creditor was not discharged as creditor did not have notice of the case in time to file proof of claim, where evidence indicated that creditor was unaware of bankruptcy case until after case had closed and Debtor first provided effective notice only when creditor began proceedings to renew judgment.

(3330) *Hawthorn v. Petty,* 2013 WL 1896261 (8th Cir. BAP 2013) – If creditor is not provided notice of filing in time to file adversary under Sections 523(a)(2), (4) or (6), then there is no subsequent deadline imposed to bring action. Debtor failed to give creditor notice of filing until after deadline had expired. Creditors filed adversary proceedings 64 days later. BAP ruled that adversary was by definition timely. Lack of notice to creditor in time to file adversary precluded Debtor for seeking to dismiss later filed adversary as untimely.

(3331) *First Place Bank v. Casino Concepts by Design, Inc.,* 2013 WL 3351572 (Mi. App. 2013) – Bankruptcy Code requires Debtor to schedule all parties to whom debts are owed. Section 523(a)(3) excepts from discharge any Debtor that is not listed or scheduled in time to permit the creditor to file claims or actions under Section 523(a)(2), (4) or (6). Debtor acknowledged that schedules did not list creditor and that creditor did not have notice of case within times set forth in Section 523(a)(3) but contended that as a "no asset" case debt was discharged. Court rejected Sixth Circuit holding in *Madaj* and adopted holding in *Colonial Surety* that there is no exception in Section 523(a)(3) based on whether the bankruptcy case as an asset or a no-asset case. Debtor bears burden for re-opening bankruptcy case to add creditor if Debtor wants debt to be declared discharged.

(3332) *Gonsalves v. Belice,* Case No. 11-048 (1st Cir. BAP 2012) – Creditor stated "plausible cause of action" where Debtor knowingly listed an incorrect address for creditor in the schedules and matrix, such that all of the mail from the court including the notice of commencement were mis-directed.

(3333) *Seibert v. Horton,* Adv. No. 11-6651 (Bankr. E.D. Mi. 2012) - Unscheduled debt is generally dischargeable in no asset chapter 7 case. However, unscheduled debt that is not otherwise non-dischargeable under section 523(a)(2), (4), or (6), is not automatically discharged if the potential creditor did not have knowledge of the bankruptcy case. Unscheduled creditor did not violate discharge injunction by filing post discharge State Court complaint alleging nondischargeable debt based on alleged theft of money. If proven, debt would be nondischargeable under section 523(a)(6) notwithstanding the general discharge for otherwise unscheduled debts.

(3334) *Tennessee Commerce Bank v. Cox,* Case No. 309-0410 (Bankr. M.D. Tn. 2010) - Critical factual issue under 11 U.S.C. Section 523(a)(3) is whether the plaintiff had notice or actual knowledge of the case in time to file a timely proof of claim. The Debtor did not include Creditor in statements and schedules and Creditor admittedly did not have notice of the bankruptcy until well after the deadline for filing proofs of claim had expired. Debtor not permitted to file late proof of claim on behalf of Creditor and then provide for Tennessee Commerce's debt in her Chapter 13 plan to avoid consequences of failure to list in first instance.

(3335) *Mays v. Hill,* Adv. Case No. 09-6061 (Bankr. E.D. Ky. 2009) – Rule 4007 generally requires a complaint to determine dischargeability of debt to be filed no later than 60 days after the date set for the first meeting of creditors. However, where debt is neither scheduled nor listed, debt is not discharged unless creditor acquires actual knowledge of bankruptcy and time to file a complaint to determine dischargeability. Where creditor did not receive actual knowledge of bankruptcy case until almost one year after commencement of the case and well after the deadline to file an adversary proceeding, creditor's adversary proceeding to determine dischargeability was not time-barred.

8.195 Section 523(a)(4) – Larceny

(3336) *Brown Jordan International, Inc. v. Carmicle,* 2018 WL 3583054 (Bankr. W.D. Ky. 2018) – Larceny requires actual or constructive taking away of property of another without consent and against will of owner with intent to convert property to use of someone other than owner. Intangible property is included and creditor can be deprived of use of intellectual property. Prior District Court Judgment concluded that Debtor accessed Company employee email accounts with fraudulent intent, without authorization, against Company policy and done with purpose of using property for Debtor's own use. Larceny does not require that rightful owner be deprived of use or benefit of property and will be found where Debtor transmits confidential information without authorization even where plaintiff's use of that information was not prevented. Access and transfer of confidential electronic information without authorization is sufficient to establish larceny.

(3337) *Haire v. Padgett,* 2017 WL 3888293 (Bankr. W.D. Ky. 2017) – Larceny is defined as taking of property from possession of another without his consent and with intent to permanently deprive, and requires proof that debtor wrongfully and with fraudulent intent took property from owner. Although landlord established that after Debtor vacated rented property, certain equipment was missing, landlord did not establish that Debtor was the person who took it. When landlord first confronted Debtor about alleged missing equipment, Debtor offered to allow landlord to inspect Debtor's storage containers and landlord declined. Landlord did not pursue either civil action or criminal action in effort to recover property or charge Debtor for theft.

(3338) *Cowin v. Countrywide Home Loans, Inc.,* Case No. 15-20600 (5th Cir. 2017) – Larceny is defined as fraudulent and wrongful taking of property of another with intent to convert it to taker's use and intent to permanently deprive owner of property. Evidence supported finding that Debtor, as part of a conspiracy, committed acts designed to deprive Plaintiff of its interest in proceeds of sale of property by engineering scheme to cause funds to be distributed to entity related to Debtor. Further, even if Debtor did not himself commit larceny, intent and actions of co-conspirators will be imputed to Debtor. Evidence clearly demonstrated that even if Debtor did not personally commit larceny, actions of co-conspirators as part of scheme to deprive Plaintiff of sale proceeds would be imputed to Debtor. Section 523(a)(4) requires only that debt result from larceny and that Debtor be obligated to pay debt, not that Debtor personally committed larceny. As member of conspiracy that obtained funds, Debtor is personally liable for damages caused by actions of conspiracy.

(3339) *Initial Investments, Inc. v. Woodford,* 2016 WL 7191534, *rehg denied,* ___WL ___ (Bankr. E.D. Mi. 2016) – Larceny requires that the

Debtor unlawfully take and carry away of property of another with intent to convert such property to the taker's use without the consent of the owner. Although Debtor breached contract that required Debtor to turn over to plaintiff proceeds received from insurance company to pay plaintiff for work done, there was no evidence that checks from insurance company or proceeds of those checks were property of the Plaintiff or that Debtor intended to convert the property where Debtor was acting under good faith, if erroneous., belief that plaintiff had not completed all work to required specifications. Debtor's actions in refusing to turn over proceeds amounted to breach of contract but did not constitute larceny.

(3340) *Johnson v. Loomis,* 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Debtor committed larceny when he used plaintiff's identification without plaintiff's knowledge or consent to open two credit cards in plaintiff's name, then used the cards and failed to pay the charges. Larceny is defined as fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner and includes credit card identity theft.

(3341) *Cardwell v. Hester,* 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Larceny requires proof that a) the Debtor has wrongfully appropriated funds or property of another for Debtor's own benefit, and (b) he did so with fraudulent intent or deceit. Larceny does not require a pre-existing fiduciary relationship. Evidence indicated that Debtor committed larceny when he entered a store owned by Plaintiff an defendant jointly and removed funds form the safe. Funds belonged to the store or to Plaintiff and Debtor had no right to or interest in the funds, and Debtor admitted wrongfully removing funds for the store without the consent of plaintiff.

(3342) *Coolants, Plus, Inc. v. Couch,* 2016 WL 97524 (Bankr. E.D. Ky. 2016) – State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff for embezzlement, or that Debtor's conduct rose to level of embezzlement or larceny.

(3343) *Phi Air Medical, LLC, v. Holskey,* 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Larceny is defined as the wrongful taking of property from its owner with fraudulent intent, but does not require any fiduciary capacity or relationship. Debtor incurred medical transport charge. Provider submitted invoices to Debtor's insurer. Insurer issued check to Debtor as partial reimbursement of expenses with directions for Debtor to pay provider directly. Instead, Debtor took money and used for personal and household purposes. Debtor knew that the funds belonged to the provider and that he had no right to retain or use the funds. Debtor's actions evidenced a wrongful taking of the funds with fraudulent intent or deceit.

(3344) *Meade v. Pinkerman,* 2015 WL 2445077 (Bankr. N.D. Ohio 2015) – Larceny is fraudulent and wrongful taking and carrying away of property of another with intent to convert the property without consent of owner. Larceny can include intangible property and intellectual property as well as tangible property. After Debtor fraudulently obtained control of Plaintiff's business, Debtor made no attempt to transfer license agreement with licensor and wrongfully and intentionally used trademarks that were licensed to Plaintiff thereby converting the license and trademark agreements to Debtor's use, and Debtor then used plaintiff's name and account with supplier to obtain products without paying for those products, thereby fraudulently and wrongfully obtaining use of Plaintiff's credit.

(3345) *Accounting/Tax Pros, LLC v. Schwartz,* 2015 WL 1407380 (Bankr. M.D. Tn. 2015) – Larceny is actual or constructive taking of property of another without consent and against will of owner or possessor, with intent to convert property to one's own use. Debtor must act wrongfully and with fraudulent intent. Intent is determined on subjective basis, taking into account all of the circumstances. Contract between Debtor and plaintiff was poorly written, leaving it ambiguous as to when title to assets transferred or Debtor's rights in the event of default. While evidence was in dispute, it was possible to reach inference that Debtor did not have fraudulent intent when Debtor declared plaintiff to be in breach of contract and retook and resold assets that Debtor previously sold to plaintiff.

(3346) *Malinowski v. Whisman,* Case No. 14-2041 (Bankr. E.D. Mi. 2015) – Larceny requires a wrongful taking of property with intent to convent the property to the person's own without the knowledge or consent of the owner. Defendant had no direct knowledge of mother's wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college. There was insufficient evidence to link defendant to mother's wrongful actions.

(3347) *Phoenix Financial Solutions, Inc. v. Williams,* 2015 WL 430242 (Bankr. N.D. Ohio 2015) – Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Evidence was insufficient to establish that Debtor committed larceny when he issued check on which Debtor later stopped payment.

(3348) *Merritt v. Layne,* 2014 WL 4723081 (Bankr. E.D. Ky. 2014) –Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff; and there was no evidence that plaintiff entrusted funds to Debtor for specific purpose but that Debtor fraudulently used funds for Debtor's own purposes as necessary to establish embezzlement; and complaint admitted that plaintiff willingly gave money to Debtor precluding finding of larceny. Rather, complaint alleged only that plaintiff made loan to Debtor to enable Debtor to purchase truck, and that Debtor thereafter failed to repay loan.

(3349) *Yoppolo v. Asbury,* 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Larceny requires fraudulent and wrongful taking and carrying away of property of another with intent to convert the property to the taker's use without consent of owner, and is generally considered synonymous with theft. Payments made by creditor to Debtor pursuant to land contract did not amount to obtaining money by larceny. While creditor may have thought that Debtor would use payments by creditor to make payments on underlying mortgage, there was no evidentiary basis for that understanding. There was no testimony that Debtor and creditor ever discussed the issue and nothing in the land contract required application of payments in any particular manner.

(3350) *Bank of America v. Killgrove,* 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd,* 2014 WL 4187988 (E.D. Mi. 2014) – Larceny requires a wrongful taking of property from its rightful owner. Debtor cannot commit larceny where the property in question already belonged to Debtor. Collateral for loan was already property of the Debtor. Debtor could not have committed larceny when Debtor later transferred title to the collateral to third party.

(3351) *First National Bank v. Sierlein,* 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – Larceny differs from embezzlement as larceny requires that initial acquisition itself be wrongful, while embezzlement requires that original acquisition be lawful but that property later be wrongfully retained.

(3352) *Robinson v. Robinson,* 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – Larceny is defined as "the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Because the misappropriated funds at issue were lawfully obtained by Debtor when Plaintiff entrusted the funds to Debtor, claim sounds in embezzlement rather than larceny.

(3353) *Dean v. Hunter,* 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Debtor, a building contractor, committed larceny when Debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and Debtor. State Court judgment in favor of Plaintiff supported finding of larceny. Although judgment did not state that Debtor acted fraudulently or intentionally, State Court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.

(3354) *Hulett v. Rowe,* Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Plaintiff's action against Debtor for alleged diversion of corporate assets failed to evidence any damages based on that alleged diversion. Only damages suffered by plaintiff resulted from Debtor's failure to pay promissory note by which Debtor purchased business from plaintiff. Damages for failure to installments on promissory note does not equate to larceny for purposes of non-dischargeability. Plaintiff did not offer any evidence of any particular asset that was allegedly converted or taken or the value of any such asset. Absent evidence of damages from the alleged larceny independent of damages for breach of the promissory note, judgment would be entered in favor of Debtor.

(3355) *Ewers v. Cottingham,* 2011 WL 2118247 Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

8.196 Section 523(a)(4) – Embezzlement

(3356) *Ellsworth v. Carmichael,* 2018 WL 4201750 (Bankr. E.D. Tn. 2018) – Embezzlement requires fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come. Creditor must show that he entrusted property to Debtor, Debtor appropriated property for use other than that for which it was entrusted, and circumstances indicate fraud. Complaint did not allege embezzlement where underlying agreement required Debtor to collect gross monthly receipts for business and then remit percentage of receipts to plaintiff as commissions. Funds were received by Debtor and his business entity and became property of Debtor and business entity. Debtor's breach of contractual obligation to then pay commissions to plaintiff did not amount to embezzlement.

(3357) *Curtis v. Clair,* 2018 WL 3954188 (Bankr. N.D. Ohio 2018) – Embezzlement as fraudulent appropriation of property by person to whom property has been entrusted. Property "embezzled" must be property of creditor. Debtor cannot embezzle his own property. Debtor obtained loans from creditor through representation that funds would be used to invest in Debtor's business. Instead, Debtor used funds for personal reasons. Debtor's use of funds was not embezzlement where funds became property of Debtor after creditor extended loan. Although loan may have been obtained through unethical or illegal manner, transfer of funds to Debtor operated to transfer title to funds solely to Debtor and funds were Debtor's to spend as he saw fit.

(3358) *Westfield National Insurance Company v. Young,* 2018 WL 1219544 (Bankr. N.D. Ohio 2018) – Embezzlement is fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come. Creditor must prove entrustment of property to Debtor; Debtor appropriated property for use other than that for which it was intended; and circumstances indicate fraud. Embezzlement does not require pre-existing fiduciary relationship and differs from larceny only in that original taking was lawful but embezzlement of property then occurred. State Court judgment established all elements necessary for finding of embezzlement. Debtor was employed as convenience store clerk handling sales of lottery tickets and proceeds of sale, with proceeds coming into Debtor's possession lawfully. Debtor appropriated funds by forging winning lottery tickets allowing Debtor to appropriate lottery cash for purposes other than use intended by employer. Facts evidenced Debtor's fraudulent intent as conduct was repetitive and required intentional fraudulent conduct.

(3359) *Feldman v. Pearl,* 2017 WL 4404243 (Bankr. E.D. Ky. 2017) – Kentucky law does not recognize common law cause of action for embezzlement but does recognize action for conversion which is defined as deceitful, intentional appropriation of the money without right or belief of right. Federal law defines embezzlement as fraudulent appropriate of property by person to whom such property has been entrusted or into whose hands it lawfully came and requires proof that Plaintiff entrusted property to Debtor, Debtor appropriated property for use other than that for which it was entrusted, and circumstances of fraud. Evidence that Debtor took disproportionate distributions from corporation co-owned by Debtor and Plaintiff did not establish that Debtor lacked right to do so or that Debtor lacked belief that he had right to distributions. There was also no evidence of fraudulent intent or deceit.

(3360) *The Brothers Grimm Grass Company v. Weidaw,* 2017 WL 6754136 (Bankr. N.D. Ohio 2017) – Section 523(a)(4) excepts from discharge debt resulting from embezzlement, where creditor entrusts property to Debtor for specific purpose, Debtor appropriated property for use other than that for which it was entrusted, and circumstance indicate fraud. Facts were too disputed to allow resolution by summary judgment and

Debtor not collaterally estopped by Guilty Plea in criminal case where under State law, criminal convictions do not bar re-litigation in later civil case. Collateral estoppel requires mutuality of parties. Criminal case was brought by State of Ohio and Creditor was not party to nor in privity with any party to criminal proceeding. Further, conviction and indictment itself were dismissed where Debtor completed diversionary program, and Court was not aware of any basis to determine that dismissed indictment could be considered conviction.

(3361) *HST Corporate Interiors LLC v. Sherrick,* 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Debt resulting from embezzlement is not dischargeable under Section 523(a)(4). Embezzlement requires proof that property of creditor was entrusted to Debtor; Debtor appropriated property for use other than that for which it was entrusted; and circumstances indicate fraud or deceit. Evidence indicated that Debtor embezzled funds where Debtor acted as contractor for government project with plaintiff Corporation being retained to perform and coordinate all work on project. When payments were received by Debtor from government agency, Debtor knew that Debtor was not entitled to keep entire amount yet Debtor made no effort to advise plaintiff when payments were received or to forward payments owed to plaintiff for services performed. Debtor instead used funds to pay overdue personal income taxes, corporate payroll taxes and insurance penalties. Debtor delayed distributing funds to plaintiff and concealed the fact that plaintiff had received funds from government agency until after vast majority of funds had been expended for Debtor's personal obligations. Debtor's diversion of funds constituted embezzlement resulting in debt being nondischargeable.

(3362) *Allen v. Smith,* 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.

(3363) *Townsel v. Recon Management Group, LLC,* 2017 WL 1130094 (E.D. Mi. 2017) - Collateral estoppel warranted determination of debt as nondischargeable where State Court Complaint that gave rise to default judgment incorporated elements of embezzlement referenced in State Court criminal conviction and State law elements of embezzlement for purposes of criminal proceeding were same as definition of embezzlement under bankruptcy code.

(3364) *Poole v. Batson,* 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) excepts from discharge debts resulting from embezzlement or larceny. Embezzlement and larceny do not require fiduciary capacity. Embezzlement is defined as fraudulent appropriation of property by person to whom property has been entrusted, and requires proof that property of Creditor was entrusted to Debtor, that Debtor appropriate property for use other than that for which it was entrusted, and circumstances indicate fraud. Plaintiffs hired Debtors, a building contractor, to build project for plaintiffs and plaintiffs entrusted funds to Debtors for purposes related to that construction. Funds were used for purposes other than construction where Debtors used money for other business expenses unrelated to plaintiffs construction. Debtors knew that Debtors were having cash difficulties when they took the retainer and knew that plaintiffs understood that retainer would be used solely for construction of plaintiff's project. Debtors use of funds for other purposes constitutes embezzlement for purposes of Section 523(a)(4).

(3365) *Federal Insurance Company v. Sorge,* Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from embezzlement. Embezzlement does not require fiduciary relationship. Embezzlement requires that creditor entrusts money or property to Debtor, Debtor appropriates money or property for use other than that for which it was entrusted, and circumstances indicate fraud. Complaint did not contain sufficient facts to establish embezzlement. Complaint contained conclusory statements that defendant, an employee of plaintiff, committed embezzlement by approving fraudulent insurance claims but did not allege any factual basis to support the allegations.

(3366) *Contemporary Imports, Inc. v. Morrow,* 2017 WL 122981 (Bankr. E.D. Tn. 2017) – Section 523(a)(4) allows court to except from discharge any debt for fraud or defalcation while acting in fiduciary capacity, or for embezzlement or larceny. Embezzlement means fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come, but person uses or appropriates property for purpose other than that for which it was entrusted. Creditor must prove (1) that he entrusted property to Debtor; (2) that Debtor appropriated property for purpose other than that for which it was entrusted and (3) circumstances indicate fraud. Debtor embezzled proceeds of sale of automobile. Automobile was owned by Plaintiff and was entrusted to Debtor's company solely for repair, after which the vehicle was to be returned to a vehicle auctioneer. Instead, Debtor's company sold vehicle to third party, signed bill of sale to third party identifying Debtor's company as the owner, Debtor took the buyer's trade-in vehicle and cash for the full purchase price, and deposited check into company bank account. Debtor never disclosed to creditor that she had sold vehicle or made any attempt to provide accounting of proceeds and creditor did not discover sale until months later, long after sale had completed and Debtor had used proceeds for personal and business expenses.

(3367) *Initial Investments, Inc. v. Woodford,* 2016 WL 7191534 (Bankr. E.D. Mi. 2016) – Embezzlement is fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has unlawfully come and requires a showing of wrongful intent. Debtor did not embezzle money when Debtor received check from insurance company payable to both Debtor and plaintiff/contractor, but sent check back and received replacement check payable only to Debtor. Debtor did not receive or retain proceeds of check payable to Plaintiff and Debtor and so could not have embezzled those proceeds. Debtor could not embezzle proceeds of replacement check as check was payable to Debtor alone. Plaintiff had no interest in that check or its proceeds and Debtor cannot embezzle property to which Debtor is the owner.

(3368) *Sheen Falls Strategies, LLC v. Keane,* 2016 WL 6875879 (Bankr. N.D. Ohio 2016) – Embezzlement is fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come where person then appropriates property for use other than that for which it was entrusted, and the circumstances indicate fraud. Embezzlement requires fraud in fact involving moral turpitude or intentional wrongdoing, for the purpose of permanently depriving another of his property. Debtor embezzled money when Debtor knew that the purpose of the loan was only for business, but he never used the money for its intended purpose. Instead, the Debtor

spent the money on personal expenses. The circumstances of the loan also indicate fraud. The Debtor purposefully deprived creditor of its property when he solicited the loan where Debtor did not intend to use the loan for business purposes and Debtor lacked the intent to repay the loan.

(3369) *Monson v. Galaz,* Case No. 15-14939 (11th Cir. 2016) – Action under Section 523(a)(4) requires evidence that Debtor wrongfully took or retained assets of a third party with fraudulent intent. Evidence did not demonstrate that borrower wrongfully absconded with lender's property where Debtor believed that Debtor's company owned equipment and that lender did not hold valid security interest as Debtor never signed the financing statement. Although Debtor may have been incorrect regarding ownership and validity of security interest, Debtor held good faith belief that equipment belonged to his company free and clear of any liens, and Debtor did not commit embezzlement by removing assets and equipment form company and transferring those assets to new company to open business in different location rather than return assets to lender to liquidate after default.

(3370) *Johnson v. Loomis,* 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Debt not excepted from discharge for embezzlement where the obligations were loans between friends and were understood as such. Fact that Debtor may have not used funds wisely does not convert loan proceeds into embezzled property.

(3371) *Cardwell v. Hester,* 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Embezzlement requires that (a) Debtor appropriate funds for his own benefit, and (b) with fraudulent intent or deceit. Evidence indicated that Debtor embezzled funds when he entered a store owned by Plaintiff an defendant jointly and removed funds form the safe. Funds belonged to the store or to Plaintiff and Debtor had no right to or interest in the funds, and Debtor admitted wrongfully removing funds for the store without the consent of plaintiff.

(3372) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Cause of action barred where court action was not brought until after statute of limitations expired. Under Kentucky law, statute began to run on date on which embezzlement was, or reasonably could have been discovered. Plaintiff admitted that embezzlement was discovered in 2010 but State Court action was not commenced until 2015.

(3373) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Embezzlement requires that creditor entrust property to Debtor, Debtor appropriates property for purpose other than that for which it was entrusted, and circumstances indicate fraud. Creditor who made loan to Debtor did not "entrust" Debtor with property of creditor, as creditor retained right to repayment and funds given to Debtor were no longer creditor's property at time Debtor used funds and funds did not have specific limitation on how funds could be used.

(3374) *Szachta v. Thompson,* 2016 WL 1055582 (E.D. Mi. 2016) – Embezzlement requires that plaintiff entrusted funds to Debtor; that Debtor appropriated funds for purpose other than that for which it was entrusted; and circumstances indicate fraud. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Settlement funds were entrusted to attorney, not office manager. Absent fiduciary relationship resulting from entrustment to Debtor, plaintiff could not prevail against Debtor for embezzlement, even if office manager was active co-conspirator in wrongful removal and transfer of funds.

(3375) *Coolants, Plus, Inc. v. Couch,* 2016 WL 97524 (Bankr. E.D. Ky. 2016) - State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff's customers. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff.

(3376) *Phi Air Medical, LLC, v. Holskey,* 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Embezzlement is the wrongful appropriation of funds for person's own benefit done with fraudulent intent. Debtor incurred medical transport charge. Provider submitted invoices to Debtor's insurer. Insurer issued check to Debtor as partial reimbursement of expenses with directions for Debtor to pay provider directly. Instead, Debtor took money and used for personal and household purposes. Debtor knew that the funds belonged to the provider and that he had no right to retain or use the funds. Debtor's actions evidenced a wrongful taking of the funds with fraudulent intent or deceit.

(3377) *Walker v. Federal Insurance Company,* 2015 WL 9491181 (Bankr. N.D. Ohio 2015) – Section 523 discharges unscheduled debt unless creditor lacked notice or knowledge of bankruptcy case in time to file adversary to except debt from discharge and debt is one that fits within Section 523(a)(2), (4) or (6). Creditor lacked notice where creditor was not scheduled or included in matrix and received no notifications from Court or from Debtor's counsel and Debtor presented no evidence that creditor had actual or constructive knowledge of bankruptcy case. Debt fell within Section 523(a)(4) where Debtor, while working at senior health care facility, used funds in residents' reimbursement accounts for her own purposes. Funds were in accounts for benefit of residents and not Debtor. Debtor covered up the missing funds by manipulating or forging the general ledger and records of the residents' accounts. Debtor's actions constituted embezzlement as property was entrusted to Debtor for a particular purpose, Debtor used those funds for purposes other than for which funds were entrusted, and circumstances indicated fraud evidenced by manipulation of accounts.

(3378) *Jenkins v. Schmank,* 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Embezzlement is defined as fraudulent appropriation of property by person to whom such property has been entrusted or into whose possession it has lawfully come, but that is used for purpose different than that for which it was entrusted. Advance by plaintiff was non-dischargeable where Debtor induced plaintiff to advance another $23,000 under representation that funds would be used for project but Debtor immediately withdrew $11,500 for personal expenses. Debtor knew that funds were to be used for project and intentionally diverted funds for payment of personal expenses.

(3379) *Smith v. Morse,* 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Embezzlement is fraudulent appropriate of property by person to whom the property has been entrusted or into whose hands it has lawfully come, and the person appropriates property for use other than that for which it was entrusted under circumstances that indicate fraud. Creditor must prove (1) that he entrusted his property to the Debtor (2) that Debtor appropriated the property for a use other than that for which it was entrusted, and (3) that circumstances indicate fraud. Fraud requires element of moral turpitude or intentional wrong. Conflicting factual evidence prevented court from granting summary judgment. Although parties agreed that plaintiff gave defendant $100,000, parties disagreed on purpose of the funds.

(3380) *Meade v. Pinkerman,* 2015 WL 2445077 (Bankr. N.D. Ohio 2015) – Embezzlement requires that Debtor lawfully come into possession of property for specific purpose and that Debtor appropriate property for use other than that for which it was intended, under circumstances that sound in fraud. Plaintiff failed to demonstrate embezzlement where Debtor fraudulently came into possession of stock of business in first instance. Plaintiff cannot be said to have entrusted property to Debtor where property was obtained in first instance by wrongful conduct.

(3381) *Duley v. Thompson,* 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be "actually litigated" in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.

(3382) *Malinowski v. Whisman,* Case No. 14-2041 (Bankr. E.D. Mi. 2015) – Embezzlement requires proof of fraudulent appropriation of property by person to whom such property has been entrusted or into whose hands it has lawfully come. Defendant had no direct knowledge of mother's wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college. There was insufficient evidence to link defendant to mother's wrongful actions.

(3383) *Kloeber v. Montanari,* 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Embezzlement is fraudulent appropriation of property to whom the property has been entrusted or into whose hands the property has lawfully come. Plaintiff must prove both that creditor entrusted property to Debtor and that Debtor appropriated property to own use under circumstances indicating fraud. Fraud must be fraud in fact, not merely implied or constructive fraud. Court would not draw negative inference regarding intent based solely on Debtor's assertion of Fifth Amendment privilege. Plaintiff did not establish that Debtor committed embezzlement where plaintiff established that Debtor's withdrawals from company were in breach of forbearance agreement but did not establish fraud in fact or wrongful intent.

(3384) *Go Wireless, Inc. v. Lehrmitt,* 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect and binds bankruptcy court in later dischargeability proceeding. State Court judgment conclusively established every fact to support finding that debt was incurred by fraud while acting in fiduciary capacity. Debtor's request that court disregard preclusive effect because Debtors are elderly, without significant assets or recourses, and care for special needs child and have health issues, unavailable as equitable determination would insert conditions into Section 523 that are not present in the statute.

(3385) *Merritt v. Layne,* 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint did not allege that plaintiff entrusted funds to Debtor for specific purpose but that Debtor fraudulently used funds for Debtor's own purposes as necessary to establish embezzlement.

(3386) *City of Kentwood v. Salmon,* Case no. 14-80016 (Bankr. W.D. Mi. 2014) – State Court criminal conviction and Judgment of criminal restitution established all elements to except debt from discharge. Undisputed facts established in criminal proceeding established that Debtor embezzled funds from her employer that were transferred to her care in her duties as employee. Employer had superior right to the funds and Debtor obviously and intentionally interfered with that right by misappropriating the funds.

(3387) *Altercare of Navarre Center for Rehabilitation& Nursing Care, Inc. v. Conley,* 2014 WL 1577236 (Bankr. N.D. Ohio 2014) – Embezzlement requires wrongful appropriation or use of property that has been entrusted to Debtor. Power of Attorney from grandmother to Debtor placed Debtor in control of grandmother's property for use and benefit of Debtor. If Debtor misuse that property, then Debtor may have committed embezzlement as to grandmother. Creditor of grandmother could not bring action against Debtor for embezzlement of grandmother's property merely because transfers removed assets that could otherwise have been used to pay creditor. Embezzlement must be direct relationship between Debtor and alleged victim of embezzlement.

(3388) *Yoppolo v. Asbury,* 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Embezzlement requires fraudulent appropriation of property entrusted to person who then uses property for purposes other than that for which it was entrusted. One cannot embezzle property that one owns. Payments made by creditor to Debtor pursuant to land contract did not amount to obtaining money by embezzlement where money was not paid to Debtor for any particular purpose. While creditor may have thought that Debtor would use payments by creditor to make payments on underlying mortgage, there was no evidentiary basis for that understanding. There was no testimony that Debtor and creditor ever discussed the issue and nothing in the land contract required application of payments in any particular manner.

(3389) *Kraus Anderson Capital, Inc. v. Bradley,* 507 BR 192(6th Cir. BAP 2014) – Embezzlement requires that property be entrusted to Debtor or

that Debtor have lawfully acquired property; that Debtor appropriated property for a use other than that for which the property was intended; and circumstances indicate fraud. Debtor cannot embezzle property that Debtor actually owns. Debtor's sale of collateral and retention of proceeds not "embezzlement" as lien creditor did not hold title to or any right to possess either the property or the proceeds, as both the property and the proceeds belonged to the Debtor, subject to lender's security interest. Mere security interest does not rise to level of ownership for purposes of embezzlement.

(3390) *Liggett v. Schwartz,* 2014 WL 1028960 (E.D. Mi. 2014), *aff'd,* 2015 WL 4478033 (6th Cir. 2015) – Embezzlement requires fraudulent appropriation of property by person to whom the property has been entrusted or into whose hands it has lawfully come, where person then appropriates property for use other than that for which it was entrusted, under circumstances that indicate fraud. Debtor's use of property that is encumbered by interest of third party is generally a breach of contract and not embezzlement. Divorce judgment that awarded Wife a 50% interest in Husband's IRA did not convert IRA from property of Husband into property of Wife. Further, at no point did Wife entrust property to Husband. Husband cannot embezzle property that was Husband's property in the first instance.

(3391) *First Assembly of God v. Ping,* 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Embezzlement requires fraudulent appropriation of property by person into whose hands the property had been entrusted or to whom it has lawfully come. Creditor must prove that he entrusted property to Debtor and that Debtor appropriated property for use other than that for which it was entrusted under circumstances indicating fraud. Complaint that alleged conclusion that Debtor fraudulently converted Church funds but did not allege any facts suggesting entrustment of funds, or purpose for which funds were entrusted, or any facts that would demonstrate that the appropriation was done fraudulently, failed to state claim on which relief could be granted.

(3392) *Bank of America v. Killgrove,* 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd,* 2014 WL 4187988 (E.D. Mi. 2014) – Embezzlement requires that person unlawfully hold or misuse property of third party. Debtor cannot embezzle property that Debtor already owns. Debtor's use of collateral and disposition of that collateral is not embezzlement as Debtor owned the assets subject only to creditor's security interest. Further, there was no evidence that lender "entrusted" Debtor with loan proceeds, and proceeds belonged solely to Debtor upon disbursement by lender.

(3393) *Rice v. Morse,* 504 BR 462 (Bankr. E.D. Tn. 2014) – Embezzlement requires the fraudulent appropriate of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. Embezzlement requires proof that creditor entrusted property to the Debtor and that Debtor appropriated property for own use or use other than that for which it was entrusted, under circumstances indicating fraud. Fraud requires moral turpitude or intentional wrong, such tat taking was done with fraudulent intent, and can be shown by circumstantial evidence. Complaint sufficiently alleged action for embezzlement. Plaintiff paid Debtor, a contractor, a deposit specifically to be used to construct home. Debtor did not use the funds for that purpose but instead used them for his own purposes including payment of operating expenses for Debtor's business and a sister company. Debtor diverted the money without plaintiff's knowledge or consent and had no intention of using the funds for construction of plaintiff's home as contracted.

