with appellants arguments on appeal, arguments were not frivolous and record did not indicate that appeal was taken for improper purpose or bad faith.

In re Schaller, 2019 WL 460302 (Bankr. E.D. Mi. 2019) – Section 330 allows compensation for services necessary to administration or beneficial at time services were rendered toward completion of case. In Chapter 13, compensation may also include benefit and necessity of services to Debtor and effect of services on bankruptcy estate, bankruptcy case and Debtor. Counsel not entitled to compensation for defending Motion for Sanctions which sought relief only against counsel and not against bankruptcy estate or Debtor. Fees were not necessary to administration of case and did not provide any benefit to estate or Debtor as all fees were incurred solely to benefit third-party. Both Rule 9011 and 28 USC Section 1927 draw distinction between client and attorney. Rule 9011 Authorizes Court to impose sanctions against attorneys, law firms, or parties. 28 USC Section 1927 permits Court to assess sanctions only against attorney and not against party.

Nathanson v. Fife, 2019 WL 168540 (E.D. Mi. 2019) – Section 1927 Motion does not need to specifically identify attorney against whom sanctions are sought where attorney is sole attorney that appeared in case and Section 1927 limits sanctions to personal liability against attorney. Inquiry under Section 1927 is not whether attorney acted in bad faith but whether attorney knows or reasonably should know that claim is frivolous, or that litigation tactics will needlessly obstruct litigation of nonfrivolous claims and requires showing of something less than subjective bad faith, but something more than negligence or incompetence. Where during course of proceeding it becomes apparent that party's position lacks legal or factual support, party must withdraw or amend position. Party seeking sanctions not obligated to request concurrence of opposing counsel notwithstanding local rule as it is obvious that concurrence will not be granted, particularly where there is no evidence of prejudice from lack of concurrence.

Goldstein v. Bavelis, 2018 WL 6040863 (6th Cir. 2018) – Bankruptcy Court has authority under Section 1927 to impose sanctions where attorney's conduct unreasonable and vexatiously multiplied proceedings. Sanctions warranted where clear and convincing evidence established that party and party's counsel engaged in egregious, bad faith conduct in multiple ways including filing multiple faulty documents with Court and failing to produce documents and stating that no responsive documents existed even though documents did exist. Attorney objectively fell short of duty to candor to Court and nondisclosure of documents in response to discovery requests constituted unreasonable and vexatious litigation tactics. Fact that opposing party did not seek discovery sanctions did not prevent Court from exercising inherent authority to impose sanctions where discovery rules are inadequate to address situation where party fails to produce documents and makes false statements designed to conceal documents. Sanctions include attorney fees incurred due to bad faith misconduct to the extent reasonably necessary but is limited to fees that would not have been incurred but for misconduct. Sanctions awarded in the amount of \$250,000 representing unnecessary costs and fees.

In re Gorges, 2018 WL 4945642 (Bankr. E.D. Mi. 2018) – Section 1927 allows Court to impose sanctions only against attorney; not against represented party or law firm. Section 1927 requires proof that attorney (1) multiplied proceedings, (2) unreasonably and vexatiously, (3) in bad faith or when an attorney knows or reasonably should know that the claim or litigation tactics pursued is frivolous or will impede the litigation of proper claims, and (4) which has resulted in additional expense to other parties. Attorney must *objectively* fall short of obligations owed by member of bar that causes additional expense to opposing party. Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, if bad faith was not present, whether they multiplied proceedings. Sanctions not warranted where there was no evidence that papers were filed with improper purpose and Moving party did not comply with safe harbor requirement. Court would not sanction attorney for alleged conduct in state court proceeding or in bankruptcy case other than case in which Motion was filed. Evidence indicated that Bankruptcy Petition was filed in good faith where there was dispute about parties' rights under prior State Court settlement agreement and bankruptcy petition filed to give parties additional time

to resolve disagreement. Counsel's conduct in responding to stay lift motion was reasonable and in good faith where at time of filing Counsel reasonably believed that Debtors would pay amount needed by settlement to redeem property and only found out later that Debtors no longer decided to do so, and counsel promptly file motion for voluntary dismissal of bankruptcy case.

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.

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.

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.

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 grievance procedure 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.

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.

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.

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 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.

Castellanos Group Law Firm, LLC v. FDIC, Case No. 15-036 (1st Cir. BAP 2016) – Vexatious 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.

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.

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.

Hood v. Chase Manhattan Mortgage Corp., 2013 WL 1629306 (E.D. Mi. 2013) – Court can sanction any attorney who unreasonably or vexatiously multiplies proceedings in any case. Sanctions do not require finding of bad faith where attorney knows or reasonably should know that litigation tactics will needlessly obstruct litigation process. Attorney sanctioned where attorney made numerous errors in supplemental response to Motion to dismiss, including filing supplemental brief after briefing had closed; requesting leave to amend in improper manner and without first seeking consent of opposing counsel; requesting leave to amend in a motion that was not properly formatted or captioned; and failing to attach proposed amended complaint to request for leave to amend.

Hayes v. Internal Revenue Service, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – IRS cannot be sanctioned for filings made in District Court.

In re Greater Middle Missionary Baptist Church, 2011 WL 6349290 (Bankr. E.D. Mi. 2011) – Section 1927 allows court to impose sanctions against attorney who unreasonably and vexatiously multiplies proceedings in case. Sanctions can include excess costs, expenses and attorney fees reasonably incurred in response to the conduct. Section 1927 is intended to deter dilatory practices. Section 1927 requires something less than bad faith but something more than negligence or incompetence. Chapter 11 petition filed under emergency circumstances where attorney did not have sufficient time to fully investigate circumstances and title to property. Counsel was not experienced and accepted at face value client’s version of facts without detailed independent investigation. Once counsel became fully aware of circumstances, counsel convinced client to not oppose motion to dismiss, surrender of property to creditor, and to stipulate to entry of State Court judgment of possession. Counsel’s conduct, particularly when coupled with timely corrective action upon discovery of true state of facts, did not rise to level of vexatious that so far exceeded zealous advocacy as to warrant sanctions.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Section 1927 is not applicable to actions or representations taken in State Court proceedings. Court has no authority to impose sanctions against Trustee for actions taken by Trustee in State Court employment litigation. For actions taken in Bankruptcy Court, sanctions under Section 1927 are warranted when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. When an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Bad faith is not required to support a sanction under Section 1927. Trustee’s erroneous determination that certain assets had not been abandoned by the estate was not unreasonable or lacking in legal basis notwithstanding that the Court later determined Trustee’s position to be incorrect and Trustee thereafter immediately terminated actions which Debtor contended were vexatious.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - Attorney who multiplies proceedings in any case unreasonably and vexatiously may be sanctioned by the Court. Sanctions are warranted when attorney objectively falls short of the obligations owed by a member of the bar to the Court and which causes additional expense to the opposing party. Sanctions are to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. Sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

Maloof v. Level Propane Gasses, Inc., 316 Fed. Appx. 373 (6th Cir. 2008) - Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney’s fees and costs, when it was the third motion, asking for the same relief.

26.3 Inherent Authority of Court

In re Carroll, Case No. 14-5844 (Bankr. W.D. Mi. 2019) – Bankruptcy Court has “inherent authority” to impose sanctions for bad faith conduct.

Nathanson v. Fife, Case No. 18-11509 (E.D. Mi. 2019) - Court has inherent authority to sanction attorney who multiplies proceedings unreasonably and vexatiously even absent conscious impropriety. Inquiry is not whether attorney acted in bad faith, but whether Debtor knew or reasonably should have known that claim was frivolous or that tactics would needlessly obstruct litigation. Award requires less than subject of bad faith but more than mere negligence or incompetence. Bankruptcy appeal is frivolous only if results are obvious or argument is wholly without merit. While Court disagreed with appellants arguments on appeal, arguments were not frivolous and record did not indicate that appeal was taken for improper purpose or bad faith.

Goldstein v. Bavelis, 2018 WL 6040863 (6th Cir. 2018) – Bankruptcy Court has inherent authority to impose sanctions where necessary to prevent abuse of process. Sanctions warranted where clear and convincing evidence established that party and party’s counsel engaged in egregious, bad faith

conduct in multiple ways including filing multiple faults documents with Court and failing to produce documents and stating that no responsive documents existed even though documents did exist. Attorney objectively fell short of duty to candor to Court and nondisclosure of documents in response to discovery requests constituted unreasonable and vexatious litigation tactics. Fact that opposing party did not seek discovery sanctions did not prevent Court from exercising inherent authority to impose sanctions where discovery rules are inadequate to address situation where party fails to produce documents and makes false statements designed to conceal documents. Sanctions include attorney fees incurred due to bad faith misconduct to the extent reasonably necessary but is limited to fees that would not have been incurred but for misconduct. Sanctions awarded in the amount of \$250,000 representing unnecessary costs and fees.

In re Gorges, 2018 WL 4945642 (Bankr. E.D. Mi. 2018) – Court has inherent power to sanction parties for improper conduct to protect the orderly administration of justice and to maintain the authority and dignity of the court. Inherent power differs from Civil Contempt as inherent authority allows bankruptcy court to sanction broad range of conduct, not limited to violation of a specific order; and inherent authority requires court to make an explicit finding of bad faith or willful misconduct that is more egregious than mere negligence or recklessness. Sanctions can include attorney fees and expenses. Sanctions not warranted where there was no evidence that papers were filed with improper purpose and Moving party did not comply with safe harbor requirement. Court would not sanction attorney for alleged conduct in state court proceeding or in bankruptcy case other than case in which Motion was filed. Evidence indicated that Bankruptcy Petition was filed in good faith where there was dispute about parties' rights under prior State Court settlement agreement and bankruptcy petition filed to give parties additional time to resolve disagreement. Counsel's conduct in responding to stay lift motion was reasonable and in good faith where at time of filing Counsel reasonably believed that Debtors would pay amount needed by settlement to redeem property and only found out later that Debtors no longer decided to do so, and counsel promptly file motion for voluntary dismissal of bankruptcy case.

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.

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.

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.

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.

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.

Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178 (2017) - order issued under Courts inherent authority to sanction for bad-faith conduct is limited to attorney fees innocent party incurred solely because of misconduct.

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.

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.

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 party's bad faith conduct and imposed prefiling injunction precluding party from filing any future litigation without Court authorization.

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.

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.

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.

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.

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.

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.

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.

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

In re Monteagudo, Case No. 13-20044 (5th Cir. 2013) – Generally, court’s inherent authority to impose sanctions requires some element of bad faith conduct. Bad faith can be inferred where conduct is patent from the record, even without specific findings by the sanctioning court. Bankruptcy Court properly sanctioned attorney for repeated and multiple filings of adversary proceedings under Section 523(a)(2) without pleading any facts or making any effort to plead fraud with specificity as required by Rule 9. Court had previously advised attorney that fraud must be pled with specificity yet attorney continued to routinely file adversaries that disregarded that admonition.

Richard v. Spradlin, 2013 WL 1571059 (E.D. Ky. 2013), *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.

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).

In re Burton-Katzman Development Company, Inc., Case No. 10-66734 (Bankr. E.D. Mi. 2012) – Chapter 7 proceeding dismissed where schedules showed no assets or liabilities and were, in fact, completely blank; and case was allegedly filed pursuant to a corporate resolution dated 2 years after Debtor had filed Certificate of Dissolution with State of Michigan. Petition filed in bad faith effort to stall litigation between City of Dearborn as Plaintiff and Debtor and its principals as defendants. Court imposed sanctions against Debtor and its principals for fees and expenses incurred by City in having case dismissed.

In re MacFarland, 462 BR 857 (Bankr. S.D. Fl. 2011) – Debtor’s counsel suspended from practice of law for 31 days as sanctioned for filing objections to proofs of claim based on lack of supporting documentation, despite fact that Debtors had scheduled, as undisputed, debts in amounts that equal or exceed amounts set forth in proof of claim. Failure to attach supporting documentation may rob claim of evidentiary presumption of validity, but where Debtor’s schedules independently establish prima facie case of Debtors liability, there is no legal basis to support and objection to claim based solely on a failure to attach documents.