(3394) *Smith v. Morse,* 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Embezzlement requires fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Fraud" required is "fraud in fact, involving moral turpitude or intentional wrong, that Debtor had fraudulent intent in taking creditor's property, and encompasses any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another. Fraud does not require misrepresentation or misleading omissions, although misrepresentations, omissions and concealments are circumstances that evidence fraud. Creditor established embezzlement where Debtor borrowed money from creditor for purposes of building custom home that would be sold, with Debtor and creditor to split the profit. Debtor did not use the money to build the home but instead used the loan to pay general business debts and obligations. Debtor misrepresented the purpose of the loan and never intended to use the loaned funds for the stated purpose." However, creditor failed to sustain action against Debtor-wife where there was no evidence that wife took money, knew of loan, or received any benefit from loan.

(3395) *General Motors, LLC v. Gunner,* 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – Embezzlement requires the creditor have entrusted property to Debtor, Debtor's appropriation of property for Debtor's own use, and circumstances indicating fraud. Debtor properly issued correct and accurate invoices to Plaintiff which, due to internal processing errors, overpaid. Funds are not "entrusted" merely because the funds represent an overpayment. Payments made with "no strings attached" are not entrusted to Debtor for any agreed upon purpose. Further, payments were not made for a purpose other than intended by Plaintiff, as Plaintiff intended that funds be used for payment of invoices, and were actually applied for that purpose.

(3396) *Bank of America v. Armstrong,* Case No. 13-6013 (8th Cir. BAP 2013) – Debtor committed embezzlement when Debtor received insurance proceeds from loss of property and used proceeds to pay personal expenses. Lender had security interest in the insurance proceeds and was named as the loss payee. Debtor had no right to receive the proceeds and when Debtor retained proceeds without forwarding those to the lender, Debtor wrongfully exercised dominion and control over lender's property.

(3397) *Vicars v. Freeman,* 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Embezzlement is fraudulent appropriation of property by person to whom property has been entrusted or into whose hands the property has lawfully come. Creditor must show that property was entrusted to Debtor, that Debtor appropriated the property for purposes other than that for which it was entrusted, and the circumstances indicate fraud. President and majority shareholder did not embezzle corporate funds by having corporation pay mortgage on Debtor's home, were mortgage was taken out for purposes of generating capital to invest in the business. Payments by corporation on mortgage were legitimate payments of business expenses attributable to the loan. Use by Debtor and Debtor's father (also an employee of business) of trucks was not embezzlement where evidence indicated that Debtor and father drove trucks for business purposes including deliveries to customers, a normal and reasonable business expense and function. Creditor failed to demonstrate that payments by company on Debtor's personal credit cards was embezzlement where evidence indicated that credit cards in Debtor's name were used for corporate expenses and purposes. Debtor's salary

did not constitute embezzlement where, Debtor would occasionally receive more in a specific week than the annual salary prorated over 52 weeks, where Debtor never received more than the agreed upon annual salary in any given year. Payment of Debtor's home phone and internet expenses was not embezzlement where evidence indicated that Debtor often worked from home in the evenings and on weekends and used cell phones to stay in contact with customers and suppliers and for other business purposes. Checks written to IRS were payments of payroll taxes for which corporation and Debtor were jointly liable. As such, payments were for obligations owned by corporation which did not constitute embezzlement. Miscellaneous expenditures made by Debtor's father, while arguably improper, were not made by Debtor and were not authorized by Debtor, such that Debtor could not be held liable for misappropriation.

(3398) *First National Bank v. Sierlein,* 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – Embezzlement is defined as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Embezzlement requires proof of intentional wrong, not mere implied or constructive fraud. Debtor embezzled proceeds of casualty insurance that Debtor was required to maintain by terms of mortgage. After fire destroyed building, insurance company erroneously sent proceeds to Debtor rather than mortgagee as loss payee. However, lender could not maintain action because, after error was discovered, insurer sent second payment to bank to pay off loan. As such, while Debtor embezzled money in which bank had lien, bank did not suffer any actionable harm or damage. Insurance company was entitled to determination that debt was not discharged. Debtor received money from Insurance company and wrongfully retained the funds, entitling insurance company to have debt declared non-discharged.

(3399) *Kraus Anderson Capital, Inc. v. Bradley,* 2013 WL 486789 (Bankr. N.D. Ohio 2013) – To prevail on claim of embezzlement, creditor must prove that (1) he entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. Debtor did not embezzle proceeds of sale of equipment where security agreement allowed Debtor to sell equipment in ordinary course of business and sale appeared to be in ordinary course. Evidence also did not indicate fraud as Debtor intended to pay creditor and did make substantial payments after sale of equipment.

(3400) *Lawson v. Conley,* 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Embezzlement is fraudulent appropriation of property by person to whom such property has lawfully come or to whom property has been lawfully entrusted. Embezzlement is proven by showing that: 1) the creditor entrusted his property to the Debtor, 2) the Debtor appropriated the property for a use other than that for which it was entrusted, and 3) the circumstances indicate fraud. Creditor owned trucks prior to commencement of business relationship with Debtor. As part of business relationship, creditor contributed trucks to business that Debtor was to operate, using the trucks, pursuant to agreement with Debtor to operate business and share profits. Creditor entrusted separate truck to Debtor by parking truck on Debtor's property for purposes of storage. Debtors deprived creditor of ownership and possessory rights in trucks by transferring titles and later disposing of the trucks in a manner inconsistent with the purposes for which the trucks were entrusted in the first instance. Although there was no evidence of any fraudulent intent at the time of entrustment, Debtors committed fraud by fabricating outstanding mechanic's bills in name of non-existent Company and using the fabricated bills filed a mechanics lien and unclaimed motor vehicle affidavit with state, thereby allowing Debtors to gain title to vehicles. Debtors then sent false and misleading notices to creditor that did not comply with statutory requirements in effort to defeat creditor's right to contest title transfer. Method of transfer established fraudulent intent to deprive creditor of title to trucks, leaving debt non-dischargeable.

(3401) *Robinson v. Robinson,* 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – Embezzlement is defined as fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Embezzlement differs from larceny in that the embezzler's initial acquisition of the property is lawful. Creditor must prove that (1) he entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. Evidence indicated that Plaintiff entrusted funds to Debtor with intent that Debtor hold funds for benefit of Plaintiff, and that Debtor used a portion of the funds for purposes other than that for which they were entrusted by using funds to pay for improvements to Debtor's home without permission. However, circumstances did not indicate fraud. Fraud requires moral turpitude or intentional wrong, for purpose of permanently depriving another of his property. Evidence indicated that Debtor did not intend to permanently deprive plaintiff of funds. Before Debtor used funds, he had been preapproved for a home equity loan subject to an adequate appraisal when home was completed and that Debtor intended to repay the funds when he received the loan. Downturn in housing market resulted in denial of loan that prevented repayment of funds. Mere negligence, even if characterized as gross negligence, is not the same thing as fraud. While Defendant had no authority to use the funds as he did, he did not have fraudulent intent to take money without repaying it. Debtor in good faith but erroneously believed that he was going to obtain the loan money to replace the funds used by him.

(3402) *Dean v. Hunter,* 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Debtor, a building contractor, committed larceny when Debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and Debtor. Even if materials had properly come into Debtor's possession as the contractor performing the construction, Debtor's action in removing the materials constituted embezzlement. State Court judgment in favor of Plaintiff supported finding of embezzlement. Although judgment did not state that Debtor acted fraudulently or intentionally, State Court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.

(3403) *Frost & Co., Inc, v. Smithey,* 474 BR 830 (Bankr. N.D. Ohio 2012) – To prevail on complaint to except debt from discharge as one for Debtor's embezzlement: (1) creditor must have entrusted his property to Debtor; (2) Debtor must have appropriated the property for use other than that for which it was entrusted; and (3) the circumstances must indicate fraud. Chapter 7 Debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, committed embezzlement of corporate funds as against other 50% shareholder where Debtor wrongfully used corporate funds to pay $24,994.36 for personal legal services, $8,856.76, for country club membership, and $7,120.00 for painting work at Debtor's home.

(3404) *Dantone v. Dantone,* 477 B.R. 28 (6th Cir BAP 2012) – Embezzlement requires proof that plaintiff entrusted property to Debtor; Debtor appropriated property for use other than that for which it was entrusted; and circumstances indicate fraud or deceit. Michigan judgment for statutory conversion established that plaintiff entrusted property to Debtor and that Debtor appropriated property for purpose other than that for which it was entrusted. However, State Court complaint did not allege any indicia of fraud and indicia of fraud is not element of statutory

conversion. Final Judgment in State Court awarding damages for statutory conversion was not collateral estoppel in action under Section 523(a)(4) because one necessary element under Section 523(a)(4) was not necessary or essential to State Court judgment.

(3405) *Hulsing Hotels Tennessee, Inc. v. Steffner,* 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Creditor failed to demonstrate any property interest in property allegedly embezzled. Debtor caused LLC to engage in various loans and other inter-company transfers with sister corporation. Funds and property allegedly transferred were not those of creditor nor did creditor have any interest in those assets. Creditor, as creditor of LLC, did not have specific right to or interest in any particular piece of corporate property or corporate asset.

(3406) *Schofield v. Prentice,* 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Plaintiff failed to demonstrate that Debtor embezzled funds of Plaintiff. Debtor was principal of corporation that owed money to Plaintiff. Debtor allegedly embezzled funds belonging to corporation and used those for Debtor's personal use. Plaintiff did not demonstrate any interest in funds embezzled and failed to join the corporate entities involved which is required for derivative action.

(3407) *Automotive Finance Corp. v. Leonard,* 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. A Debtor cannot embezzle his own property for purposes of a § 523(a)(4) embezzlement action, even if a creditor has a security interest in that property. Debtor who allegedly sold inventory without remitting payments to floor plan lender did not embezzle, as the assets being sold and the proceeds of those sales belonged to Debtor and not to creditor.

(3408) *Humphrey v. Morgan,* 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. Creditor must prove that he entrusted property to Debtor; that Debtor appropriate the property for a use other than that for which it was entrusted; and that the circumstances indicate fraud. "Fraud" requires some element of moral turpitude or intentional wrong and is much broader than just misrepresentations or misleading statements, although misrepresentations or omissions can be relevant to illuminate fraudulent intent. Complaint failed to state cause of action against Debtor-husband where complaint alleged that creditor entrusted property to Debtor-wife.

(3409) *Bello Paradiso, LLC v. Hatch,* 465 BR 479 (Bankr. W.D. Mi. 2012) - Plaintiff who conspired with Debtor to engaging alleged fraudulent scheme to obtain property from third-party could maintain action against Debtor to have debt declared nondischargeable where Debtor misappropriated funds provided by plaintiff to Debtor for use in the underlying fraudulent scheme. Plaintiff and Debtor conspired to wrongfully obtained jewelry from third-party jewelry manufacturer which Debtor would then sell to plaintiff. Under manufactures standard wholesale agreement, plaintiff was not allowed to purchase jewelry directly from manufacturer, a restriction which was known to both plaintiff and Debtor. Instead, plaintiff the Debtor enter it into transaction were plaintiff would provide funds to Debtor for purpose of acquiring jewelry (which Debtor could properly acquire under the manufactures standard wholesale agreement) and the Debtor would then forward the jewelry to the plaintiff. Debtor obtained funds from plaintiff but did not use those funds for purchase of jewelry as acquired. Although underlying scheme was, itself, fraudulent, nature of underlying scheme did not provide a defense to plaintiff's action to declare obligation from Debtor to plaintiff nondischargeable based on embezzlement and conversion.

(3410) *Jones v. Leedey,* 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – State Court judgment that contained specific finding that Debtor removed and converted money from Plaintiff without proper authority or justification, the amount of $131,489.99 was sufficient to support collateral estoppel judgment in adversary under Section 523(a)(4).

(3411) *Ewers v. Cottingham,* 2011 WL 2118247 Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

8.197 Section 523(a)(4) – Bad Check

(3412) *Tillmon v. Mack,* 2013 WL 3822075 (Bankr. N.D. Ohio 2013) – Action to except debt resulting from passing of bad check from discharge falls within Section 523 (a)(2) and (a)(4) for fraud and theft. Delivery of check without sufficient funds in account is not necessarily fraud. Theft requires some fraudulent and wrongful taking and carrying away of property with intent to convert property without consent of the owner. Embezzlement similarly requires showing of fraud. Debtor delivered cheek to plaintiff and advised plaintiff that there were not sufficient funds in the account, precluding finding of fraud in passing of check in first instance.

8.198 Section 523(a)(4) – Fraud or Defalcation

(3413) *Ellsworth v. Carmichael,* 2018 WL 4201750 (Bankr. E.D. Tn. 2018) – Defalcation by fiduciary requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires either express or technical trust and is determined by federal law. Express trust requires declaration creating trust, trust race, and designated beneficiaries; or where parties agree that one party will transfer property to another so the transferee can administer property for benefit of transferor. Complaint did not allege the existence of any express or technical trust established by agreement or by operation of law. Complaint alleged only that Debtor controlled and managed business, that is manager of business he acted as "fiduciary" and Debtor did not pay Creditor share of commissions he controlled and agreed to pay. Fiduciary relationship does not arise by very active wrongdoing out of which contested Debtor arose as Debtor must of been Trustee before wrongdoing and without any reference to wrongdoing. While resulting or constructive trust may have arisen under state law, that was not sufficient to establish fiduciary duty under Section 523.

(3414) *Tennessee Education Lottery Corporation v. Rassas,* 2018 WL 2972352 (Bankr. E.D. Tn. 2018) – Section 523(a)(4) excepts from discharge debt for defalcation acting in fiduciary capacity. Defalcation encompasses embezzlement, misappropriation, and failure to properly account for funds. Plaintiff must prove pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires pre-existing fiduciary relationship resulting from either express or technical trust. Tennessee state law creates express trust relationship between Lottery Retailer and Lottery Corporation by which Retailer receives payment for lottery tickets held in trust for benefit

of Lottery Corporation. Debtor's failure to deposit lottery ticket sale proceeds into Lottery Corporation account or to otherwise account for funds constituted defalcation while acting in fiduciary capacity.

(3415) *Reis v. Terrell,* 2018 WL 2138260 (Bankr. E.D. Mi. 2018) – Defalcation requires proof of pre-existing fiduciary relationship, breach of relationship, and resulting loss. Fiduciary relationship requires express or technical trust relationship arising from placement of specific res in hands of Debtor, evidenced by intent to create trust, Trustee, trust res, and definite beneficiary. Whether requisite fiduciary relationship exists is matter of federal law. Fact that state law places to parties in relationship that has some characteristics of fiduciary relationship does not mean that federal standard for fiduciary relationship exists. Creditor sent money to Debtor which Debtor was to invest on Creditor's behalf. However, there was no evidence of any trust relationship or any other fiduciary capacity other than party who worked through real estate agent to invest in property.

(3416) *DeWine v. Dudley,* 2017 WL 8772047 (Bankr. S.D. Ohio 2017) – Section 523(a)(4) excepts debt from discharge where debt results from fraud or defalcation while acting in fiduciary capacity. Plaintiff must prove pre-existing fiduciary relationship; breach of fiduciary obligations; and resulting loss. Defalcation also requires culpable state of mind and involve either knowledge of or gross recklessness in respect or improper nature of fiduciary's actions. Debtor's conduct as Designated Fiscal Officer for Ohio School System potentially met standards where Audit evidenced overpayments payments to Debtor or entity controlled by Debtor. Based on Debtor's education and training, finder of fact could conclude that Debtor possessed requisite scienter to support finding of defalcation and that Debtor was aware that conduct created substantial and unjustifiable risk that conduct could violate fiduciary duties; particularly where Debtor failed to correct record keeping practices and repeating same behavior at other schools, accounting over 80 Audit violations.

(3417) *Calloway Cleaning & Restoration, Inc. v. McFarland,* 2018 WL 1005288 (Bankr. E.D. Ky. 2018) – Section 523(a)(4) excepts debt from discharge where debt results from fraud or defalcation while acting in fiduciary capacity. "Fiduciary capacity" is narrowly construed to express or technical trust relationships where specific res is placed in hands of debtor, and requires proof of either express or statutory trust; debtor owing fiduciary obligation with relation to trust; breach of fiduciary duty either my misappropriating res or by filing, intentionally or unintentionally, to account for res. Express trust required express intent to create trust; ascertainable res; certain beneficiary; and trustee to administer trust. Debtor retained Contractor to repair Debtor's home after fire. Contract provided that Debtor would submit insurance claim and receive payment from insurance company to pay Creditor. Contract designated Creditor as Debtor's agent for communication with insurance company but did not make Debtor agent for Creditor; contract required Debtor to make prompt payment for amounts not paid by the insurance company; and required Creditor to submit estimates to insurance company without which Debtor would not receive insurance proceeds. Nothing in contract created any trust relationship between Debtor and Creditor with regard to insurance proceeds. Contract did not express intent to create trust for benefit of Creditor and nothing required Debtor to hold funds in trust for Creditor.

(3418) *Johnstone Supply of Detroit v. Rooks,* 2017 WL 4404272 (Bankr. N.D. Ohio 2017) – Section 523(a)(4) excepts from discharge debts based on fraud or defalcation while acting in fiduciary capacity. Defalcation includes embezzlement, misappropriation and failure to account for property. Defalcation renders debt excepted from discharge where there was pre-existing fiduciary duty, breach of that fiduciary duty, and resulting loss. There also must be conduct that Debtor knows is improper or that is so reckless as to be the equivalent to intentional amounting to conscious disregard of or willful blindness to duty that creates substantial and unjustifiable risk that conduct will turn out to violate fiduciary duty. Fiduciary capacity required express or technical trust, and is far more narrow than term "fiduciary" is used in other capacities, requiring intent to create trust, trustee, res, and definite beneficiary. Normal contractual relationship between creditor and debtor is not sufficient to establish trust relationship.

(3419) *HST Corporate Interiors LLC v. Sherrick,* 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(4) results in debt being nondischargeable if debt results from fraud or defalcation while acting in fiduciary capacity. Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Debt not excepted from discharge where relationship between Debtor and creditor was arm's-length business relationship and did not involve any express or technical trust relationship or the placement of any specific property in hands of Debtor.

(3420) *Allen v. Smith,* 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.

(3421) *Process Engineering Associates, LLC v. Smith,* 2017 WL 685111 (Bankr. E.D. Tn. 2017) – Section 523(a)(4) exempts from discharge a debt resulting from defalcation while acting in fiduciary capacity. Amount of nondischargeable debt includes actual damages plus interest at the applicable judgment rate. Payments made by Debtor prior to commencement of bankruptcy case are applied according to applicable state law. Creditor properly applied payments made by Debtor to interest accruing on State Court, Judgment. As amounts paid by Debtor did not cover full interest accrual, amount of debt determined to be nondischargeable included principal amount of debt plus all unpaid interest.

(3422) *Federal Insurance Company v. Sorge,* Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from defalcation while acting in fiduciary capacity. Term "fiduciary" is more narrowly construed than under state law and requires express or technical trust that predates alleged defalcation. Although employee under state law owes fiduciary duty to employer, that fiduciary duty is not sufficient for purposes of Section 523.

(3423) *Initial Investments, Inc. v. Woodford,* 2016 WL 7191534 (Bankr. E.D. Mi. 2016) – Defalcation while acting in a fiduciary capacity require preexisting fiduciary relationship in the form of an express trust or technical trust; a breach of that fiduciary relationship; and resulting loss. An express trust requires (1) intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary. Work authorization between Debtor and Contractor to perform work to be paid by Debtor's insurance company did not crate "trust" as Work Authorization did not state any intent to create a trust, did not have any designated trust res, and did not designate a beneficiary. Authorization required Debtor to pay

for services provided and to endorse insurance payments received by Debtor to Plaintiff or fork performed, and Debtor clearly breached that agreement by retaining and not turning over insurance proceeds, but that is not sufficient to establish express trust relationship. Even if trust relationship exists, defalcation requires that Debtor knows that conduct is wrongful and reckless at a level of criminality. Debtor did not turn over proceeds because Debtor believed that work had not been performed in satisfactory manner and that Plaintiff was not owed the invoiced amount. While Debtor may have been incorrect in her conclusions, that did not alter fact that Debtor held sincere belief that money was not owed, such that Debtor's conduct did not rise to level of wrongful or reckless.

(3424) *Johnson v. Loomis,* 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Claim for non-dischargeability for defalcation denied where evidence did not indicate any fiduciary relationship between parties. There was no proof of any trust relationship between parties. At most, parties were friends and loans were product of plaintiff's desire to remain active after retirement by providing voluntary services to Debtor's business, neither of which gives rise to express or technical trust relationship.

(3425) *Cardwell v. Hester,* 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Exception for discharge for "fraud or defalcation" requires a pre-existing express or technical trust between plaintiff and defendant which defendant then violated by taking property or money for purposes inconsistent with the trust relationship. Plaintiff and Defendant were business partners but there was no express or technical trust relationship between them precluding recovery under Section 523(a)(2) for fraud or defalcation.

(3426) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Fraud or defalcation requires proof of fiduciary relationship between Debtor and creditor. Fiduciary capacity for purposes of non-dischargeability requires express or technical trust, and does not extend to implied trusts that arise by operation of law as matter of equity. Although Debtor, as employee of company, had ability to have checks issued by company, that did not create express or technical trust relationship such that Debtor's wrongful issuance of checks to himself is not fraud while acting in fiduciary capacity.

(3427) *Szachta v. Thompson,* 2016 WL 1055582 (E.D. Mi. 2016) – Defalcation requires (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Fiduciary capacity is narrowly defined as express or technical trust resulting from placement of specific res in hands of Debtor with intent to create trust with Debtor as trustee. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Settlement funds constituted trust but attorney, not office manager, was trustee. Michigan rules of professional conduct impose duty on attorney to safeguard funds. Debtor, as office manager, did not owe fiduciary duty to clients and so debt resulting from misappropriation by attorney, even if Debtor was active participant and co-conspirator, did not constituted defalcation by Debtor.

(3428) *United Fire & Casualty Co. v. Eldridge,* 2015 WL 5996417 (Bankr. E.D. Ky. 2015) – Complaint is fatally defective where there is no debt to be excepted from discharge. Debtor's obligation to plaintiff was discharged in prior bankruptcy case. Debtor's second bankruptcy filing 10 years later did not revive debt for purposes of determining dischargeability even where Debtor's schedules in the second case listed the debt as undisputed and non-contingent.

(3429) *Jenkins v. Schmank,* 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Section 523(a)(4) requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Whether fiduciary relationship exists is matter of state law. Under state law, members of partnership owe fiduciary obligation to other partners regarding assets and funds of partnership. Debtor obtained money from partner based on representation that funds would be used for business but instead Debtor used half of the funds for payment of personal expenses in violation of terms of partnership agreement. Debtor's use of funds constituted defalcation for purposes of Section 523.

(3430) *Cornerstone Industries Corp v. Kaufman,* 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. Defalcation requires express or technical trust where one party places specific res in hands of Debtor. Fiduciary relationship alone is not enough, and agent-principal relationship is insufficient to meet "fiduciary" standard. State Court judgment was not collateral estoppel where state law definition of fiduciary duty was broader than Section 523(a)(4) as it included not only actual trust relationships but fiduciary relationship between director or managing officer and corporation and stockholders.

(3431) *Malinowski v. Whisman,* Case No. 14-2041 (Bankr. E.D. Mi. 2015) – "Fiduciary Relationship" requires express or technical trust, consisting of an intent to create a trust; a trustee; a trust res; and a definite beneficiary. Plaintiff did not establish trust relationship with Debtor where Plaintiff's trustee was defendant's mother, not defendant. Although mother unquestionably breached fiduciary duty by using trust assets for her own purpose, including gifts to defendant, those transfers did not themselves place defendant in position of "trustee" of express trust. Absent a trust relationship between Plaintiff and defendant, Plaintiff could not state cause of action for fraud or defalcation. Evidence also failed to demonstrate that defendant acted with requisite intent. Defalcation requires an intentional wrong, or that the trustee consciously disregards or is willfully blind to a risk that his conduct will turn out to violate fiduciary duty. Risk must be of such a nature and degree that considering nature and purpose of fiduciary's conduct and circumstances known to him, conduct involves gross deviation from standard of conduct that law abiding person would observe in similar situation. Defendant had no direct knowledge of mother's wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college.

(3432) *Merritt v. Layne,* 2014 WL 4723081 (Bankr. E.D. Ky. 2014) –Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff.

(3433) *Herbert v. Hesse,* 2014 WL 4536273 (Bankr. S.D. Ohio 2014) – Complaint adequately alleged cause of action against Debtor, principal of

defunct corporation, for failing to fund retirement plan. Company withheld 3% of employee's pay for contribution to benefit plan but did not actually make the contributions. Record was not sufficiently developed to allow court to determine whether Debtor's control over corporation and over retirement plan were sufficient to allow court to hold Debtor personally responsible. However, to extent contract between employee and corporate entity required entity to also make matching contributions, complaint failed to allege any fiduciary obligation between company and employee or between Debtor and employee, where obligation was merely contractual in nature.

(3434) *Auto-Owners Insurance Company v. Fitzgerald,* 2014 WL 1117090 (Bankr. N.D. Ohio 2014) – Whether conduct of Debtor amounts to defalcation is based on subjective standard, whether the conduct was intentionally wrong to involved bad faith, moral turpitude or immoral conduct; or where conduct was equivalent to conscious disregard of a substantial and unjustifiable risk that conduct will violate fiduciary duty. Mere negligence or recklessness is not sufficient. State Court findings that Debtor's conduct as fiduciary for decedent's estate was not sufficient to prove mental state. State Court findings that Debtor did not fulfill duties and engaged in self-dealings and wasted assets by keeping estate open for Debtor's personal benefit did not demonstrate requisite mental state where state law did not required proof of bad faith or culpability. Debtor was not professional and had no special knowledge regarding or experience in dealing with probate matters and Debtor was represented by competent counsel. Debtor's allegations that he followed instructions of attorneys and probate court and never instructed attorney to do work for his personal benefit presented sufficient disputed issues of material fact to preclude summary judgment.

(3435) *Liggett v. Schwartz,* 2014 WL 1028960 (E.D. Mi. 2014) – Defalcation requires pre-existing fiduciary relationship, breach of that relationship, and resulting loss. Fiduciary capacity must be express or technical and does not encompass constructive or implied or resulting trusts. Divorce decree that awarded Wife a 50% interest in Husband's IRA was not express or technical trust. At best, decree created constructive trust which will not support determination of non-dischargeability under Section 523(a)(4).

(3436) *First Assembly of God v. Ping,* 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Fiduciary capacity results from express or technical trusts, where the parties have intent to create trust, there is a designated trustee and trust res, and a designated beneficiary. Fiduciary capacity can also arise from relationships established by law as long as the relationship existed prior to the alleged wrongdoing. Conclusory statement in adversary complaint that Church Pastor was "acting as a fiduciary for [the church] pursuant to his position as Pastor" was not sufficient as the conclusion failed to allege any factual basis for the statement and the complaint otherwise alleged only an employer-employee relationship which does not constitute fiduciary relationship.

(3437) *Great American Insurance Company v. Poynter,* 459 BR 679 (Bankr. W.D. Ky. 2011), *aff'd* 2012 WL 4959566 (E.D. Ky. 2012), *aff'd* 2013 WL 4779583 (6th Cir. 2013) – Fraud or defalcation while acting in fiduciary capacity requires failure to produce funds entrusted to fiduciary but does not necessarily require proof of fraud, embezzlement or misappropriation. Defalcation must occur in course of express or technical trust arising from placement of specific res in hands of Debtor. Indemnity agreement between contractor's sole owner and issuer of payment and performance bond created trust where agreement stated that funds received under construction contract were trust funds, identified the beneficiaries of the trust funds, and designated the company and its principal as trustees. Debtor breached fiduciary obligation by receiving funds for bonded construction projects and used funds to pay lender and Debtor's former company rather than paying job creditors and suppliers.

(3438) *Auto Owners Insurance Company v. Fitzgerald,* 2013 WL 4853316 (Bankr. N.D. Ohio 2013) - Plaintiff must establish (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. Debtor must have held funds in a trust for the benefit of a third party to pursuant to an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. Debtor's status as personal representative of decedent's estate created the requisite technical trust as specific assets (the estate) were placed in hands of Debtor for administration for benefit of heirs. State Court surcharge order established that Debtor engaged in self-dealing causing a loss to estate. State Court judgment concluded that Debtor was removed as administrator for failing to follow the Probate Court's order to distribute estate proceeds to the rightful heir of the decedent; Debtor had a conflict of interest in that he claimed a right to the proceeds of the decedent's estate; Debtor had a duty to avoid self-dealing and is responsible for attorney fees and expenses paid by the estate that relate to his personal claims; Debtor did little to administer the estate and kept the estate open for his own personal benefit in pursuing his claim to estate assets; the majority of attorney fees incurred by the beneficiary of the estate and ordered by the court to be paid from estate proceeds would not have been incurred but for Debtor's self-dealing; and the majority of the reasonable and necessary services of successor administrator were the result of Debtor failing to complete his duties as administrator rather than concentrating on advancing his own claims to the estate proceeds. Probate Court concluded that Debtor did not fulfill duties as administrator in accordance with his oath, engaged in self-dealing and caused a waste of estate assets and entered judgment in favor of the successor administrator of the estate and against Debtor in the amount of $148,029.76. However, State Court record was insufficient to establish that any defalcation met the subjectively reckless standard established in *Bullock*. While conduct may have been objectively reckless, non-dischargeability turns on Debtor's subjective state of mind, which was not sufficiently demonstrated in the record.

(3439) *State Farm Fire & Casualty Co. v. Murphy,* 2013 WL 1759555 (Bankr. E.D. Mi. 2013) – Sixth Circuit law requires actions by trustee to be objectively reckless. Mere negligence or mistake of fact by the trustee is not sufficient to constitute defalcation. State Court removal of trustee and appointment of replacement trustee did not, in itself, establish that original trustee had acted in objectively reckless manner. Record was insufficient to determine whether Debtor had committed defalcation in light of contradictory evidence that Debtor did the best job she could and that any distributions from the trust were made to third parties solely at the direction of the beneficiary of the trust.

(3440) *Bullock v. BankChampaign,* 133 S. Ct. 1754 (2013) - Defalcation under Section 523(a)(4) requires element of intent or scienter on part of Debtor who allegedly committed defalcation. Defalcation requires culpable state of mind involving knowledge or, or gross recklessness in respect to, the improper nature of the fiduciary behavior. While conduct may have been "objectively reckless", that is not sufficient for purposes of defalcation under Section 523(a)(4). Record was insufficient for court to determine whether trustee's conduct met "scienter" standard where evidence indicated that trustee engaged in self-dealing by taking loans from trust assets but then repaying those loans with interest at market rate. Case remanded for further proceedings.

8.199 Section 523(a)(4) – Builders Trust Fund Act

(3441) *McNally v. Stallman,* 2018 WL 3816779 (Bankr. W.D. Mi. 2018) – Debt can be excepted for breach of fiduciary duty under MBTFA even where Debtor is not officer of corporation where facts show that Debtor was Company's bookkeeper and cut company checks including checks in connection with plaintiff's project and as a functional matter operated as fiduciary under MBTFA.

(3442) *McNalley v. Stallman,* 2017 WL 4857422 (Bankr. W.D. Mi. 2017) – Fiduciary relationship under Michigan Building Contract Fund Act, Section 570.151, arises when money is paid to the contractor or subcontractor regardless of whether there are any unpaid suppliers, subcontractors or materialmen or other "beneficiaries" of trust and continues until all beneficiaries are paid. Although Contractor originally misappropriated funds and did not pay subcontractors, Contractor later reached settlements with all subcontractors and all subcontractors have released liens against property. Fiduciary relationship between Owner, Contractor and beneficiaries terminated when beneficiaries were paid in full, even if that occurs belatedly and from funds other than those originally paid to Contractor by Owner. However, liability for defalcation attaches not only for funds wrongfully diverted but to all damages arising from defalcation even beyond funds wrongfully appropriated. If Plaintiff can demonstrate some liability on account of the defalcation, that is something beyond the trust res for which Contractor had already accounted such as attorney fees or costs incurred in attempting it eliminate liens before Contractor paid lienholders, debt may remain non-dischargeable to that extent. Contractor's payment of lienholders reduces, but does not necessarily eliminate, Contractor's liability for defalcation.

(3443) *Johnstone Supply of Detroit v. Rooks,* 2017 WL 4404272 (Bankr. N.D. Ohio 2017) – Section 523(a)(4) excepts from discharge debts based on fraud or defalcation while acting in fiduciary capacity. Defalcation includes embezzlement, misappropriation and failure to account for property. Defalcation renders debt excepted from discharge where there was pre-existing fiduciary duty, breach of that fiduciary duty, and resulting loss. There also must be conduct that Debtor knows is improper or that is so reckless as to be the equivalent to intentional amounting to conscious disregard of or willful blindness to duty that creates substantial and unjustifiable risk that conduct will turn out to violate fiduciary duty. Michigan Builders Trust Fund Act crates fiduciary relationship between contractor and supplier where supplier provides materials for specific project and Contractor receives payment for that project, requiring Contractor to pay supplier before using funds for other purposes. However, Michigan Builders Trust Fund Action does not apply to Ohio based supplier who sells products to Michigan Based contractor at supplier's Toledo facility unless Plaintiff can establish "close tie" between supplies, payments and Michigan. Plaintiff alleged sufficient "tie" by attaching project list that identified addresses for which materials were supplied and that included one project located in Michigan. To extent of projects located in Michigan, complaint stated cause of action under MBTFA.