Wells Fargo Bank, N.A. v. Stewart, 647 F.3d 553 (5th Cir. 2011) – Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Court has inherent authority to impose sanctions when party acts in bad faith, vexatiously, wantonly or for oppressive reasons. Bad faith for purposes of sanctions requires (1) the claims advanced were meritless; (2) counsel knew or should have known the claims were meritless; and (3) the motive for filing the suit was for an improper purpose such as harassment. Mere lack of success is not basis for sanctions. Trustee’s opposition to Motion to Enforce Abandonment did not constitute pursuit of meritless claim or action where Trustee had good faith belief that asset had not been properly disclosed and could not have been abandoned; and once Court determined that asset had been abandoned, Trustee immediately terminated any effort to pursue recover of asset.

Dorbeck v. Sykora 2010 WL 4923215 (E.D. Mi. 2010) – Complaint filed in District Court alleged that Plaintiff held ownership interest in corporation. Plaintiff was also Debtor in Chapter 13. Bankruptcy documents failed to disclose any ownership or other interest in corporation. Court has inherent authority to assess attorney fees where claims advanced were meritless, counsel or the party knew or should have known this, and filing the suit was for an improper purpose. Plaintiff’s complaint was devoid of legal or factual merit as it clearly violated concept of judicial estoppel; Plaintiff was well aware at start of proceedings of factual inconsistencies in pleadings filed at District Court versus those filed in Bankruptcy Court; and Plaintiff demonstrated utter disregard for sanctity of judicial process by failing to disclose assets in Bankruptcy court and then filing

complaint based entirely on interests that he denied having in Bankruptcy proceeding.

In re Wilson, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific Court Order which required the performance or the nonperformance of an act with knowledge of that Court Order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

In re Denison, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific Court Order which required the performance or the nonperformance of an act with knowledge of that Court Order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

Fokkena v. Countrywide Home Loans, Inc., 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has inherent power to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".

In re Steiner, Case No. 08-33717 (E.D. Mi. 2009) – Debtors' Chapter 7 Attorney failed list tax refunds based on erroneous belief that tax refunds were not assets of the Bankruptcy estate. After Debtors amended to disclose and exempt the tax refund, the Court set an evidentiary hearing on the issues of good faith, but Debtors' counsel failed to advise Debtors to attend, requiring an adjournment of that hearing. Court sanctions Debtors' counsel \$600 to pay to the estate to compensate the Trustee for time spent preparing for the evidentiary hearing that had to be adjourned and an additional \$300.00 for failing to understand that tax refunds are part of the estate and must be scheduled as such thereby causing the Trustee to expend time and effort to recover those tax refunds for the estate.

26.4 Section 105

Goldstein v. Bavelis, 2018 WL 6040863 (6th Cir. 2018) – Bankruptcy Court has authority under Section 105 to impose sanctions where necessary to prevent abuse of process. Sanctions warranted where clear and convincing evidence established that party and party's counsel engaged in egregious, bad faith conduct in multiple ways including filing multiple faulty documents with Court and failing to produce documents and stating that no responsive documents existed even though documents did exist. Attorney objectively fell short of duty to candor to Court and nondisclosure of documents in response to discovery requests constituted unreasonable and vexatious litigation tactics. Fact that opposing party did not seek discovery sanctions did not prevent Court from exercising inherent authority to impose sanctions where discovery rules are inadequate to address situation where party fails to produce documents and makes false statements designed to conceal documents. Sanctions include attorney fees incurred due to bad faith misconduct to the extent reasonably necessary but is limited to fees that would not have been incurred but for misconduct. Sanctions awarded in the amount of \$250,000 representing unnecessary costs and fees.

In re Gorges, 2018 WL 4945642 (Bankr. E.D. Mi. 2018) – Section 105 provides court with authority to award attorney fees as sanction where party intentionally abused judicial process in unreasonable and vexatious manner and unreasonably prolonged litigation. Sanctions not warranted where there was no evidence that papers were filed with improper purpose and Moving party did not comply with safe harbor requirement. Court would not sanction attorney for alleged conduct in state court proceeding or in bankruptcy case other than case in which Motion was filed. Evidence indicated that Bankruptcy Petition was filed in good faith where there was dispute about parties' rights under prior State Court settlement agreement and bankruptcy petition filed to give parties additional time to resolve disagreement. Counsel's conduct in responding to stay lift motion was reasonable and in good faith where at time of filing Counsel reasonably believed that Debtors would pay amount needed by settlement to redeem property and only found out later that Debtors no longer decided to do so, and counsel promptly file motion for voluntary dismissal of bankruptcy case.

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.

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.

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.

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.

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, 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.

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.

Gharib v. Casey, Case No. 16-55007 (9th Cir. 2017), *reh’g and reh’g 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.

In re Tucker, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Co-debtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Co-debtor 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 Co-debtor stay but 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.

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.

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.

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.

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.

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.

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 party’s bad faith conduct and imposed prefiling injunction precluding party from filing any future litigation without Court authorization.

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 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.

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.

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.

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.

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.

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, 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.

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.

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.

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.

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.

Hahn v. Educational Credit Management Corporation, Case No. 11-084 (1st Cir BAP 2012) – Section 105 provides court broad authority to exercise equitable powers where necessary or appropriate to implement Order or other Code provisions. However, power must be used cautiously and only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Code. Sanctions were appropriate where creditor repeatedly called Debtor post-discharge in effort to obtain payment, although Bankruptcy Court had determined that Debtor had paid non-dischargeable student loans prior to commencement of bankruptcy and Debtor was no longer indebted to creditor. Sanctions properly awarded for attorney fees and costs incurred in responding to creditor's post-discharge collection actions.

Chastain v. Bank of America Home Loans, 2012 WL 2377476 (Bankr. E.D. Tn. 2012) – Remedy for alleged violation of discharge injunction is motion for contempt. Neither Section 524 nor Section 105 creates private cause of action for violation. Adversary proceeding requesting finding of civil contempt and award of attorney fees and costs dismissed. Proper vehicle for seeking contempt is by motion for contempt, not by adversary proceeding.

In re Mehlhose, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court's inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later refile. Court can award attorney fees and costs where the party acted in bad faith, vexatiously, wantonly or for oppressive reasons. Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of Debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, Debtors must have known, and in fact did know, that Schedule I was false when Debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Debtors do not have a private right of action under section

105 against creditor for filing proofs of claim for time-barred debts. Section 105 does not provide a private right of action for damages for filing a false proof of claim.

In re Lundeen, 442 BR 659 (Bankr. S.D. Ohio 2011) – Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against Debtor. Criminal proceedings against Debtor affected only Debtor and would not result in any judgment against any third party.

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

26.5 Rule 9011

Dean v. Lane, 2019 WL 4126190 (6th Cir. BAP 2019) – Rule 9011 allows Court to sanction party who presents to court a paper that is presented for improper purpose. Safe Harbor provision requires that moving party has served a copy of the Motion on the alleged offending party with 21-days’ notice and opportunity for the alleged offending party to withdraw or correct. Moving party satisfied safe harbor by mailing copy of safe harbor letter and copy of proposed motion via certified mail. Service by mail is compete on mailing and carries presumption of receipt, and alleged violating party admitted receipt. Request for sanctions must be in separate pleading, not buried at the end of independent pleading. Movant satisfied requirement by filing Motion for Sanctions, properly titled as such, which requested sanctions for improper conduct. Rule does not require paper filed for improper purpose to be signed by party filing paper. Court not required to issue Show Cause Order and was not imposing sanctions *sua sponte* where opposing party filed Motion for Sanctions with appropriate notice. Court properly issued sanctions against party who filed Settlement Letter where party presented no evidence of any permissible use of letter.

Warner Family Trust v. Fleming, 2019 WL 921659 (Bankr. E.D. Mi. 2019) - Compliance with “safe harbor” provision of Rule 9011 is “absolute requirement”. Sanctions are unavailable unless motion is served on opposing party for full 21 day period before it is filed with or presented to Court. Motion denied where neither motion nor any certificate of service indicated that moving party complied with safe harbor provision.

Warner Family Trust v. Cobb, 2019 WL 921646 (Bankr. E.D. Mi. 2019) - Compliance with “safe harbor” provision of Rule 9011 is “absolute requirement”. Sanctions are unavailable unless motion is served on opposing party for full 21 day period before it is filed with or presented to Court. Motion denied where neither motion nor any certificate of service indicated that moving party complied with safe harbor provision.

In re Schaller, 2019 WL 460302 (Bankr. E.D. Mi. 2019) – Section 330 allows compensation for services necessary to administration or beneficial at time services were rendered toward completion of case. In Chapter 13, compensation may also include benefit and necessity of services to Debtor and effect of services on bankruptcy estate, bankruptcy case and Debtor. Counsel not entitled to compensation for defending Motion for Sanctions which sought relief only against counsel and not against bankruptcy estate or Debtor. Fees were not necessary to administration of case and did not provide any benefit to estate or Debtor as all fees were incurred solely to benefit third-party. Both Rule 9011 and 28 USC Section 1927 draw distinction between client and attorney. Rule 9011 Authorizes Court to impose sanctions against attorneys, law firms, or parties. 28 USC Section 1927 permits Court to assess sanctions only against attorney and not against party.

Jodway v. Orlans, PC, 2018 WL 6721097 (6th Cir. 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. Party seeking sanctions must comply with “safe harbor” provision of Rule that requires service of proposed Motion for Sanctions on offending party. Letter sent to offending party did not meet requirements of “safe harbor” even where letter demanded dismissal of complaint within 21 days failing which defendant would seek sanctions. Award of sanctions without compliance with safe-harbor was abuse of discretion.

In re Gorges, 2018 WL 4945642 (Bankr. E.D. Mi. 2018) – Standard for sanctions under Rule 9011 based on whether conduct was reasonable under circumstances at time of conduct but does not apply to filing of Bankruptcy Petition itself. Moving party musts comply with “safe harbor”. Sanctions not warranted where there was no evidence that papers were filed with improper purpose and Moving party did not comply with safe harbor requirement. Further Court would not sanction attorney for alleged conduct in state court proceeding or in bankruptcy case other than case in which Motion was filed. Evidence indicated that Bankruptcy Petition was filed in good faith where there was dispute about parties’ rights under prior State Court settlement agreement and bankruptcy petition filed to give parties additional time to resolve disagreement. Counsel’s conduct in responding to stay lift motion was reasonable and in good faith where at time of filing Counsel reasonably believed that Debtors would pay amount needed by settlement to redeem property and only found out later that Debtors no longer decided to do so, and counsel promptly filed motion for voluntarily dismissal of bankruptcy case.

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.

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.

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.

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 facto 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.

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 corporants. 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.

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.

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.

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.

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.

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.

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 and 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Ettinger & Assoc., LLC v. Miller, Case No. 12-3151 (3d Cir. 2013) – Safe harbor provision of Rule 9011 requires that party to give 21 days' notice before filing motion. If safe-harbor notice is given by mail, Rule 9006 requires three additional days. Compliance with safe-harbor provisions is condition of relief under Rule 9011 and party who fails to comply cannot prevail on 9011 motion. Sanctions motion denied where moving party mailed 9011 notice and then filed motion 23 days later. As party failed to strictly comply with Rule 9011 as extended by Rule 9006, Motion was defective as a matter of law.

Winterton v. Blue Pine Group, Inc., Case no. 11-60059 (9th Cir. 2013) – Rule 9011 provides for sanctions for conduct that is baseless and made without reasonable inquiry. Counsel filed and continued to pursue a bankruptcy petition without adequate investigation that it was legitimate, 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.

Haines & Krieger, LLC v. National Capital Management, LLC, Case No. 12-1375 (9th Cir. BAP 2013) – Debtor's objection to proof of claim based on alleged failure to attach documents was frivolous and was properly overruled. Debtor scheduled the obligation as liquidated, non-contingent and undisputed, which provides evidentiary basis for validity of claim. Debtor had no good faith reason to believe that debt was not owed or that there was any other substantive objection to either existence or amount of claim. However, Bankruptcy Court erred in awarding sanctions under Rule 9011 where court failed to state the factual basis for conclusion why Court considered objection meritless under standard of Rule 9011 and where there was no evidence of compliance with safe harbor provisions of Rule 9011.

In re M.P. Construction Company, Inc., Case No. 12-1306 (9th Cir. BAP 2013) – Attorney sanctioned for filing petition for corporate Debtor where Debtor had no assets and filing was done solely to benefit insiders by allowing Debtor to transfer license to insider without any effort to answer to judgment creditors. Filing is frivolous if it is baseless in fact and made without reasonable inquiry. Attorney has duty to conduct reasonable investigation. Bankruptcy petition is "pleading" for which sanctions can be awarded. Petition is not within "safe harbor" provision. As such, creditor is not required to issue "safe harbor" letter and to give Debtor opportunity to withdraw petition before seeking sanctions.

In re Halcomb, 2012 WL 3778876 (Bankr. N.D. Ohio 2012) – Motion for 9011 Sanctions fatally defective where allegedly offending pleading was withdrawn two days after party was first presented with 9011 demand.

In re Dahlgren, Case No. 11-2794 (3d Cir. 2012) – Attorney sanctioned under Rule 9011 for promulgation of Amended Chapter 13 Plan that was substantively identical to original plan, confirmation of which had already been denied. Although initial plan was not confirmed, original plan did not lack good faith basis in law or reasonable argument for modification or extension of law. However, after Bankruptcy Court denied confirmation, holding that the plan was "patently unconfirmable", counsel filed amended plan that was substantively identical. At that point, counsel knew that he provisions were not confirmable and lacked any good faith basis to believe that the plan could be confirmed, warranting sanctions under Rule 9011.

Budzynski v. US, 2012 WL 3150836 (E.D. Mi. 2012) – Motion for sanctions under Rule 9011 was itself frivolous and subject to sanctions where moving party failed to satisfy 21-day notice requirement before filing Motion. Rule 9011 requires strict compliance with "safe harbor". Further, conduct complained of was issuance by IRS of notice of levy automatically generated by computer where IRS immediately advised counsel that IRS had no intention of levying. Motion for sanctions was not reasonable and lacked any good faith basis.

Huntington National Bank v. Bruinsma, 475 BR 602 (Bankr. W.D. Mi. 2012) – Court can impose sanctions under Rule 9011 on court's own initiative. Court should enter Order to Show Cause that identifies specific conduct that violates attorney's accountability for his own representations. Attorney sanctioned for representing to court that Michigan recognized common law landlord lien where lease agreement did not grant any lien. Court concluded that Michigan did not have, and has never had, any general common-law lien on tenant's property to secured payments under the main lease. Court can impose monetary sanction for actions that result in waste of court's time. Court did not impose monetary sanctions in this case, noting that "stern warning" should be sufficient to deter future conduct.

In re Lewis, 2012 WL 1682587 (2012 WL 1682587 (Bankr. N.D. Ohio 2012) – Chapter 13 trustee filed a motion for the imposition of sanctions against Debtor's Attorney alleging that no reasonable basis existed for Attorney to assert in Debtor's Chapter 13 plan that there was no arrearage claim by Lender with regard to the East Cleveland property. Attorney was on notice of the arrearage because of Attorney previously represented Debtor. Attorney admitted having knowledge of the foreclosure proceedings, but asserted that he relied on information from 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 Debtor. Attorney should have obtained something in writing from Advisor, 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 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 Debtor's bankruptcy case. Safe harbor requires that the challenged paper, claim, defense, contention, allegation, or denial [be] withdrawn or appropriately corrected. Attorney did not amend the plan or withdraw the plan as required to fit safe harbor as dismissal did not "correct" the challenged paper. Rule 9011 permits a broad array of nonmonetary sanctions, plus monetary sanctions limited to what would be sufficient to deter such conduct in the future. Minimal monetary sanction, coupled with the nonmonetary sanction associated with a written finding of a Rule 9011 violation, is sufficient to deter future violations. Attorney directed to pay the sum of \$200.00 to the

clerk of court . Lack of prior sanctions and no indication that Attorney acted in bad faith would not justify award of attorney's fees to the Chapter 13 trustee.

Boone v. JPMorgan Chase Bank, Case No. 11-10891 (11th Cir. 2011) – Sanctions under Rule 11 and 28 USC Section 1927 requires proof of unreasonable and vexatious conduct; that multiplies the proceedings; and amount of sanctions must bear financial nexus to proceedings. Rule 11 allows for sanctions for a pleading that is in bad faith for an improper purpose; that has no reasonable factual basis, or ; is based on a legal theory with no reasonable chance of success. Claims must be “objectively frivolous”. Rule 11 does not require showing of subjective bad faith. Plaintiff’s complaint did not allege any factual basis support allegation that creditor filed false statements or that any alleged inaccuracies were done with intent to hinder, deceive or harass plaintiff. Creditor filed copy of loan agreement but failed to redact social security number. Creditor immediately realized error and withdrew the exhibit and re-filed a redacted copy.

In re Taylor, 2011 WL 3692440 (3d Cir. 2011) – Attorney who blindly relied on computerized information without contacting creditor directly or taking any other steps to verify data violated Rule 9011 in filing proof of claim, response to objection to claim and Motion for Stay Relief. Proof of claim contained factual errors; the wrong mortgage was attached; Debtors’ monthly payment was incorrect and the value of 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 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 Debtors were continuing to make payments, yet the papers indicated that Debtors were in default, with no reference to the insurance issue. Attorney preparing the signed documents ignored clear warning signs in Debtors’ claim objection and response to the stay motion. “At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and avoid any further errors.”

Byrd v. Arvest Bank, Case No. 10-8071 (6th Cir. BAP 2011) – Sanctions under Rule 9011 are based on whether the conduct was reasonable under the circumstances as they existed when the potentially sanctionable conduct occurred. Bankruptcy Petition filed for corporate entity without authorization is sanctionable under Rule 9011. Once Court finds violation of Rule 9011, Court has broad discretion in fashioning sanctions with the twin goals of deterrence of the offending party and compensation to the injured party, and may include reasonable attorney fees taking into account the sanctioned party’s ability to pay. Court properly awarded injured secured creditor sanctions of more than \$42,000 against person who signed petition on behalf of limited partnership without authorization.

Turner v. American Express Centurion Bank, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Motion for sanctions under Rule 9011 may not be filed or presented to the court unless the alleged offending party has been provided with twenty-one days to withdraw or correct the improper pleading. Debtor failed to comply with Rule 9011 in requesting attorney fees for first time as a part of Amended Complaint.

Rankin v. Lavan, 2011 WL 3701441 (6th Cir. 2011) – Debtor’s repeated filings against numerous entities, including request for Grand Jury investigation to charge various parties with violations of Civil Rights and RICO, without evidence and with “a marked absence of coherence”, and Debtor’s general litigious behavior which culminated in Bankruptcy Court injunction against Debtors filing any further pleadings warranted imposition of sanctions for abusive conduct.

In re Ashford, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Rule 11 requires the moving party to provide notice to the other party with the other party having 21 days to withdraw the challenged document or argument, before any sanctions can be awarded. Prior notice is “mandatory prerequisite” to sanctions. Debtor’s failure to provide notice to the Trustee prior to filing Motion for Sanctions precludes award under Rule 11.

IRS v. Hayes, 2011 WL 2490945 (E.D. Mi. 2011) – Rule 11 authorizes sanctions for a complaint that is presented for an improper purpose such as harassment or unnecessary delay or expense. Government’s complaint in District Court to determine tax debt filed while there was also adversary proceeding in Bankruptcy Court to determine same issue was not done with intent to harass. Government had legitimate interest in filing action in District Court where there was non-Debtor co-obligor and government intended to have Bankruptcy Court abstain so that all matters could be adjudicated at one time in one proceeding. Further, movant failed to serve notice of intent to file the Rule 11 motion 21 days in advance as required. Although movant may have believed that any demand would only have been ignored, Rule 11 requirements for notice must be strictly complied with.

Proctor v. Educational Credit Management Corp., 2010 WL 4919670 (Bankr. S.D. Ohio 2010) – Plaintiff’s conduct in pursuing second complaint against Debtor was unreasonable where plaintiff had previously filed identical complaint against same defendant and lost the prior action on Summary Judgment. Sanctions appropriate under Rule 11. Sanctions should be measured by goal of deterrence and must impose the least severe sanction that is likely to deter. Motion to Dismiss clearly identified complaint as offending pleading and plaintiff was repeatedly informed by letter 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.

Burns v. George Basilikas Trust, 599 F.3d 673 (D.C. Cir. 2010) - Rule 9011 sanctions were improperly imposed against counsel whose argument was supported by unreported district court case.

Cappuccilli v. Lewis, 2010 WL 2870668 (E.D. Mi. 2010) - The test for imposing Rule 11 sanctions is “whether the attorney’s conduct was reasonable under the circumstances.” Trustee’s Motion to Dismiss Appeal was not unreasonable where Debtors’ designation and statement of issues

were not filed on time. Untimely filing has been a basis for dismissal in the past, rendering Trustee's motion for dismissal reasonable under the circumstances.

D.A.N. Joint Venture III, L.P. v. Shekerjian, Case No. 07-55859 (Bankr. E.D. Mi. 2010) – Court dismissed adversary seeking to deny discharge after concluding that Plaintiff failed to prove that it held assignment promissory notes and, therefore, lacked standing to maintain the action and that promissory notes had been satisfied by Debtor before Plaintiff purported to acquire an interest in the notes. Sanctions under Rule 9011 are appropriate only where the attorney's conduct was unreasonable under the circumstances. A good faith belief in the merits of the action, standing alone, is not sufficient to avoid sanctions. However, where there appeared to be evidentiary support for Plaintiff's claims, Plaintiff's ultimate failure to prevail in the action does not warrant imposition of sanctions. Plaintiff made a reasonable investigation before instituting the proceeding and Plaintiff's complaint and supporting evidence was sufficient to survive pre-trial motions and to proceed to trial.

In re Lundeen, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Imposition of sanctions under Rule 9011 is discretionary with the court. Sanctions should only be imposed if it is patently clear that a claim has absolutely no chance of success, and all doubts should be resolved in favor of the signing attorney. Court refused to impose sanctions where it would not have been patently clear to counsel at the time the involuntary petition was filed that the petition had no chance of success. Alleged personal liability was a close question and that the Petitioning Creditors and their counsel had a good faith (albeit wrong) belief that Debtor's personal liability was not in bona fide dispute.

Followell v. Mills, 2009 WL 723132 (6th Cir. 2009) - By signing pleading, Counsel certifies that to the best of counsel's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) pleading is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The test for imposition of sanctions under rule is whether individual attorney's conduct was reasonable under the circumstances. A good faith belief in merits of case is not necessarily sufficient to avoid sanctions and proof of bad faith is not required for award of sanctions. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

Maloof v. Level Propane Gasses, Inc., 316 Fed. Appx. 373 (6th Cir. 2008). Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.

Fokkena v. Countrywide Home Loans, Inc., 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has authority under Rule 9011 to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".

Countrywide Home Loans, Inc. v. McDermott, 426 B.R. 267 (N.D. Ohio 2010) - Rule 9011 allows a court to award sanctions on its own initiative only after entering an order describing the specific conduct that appears to violate the rule and directing an attorney, law firm, or party to show cause why it has not violated the rule. Bankruptcy court's imposition of sanctions without the requisite show cause order resulted in creditor lacking notice that the bankruptcy court, on its own initiative, would be considering sanctions. Creditor's "errors" consisted of the filing of *one* proof of claim and *one* objection to confirmation, neither of which was supported by the actual facts. Record was devoid of evidence of similar errors in any other bankruptcy case. Bankruptcy Court's statement that Creditor's systemic inefficiencies had caused it to file a proof of claim and an objection to confirmation of plan was not supported by the record evidence and it was an abuse of discretion for the bankruptcy court to hold that the mistaken filing of two documents amounted to sanctionable conduct. Although Court may have been frustrated by what the court perceived as a systemic problem in the mortgage servicing industry, evidence in this case did not support sanctions including sweeping directive that Creditor completely change policies and procedures for filing proofs of claim and attach documents not required by the Rules and Code.

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

B-Line, LLC v. Wingerter, 594 F.3d 931 (6th Cir. 2010) – Creditor did not violate Rule 9011 by filing Proofs of Claim without attaching originating documents and in relying on warranties and representations provided by original creditor when purchasing debt obligations. Under the Creditor's standard Contract, the seller of the debts warrants that the debt is legal, valid and binding and that it has not been disputed by Debtor or a Trustee and that no objection to a claim has been lodged. At the time Creditor filed the Proof of Claim, creditor had no reason to believe that the warranties and representations were false 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.