(3444) *Iverson's Building Supply Company, Inc. v. Brown,* Case No. 15-3149 (Bankr. E.D. Mi. 2016) – Defalcation requires proof that Debtor misappropriated money or property entrusted to him as fiduciary. Fiduciary relationship must be express or technical trust and must pre-date debt that is at issue. Michigan Builders Trust Fund ACT (MBTFA") creates fiduciary relationship between contractor and subcontractors, suppliers and laborers, that requires Contractor to use all funds received from owner to first to pay subcontractors, materialmen and laborers. Debtor violated MBTFA and breached fiduciary obligation to supplier when Debtor used portion of proceed paid to contractor for purposes other than payment of suppliers, subcontractors and laborers. Evidence indicated that Debtor received payments totaling $23,5028 and paid subcontractors, materialmen and laborers $19,965.70. Debt to unpaid supplier is non-dischargeable to extent of $3,536.38 that Debtor received from owner but did not use to pay MBTFA beneficiaries. Balance of unpaid amount owed to supplier is dischargeable as Debtor did not receive, and could not have committed defalcation of, any remaining amounts.

(3445) *Shears v. Vestal,* Adv. No. 12-80330 (Bankr. W.D. Mi. 2014) – Debtor's violation if Michigan Builders Trust Fund Act does not automatically establish level of scienter or intent required to except debt from discharge after Supreme Court's decision in *Bullock v. BankChampaign,* 133 S. Ct. 1754. Plaintiff bringing action under Section 523(a)(4) must prove more than the fact that the Debtor received funds for purposes of performing construction but did not use those funds to pay materialmen and suppliers. Plaintiff must also prove that Debtor knew that his conduct was improper or that Debtor disregarded a substantial and unjustifiable risk that conduct would breach fiduciary duty. Evidence indicated that Debtor had good faith basis to believe that he had right to retain "security deposit" after Plaintiff cancelled the contract where contract terms indicated that if Plaintiff breached the agreement, Debtor could retain the deposit as liquidated damages. Further, Debtor contacted his attorney who advised Debtor that Debtor had right to retain funds. While Debtor's interpretation of contract may have been incorrect, giving rise to debt between Debtor and Plaintiff, good faith interpretation of contract, bolstered by opinion of counsel, did not support finding of intentional wrongdoing or conduct that created substantial risk of breach of duty.

(3446) *Bakdaleyeh v. Warpup,* Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Plaintiff's complaint under Michigan Builders Trust Fund Action against Debtor-wife dismissed where complaint did not establish that wife agreed to perform or oversee building activities. Although Debtor-wife may have been signatory on business bank account, that status without more did not trigger MBTFA.

(3447) *Astro Building Supplies, v. Slavik,* 2011 WL 6157348 (6th Cir. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff could not prevail under MBTF where evidence did not indicate that materials had been sold to Debtor for a specific project. Instead, evidence indicated that materials were generally sold to Debtor on an open account, which is not sufficient to support non-dischargeability.

(3448) *Zeeland Lumber & Supply Co. v. Harttung,* 2011 WL 1600544 (Bankr. W.D. Mi. 2011) – Violation of Michigan Builder Trust Fund Act creates statutory trust, such that violation results in non-dischargeable debt. The *prima facie* elements under Michigan Building Contract Fund Act are: (1) the defendant is a contractor engaged in the building construction industry, (2) a person paid the contractor for labor or materials provided on the construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. Debtor's closely held corporation contracted to build a cottage and contracted with Zeeland Lumber to

provide materials on the project, but did not pay for the materials. Corporation received $197,300.00 on account of the project, and this sum constitutes the *res* of a statutory trust. Debtor as the person with authority for management and funds of the corporation was a contractor within MBTFA and is liable for failure to cause corporation to pay suppliers, rendering Debtor personally liable for non-dischargeable debt.

(3449) *Emergency Restoration Company v. Fiore,* Case No. 08-4685 (Bankr. E.D. Mi. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff failed to prove that Debtor actually received payment on a specific project or that Debtor failed to use those funds to pay plaintiff.

(3450) *Comfort Control Supply Company, Inc. v. Hunter,* 2010 WL 3786032 (Bankr. W.D. Mi. 2010) – Section 523(a)(4) renders non-dischargeable debts resulting from fraud or defalcation while acting in a fiduciary capacity. Section 523(a(4) requires express or technical trust resulting from the placement of specific res in the hands of the Debtor. Michigan Builders Trust Fund Act imposes an express trust on any building contractor for funds paid to the contractor for the benefit of contractors, laborers, subcontractors or materialmen. To establish a cause of action based upon alleged violations of the MBTFA, a creditor- beneficiary must prove that: (1) the Debtor-defendant is a contractor or subcontractor in the building construction industry; (2) a person paid the Debtor for labor or materials to be used on the construction project; (3) the Debtor retained or used a portion or all of the funds; (4) for any purpose other than to first pay laborers, subcontractors or material men; (5) who were engaged or hired by the Debtor for the construction project. MBTFA does not apply to purchases of supplies for general use or inventory. MBTFA applies only to supplies purchased for specific project where contractor then incorporates those supplies and receives payment from the owner or contractor. Debt held non-dischargeable to extent supplier could link specific purchase to specific projects and prove that Debtor had been paid for those projects but failed to pay supplier.

(3451) *Strickfaden v. Sangal,* 2010 WL 3583427 (E.D. Mi. 2010) – Section 523(a)(4) action has three requirements: (1) fiduciary relationship; (2) breach of fiduciary duty; and (3) resulting loss. Under Michigan Builders Trust Fund Act, builder had fiduciary obligation to owner that was breached when builder collected funds for subcontractors and then failed to pay those subcontractors. However, breach did not result in damages where builder was able to provide detailed accounting of funds showing that builder spent more on the construction than owner paid builder. Although builder committed a technical breach of the trust by failing to pay all subcontractors, owner could not show damages where all of owner's money was, in fact, used for the construction.

(3452) *Fingerle Lumber Co. v. Boychuck,* Case No. 09-5477 (Bankr. E.D. Mi. 2010) – Michigan Builder Trust Fund Act (MBTFA) establishes fiduciary relationship between contractor and subcontractor and suppliers, and a failure to pay funds received by the contractor for payment to suppliers and subcontractors is a defalcation while acting in a fiduciary capacity. Supplier who received partial reimbursement from State Builders Recovery Fund did not extinguish the debt from Contractor to Supplier, but did create right to Recovery Fund to repayment from Supplier if and when Supplier received payment. If debt is non- dischargeable, then interest and cost components to the debt are also non-dischargeable.

(3453) *Astro Building Supplies, Inc., v. Slavid,* 2010 WL 2772509 (E.D. Mi. 2010) - To find a debt non- dischargeable under § 523(a)(4) due to defalcation, Plaintiff must prove: (1) a pre-existing fiduciary relationship, (2) breach of that fiduciary relationship, and (3) a resulting loss. Fiduciary capacity requires an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. A statute may create a trust if that statute: (1) defines the trust res; (2) imposes duties on the trustee; and (3) those duties exist prior to any act of wrongdoing. The Michigan Builders Trust Fund Act (MBTFA), imposes a trust with the contractor operating as the trustee, upon the funds paid by any person in connection with a building contract. When a Debtor violates the MBTFA in his capacity as a contractor and fiduciary of the building contract fund, the resulting debt may be non-dischargeable. The general contractor a trustee of project funds and must pay laborers, subcontractors, and materialmen before himself, his employees and any other expenses. Plaintiff must establish that it provided supplies to the defendant contractor for use on a specific construction project, that the defendant contractor was paid by its customer for the specific construction project where those supplies were used, and that the defendant contractor failed to pass on the payment it received from that specific project to the plaintiff. It is not the mere provision of supplies to a contractor which creates a trust, it is instead the payment of funds on a specific project where those supplies were consumed which creates the trust under the MBTFA. MBTFA is not implicated unless and until Plaintiff can demonstrate that payments were received by Debtor on a specific project for which it provided supplies. Plaintiff failed to identify any specific project for which it provided Debtor materials, let alone a specific project for which it provided supplies and Debtor also received payment. Parties merely transacted business on an open account basis and Debtor failed to pay the "running balance" on that account to zero. As such, the exception set forth in the defalcation provision, 11 U.S.C. §523(a)(4), is inapplicable.

(3454) *Patel v. Shamrock Floorcovering Services, Inc.,* 565 F.3d 963 (6th Cir. 2009) – violation of Michigan Builder Trust Fund Act constitutes "defalcation in a fiduciary capacity" resulting in debt being non- dischargeable pursuant to section 523(a)(4). Corporation obtained payments from homeowners but failed to pay suppliers for goods and services provided in connection with the improvements. After Corporation closed, the corporate principle filed for relief under Chapter 7. Court, applying state law definitions and concepts under the MBTFA, concluded that corporate officer can be held personally liable under MBTFA as a "contractor" owing a fiduciary duty to suppliers. The use of monies paid for purposes other than to pay laborers, subcontractors or materialmen constitutes defalcation under section 523(a)(4) as long as the use was not the result of mere negligence or mistake of fact. Corporate principle recklessly misallocated funds and failed to pay subcontractors where corporate accounting was "woefully inadequate", that the business operations were "sloppy at best" and the corporate principle did not know if an overall accounting was done or how much exactly was owed to Shamrock.

8.200 Section 523(a)(4) – PACA Claims

(3455) *Coosemans Miami, Inc. v. Arthur,* Case No. 17-1378 (Bankr. S.D. Fl. 2018) – PACA statutory trust is not "express" or "technical" trust for purposes of Section 523(a)(4). Express or "technical" trust requires voluntary creation of trust rather than in voluntary resulting or

constructive trust; and express or technical trust must exist before alleged defecation. PACA does not create technical trust until and unless Court imposes additional duties after showing of malfeasance. PACA does not require segregation of assets and allows co-mingling and permits use of trust assets for purposes other than payment to suppliers prior to showing of dissipation which is fatal to finding that technical or express trust exists. Technical trust requires identified trust race with segregation requirement.

(3456) *S&H Packing & Sales Co. v. Tanimura Distributing, Inc.,* Case No. 14-56059 (9th Cir. 2017) – PACA creates statutory trust that protects growers from not being paid by giving producers rights a head of accounts receivable financing. True sale of accounts receivable precludes farmers from recourse under PACA against purchaser of receivables. Court must determine whether true sale of receivables actually occurred and whether sales were commercially reasonable. Court noted split between prior 9th Circuit precedent and decisions in other Circuits that have considered issue and suggested 9th Circuit needed *en banc* review to reconcile split. Other Circuits focus on whether sale transferred risk from original lender to "receivable purchaser" in determining whether transaction was true sale versus secured lending relationship.

(3457) *R.A.M Produce Distributors, LLC v. Cipriano,* 2015 WL 3441212 (E.D. Mi. 2015) – Action against principal of corporation that purchased perishable agricultural products is action for breach of fiduciary duty owed by principal of purchaser to seller under PACA, to hold and preserve statutory trust assets for benefit of seller. Action by seller against principal is not action to collect debt as the debt runs from the purchaser corporation to the seller, and there was no personal guarantee or undertaking by principal to pay debt. Statute of Limitations is state law limitations period for actions for breach of fiduciary duty. Action against principal to except debt from discharge untimely where action not brought until after state statute of limitations expired on actions for breach of fiduciary duty, even if statute of limitations on collection of underlying debt itself has not expired.

(3458) *Indianapolis Fruit Co. v. Locavore Food Distributors, Inc.,* 2011 WL 4373976 (E.D. Mi. 2011) – Individual who controls activities of Corporation that is subject to PACA trust is liable to unpaid suppliers to the extent that the assets of the Corporation are insufficient to pay the PACA trust obligations. Corporation is subject to PACA trust if Corporation purchases aggregate quantities of perishable commodities in excess of 2,000 pounds in one day. Corporation is subject to PACA trust where Corporation does not purchase 2,000 pounds from any one supplier on any day, but does purchase an aggregate 2,000 pounds from all suppliers combined in any given day.

(3459) *Ruby Robinson Co. v. Herr,* Case No. 10-20788 (5th Cir. 2011) – PACA liability attaches first to the licensed commission merchant, dealer, or broker of perishable agricultural commodities. If the assets of the licensed commission merchant, dealer, or broker are insufficient to satisfy the PACA liability, then others may be held secondarily liable if they had some role in causing the corporate trustee to commit the breach of trust. Individual shareholders, officers, or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA. Stock Purchase Agreement granted purchasing shareholders authority over certain business and financial matters and entitled them to sit on the Debtor's board of directors gave them legal authority to control the trust assets for purposes of imposing PACA liability.

8.201 Fiduciary Relationship

(3460) *Tennessee Education Lottery Corporation v. Rassas,* 2018 WL 2972352 (Bankr. E.D. Tn. 2018) – Fiduciary capacity requires pre-existing fiduciary relationship resulting from either express or technical trust. Tennessee state law creates express trust relationship between A lottery Retailer and Lottery Corporation by which Retailer receives payment for lottery tickets held in trust for benefit of Lottery Corporation. Debtor's failure to deposit lottery ticket sale proceeds into Lottery Corporation account or to otherwise account for funds constituted defalcation while acting in fiduciary capacity.

(3461) *Nallaballi v. Achanta,* 583 BR 123 (Bankr. E.D. Mi. 2018) – "Fiduciary capacity" for purposes of excepting debt under Section 523(a)(4) requires pre-existing express or technical trust involving (1) intent to create trust; (2) trustee; (3) trust res; and (4) definite beneficiary, but does not require any particular form of words. Complaint did not state cause of action where Complaint alleged only that funds were "entrusted" to Debtor a fiduciary relationship was created where Debtor and Plaintiff were "fellow shareholders," and Debtor was the Manager of Corporation under Operating Agreement. Debtor's status as corporate shareholder or officer does not create a trust with respect to assets of corporation. Debtor's status as Manager under Operating Agreement did not meet requirements of trust. Complaint plausibly alleged that Debtor breached Operating Agreement by failing to provide Plaintiff with financial information and failing to distribute Plaintiff's share of profits but Operating Agreement did not indicate intention to create trust, transfer of property to Debtor to hold for benefit of Plaintiff, or definite beneficiary. Amended Complaint alleged that Plaintiff and Debtor entered into contract regarding the management of business, and breach of contract by the Debtor as the Manager, but that is not sufficient to except debt from discharge under Section 523(a)(4).

(3462) *Reis v. Terrell,* 2018 WL 2138260 (Bankr. E.D. Mi. 2018) – Defalcation requires proof of pre-existing fiduciary relationship, breach of relationship, and resulting loss. Fiduciary relationship requires express or technical trust relationship arising from placement of specific res in hands of Debtor, evidenced by intent to create trust, Trustee, trust res, and definite beneficiary. Whether requisite fiduciary relationship exists is matter of federal law. Fact that state law places to parties in relationship that has some characteristics of fiduciary relationship does not mean that federal standard for fiduciary relationship exists. Creditor sent money to Debtor which Debtor was to invest on Creditor's behalf. Although state law provides that real estate broker has fiduciary relationship with principal, there was no evidence of any express or technical trust relationship other than party who worked through real estate agent to invest in property.

(3463) *Calloway Cleaning & Restoration, Inc. v. McFarland,* 2018 WL 1005288 (Bankr. E.D. Ky. 2018) – "Fiduciary capacity" is narrowly construed to express or technical trust relationships where specific res is placed in hands of debtor, and requires proof of either express or statutory trust; debtor owing fiduciary obligation with relation to trust; breach of fiduciary duty either my misappropriating res or by filing, intentionally or unintentionally, to account for res. Express trust requires express intent to create trust; ascertainable res; certain beneficiary; and trustee to administer trust. Debtor retained Contractor to repair Debtor's home after fire. Contract provided that Debtor would submit

insurance claim and receive payment from insurance company to pay Creditor. Contract designated Creditor as Debtor's agent for communication with insurance company but did not make Debtor agent for Creditor; contract required Debtor to make prompt payment for amounts not paid by the insurance company; and required Creditor to submit estimates to insurance company without which Debtor would not receive insurance proceeds. Nothing in contract created any trust relationship between Debtor and Creditor with regard to insurance proceeds. Contract did not express intent to create trust for benefit of Creditor and nothing required Debtor to hold funds in trust for Creditor.

(3464) *Haire v. Padgett,* 2017 WL 3888293 (Bankr. W.D. Ky. 2017) – Exception from discharge for fraud or defalcation requires pre-existing fiduciary relationship between parties. Relationship as landlord and tenant does not constitute "fiduciary" relationship and cannot support action under Section 523(a)(4) for fraud or defalcation.

(3465) *Thomas v. Covey,* Case No. 16-3108 (Bankr. E.D. Mi. 2017) – Exception to discharge for fraud or defalcation requires fiduciary capacity in for of express or technical trust; breach of that fiduciary relationship; and resulting loss. Express trust requires intent to crate trust; trustee; trust res; and definite beneficiary. Once Plaintiff establishes existence of trust and that defendant is trustee, burden shifts to defendant to prove that defendant acted in good faith and made full disclosures of all facts and that defendant has accounted for all trust assets received. Defalcation occurs when trustee misappropriates or fails to properly account for trust funds and requires conduct that fiduciary knows is improper or is reckless to extend that criminal law treats conduct as intentional, and includes conduct where fiduciary consciously disregards or is willfully blind to substantial and unjustifiable risk that conduct will prove to violate fiduciary duty. Debtor was personal representative of decedent's estate, creating necessary fiduciary relationship. To extent Debtor owed money to estate based on loans from decedent to Debtor during decedent's lifetime, those loans did not amount to any unusual amounts incurred or owed to father's estate. However, loans from father to Debtor's son would have been collected by Debtor as amounts were owed for rent incurred by son in residing with decedent yet Debtor failed to make any effort to collect that amount while disbursing more than this amount to Son as directed in decedent's will. Debtor also breached fiduciary duty by withdrawing more than $16,000 from estate after State Court had appointed special Personal Representative to take over estate administration without notifying special PR or obtaining consent to withdraw funds allegedly to reimburse Debtor for expenses incurred in administration of estate.

(3466) *HST Corporate Interiors LLC v. Sherrick,* 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(4) results in debt being nondischargeable if debt results from fraud or defalcation while acting in fiduciary capacity. Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Debt not excepted from discharge where relationship between Debtor and creditor was arm's-length business relationship and did not involve any express or technical trust relationship or the placement of any specific property in hands of Debtor.

(3467) *Allen v. Smith,* 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.

(3468) *Federal Insurance Company v. Sorge,* Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from defalcation while acting in fiduciary capacity. Term "fiduciary" is more narrowly construed than under state law and requires express or technical trust that predates alleged defalcation. Although employee under state law owes fiduciary duty to employer, that fiduciary duty is not sufficient for purposes of Section 523.

(3469) *Johnson v. Loomis,* 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Claim for non-dischargeability for defalcation denied where evidence did not indicate any fiduciary relationship between parties. There was no proof of any trust relationship between parties. At most, parties were friends and loans were product of plaintiff's desire to remain active after retirement by providing voluntary services to Debtor's business, neither of which gives rise to express or technical trust relationship.

(3470) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Fiduciary capacity for purposes of non-dischargeability requires express or technical trust, and does not extend to implied trusts that arise by operation of law as matter of equity. Although Debtor, as employee of company, had ability to have checks issued by company, that did not create express or technical trust relationship such that Debtor's wrongful issuance of checks to himself is not fraud while acting in fiduciary capacity.

(3471) *Cora v. Jahrling,* 2016 WL 1073240 (7th Cir. 2016) – Former client's malpractice recovery against former attorney who filed for bankruptcy was excepted from discharge as defalcation while acting in fiduciary capacity. Defalcation requires culpable state of mind involving knowledge of or gross recklessness with respect to improper nature of fiduciary behavior. Conduct must be such that fiduciary knows it to be improper or fiduciary consciously disregards or is willfully blind to substantial and unjustifiable risk that conduct will violate fiduciary duties. Attorney's conduct in representing client who could not speak English and with whom attorney could not communicate except through counsel for adverse party, allowing sale of house that did not include material conditions that client requested and at "bargain basement" price utterly failed to meet any standard of conduct of attorney and was so basic and risk of harm so obvious that attorney must have known risk to client yet proceeded despite risks. While breach of rules of professional conduct, alone, is not enough to constitute defalcation, rules of professional conduct are relevant.

(3472) *Szachta v. Thompson,* Case No. 15-4775 (E.D. Mi. 2016) – Defalcation requires (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Fiduciary capacity is narrowly defined as express or technical trust resulting from placement of specific res in hands of Debtor with intent to create trust with Debtor as trustee. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering

funds to clients. Settlement funds constituted trust but attorney, not office manager, was trustee. Michigan rules of professional conduct impose duty on attorney to safeguard funds. Debtor, as office manager, did not owe fiduciary duty to clients and so debt resulting from misappropriation by attorney, even if Debtor was active participant and co-conspirator, did not constituted defalcation by Debtor.

(3473) *Rose v. Friendly Finance Co.,,* 2016 WL 98597 (S.D. Ohio 2016) – Fiduciary relationship requires a special relationship where one party reposes trust and special confidence in other party and there is resulting position of superiority or influence. Single party's belief that special relationship exists is not sufficient, and relationship of Debtor and creditor is not sufficient to create fiduciary position. Contract that allowed lender to force place insurance if borrower failed to maintain insurance did not create fiduciary relationship as contract specifically allowed lender to insure its interests without being required to insure borrower's interest.

(3474) *Duley v. Thompson,* 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be "actually litigated" in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.

(3475) *Landis v. Baker,* 2015 WL 1568377 (Bankr. W.D. Ohio 2015) – Complaint to except debt from discharge for fraud must please sufficient direct or inferential allegations respecting all material elements of claim. Complaint must have facial plausibility which requires sufficient factual content to allow court to draw reasonable inference that defendant has acted unlawfully. Complaint must be more than legal conclusions and must contain sufficient well-pled allegations that, put together, give rise to right to relief. Complaint that alleged only that State Court judgment awarded punitive damages and attorney fees was mere legal conclusion without any factual support to demonstrate that Debtor's conduct met standards for non-dischargeability. Complaint failed to allege any facts that would support finding that Debtor was fiduciary or that there was any actual trust existing or the placing of any specific res in hands of Debtor to be held in trust for plaintiff.

(3476) *Malinowski v. Whisman,* Case No. 14-2041 (Bankr. E.D. Mi. 2015) – "Fiduciary Relationship" requires express or technical trust, consisting of an intent to create a trust; a trustee; a trust res; and a definite beneficiary. Plaintiff did not establish trust relationship with Debtor where Plaintiff's trustee was defendant's mother, not defendant. Although mother unquestionably breached fiduciary duty by using trust assets for her own purpose, including gifts to defendant, those transfers did not themselves place defendant in position of "trustee" of express trust. Absent a trust relationship between Plaintiff and defendant, Plaintiff could not state cause of action for fraud or defalcation.

(3477) *Ritter v. Smith,* 2014 WL 4702610 (Bankr. E.D. Mi. 2014) – "Fiduciary relationship" must pre-exist filing of bankruptcy case and requires express or technical trust arising from placement of specific res in hands of Debtor with intent to create a trust and with a definite beneficiary. Fiduciary capacity does not mean failure to meet common law fiduciary relationship. While officers and directors of corporation owe fiduciary duties to shareholders, that does not place officers and directors in position of "trustee" for purposes of Section 523(a)(2). Alleged use by corporation to pay salaries to certain shareholders for work that was not performed was not breach of fiduciary duty to other shareholders for purposes of holding debt to be non-dischargeable.

(3478) *Merritt v. Layne,* 2014 WL 4723081 (Bankr. E.D. Ky. 2014) –Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff.

(3479) *Jennings v. Bodrick,* 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Fraud or defalcation in fiduciary capacity requires pre-existing, express or technical trust, not a trust arising by operation of law out of the very act of wrongdoing. While creditor may have believed Debtor to be trustworthy and successful, that does not constitute fiduciary relationship between Debtor, a financial advisor; and creditor who relied on Debtor's investment advice.

(3480) *Altercare of Navarre Center for Rehabilitation& Nursing Care, Inc. v. Conley,* 2014 WL 1577236 (Bankr. N.D. Ohio 2014) – Fiduciary relationship requires express or technical trust with intent to create a trust, a defined trustee, a defined res, and a definite beneficiary. Breach requires more than a normal fiduciary breach, and must indicate bad faith, moral turpitude, or immoral conduct or intentional wrong, such as conduct that fiduciary knows is improper or is criminally reckless such as willful blindness to substantial and unjustifiable risk that conduct will result in breach of duty. Debtor owed fiduciary responsibility to her grandmother but did not owe fiduciary duty to nursing home that provided care to grandmother. Creditor (nursing home) could not boot strap fiduciary obligation owed by Debtor to grandmother for care of grandmother into fiduciary relationship between Debtor and creditor. Fiduciary obligation must be one between Debtor and creditor directly.

(3481) *Hubanks v. Jouett,* 2014 WL 948517 (Bankr. N.D. Ok. 2014) – Debt resulted defalcation while acting in fiduciary capacity. Creditor was Debtor's half-brother. While creditor was incarcerated, gave Debtor a power of attorney to manage creditor's financial affairs. Power of Attorney crated fiduciary relationship that required Debtor to act solely for creditor's benefit. Debtor breached fiduciary duty by withdrawing thousands of dollars from creditor's accounts and using those to pay personal expenses.

(3482) *Yoppolo v. Asbury,* 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Section 523(a)(4) requires that fraud or defalcation occur within cope of fiduciary capacity. Fiduciary relationship must be actual trust for benefit of creditor, not merely resulting trust or trust implied by law, and requires intent to create trust, trustee, trust res, and definite beneficiary. Land contract between Debtor and creditor did not create express trust. Nothing in the land contract required Debtor, the land contract vendor, to use proceeds paid by creditor for any specific purpose.

(3483) *Liggett v. Schwartz,* 2014 WL 1028960 (E.D. Mi. 2014) – Defalcation requires pre-existing fiduciary relationship, breach of that relationship, and resulting loss. Fiduciary capacity must be express or technical and does not encompass constructive or implied or resulting trusts. Divorce decree that awarded Wife a 50% interest in Husband's IRA was not express or technical trust. At best, decree created constructive trust which will not support determination of non-dischargeability under Section 523(a)(4).

(3484) *Rice v. Morse,* 504 BR 462 (Bankr. E.D. Tn. 2014) – Complaint failed to allege actual or technical trust for purposes of exception from discharge under Section 523(a)(4). Trust requires actual or technical trust, and does not have to be in writing, as long as there is (1) a trustee who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another, (2) a beneficiary to whom the trustee owes the equitable duties to deal with the trust property for his benefit, and (3) identifiable trust property. Contract did not require Debtor to hold funds in trust or escrow, and expressly called for funds to be released to Debtor. There was no indication in contract that trust relationship was contemplated or that plaintiff was intended as beneficiary, as funds were turned over to Debtor without express condition or restriction in the contract between the parties.

(3485) *Cameron v. Thomas,* 2014 WL 509327 (Bankr. E.D. Tn. 2014) – Fiduciary capacity requires express or technical trusts, not merely those resulting from wrongful conduct. Actions constitute defalcation as a result of embezzlement or misappropriation, or a failure to properly account for the entrusted funds. Power of attorney given to Debtor for purposes of paying bills and taxes and ultimately used to transfer title to real property was sufficient to constitute "trust" where State Court judgment had previously determined that power of attorney created a 'confidential relationship". Fact that State Court did not impose punitive damages did not preclude claim of defalcation where punitive damages required the "most egregious of wrongs" where defendant acted intentionally, fraudulently, maliciously or recklessly, and must be proved by clear and convincing evidence. For purposes of Section 523(a)(4), defalcation does not require malice or intentional fraud, but only knowledge of or gross recklessness in respect to the improper nature of the fiduciary behavior, and must be proved only by preponderance of evidence. Although only Debtor-Wife was named in Power of Attorney, Plaintiff could maintain action against Debtor-Husband if Plaintiff could prove that Husband acted in concert with Wife to commit wrongful acts sufficient to impute wrongful conduct to him.

(3486) *Great American Insurance Company v. Poynter,* 459 BR 679 (Bankr. W.D. Ky. 2011), *aff'd* 2012 WL 4959566 (E.D. Ky. 2012), *aff'd* 2013 WL 4779583 (6th Cir. 2013) – Fraud or defalcation while acting in fiduciary capacity requires failure to produce funds entrusted to fiduciary but does not necessarily require proof of fraud, embezzlement or misappropriation. Defalcation must occur in course of express or technical trust arising from placement of specific res in hands of Debtor. Indemnity agreement between contractor's sole owner and issuer of payment and performance bond created trust where agreement stated that funds received under construction contract were trust funds, identified the beneficiaries of the trust funds, and designated the company and its principal as trustees. Debtor breached fiduciary obligation by receiving funds for bonded construction projects and used funds to pay lender and Debtor's former company rather than paying job creditors and suppliers.

(3487) *Auto Owners Insurance Company v. Fitzgerald,* 2013 WL 4853316 (Bankr. N.D. Ohio 2013) - Plaintiff must establish (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. Debtor must have held funds in a trust for the benefit of a third party to pursuant to an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. Debtor's status as personal representative of decedent's estate created the requisite technical trust as specific assets (the estate) were placed in hands of Debtor for administration for benefit of heirs.

(3488) *Vicars v. Freeman,* 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Fiduciary relationship for purposes of Section 523(a)(4) requires preexisting express or technical trust and does not include constructive trusts. Under Tennessee law, Debtor as president and majority owner of corporation owed fiduciary obligation to corporation and to minority shareholders. However, fiduciary obligation alone is not sufficient to constitute an express or technical trust arising from the placement of a specific res in the hands of the Debtor, nor was there any specific trustee or beneficiary. Debtor's alleged wrongful removal of assets from corporation, while perhaps a breach of Debtor's fiduciary obligations, did not breach any express or technical trust for purposes of Section 523(a)(4).

(3489) *Adamovic v. Lazarevic,* 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Defalcation requires (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. A fiduciary relationship requires an express or technical trust; an intent to create a trust; a trustee; trust res; and a definite beneficiary. The trust can be either written or oral as long as the evidence establishes a trustee who holds identifiable property in trust for a defined beneficiary to whom the trustee owes fiduciary duties. Evidence did not establish any express or technical trust. Evidence indicated that when terminally ill sister gave her assets to her brother, she did so only asking the brother to "take over" the assets. There was no evidence that sister intended brother to take property as trustee for benefit of Debtor's children or that the brother accepted that position. Deed from sister to brother did not mention trustee. Although children may have assumed that transfer was in trust for their benefit, evidence did not establish any trust relationship.

(3490) *Robinson v. Robinson,* 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – For purposes of Section 523(a)(4), trust relationship must be express or technical. Although written trust agreement is not required, Plaintiff must evidence intent to create a trust; a trustee; and a definite beneficiary. Power of attorney, standing alone, does not create trust relationship. Evidence indicated existence of express trust. Plaintiff transferred personal injury settlement funds to Debtor with understanding that Debtor was to hold funds for benefit of and at the direction of Plaintiff. Evidence also demonstrated that Debtor breached fiduciary duty by using funds for personal use without consent of Plaintiff. Plaintiff suffered damages when Debtor was unable to repay funds. Plaintiff entitled to judgment holding debt to be non-dischargeable. Court could also enter money judgment in connection with actions to except debts from discharge. Evidence indicated that Debtor took $43,000 from account. However, Debtor later used personal funds for Plaintiff's personal expenses and is entitled to credit for those amounts. Plaintiff failed to support award of punitive damages where plaintiff did not present evidence that Debtor acted with fraudulent intent to permanently deprive Plaintiff of funds. Punitive damages are warranted only where facts show actual malice was intended. Actual malice requires (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Possibility, or even probability, of harm is not

sufficient. Attorney fees are not awardable as there is no statute or contractual provision that would support award of attorney fees and no basis in Bankruptcy Code for award of fees in Section 523 action.

(3491) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Fiduciary relationship requires express or technical trust, which requires intent to create trust; a trustee; a specific trust res; and a definite beneficiary. Trust agreement does not have to be written or formal document, but trust relationship must pre-date conduct complained of. Constructive Trust implied at law based on alleged wrongful conduct is not sufficient to support relief under Section 523(a)(4). However, power of attorney, without more, is not sufficient to create trust relationship.

(3492) *Oak Street Funding, LLC v. Blair,* 2012 WL 4506913 (Bankr. E.D. Tn. 2012) – Complaint stated cause of action for defalcation while acting in fiduciary capacity. Complaint adequately alleged existence of actual trust relationship. Security Agreement between parties imposed on Debtor's company a trust duty to hold Insurance Policy Commissions in trust after a default. Complaint alleged that Company failed to meet the minimum annualized sale commissions and that the Plaintiff terminated the Company's right to "sweepback" excess cash after the payment was made. Credit Agreement prohibited redirection of commissions and that Debtor redirected the commissions and that she used the money for the Agency's rent and her personal expenses. Commissions were to be segregated in the Deposit Account for the benefit of Plaintiff and were available to the Agency only after certain conditions were met.

(3493) *First American Title Insurance Company v. Gaskill,* 2012 WL 4457738 (Bankr. W.D. Mi. 2012) – Section 523(a)(4) requires a pre-existing fiduciary relationship; a breach of that relationship; and a resulting loss. Fiduciary relationship requires express or technical trust that results from specific property being place in hands of Debtor. Michigan law creates an express fiduciary trust relationship between insurance agency and underwriter. Title Agency had fiduciary relationship with Title Insurer. Title Agency, through its president, agreed to receive premiums for insurance policies written by Agency for policies issued by underwriter and to remit to underwriter the appropriate amount of the premium. Corporate Officers and Directors will also be deemed fiduciaries if they personally cause the Agency to fail to remit premiums. Individual Debtor in this case did not have fiduciary relationship with underwriter. Although a 50% shareholder of the Agency, Debtor had very limited relationship with underwriter. Debtor was not signatory to Agency Agreement between Agency and Underwriter. Debtor did not personally guaranty any obligations of Agency to Underwriter. Debtor played no role whatsoever in failure to remit premiums. Debtor handled real estate closings and turned over funds to Agency President who was to remit premiums to Underwriter. Underwriter dealt solely with President and not with Debtor. Debtor had no involvement in financial dealings of business until after President left town, at which time it was discovered that President had embezzled Agency funds. Status of Debtor as Vice-President and Treasurer of Agency and as insurance agent under Michigan Law, without more, did not resulting requisite fiduciary relationship. Even if Debtor was fiduciary, evidence did not support finding of defalcation by Debtor, which required embezzlement or misappropriation by a fiduciary or failure to properly account for funds. Defalcation requires that Debtor be "objectively reckless" in failing to properly account for or allocate funds. Debtor's actions were not objectively reckless. Agency President, and not Debtor, caused and controlled Agency's failure to remit premiums. Division of duties between Debtor and President were reasonable and losses resulted from President's embezzlement of funds, not any actions of Debtor. Although Debtor perhaps could have been more informed about Agency's financial situation, it was not objectively reckless for Debtor to rely on President to properly manage funds where Debtor did not have any reason to suspect that President was embezzling funds rather than using funds to pay corporate debts.

(3494) *Frost & Co., Inc, v. Smithey,* 474 BR 830 (Bankr. N.D. Ohio 2012) – Existence of fiduciary relationship is one of federal, not state, law. Exception to discharge requires express or technical trust, arising from placement of specific res in hands of Debtor. Chapter 7 Debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, did not stand in express trust relationship to his fellow officer and other 50% shareholder, as required for debt that arose from Debtor's alleged misapplication of corporate funds to be excepted from discharge on "fiduciary defalcation" theory.

(3495) *Hulsing Hotels Tennessee, Inc. v. Steffner,* 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires express or technical trust arising from placing of specific *res* in hands of Debtor. Statute which makes officers and directors of corporation "fiduciaries" for benefit of corporate creditors did not create fiduciary relationship sufficient for Section 523(a)(4). Tennessee Revised Limited Liability Company Act did not express intent to create an express or technical trust relationship between a limited liability company and its creditors. No language establishes a trust *res* in the dissolved company's assets or requires that those assets be held as a trust fund. Similarly, no statute imposes fiduciary obligations on a party, notwithstanding the specified distribution scheme.

(3496) *Becton, Dickinson & Co. v. Sterling,* 2012 WL 3257841 (Bankr E.D. Mi. 2012) – Fiduciary capacity is narrowly defined as express or technical trust relationship arising from placement of a specific res in hands of Debtor. Debtor's receipt of salary in excess of correct amounts did not constitute defalcation in fiduciary capacity. Debtor's employer did not entrust Debtor with any specific res as required for trust relationship. Debtor was not "trustee" and was never designated as trustee. Mere status of Debtor as employee, without more, does not create trust relationship between employer and employee.

(3497) *Schofield v. Prentice,* 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Fiduciary relationship requires existence of express or statutory trust. Plaintiff failed to demonstrate fiduciary relationship merely because Debtor was an owner and manager of businesses in which part owner.

(3498) *Tweedie v. Semeniuk,* Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in Debtor's business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.

(3499) *Automotive Finance Corp. v. Leonard,* 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Defalcation in a fiduciary capacity requires proof of pre-existing express or technical trust coupled with either a misappropriation of funds or a failure to account for funds. Floor plan finance

agreement that required amount received from disposition of inventory to be held and paid to creditor established a subject matter for the trust and a beneficiary for whom the trust was created. However, the floor plan agreement did not specify the nature of the interests held by the beneficiary or any manner for the implementation and administration of the alleged trust. Floor plan financing is contractual relationship that does not constitute "trust". Debtor who allegedly sold inventory without remitting funds did not commit defalcation while in fiduciary capacity.

(3500) *Humphrey v. Morgan,* 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Fraud or defalcation by fiduciary requires pre-existing fiduciary duty; breach of that duty; and resulting loss. "Fiduciary relationship" requires express or technical trust and does not encompass a common law fiduciary relationship. Ordinary agent-principal relationships, while involving fiduciary obligations, is insufficient to establish the type of fiduciary duty contemplated by Section 523(a)(4). Trust relationship requires intent to create a trust; a trustee; a trust res; and a definite beneficiary. Complaint against Debtor-husband did not demonstrate existence of pre-existing trust relationship between creditor and husband. Debtor-wife held a power of attorney and accepted appointment as a representative of creditor, potentially creating a fiduciary obligation between Debtor-wife and creditor, but evidence indicated that Debtor-husband never signed either the power of attorney or any acceptance of appointment, precluding finding of trust relationship between Debtor-husband and creditor.

(3501) *Tweedie v. Hermoyian,* 466 BR 348 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in Debtor's business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.

(3502) *Korte v. Brewer,* Adv. No. 11-4011 (Bankr. E.D. Mi. 2011) – Fiduciary element of section 523(a)(4) requires pre-existing express or technical trust. Complaint must allege (1) intent to create trust; (2) a trustee; (3) a trust res; and (4) a defined beneficiary. Complaint that alleged fraud but did not allege any elements of trust failed to state cause of action.

(3503) *Tennessee Education Lottery Corp. v. Little,* 2011 WL 4344584 (Bankr. E.D. Tn. 2011) – Creditor failed to prove that Debtor's non-remittance of proceeds of lottery sales constituted defalcation, where Debtor testified that Lottery Tickets were not sold but were stolen by former employee before Debtor could remit the proceeds to the Lottery.

(3504) *Plasterers Local 67 Pension Fund v. Warren,* 2011 WL 240409 (Bankr. W.D. Mi. 2011) – Debtor, principal of construction company that received payment for construction services and materials but failed to use funds to pay subcontractors and suppliers, committed defalcation of funds received in pre-existing fiduciary relationship sufficient to deny discharge of debt under Section 523(a)(4). Michigan Building Contract Fund Act creates fiduciary relationship between contractor and owner as to funds paid to contractor but that is not used to pay suppliers or subcontractors. Company received sufficient funds but used those funds to pay office and general expenses of business.

(3505) *Marshall v. Dickson & Campbell, LLC,* 2011 WL 249500 (S.D. Ohio 2011) – Debtor, an attorney, did not commit fraud or defalcation while acting in fiduciary capacity. State Court Order directing Debtor to retain settlement proceeds pending resolution of an attorney fee claim by client's former attorney did not constitute express or technical trust. Debtor did not embezzle funds because Debtor did not retain the funds but instead released the funds to the client. When funds were delivered to Debtor, there was a pending dispute as to ownership of the funds. Therefore, creditor could not prove that at the time the funds were paid to the Debtor, the funds constituted property of the creditor as required to make claim for embezzlement.

(3506) *King's Welding & Fabricating, Inc. v. King,* 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff'd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee owes fiduciary obligation to employer, the breach of which can result in the obligation being non-dischargeable.

(3507) *Ewers v. Cottingham,* 2011 WL 2118247 (Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

(3508) *Bush v. Roberts,* 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Plaintiff must show that (1) the Debtor was acting in a fiduciary capacity; and (2) Debtor committed a defalcation while acting in such capacity. Creditor must establish the existence of a fiduciary relationship based on an express or technical trust, not merely one who fails to meet a common law fiduciary obligation. Although Debtor and creditor were partners and owed each other a common law fiduciary obligation, the parties never executed any corporate governance or other documents that would create either an express or technical trust relationship.

(3509) *Old Republic National Title Insurance Co. v. Licavoli,* Case No. 08-4065 (Bankr. E.D. Mi. 2011) – President of title agency breached fiduciary obligation owed to issuer of insurance policies when President and agency failed to segregate funds payable to issuer as required by Agency Agreement. Agency Agreement created express trust relationship and Michigan law also imposes fiduciary obligation on insurance agency. Issuer's conduct that may have been inconsistent with fiduciary relationship, such as allowing relationship to continue even though Issuer's prior audit showed a few violations by agency, did not constitute a waiver of ongoing fiduciary obligations. Comingling of trust funds with non-trust funds does not destroy fiduciary relationship or alter status of funds as "trust funds".

(3510) *Messing v. Chelton,* Case No. 10-6921 (Bankr. E.D. Mi. 2011) – Section 523(a)(4) excludes from discharge debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. Exception based on fraud or defalcation requires proof of a pre-existing express or technical trust that encompasses the property at issue. An express or technical trust requires (1) intent to create trust; (2) a trustee; (3) a res; and (4) a beneficiary. Mere contractual relationship between parties Is not sufficient to establish existence of trust. Sale of option to purchase property that was subject to mortgage did not constitute embezzlement of price of option even where sale of option may have violated terms of mortgage itself. Mortgagee still held mortgage and enforceability was not altered in any way by sale of option.

(3511) *In re Nail,* 446 BR 292 (8th Cir BAP 2011) – To except a debt for the settlement proceeds from the Debtor's discharge for defalcation while acting in a fiduciary capacity, the Creditor must prove: (1) the existence of a fiduciary relationship between the Debtor and Creditor; and (2) commission of defalcation by the Debtor in the course of that fiduciary relationship. For purposes of Section 523, a "fiduciary relationship" requires the existence of an express trust, a definition that is much more narrow than the general common law requirement for a fiduciary relationship. Mere contractual relationship between Debtor and bank, where Debtor was to pay certain funds to the lender in repayment of the loan, did not create express trust as to those funds when received by the Debtor and so could not support a finding of non-dischargeability.

(3512) *Follett Higher Education Group, Inc. v. Berman,* 2011 WL 181482 (7th Cir. 2011) – Chapter 7 Debtor did not stand in "fiduciary capacity" to creditor of his wholly-owned corporation, as that term was used in dischargeability exception, merely because corporation was allegedly insolvent, and Debtor, as president and director of corporation, might have owed fiduciary duties to corporate creditors under state law. Contractual relationship between creditor and Debtor's wholly owned corporation to provide bill paying services did not create express trust where Debtor's corporation did not maintain any separate or segregated fiduciary accounts and the contracts between creditor and corporation did not require any segregation of funds. Ordinary contractual relationship between creditor and corporation does not give rise to fiduciary relationship.

(3513) *In re Harwood,* 2011 WL 1239810 (5th Cir. 2011) – Section 523(a)(4) barred discharge of obligations that result for fraud or defalcation while acting in a fiduciary capacity and includes debts arising from Debtor's acquisition or use of property that is not the Debtor's. Debtor breached fiduciary obligation to partnership in which Debtor was the president and chief operating officer of limited partnership when Debtor obtained loans to himself from limited partnership funds without disclosing these loans to the other partners. Office of corporate general partner owed fiduciary obligations to both the corporate general partner and to the limited partnership itself, where Debtor was charged with the day to day management of the limited partnership and exercised operational control over affairs and business of partnership.

(3514) *In re Warren,* 2011 WL 240409 (Bankr. W.D. Mi. 2011) – The court must except a debt from discharge if the creditor establishes that the debt arises from "defalcation" when there is (1) a pre-existing fiduciary relationship; (2) a breach of that relationship; and (3) a resulting loss. Fiduciary relationship requires either an express or technical trust. Michigan Building Contract Fund Act establishes an express or technical trust. Individual corporate officer can be a "contractor" for the purposes of the MBCFA and therefore a "fiduciary". Defendant on behalf of his corporation he received funds, hired subcontractors, and had sole responsibility for the administration of these funds, including who got paid and who did not. Corporation used funds for expenditures such as meals and entertainment, fuel, car repairs, car insurance and office supplies.

(3515) *JGR Associates, LLC v. Brown,* 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Federal law defines "embezzlement' under § 523(a)(4) as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicated fraud. Members of LLC failed to prove that manager of LLC took possession of property of the Members. Manager may have taken possession of income and assets of the LLC, but that income and those assets were not the property of the Plaintiffs themselves. Plaintiffs also failed to prove fraudulent intent where there were credible explanations under the management agreements why the manager may have taken the funds. Manager's conduct may ultimately have been a breach of the management agreements, but plausible explanation negated possible fraudulent intent.

(3516) *Hudson & Muma, Inc. v. Muma,* Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State Court judgment finding that Debtor did not commit fraud was not preclusive on issue where State Court used "clear and convincing evidence" standard but standard under Section 523 is "preponderance of evidence".

(3517) *In re McDowell,* 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Section 1328(a)(2) excludes from the Chapter 13 discharge any obligation determined to be non-dischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Embezzlement requires proof that creditor entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Factual findings in State Court judgment did not conclusively demonstrate that Debtor's actions were evidence of fraud. Parties entered into contractual arrangement and Debtor's actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property. Larceny requires actual or constructive taking away of property of another without the consent and against the will of the owner or possessor with the intent to convert the property to the use of someone other than the owner. As distinguished from embezzlement, the original taking of the property must be unlawful. Factual findings in State Court Judgment did not conclusively demonstrate larceny where Plaintiff originally delivered automobile to Defendant for Defendant to rebuild, and Defendant refused to redeliver automobile after contractual dispute arose.

(3518) *Holmes Lumber & Building Center, Inc., v. Miller,* 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Action under Section 523(a)(4) for fraud or defalcation while acting in fiduciary capacity requires pre-existing express trust relationship. Plaintiff failed to allege any pre-existing trust relationship where alleged defalcation arose out of a consent judgment between Plaintiff and Debtor that liquidated claim and permitted Plaintiff to record lien against property but did not require Debtor to hold property for benefit of Plaintiff.

(3519) *Hoffman v. Anstead,* 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a State Court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargeability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be

indicative of simple forgetfulness or ignorance-clearly nonculpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(4).

(3520) *Humility of Health Partners v. Garritano,* 427 BR 602 (Bankr. N.D. Ohio 2010) – To prevail on complaint to except debt from discharge as one for Chapter 7 Debtor-physician's "fraud or defalcation while acting in a fiduciary capacity," creditor that had entered into professional medical services agreement to pay Debtor a fixed salary in exchange for receipt of net proceeds of his medical practice had to establish existence of some pre-existing express or technical trust between parties with respect to funds at issue. To establish "embezzlement," creditor must prove that it entrusted property to Debtor, that Debtor appropriated property for use other than that for which it was entrusted, and that the circumstances indicate fraud, but does not require proof of express misrepresentation or misleading omission. Though Chapter 7 Debtor-physician may have breached terms of professional medical services agreement, pursuant to which creditor had agreed to pay Debtor a salary in exchange for receipt of net profits from his medical practice, by taking certain deductions not authorized by terms of agreement, there was no indication of fraudulent intent on Debtor's part given evidence that deductions which Debtor took were consistent with manner in which he operated his practice prior to entering into professional medical services agreement with creditor. "Larceny" is the fraudulent and wrongful taking and carrying away of property of another with intent to convert such property to the taker's use without consent of the owner, and is distinguishable from "embezzlement" in that the original taking must have been unlawful. Chapter 7 Debtor-physician's alleged breach of terms of professional medical services agreement, pursuant to which creditor had agreed to pay Debtor a salary in exchange for receipt of net profits from his medical practice, due to Debtor's failure to pay over the full share of profits to which creditor was entitled was not in nature of misappropriation of any property belonging to creditor, in which Debtor did not have interest, as required to except resulting debt from discharge as one for Debtor's "larceny."

(3521) *Kelly v. Aho,* Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Action for defalcation requires pre-existing fiduciary obligations arising from express or technical trust. Debtor's status as real estate agent for plaintiff, although carrying certain fiduciary obligations, did not give rise to actual trust relationship.

(3522) *Bluegrass Stockyards of Campbellsville, LLC. v. Smith,* Case No. 09-1022 (Bankr. W.D. Ky. 2010) - To be non-dischargeable, debt resulting from defalcation requires pre-existing fiduciary relationship. Fiduciary capacity is narrowly construed to express or technical trusts, and does not incorporate implied trusts imposed by operation of law. Although Debtor was general manager of business which may have given rise to fiduciary obligations, status did not create express trust with Debtor as trustee. However, fiduciary capacity is not required for debt to be non-dischargeable for embezzlement or larceny. Debtor repeatedly used corporate assets to purchase assets for Debtor's own use in spite of repeated admonitions not to do so and removed corporate assets to Debtor's personal property with intent to re-sell and retain the proceeds, giving rise to non-dischargeable debt for embezzlement and larceny.

(3523) *The Hanover Insurance Co., v. Dunham,* Case No. 09-2001 (Bankr. E.D. MI. 2010) – Defalcation while acting in fiduciary capacity requires pre-existing fiduciary relationship based on express or technical trust. A constructive or implied trust imposed by operation of law is not sufficient. Michigan law requires that an express trust requires an explicit declaration of trust, or circumstances that show beyond reasonable doubt a trust was intended, accompanied by a transfer of property to one for the benefit of another. Language in indemnification agreement obtained in connection with construction bonds for public works projects did not create express trust for purposes of Section 523(a)(4). Although the indemnification agreement did use the phrase "in trust", the property that would allegedly be subjected to the trust would be paid by public agencies, not the alleged creator of the trust and there was no agreement by the public agency that the funds were to be held in trust. Indemnification agreement also referred to "all funds due" whether or not those had been actually paid, while Michigan law requires both declaration of trust and transfer of property.

(3524) *General Motors Acceptance Corp. v. Cline,* Case No. 08-8104 (6th Cir. BAP 2010) – Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted. Creditor seeking to declare debt non-dischargeable under Section 523(a)(4) must prove that he entrusted his property to the Debtor, the Debtor appropriated the property for use other than that for which it was entrusted, and the circumstances indicate fraud. Fraudulent intent may be proven through circumstantial evidence including suspicious timing of events, insolvency, transfer to family members or other insiders. Court must review all of the facts and circumstances surrounding the transaction and determine whether the evidence leads to the conclusion that it is more probable than not that Debtor had fraudulent intent. Debtor was president of car dealership that sold the vehicles without paying the floor plan lender. Dealership transferred vehicles to family members and affiliates will shortly before dealership filed for bankruptcy without remitting any of the funds to the floor plan lender. Debtor was causing dealership to repay loans from Debtor's friends and family members and affirmatively misrepresented that dealership was paying floor plan lender when dealership was not making any payments. Debtor's alleged motivation of survival of business did not defeat finding a fraudulent intent. Fax indicated concerted effort to liquidate large amount of inventory in abbreviated period of time, just prior to filing for bankruptcy, with our remaining any of the proceeds to floor plan lender know, warranting conclusion that death resulted from embezzlement under Section 523(a)(4).

(3525) *Ormsby v. First American Title Company,* 591 F.3d 1199 (9th Cir. 2010) - Section 523(a)(4) prevents discharge for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Bankruptcy court is not bound by the state law definition of larceny and may follow federal common law which defines larceny as a felonious taking of another's personal property with intent to convert it or deprive the owner of the same. Theft of trade secrets and confidential and proprietary information from Debtor's competitor company and Debtor's actions in hiring management level employees from competitor with intent to wrongfully gain access to confidential information constituted larceny within federal definition, rendering debt non-dischargeable.

(3526) *Double v. Cole,* Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which Debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to wave the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.

(3527) *Tiernan v. Dietrich,* Case No. 08-68294 (Bankr. E.D. Mi. 2010) – Phrase "while acting in a fiduciary capacity" modifies both the fraud and defalcation provisions of section 523(a)(4). Plaintiff could not prevail in action against the Debtor who represented himself as a licensed attorney when Debtor no longer was, where plaintiff conceded that there was no fiduciary relationship between plaintiff and Debtor.

(3528) *Issacs Cars, Inc. v. Woods,* 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(4), Plaintiff must prove (1) fraud or defalcation while acting in a fiduciary capacity; or (2) embezzlement; or (3) larceny. "Fiduciary capacity" requires express trust relationship and does not extend to implied trusts which are imposed on transactions by operation of law as a matter of equity. Embezzlement required that Debtor appropriate funds for his own benefit with fraudulent intent or deceit. Larceny requires that Debtor have wrongfully and with fraudulent intent taken property from rightful owner. Debtor who was "aware" of business's financial difficulties did not run business and had no knowledge that business was selling cars "out of trust". When possible sales out of trust were brought to Debtor's attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to deceive Plaintiff Financing Agency.

(3529) *Baker v. Wentland,* 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - § 523(a)(4) excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Larceny cannot apply where property initially comes into hands of Debtor lawfully. Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come and requires proof that creditor (1) entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud in fact, involving moral turpitude or intentional wrong. Creditor failed to prove fraud where Debtor's representation when hiring employee that money withheld from employee's pay would be used to pay health insurance premium there was no proof of falsity when made and Debtor in fact paid health insurance premiums for 25 years before starting to misappropriate funds. Defalcation while acting in a fiduciary capacity need not rise to the level of fraud. Defalcation includes misappropriation of funds by a fiduciary as long as the use was not the result of mere negligence or a mistake of fact. Fiduciary relationship requires a Debtor must hold funds in an express or technical trust relationship arising from placement of a specific *res* in the hands of the Debtor. Debtor withholding funds from employee's pay for purposes of paying health insurance premiums constituted sufficient proof of a trust relationship for specific purpose rendering debt non-dischargeable pursuant to Section 523(a)(4).

(3530) *Huntington National Bank v. Moore,* 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Embezzlement is fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Creditor can prove embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Larceny is fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. The original taking of the property must have been unlawful. Creditor failed to prove embezzlement or larceny of loan proceeds merely because money loaned to closely held corporation was used for payment of Debtor's (corporation's sole shareholder) personal expenses.

(3531) *Pearce v. Muncey,* 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(4) requires preexisting fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires "express" or "technical trust" and not merely common law fiduciary relationship or "resulting" trust based on alleged wrongful act. Purchase and Sale agreement between seller and buyer of property does not create fiduciary relationship sufficient to support action under 523(a)(4).

(3532) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Section 523(a)(4) allows debt resulting from embezzlement to be non-dischargeable. "Embezzlement" is fraudulent appropriation of property which has been entrusted to person for specific purpose but party instead misappropriates property for use other than that for which it was entrusted. Debtor lawfully received funds from Creditor for payment to third party vendor, but retained those funds for own purposes, constituting embezzlement sufficient to deny dischargeability of debt.

(3533) *Morganroth & Morganroth, PLLC v. Stollman,* Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Debts resulting from "defalcation while acting in fiduciary capacity" are non-dischargeable. Plaintiff must prove (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Section 523(a)(4) requires express or technical trust arising from placement of specific res in the hands of the Debtor for the benefit of a definite beneficiary. A "constructive" or "resulting" trust is not sufficient. Plaintiffs failed to demonstrate any intent to create a trust, a trustee, a res or a definite beneficiary. Debtor's actions in obtaining, using and concealing proceeds that were encumbered by security interests may constitute breach of contract but does not support an express trust relationship. Section 523(a)(4) also excepts from discharge debts resulting from embezzlement or larceny. Embezzlement requires fraudulent appropriation of property by person to whom property was lawfully entrusted. Court adopted narrow definition of property and held that interfering with a security interest was not embezzlement because the money on which Plaintiffs' held liens was property of the Debtor, not Plaintiffs'. One cannot embezzle property for which the person is the lawful owner. Larceny is actual or constructive taking of property without the consent of and against the will of the owner or possessor with intent to convert property. Debtor's actions in disposing of property that was subject to Plaintiffs' lien did not constitute larceny. Debtor was the owner of the funds involved. Further, Debtor did not wrongfully take the proceeds – Debtor was entitled to the proceeds, subject only to Plaintiffs' security interests.

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(3534) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) – Domestic Support Obligations survive discharge under

Section 523(a)(5). Section101(14A) defines "domestic support obligation" as obligation owed to or recoverable by spouse, former spouse or child; in the nature of alimony, maintenance or support regardless of whether debt is expressly designated as such; established by separation agreement, divorced agreement or property settlement agreement, order of Court of record or determination made under applicable nonbankruptcy law by governmental unit; and that has not been assigned to nongovernmental agency. Antenuptial Agreement constituted "property settlement agreement" where agreement defined respective property rights of parties during marriage, in event of divorce, and in the event of death. Agreement specifically defined "separate property" and provide that parties would retain separate property during marriage; and defined "marital property" and provided that each would receive one-half of marital property in event of divorce; and provided that parties would have no rights against each other in event of divorce or death except as stated in Agreement. Provisions were clearly settlement of property interest between parties such that Antenuptial Agreement constituted "property settlement agreement".

(3535) *Stevens v. Knestrick,* 2018 WL 3752993 (Bankr. N.D. Ohio 2018) – Super discharge under Section 1328 requires Debtor to completeall Plan payments and certify that all amounts payable under domestic support order have been paid. Discharge under Section 1328 does not discharge debts specified in Section 523(a)(5) as "domestic support obligations". DSO is one that accrues before, on or after date of order for relief; that is owed to or recoverable by a spouse, former spouse or child of Debtor; in the nature of alimony, maintenance or support without regard to how the debt is expressly designated; established or subject to establishment in separation agreement, divorce decree, property settlement agreement, other order of Court of record, or made in accordance with applicable nonbankruptcy law by government unit; and that is not assigned to nongovernmental agency. In general, individuals obligation to pay portion of child's college expenses is in nature of support. However, original Child Support Order and later modified Child Support Order did not include any obligation for Debtor to pay college expenses. Letter from governmental agency expressing position on whether college expenses should be included is not order adopting any agreement or imposing any obligation. Further, although Court can order child support to continue beyond 18th birthday, administrative agency can continue support beyond 18th birthday only if child continuously tends recognized and accredited high school on full time basis, which excludes any ability of administrative agency to require payment of college expenses. Debtor not judicially estopped from contesting obligation to pay college expenses where Debtor included in Official Form 22C a deduction for payment of support, as form is used to calculate disposable income but does not amount to persuading Court to accept a manner in which Debtor characterize support income and there was no evidence that Court was misled by statements in Form 22C. Court cannot use equitable powers or authority under Section 105 to convert a private agreement between Debtor and plaintiff for Debtor to pay support obligations into an Order of Court as defined in Section 523(a)(5).

(3536) *Krakora v. Martin,* 2017 WL 6333925 (Bankr. N.D. Ohio 2017) – Section 523(a)(5) excepts from discharge domestic support obligations, defined as (i) debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title; (ii) owed to or recoverable by either (a) spouse, former spouse, or child of debtor or child's parent, legal guardian, or responsible relative; or(b) a governmental unit; and (iii) is in nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated; and (iv) established or subject to establishment before, on, or after the date of other for relief as result of (a) a separation agreement, divorce decree, or property settlement agreement; or (b) order of court of record; or (c) is determination made in accordance with applicable non-bankruptcy law by a governmental unit; and (v) has not been assigned to nongovernmental entity, unless assigned voluntarily or purpose of collecting the debt. Mere labeling by parties as alimony or support will not by itself render obligation non-dischargeable. Whether obligation is in nature of alimony or support, courts look to factors including (1) label such as alimony, support, or maintenance in decree or agreement, (2) direct payment to former spouse, as opposed to assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. Hold harmless clause in divorce that required debtor to retain household and pay mortgage and hold ex-spouse harmless is ambiguous and decree both stated that neither party owed support to other but then stated that divisions of assets and liabilities are intended in nature of maintenance and support. Court unable to resolve mater on summary judgment where testimony of parties conflicted on intent of decree.

(3537) *Vander Roest v. Vander Roest,* 2017 WL 2627914 (Bankr. W.D. Mi. 2017) – "Anti-Bankruptcy Clause" in judgment of divorce that purports to convert property settlement into non-dischargeable alimony in the event one party files for bankruptcy does not automatically render obligations non-dischargeable or deprive Bankruptcy Court of authority to determine dischargeability of obligation. Although state courts enjoy concurrent jurisdiction to determine dischargeability, there is no authority to determine dischargeability in advance of any bankruptcy filing. Whether obligation is property settlement or support is not determined by label applied by State Court, although Bankruptcy Court will consider label such as alimony, support or maintenance specified in the decree as well as whether the obligation is paid directly to the former spouse as opposed to assumption of third-party debt and whether payments are contingent upon events such as death, remarriage or eligibility for Social Security. Judgment of Divorce specify that neither party would be entitled to alimony and instead allocated debts and included "hold harmless" clause. Obligation was nonmodifiable, not extendable and nonreviewable and is measured by unpaid obligations under hold harmless clauses rather than any showing of need or capacity to pay. Obligations did not terminate upon death or remarriage of either

party, evidencing intent to create property settlement. Judgment of Divorce specify that payments would not be taxable to the recipient and not deductible by the payer, further intending that payments were in the nature of property settlement, because under Internal Revenue Code, alimony payments are deductible on payer's return and taxable to payee. Judgment of Divorce reference obligation as "alimony in gross" which is termed generally used for division of property rather than support. Obligation constituted property settlement under 11 USC Section 523(a)(15) which is dischargeable in Chapter 13 if Debtor confirms a Plan and makes all required payments.

(3538) *Zadeh v. Nelson,* 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – State Courts have concurrent jurisdiction with Bankruptcy Courts to determine whether debt is excepted form discharge under Section 523(a). State Court had previously determined on multiple occasions that obligation owed by Debtor to creditor was not DSO. Action brought in Bankruptcy Court seeking to except debt from discharge blocked by *Rooker-Feldman* as any judgment by Bankruptcy Court would necessarily amount to Federal Court review of State Court judgment.

(3539) *Missouri v. Spencer,* 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.

(3540) *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.

(3541) *In re Packer,* 2016 WL 5928899 (Bankr. W.D. Mi. 2016) – State Court Order directing Debtor to pay ex-spouse $25,000 to reimburse attorney fees was in nature of support. State Court considered income disparities between parties and attorney fees expended, concluded that ex-wife's attorney fees were direct result of activities of Debtor. Even State Court Ordered support will not be DSO to extent amount awarded is unreasonable. Debtor presented no evidence that amount awarded was unreasonable. Bankruptcy Court will not sit as "super-divorce" court and second guess determination of State Court that ex-wife had established sufficient basis for attorney fees as DSO.

(3542) *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.

(3543) *Rismiller v. Schweitzer,* 2015 WL 5918031 (Bankr. N.D. Ohio 2015) – Property settlement awards are discharged in Chapter 13 if Debtor receives full discharge under Section 1328(a). However, property settlement awards are not discharged in Chapter 13 if Debtor receives hardship discharge under Section 1328(b). Dischargeability or non-dischargeability is self-executing depending on which type of discharge is granted. Whether obligation is support or property settlement depends on whether debt is owed to or recoverable by former spouse, is in the nature of support, and was established by separation or divorce decree. Debtor's obligation to pay joint mortgage debt is "claim" of spouse as spouse would have right under "hold harmless" provision of decree to recover from Debtor if spouse is required to pay mortgage payment, giving rise to contingent claim. Whether obligation is in nature of support where the decree does not designate it as such depends on whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; if the first two conditions are satisfied, whether the obligation is so excessive as to be unreasonable under traditional concepts of support; to the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Court will look to traditional state law indicia of support including (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits; as well as disparity in earning power of parties, need for economic support and stability, presence of minor children, marital fault, evidence of negotiations or understandings as to intended purpose of assumption of debt. Court could not determine on summary judgment whether Debtor's assumption of mortgage obligation was intended to be support obligation or whether loan assumption enabled Plaintiff to provide a home for their minor children or whether, without the loan assumption, plaintiff could not maintain the daily necessities, such as food, housing and transportation.

(3544) *In re Kinsey,* 2015 WL 5675586 (Bankr. E.D. Tn. 2015) – There is no deadline for filing adversary proceeding to determine dischargeability of debt under Section 523(a)(5). However, Court has authority to impose one to facilitate orderly case administration.

(3545) *Liggett v. Schwartz,* 2015 WL 4478033 (6th Cir. 2015) –Divorce decree that awarded wife one-half of retirement account had contract right to recover one-half of the account that was non-dischargeable under Section 523(a)(15). Award constituted property settlement but there was no evidence that settlement was intended to act as alimony or support. Husband's failure to transfer funds amounted to breach of contract and could not constitute conversion as a matter of law.

(3546) *Read v. Read,* 2015 WL 3918137 (Bankr. E.D. Tn. 2015) – Domestic support obligation is one owed to spouse or former spouse or child that accrues before, on or after date of bankruptcy filing and is nature of alimony, maintenance or support. Payments defined in divorce judgment as "alimony" undoubtedly fall within scope of "domestic support obligation".

(3547) *Michigan Department of Human Services v. Marks,* Case No. 15-80301 (Bankr. W.D. Mi. 2015) – Debtor's alleged fraudulent obtaining of Supplemental Nutrition Assistance program benefits is not "domestic support obligation" even if benefits are based on representation of household income. However, Debtor's misrepresentation of Debtor's income for purposes of obtaining benefits constitutes fraud that would be excepted from discharge under Section 523(a)(2).