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 incomplete 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 Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations in the claim is not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing

companies' procedures for filing proves of claim were not based on a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the bankruptcy Court, must obtain originating documentation or, when such documents are not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against Debtor. The purchaser should then attach to the proof of claim from the originating documents or an affidavit explaining the non-availability of those documents so 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

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 order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

26.7 All Writs Act 28 USC §1651

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 party's bad faith conduct and imposed prefiling injunction precluding party from filing any future litigation without Court authorization.

26.8 Rule 8020 – Frivolous Appeal

Nathanson v. Fife, Case No. 18-11509 (E.D. Mi. 2019) - Federal Rule of Bankruptcy Procedure 8020 provides that if District Court determines that appeal is frivolous, Court may, on separately filed motion and notice, award damages including single or double costs. Rule 8020 is materially same as Federal Rule of Appellate Procedure 38 and is entitled to provide District Court with authority to award sanctions for frivolous appeals. Bankruptcy appeal is frivolous only if results are obvious or argument is wholly without merit. While Court disagreed with appellants arguments on appeal, arguments were not frivolous and record did not indicate that appeal was taken for improper purpose or bad faith.

26.9 Failure to Seek Concurrence

Nathanson v. Fife, 2019 WL 168540 (E.D. Mi. 2019) – Bankruptcy and District Courts have ability to waive requirement that party seek concurrence when it is obvious that opposing party would not have concurred. Party seeking sanctions not obligated to request concurrence of opposing counsel notwithstanding local rule as it is obvious that concurrence will not be granted, particularly where there is no evidence of prejudice from lack of concurrence.

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.

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.

26.10 Frivolous Removal

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.

26.11 Attorney Fees

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 wrongdoers of culpability; extent of client's 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.

26.12 Punitive Damages

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.

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.

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.

26.13 Discharge Injunction

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.

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.

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.

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.

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.

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.

In re Jones, 2012 WL 5385682 (Bankr. E.D. Ky. 2012) – Lender violated discharge injunction by filing State Court foreclosure action that also sought to collect debt as personal liability after discharge in completed Chapter 13 proceeding. Although Discharge injunction does not carry private right of action, Court can enforce injunction through contempt proceedings. Sanctions are warranted where creditor's violation is willful, which requires that creditor have knowledge of discharge and that creditor willfully brought State Court action to recover discharged debt. Sanctions awarded for attorney fees incurred as a result of creditor's conduct in sum of \$2047.50.

Marshall v. PNC Bank, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – There is no private right of action for alleged violation of discharge injunction. Remedy must be sought by motion for contempt via contested matter, and not in an adversary proceeding. Adversary would be dismissed without prejudice to Debtor seeking relief via contested matter.

Holley v. Kresch Oliver, PLLC, 2012 WL 2777735 (Bankr. E.D. Mi. 2012) – Remedy for violation of discharge injunction is through civil contempt proceeding flowing from Section 105. Damages include \$16,837.50 in attorney fees as reflecting damages incurred by Plaintiff as a result of defendant's violation of discharge injunction. However, Court would not award punitive damages because punitive damages may be awarded only in criminal contempt proceeding and bankruptcy court lacks criminal contempt powers. Further, even if court has authority, court would do so only where conduct is particularly egregious. Defendant's violations did not rise to the level which would constitute particularly egregious.

In re Vanwoert, Case No. 11-33514 (Bankr. E.D. Mi. 2012) – Creditor admittedly violated both automatic stay and discharge injunction by sending collection letters after creditor had been notified of case filing, both before and after Debtor received discharge. Although Debtor did not have any actual damages, impact of letters on Debtor, an elderly widow, were "substantial". Sanctions awarded for \$500 each for first two violations and \$1500 for third violation which occurred after creditor had actual knowledge of entry of discharge. Court also awarded \$5,890 in fees.

In re Moore, Case No. 09-2783 (Bankr. W.D. Mi. 2012) – Creditor violated discharge injunction by garnishing Debtor's state tax refund post-discharge. Creditor ordered to refund garnished funds to Debtor and, if creditor fails to pay by date specified, amount would increase by \$10 per day until paid in full.

In re Martin, Case No. 11-8052 (6th Cir. BAP 2012) - Creditor willfully violated discharge injunction when he filed a post-discharge State Court lawsuit where the parties had not entered into a reaffirmation agreement during the pendency of Debtor's case. Debtor's voluntary post-petition payment did not obligate her to continue making payments to the creditor or somehow waive benefit of discharge of underlying obligation. Parties did not enter into a new contract for payment of the debt because mutual assent and consideration independent of the discharged debt were both lacking. The creditor's mistaken belief that his actions were somehow outside the scope of 524(a)(2) does not remedy a violation of the discharge injunction. Debtor was entitled to an award of actual damages for the violation, including attorneys' fees.

Haney v. Educational Credit Management corp., 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have a provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding. Creditor's collection efforts for non-discharged student loan did not violate discharge injunction.

Bridges v. Grange Mutual Casualty Company, 2011 WL 5837053 (Bankr. W.D. Ky. 2011) – Section 523(a)(9) does not require formal action in Bankruptcy Court to declare debt non-dischargeable. Creditor, as the holder of a claim by subrogation as a result of insurance payouts, did not violate discharge injunction by filing suit in State Court after entry of discharge, where complaint alleged that Debtor caused injury while operating a motor vehicle while intoxicated.

Palazzola v. City of Toledo, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Violation of Discharge Injunction can be remedied through contempt proceedings. Once contempt is established, injured party can recover damages and, if necessary to effectuate purposes of injunction, attorney fees. Proper vehicle for contempt is contested matter under Rule 9014. However, Adversary Complaint for damages for contempt would not be dismissed where adversary proceeding provided more, not less, due process protection for defendant and defendant cannot allege any prejudice because action filed as adversary rather than Motion.

In re Baer, 2011 WL 3667511 (Bankr. E.D. Ky. 2011), *aff'd* 2012 WL 2368698 (6th Cir. BAP 2012) – There is no private cause of action for violation of the discharge injunction.

Frambes v. Nuvel National Auto Finance, LLC., 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – There is no private right of action for alleged violation of discharge injunction. Party allegedly aggrieved can seek sanctions through Motion for Contempt. However, remedy must be sought by Motion rather than by Adversary Proceeding. Adversary dismissed for lack of jurisdiction.

Lassiter v. Moser, Case No. 09-8067 (6th Cir. BAP 2010) – Creditor's commencement of litigation in State Court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although the discharge injunction does not, of itself, present a private cause of action for damages, Debtor who suffers injury can seek sanctions for contempt. Damages, including attorney fees, are appropriate where creditor instituted suit post-discharge based on events that occurred pre-petition and were discharged.

Pickrel v. Household Realty Corp., 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

In re Greenspan, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd*, 2011 WL 310703 (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 Debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.

Dalvit v. United Airlines, Inc., Case No. 08-1283 (10th Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived. Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

26.14 Injunction Against Filing

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 party's bad faith conduct and imposed pre-filing injunction precluding party from filing any future litigation without Court authorization.

26.15 Contempt – Generally

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019) – To hold party in contempt requires proof that party violated definite and specific Court order requiring party to perform or refrain from performing act, which knowledge of Court order. Automatic Stay is "Order" within scope of contempt powers. Creditors that, with knowledge of Debtor's Chapter 7 filing, had commenced state court action asserting general fraudulent transfer and breach of fiduciary duty claims which belonged to creditors as whole, and which were included in "property of the estate," without first seeking to compel abandonment of claims or moving for stay relief, could be held in contempt for willfully violating automatic stay.

Taggart v. Lorenzen, ___ US ___, 2019 WL 2331303 (2019) – Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief. Civil contempt warranted where there is no fair ground for doubt as to wrongful use of conduct using object of standard. Subjective intent may be taken into consideration in determining whether party acts in bad faith, and parties good faith, while not defense to civil contempt, may help to fashion remedy.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Contempt is not proper remedy as contempt requires knowledge of "definite and specific order of Court" that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney's fees; and inappropriate circumstances punitive damages.

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 stated that it had updated Plaintiff's account file to reflect the discharge. Creditor's actions constitute violate 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.

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.

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.

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.

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.

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.

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.

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.

26.16 Contempt – Civil

Lane v. Dean, 2019 WL 3315380 (Bankr. W.D. Ky. 2019) - Civil contempt requires that alleged contemnor have knowledge of order; alleged contemnor violated order; and order was specific and definite. Defendant had clear knowledge of order requiring defendant to appear for deposition; defendant did not appear despite plaintiff's counsel's efforts to accommodate defendant's schedule, and order violated with specific and definite. Defendant's actions in refusing to appear for depositions were willful and specifically violated Court order. Defendant's actions needlessly increased

plaintiff's attorneys fees and consumed inordinate amount of time on Court docket. Court impose sanction of \$5000 but permitted defendant to purge by immediately scheduling and appearing at deposition.

Owner-Operator Independent Drivers Association, Inc. v. Arctic Express, Inc., 2019 WL 9734477 (S.D. Ohio 2019) – Civil contempt requires moving party to prove by clear and convincing evidence that alleged contemnor violated definite and specific order of court that required him to perform or refrain from performing particular act, and that alleged contemnor had knowledge of Court order. Underlying order must be clear and unambiguous, with any ambiguity construed in favor of alleged contemnor. Once Moving party meets burden, alleged contemnor must prove that he is presently unable to comply, showing categorically and in detail why. Where act requires payment of money, alleged contemnor must prove in great detail inability to pay and show that he did not cause inability or that he unsuccessfully attempted compliance in good faith, taking all reasonable steps to comply. Settlement order sufficiently specific and definite where Order provided for payment of specific amounts of money on specific dates. Alleged contemnor made general assertion of inability to pay based on difficulty arranging financing, repair costs and disposition costs of assets, legal fees, lack of State credit, refusal of account payable to make payments, and high fuel prices. Explanation did not show in great detail that it was impossible for alleged contemnor to comply. Party did not provide any bank records, affidavits or new arguments or show that it had sufficient funds only to meet secured debt or that party was otherwise insolvent. Party represented less than two months earlier that party would make payment, which party would not have done if party was truly insolvent and there was no evidence of any event in intervening two months that would have caused party to be unable to pay. Party chose to pay other creditors, purchase new equipment, and pay other obligations ahead of those Ordered by Court. Although alleged contemnor sold multiple pieces of equipment, it did not use any of those proceeds to pay amounts owed pursuant to Settlement.

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.

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.

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.

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.

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.

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.

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.

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 supersedeas 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.

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.

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.

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.

In re Hibbitts, 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.

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.

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.

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.

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.

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.

People's Capital & Leasing Corp v. Power-Tec Mfg. LLC, 2013 WL 5423056 (E.D. Mi. 2013) – Contempt cannot be used to compel performance of an action that cannot be legally performed. Contempt also cannot be used merely to coerce payment of debt.

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

In re Borowski, 2013 WL 3759794 (Bankr. E.D. Tn. 2013) – Upon finding of civil contempt, fines payable to aggrieved party must be based on actual damages incurred as a result of the contempt or non-compliance. Bankruptcy courts cannot impose punitive damages as punitive damages are available only for criminal contempt and bankruptcy courts lack criminal contempt powers.

Williamson v. Recovery, L.P., 2013 WL 3222428 (S.D. Ohio 2013) – Court can use civil contempt power to enforce terms of its orders. Party who brings successful motion for contempt is entitled to recover from contemnor attorney fees incurred in bring the motion. Where party is only partially successful in contempt action, proving fewer than all alleged violations, Court can but is not required to reduce fees accordingly.

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

In re Trinity Communications, LLC, 2012 WL 2367169 (Bankr. E.D. Tn. 2012) – Court has power to find contempt pursuant to Federal Rule of Civil Procedure 71, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7071, as well as section 105. Court can hold non-parties in contempt if the non-party has actual knowledge of the Court Order and abets a party in violating that order. Basic proposition is that all orders and judgments of courts must be complied with promptly. Contempt requires a violation of a specific and unambiguous order by a party to whom that order applied. Ambiguities must be resolved in favor of the party charged with contempt. Principal of reorganized Debtor was in contempt of court for failing to comply with terms of confirmation order that required submission of additional funds necessary to pay administrative expenses. Confirmation Order was entered in reliance on principal's representations about its commitment to ensure that the Reorganized Debtor could perform its confirmation obligations. Reorganized Debtor was also using funds that the Plan required to be paid to creditors for purposes other than as specified in confirmed plan. The Reorganized Debtor has no independent management other than Principal. Reorganized Debtor paid other ongoing expenses since confirmation. Principal exercised its control to cause the Reorganized Debtor to violate its obligations under the Plan.

Burrage v. Homecomings Financial Network, Inc., 2011 WL 6000794 (Bankr. N.D. Ohio 2011) - Stay pending appeal relieves appellee of obligation to comply with order being appealed. Appellee cannot be held in contempt for failing to comply with order while appeal is pending.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Violation of co-Debtor stay can be remedied through civil contempt. Contempt requires that the alleged contemnor have knowledge of the order; alleged contemnor must have in fact violated order; and order violated must be specific and definite. Co-Debtor stay constitutes clear and specific injunction in terms of what is prohibited. Actions of creditor in reporting information to credit bureau, without more, does not constitute violation of co-Debtor stay, as reporting was not intended to coerce payment and information provided to bureau was accurate.

In re Moohaven Dairy, LLC, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed, that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of Debtor. Counsel's continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available. Sanctions are to be remedial, to compel compliance with Court Order or to compensate other party for harm resulting from non-compliance. Sanctions can be monetary or incarceration. Court awarded attorney fees as sanction in amount equal to what creditor had to incur as a direct result of actions of contemnor.

In re Terrell, Case No. 09-63848 (Bankr. E.D. Mi. 2010) - Petition Preparer who prepared documents and accepted compensation in violation of outstanding permanent injunction ordered to disgorge all compensation received. Court can use contempt power to compel compliance where court finds by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; contemnor must have actually violated that order; and order must have been specific and definite. Once established burden shifts to alleged contemnor to come forward with evidence that he is unable to comply; contemnor took all reasonable steps to comply; and demonstrated that inability to comply was not caused by contemnor. Defense requires a "literally inability" to comply, not just an "unwillingness" to comply. Once found to be in contempt, court can use monetary sanctions to coerce compliance; or can use incarceration until contemnor complies. Court imposed payment plan until amount is paid in full, with provision that if Petition Preparer fails to make a payment, court will enter warrant for arrest without further proceedings.

In re Rose, 2010 WL 3733858 (Bankr. N.D. Ohio 2010) – Creditor held in contempt of court where creditor refused to cancel lien of record and surrender title to Debtor upon tender of court determined redemption amount. Court has broad discretion to award sanctions including damages and attorney fees in contempt action. Court awarded damages measured by lost income of Debtor having to attend hearing on contempt motion and attorney fees incurred by Debtor in attempt to obtain compliance with Court Order. Court further ordered creditor to satisfy lien and surrender title without Debtor being required to pay previously determined redemption amount and authorized Debtor to obtain clean title if creditor continued to refuse to comply. To the extent additional sanctions including attorney fees exceed redemption amount, court would offset the redemption amount against those sanctions to avoid "double recovery" by Debtor.

In re Moser, Case No. 05-38518 (Bankr. S.D. Ohio 2010) – Court has authority to issue contempt sanctions pursuant to Section 105. Purpose of civil contempt is to coerce compliance with a Court Order and to compensate the complainer for its losses. Moving party must prove by clear and convincing evidence that the respondent violated a Court Order that was clear and unambiguous and that required respondent to perform or refrain

from performing a specific act. Court Order sealing particular document is not an order to respondent to refrain from publishing, discussing or using the document in court proceedings. Respondent's reference to the sealed document in an appellate brief did not violate any specific Court Order precluding dissemination or citation.

In re Wilson, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) – Petition preparer had been previously prohibited from preparing or assisting in the preparation of bankruptcy petitions pending further order based on Preparer's improper activities as a petition preparer, its failure to disgorge excessive petition preparer fees to Debtors in that case as required by a previous Court Order, and its failure to appear at hearing. Preparer nonetheless prepared documents for Debtor and charged fee in excess of presumptively reasonable fee. Preparer failed to appear on Court's Order to Show Cause why it should not be held in contempt for violation of prior Order. Preparer had knowledge of both orders and failed to comply with them and was given adequate notice and an opportunity to be heard on the contempt issue, yet failed to appear and has not provided any explanation for its failure. A coercive fine is an appropriate remedy for civil contempt. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$1,000.00 per day until Preparer files a request for a hearing to explain its failure to comply.

In re Denison, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Bankruptcy Petition Preparer held in civil contempt for disregard of Court Orders. Court issued first Show Cause for Preparer to explain why Preparer charged more than the presumptively allowable fee. Petition Preparer responded with amended statement of compensation that disclosed a different social security number and different address than was stated in prior statement. Court issued second Show Cause for Preparer to explain why she filed documents listing two different social security numbers, and stated that court would consider whether she should be held in contempt for failure to obey a lawful Court Order and/or barred from participating as a bankruptcy petition preparer in the Northern District of Ohio and/or be referred to the United States Attorney for such action as he deems appropriate. After Preparer failed to appear, Court concluded that civil contempt finding was appropriate where Preparer was served with and had knowledge of the order and the terms of the order were specific and required her to appear on July 29, 2010. A coercive per diem fine is appropriate to encourage compliance with the court's order. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$10.00 per day until Preparer complies with the order and is barred from participating as a bankruptcy petition preparer in any case absent further order of this court. Finally, the issue of the different social security numbers is referred to the U.S. trustee for such action as he deems appropriate.

26.17 Contempt – Criminal

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.

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.

26.18 Parties Liable

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – When imposing sanctions against corporate entity, Court can use civil contempt power including imposition of per diem penalties and incarceration against anyone in position to ensure that corporation makes payment. Command to corporation to act is command to those officially responsible for corporate affairs. If parties responsible prevent compliance or fail to take actions within power of corporate duties, principal is no less guilty of corporation itself and may be punished accordingly.

26.19 Show Cause

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.

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.

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.

In re Hermiller, Case No. 10-70825 (Bankr. E.D. Mi. 2010) – There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes the stay has been violated, appropriate action is motion under Section 362(f).

In re Lee-Blue, Case No. 10-42861 (Bankr. E.D. Mi. 2010) - There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes a Court Order has been violated, party may file a motion asking the court to hold the allegedly violating party in contempt through the mechanism in Local Rule 9014-1.

26.20 Defense – Bad Faith and Unclean Hands of Moving Party

In re Mabone, 2012 WL 1918433 (Bankr. E.D. Mi. 2012) – Creditor’s Motion for Sanctions denied based on creditor’s own lack of good faith. Prior to commencement of Chapter 13 case, creditor repossessed Debtor’s automobile. When Debtor filed bankruptcy, creditor agreed to return the vehicle, but when Debtor attempted to retrieve vehicle it would not start, requiring Debtor to have vehicle towed. Prior to confirmation of Debtor’s Chapter 13 plan, vehicle was destroyed in an accident. Creditor sought sanctions against Debtor and attorneys for allegedly filing case in bad faith; pursuing entry of an order compelling creditor to return the vehicle after the vehicle had already been returned; and that Debtor’s schedules were false and intentionally mis-stated income and debts. Court denied creditor’s motion. Reason vehicle would not start when Debtor attempted to retrieve it was because creditor had installed a GPS tracking device and a starter interrupt device and, after agreeing to return vehicle, apparently used the devices to prevent the car from starting, requiring Debtor to have vehicle towed to repair shop at cost of \$532.00. Creditor’s actions were intentional and deliberate attempt to interfere with property of estate which, itself, was sanctionable as a deliberate and willful violation of stay

SIXTH CIRCUIT CASELAW THAT MAY COME IN HANDY

By: Karen Declercq, former law clerk to the Hon. Mary Ann Whipple
John P. Gustafson

Bankruptcy Code Issues:

The Automatic Stay And Relief:

Laguna Assoc. Ltd. P'ship v. Aetna Casualty & Surety Co. (In re Laguna Assoc. Ltd. P'ship), 30 F.3d 734 (6th Cir. 1994) (recognizing that a debtor's lack of good faith in filing a petition for bankruptcy is a basis for lifting the automatic stay and setting forth eight factors to consider.).

Easley v. Pettibone Mich. Corp., 990 F.2d 905, 911 (6th Cir. 1993) ("actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances.").

Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6th Cir. 2001) (In deciding whether action by government unit comes within "police or regulatory power" exception to automatic stay, court applies two tests, a "pecuniary purpose" and "public policy" test).

Tidewater Finance Co. v. Curry (In re Curry), 509 F.3d 735 (6th Cir. 2007) (affirming order denying motion for relief from stay and finding that vehicle repossessed by secured creditor under Ohio law before commencement of owner's Chapter 13 case, that had not been sold or otherwise disposed of, is property of the bankruptcy estate).

Discharge And Dischargeability:

Rembert v. AT&T Universal Card Servs. (In re Rembert), 141 F.3d 277, 281 (6th Cir. 1998) (setting forth the elements of a claim for nondischargeability for fraud under § 523(a)(2)(A)).

Commonwealth Land Title Co. v. Blaszak (In re Blaszak), 397 F.3d 386, 390 (6th Cir. 2005) (under § 523(a)(4), the required fiduciary relationship turns on the existence of a pre-existing express or technical trust whose res encompasses the property at issue).

Brady v. McAllister (In re Brady), 101 F.3d 1165, 1172-73 (6th Cir. 1996) (defining embezzlement under § 523(a)(4) as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.").

Long v. Calhoun (In re Calhoun), 715 F.2d 1103 (6th Cir. 1983) (setting forth four-step analysis for determining whether the assumption of debt to a third party was in the nature of support under § 523(a)(5)); *see also, In re Sorah*, 163 F.3d 397 (6th Cir. 1998) (bankruptcy courts look to traditional state law indicia that are consistent with a support obligation).

Markowitz v. Campbell (In re Markowitz), 190 F.3d 455 (6th Cir. 1999) (holding that "unless 'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' . . . he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)").

Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986) (under § 523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent.").

Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433 (6th Cir. 1998) (addressing student loan dischargeability under § 523(a)(8)).

Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler), 397 F.3d 382 (6th Cir. Feb. 3, 2005) (adopting the second circuit's *Brunner* test in determining the existence of undue hardship under § 523(a)(8)).

Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch), 409 F.3d 677 (6th Cir. 2005) (all three prongs of the *Brunner* test must be satisfied for the court to find undue hardship; the availability of advantageous administrative payment alternatives is a relevant factor to be considered by the court in addressing good faith repayment efforts).

Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett), 487 F.3d 353, 364 (6th Cir. 2007) (finding that the debtor's decision not to participate in income contingent repayment program, while probative of his intent to repay these loans, did not *per se* prevent him from satisfying the good faith prong of *Brunner* test).

Miller v. Pennsylvania Higher Educ. Assistance Agency (In re Miller), 377 F.3d 616 (6th Cir. 2004) (grant of a partial discharge of student loan indebtedness could only be made upon a showing of undue hardship with regard to the amount discharged; court cannot rely on equitable powers to evade plain language of § 523(a)(8)).

Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467, 472 (6th Cir.1998)(in a no-asset Chapter 7 case, unlisted claims are discharged – notwithstanding Section 523(a)(3) – unless the creditor holds a claim that is non-dischargeable under Section 523(a)(2), (4), or (6)). *See also, Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539 (6th Cir.1985).

Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000) (in contrast to a violation of the automatic stay, a debtor has no private cause of action under § 524 against a creditor for violation of the discharge injunction. The action is one for contempt of the discharge order.).

Property Of The Estate And Avoidance Actions:

Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455, 461-63 (6th Cir. 2013) (discussing when a cause of action becomes property of the estate and stating that all causes of action that hypothetically could have been brought pre-petition are property of the estate under § 541(a) “even if the debtor was unaware of the claim” and that “the entire cause of action is property of the estate, even if further post-petition damages were incurred.”).

Suhar v. Burns (In re Burns), 322 F.3d 421, 427 (6th Cir. 2003) (“[A]voidance and recovery are distinct concepts and processes;” recovery under § 550 is necessary only when the remedy of avoidance is inadequate).

Conversion Or Dismissal:

Copper v. Copper (In re Copper), 426 F.3d 810 (6th Cir. 2005) (conversion of a Chapter 7 case under § 704 to a case under Chapter 11, 12, or 13 may be denied where request is made in bad faith or is attempt to abuse the bankruptcy process).

Indus. Ins. Servs., Inc. v. Zick (In re Zick), 931 F.2d 1124, 1126-27 (6th Cir. 1991) (interpreting the “for cause” provision of § 707(a) as permitting a bankruptcy court to dismiss a Chapter 7 petition if it finds that the petition was not filed in good faith).