(3548) *In re Cummings,* 2014 WL 7202109 (Bankr. W.D. Mi. 2014) – Obligation is in the "nature" of support if State Court Order labels it as alimony, support or maintenance; payment is directly to spouse rather than assumption of third party debt; and payments are contingent on events such as death, remarriage, or eligibility for social security. Award that meets these indicia are conclusively presumed to be support and bankruptcy court will not second guess State Court determination. Mediation award met qualifications as support where award specifically awarded "spousal support" and included explanation as to why award was support; payment was directly to Debtor and not to third party nor was award in any way conditioned on or linked to any obligation to pay third party. Payments were contingent as payments continued only until a specified total was reached or until the death of the payee. While bankruptcy court can evaluate reasonableness of support payment amounts, court would do so only if Debtor demonstrates an inability to make the required payments in light of Debtor's circumstances. Debtor did not show requisite hardship where Debtor continued to pay $600 per month on mortgage on cottage and Debtor paid his attorney over $22,000 to fight frivolous State Court proceedings. Debtors also purchased two new vehicles on eve of filing bankruptcy, while evidence indicated that both Debtors were retired and could share one vehicle. Award of attorney fees to creditor's attorney as part of domestic proceeding also qualified as support. Mediation Award included attorney fees as part of "support". Debtor's conduct was vindictive, spiteful and dilatory and impaired creditor's ability to earn a living; and creditor had no resources from which to pay attorney fees. Money was to be paid directly to Debtor and not to the attorney and the obligation was contingent on either full payment or death of the creditor.

(3549) *In re Ballinger,* 2013 WL 6383011 (Bankr. E.D. Ark. 2013) – Debtor's husband's obligation to pay child support to husband's children did not constitute non-dischargeable debt as to Debtor. Debtor was not responsible for payment of support to husband's ex-spouse and claim cannot qualify as domestic support.

(3550) *In re Willis,* 2014 WL 231982 (Bankr. S.D. Al. 2014) – Child support obligation owed to more recent ex-wife was not excepted from discharge in bankruptcy filed by Debtor's first ex-wife. Second wife received child support allegedly from funds that ex-husband should have used to pay child support to first ex-wife. When second ex-wife filed bankruptcy, first ex-wife filed claim asserting that second ex-wife was based on use of money that should have been paid to first ex-wife but instead was paid to second ex-wife. Debt not excepted from discharge under Section 523(a)(5) because there was no familial connection between the two ex-spouses.

(3551) *Bendetti v. Guinness,* 2014 WL 177247 (9th Cir. BAP 2014) – Status of creditor as spouse, former spouse or child of Debtor is prerequisite to except debt from discharge. Debtor and her husband were liable for attorney fees owed to Husband's former spouse for costs of divorce. The lack of any familial connection between Debtor and creditor prevented debt from being within scope if Section 523(a)(5). Court noted that cases that extended scope to persons other than the spouse, former spouse or child involved debts that flowed to the benefit of a member of the listed classes, or where the discharge would adversely affect explicitly covered family members. Debt to spouse's former spouse was not one that would flow to Debtor's family member and did not adversely affect Debtor's family member. Debt was not excepted from discharge.

(3552) *Hamilton v. Kyer,* 2013 WL 3877897 (Bankr. N.D. Ohio 2013) – Whether obligation is in the nature of support, alimony or maintenance depends on traditional state law indicia such as label used by State Court; direct payment to the spouse as opposed to assumption of obligation owed to third party; and payments that are contingent on some event such as death, remarriage or eligibility for Social Security. Obligation was not in nature of support where obligation was in section of Settlement Agreement titled "Division of Property" and not section titled "Spousal Support". Parties knew how to designate obligation as spousal support. Obligation was to pay debt to third party for lien secured by automobile that was retained by Debtor, and not an obligation to pay the spouse although the spouse was jointly liable on the debt. Debtor's obligation to pay was not contingent but was unconditional obligation of Debtor to pay the debt until the lien

was paid in full.

(3553) *In re Owsley,* 2013 WL 2352604 (Bankr. E.D. Tn. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the Debtor, or for other cause. Reopening case grants no relief. Court should only reopen case where moving party demonstrates compelling reason to do so. The longer the time between closing and the motion to reopen, the more compelling the reason must be. Court should not reopen case where court cannot grant effective relief to moving party. Pre-BAPCPA version of Section 523(a)(5) allowed for discharge of domestic support obligations only where the debt, while denominated as child support, was in fact not such; or where the debt had been assigned to an entity other than a governmental entity Debtor's pre-petition child support obligation had been assigned to the state for purposes of recovering amounts advanced to former spouse constituted obligation assigned to governmental unit that was not dischargeable. Treatment of obligation as unsecured in confirmed plan did not make debt dischargeable at end of Plan. Personal liability for unpaid child support is unaffected by discharge in Chapter 13 case. Nothing in the plan purported to determine dischargeability of debt. Plan merely addressed how debt would be paid during term of plan. Court would not reopen case for purposes of allowing Debtor to bring contempt action against State where debt had not been discharged and State actions were, therefore, not violation of discharge injunction. Reopening would be futile act as Debtor was not entitled to any relief.

(3554) *In re Ashby,* 2013 WL 149947 (Bankr. W.D. Ky. 2013) – Ex-husband's Obligation to pay "Consulting fees" to ex-wife constituted support and was not dischargeable under Section 523(a)(5). During marriage, parties jointly owned business. As part of divorce, husband was awarded ownership and was required to pay ex-wife a consulting fee of $33,800 per year until ex-wife became eligible for social security. Other than consulting fee, decree stated that "Neither party shall be responsible to the other for payment of maintenance." Testimony established that consulting fee was to be paid in lieu of maintenance and was structured as consulting fee for tax purposes. Fee would continue until ex-wife became eligible for social security and was intended to allow wife to maintain standard of living. Statement in decree that neither party was obligated for support did not prevent court from looking behind language to actual intent of parties.

(3555) *Rugiero v. Dinardo,* 2012 WL 4800059 (6th Cir. 2012) – Attorney fee award to child's parent arising out of custody action is non-dischargeable domestic support obligation. Award was made directly to parent, constituted a "debt" and was established by Court Order. Fact that parents were never married is irrelevant to outcome as Section 523(a)(5) focuses on whether award was to "parent" without limitation or regard to marital status. In determining whether award is "support" court will consider label assigned by State Court and whether the award is denominated support or maintenance; whether payment is direct to recipient rather than payable to third party; and whether payment is contingent on events such as remarriage or death. State Court considered relative capacities of parties to pay fees and determined that recipient lacked ability to pay fees. Proceedings in case involved welfare of children and affordability of attorney fees was considered and necessary to allow parties to advance positions in domestic support action. Total award was not excessive or unreasonable and record indicated that State Court made painstaking review of fee request before entering award.

(3556) *Taylor v. Taylor,* Case No. 11-103 (10th Cir. BAP 2012) – Obligation owed to Debtor's ex-spouse arising out of ex-spouse's overpayment of support is not "support obligation" within Section 523(a)(5). Domestic Support Obligation under Section 523(a)(5) must be owed to spouse, former spouse; be in the nature of support or alimony; and must be established as part of a separation agreement, divorce decree, or property settlement agreement. Although obligation itself arose out of payment of a Domestic Support Obligation, the debt resulting from the overpayment did not retain that same character where there was no evidence that ex-spouse had any need for support or that court intended repayment to constitute support. Obligation to pay alimony was to terminate when spouse co-habitated. Spouse (now Debtor) began to cohabit but did not disclose this to either her ex-spouse or to the court, resulting in continued payments of alimony to which Debtor was not entitled.

(3557) *In re Peake,* 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Chapter 7 discharge does not discharge obligations for alimony, support or maintenance. Obligation will constitute support only if parties intended to create a support obligation; obligation must have actual effect of providing necessary support; court must determine if obligation is so excessive as to be unreasonable; and if amount is unreasonable, amount is dischargeable to the extent necessary to serve purposes of bankruptcy code. Although judgment expressly waived any rights to support, judgment provided for property settlement that stated that property settlement was to provide Wife "with support and maintenance in lieu of direct alimony, this obligation is determined to be non-dischargeable in bankruptcy". Wife testified that Debtor took most of the furniture, appliances and household goods when he moved out, and wife considered award to be support to allow her to purchase new furnishings and to repair damages to home caused by Debtor. Award had actual effect of support as Wife continued to pay mortgage on marital home and utility expenses while Debtor was living in home during course of divorce, and Wife, living elsewhere, had to pay her own living expense in addition. Once Wife returned home, she had to purchase items to replace those taken by Debtor. Money awarded by State Court had actual effect of providing support. Amount was not unreasonable or excessive given Wife's expenses and need to replace items taken by Debtor and repair damages caused by Debtor.

(3558) *Baer v. Cabrian,* 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy

Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.

(3559) *In re Lee,* 465 BR 469 (Bankr. W.D. Ky. 2012) - Debtor's obligation to pay ex-spouses attorney fees incurred in divorce constituted "domestic support obligation" that is excepted from automatic stay. Ex-spouses action in obtaining an award of attorney fees in the domestic relations action did not violate automatic stay. Further, domestic Court Order requiring Debtor to pay $1506 per month "toward his share of the marital debts" also constituted award of support as award was intended to assist ex-wife with payment of monthly household obligations and, therefore, entry of order was also excepted from automatic stay.

(3560) *In re Phile,* 490 BR 250 (Bankr. S.D. Ohio 2011) – Chapter 13 plan that provided that Debtor's obligation to former spouse would be deemed to not constitute a domestic support obligation and would be discharged at end of plan could not be confirmed. Dischargeability of obligation could not be established through plan confirmation process, but required adversary proceeding.

(3561) *Rugiero v. Dinardo,* 2012 WL 4800059 (E.D. Mi. 2011) – Enforcement of domestic support order is within exception to automatic stay. State Court has authority to determine, post-petition, whether the debt is in the nature of support and is non-dischargeable within Section 523(a)(5) even in proceedings conducted post-petition. Orders to reimburse creditor for attorney fees was debt owed to or recoverably by a child or parent and that is in the nature of support and established by order of court. Fact that Debtor was never married to creditor does not change nature of obligation as one for child support. Section 101(14A) does not require marriage as condition of DSO. State Court Order established that reimbursement was intended as support and took into consideration relative financial positions of the parties.

(3562) *Hollington v. Ruf,* Case No. 10-8086 (6th Cir. BAP 2011) – Debtor's obligation to pay third party obligations are non-dischargeable. The precedent, *Gibson v. Gibson,* 219 BR 195 (6th Cir. BAP 1998), although pre-BAPCPA, is still good law. Divorce obligation that required Debtor to pay private school tuition for children is not dischargeable.

(3563) *Dinicola v. Slimak,* 2011 WL 3759468 (Bankr. N.D. Ohio 2011) – Guardian ad litem fees for Debtor's children are non-dischargeable under Section 523(a)(5). "Domestic Support Obligation" is one that is owed to or recoverable by governmental unit or specified person; in the nature of support; arising from agreement or Court Order; and not assigned to a governmental unit. Guardian ad litem has relationship with Debtor; obligation to pay GAL fees arose from Court Order; and debt had not been assigned. GAL services were "in the nature of support of the Debtor's children throughout the Debtor's divorce proceeding" to bring the obligation within the scope of non-dischargeable DSO.

(3564) *In re Fath,* Case No. 09-21637 (Bankr. E.D. Mi. 2010) – "Domestic support obligation" is an obligation which is in the nature of alimony, maintenance or support. Alimony and support are given broad constructions to promote congressional policy that favors enforcement of obligations for spousal and child support. In determining whether an obligation not specifically designated as alimony, maintenance or support will nonetheless be "in the nature of support", court will consider whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; whether the obligation is excessive or unreasonable under traditional concepts of support; and if the amount is unreasonable, the extent to which the dischargeability of the obligation serves the purpose of federal bankruptcy law. State Court Orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support.

(3565) *Reissig v. Gruber,* 2010 WL 2756762 (Bankr. N.D. Ohio 2010) - A discharge does not discharge an individual Debtor from any debt for a domestic support obligation. A domestic support obligation" is defined under 11 U.S.C. § 101 of the Bankruptcy Code as a debt that accrues before, on, or after the date of the order for relief that is in the nature of alimony, maintenance, or support of such spouse, former spouse, or child of the Debtor or such child's parent, without regard to whether such debt is expressly so designated. Award of attorney fees made in connection with an order entered in a domestic matter constitutes an obligation in "the nature of support." The attorney fees were awarded in a proceeding concerning the health and welfare of the Parties' children; and the award of attorney fees was done for the express purpose of compensating the Plaintiff for the Defendant's improper litigation tactics which forced the Plaintiff to expend resources unnecessarily-resources which would have been available to support the children. Federal bankruptcy law controls determination of obligation's status as "support". Debtor's obligation to pay ex-spouse's attorney directly would not remove obligation from status of "support" although Ohio law defined support as only those obligations paid through the office of child support. Direct payments to the creditor, although removing the obligation from the state definition of "support", did not alter the status for purposes of Section 523(a)(5).

(3566) *Kassicieh v. Battisti,* 467 B.R. 445 (Bankr. S.D. Ohio 2012), *aff'd* Case No. 12-8015 (6th Cir. BAP 2012) – A domestic support obligation is one owed to or recoverable by a spouse, former spouse or child of the Debtor or the child's parent, legal guardian or responsible relative. As part of custody dispute, Court appointed guardian ad litem to act as representative of the minor child. Court Ordered that each party was fully responsible for the guardian ad litem fees. Courts have adopted three different approaches to determine if a debt is payable to one of the defined classes: (1)

the "plain-meaning" approach, holding that the dischargeability of the debt turns on whether it is payable to or recoverable by a person or entity described in section 101(14A); (2) the view that, if a debt is in the nature of support, it is non-dischargeable even if payable directly to a third party and even if the Debtor's spouse, former spouse or parent of the child would not be financially harmed if the Debtor discharged the obligation; and (3) a more limited approach that requires some ongoing liability of the Debtor's spouse, former spouse, or parent of the Debtor's child on the support obligation owing to a third party (so that its non-payment might have a financial impact on those parties) before it may be excepted from discharge. Fees are non-dischargeable DSO where the payment was in nature of support, even if payable to person who is outside statutory list of persons to whom a DSO may be owed and even though no listed person is jointly liable with the Debtor for payment of fees. Services of guardian ad litem protect child and have effect of providing support.

(3567) *Cheatham v. Cheatham,* 2009 WL 2827951 (Bankr. N.D. Ohio 2009) - An award that is designated as support by the State Court and that has the indicia of a support obligation is conclusively presumed to be a support obligation by bankruptcy courts in the Sixth Circuit. Indicia of support include but are not necessarily limited to, (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. Debtor's obligation to make payments on secured debts are not "support obligations". The payments are not to the spouse but are to the lenders directly; the obligations do not terminate on the death, remarriage or eligibility of the spouse for Social Security; Debtor was required to obtain the release of the secured claims within two years regardless of any other change or lack of change in the status of either party; and the Judgment of Dissolution had another paragraph expressly titled "spousal support" that established a direct payment obligation that terminates on the death of either party or the remarriage of the spouse. Debtor's obligation to pay the mortgage and home equity line on the former marital homestead was not an obligation for support or maintenance that would be non-dischargeable under Section 523(a)(5).

8.203 Section 523(a)(5) – Delinquency Proceedings

(3568) *Rivera v. Orange County Probation Department,* Case No. 13-1476 (9th Cir. BAP 2016) – Costs incurred by county for support of Debtor's son while in juvenile detention is not "domestic support obligation" and is not excepted from discharge. Section 101(14A) specifically includes in definition of Domestic Support Obligation any obligation owed to a governmental unit, which allows government to recover temporary child or spousal aid payments, foster care, wardship, residential treatment centers, or expenses incurred for child's benefit in divorce and custody proceedings. However, 101(14A) does not include payments that are outside the governmental family support infrastructure such as charges incurred while juvenile is involuntarily detained. Expenses incurred by County were not intended as family support but were incurred as part of and incidental to larger government purpose of promoting public safety and reducing crime through corrections efforts. Purpose of detention was to enforce criminal law, not to support family. Expenses were incurred by public safety agency and provision of food and clothing was incidental to incarceration, and objective was not to place child in place of wholesome upbringing but to enforce criminal law.

(3569) *Ferguson v. Genesee County Circuit Court,* Case No. 14-3192 (Bankr. E.D. Mi. 2015) – Section 101(14A) defines domestic support obligation as one owed to or recoverable by spouse, former spouse or child or a governmental unit; in the nature of alimony, maintenance or support; and established or subject to establishment by Court Order or by determination made in accordance with applicable non-bankruptcy law. Debtor's two children were removed from home on delinquency petition. State Court later determined that Debtor had financial ability to reimburse court for costs of care. As of the petition date, Debtor owed $69,000 in costs. Costs were owed to a governmental unit as determined by Court Order. Costs were awarded for purpose of providing maintenance and support of children while placed outside Debtor's home and were expressly intended to pay costs of care and service to child. Debts were established by Court Orders in accordance with Michigan law. Debts were payable directly to county and were not assigned. Debts meet definition of domestic support obligation which is excepted from discharge under Section 523(a)(5).

8.204 Section 523(a)(5) – Hold Harmless Clause

(3570) *Carter v. Carter,* 2017 WL 1327720 (Bankr. W.D. Ohio 2017) – Domestic Support Obligations are non-dischargeable in Chapter 13 pursuant to 11 USC Section 523(a)(5). "Domestic Support Obligation" is debt owed to former spouse that is in nature of alimony, maintenance or support without regard to whether the debt is expressly designated. If marital debt is not expressly designated as alimony, maintenance or support, Court will consider (1) whether parties or Court intended to create support obligation; (2) whether obligation will have actual effect of providing support; (3) if first 2 conditions are satisfied, Court must determine if obligation is so excessive as to be unreasonable under traditional concepts of support; and (4) if amount is unreasonable, obligation is dischargeable to extent necessary to serve a purpose of federal bankruptcy law. In determining whether provision of State Court decree providing for one spouse to assume marital debt and hold non-Debtor spouse harmless on the post-dissolution monthly mortgage payments constituted support obligation, Court will consider (1) label such as alimony, support or maintenance in decree or agreement; (2) direct payment to former spouse as opposed to Assumption of third-party debt; (3) payments that are contingent upon death, remarriage or eligibility for Social Security; (4) nature of obligations assumed; (5) structure and language of parties agreement or courts decree; (6) whether other lump-sum or periodic payments were also provided; (7) length of marriage; (8) age, health and work skills of parties; (9) whether obligation terminates on death or remarriage of parties; (10) adequacy of support absent debt assumption; and (11) evidence of negotiations or other understandings as to intended purposes of assumption of debt. Debtor's obligation to assume mortgage debt did not provide for direct payment to non-filing spouse but instead reflect assumption of debt with obligation to pay mortgage company directly. Obligation to pay mortgage did not terminate upon death or remarriage, was not labeled alimony, maintenance or support, was located in Section of dissolution degree entitled "Division of Property and Debts," and section entitled "Spousal Maintenance" provided that non-Debtor did not ask for spousal maintenance and was not awarded spousal maintenance. Courts that have held that assumption of mortgage debt on principal residence constituted support obligation did so in context where non-Debtor remained in marital residence and Debtor's obligation to pay mortgage was means of providing shelter that spouse and children could not otherwise afford. In this case, property was retained by Debtor and non-Debtor and children did not remain in marital residence. Post-dissolution proceedings in State Court further supported conclusion where Court issued Order that to the extent non-Debtor made payments against mortgage after dissolution of marriage, then upon sale of property non-Debtor would be entitled to recover those amounts from proceeds of sale or, if sale or disposition results in deficiency, Debtor's share of deficiency would be increased to reflect the amount of payments made by non-Debtor post-dissolution. Debtor's obligation to hold non-Debtor harmless on any post-decree monthly mortgage payments is dischargeable as property settlement, not support or maintenance.

8.205 Section 523(a)(6)

(6162) *Launder v. Doll,* 2018 WL 1189171 (Bankr. N.D. Ohio 2018) – Section 523(a)(6) excepts from debt discharge resulting from willful and malicious injury by Debtor to another entity or property of another entity. Willful requires deliberate or intentional injury, not merely deliberate or intentional act that causes injury, and requires that Debtor either desire to cause consequences of actions or believe that consequences are substantially certain. Malicious requires that Debtor acted in conscious disregard of duties or without just cause but does not require ill will, spite or animosity. Record reflected facts that raise genuine dispute as to whether Debtors conduct constituted intentional injury or to evidence malice. Plaintiff's allegation that Debtor entered into agreement to restore plaintiff's automobile and later refused to return parts after dispute arose did not support summary judgment where Debtor asserted that he retained parts under Ohio, law provisions, allegations which were equally unsupported. Parties did not present evidence detailing precisely what occur drink course of project or to determine whether Debtor may have been holding onto parts in good faith.

(6163) *Launder v. Doll,* 2018 WL 1189171 (Bankr. N.D. Ohio 2018) – Section 523(a)(6) excepts from debt discharge resulting from willful and malicious injury by Debtor to another entity or property of another entity. Willful requires deliberate or intentional injury, not merely deliberate or intentional act that causes injury, and requires that Debtor either desire to cause consequences of actions or believe that consequences are substantially certain. Malicious requires that Debtor acted in conscious disregard of duties or without just cause but does not require ill will, spite or animosity. Collateral estoppel, also known as issue preclusion, requires final judgment on merits in previous case after full and fair opportunity to litigate; issue must have been actually and directly litigated in prior suit and resolution necessary to final judgment; issue in present suit must be identical to issue in prior suit; and party against whom estoppel is asserted was party to or was in privity with party to prior action. Plaintiff and defendant in current action or same parties to state Court action that gave rise to default judgment. Defendant had full and fair opportunity to litigate where defendant was properly apprised of pendency of action but chose not to defend, resulting in default judgment. State Court judgment was not collateral estoppel under Section 523(a)(6) where state Court judgment did not contain sufficiently specific findings of fact and conclusions of law to determine that Debtor's actions were both willful and malicious. Record did not indicate that state Court had made any express adjudication as to Debtor's state of mind such that claims adjudicated by state Court did not satisfy identical issue or actually litigated elements.

(3571) *Brown Jordan International, Inc. v. Carmicle,* 2018 WL 3583054 (Bankr. W.D. Ky. 2018) – "Willful and malicious" injury is a deliberate or intentional injury, not deliberate or intentional act that causes injury and requires plaintiff to show that Debtor's conduct was willful and malicious; plaintiff suffered injury to legal rights; and plaintiff's loss was caused by Debtor's conduct. Debtor's actions and interfering with plaintiff's advantageous business relationships constitutes injury to plaintiff's legal rights fulfilling 2nd element of cause of action. Prior United States District Court judgment in favor of plaintiff and against defendant concluded that Debtor violated Stored Communications Act which by its terms requires that Debtor acted with a knowing or intentional state of mind and District Court opinion was replete with findings related to Debtor's actions in intentionally accessing and viewing Companies Employees email

accounts in direct violation of Companies policies. District Court judgment also evidenced that Debtor acted maliciously. Malice does not require ill will or specific intent to do harm, but only conscious disregard of one's duties or without just cause. Debtor intended to access Company email accounts intentionally and without authority and specifically circumvented company policy. Further, District Court awarded punitive damages necessarily requiring finding that Debtor's actions were without just cause and were inexcusable.

(3572) *Ellsworth v. Carmichael,* 2018 WL 4201750 (Bankr. E.D. Tn. 2018) – Section 523(a)(6) requires that injury be willful, defined as deliberate or intentional injury, not merely deliberate or intentional act that leads to injury, such that Debtor desires to cause consequences of act or believe that consequences were substantially certain. Malice requires that act be taken in conscious disregard of one's duties and without just cause but does not require ill will or specific intent to do harm. Malice require some consciousness of wrongdoing. Creditor may establish malice by showing that Debtor committed wrongful act, Debtor undertook act intentionally, act necessarily caused injury, and there was no just cause or excuse. Conversion of property defined as appropriation of tangible property to parties own use in exclusion or defiance of owner's rights constitute willful and malicious act if Debtor intended to cause harm or was substantially certain that harm would occur. Complaint stated cause of action by alleging that Debtor converted commissions due to be paid to Creditor and intended harm caused by conversion or knew that harm was substantially certain to occur given refusal to give Creditor access to financial records so she could determine amount of commissions due. Complaint also alleged that Debtor willfully injured Creditor through outrageous threats and acts of physical violence leading to Creditor's emotional distress which is sufficient to warrant finding of willful and malicious where applicable state law required that defendant acted intentionally or recklessly; that conduct be extreme or outrageous; that there was causal connection between defendant's conduct and plaintiff's emotional distress; and that emotional distress was severe.

(3573) *Curtis v. Clair,* 2018 WL 3954188 (Bankr. N.D. Ohio 2018) – Section 523(a)(6) requires that injury be willful, defined as deliberate or intentional with Debtor intending consequences of act or where Debtor believes consequences are substantially certain to result from act, and not merely intentional act itself; and malicious, defined as conscious disregard of one's duties or without just cause. Plaintiff did not prove that Debtor intended to cause harm where Debtor borrowed money from plaintiff allegedly for use in Debtor's business but Debtor apparently used funds for other purposes. Plaintiff did not produce any evidence that loans were to be specifically used by particular corporate entity or that Debtor intended to cause harm to plaintiff where plaintiff did not produce any documentation or evidence as to how Debtor actually used funds advanced. Evidence indicated that money was "loaned and lost" which does not constitute willful and malicious injury.

(3574) *Thomas v. Alheit,* 2018 WL 3807811 (Bankr. N.D, Ohio 2018) – Section 523(a)(8) does not apply in Chapter 13 and is not exception to "super discharge" under Section 1328. Adversary proceeding dismissed.

(3575) *Lincicome v. Anthony Roofing, LLC,* 2018 WL 3323878 (Bankr. N.D. Ohio 2018) – Section 523 (a) (six) requires deliberate or intentional injury imposed in conscious disregard of one's duties or without just cause. Court could not resolve matter on summary judgment where record contained factual disputes as to whether defendant, a roofing company which installed a new roof on plaintiff's house, refused to honor a warranty where Debtor steadfastly maintained that he would have honored warranty and completed repairs had plaintiff cooperated in scheduling repairs.

(3576) *Marketgraphics Research Group, Inc. v. Berge,* 2018 WL 3219626 (Bankr. M.D. Tn 2018) - Section 523 (a)(6) requires willful and malicious injury. Debtor must have intended to cause injury, not merely to take intentional act that leads to injury. Unless Debtor desires to cause consequences or that consequences are substantially certain to result, Debtor has not committed "willful and malicious" injury. Collateral estoppel applies only where issues in subsequent litigation are identical to issue resolved in earlier litigation. Prior State Court judgment holding that defendant violated Consumer Protection Act was not collateral estoppel in subsequent action under Section 523(a)(6). Section 523(a)(6) requires that injury be willful, such that Debtor desired to cause consequences or the consequences are substantially certain. Action that happens to result in injury is not sufficient. Under Consumer Protection Act, plaintiff was required to prove only that defendant acted with actual awareness of deception but did not require that defendant intended to cause harm or that harm was substantially certain to result. Action for copyright infringement not collateral estoppel where copyright infringement does not require proof of intent to cause harm and can be based on either intentionally copying prior work or acting with reckless disregard. Reckless disregard is not sufficient to be willful as required by Section 523(a)(6).

(3577) *Trost v. Trost,* 2014 WL 1891354 (Bankr. W.D. Mi. 2014), *aff'd*, 2017 WL 2799842 (6th Cir. BAP 2017), *aff'd,* 735 Fed. Appx. 875 (6th Cir. 2018), *petition for certiorari docketed,* ___ S.Ct. ____ (2018*)* (6th Cir. 2018) – Collateral estoppel requires that the same issue was actually and necessarily adjudicated in prior proceedings. There was no question that prior litigation determined that Debtor had converted property belonging to plaintiff. Although final judgment did not use phrase "willful and malicious", factual findings in final judgment sufficiently established factual predicate to mandate finding that Debtor's conversion of plaintiff's property was willful. Plaintiff owned the assets in question, and all parties knew that plaintiff owned the assets. Despite that knowledge, Debtor took, and retained the assets following repeated requests by plaintiff to return the assets. Debtor's actions could not be "unwitting" or "unintentional" and was substantially certain to cause injury, meeting "willful" standard of Section 523(a)(6). Factual findings in prior judgment also established that Debtor took and retained plaintiff's property without cause or excuse, fulfilling "malicious"

requirement. Prior Court Judgment awarding plaintiff $108,797.06 is non-dischargeable under Section 523(a)(6).

(3578) *Fulcher v. Battles,* Case No. 16-3112 (Bankr. E.D. Mi. 2018) – Section 523(a)(6) excepts from discharge any debt for willful and malicious injury. Debtor must intend to cause injury and be motivated by desire to inflict injury or be substantially certain to result in injury, not merely take deliberate act that causes injury. Malicious requires action in conscious disregard of one's duties or without just cause, but does not require ill will or specific intent. Debtor's guilty plea to charge of assault included acknowledgment by Debtor that he struck plaintiff. Malice can be defeated by finding of self-defense where one honestly or and reasonably believes that use of force is necessary to defend himself or another individual. Evidence did not support finding of self-defense. Debtor goaded another group into beginning fight and there was at least 30 second delay between any exchange and Debtor punching plaintiff in face. Debtor had punched other individuals as part of altercation but did not use sufficient force to render those individuals unconscious, such that Debtor unnecessarily hit plaintiff and did so harder than needed so as to render plaintiff unconscious. Further, Debtor's Facebook post less than 12 hours after incident stated "Wondering what happened to the DJ I punched and put in the hospital … One-hitter quitter! What can say haha LOL" indicated both intent to cause injury and lack of remorse. Debtor's self serving testimony notwithstanding, evidence supported finding that Debtor intentionally hit plaintiff with intent to injure plaintiff and did so in conscious disregard to duties and without just cause as Debtor was not acting in self-defense, he was not in danger and there was no need to defend himself when he hit plaintiff.

(3579) *Reis v. Terrell,* 2018 WL 2138260 (Bankr. E.D. Mi. 2018) – Section 523(a)(6) requires that injury be both "willful" and "malicious". "Willful" requires proof that Debtor intended to cause injury, not merely a deliberate or intentional act that leads to injury. Breach of contract is not "willful close quote unless accompanied by independent tortious conduct which results in willful and malicious injury. Complaint did not allege cause of action for "willful and malicious" or complaint alleged only that plaintiff and Debtor entered into contractual relationship by which Debtor would acquire property in creditor's name, yet Debtor did not acquire property or account for funds provided by creditor.

(3580) *CNH Industrial Capital America, LLC v. Williams,* 2018 WL 1684306 (Bankr. W.D. Ky. 2018) – Section 523(a)(6) requires both willfulness and malicious intent. Debtor must either (1) intend to cause injury to creditor or their property; or (2) engage in intentional act which debtor knew was substantially certain to result in injury. Maliciousness does not focus on Debtor's subjective intent to repay and good faith is immaterial to finding of conversion. Debtor was fully aware of creditor's lien rights and duty to take all steps necessary to protect. Debtor converted collateral by selling it without creditor's consent and retaining proceeds of sale. Debtor's actions were willful and malicious where actions in selling the equipment without creditor's permission were in conscious disregard of duties under agreement with lender; and Debtor knew that keeping proceeds from unauthorized sale of equipment was wrongful and was done without just cause or excuse.

(3581) *Campbell v. Butz,* 2018 WL 314871 (Bankr. W.D. Ky. 2018) – To except debt from discharge, creditor must prove that debtor willfully and intentionally injured creditor. Willful requires deliberate or intentional injury, not merely intentional act that causes injury. Debts arising out of conversion generally meet standard of willful and malicious. Debtor converted funds obtained from creditor where funds were advanced for specific purpose but Debtor instead used funds for personal expenses. Debtors converted loan proceeds intended for business to their own use. he Debtors knew they had given Plaintiffs a lien on personal property but sold personal property without turning proceeds over to Plaintiffs. Actions constitute willful and malicious injury to Plaintiff supporting finding that debt is non-dischargeable.

(3582) *Charon v. Morris,* 2017 WL 6629161 (W.D. Mi. 2017) – Sanctions for Civil Contempt can be willful and malicious injury that is excepted from discharge. Contempt power to reimburse party for costs incurred by contemptuous conduct of adversary including attorney fees is civil in nature but does not require finding of willful disobedience, only that the party disobey a lawful order of Court. Debtor violated Court Order in civil proceedings that prohibited transferring of assets without court permission. Debtor and Debtor's counsel were aware of Order, yet Debtor embarked on effort to transfer assets to friendly buyer amounting to textbook example of contempt of court. Collateral estoppel effect of State Court ruling precluded Debtor from relitigating factual findings of State Court. Whether Debtor's conduct constitutes contempt was fully and necessarily determined in State Court proceedings with Debtor having full and fair opportunity to contest issues. Both state trial court and state court of appeals described Debtor's knowledge of injunction and intentional conduct in thorough detail and State Court actually determined that Debtor's conduct was willful, although State Courts did not use that term and state courts did not identify facts that would have allowed finding of contempt for conduct that was less than willful.

(3583) *Almasudi v. Ibrahim,* 2017 WL 6498026 (Bankr. E.D. Mi. 2017) - Plaintiff must prove (1) deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and (2) Defendant either desired to cause the consequences of his actions or believed with reasonable certainty that such consequences would occur. act will be deemed 'willful' only if it was undertaken with the actual intent to cause injury, based on Debtor's subjective state of mind, and can be proven where Debtor knew of creditor's rights and knew conduct would injure those rights. Malice exists where Debtor took actions intentionally and with no just cause or excuse but does not require ill will, spite or animosity. Conversion, defined as appropriation of another's property to one's own use and benefit in defiance of owner's right constitutes willful and malicious act if Debtor intended to cause the harm or was substantially certain that such

harm would occur. Debtor converted funds of Creditor where Creditor provided funds to Debtor for specific purpose of investing in business and making capital improvements to business premises when Debtor knew that business was failing and Debtor used funds for personal expenses.

(3584) *Ryan v. Morris,* 2017 WL 6512215 (Bankr. W.D. Ky. 2017) – Section 523(a)(6) requires that injury be both willful and malicious, indicting a deliberate or intentional injury, not merely deliberate act that leads to injury. Debts arising out of conversion constitute "willful and malicious" injury. Conversion is wrongful exercise of dominion and control over property of another. Debtor committed conversion when he received funds form Plaintiff for purposes of purchasing properties for resale with Plaintiff to be repaid form sales. Debtor instead sold properties without informing Plaintiffs and without repaying funds provided by Plaintiff. Debtor deposited funds into joint bank account with wife and used funds for personal living expenses or to purchase other properties in their own names or in the name of a Trust controlled by wife.

(3585) *Nadeau v. Fraser,* 2017 WL 5064155 (Bankr. N.D. Ohio 2017) – Section 523(a)(6) requires intent to cause injury, not merely intent to take action that causes injury that is not desired nor in fact anticipated. Breach of contract is knowing action but does not constitute intent to cause injury, Debtor's breach of contract and subsequent failure to pay state court judgment rendered in favor of Plaintiff for breach of contract are not within scope of Section 523(a)(6). Fact that Debtor did not pay consideration due, even if done intentionally, will not support finding of non-dischargeable under Section 523(a)(6). Failure to pay judgment where judgment itself is based on dischargeable obligation similarly is not basis to except debt from discharge.

(3586) *Feldman v. Pearl,* 2017 WL 4404243 (Bankr. E.D. Ky. 2017) – Section 523(a)(6) requires injury to be both willful and malicious. Act must be done with actual intent to cause injury or where consequences are substantially certain to result, and must be taken in conscious disregard of duties or without just cause. Plaintiff did not establish that Debtor's alleged wrongful withdrawals of funds from corporation jointly owned by Debtor and Plaintiff were taken with intent to cause corporation injury. Disparity of distributions without evidence of intent to injure, is insufficient to except debt from discharge.

(3587) *Haire v. Padgett,* 2017 WL 3888293 (Bankr. W.D. Ky. 2017) – Section 523(a)(6) requires proof that Debtor intended to cause injury, not just that Debtor intended action that resulted in injury. Landlord did not present evidence that Debtor intended to damage or destroy rented premises. Lease required Debtor to maintain property and perform major repairs. Debtor, a licensed contractor with over 60 years' experience, undertook many repairs. Although Debtor did not finish all repairs, the was no evidence that unfinished repairs were anything more than negligence. Landlord also did not establish that Debtor removed any assets form property on surrendered possession. Although Landlord established that certain items were missing, there was no evidence that Debtor took items or did so with intent to cause harm.

(3588) *Jacques v. Hose,* 2017 WL 83351 (Bankr. N.D. W.Va. 2017) – Section 523(a)(6) will support exception to discharge for debt incurred where Debtor intentionally acts knowing that consequences of act are certain or substantially certain. State Court judgment against Debtor arising from wrongful death as result of Debtor shooting third party non-dischargeable where State Court Judgement stated that Debtor intentionally shot and killed decedent, and that Debtor evidenced criminal indifference to civil obligations and willfully disregarded rights of decedent. Debtor lacked any justification for actions as determined by State Court Criminal conviction for voluntary manslaughter in which Court considered and rejected Debtor's assertion of self-defense.

(3589) *Cowin v. Countrywide Home Loans, Inc.,* Case No. 15-20600 (5th Cir. 2017) – Section 523(a)(6) excepts form discharge any debt for willful and malicious injury. Evidence supported finding that Debtor, as part of a conspiracy, committed acts designed to deprive Plaintiff of its interest in proceeds of sale of property by engineering scheme to cause funds to be distributed to entity related to Debtor, amounting to willful and malicious injury. However, actions of co-conspirators cannot result in debt being non-dischargeable under Section 523(a)(6) unless evidence indicates that Debtor personally committed willful and malicious act. Section 523(a)(6) requires proof of a willful and malicious injury *by the Debtor*, preventing imputation of actions of co-conspirators for purposes of determining willful and malicious.

(3590) *Community Financial Services Bank. v. Edwards,* 2017 WL 3037451 (Bankr. W.D. Ky. 2017) – Section 523(a)(6) requires proof of a willful and malicious injury to Plaintiff or property of Plaintiff. Debtor must intend the act and must also intend to cause consequences of act or must know that consequences are substantially certain. Where Debtor converts creditor's collateral, "willfulness" can be indirectly established by showing that Debtor knew of creditor's lien rights and knew that conduct would cause injury to those rights,. Debtor's response that he did not read loan document and did not know that loan documents contained security interest rejected as Debtor was quite adept at financing business ventures and had filled out several loan applications in the past including prior floor plan financing arrangements with other lenders, and Debtor was sophisticated businessman with College Degree in business Management. Even if Debtor did not read documents, under the law he is presumed to know the contents of the documents signed with Creditor if he was given opportunity to read documents and was not prevented from doing so because of language incapacity or fraud. As experienced businessman, Debtor knew that sale of collateral without remitting payments to floor plan lender would have natural consequence of injuring Creditor, and Debtor admitted that he sold collateral without remitting proceeds to

Creditor, establishing willful injury. Injury was also malicious where Debtor's actions evidenced a conscious disregard for his duties under loan documents. Malicious does not require ill will or specific intent to harm, but only deliberate disregard of creditor's rights. Malice is inferred when Debtor sells collateral "out of trust" and fails to remit proceeds to lender. However, there was no evidence that Debtor-wife was aware of Creditor's rights where Debtor-wife did not sign any of the financing documents other than a personal guarantee and there was no evidence that Debtor-wife knew that funds being used to pay household expenses were proceeds of collateral that should have been remitted to Creditor. Debtor-wife's action in writing checks for business were intentional, there was no evidence of any willful intent to cause injury to Creditor.

(3591) *HST Corporate Interiors LLC v. Sherrick,* 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Debt may be excepted from discharge under Section 523(a)(6) if debt is for willful and malicious injury by Debtor to another entity or property of another entity. Debtor must have acted with intention to cause consequences of act or believe that consequences were substantially certain. It is not sufficient that Debtor should have known that conduct wrist injury to others or that Debtor acted in reckless disregard of creditors interests. Creditor did not show that Debtor maliciously intended to cause harm to creditor. Although Debtor's conduct ultimately resulted in damage to plaintiffs economic interest, there was no showing that Debtor intended to cause harm at time when Debtor received payments from third-party but failed to remit those payments to plaintiff.

(3592) *Dardinger v. Dardinger,* 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – Ohio Courts give preclusive effect to prior judgment if (1) there is a Final Judgment on merits in previous case after full and fair opportunity to litigate; (2) issue was actually and directly litigated and necessary to Final Judgment; (3) issue in present suit is identical to issue in prior suit; and (4) party to be estopped was party or in privity with party in prior action. State Court judgment against defendant entitled to preclusive effect in action to deny discharge under Section 523(a)(6) for willful and malicious injury. On at least 37 separate occasions, defendant used a spy camera to surreptitiously video record plaintiff in various stages of undress in her bedroom, bathroom and other private areas of family residence. After plaintiff referred matter to police, defendant made numerous contacts with plaintiff, threatening to cut her off financially and to use media to "ruin" plaintiff's life. Defendant pled guilty and was convicted of illegal use of minor in nudity oriented material, a fifth degree felony. Defendant also assaulted plaintiff by grabbing her arm, twisting it behind her back and slamming her into a wall, amounting to assault and battery under state law. State Court concluded that defendant's conduct was done knowing and intentionally and was done willfully and maliciously and without just cause, warranting award of actual damages of $104,200, punitive damages of $1,850,000, and attorney's fees of $651,400. All issues necessary for determination of dischargeability under Section 523(a)(6) were actually and necessarily litigated as State Court necessarily had to find that Debtor engaged in certain conduct that would be willful and malicious. State Court received evidence from a number of sources and issued specific findings and conclusions to establish that Debtor rises from conduct that was willful and malicious.

(3593) *Allen v. Smith,* 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(6) renders non-dischargeable debt that results from willful and malicious injury by Debtor to another entity. Actor must desire to cause consequences of act or believe that consequences were substantially certain to result from it, requiring more than that a reasonable Debtor should have known that conduct wrist injuries. Conduct was also be more culpable than reckless disregard of economic interest and expectancies. Although Debtor's conduct was willful as Debtor intentionally diverted funds which creditor intended to invest into business for payment of Debtor's own personal expenses, but Debtor's conduct was motivated solely by maintaining his lifestyle without any thought to the consequences of his action as to creditor such that conduct, while willful, was not malicious.

(3594) *Roe v. Boland,* 2017 WL 2312854 (Bankr. N.D. Ohio 2017) – Section 523(a)(6) requires that Debtor have committed an act with an intent to injure and not merely an act done intentionally that causes injury. Debtor must desire consequences of act or believe that consequences are substantially certain to result from it. Debtor was convicted of knowingly manipulating images of real children to superimpose pictures into child pornography. However, there was no evidence that Debtor ever disseminated or distributed pictures and Debtor testified that he created images in his role as a consultant and courtroom proceedings to demonstrate ease with which images can be combined in such a way that it cannot be easily determined. Absent evidence contradicting Debtor's testimony why he downloaded innocent images and altered them for courtroom demonstrations, there was no evidence that Debtor actually intended to cause harm or knew that harm was substantially certain to occur.

(3595) *Marketgraphics Research Group, Inc. v. Berge,* 2017 WL 1214461 (M.D. Tn. 2017) – Section 523(a)(6) requires that Debtor acted "willfully and maliciously". After Supreme Court decision in *Kawaauhua v. Geiger,* 523 US 57 (1998), "but willful and malicious" should be construed as a single test, rather than considering "willful" and "malicious" as separate elements. Conduct is "willful and malicious" where Debtor intended to cause consequences of act or believe that consequences were substantially certain to result from it. "Willful and malicious" no longer requires consideration of whether Debtor's conduct was "without just cause or excuse" as long as Debtor intended consequences of act. Bankruptcy Court holding that Debtor did not act maliciously applied incorrect standard for determining whether conduct was malicious. However, factual findings supported Bankruptcy Court's conclusion that Debtor did not intend to cause

injury as required for action to be "willful and malicious". Bankruptcy Court's incorrect definition of "malicious" was harmless error.

(3596) *Poole v. Batson,* 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Section 523(a)(6) excepts from discharge any debt resulting from willful and malicious injury by Debtor to another entity or property of another entity. Conduct must be both willful and malicious, such that actor must desire to cause consequences of act or believed that consequences are substantially certain. It is not sufficient that Debtor "should have known" that conduct may cause injury, and conduct must be more culpable than mere recklessness. Lack of excuse or justification, without more, does not make debt non-dischargeable. Evidence did not support finding that Debtor, a builder, maliciously intended to harm plaintiffs by obtaining "retainer" on signing of contract. Debtor was known for doing excellent work and Debtor credibly testified that Debtor intended to finish the project. Although Debtor may have intentionally misled plaintiff and converted money, there is no evidence that Debtor intended to fail to complete project or cause harm or otherwise acted maliciously

(3597) *Smith v. McCants-Johnson,* 2017 WL 835165 (Bankr. N.D. Ohio 2017) –

(3598) *HIJ Industries, Inc. v. Roy,* 2017 WL 377930 (Bankr. E.D. Ky. 2017) - Section 523(a)(6) excepts from discharge any debt for willful and malicious injury by Debtor to another entity or property of another entity. Injury must be both "willful" and "malicious". "Willful" requires that Debtor intended to cause the consequences of the act or believed that consequences were substantially certain and is akin to an intentional, rather than negligent or reckless tort. Act is "malicious" if undertaken in conscious disregard of one's duties or without just cause or excuse, but does not require ill will or specific intent to do harm. Creditor failed to produce evidence that Debtor intentionally manipulated corporate assets and financials so as to cause Corporation to default on loan. Evidence indicated that Debtor expended significant resources and pursued several reasonable paths an effort to save business, but business lost largest client and suffered other operational challenges that ultimately caused business to fail. Creditor did not present any evidence that Debtor benefitted in any tangible way from failure of business or foreclosure of senior lien held by SBA or that Debtor was wrongfully attempting to acquire assets. While Creditor, a former owner of the business, may have considered it unreasonable to operate business differently than Creditor did, that does not establish that Debtor willfully and maliciously injured creditors interests.

(3599) *Walker v. Vanwinkle,* 2016 WL 7443168 (Bankr. E.D. Ky. 2016) - Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(6) requires that debt to creditor was result of willful and malicious conduct. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.

(3600) *Monson v. Galaz,* Case No. 15-14939 (11th Cir. 2016) – Action under Section 523(a)(6) requires evidence that injury was both willful and malicious. Injury is willful where Debtor commits intentional act the purpose of which is to cause injury or which is substantially certain to cause injury. Act is malicious if it is willful and without just cause or is excessive but does not require proof of personal hatred, spite or ill-will. Debtor committed willful and malicious act by absconding with equipment that was subject to security interest and using that equipment to open new business after creditor had called loan and demanded turnover of collateral for liquidation. Fact that Debtor's actions also amounted to breach of contractual provisions requiring Debtor to surrender collateral did not preclude finding of willful and malicious as Debtor's breach of contractual obligation was certain to cause injury even absent separate tortious conduct Debtor knew that lender claimed security interest in collateral, although Debtor doubted validity of that interest as Debtor never signed financing statement, and with full knowledge of lender's claimed security interest he retrieved equipment form storage, relocated equipment to different part of state, an used it to open new business, all without consent or notice to creditor, Debtor's actions in disposing of collateral with knowledge of security interest is willful and malicious act.

(3601) *Bancorpsouth v. Shahid,* Case No. 16-3009 (Bankr. N.D. Fl. 2016) – Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(6) requires that debt to creditor was result of willful and malicious conduct. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.

(3602) *Jennings v. Bodrick,* 2016 WL 6216099 (Bankr. S.D. Ohio 2016) – Willful and malicious injury required that Debtor take action intending to cause injury or under circumstances where Debtor believed that injury was substantially certain to occur. Focus is on subjective intent of Debtor to cause harm. Deliberate act that causes injury is not sufficient absent evidence that injury was intended. A Debtor must also have acted in conscious disregard of duties or without just cause or excuse. Prior ruling in Adversary proceeding that "Debtors intended to defraud [Plaintiff]" not entitled to preclusive effect where prior adversary to except debt form discharge under Section 523(a)(2) resulted in judgment in

favor of Debtor. Finding of final judgment has collateral estoppel effect only if finding was actually litigated and was necessary to outcome in prior case. Judgment in prior case concluded that even if Debtors intended to defraud creditor, creditor did not reasonably or justifiably rely on statements. Finding that Debtor intended to defraud in no way affected court's determination of dischargeability of debt and, therefore, was not "necessary" to the outcome for purposes of collateral estoppel.

(3603) *Johnson v. Loomis,* 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Exception from discharge requires that claim result from willful and malicious conduct. Action is willful where Debtor either intended the consequences of his act or where consequences were substantially certain. Debtor willfully and maliciously caused harm to plaintiff by obtaining loans from plaintiff for specific business purposes, but Debtor instead used loans to fund personal lifestyle constituting willful and malicious conduct. Debtor committed willful and malicious act when he used plaintiff's identification without plaintiff's knowledge or consent to open two credit cards in plaintiff's name, then used the cards and failed to pay the charges. Defendants used Plaintiff's personal financial information to open two credit cards, without Plaintiff's knowledge and consent and concealed the existence of the accounts by directing all monthly billing statements in Plaintiff's name to Defendants' home.

(3604) *Cardwell v. Hester,* 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that Debtor intended to cause harm or that harm was substantially certain to occur as result of behavior. Debtor's actions in removing money and property for store co-owned by plaintiff and defendant and using those funds a property for Debtor's own benefit constituted willful and malicious act, as harm to store and plaintiff from loss of funds was either intended or substantially certain and Debtor had no right or legal justification for stealing the funds. However, to extent Debtor removed property that belonged to him or to family members and not to the store, any removal of those items by Debtor would not be wrongful as Debtor had a superior right of possession. Funds taken from safe were not non-dischargeable but property allegedly removed was not excepted from discharge.

(3605) *Trentadue v. Zimmerman,* 2016 WL 4163586 (Bankr. N.D. Ohio 201) – A debt for willful and malicious injury by the Debtor to another entity or to the property of another entity is not dischargeable. Willful requires deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury, including circumstances where (i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act. Malicious means in conscious disregard of one's duties or without just cause or excuse but does not require ill-will or specific intent. Prior State Court judgment in favor of plaintiff and against Debtor that awarded actual but not punitive damages was not collateral estoppel on issues of willful or malicious. Collateral estoppel requires (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. While State Court action resulted in final judgment and action was indisputably between same parties, fact that plaintiff sought punitive damages but none were awarded is insufficient absent evidence that plaintiff actually sought punitive damages and that court specifically refused to award them coupled with finding of fact that would negate later finding that actions were willful and malicious. Further, denial of punitive damages is not collateral estoppel because State Courts impose higher burden of proof for punitive damages of clear and convincing than the preponderance of evidence required by Section 523 such that issue of willful and malicious was not "actually litigated".

(3606) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that action was willful, defined as deliberate or intentional injury, not merely intentional act that causes harm. Malicious means done without just cause or excuse or done in conscious disregard of duties but does not require ill will or specific intent to do harm. Debtor admitted that he knowingly made false statements to induce company to issue checks to him with intent to use proceeds for personal use, and Debtor acted with intent to defraud in order to steal company money, rendering debt non-dischargeable under Section 523(a)(6).

(3607) *Estate of Jackson v. Hardaway,* 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Willful and malicious injury requires that Debtor intended to take action and intended to cause injury or believed that injury was substantially certain to occur; and that action was taken in disregard of one's duties or without cause or excuse. Criminal conviction for voluntary manslaughter following Debtor's shooting and killing of Plaintiff was not entitled to collateral estoppel effect. Collateral estoppel requires a final judgment in action between same parties where issue was actually litigated and necessarily determined. Mutuality of parties is essential as there must be mutuality of estoppel effect. Criminal conviction was undoubtedly a final judgment but did not involve same parties as dischargeability action. Parties to criminal conviction were Debtor and the State of Michigan, while parties to the adversary are Debtor and the Estate of the decedent. Absent mutuality of estoppel, conviction lacked any collateral estoppel effect in favor of either Debtor or plaintiff. Evidence indicate, and Debtor did not deny, that Debtor intended to harm decedent when Debtor shot him 5 times. Debtor claimed that the shooting was legally justified as he was acting in self-defense, which permits person to use deadly force if person believes his own life is in danger. Facts indicated that while decedent started the altercation and actually shot Debtor first, decedent then dropped his gun and was running away when Debtor shot him twice in the back, inflicting the fatal

wounds. Court abstained from further rulings on liability and damages, as State Court where wrongful death action was pending was better forum to determine issues, with Court finding only that to extent decedent's estate prevails in State Court wrongful death action, any award that State Court may order will survive discharge.

(3608) *Abraham v. Palmer,* 2016 WL 4544432 (Bankr. N.D. Ohio 2016) – Court can deny discharge under Section 523(a)(6) where Debtor commits willful and malicious injury to person or property of another. Willful requires that action amount to intentional tort, not merely negligence or recklessness, such that Debtor takes action intending to cause injury, not merely that Debtor intentionally acts in such a way as to cause injury. Injury is malicious if act is taken in conscious disregard of ones duties or without just cause. 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. 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. 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. 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.

(3609) *Westbury Village Association v. Zweifel,* 2016 WL 4371828 (Bankr. S.D. Ohio 2016) – Sanctions for contempt for violation of State Court Order are not automatically excepted from discharge. Damages caused by reckless or negligent conduct do not fall within Section 523(a)(6). Section 523(a)(6) requires proof that Debtor either desired to cause consequence of act or believes that injury was substantially certain to occur; and that actions were taken without any legal justification. Inquiry focuses on Debtor's state of mind. While Court can consider circumstantial evidence that tends to establish what Debtor must have actually intended, fact that Debtor should have known the consequences of actions is not sufficient. Collateral estoppel requires that same issue have been decided in prior litigation. Under State law, finding of civil contempt did not require proof of purposeful, willful or intentional violation of prior order, and "good faith" is not defense. Section 523(a)(6) requires higher burden, to show intentional and willful conduct. As State Court found that Debtor's actions were intentional but did not make, and was not required to make, finding of intentional or willful in finding of civil contempt, finding of contempt was not collateral estoppel on dischargeability under Section 523.

(3610) *Elkins v. Benner,* 2016 WL 3648633 (Bankr. E.D. Mi. 2016) – Attorney's failure to pay "referral fee" per agreement with referring attorney was non-dischargeable debt. Attorney who owed referral fee received recovery from litigation but rather than paying share to referring attorney, attorney spent money on his own expenses plus expenses of clients, friends, employees and at least one other attorney. Debtor's actions constitute conversion of proceeds where Debtor wrongfully and knowingly exerted control and possession over money that was owed to referring attorney.

(3611) *Hoewischer v. White,* 2016 WL 3517480 (Bankr. S.D. Ohio 2016) – Section 523(a)(6) requires a deliberate and intentional injury, not just intentional conduct that causes injury, such that actor intended consequence s of act not merely act itself or there was objective certainty of harm. Focus is on Debtor's state of mind. Act must also be malicious, lacking just cause or excuse. Debtor's actions constituted willful and malicious where Debtor intentionally uploaded nude pictures of plaintiff to "revenge porn" webpage. State Court judgment had collateral estoppel effect on issues where State Court determined that (1) Debtor intended to cause emotional distress or knew or should have known that his conduct would result in serious emotional distress to plaintiff; (2) Debtor's conduct was outrageous and extreme beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; and (3) Debtor's conduct was the proximate cause of plaintiff's psychic injury. State Court awarded damages under a claim for invasion of privacy finding that Debtors conduct was "outrageous, *intentional,* and *highly offensive".* State Court concluded that Debtor acted intentionally as act of posting pictures could not be done accidentally and was done where harm was certain to occur and Debtor had no legitimate purpose in posting pictures, but instead possessed subjective intent to cause harm. Collateral estoppel applies where State Court has entered final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; issue was actually and directly litigated in the prior suit and was necessary to the final judgment; issue in the present suit is identical to the issue in the prior suit; and party against whom estoppel is sought was a party or in privity with a party to the prior action. Collateral estoppel applies to default judgment where judgment is based on more than just an unverified complaint, and is supported by admissible evidence apart from pleadings, and State Court, based on evidence submitted, actually makes findings of fact and conclusions of law sufficiently detailed to support application of collateral estoppel such that later court can determine that State Court actually decided merits of the case and later court has reliable way of knowing decision was on merits. Debtor had actual notice of State Court matter inducing hearing on damages constituting full and fair opportunity to participate in litigation; fact that Debtor chose not to appear

does not constitute lack of a full and fair opportunity to litigate. State Court action necessarily decided "willful and malicious" as State Court required plaintiff to testify and provide admissible evidence in support of claim and State Court then specifically found that conduct was "outrageous, intentional and offensive" as necessary for state law claims for intentional infliction of emotional distress and for invasion of privacy. Finding of malice was also required as predicate to award of $100,000 punitive damages. Issues in State Court action were identical to those in adversary proceeding where standards applied by State Court for willfulness were identical to standards required under Section 523.

(3612) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof that Debtor acted deliberately and with intent to cause injury, and not merely that Debtor acted intentionally and act happened to cause injury, such that Debtor either desires to cause consequences of act or that consequences are substantially certain to result from it; and that Debtor acted in conscious disregard of duties or without just cause or excuse. Although creditor intended investment to be used for specific purpose, nothing in promissory note limited use of funds for that sole purpose. Fact that Debtor later used funds for personal use was important to finding that Debtor commixed fraud, but did not raise actions to level of willful and malicious.

(3613) *Hagmaier v. Cooley,* Case No. 15-1214 (W.D. Ok. 2016) – In dicta, court held that creditor's proof that Debtor raped her was not sufficient for purposes of willful and malicious injury, absent evidence that rapist intended to cause injury or at least believed it was substantially certain to occur. Court would not presume willful and malicious intent and creditor's attorney utterly failed to submit any evidence that Debtor disliked or hated creditor or believed consequence of acts were substantially certain to occur and cause injury.

(3614) *Irvin v. Faller,* 2016 WL 1068940 (Bankr. W.D. Ky. 2016) – Willful means that Debtor took intentional act with intent to cause injury, not merely that Debtor took intentional act that caused injury. Malicious means conscious disregard for duties or without just cause, but does not require ill-will or specific intent to do harm. Collateral estoppel applies where same parties or their privies litigated issues in State Court that produced final decision; identity of issues that were actually litigated and determined; that issues were necessarily determined as part of resolution of State Court matter; and the party to be estopped had full and fair opportunity to litigate. State Court judgment holding Debtor liable for defamation lacked preclusive effect where judgment established that Debtor intentionally published statement but there was no evidence of finding that statement was published with intent to cause harm or with knowledge of falsity. Fact that State Court found Debtor liable for libel per se did not, in itself, meet required mental state for willful and malicious, as libel per se did not require knowledge that statement was false when made. Further, there was no evidence that Debtor intended to cause injury, rather than to make intentional statement that incidentally caused injury, and intent to cause injury is not element of state law action for defamation per se. However, State Court judgment for abuse of process required finding of "ulterior motive or purpose" and "willful act in use of process that was not proper in the regular course of the proceeding". Judgment specifically required finding that defendant acted willfully and maliciously in filing action solely for purpose of harassing and annoying and without any good faith purpose.

(3615) *HIJ Industries, Inc. v. Roy,* 2016 WL 1126272 (Bankr. E.D. Ky. 2016) – Discharge exception requires an injury resulting from conduct that is both willful and malicious. Act must be done with intent to cause injury—and not merely acts done intentionally that cause injury. Debtor must have desired to cause the consequences of his act, or believed that the consequences are substantially certain to result from it. Malicious injury occurs 'when a person acts in conscious disregard of duties or without just cause or excuse but does not require a determination of ill-will or specific intent. Complaint sufficiently stated cause of action by alleging that Debtor engineered scheme to cause plaintiff to sell business to entities controlled by Debtor with the full intent of defaulting on payment obligations, allowing purchaser to cause primary lender to foreclose and to have related entity repurchase assets free and clear of purchase money security interest extended by plaintiff. Actions were willful in effort to obtain control of assets of plaintiff and were known or substantially certain to cause harm to plaintiff by deprivation of assets and payment for purchase of assets.

(3616) *Sequatchie Mountain Creditors v. Detweiler,* 2016 WL 321037 (Bankr. N.D. Ohio 2016) – Section 523(a)(6) requires that Debtor both willfully and maliciously cause injury. Allegations that Debtor convinced plaintiffs to purchase undeveloped lots knowing that development would fail did not prove that Debtor knew or intended to cause harm to plaintiffs from start of project, where evidence indicated that Debtor continued development activities long after purchasers bought lots and it was not until much later that development became infeasible.

(3617) *Szachta v. Thompson,* 2016 WL 1055582 (E.D. Mi. 2016) – Willful and malicious injury requires that action taken be intentional and done with intent to cause consequences of act, not merely intentional act that produces consequence. Malicious requires that act be in disregard of duties or without justification. Conversion can constitute action within Section 523(a)(6) if willful and malicious – conversion which is innocent or technical or done with honest but mistaken belief that Debtor could take funds, would not be excepted from discharge. Debtor was office manager and bookkeeper for attorney. Debtor and attorney conspired to obtain funds from settlement of client personal injury claims and to divert those to the personal benefit of Debtor and attorney while misleading clients about status and whereabouts of settlement funds amounting to deliberate and intentional deprivation of plaintiff of settlement funds.

(3618) *Kearns v. Havlovic,* 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof pf deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts necessary for finding of non-dischargeability. Collateral estoppel applies where (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor's conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper from and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff's favor; and (4) seizure of plaintiff's person or property during the course of the prior proceedings. Proceedings differ as abuse or process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor's intentional conduct.

(3619) *All American Insurance Company v. Taylor,* 2016 WL 828335 (Bankr. N.D. Ohio 2016) – Section 523(a)(6) requires proof that Debtor acted with intent to cause injury or that injury was substantially certain to occur, not merely that Debtor intentionally acted in way that caused injury. Evidence was insufficient to support summary judgment where Debtor, in effort to commit suicide, intentionally crashed car into guardrail on hope that he would be ejected from car and killed, but instead Debtor proceeded through guardrail and crashed into plaintiff's insured's building. Record left genuine issues of fact as to whether defendant intended to hit building where Debtor's affidavit stated only that drove a dead end street a high rate of speed but lacked any intent to hit anything other than the guardrail but ended up hitting building. Record was unclear as to when Debtor lost consciousness or whether Debtor had any opportunity to avoid building after striking guardrail.

(3620) *Phi Air Medical, LLC, v. Holskey,* 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that Debtor commit an intentional act with intent that act cause harm. Fact that act caused harm is not sufficient absent proof that Debtor intended harm to result or that harm was substantially certain to result. Debtor incurred medical charges and invoices were submitted to insurer. Insurer send check to Debtor with instructions to remit proceeds to provider. Instead, Debtor retained and used proceeds for personal items. Debtor's actions in retaining funds rather than remitting funds to provider was intentional act done without justification and actions necessarily caused, or was substantially certain to cause, harm to provider. Evidence indicated that Debtor spent proceeds when he was aware that he did not own the proceeds and had been reminded many times from multiple sources that he did not own the proceeds.

(3621) *In re Chaban,* 2016 WL 354308 (S.D. Mi. 2016) – State Court sanction award against attorney for frivolous litigation is non-dischargeable in attorney's subsequent Chapter 7 proceeding. Although attorney was not "party" in State Court proceeding, attorney was sufficiently involved to warrant giving sanction order collateral estoppel effect. Attorney had opportunity to litigate sanction issue before State Court and failed to prevail in that litigation or the subsequent appeal.

(3622) *Credit Acceptance Corp. v. Collins,* 2016 WL 406223 (Bankr. E.D. Mi. 2016) – Debtor's sale of motor vehicle that Debtor knew to be subject to security interest without paying lien and without consent of lienholder constituted willful and malicious injury. Debtor knew when he sold vehicle that it was subject to lien and sale itself was voluntary and knowing act. Act was malicious as Debtor lacked any justification for selling vehicle that was encumbered without taking steps to pay off lien or obtain consent of lienholder to transfer. Balance owed to creditor was not dischargeable under Section 523(a)(6).

(3623) *Juett v. Casciano,* 2016 WL 105926 (6th Cir. BAP 2016) – Debtor's action in punching plaintiff in the face constituted an act intended to cause injury. Although Debtor may not have intended specific injury that resulted (a cracked orbital

bone), Debtor did intent to punch plaintiff in the nose which would necessarily result in injury. Whether punch was malicious depends on whether Debtor had legal justification or excuse. Self-defense can negate finding of malice. Bankruptcy court failed to analyze issue of self-defense requiring remand for further proceedings.

(3624) *Cosby v. Baltrip,* Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Section 523(a)(6) excepts debts from discharge that result from willful and malicious injury to another entity. Injury must be both willful, defined as conduct intended to cause injury or actions such that consequences are substantially certain, and must be more than intentional act that causes injury; and malicious which requires that action be without just cause or excuse. Complaint based on auto accident that caused death of Debtor's husband, at best, stated cause of action for negligence which is not sufficient for purposes of Section 523(a)(6).

(3625) *In re Chaban,* Case No. 15-11879 (E.D. Mi. 2015) – Sanctions imposed by court for contempt are excepted from discharge where State Court characterized Debtor's conduct as willful and malicious conduct leading to vexations litigation. Debtor's actions were beyond the scope of reasonable representation of client and was in conscious disregard of duties as an attorney and without just cause or excuse. Effects of vexatious actions constitute injury for which damages are not dischargeable.

(3626) *CMCO Mortgage, LLC v. Hill,* 2015 WL 6685347 (Bankr. W.D. Ky. 2015) – Collateral estoppel applies in non-dischargeability action where State Court judgment establishes that issue in bankruptcy case is same as issue in prior State Court action; issues were actually litigated and actually decided; and were necessary to court's judgment. State Court judgment established that Debtor misappropriated trade secrets and that Debtor's action were willful, intentional, in bad faith, egregious, and done with malice; that Debtor's actions caused a willful and malicious injury to plaintiff; that Debtor's actions also constituted fraud and defalcation while acting in a fiduciary capacity given Debtor's intentional misrepresentations made to conceal his wrongful actions from plaintiff, and Debtor's failure to meet fiduciary obligations to plaintiff; and that Debtor intended the consequences of actions, including the destruction of plaintiff's internet division and actions were done in reckless disregard of plaintiff's economic interests and expectancies. Issues were actually litigated where, although judgment was ultimately entered by default, Debtor had substantially participated in underlying action but then decide to abandon his defense. Judgment established that all issues were actually decided and that decisions were necessary in order to hold Debtor liable under asserted theories. Debtor's alleged lack of notice of State Court's intention to enter default did not obviate collateral estoppel effect of Judgment as Debtor's remedy would lie in State Court. As long as State Court judgment remained valid, judgment entitled to preclusive effect.