In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (discussing factors relevant to a § 707(b)(3)(B) determination as to whether a debtor's financial predicament warrants discharge of his debts in a Chapter 7 case).

In re Behlke, 358 F.3d 429, 435 (6th Cir. 2004) (discussing ability to pay and stating that it alone may be - but is not necessarily - sufficient to warrant dismissal under § 707(b)).

Denial Of Discharge Under Section 727:

Keeney v. Smith (In re Keeney), 227 F.3d 679, 683 (6th Cir. 2000) (setting forth elements under § 727(a)(2)(A) and (a)(4)(A)).

Chapter 11 - Bad Faith:

Trident Associates Ltd. Partnership v. Metropolitan Life Insurance Co. (In re Trident Associates Ltd. Partnership), 52 F.3d 127 (6th Cir. 1995) (discussing factors court may consider in determining whether Chapter 11 petition filed in bad faith and finding newly created debtor with only a single asset and no ongoing business or employees was filed in “bad faith”).

Interest:

Bank of Montreal v. Official Comm. of Unsecured Creditors (In re Am. HomePatient, Inc.), 420 F.3d 559 (6th Cir. 2005) (discussing proper approach to determining cramdown interest rate in Ch 11).

Chapter 13:

Harshbarger v. Pees (In re Harshbarger), 66 F.3d 775, 777-78 (6th Cir. 1995) (applying the disposable income test of § 1325(b)(2) and finding “that it would be unfair to creditors to allow the Debtors . . . to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.”).

Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012) (holding that post-petition income freed up after a debtor’s 401(k) loans are fully paid is “projected disposable income” that must be paid into a Chapter 13 plan under § 1325(b)).

Lane v. Western Interstate Bancorp (In re Lane), 280 F.3d 663 (6th Cir. 2002) (antimodification provision of § 1322(b)(2) permits modification of the rights of totally unsecured homestead mortgagees in Chapter 13 plans since, under § 506(a), the mortgagee holds only a unsecured claim where a second mortgage is valued at less than debtor's secured obligation to a first mortgagee; secured status depends on whether the lienholder's interest in the collateral has economic value).

Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011) (§ 1325(b)(4) imposes a temporal requirement, not a monetary requirement, even if a debtor has no projected disposable income – so the under 100% Chapter 13 plans of over-the-median debtors are required to run 60 months).

Darrohn v. Hildebrand (In re Darrohn), 615 F.3d 470 (6th Cir. 2010) (concluding that a bankruptcy court must account for changed circumstances in both a debtor’s income and expenses in determining “projected disposable income.”).

Carroll v. Sanders (In re Sanders), 551 F.3d 397, 399-400 (6th Cir. 2008) (The clock on the four-year ban on receiving a Chapter 13 discharge after getting one in a Chapter 7 case begins to run with the filing of the first case, not the date the court granted the discharge).

In re Nolan, 232 F.3d 528, 532 (6th Cir. 2000); *In re Adkins*, 425 F.3d 296, 301 (6th Cir. 2005) (Section 1329(a) does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim.... Instead, section 1329(a)(1) only affords the debtor a right to request alteration of the amount or timing of specific payments.).

Shaw v. Aurgroup Financial Credit Union, 552 F.3d 447 (6th Cir. 2009) (holding that a creditor's failure to timely object to plan confirmation may be construed as acceptance of the Chapter 13 plan).

In re Caldwell, 895 F.2d 1123, 1126 (6th Cir. 1990) (debtor has the burden of proof to establish that a plan should be confirmed based on the criteria in § 1325(a)).

In re Okoreeh–Baah, 836 F.2d 1030 (6th Cir. 1988) (setting forth a twelve-part test for determining whether a debtor's Chapter 13 plan is proposed in good faith).

Bankruptcy Rules:

Brunswick Assocs. Ltd. P'ship v. Pioneer Inv. Servs. Co. (In re Pioneer Inv. Servs. Co.), 943 F.2d 673 (6th Cir. 1991) (discussing “excusable neglect” standard under Fed. R. Bankr. P. 9006(b)).

Waldschmidt v. Commerce Union Bank (In re Bauer), 859 F.2d 438, 441 (6th Cir. 1988) (under Rule 9019, in considering whether to approve a proposed compromise, the court must weigh all conflicting interests in deciding whether the compromise is “fair and equitable,” considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors).

Claim and Issue Preclusion:

Corzin v. Fordu (In re Fordu), 201 F.3d 693 (6th Cir. 1999) (addressing issue preclusion under Ohio law; federal court must apply the law of the state in which the prior state court judgment was rendered).

Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565 (6th Cir. 2008) (identifying requirements for application of claim preclusion of prior federal court judgment); *and, Wolfe v. Perry*, 412 F.3d 707 (6th Cir. 2005) (identifying requirements for the application of issue preclusion of prior federal court judgment).

Bankruptcy Court Jurisdiction:

Waldman v. Stone, 698 F.3d 910, 918 (6th Cir. 2012) (addressing constitutional limitation on bankruptcy court jurisdiction).

Michigan Employment Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co., Inc.), 930 F.2d 1132 (6th Cir. 1991) (explaining the four types of matters over which 28 U.S.C. § 1334 grants jurisdiction; re: “arising under,” “arising in,” and “related to” jurisdiction, court need only “determine whether a matter is at least ‘related to’ the bankruptcy”).

Browning v. Levy, 283 F.3d 761 (6th Cir. 2002) (explaining that a claim is a “core” proceeding under 28 U.S.C. § 157 if it either invokes a substantive right created by federal bankruptcy law or could not exist outside of the bankruptcy).

Lowenbraun v. Canary (In re Lowenbraun), 453 F.3d 314 (6th Cir. 2006) (defining core and non-core proceedings and addressing mandatory abstention under 28 U.S.C. § 1334(c)(2)).

McCormick v. Braverman, 451 F.3d 382, 393-94 (6th Cir. 2006) (the *Rooker-Feldman* doctrine “is confined to those cases exemplified by *Rooker* and *Feldman* themselves: when a plaintiff asserts before a federal district court that a state court judgment itself was unconstitutional or in violation of federal law.”).

Longo v. McLaren (In re McLaren), 3 F.3d 958, 965-66 (6th Cir.1993) (recognizing a bankruptcy court's authority to determine the validity and amount of a debt as well as the debt's dischargeability).

Moran v. LTV Steel Company, Inc. (In re LTV Steel Company, Inc.), 560 F.3d 449 (6th Cir. 2009) (A party “does not have standing to appeal a bankruptcy court order unless that party is directly and adversely affected pecuniarily by the order.”).

A FEW SUPREME COURT BANKRUPTCY DECISIONS THAT MAY BE HELPFUL TO KNOW BY NAME

By John P. Gustafson

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). "For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations." The *Ransom* case holds that there is no Means Test deduction for vehicles that are owned free and clear of liens.

The case also contains the statement: "'Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system.' *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 231-232, 130 S.Ct. 1324, 1329, 176 L.Ed.2d 79, 84 (2010)). In particular, Congress adopted the means test -- "[t]he heart of [BAPCPA's] consumer bankruptcy reforms," H. R. Rep. No. 109-31, pt. 1, p. 2 (2005) (hereinafter H. R. Rep.), and the home of the statutory language at issue here -- to help ensure that debtors who can pay creditors do pay them. *See, e.g., ibid.* (under BAPCPA, "debtors [will] repay creditors the maximum they can afford")."

Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Attorneys who provide bankruptcy assistance are debt relief agencies within the meaning of BAPCPA. However, the court read the restrictions on attorneys giving advice to clients about incurring debt narrowly, thereby avoiding the Constitutional "free speech" issues. Disclosure requirements in advertising -- i.e., the "debt relief agency" language -- were reasonably related to the state's interest in preventing deception of consumers, and the disclosure requirement did not prevent debt relief agencies from conveying any additional information.

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010). Order confirming plan discharging student loan debt without "undue hardship" finding, or adversary proceeding, was not void. Supports the binding effect of confirmation of Chapter 13 Plans, and the need for creditors to not sleep on their rights in seeking relief under Rule 60(b). There is also language in the majority opinion about the obligation of bankruptcy judges to review Chapter 13 Plan language and not confirm Plans that do not comply with the Code.

Taylor v. Freeland & Kronz, 503 U. S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). A Chapter 7 trustee could not contest the validity of claimed exemption after the 30 day period for objections had expired, and no extension had been obtained, even though debtor had no colorable basis for claiming exemption. The Supreme Court clarified the *Taylor* rule in **Schwab v. Reilly**, 560 U.S. 770, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010). Where a Chapter 7 debtor claimed exemptions in business equipment that equaled the maximum allowed under 11 U.S.C.S. §522(d) and also equaled the debtor's estimated market value for the equipment, the trustee was not required to object under §522(l) in order to preserve the estate's right to retain any value beyond the claimed amount.

Law v. Siegel, 571 U.S. 415, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014). The holding was that bankruptcy courts have no power to equitably surcharge administrative expenses against a debtor's claimed exemptions on the grounds that the debtor had engaged in fraudulent conduct. The case also supports two important propositions: 1) equity/Section 105(a) cannot be used to take an action prohibited by another provision of the Bankruptcy Code; and 2) disallowance of exemptions is limited to federal statutory grounds, or state law limitations.

Hamilton v. Lanning, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010). "Forward looking" approach could be used in calculating "projected disposable income" under §1325(b)(1)(B) as courts had discretion to account for known or virtually certain changes in a debtor's income. The use of Chapter 13 debtor's current income, not an inflated figure due to a prior one-time employer buyout, was affirmed.

Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918 59 L.Ed.2d 136, 141-142 (1979). "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Everything we do in bankruptcy is premised on due process based upon "notice and the opportunity for a hearing." *Mullane* is the case to know by name on the constitutional requirements for notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

United States v. Whiting Pools, Inc., 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Stands for the proposition that the IRS is no better than any other creditor and has to follow the bankruptcy laws like everyone else. One of the IRS's arguments was that it was exempt from the Bankruptcy Code's provision that related to other secured creditors. *Whiting Pools* also held that a debtor's estate includes property that has already been seized by a creditor.

BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). A non-collusive and regularly conducted nonjudicial foreclosure sale could not be challenged as a fraudulent conveyance because the consideration received in such a sale established reasonably equivalent value as a matter of law. This case set the old *Madrid* rule in stone.

Nobelman v. American Savings Bank, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The protection of §1322(b)(2) prevents the use of 11 U.S.C. §506(a) to "strip down" the lien of a mortgage to the value of the mortgaged real estate when the creditor's claim is secured only by a lien on the debtor's principal residence. The holding in *Nobelman* is what courts must distinguish in allowing the stripping of wholly unsecured second and third mortgages in Chapter 13 cases – and until that issue gets to the U.S. Supreme Court, there is still some uncertainty, in some jurisdictions, surrounding the allowance of mortgage strips in Chapter 13.

Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). A debtor's suit to "strip down" creditors' lien on the debtor's real property to equal the property's fair market value and declare the remainder void was dismissed because the creditors' claim had been "allowed" and was "secured." *Dewsnup* was followed in the recent "strip off" decision, **Bank of America, N.A. v. Caulkett**, ___ U.S. ___, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015).

Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). There is no 'absolute right' to convert a Chapter 7 case to a Chapter 13. Where there is fraud, §706(d) provides adequate authority for the denial of conversion. Further, nothing in the text of either §706 or §1307(c) (or the legislative history of either provision) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who had demonstrated that the litigant was not entitled to the relief available to the typical debtor. The broad authority granted to bankruptcy judges in §105(a) was adequate to authorize an immediate denial of a §706(a) motion to

convert. The impact of this decision on the debtor's 'absolute right to dismiss' a Chapter 13 case is still a hot issue before the courts.

Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d (1997). In determining the value of a creditor's secured claim in property subject to a debtor's "cramdown" under §1325, courts must use a replacement value standard that depends on the type of debtor and the nature of the property and its intended use.

Till v. SCS Credit Corp., 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The controversy over the 4-4-1 split seems to have died down, and reductions in interest rates to "prime plus a risk factor" of 1% to 3% are being applied to all kinds of high interest rate loans (other than mortgages on the debtor's primary residence), reducing the amount of interest that Chapter 13 debtors have to pay. The majority of courts allow the "*Till*-ing of interest" on 910 vehicle loans, and "*Till*-ing up" very low interest rate motor vehicle loans under certain circumstances.