(3627) *Morris v. Charron,* 2015 WL 7739233 (Bankr. WD. Mi. 2015), *rehearing denied,* 2015 WL 7709308 (Bankr. W.D. Mi. 2015), *aff'd,* 2017 WL 6946642 (W.D. Mi. 2017) – Section 523(a)(6) requires proof that Debtor intended to cause injury or acted in such a way as to believe that injury is substantially certain to result. Mere intentional act that causes injury is insufficient, although injury that results does not need to be exact injury intended. Action is malicious when taken without just cause or excuse or in conscious disregard of duties, but does not require ill will or spite. Examples of debts that are non-dischargeable include intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberate vandalizing of property, as well as contempt penalty imposed by court. Principals of collateral estoppel apply if issues in dischargeability action were actually raised and litigated in prior court in action involving same parties and prior court entered judgment based on those issues with party to be estopped having had a full and fair opportunity to litigate the issues. Fact that state law would have permitted court to enter contempt sanctions without proof that conduct was willful or malicious did not deprive judgment of collateral estoppel effect where findings in judgment went well beyond ,minimal standards imposed by state law and amply demonstrated that conduct met higher standard of willful and malicious. State Court Order finding Debtor to be in contempt of court amply supported finding that debt was non-dischargeable. Debtor had full knowledge of entry of Court Order enjoining corporate defendant from transferring assets and knowingly and intentionally engaged in scheme to cause corporation to transfer assets in direct violation of Court Order. Court made extensive findings regarding Debtor's knowledge of the existence, terms and duration of the injunction and described Debtor's conduct as "textbook" example of contempt of court. State Court award to Plaintiff of attorney fees and costs incurred as a result of Debtor's violation of injunction constituted damages for purposes of Section 523(a)(6). Actual injury to person or physical property is not required where conduct led directly to actual loss with contempt award designed to indemnify the injured party from harm resulting from contemptuous conduct.

(3628) *Jackson v. Spencer,* 2015 WL 6162945 (Bankr. W.D. Mi. 2015) – Principals of collateral estoppel and res judicata apply in bankruptcy cases to extent prior court made findings of fact that apply to issues. Collateral estoppel does not apply where underlying judgment is on appeal but lower court findings are still binding as res judicata unless underlying judgment is reversed. State Court judgment established facts to find that debt was not dischargeable. Debt must be both willful and malicious to be excepted from discharge. Willfulness requires deliberate or intentional injury, not merely a deliberate or intentional *act* that leads to injury, such that Debtor desired to cause the consequences of his act, or the consequences were substantially certain to result. Injury is "malicious" when a Debtor acts in conscious disregard of duties or without just cause or excuse but does not require ill-will or specific intent to do harm. State Court concluded that Debtor had engaged in "brazen" conversion of creditor's money when Debtor induced creditor to give Debtor funds

for Debtor to make specific investments on behalf of creditor and Debtor instead used money for Debtor's personal bills and expenses. Debtor knew that taking funds was in direct contravention of instructions provided by creditor when funds were provided and Debtor knew that consequences of diverting creditor's retirement funds for Debtor's personal use was substantially certain to cause harm to creditor and did, in fact, cause harm as Debtor never returned funds to creditor. Debtor acted maliciously as Debtor disregarded duties with no cause or excuse when Debtor promised to invest funds in certain way and then immediately used them for personal expenses.

(3629) *Yeager v. Wilmers,* 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that Debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that Debtor's conduct be in conscious disregard of one's duties or without just cause. State Court judgment finding Debtor liable for battery was not collateral estoppel in dischargeability action where element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that Debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where Debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that Debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that Debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that Debtor intended to cause some harm, and it is not required that Debtor intend to cause the precise injury that resulted.

(3630) *Jenkins v. Schmank,* 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Conduct is willful where Debtor intends to cause harm to plaintiff, not merely because Debtor took intentional action that happened to cause harm or where consequences were substantially certain to occur. Action is malicious where the Debtor acts in conscious disregard of duties or without just cause of excuse. Willfulness is generally proved by showing that Debtor committed wrongful act; that Debtor did so intentionally; that act necessarily caused injury; and there was on just cause or excuse for actions. Debtor did not willfully cause loss of investment by plaintiff in partnership as there was no evidence that business failed as a result of Debtor's actions or inactions, or that Debtor intended to cause harm to plaintiff resulting from failure of business. Debtor causes willful and malicious injury by convincing plaintiff to invest additional funds into business and then withdrawing those funds for personal expenses, and then engaging in conduct designed to cover up and conceal withdrawal. Actions were taken in direct violation of plaintiff's rights under partnership agreement and in direct violation of Debtor's obligations under partnership agreement/

(3631) *Risk v. Hunter,* 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Conduct to except debt from discharge must be both willful and malicious and resulting debt must not be subject to valid defense. Willful requires intentional injury, not just intentional conduct that leads to injury, and requires proof that Debtor intended consequence of act or knew that consequence was substantially likely. Malicious requires conscious disregard of duties or lacking just cause or excuse, but does not require specific intent or ill will. Issue preclusion applies in dischargeability actions and prevents re-litigation of issues that were already fully and fairly litigated in another forum. Estoppel requires (1) party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) issue must have been identical to the issue involved in the prior suit. State Court judgment established that plaintiff was the owner of steel beams that were wrongfully cut up and taken by Debtor. Issue of ownership and Debtor's actions in cutting up and removing beams were specifically litigated in State Court action that resulted in damage award to plaintiff. However, State Court judgment did not establish that Debtor acted willfully and maliciously where judgment did not make specific findings and issues of willful and malicious were not specific elements of State Court action.

(3632) *Cornerstone Industries Corp v. Kaufman,* 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. State Court judgment preclusive on dischargeability of debt where jury instructions specifically required finding that Debtor's actions were willful and malicious and Jury Verdict specifically found that Debtor aided and abetted an individual in breaching fiduciary duty, that Debtor knew that the conduct was a breach of that duty, and that Debtor assisted in carrying out the breach. Verdict From also found that Debtor's actions were malicious or without justification. Jury also found Debtor acted reprehensibly enough to warrant award of punitive damages.

(3633) *Smith v. Morse,* 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Debt is non-dischargeable if it results from willful and malicious conduct. Willful means intentional voluntary or deliberate, and requires acts done with intent to cause injury. Debtor must either intend consequence of act of know that consequences are substantially certain to result from it. Malice requires that act be done in conscious disregard of duties of without just cause or excuse and must be more than mere negligence, but does not require proof of ill will or specific intent. Factual disputes prevented entry of summary judgment where parties agreed that plaintiff loaned defendant $100,000 but disputed purpose of loan.

(3634) *Chudzinski v. Hanif,* 2015 WL 1981518 (Bankr. E.D. Mi. 2015) – Prior State Court default judgment was collateral estoppel as to dischargeability of debt for willful and malicious conduct. Conversion gives rise to non-dischargeability

where conversion is both willful and malicious. State Court complaint adequately alleged that Debtor intentionally and without justification excluded plaintiff from business, establishing pattern of conduct that could lead only to plaintiff's exclusion and loss of business interest. Complaint specifically alleged that Debtor unlawfully and intentionally converted membership interest for his own benefit causing damages to Plaintiff. Default judgment established all well pled facts which met standard for finding of non-dischargeability. Fact that State Court did not award treble damages did not negate finding that actions were willful and malicious as treble damages are purely discretionary, and lack of award did not negate fact that State Court specifically found that Debtor had willfully and maliciously converted Plaintiff's membership interest. State Court judgment also collaterally estopped issue of damages. Although complaint contained multiple counts, some of which were dischargeable and some not, judgment awarded only single lump sum amount. Entire amount non-dischargeable as judgment for fraud, standing alone, would have supported entire amount of judgment. If trial court rests judgment on two grounds, each of which is adequate to support entire award, judgment is conclusive on to both counts.

(3635) *Duley v. Thompson,* 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be "actually litigated" in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.

(3636) *Accounting/Tax Pros, LLC v. Schwartz,* 2015 WL 1407380 (Bankr. M.D. Tn. 2015) – Willful and malicious injury requires Debtor act with intent to cause consequences of act or that consequences are substantially certain to result. Malicious injury requires intent to cause harm, not merely intent to take action that causes harm. It is not sufficient that a reasonable person should have known that conduct risked injury; Debtor must will or desire harm. Where contract between plaintiff and Debtor was poorly written and ambiguous as to Debtor's rights to retake assets in event of default by plaintiff, Debtor's actions in retaking possession and reselling assets did not demonstrate requisite intent, even if Debtor's subjective belief in right to do so was later determined incorrect.

(3637) *Truban v. Draise,* 2015 WL 757485 (Bankr. S.D. Ohio 2015) – Plaintiff failed to meet burden to prove willful and malicious injury. Plaintiff and Debtor became engaged and bought home. Although plaintiff thought property would be titled in joint names, Debtor caused property to be titled solely in her name. After parties separated, plaintiff discovered that he was on the title. However, because plaintiff did not show that entire relationship was sham or that defendant entered into relationship with the intent of obtaining funds and property from plaintiff, evidence did not support finding of willful and malicious.

(3638) *Kloeber v. Montanari,* 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Plaintiff must prove deliberate or intentional injury, not just intentional conduct that causes injury; and that Debtor intended to cause the consequences of action or knew with reasonable certainty that injury would result. Act must also be willful which requires act undertaken with intent to cause injury. Summary judgment not appropriate where record did not establish Debtor's subjective intent to cause harm.

(3639) *Go Wireless, Inc. v. Lehrmitt,* 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect and binds bankruptcy court in later dischargeability proceeding. State Court judgment conclusively established every fact to support finding that debt was incurred by willful and malicious action. Debtor's request that court disregard preclusive effect because Debtors are elderly, without significant assets or recourses, and care for special needs child and have health issues, unavailable as equitable determination would insert conditions into Section 523 that are not present in the statute.

(3640) *Ritter v. Smith,* 2014 WL 4702610 (Bankr. E.D. Mi. 2014) – Willful and malicious injury requires proof that Debtor took action with intent to cause harm. Plaintiff did not present any evidence that Debtor, in convincing plaintiff to invest in business, intended to cause plaintiff to lose substantial part of that investment.

(3641) *McClendon v. Springfield,* 765 F.3d 501 (5th Cir. 2014) – Debt arising out of claim of defamation is excepted from discharge as willful and malicious. Debtor claimed that statements were made in honest but mistaken belief that statements were true, and honest but mistaken belief, even if negligent, does not rise to level of willful. Further, Debtor claimed that good faith, if mistaken belief negated any intent to cause injury as Debtor could not have intended injury nor would Debtor have known that injury was substantially certain. Court rejected Debtor's testimony as unbelievable

and found as matter of fact that Debtor knew statements were false when made. Statements to third persons accusing another of a crime create objective substantial certainty of harm to that person absent extenuating circumstances. Debtor's statements were intended to or were substantially certain to cause harm to plaintiff.

(3642) *MarketGraphics Research Group, Inc. v. Berge,* 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Action under Section 523(a)(6) requires proof that Debtor acted with intent to cause injury (willfully) and that Debtor did so without just cause or in conscious disregard of duties (malice). Whether final judgment has preclusive effect depends on whether findings of State Court raise same issues as are raised in subsequent litigation. Prior court judgment for Tennessee Consumer Protection Act is not preclusive under Section 523(a)(6) where state statute required finding that defendant willfully or knowingly violated statute bur did not require finding of malice and district Court Order did not include findings of malice. Judgment for copyright violation also was not preclusive in later Section 523(a)(6) action where statute required proof that Debtor copied protectable elements of the work. District Court found that Debtor's infringement was willful but did not include any finding of malice. Finally, judgment against Debtor for violation of federal Anticybersquatting act was not preclusive where statute did not require finding of either intent to cause harm or malice, instead requiring finding of bad faith intent to profit and there were no findings of fact in district court judgment of either willfulness or malice.

(3643) *First Financial Bank v. Jutte,* 2014 WL 4851822 (Bankr. N.D. Ohio 2014) – Sale of collateral and failure to remit proceeds is not per se debt within scope of Section 523(a)(6). While sale may constitute state law conversion, Section 523(a)(6) also requires proof that Debtor sold collateral with willful intent to cause harm to lender, either by showing that borrower intended to cause harm or that consequences were substantially certain to occur; and that borrower acted with no legal justification or in conscious disregard of duties. Complaint alleged only that Debtor transferred collateral and refused to remit proceeds, which is not sufficient to show that actions were either willful or malicious.

(3644) *Merritt v. Layne,* 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(6) where complaint failed to allege that Debtor borrowed money from plaintiff with intent to cause willful and malicious injury to plaintiff and there was no evidence of any intent to cause harm.

(3645) *Hall v. Carter,* 2014 WL 4187123 (Bankr. E.D. Tn. 2014) – Whether Debtor had requisite intent to cause harm is peculiarly factual dispute that must be determined at trial, with the trier of fact having the opportunity to hear testimony, observe the demeanor of the witnesses, and to evaluate overall credibility of the evidence. Court would not determine whether Debtor had requisite intent on Summary Judgment.

(3646) *Ferguson v. Clark,* 2014 WL 4109794 (E.D. Mi. 2014) – Plaintiff's failure to respond to request for admissions that stated that plaintiff admit that plaintiff did not suffer any personal injury or bodily injury and that only injury was result of non-payment of loans established these facts for purposes of summary judgment. Admissions directly refuted element of cause of action under Section 523(a)(6) that injury cause personal injury or property damages, entitled defendant to judgment as a matter of law.

(3647) *Sailor Music v. Walker,* Case no. 14-6012 (8th Cir. BAP 2014) – Pre-petition civil judgment against Debtor for copyright infringement is willful and malicious injury that is excepted from discharge under Section 523(a)(6). Debtor, as manager of bar, caused bar to play music and to present musical performances, including music that was copyrighted. Debtor did not obtain a license to use or play the music. ASCAP, the license holder, repeatedly contacted Debtor in effort to either cause Debtor to obtain license or to cease playing the copyrighted materials. Debtor, as manager, had obligation to ensure all required licenses were obtained yet failed to do so, such that Debtor's continued use of music was "willful" even without the multiple contacts by ASCAP, leading to conclusion that Debtor was willfully ignoring copyright laws. Actions were malicious as Debtor's use of music without license was intended to cause harm by using the copyrighted materials without paying royalties. Debtor knew or should have known that natural consequence of failure to obtain license would be financial harm to the copyright holders and Debtor intended to cause that harm by evading license requirements.

(3648) *National Union Fire Insurance Company v. Krause,* 2014 WL 1725808 (Bankr. N.D. Ill. 2014) – Debtor's sale of property encumbered by unrecorded mortgage and retained proceeds without paying off the mortgage rendered debt non-dischargeable. Debtor sold property knowing property was encumbered yet continued to make mortgage payments to lender to conceal sale and prevent lender from exercising right to call loan upon sale. Sale of property and retention of proceeds constituted conversion and Debtor's actions to conceal sale for over three years were substantially certain to cause harm to lender.

(3649) *City of Kentwood v. Salmon,* Case no. 14-80016 (Bankr. W.D. Mi. 2014) – State Court criminal conviction and Judgment of criminal restitution established all elements to except debt from discharge. Undisputed facts established in criminal proceeding established that Debtor embezzled funds from her employer that were transferred to her care in her duties as employee. Employer had superior right to the funds and Debtor obviously and intentionally interfered with that right by misappropriating the funds, and did so intentionally and without legal justification.

(3650) *Dunn v. Campbell,* 2014 WL 2722755 (Bankr. W.D. Ky. 2014) – State Court judgment was res judicata on issues relating

to willful and malicious conduct of Debtor. State Court jury expressly found that Debtor committed conversion when Debtor sold motorcycle for $18,000 but then refused to transfer the title to the purchaser. Issue of conversion was actually and necessarily litigated and decided by State Court. State Court judgment established that Debtor violated a restraining order and that Debtor acted in willful and malicious manner. Debtor cannot use Section 523(a)(6) adversary to relitigate issues of liability and damages that were previously considered and ruled upon by State Court.

(3651) *In re Wilcox,* 2014 WL 2208893 (Bankr. W.D. 2014) – Section 523(a)(6) is not self-executing. Creditor alleging that debt is excepted from discharge as willful and malicious injury must bring adversary proceeding within time permitted in rules or debt is discharged. Creditor violated discharge injunction in continuing collection against Debtor. While creditor may have been able to except debt under Section 523(a)(6), creditor failed to bring action and debt was discharged.

(3652) *Jennings v. Bodrick,* 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Even if proven, debt that would be excepted from discharge under Section 523(a)(6) in Chapter 7 is not excepted from discharge in Chapter 13. Adversary proceeding to except claim from discharge in Chapter 13 case failed to state cause of action.

(3653) *Wolfe v. Pugh,* 2014 WL 1873417 (Bankr. E.D. Tn. 2014) – Complaint failed to state cause of action for damages resulting from dog bite where plaintiff conceded that dog's attack was not willful or malicious attempt by Debtor to cause harm. While action may have been negligent, absent evidence of intent to cause injury, complaint would be dismissed.

(3654) *Bowe v. Kilmartin,* 508 BR 35 (Bankr. W.D. Ky. 2014) – Arbitration award that has been confirmed by State Court is valid final judgment for purposes of collateral estoppel. However, award did not collaterally estop Debtor in action under Section 523(a)(6) where award was based solely on Debtor's guilty plea to a misdemeanor charge of simple assault and did not make specific findings either that Debtor acted with intent to cause harm or that actions were malicious as required by Section 523(a)(6), where simple assault can include behavior undertaken purposely, knowingly or recklessly, and simple recklessness is insufficient to except debt from discharge as willful and malicious.

(3655) *Duree v. Dunn,* 2014 WL 1612232 (Bankr. E.D. Ky. 2014) – Section 523 excepts from discharge any debt resulting from willful and malicious injury. Complaint must establish that plaintiff sustained an injury, that the injury was caused by Debtor, and that injury was both willful and malicious. Debtors' filing suit against former attorney for malpractice, while an intentional act, was not willful or malicious in absence of allegations that filing was intended to, or did, cause loss of clients, future income, embarrassment or emotional distress absent evidence that Debtor knew action was frivolous and filed it solely to embarrass attorney. Fact that attorney may have defenses to action does not make malpractice action "willful" and "malicious".

(3656) *Yoppolo v. Asbury,* 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Willful and malicious injury requires proof that Debtor desired to cause consequence of act or believed that consequences of act were substantially certain; and that Debtor acted without just cause or excuse, although it does not require finding of ill-will. Although land contract vendor was ultimately unable to deliver clear title at end of land contract, there was no evidence that Debtor intended, when contract was entered into, to cause harm to creditor/vendee. Further, there was no evidence that Debtor's actions were malicious, where there was no evidence that Debtor knew of statutory prohibition against holding a land contract that had a balance due that was less than the underlying mortgage, or that Debtor acted in conscious disregard of that duty. Debtor's conduct was, at most, breach of contract which is not "willful and malicious injury".

(3657) *Bowe v. Kilmartin,* 2014 WL 1281488 (Bankr. W.D. Ky. 2014) – Guilty plea to simple assault and arbitration award based on guilty plea did not establish that Debtor's conduct was willful and malicious. Under state law, simple assault could be predicated on mere recklessness, and record did not contain any findings that Debtor intended to cause a harmful or offensive contact with Plaintiff.

(3658) *Old Republic National Title Insurance Co. v. Levasseur,* 2013 WL 6570917 (1st Cir. 2013) – Debtor committed willful and malicious acts when Debtor accessed credit line that Debtor knew lender had inadvertently failed to close. Debtor had line of credit secured by second mortgage on Debtor's home. Debtor sold home and paid off mortgage, but lender inadvertently failed to close account. Debtor, a real estate broker, knew that the Home Equity Account should no longer be used but she continued to draw on that account. By taking two cashier's checks totaling more than $124,000. Debtor's use of the equity line when she knew that account should have been closed constituted was objectively wrongful amounting to willful and malicious.

(3659) *Kraus Anderson Capital, Inc. v. Bradley,* 507 BR 192(6th Cir. BAP 2014) – Debtor's sale of assets "out of trust" and contrary to floor plan agreement creates non-dischargeable debt under Section 523(a)(6). Debt is not dischargeable if debt results from willful and malicious injury. Debtor must intend consequences of an act, not merely the act itself – that is, Debtor must desire to cause consequences of act or know that consequences are substantially certain to result. Debtor's actions in selling collateral and not remitting proceeds to lender as required constituted willful and malicious injury. Debtor knew of creditor's lien rights and knew that sale and retention of proceeds would cause injury to those rights, yet intentionally disposed of collateral and retained proceeds. Parties intended that as collateral is sold, proceeds would be

used to pay down debt owed to lender, but Debtor instead used proceeds for different use. Fact that different use was business use did not change fact that proceeds were used for purpose other than that for which they were intended. Debtor's actions were malicious as Debtor acted in knowing disregard of creditor's rights. Debtor's testimony that he intended to repay the loans "eventually" did not prevent finding that Debtor's actions in first instance were willful. Lack of specific intent to cause harm or ill will does not defeat fact that Debtor wrongfully retained proceeds.

(3660) *Hunter v. Lake Cumberland Regional hospital, LLC,* 2014 WL 1159674 (E.D. Ky. 2014) – Creditor seeking to oppose discharge under Section 523(a)(6) must bring action to declare debt excepted from discharge. Section 523(a)(6) is not "self-executing". District Court in which underlying litigation was pending lacked jurisdiction to determine whether debt was dischargeable under Section 523(a)(6) as action must be brought as adversary proceeding in bankruptcy court. Absent issuance of a judgment by Bankruptcy Court excepting debt from discharge, any attempt to prosecute that claim in district court is barred by discharge injunction and would be dismissed.

(3661) *Smith v. LeGare,* 2014 WL 1168899 (Bankr. N.D. Ohio 2014) – Injury is willful where actor desires to cause consequences of act or where consequences of act are substantially certain to occur. Malicious means in conscious disregard of one's duties or without just cause or excuse, although it does not require either ill-will or specific intent. Debtor's obligations to ex-girlfriend were result of willful and malicious conduct, where Debtor deliberately punched ex-girlfriend in face and body several times and broke several televisions in the home. Debtor acted after becoming angry when ex-girlfriend attempted to break off relationship and did so in anger and without just cause or excuse.

(3662) *Davis v. Music,* 2014 WL 1089849 (Bankr. N.D. Ohio 2014) – State Court judgment can be collateral estoppel on issues in adversary proceeding as long as the State Court judgment is a final judgment on the merits; issue was actually and directly litigated and was necessary to final judgment; issue in the present case is identical to issue in prior action; and party to be estopped was a party or was in privity with a party to the prior action. State Court action which sought damages for both negligence and for intentional tort of assault was entitled to collateral estoppel effect although judgment did not clearly indicate on which theory judgment was based. Punitive damage award demonstrated element of maliciousness where state law allows punitive damages for either intentional tort or negligence accompanied by malice. Trial transcripts established willfulness as testimony indicated that Debtor caused harm after Debtor became intoxicated and belligerent and then punched Plaintiff in the face twice and jumped on him before being pulled off. There was no suggestion that punches were accidental or any dispute that punches were intentional, and Debtor intended to cause injury by punching Plaintiff and did so in ager and without just cause, as Debtor's own testimony established that plaintiff did nothing to provoke assault. Voluntary intoxication alone does not negate willful and malicious elements of Debtor's actions, particularly where there was no evidence that defendant lacked the mental capacity to cause harm.

(3663) *Goaz v. Rolex Watch USA, Inc.,* Case No. 13-10282 (5th Cir. 2014) – Knowingly selling merchandise bearing counterfeit trademarks necessarily causes injury to the trademark. Debtor's actions were willful as injury was intended or substantially certain, and malicious as Debtor knew items were counterfeit and lacked any justification for sale.

(3664) *Liggett v. Schwartz,* 2014 WL 1028960 (E.D. Mi. 2014) – Willful and malicious requires that Debtor intend to cause injury or knew injury was substantially certain to occur, and done without legal justification or conscious disregard of duties. Creditor's contention that ex-husband willfully and maliciously concealed and misrepresented IRS barred by collateral estoppel where State Court judgment that awarded wife 50% interest in IRA had made factual finding Husband had not acted intentionally or willfully and, at worst, has just forgotten about existence of IRA. State Court found that Husband had not intentionally hidden IRA, that any failure to disclose IRA was result of error, and Husband promptly disclosed existence when he discovered it. Husband's actions were, at worst, negligent or accidental, a finding that precludes any finding of willful or malicious.

(3665) *Brown v. Ausley,* 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – Judgment against Debtor was collateral estoppel for purposes of Section 523(a)(6) if findings of fact in State Court judgment established each element of non-dischargeability action. While State Court judgment established most of the elements of action, State Court did not decide, and did not need to decide under state law, whether Debtor's actions were willful and malicious. Court concluded Debtor's actions were willful and malicious, where Debtor requested writ of possession to evict tenant from property after State Court issued judgment in favor of tenant and denying Debtor's request for eviction. Writ of possession would not have been issued and tenant's possessions would not have been removed had Debtor not requested writ of possession. Act of causing writ to be issued was willful act which Debtor knew would cause tenant to be wrongfully evicted from rental home. Act was also malicious, where state judge, in presence of Debtor, ruled in favor of tenant and yet Debtor nonetheless obtained writ of possession. Debtor had no legal right to writ and no just cause or excuse for obtaining writ and knew that act would cause harm to tenant yet proceeded with that action. State Court judgment that liquidated debt owed by Debtor to tenant would be given collateral estoppel effect.

(3666) *First Assembly of God v. Ping,* 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Section 523(a)(6) requires deliberate or intentional injury, not just intentional act that causes injury. Actor must indent consequences of the act, not just the act itself. Willfulness is shown when Debtor either had a desire to cause the consequences of his act or believed that injury was substantially certain from conduct, and must be more than reckless or negligent. Act is malicious if act is intentional

and without just cause or excuse, and does not require finding of ill will. Complaint stated cause of action against pastor for alleged misuse of church funds for personal purposes.

(3667) *Bank of America v. Killgrove,* 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd,* 2014 WL 4187988 (E.D. Mi. 2014) – Section 523(a)(6) requires that injury be willful, such that Debtor intended to cause the specific injury or that Debtor acted with belief that alleged injury was substantially likely to occur. Malicious requires proof that action was taken in conscious disregard of one's duties or without just cause. Intentional breach of contract is not "willful and malicious" unless accompanied by separate tortious conduct that, itself, results in willful and malicious injury. Debtor's conduct may have been breach of loan agreement hen Debtor closed professional practice and transferred assets to Debtor's new employer, but there was no evidence that Debtor closed practice and joined competitor with the intent of causing injury to the lender. Instead, evidence indicated that Debtor's practice was in substantial distress, that Debtor made numerous good faith efforts to save practice, that Debtor' efforts were focused on self-preservation and not with specific intent to cause harm to lender, that the injuries suffered by lender were in the nature of breach of contract for failure to repay loan, and lender still had valid security interest in collateral and retained full state law rights in the collateral.

(3668) *Rice v. Morse,* 504 BR 462 (Bankr. E.D. Tn. 2014) – Section 523(a)(6) excepts from discharge debts that are the result of willful and malicious injury. Willful requires that injury be intentional or deliberate, not merely actions that cause injury. Malicious requires lack of legal justification or knowledge by Debtor that actions were wrong, but does not require any ill will. Debtor's obligation to creditor was willful and malicious, where Debtor induced creditor to loan money for specific purpose of constructing home that would be sold, with profits to be split. However, Debtor did not use the proceeds to build the home but used them for general business purposes. Debtor's actions in obtaining money with no intent to use them for stated purpose was conduct that was intended to cause loss to creditor, and Debtor knew that proceeds were advanced for specific purpose but misappropriated the funds for other purposes without any legal justification or excuse. However, creditor could not prevail against Debtor-wife where there was no evidence that she made any representations or that she otherwise caused any injury, or conspired to cause injury, to creditor.

(3669) *Smith v. Morse,* 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Section 523(a)(6) excepts from discharge debts that are the result of willful and malicious injury. Willful requires that injury be intentional or deliberate, not merely actions that cause injury. Malicious requires lack of legal justification or knowledge by Debtor that actions were wrong, but does not require any ill will. Debtor's obligation to creditor was willful and malicious, where Debtor induced creditor to loan money for specific purpose of constructing home that would be sold, with profits to be split. However, Debtor did not use the proceeds to build the home but used them for general business purposes. Debtor's actions in obtaining money with no intent to use them for stated purpose was conduct that was intended to cause loss to creditor, and Debtor knew that proceeds were advanced for specific purpose but misappropriated the funds for other purposes without any legal justification or excuse. However, creditor could not prevail against Debtor-wife where there was no evidence that she made any representations or that she otherwise caused any injury, or conspired to cause injury, to creditor.

(3670) *Vision Bank v. Harless,* 2013 WL 6198215 (Bankr. N.D. Al. 2013) – Damages to property caused by owner after entry of foreclosure judgment but prior to eviction constituted willful and malicious injury excepting damage claim by lender from discharge. Evidence indicated that Debtor intended to cause harm to the lender by taking property and causing damages to property; and that action s were malicious because Debtor was in adversarial relationship and Debtor knew actions were wrong and without legal basis or justification.

(3671) *McCallum v. Pixley,* 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A "true default judgment" is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest. State law judgment for conversion not conclusive under Section 523(a)(6) where state law action for conversion does not require finding that Debtor acted "willfully and maliciously". State Court judgment conclusively determined that plaintiff had given Debtor $50,600 to purchase a Chrysler 300 Automobile and to convert the vehicle into a limousine, but that Debtor did not deliver the vehicle or refund the money, constituting state law conversion. Evidence established at trial that Debtor acted willfully as Debtor knew he could not keep both the vehicle and the money advanced by Plaintiff, yet Debtor did so knowingly and intentionally rather than unwittingly or innocently. Actions were also malicious as State Court judgment found that Debtor's actions were "without just cause or excuse". To be malicious, action need only be conscious disregard of duties or without cause, and does not require finding of ill will.

(3672) *Shears v. Vestal,* Adv. No. 12-80330 (Bankr. W.D. Mi. 2014) – Conversion requires willful possession or retention of property belonging to third party. Debtor had good faith basis to claim contract deposit as liquidated damages after Plaintiff allegedly breached the contract. Absent evidence that Debtor acted with intent to wrongfully retain deposits, Debtor's actions may have constituted breach of contract if Debtor's interpretation of liquidated damages clause was incorrect, but would not constitute basis to except debt from discharge.

(3673) *General Motors, LLC v. Gunner,* 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – Willful and malicious requires that injury itself have been deliberate, not just the act that ultimately produced the injury, and requires evidence that defendant either acted with actual intent to cause the alleged injury or that the alleged injury was substantially certain

to result. Malicious requires that actions be taken in conscious disregard of one's duties or without just cause or excuse. Court could not determine on summary judgment whether Debtor's actions were willful and malicious where Debtor knew it received overpayments on invoices issued to Plaintiff, yet retained those overpayments. The allegation mounted to more than mere failure by Debtor to pay debt and turned on Debtor's knowledge and intent when the overpayments were received and retained. Although Debtor may have committed state law conversion, not every act of conversion is "willful and malicious" and facts may support finding that conversion was innocent or technical, or an unauthorized assumption of dominion without willfulness.

(3674) *Wilmers v. Yeager,* 2013 WL 5863059 (Bankr. S.D. Ohio 2013) – Section 523(a)(6) requires finding that injury was both willful and malicious. State Court judgment against Debtor for battery against creditor not entitled to preclusive effect where judgment did not demonstrate that injuries were willful and malicious. Similarly, State Court judgment would not be given preclusive effect against willful and malicious merely because State Court declined to award punitive damages. However, State Court judgment was preclusive as to whether Debtor committed battery and amount of damages suffered by creditor as a result. State Court judgment was not clear as to whether Debtor's action were intended to cause injury, or whether Debtor intended the act that led to injury.

(3675) *Walker v. Alama,* 2013 WL 5817736 (Bankr. E.D. Tn. 2013) – Conversion of property can be basis for non-dischargeability under Section 523(a)(6). Conversion requires appropriation of tangible property to a party's own use and benefit in exclusion of or defiance of owner's rights. Conversion becomes non-dischargeable where actions constituting conversion were done with intent to cause the harm or substantially likely to cause the harm to the rightful owner. Debtor did not "convert" property of plaintiff when Debtor purchased and sold property owned by Debtor after Plaintiff had obtained final judgment arising from automobile accident. Judgment had not been recognized in Tennessee and had not been recorded in property records and did not constitute a lien against any of Debtor's property. Plaintiff held no ownership or lien interest in the property owned and later sold by Debtor and Debtor did not interfere with Plaintiff's rights to possess any property as plaintiff had no such rights.

(3676) *In re Krupp,* 2013 WL 5745274 (E.D. Mi. 2013) – Plaintiff must demonstrate that Debtor deliberately caused harm, not must that Debtor took intentional act that caused injury. Plaintiff failed to demonstrate that any failure to disclose defects in sale of RV was intended to cause harm, where vehicle was listed for sale "as is" and afforded buyer every opportunity to inspect the vehicle before purchasing but buyer failed to have vehicle inspected. Evidence did not establish that any failure to disclose defects was done with intent to cause injury.

(3677) *Citizens Insurance Company v. King,* 2013 WL 5770275 (Bankr. E.D. Mi. 2013) – Prior adjudication has preclusive effect only where prior litigation involved same parties and produced a mutuality of estoppel. Debtor's guilty plea and criminal conviction for felonious assault with a deadly weapon carries no preclusive effect in subsequent litigation brought by insurer to declare debt non-dischargeable, as insurer was not party to criminal proceeding and would not have been bound by adjudication had Debtor been adjudicated not guilty. While guilty plea may be relevant in dischargeability litigation, plea does not prevent Debtor from contesting that elements of Section 523(a)(6) are met.