United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365, 370-371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). When a motion for relief from stay is filed, once the movant shows that the debtor has no equity in the property, the burden shifts to the debtor to establish that the property is "necessary to an effective reorganization" and that there is "a reasonable possibility of a successful reorganization within a reasonable time." And, *Timbers* also held that when secured collateral is declining in value, the secured creditor is entitled to cash payments or additional security in the amount of the decline.

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 166 S.Ct. 286, 133 L.Ed.2d 258 (1995). The Supreme Court held that bank accounts may be frozen, by the bank, to preserve their right to set off debts owed to them against the debtor's accounts. However, if the accounts are frozen, the creditor has move quickly to seek relief from stay to effectuate a setoff.

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), the Supreme Court stated: "Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'" *Grogan*'s endorsement of the lower "preponderance" standard in dischargeability proceedings means that state and federal court judgments are more likely to be given preclusive effect, because the judgment-issuing court will have either used the preponderance standard, or a higher one.

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). The law specifically allowed postpetition interest on a nonconsensual oversecured lien as well as on a consensual claim in light of the clear language of 11 U.S.C.S. §506(b). Congress intended that all oversecured claims be treated the same way for purposes of postpetition interest.

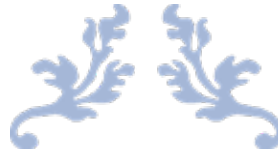
Johnson v. Homestate Bank, 501 U.S. 78, 111 S.Ct.2150, 115 L.Ed.2d 66 (1991). Held that the Code permits "Chapter 20" cases – a Chapter 13 following hard on the heels of a Chapter 7. Further, *Johnson* held that a creditor with an obligation secured by a lien on a debtor's property that the debtor has no personal liability, due to a prior bankruptcy discharge, still has a claim against the subsequent Chapter 13 estate and that claim can be dealt with in the Chapter 13 case.

Non-Article III Jurisdiction Cases

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). In addition to the important statutory changes made in response to *Marathon*, this decision set the boundaries of Bankruptcy Court authority. Without the consent of the parties, Bankruptcy Courts can issue final judgments only on “core proceedings”. For non-core related proceedings, a Bankruptcy Judge can only issue proposed findings of fact and conclusions of law, which are submitted to the District Court, which reviews them *de novo*. Much of *Marathon*’s holding appears to have been altered or superseded by later Supreme Court decisions like *Stern*, *Arkison*, and *Wellness*

Exec. Benefits Ins. Agency v. Arkison, ___ U.S. ___, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014). This case set forth the procedure under which bankruptcy courts are to render proposed findings of fact and conclusions of law with regards to *Stern* claims that are then reviewed by the district court, even if said claims are “core” under the Bankruptcy Code. The holding in *Wellness* suggests that the *Arkison* procedure ought to be used for *Stern* claims where parties have not consented to entry of final judgment by the bankruptcy court.

Wellness Intern. Network, Ltd. v. Sharif, ___ U.S. ___, 135 S.Ct. 1932, 191 L.Ed.2d 1932 (2015). Held that a bankruptcy court may constitutionally enter final judgment on a *Stern* claim with the express or implied consent of the parties. This case, along with *Arkison*, appears to resolve many of the issues raised by the holding of **Stern v. Marshall**, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).



CASE LAW UPDATE

HONORABLE STEVEN RHODES VETERAN'S DAY CONFERENCE

November 11, 2019



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SUPREME COURT REVIEW

1. *Taggart v. Lorenzen*, ___ US ___, 2019 WL 2331303 (2019) – Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief.
2. *Mission Products Holdings, Inc. v. Tempnology LLC*, ___US ___, 2019 WL 2166392 (2019) – Rejection of license agreement by Debtor/Licenser does not terminate Licensee’s right to use licensed intellectual property. Rejection constitutes breach of license agreement by licenser that cannot rescind rights of non-breaching licensee.
3. *Obduskey v. McCarthy & Holthus*, ___ US ___, 139 S.Ct. 1029 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b).

DISCHARGE INJUNCTION

4. *In re DiStefano*, Case No. 18-5001 (Bankr. W.D. Mi. 2019) – Finding of contempt requires proof that creditor deliberately acted with actual knowledge of bankruptcy case; and that creditor lacked any objectively reasonable basis to believe that conduct might be lawful. Creditor violates injunction where letters sent to Debtor that objectively have effect of coercing Debtor to pay or making demand for payment.
5. *Roth v. Nationstar Mortgage, LLC*, 935 F.3d 1270 (11th Cir. 2019) – Question is whether communication has objective effect of pressuring Debtor to pay discharged debt. Discharge injunction prevents creditor from communicating with Debtor in effort to coerce payment. Discharge injunction does not prevent Debtor from voluntarily making payments to creditors.
6. *In re Bentley*, 2019 WL 4879330 (Bankr. E.D. Ky. 2019) – Creditor does not violate discharge injunction by refusing to repossess surrendered automobile.
7. *In re Deemer*, 602 BR 770 (Bankr. M.D. Al. 2019) – Creditor violates discharge injunction where Creditor refuses to repossess surrendered vehicle or release lien, forcing Debtor to indefinitely store and retain worthless vehicle.
8. *In re Sterling*, 933 F.3d 828 (7th Cir. 2019) – Party violates discharge injunction where party has knowledge of granting of discharge and undertakes actions which willfully violate post-discharge injunction. Although creditor did not take action to collect debt, creditor’s attorney who had been pursuing collection for over 10 years (but who did not have notice of bankruptcy or discharge) continued to pursue collection resulting in Debtor’s arrest.
9. *Moore v. Automotive Finance Corp.*, 2019 WL 3323328 (M.D. Al. 2019) – Creditor has no obligation to continue to do business with Debtor post-discharge and does not violate discharge injunction by refusing to do so.

SERVICE – RULE 7004

10. *In re Longwell*, 2019 WL 1293999 (Bankr. N.D. Ohio 2019) – Rule 3012 allows a Debtor to value a secured claim as part of the Chapter 13 Plan but requires that Plan be served on holder of claim in manner provided under Rule 7004. Creditor not properly served where Debtor served Plan on creditor 3 months after deadline to object to confirmation and confirmation hearing had passed.
11. *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.
12. *In re Panek-Hortman*, 593 B.R. 400 (Bankr. W.D.N.Y. 2018) – Rule 7004 requires service on insured depository institution by certified mail addressed to officer of institution. Certified mail addressed to on “Wells Fargo Bank, N.A., Attn: Timothy J. Sloan, President or CEO” but addressed “c/o” address for mortgage servicer. Debtor’s use of address in foreclosure complaint did not comply as complaint did not establish an address that would satisfy the rigid requirement of certified mail to the address of the respondent.

CHAPTER 13 ATTORNEY FEES – CONVERTED CASES

13. *In re Freeman*, 2019 WL 5692665 (Bankr. E.D. Mi. 2019) – Section 330(a)(1) does not permit compensation to attorney for services rendered before conversion of case to Chapter 13 because Debtor’s counsel is not “employed” under Section 327 or Section 1103. Section 330(a)(4)(B) allows Court in Chapter 12 or Chapter 13 to award reasonable compensation for representing Debtor’s interests in case taking into account benefit and necessity of services, but that section is also limited to services in connection with the Chapter 13 phase and not including any services performed in connection with Chapter 7 phase.

CHAPTER 11 - ABSOLUTE PRIORITY RULE AND THE INDIVIDUAL DEBTOR

14. *Todeschi v. Juarez*, 2019 WL 3943814 (9th Cir. BAP 2019) – Individual Chapter 11 Plan may be confirmed over objection of unsecured creditors only if Debtor does not retain any property of estate. Recognizing split of authority, Court concluded that absolute priority rule prohibits retention of property “under the plan” and Debtor does not retain exempt property under plan but does so under applicable exemption statutes.

AUTOMATIC STAY

15. *Ragone v. Pizza Pan Elyria, LLC*, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending state Court actions or other collection efforts including garnishments, repossessions, or foreclosures

AUTOMATIC STAY – PASSIVE RETENTION

16. *In re Fulton*, 2019 WL 2521455 (7th Cir. 2019) – Creditor “exercises control over property of estate when creditor refuses to return property that creditor repossessed prepetition. Creditor must immediately return possession without requiring that Debtor bring turnover motion.
17. *In re Newberry*, 2019 WL 3857704 (Bankr. E.D. Mi. 2019) – Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition.

LIENS IMPAIRING EXEMPTIONS

18. *Wigger v. State Treasurer*, 2019 WL 1757135, *rehearing denied*, 2019 WL 1975845 (Bankr. W.D. Mi. 2019) – Judicial lien is one that is obtained by judgment, sequestration or other legal or equitable process, while statutory lien arises solely by force of statute on specified conditions. Lien must be statutory or judicial and cannot be both, and depends on origin of lien. Lien is not “judicial” merely because lien may be enforced in court proceedings, but statutory lien must arise solely by statute.

AVOIDANCE – SECTION 544 AND BFP

19. *Hardesty v. Horn*, 2019 WL 4780759 (Bankr. S.D. Ohio 2019) – Bankruptcy Trustee steps into shoes of hypothetical bona fide purchaser of real property and is clothed with whatever legal rights a bona fide purchaser would possess under state law. Bona Fide Purchaser is one who takes in good faith, for value, without actual or constructive notice of defect. Trustee’s actual knowledge of transaction does not control, as outcome is dictated by constructive notice. While unrecorded deed is effective to transfer title, unrecorded deed is not enforceable against BFP.

CHAPTER 13 – PLAN FORM

20. *In re Malinowski*, 2019 WL 1504392 (Bankr. N.D. Ill. 2019) - Lender may not demand provisions in Chapter 13 Plan that are not authorized by Bankruptcy Code and are in conflict with district’s standard-form Plan.

CHAPTER 13 – CONFIRMATION

21. *In re Scott*, Case No. 19-10104 (Bankr. S.D. Ohio 2019) – Bankruptcy Court cannot confirm Plan that does not meet with or contains provisions that are inconsistent with mandatory requirements of Code, even in absence of objection by affected creditor. Even assuming that creditor’s silence is considered acceptance under Section 1325(a)(5), provisions were at odds with mandatory requirements of confirmed plan and Court lacks discretion to confirm plan that does not comply.
22. *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.

CHAPTER 13 – PLAN MODIFICATIONS

23. *In re Moore*, 2019 WL 1868609 (Bankr. E.D. Tn. 2019) – Modification is limited to matters that arise post-confirmation and which were unseen at time of confirmation. Debtor’s inheritance post-confirmation qualified as change in circumstances permitting Trustee to seek to modify plan to increase distributions to creditors. Debtor’s inheritance post-petition consisted property of estate that must be accounted for in any plan modification.
24. *In re Scholl*, 2019 WL 4187699 (Bankr. S.D. Ohio 2019) – Modifying plan to require Debtors to increase payments to unsecured creditors where Debtors, during plan, received large insurance payout, did not endanger “fresh start”.

PROPERTY OF ESTATE – DEATH OF DEBTOR

25. *Cohen v. Chernushin*, 911 F.3d 1265 (10th Cir. 2018) – Debtor’s death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Section 541 limits Estate’s interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, but does not elevate Estate’s interest to greater standing that Debtor had but for bankruptcy filing.
26. *In re Jaffe*, 932 F.3d 602 (7th Cir. 2019) – Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant.

PROPERTY OF ESTATE – THIRD PARTY CLAIMS

27. *In re Spiech Farms, LLC*, 2019 WL 2913270 (W.D. Mi. 2019) – Causes of action brought by creditor against Debtor’s former officers and directors for allegedly improperly diverting assets that would have been available to pay creditors was disguised action to recover fraudulent transfers or for breach of fiduciary duty that belonged to Estate. Trustee is sole party authorized to bring actions unless action is one over which creditor has exclusive right to prosecute exclusive of Debtor. If recovery of by Creditor would preclude subsequent recovery by Debtor, action is property of estate.

PROPERTY OF ESTATE – “ROOTED IN PRE-BANKRUPTCY PAST”

28. *Church Joint Venture, LP v. Blasingame*, 2019 WL 1498192 (6th Cir BAP 2019) – Pre-petition cause of action is property of Bankruptcy Estate. Whether cause of action is pre- or post-petition depends on whether pre-petition facts gave rise to pre-petition violation of Debtor’s rights. Action is bankruptcy property only if Debtor suffered a pre-petition injury.
29. *Davis v. Nasuti*, Case No. 10-24836 (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.
30. *Smith-Warren v. City of Sterling Heights*, 2019 WL 2996182 (E.D. Mi. 2019) – Pursuing cause of action that was not disclosed as an asset in previous bankruptcy filing creates inconsistency sufficient to support judicial estoppel. All facts supporting

Debtor's claims occurred prepetition but Debtor did not disclose to Bankruptcy Court any potential claims.

CHAPTER 13 - VOLUNTARY RETIREMENT CONTRIBUTIONS

31. *In re Penfound*, Case No. 18-48940 (Bankr. E.D. Mi. 2018), *affd*, 2019 WL 4573841 (E.D. Mi. 2019) – Section 1325(b) prohibits Debtors from excluding post-petition voluntary retirement contributions in calculating disposable income.
32. *Davis v. Helbling*, Case No. 17-12965 (Bankr. N.D. Ohio), *appeal pending* Case No. 19-3117 (6th Cir. 2019) - Section 1325(b) prohibits Debtors from excluding post-petition voluntary retirement contributions in calculating disposable income.

CHAPTER 13 - DIRECT PAYMENTS

33. *In re Mrdutt*, 2019 WL 2265030 (9th Cir. BAP 2019) – “Overwhelming majority” of Courts conclude that Direct pay secured claims are payments under plan for purposes of Section 1328. Debtor who has not made all direct payments has not completed payments under plan and is not eligible for discharge, even if Debtor has made all required payments to Trustee.
34. *In re Simmons*, 2019 WL 4793126 (Bankr. S.D. Ga. 2019) – Adopting minority position, Court concluded that failure to make post-petition direct mortgage payments as required by confirmed Plan. Post-petition mortgage payments paid directly by Debtor are not “payments under the Plan” and failure to make payments standing alone does not merit dismissal of case or denial of discharge. “Payments under the Plan” mean payments that Debtor is to make to Trustee.

CHAPTER 13 – EMI AND ATTORNEY FEES

35. *Credit Acceptance Corporation v. Thompson*, 2019 WL 4860971 (S.D. Ind. 2019) – Section 1325(a)(5)(B)(iii) does not require equal monthly installments from first month after confirmation where plan proposes to pay attorney fees in full ahead of secured claims. Section 1326(b)(1) requires payment of administrative claims “before or at the time or each payment to creditors”. Three alternative theories have developed regarding EMI. First theory is that once payments to creditor commence, payments must be EMI but EMI payments do not commence at confirmation as long as plan proposed interim adequate protection payments. Second approach holds that secured creditor is not entitled to any payment until administrative expense are paid in full, allowing accelerated payment of attorney fees before any payment to secured creditors. Third approach is that EMI must commence at confirmation, as Section 1326(b)(1) does not trump EMI creditor, and EMI requirement does not allow for post-confirmation adequate protection payments in amount less than EMI payment.
36. *In re Shelton*, 2018 WL 4404631 (Bankr. N.D. Ill. 2018) - 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).

EXPIRATION OF STAY

37. *In re Smith*, 2019 WL 417827 (Bankr. E.D. Tn. 2019) – Majority of courts conclude that expiration of stay applies only to Debtor and property of Debtor but not as to property of estate. Minority approach holds that stay terminates in all respects. Third approach terminates stay only as to continuation of proceedings commenced prior to bankruptcy that involve property of Debtor or property of estate.
38. *Smith v. State of Maine Bureau of Revenue Services*, 2018 WL 6520887 (1st Cir. 2018) – Expiration of stay terminates stay in entirety as to both Debtor and property of estate. Recognizing that majority of courts limit expiration to Debtor and not property of estate, text of statute is inartfully drafted, overall intent of Congress appears to have been to give second filers benefit stay temporarily and best way to accomplish that is to interpret Section First Modified Pre-Confirmation Chapter 13 Plan(c)(3)(A) to terminate entire stay including estate property.

CHAPTER 13 ELIGIBILITY

39. *Napolitano v. Rumbin*, 2019 WL 3890317 (Bankr. D. Ct. 2019) – Unsecured debts discharged in prior Chapter 7 are not included in calculation of unsecured debt in subsequent Chapter 13. Non-recourse lien that survived Debtor’s Chapter 7 discharge is subject to bifurcation with amount of claim in excess of value of property being deemed unsecured and not included in calculation for purpose of Debt limits. Undersecured balance of secured claim is not allowed claim in Chapter 13 where Debtor previously received discharge in prior Chapter 7.
40. *Asset Management Holdings, LLC v. Hernandez*, 754 Fed. Appx. 632 (9th Cir. 2019) – Mortgage that was included in Debtor’s Chapter 7 case not counted for eligibility purposes in subsequent Chapter 13 where amount of superior liens eclipsed value of property. Ability to strip lien under Section 506 was “readily ascertainable”. Wholly unsecured second mortgage discharged in prior Chapter 7 case is not counted as secured or unsecured debt for eligibility purposes

FRAUDULENT TRANSFERS – CONSTRUCTIVE FRAUD

41. *Keates v. Bullitt County Sanitation District*, 2019 WL 1965917 (Bankr. W.D. Ky. 2019) – Transfer is constructively fraudulent where Debtor received less than reasonably equivalent value and was insolvent on the date of the transfer or became insolvent as a result of the transfer. Debtor received little or no value in exchange for transfer of \$14,000 to defendant in exchange for Debtor’s oral agreement to hook up sewer lines where defendant did not connect systems even though defendant had capacity to do so.
42. *Gocha v. Downs*, 2019 WL 654295 (Bankr. W.D. Mi. 2019) – Reasonably Equivalent Value is question of fact based on facts and circumstances of particular case. Debtor did not receive value in exchange for deposit of funds withdrawn from Debtor’s retirement account into account owned solely by Debtor’s spouse where there was no enforceable agreement between Debtor and spouse to use funds to purchase new home nor any other agreement by spouse to provide any benefit to Debtor.
43. *Lim v. Manuel*, 2019 WL 4010388 (Bankr. E. D. Mi. 2019) – Debtor’s pre-petition transfer to spouse of accrued Social Security payments is potentially avoidable.

Although Social Security benefits never became part of estate, transfer may nonetheless be avoidable as constructively fraudulent.

DEATH OF DEBTOR – GENERALLY

44. *In re Marks*, 2019 WL 343815 (Bankr. E.D. Mi. 2019) When Debtor dies, only person who can appear on Debtor's behalf is official representative of probate estate. Death of Debtor post-confirmation does not require dismissal if personal representative duly appointed by probate Court substitutes in place of Debtor. Case dismissed where personal representative filed, and later withdrew, motion for substitution

CHAPTER 13 – LATE FILED PROOFS OF CLAIM

45. *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).
46. *Brenner's Restoration, Inc. v. Somerville*, 2019 WL 4923928 (Bankr. D. Md. 2019) – In Chapter 13, even untimely filed claim is allowed absent objection. Rule 3002(c)(6) allows Court to extend deadline before or after deadline expires if Debtor does not timely file list of creditor names and addresses required by Rule 1007(a). Creditor not entitled to extension where Debtor filed creditor list even though list admittedly did not include creditor. Although creditor did not have sufficient notice in time to file proof of claim, insufficiency of notice standing alone is not basis to extend deadline unless insufficiency is caused either by Debtor not filing list of creditors or Debtor listing creditor at foreign address. Creditor who did not have sufficient notice in time to file claim holds debt that is not "provided for in the plan" and is not subject to discharge under Section 1328 and may be enforced after conclusion of Chapter 13 case.
47. *In re Vanderpol*, 2019 WL 4880065 (Bankr. D. Colo. 2019) – Rule 3002(c) allows Court to extend deadline to file proof of claim if notice was insufficient because debtor did not file list of creditors names and addresses required by Rule 1007(a). If Debtor does not file matrix, case will automatically be dismissed on the 46th day post-petition which is before expiration of claims bar date. Although plain language of Rule does not apply where Debtor files incomplete matrix, "Congress must have intended" Rule to require a full and complete Matrix. Incomplete matrix does not cut off Court's ability

to extend time for Creditor who was omitted from Matrix and did not otherwise have notice of the case in time to file a Proof of Claim

CHAPTER 13 – DIRT FOR DEBT

48. *In re Keokuk*, 2019 WL 1531843 (Bankr. E.D. Ky. 2019) – Section 1325(a)(5) requires that Debtor either pay value of secured claim or surrender collateral. Lender held security interest in mobile home and real estate on which home was located. Debtor proposed to surrender mobile home and “cramdown” secured claim to value of real estate to be paid in full over the term of the Plan. Plan complied with Section 1325(a)(5)(B)(i) by providing that lender retained liens until full payment or entry of discharge; and Section 325(a)(5)(B)(ii) by providing that the value of property distributed as of effective date of the Plan was not less than allowed amount of secured claim. Debtor may distribute non-cash property to pay all allowed secured claims. Chapter 13 does not prohibit “property-for-debt” Plans. However, Plan incorrectly proposed to reduce secured claim by “replacement value” of mobile home which is value used where Debtor proposes to retain asset. Where Debtor proposes to transfer assets as partial payment, valuation must take into account liquidation value of collateral including fees related to sale and costs of ownership pending liquidation. Court denied confirmation but set matter for additional proceedings to determine value of mobile home for purposes of crediting debt under Section 506

CHAPTER 13 – 60 MONTH PLAN LENGTH

49. *Touroo v. Terry*, 2019 WL 2590751 (E.D. Mi. 2019) – Bankruptcy Court has discretion to allow Debtor to complete obligations after expiration of 60 month term. Section 1327 prohibits confirming Plan that runs more than 60 months but does not preclude allowing Debtor additional time to complete obligations that came due during 60 month plan. Factors to consider include whether Debtor substantially complied with plan including diligence in making payment; feasibility of completing Plan if permitted and length of time needed and amount of arrearage due; whether cure would prejudice creditors; whether debtor’s failure to complete plan is excusable rather than culpable; and availability and relative equities of other remedies such as conversion or hardship discharge.

CHAPTER 13 – EMPLOYMENT OF NON-BANKRUPTCY COUNSEL

50. *In re Griffin*, Case No. 19-0020 (Bankr. W.D. Mi. 2019) - Recognizing split of authority on whether Section 327 applies to Debtor’s request to employ special (non-bankruptcy) counsel, Court concluded that under circumstances of this case Debtor’s proposed employment of Special Counsel is not subject to Section 327 approval. Possibility that special counsel fees would be paid from proceeds of litigation which was property of estate did not require approval of retention in first instance. Standing to pursue cause of action in first instance was unclear and Court would not appoint counsel and perhaps implicitly determine standing of Debtor. Application clear that Debtor sought counsel to represent Debtor, not estate and not trustee; and entry of an order approving retention may cause confusion or conflict.
51. *In re Blume*, 2018 WL 5778057 (Bankr. E.D. Mi. 2018) - Recognizing split of authority on whether Section 327 applies to Debtor’s request to employ special (non-

bankruptcy) counsel, Court concluded that under circumstances of this case Debtor's proposed employment of Special Counsel is not subject to Section 327 approval. Debtor did not seek authority to pay, and will not pay, counsel during pendency of Chapter 13 case and will not be paying or seeking to pay counsel from any property of bankruptcy estate

FRAUDULENT TRANSFERS – COLLEGE EXPENSES

52. *Pergament v. Brooklyn Law School*, 595 BR 6 (E.D.N.Y. 2019) – Fraudulent transfer can be recovered from initial transferee without regard to transferee's good faith. Subsequent transferees are liable only to extent transferee took for value and in good faith. Initial transferee is first person or entity to exercise control over property and right to put money or property to transferee's own purpose. Transferee who is defined as one who has no dominion or control over assets and can do nothing more than transmit funds to third party is not "transferee". Tuition payments made for adult children while children could still withdraw and receive refund are not transfers to or for benefit of College. College did not acquire any interest in or right to funds until drop-add period expired. Until that point, College was holding funds for benefit of child and not for College's own account and College could not take or use funds for its own purposes until directed to do so by Parent or Child and then funds were applied directly to Child's account. College was mere conduit as to pre-paid tuition expenses. If children withdrew from College, funds would have been returned to Child who could use them as Child pleased. However, payments made after Child registered for classes and that were not refundable did not implicate "mere conduit" because College received funds for its own use and benefit