(3678) *CAN Financial Corp. v. Flood,* 2013 WL 5312396 (Bankr. S.D. Ohio 2013) – Willful and malicious injury requires proof that at time Debtor took action, there was actual intent to cause injury. Plaintiff failed to produce any evidence that at the time Debtor borrowed money, he intended to cause harm to lender. Debtor was employed by plaintiff. Plaintiff offered to lend money to Debtor to purchase company stock, with the loan coming due in one single payment 10 years later. When the loan was made, Debtor was a senior, highly paid executive, employed by the Plaintiff for many years. Debtor participated in the stock purchase/loan program to demonstrate loyalty to the Plaintiff. Debtor's employment was terminated by plaintiff approximately 3 years later. The fact that Debtor may not have had a definitive plan to pay the loan is not willful and malicious as Debtor had substantial income at the time of the loan and was not be required to pay anything for ten years. Although Debtor failed to pay anything on the loan, and spent considerable sums in relocating to Ohio while loan was outstanding, this demonstrates, at worst, errors in judgment and a failure to abide by contractual terms, not "willful and malicious injury".

(3679) *Vicars v. Freeman,* 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Conversion, standing alone, is not willful and malicious, absent proof that Debtor acted with intent to cause harm without any legal justification. While Debtor may have made management decisions that in the end were not in the best interests of corporation or minority shareholders, evidence did not indicate that Debtor acted with intent to cause harm to corporation or shareholders or that Debtor acted under anything other than an honest mistake in dealing with corporate assets and property.

(3680) *First National Bank v. Sierlein,* 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – Section 523(a)(6) requires that Debtor have acted with deliberate intent to cause injury or acted where injury was reasonably certain to occur, not just that Debtor took intentional act that happened to cause injury. Malice requires that action be taken without justification or in conscious disregard for duties. Debtor acted willfully and maliciously when Debtor received proceeds of casualty insurance policy where lender had been named as loss payee and was entitled to proceeds under terms of mortgage. Debtor knew that property was subject to mortgage when property was destroyed and insurance payment made Debtor concealed fact of destruction of property from Bank by continuing to make monthly mortgage payments and by sending

financial statement that falsely stated that property was unchanged. Debtor's actions constituted conversion of proceeds of insurance, entitling insurance company to judgment of non-dischargeability.

(3681) *Adamovic v. Lazarevic,* 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Willfulness can be established by demonstrating that Debtor knew of creditor's rights and knew that Debtor's conduct would cause injury to those rights. Malice is demonstrated when Debtor acts without any legal justification or in conscious disregard of duties. Debtor committed willful and malicious acts when Debtor obtained control of sister's property and assets both before and after sister's death with no permission or consent of sister. Debtor forged documents to close sister's bank accounts and retained the money for himself. Debtor sold property and furniture belonging to sister without consent and retained the proceeds. Debtor took possession of jewelry and initially claimed that the jewelry were gifts from sister but later, in bankruptcy filing, claimed that Debtor was holding items for benefit of Debtor's children. Debtor knew that his actions would cause harm to sister and, ultimately, to sister's children who were her heirs and who would have been entitled to ownership of the assets. Debtor failed to demonstrate any justification for retention and sales, where there was no evidence of any communication between Debtor and sister's heirs regarding possession or disposition of any assets. Debtor willfully took possession of proceeds from the automobile, the proceeds from the IRA, the proceeds from the Bank Account, the home furnishings and the jewelry, all without any transfer document or permission from sister given at a time she was competent. But for Debtor's conduct, all of the money and assets would have been given to the Minors as the beneficiaries of their mother's intestate estate. Instead of turning over these assets to the Minors, the Debtor used them for himself, incorporated them into his home, failed to disclose them, and delayed turning them over by filing an administration of his sister's estate years after her death, sufficient to except debt from discharge under Section 523(a)(6).

(3682) *Wilson & Muir Bank & Trust Co. v. Eifler,* 2013 WL 3300639 (Bankr. W.D. Ky. 2013) – Creditor must prove that the Debtor willfully and maliciously injured the property of another. Willful requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Debtor's transfer of property that was subject to perfected lien of creditors did not injury creditors where creditors' rights to recover the collateral were unimpaired. Further, there was no evidence that Debtor intended to cause injury as documents indicated that Debtor believed that creditor's access to collateral would not be altered. Loan documents themselves did not prohibit transfers of collateral or contain any requirement that if collateral is sold, that Debtor must pay proceeds to lender. Evidence also indicated that transfer was done for estate planning purposes shortly before Debtor went on overseas trip and that Debtor's attorney conceived idea of estate planning to equalize assets between Debtor and wife, with easiest way to accomplish that being transfer of property from Debtor to wife.

(3683) *Suarez v. Barrett.* Case No. 09-60007 (9th Cir. 2013) – State Court contempt rulings can be considered as evidence that Debtor acted in willful and malicious manner such that sanctions awarded as part of contempt proceedings are non-dischargeable under Section 523(a)(6).

(3684) *Forristall v. McCaulley,* 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Willful and malicious requires that injury must have been both willful and malicious, not just that the act giving rise to the injury was itself willful; and that actions were taken in disregard of duties or without just cause or excuse. Texas State Court not entitled to preclusive effect where state statute on which judgment was predicated did not required any finding of malice or any other subjective intent to cause harm.

(3685) *Green v. Baiardi,* 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – Willful requires that Debtor intend to cause injury or that consequences were substantially certain to result. Malicious means that the action was done without just cause or excuse. Further, debt to be deemed non-dischargeable must result from the willful and malicious conduct. Fees claimed by State Court receiver were not result of willful and malicious injury. Although receiver was appointed as remedy for Debtor's contempt of State Court Order that required Debtor to cooperate in sale of marital residence. Debt arising from contempt is not willful and malicious per se. Receiver failed to present any evidence that costs resulted from any improper conduct between Debtor and receiver and there was no evidence that Debtor in any way willfully or maliciously injured receiver. To extent that Debtor may have engaged in conduct that violated prior orders between Debtor and ex-husband, receiver lacked standing to maintain action based on those acts as receiver was not target of those acts and did not even exist at time of that conduct. Receiver cannot maintain action under Section 523(a)(6) based on Debtor's conduct toward third party that allegedly caused harm to that third party.

(3686) *Oak Street Funding, LLC v. Blair,* 2013 WL 2154795 (Bankr. E.D. Tn. 2013) – Section 523(a)(6) allows for non-dischargeability of debt for willful and malicious injury by the Debtor to another entity or to property of another entity. Action must be both willful, defined as voluntary, intentional or deliberate, and done with actual intent to cause harm, not merely intentional act that incidentally or negligently causes harm, and includes conduct that indicates intent to cause harm or where consequences are substantially likely to occur; and maliciously, defined as acting in conscious disregard of duties or without just cause or excuse. Debtor acted willfully and maliciously when Debtor diverted funds from the account to which lender had access and which was pledged as security, and into which loan documents required Debtor to deposit funds received from transaction of business. Debtor knew that actions in redirecting funds and use of those funds for Debtor's personal expenses would cause injury and that Debtor had no legal justification for her actions as obligations imposed by loan documents were clear and unequivocal.

(3687) *Bajon, Inc. v. Rhoades,* 2013 WL 2178080 (Bankr. S.D. Ohio 2013) – Willful and malicious requires more than injuries that are recklessly or negligently inflicted, and require a deliberate act intended to cause injury or where consequences are substantially certain to result. Debtor's breach of non-compete clause in employment agreement alone is insufficient to prove willful and malicious injury where the record indicated that Debtor's breach was not done with intent of causing harm. Debtor was fired from her prior employment. In need of money to pay bills and support herself, Debtor accepted the first offer of employment that came her way, but that violated non-compete. There was no evidence that Debtor intended to cause harm to former employer. Plaintiff failed to present any evidence that Debtor took customers away from former employer, and it was former employer who advised customers of Debtor's departure.

(3688) *Advantage Windows, Inc. v. Dunn,* 2013 WL 1553007 (Bankr. E.D. Tn. 2013) – Under section 523(a)(6), injury must be both willful and malicious which requires determination of Debtor's state of mind at time of acts. Summary judgment is particularly inappropriate where issues involve state of mind. Summary judgment not warranted where evidence presented was unclear as to whether Debtor made any misrepresentations to creditor. Creditor alleged that Debtor falsely stated that Debtor had secured financing to pay for project. Documents submitted in connection with summary judgment motion were unclear as to whether Debtor had secured financing as represented, or whether Debtor secured financing only after dispute arose with creditor regarding performance under the contract.

(3689) *R & L Pricecorp, LLC v. Hall,* 2013 WL 1739658 (Bankr. E.D. Tn. 2013) – Creditor must prove both a deliberate or intentional injury, not merely a deliberate act that leads to injury; and that the Debtor either intended to cause the consequences of their actions or believed with reasonable certainty that the consequences would occur. That Debtor should have known that conduct risks injury is not sufficient – Debtor must either intend or desire to cause harm, or believe injury is substantially certain. Debtors willfully and maliciously caused harm and injury to rented premises. Debtors rented house in pristine condition, to be occupied by no more than 6 people. When Debtors moved out, premises were substantially damaged and photos of damage were shocking to the court. Damage including extensive damage to the carpets, doors, walls, and windows, untreated mold and mildew growth, and broken appliances. More specifically, the house was filthy, wreaked of urine, and contained animal feces on the carpet, stairs, and a wall, there was writing on one of the walls in what appeared to be permanent ink and there were, among other things, missing and broken Levolor blinds, a broken dishwasher, a damaged stove, a damaged kitchen sink and damaged flooring. As many as 8 people lived in the house plus four dogs and one cat. Court awarded actual damages plus punitive damages as evidence indicated that actions of Debtors in damaging property were particularly egregious, and held that entire damage award was non-dischargeable.

(3690) *Spigot Resources, Inc. v. Radow,* Case No. 12-1037 (9th Cir. BAP 2013) – Creditor failed to prove that Debtor intended to cause loss or that Debtor acted maliciously when Debtor, following failure of real estate transaction to close, filed *lis pendens* against property which prevented creditor from selling property to third party. Evidence did not indicate that Debtor filed State Court litigation or *lis pendens* in bad faith. Debtor's alleged breach of contract to purchase real estate could not, as a matter of law, constitute tortious conduct which is required under Section 523(a)(6). Party cannot "maliciously" breach a contract for purposes of Section 523(a)(6) unless the breach is accompanied by some additional, unrelated conduct that constitutes a tort under state law. Alleged breach of implied covenant of good faith, standing alone, is not tort where parties appeared to be equal and who negotiated contract at arm's length and did not have any special pre-existing relationship.

(3691) *Automotive Finance Corp. v. Leonard,* 2013 WL 1092112 (Bankr. E.D. Tn. 2013) – Willful and malicious requires that Debtor take action with intent or desire to cause injury, not just that injury result from conduct; and that action be taken without just cause or in conscious disregard of duties, but does not require ill will or specific intent. Debtor must know that conduct is wrong. Conversion of secured creditor's collateral may constitute willful and malicious injury. Conversion will not qualify as willful and malicious if the conversion is innocent or technical, such as an honest mistake borne from a prior course of dealing. Debtor, as principal of LLC auto dealership that "floor planned" vehicles and then sold vehicles without paying floor plan lender committed willful and malicious act. Debtor's statements that Debtor intended to pay Lender from normal cash flow contradicted by evidence that Debtor actively concealed sales because he knew that failure to pay lender was wrongful and that Debtor used large amounts of business cash to pay personal debts shortly before LLC closed down. Further, four of the vehicles in question were sold by LLC less than two weeks prior to closing business yet proceeds were not paid to lender when it was clear that Debtor lacked any reason to believe that future cash flows would be sufficient to pay lender.

(3692) *Kraus Anderson Capital, Inc. v. Bradley,* 2013 WL 486789 (Bankr. N.D. Ohio 2013) – Willful and malicious requires proof that Debtor intended to cause consequences of act or that Debtor believed consequences are substantially certain to occur. Sale of equipment subject to security interest did not show willful and malicious where security agreement allowed for sale of items in ordinary course of business such that Debtor did not have duty to turnover proceeds. Evidence also did not support finding of intent to cause injury by not paying debt where Debtor made substantial payments after sale of assets and that Debtor had every intention of repaying until much later when economic conditions caused failure of business. Facts indicated nothing more than possible contract dispute which requires proof that Debtor, at time of execution of contract, had no intention of performing. Although Debtor did breach contract, evidence indicated that

Debtor did everything possible to save business and to pay creditor where Debtor performed for more than 18 months before economic conditions forced business to close.

(3693) *Advantage Bank v. Starr,* 2012 WL 4714978 (Bankr. N.D. Ohio 2012) – To be excluded from discharge, debt must be both (1) willful, and (2) malicious. Willful requires that Debtor intended to cause consequences or that consequences are substantially certain to occur. Injury must be deliberate or intentional, and not just a deliberate or intentional act that causes harm. Malicious requires that the injury be in conscious disregard of one's duties or without just cause or excuse. Examples of willful and malicious injury include intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises. Debtor did not cause willful and malicious injury to Bank when Debtor cashed out Raymond James Stock Account and used proceeds to pay loan from partner in business property. Debtor cashed out account because Debtor believed that Debtor may need additional liquidity as part of restructuring of bank loan, and it was not until after Debtor cashed out account but before she received proceeds that negotiations with bank fell apart. Debtor then used money to pay off loan from partner in effort to reduce interest and fees. Debtor also did not intend to cause harm to bank. Although funds in investment account were no longer a possible source of repayment, bank had security interest on property that had been appraise at amount far in excess of balance owed to bank and Debtor had no reason to believe that collateral would be insufficient to satisfy bank.

(3694) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Section 523(a)(6) requires that injury result from voluntary, intentional or deliberate conduct done with specific intent to cause injury, not merely intentional action that leads to injury. Actor must either have desired to cause consequences of act; or Debtor must have known of other party's rights and knew that his conduct would cause injury to those rights. Malice requires that actions be taken in conscious disregard of duties or without just cause, although malice does not require finding of ill-will or specific intent. Malice can be proven by demonstrating that Debtor committed wrongful act; that Debtor did so intentionally; that act necessarily caused injury; and Debtor lacked just cause or excuse.

(3695) *Her, Inc. v. Barlow,* 2012 WL 1165503 (Bankr. S.D. Ohio 2012), *aff'd,* Case No. 13-8018 (6th Cir. AP 2013) – Statutory damage award for violation of Federal Anticybersquatting Consumer Protection Act constitutes award for willful and malicious injury and is non-dischargeable under Section 523(a)(6). District Court Judgment found Debtor registered and used the internet domain names of Debtor's direct competitor to diverted to Debtor's web site traffic intended for Debtor's competitor. Debtor acted intentionally with a bad faith intent to profit, and willfully and deliberately violated the ACPA. Debtor exhibited bad faith intent to profit by registering and using the domain names associated with competitor. Debtor's use of the domain names could harm the goodwill of Plaintiffs' marks and was designed to achieve some commercial gain. Debtor admitted that he registered five of the six domain names hoping internet users would "Google" the personal names of the Plaintiffs and discover that Plaintiffs were "not smart enough" to register their own names, which ultimately would embarrass Plaintiffs among their peers and customers. Debtor conceded that he found it "funny" that Plaintiffs were "not smart enough ... to register their own names." Debtor acted intentionally, knowingly registering and using direct competitor's names in web sites. Debtor acted willfully as he either willed and desired harm or believed that injury was substantially certain to occur. Actions were clearly malicious – Debtor's actions were innocently registering what Debtor imagined to be a proper domain name but later determined that his choice caused confusion among consumers, nor did Debtor defendant not know and understand the potential harm the domain registration could cause to their rightful owners.

(3696) *In re Glenn,* 2012 WL 3775977 (Bankr. M.D. Pa. 2012) – Debtors who removed fixtures from home after secured lender had obtained stay relief to foreclose mortgage willfully caused injury. Debtors intentionally removed cabinets, built-in furnishings, ceiling fans, and other property without just cause. Debtors knew that removal of fixtures was substantially certain to cause damages to lender. In the process of ripping out cabinetry and removing lighting and plumbing fixtures, Debtors exposed wires, drains and pipes and left behind holes in walls and ceilings. Harm to property was impossible to ignore and Debtors had to have been aware that their actions would force lender to incur substantial repair costs. Debtor's testimony that they needed these items in order to secure new, habitable residence did not excuse actions. Debtor's "need" for the items, no matter how dire their financial predicament, did not justify actions or blind Debtors to consequences. Debtors' stated ignorance that the items constituted fixtures did not justify removal from property, nor did Debtors' testimony that the cabinetry was "gift" from Debtors' brother.

(3697) *Bowers v. Rogers,* 2012 WL 3929813 (Bankr. S.D. Ohio 2012) – Willful requires deliberate or intentional injury, not that intentional action leads to an injury. Malice requires that act be taken in conscious disregard of Debtor's duties or without just cause or excuse. Mere recklessness is not sufficient to fall within willful and malicious. Actor must intent consequences of act or act in such a way that consequences are substantially certain. Not all claims arising from alleged conversion are *per se* willful and malicious. Conversion may not rise to standard under Section 523(a)(6) where actor honestly believes that his actions were lawful and proper. Evidence did not establish non-dischargeability as matter of law were Debtor testified that he genuinely believed that he was entitled to hold title to property until paid in full by purchaser and while there may have been a dispute, Debtor believed that he had not been paid in full.

(3698) *Hulsing Hotels Tennessee, Inc. v. Steffner,* 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Funds in corporate bank

account on date garnishment is served remain property of corporation free of garnishment until night of service date of writ. Debtor's actions in causing single member LLC to transfer funds from corporate account to account of sister corporation on date writ of garnishment served did not constitute action to interfere with perfected writ of garnishment, as writ did not perfect or attach to LLC's account until after funds had been transferred, even though transfer occurred on same date as service of writ. As creditor had no interest in funds as of moment of transfer, transfer could not have caused harm or loss to creditor sufficient to support action under Section 523.

(3699) *McClary v. Powell,* Adv. No. 10-3823 (Bankr. E.D. Mi. 2012) – In action under Section 523(a)(6), court must allow recovery of attorney fees and costs when those fees are allowable by state law. Prior to bankruptcy filing, plaintiff sued Debtor and proceeded through case evaluation process. Debtor rejected case mediation and failed to obtain lower verdict, entitling plaintiff to award of attorney fees. Debtor filed bankruptcy prior to State Court assessment of fees. Court would not attempt to apportion fees between counts in which Plaintiff recovered more than evaluation amount from those where the recovery was less, where the counts were all based on same facts and were inherently intertwined. Expenses and fees would have been incurred even if plaintiff, with remarkable insight, would have filed only a two count complaint, precluding apportionment of fees. At most, only a portion of one day of trial would possibly have been avoided had complaint not included counts that were not excepted from discharge, such that fees would be reduced by $600 representing 4 hours of trial time. Court awarded fees of $13,339.25 plus costs of $3,094.18 plus interest of $5,113.93 and $1,406.12 respectively.

(3700) *Hulett v. Rowe,* Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Plaintiff's action against Debtor for alleged diversion of corporate assets failed to evidence any damages based on that alleged diversion. Only damages suffered by plaintiff resulted from Debtor's failure to pay promissory note by which Debtor purchased business from plaintiff. Damages for failure to installments on promissory note does not equate to larceny for purposes of non-dischargeability. Plaintiff did not offer any evidence of any particular asset that was allegedly converted or taken or the value of any such asset. Absent evidence of damages from the alleged larceny independent of damages for breach of the promissory note, judgment would be entered in favor of Debtor.

(3701) *Keeley v. Bumprecht,* Adv. No. 11-5909 (Bankr. E.D. Mi. 2012) – "Willful" requires proof that Debtor desired to cause the consequences of his act, or that he believed that consequences were substantially certain to occur. Standard is not "reasonable person" but is based on Debtor's subjective intent. Automobile accident caused by Debtor's reckless driving does not evidence that Debtor intended to cause the harm to the plaintiff or that such harm was substantially certain.

(3702) *Flagstar Bank, FSB v. Reddy,* 2012 WL 3257817 (Bankr. E.D. Mi. 2012) – Although agents and officers of corporation can be held liable for torts such as conversion based on their active participation, not every act which might be found to be a state law conversion is necessarily willful and malicious as required by Section 523(a)(6).

(3703) *Miller v. Frazier,* Adv. No. 09-2183 (Bankr. E.D. Mi. 2012) *aff'd*, 2013 WL 3798232 (E.D. MI. 2013) – Section 523(a)(6) requires that the debt be for an injury that as the result of actions intended to cause injury, not simply actions that are performed intentionally but happen to result in injury. Debtor willfully caused injury to plaintiff by retaining trucks purchased by plaintiff yet refusing to share profits or make payments to plaintiff and refused to return trucks upon demand. Debtor stated that he never intended to provide interest or profits for the use of the vehicles, rendering actions willful and malicious.

(3704) *Becton, Dickinson & Co. v. Sterling,* 2012 WL 3257841 (Bankr E.D. Mi. 2012) – Employee's receipt and retention of erroneous salary, while perhaps a technical conversion, was not sufficiently willful and malicious. Debtor reported overpayment first time it happened. Any later failure to disclose receipts was mere silence that did not rise to level of willful and malicious. Employer failed to demonstrate any evidence of legal duty of employee to do more than what employee did – notify employer on occasion of first overpayment. While Debtor may have lacked any excuse or justification for using the overpayments, lack of justification does not make action willful or done with intent to cause specific harm.

(3705) *Eaton v. Ford Motor Credit Co., LLC,* 2012 WL 3579644 (M.D. Tn. 2012) – Debtor acting as an officer of a corporation who actively converts property that is subject to a security interest is personally liable to the injured creditor. Auto dealer that sold vehicles without paying floor plan financing willfully and maliciously converted the proceeds resulting in non-dischargeable debt to floor plan financier. Debtor had many years' experience in auto sales and State Court had previously entered order directing dealership to remit proceeds upon sale of vehicles. Debtor was fully aware of State Court Orders yet willfully disregarded those orders as well as the obligations under the floor plan agreement.

(3706) *Schofield v. Prentice,* 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Plaintiff's allegation that Debtor misappropriated funds of corporation that was indebted to Plaintiff stated cause of action. Agents and officers of a corporate entity may be found personally liable for torts committed in the name of the entity. Allegations that Debtor personally participated in misappropriate of funds, causing harm to Plaintiff as a result of the corporation's inability to answer for its debt to Plaintiff, stated cause of action.

(3707) *Synergeering Group, LLC v. Jonatzke,* 478 BR 846 (Bankr. E.D. Mi. 2012) – State Court Order determining liability of

Debtor for violations of Michigan Uniform Trade Secrets Act based on Debtor's willful refusal to comply with discovery orders and willful, deliberate and repeated pattern of obfuscation and mendacity, including destruction of computers, storage devices and files, was collateral estoppel as to Debtor's liability under MUTSA. State Court findings that Debtor's actions were willful done with no reasonable justification. Debtor's actions demonstrated willful and malicious injury to Creditor's cause of action against Debtor, which is a protected property interest of creditor. State Court action involved same parties; State Court judgment was valid, final judgment; issue of Debtor's willfulness in spoliation of evidence was actually litigated; State Court Order determined that Debtor maliciously damaged creditor's action with no justification or reasonable excuse; and Debtor had full and fair opportunity to litigate issue of willfulness and maliciousness in spoliation. Measure of damages would be equal to amount creditor would have recovered based on Debtor's violation of MUTSA assuming Debtor had not destroyed evidence. Debtor originally worked for creditor. After being let go, Debtor formed new company that directly competed with plaintiff, using same distinct and unique techniques and directly working off plaintiff's customer lists and pricing information that Debtor obtained in course of employment with plaintiff. Plaintiff showed that once Debtor left, plaintiff lost business to Debtor's company as there were only two companies in the country – plaintiff and defendant's – that produced the specific products and techniques. Evidence supported damages for lost profits and reasonable attorney fees totaling 576,000 less amounts paid to plaintiff by Debtor prior to commencement of bankruptcy case.

(3708) *Morris v. Brown,* 2012 WL 2989236 (6th Cir. 2012) – Plaintiff's action against defendants alleged only that defendants trespassed on plaintiff's land. Defendants' action against Debtor for intentional and willful injury did not establish any injury or damage to property of co-defendants or that Debtor acted in such a way as to either intend to cause injury to co-defendants or that Debtor's actions were substantially certain to cause harm to co-defendants. Defendants did not claim that Debtor acted with intent to harm defendants but only that Debtor's actions evidenced "substantial and foreseeable certainty of [Debtor's] failure to meet any of his contractual, statutory, or, for that matter, commonsense, duties". Debtor's alleged failure to obtain general liability insurance and his failure to provide notice to landowner did not constitute evidence that Debtor intended to cause injury or that injury was substantially certain that defendants would be liable to landowner if Debtor removed timber from land.

(3709) *Tweedie v. Semeniuk,* Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that Debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malice were actually litigated. Arbitration award also did not find that Debtor ever intended to injure plaintiff. Although award made numerous findings that Debtor intended to deceive plaintiff, that does not equate to finding the Debtor intended that plaintiff would lose those funds or that Debtor was substantially certain that plaintiff would suffer injury.

(3710) *Peebles v. Hayes,* 2012 WL 2682788 (Bankr. M.D. Tn. 2012) – Debtor caused willful and malicious injury to neighboring property owner where Debtor intentionally built home higher than required, graded lot so as to drain toward neighbor, and turned all of the downspouts toward Plaintiff's property, causing water to literally cascade onto Plaintiff's property when it rained. Debtor's actions, at a minimum, caused a nuisance that resulted in damages to Plaintiff. State Court's judgment that "more likely than not" the actions were intentional and done with intent to cause harm to plaintiff was sufficient to apply collateral estoppel in adversary action.

(3711) *Hussein v. Shugarman,* 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award against the Defendant, awarding the Plaintiffs compensatory damages of $332,254.55; and punitive damages of $191,761.01 for attorneys' fees and costs. Plaintiffs hired Debtor to build Plaintiff's new home. At end of the project, Debtor presented Plaintiffs with contractor affidavits from suppliers and subcontractors, and Plaintiff paid Debtor balance of contract price. After subcontractors and suppliers placed numerous mechanic liens on property, Plaintiffs discovered that Debtor had forged contractor affidavits for purposes of obtaining final payment without making payment to suppliers and subs. Arbitration award found that Plaintiffs paid twice to have work performed because they were forced to pay subcontractors which the Defendant failed to pay, resulting in mechanics liens. Defendant fraudulently requested and received payments from the Plaintiffs' lender. Defendant exhibited a conscious disregard for the rights of the Plaintiffs in their contractual relationship, thereby warranting an award of punitive damages. Debtor intentionally used false and forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs. Factual findings in confirmed arbitration award met each requirement under Section 523(a)(6)(A) for finding of willful and malicious injury. Debtor knew that affidavits were forged and presented them with intent to obtain money, with full knowledge that Plaintiffs would later be required to pay for same services and materials again, constitute willfulness; and Debtor's actions were without any colorable legal basis or justification, supporting finding of malice; sufficient to warrant judgment of non-dischargeability.

(3712) *Ewers v. Cottingham,* 2012 WL 2161623 (6th Cir. BAP 2012)) – Ordinarily, one spouse will not have debt declared non-dischargeable based solely on conduct of other spouse. However, where Debtor was aware of and participated in spouse's

scheme, Debtor can be liable and debt can be non-dischargeable. Debtor's spouse embezzled money from her employer. When Debtors filed bankruptcy, employer sought judgment that the Debtor was liable for embezzled funds as Debtor conspired with the spouse as part of the embezzlement, seeking to convert the employer's funds, which constitutes willful and malicious injury. Court concluded that Debtor was obligated to spouse's employer and that debt was no-dischargeable as willful and malicious injury. Debtor knew that Debtor and spouse were spending amounts far in excess of their combined earnings. Debtor had full access to joint bank account into which spouse deposited embezzled funds and periodically withdrew large sums that Debtor knew or had to have known far exceeded combined incomes. Debtor and wife made large purchase and spent hundreds of thousands of dollars on home improvements and renovations at a time when Debtor and spouse had combined annual income of about $50,000.00. The significant disparity between income and expenses; Debtor's access to and participation in the family finances; the cost of the home improvements; and Debtor's knowledge that spouse had also embezzled large sums from a prior employer provided ample evidence that Debtor was active participant in the scheme.

(3713) *Savage v. Murphy,* 2012 WL 2006310 (Bankr. W.D. Ky. 2012) – Debtor hired people to "physically harm Plaintiff and these others did in fact cause physical harm and injury to the Plaintiff." Defendant was arrested, indicted and pled guilty to assault. Plaintiff then filed action in State Court and received default judgment for actual and punitive damages. Judgment held non-dischargeable. "Assault is almost the very definition of willful and malicious injury. … There is no doubt that the defendant committed assault upon the Plaintiff, having plead guilty to that crime."

(3714) *D.T. McCall & Sons v. Martelle,* 2012 WL 1833906 (Bankr. E.D. Tn. 2012) – Willful and malicious requires an intentional act done with intent to cause injury or where consequences are substantially certain to result from act. Malice can be demonstrated by a Debtor acting in conscious disregard of duties or without just cause or excuse, but does not require evidence of ill-will or specific intent. Creditor sustains burden by showing that Debtor committed wrongful act; that Debtor undertook the act intentionally; the act necessarily caused injury; and Debtor lacked any just cause or excuse for the act. Debtor committed willful and malicious act when Debtor received insurance proceeds in connection with items destroyed in fire but did not use the proceeds to pay the secured creditor holding a properly perfected lien on the destroyed items. Debtor knowingly obtained and used the insurance proceeds even though funds were proceeds of insurance on Debtor's household goods on which creditor held security interest. Debtor cashed insurance check and kept proceeds in safe at neighbor's house to keep funds out of reach of creditors; Debtor had experience in construction business and knew how insurance proceeds worked for payment of claims; Debtor had significant business experience handling books and records and preparing tax returns for construction business; and Debtor offered no explanation of justification for use of proceeds other than to pay secured claims.

(3715) *Automotive Finance Corp. v. Leonard,* 2012 WL 1565120 ((Bankr. E.D. Tn. 2012) – Willfulness requires deliberate act that intentionally causes injury. Malicious requires that act be done in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm. Conversion of a secured creditor's collateral may constitute willful and malicious injury. Complaint that alleged that corporation, through or at the direction of the Debtor, intentionally did not pay creditor the sales proceeds despite knowledge of its security interest in the proceeds and that the Debtor knew that injury was substantially certain to occur; and that the Debtor "appropriated" and "converted" the sales proceeds, "with fraudulent intent," "for his own use or benefit," and that the wrongful acts were "without just cause or excuse" stated cause of action for willful and malicious injury.

(3716) *Tweedie v. Hermoyian,* 466 BR 348 (Bankr. E.D. Mi. 2012) –Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that Debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malice were actually litigated. Arbitration award also did not find that Debtor ever intended to injure plaintiff. Although award made numerous findings that Debtor intended to deceive plaintiff, that does not equate to finding the Debtor intended that plaintiff would lose those funds or that Debtor was substantially certain that plaintiff would suffer injury.

(3717) *BCC Holding, Inc. v. Alexander,* 212 WL 1122952 (Bankr. W.D. Tn. 20120 – Conversion requires proof that defendant wrongfully obtained or exercised possession or control over property of plaintiff. Complaint sufficient under *Twombly* standard to state cause of action by alleging that Defendants collected rent from tenants in property that had been foreclosed on and was now owned by Plaintiff. Complaint alleged that Plaintiff was the owner of the property; that the property was occupied and used as rental property; that upon foreclosure, Plaintiff became entitled to all rental income and that Defendants lost all rights to the rental income; and that Defendants nonetheless continued to collect and keep the rents, thereby converting over $128,000 of rental income that belonged to Plaintiff. Allegations that Defendants received rents that belonged to Plaintiff and did not pay the rents to Plaintiff sufficient to establish that Defendants exercised control over property of Plaintiff. Allegation that Plaintiff made demand on Defendants evidenced Defendants' exercise of control was intentional and in defiance of true owner's rights. Plaintiff not required to plead with exactitude specific dates of the underlying promissory notes and mortgages, notices of default that lead to the foreclosure, specific addresses of properties involved, or specifically how Plaintiff calculated damages. Complaint fairly apprised Defendants of primary factual allegations, and parties could through discovery process.

(3718) *First Tennessee Bank, NA v. Hansen,* 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Section 523(a)(6) requires evidence

that Debtors intentionally and willfully caused injury. Willful requires that the act be voluntary, intentional or deliberate, with intent to cause injury or where injury is substantially certain to result, not merely an intentional act that leads to injury. Malice requires that Debtor engage in willful conduct without cause or excuse, or in conscious disregard of duties. Malice does not require determination of ill-will or specific intent, but does requires something beyond negligence or recklessness. Failure to act can constitute willfulness where intentional acts were done by another over whom the Debtor had control but failed to exercise control and knowingly or negligently allowed third party to cause harm. Bank failed to demonstrate willfulness sufficient to support finding of non-dischargeability. Debtors' grandson lived with Debtors in house that secured the Bank's loan. Grandson engaged in production of methamphetamines that so contaminated house that, after foreclosure, Bank had to gut house to cure contamination, resulting in substantial losses, Evidence did not indicate that Debtors were aware of, directed, condoned or ever benefitted from grandson's illegal activities. Bank also did not demonstrate willfulness. Bank could not demonstrate that Debtors knew of or condoned grandson's illegal activities, or that Debtors knew or reasonably should have known that activities were causing damages to property.

(3719) *Clearview Designs, Inc. v. Angelilli,* 2012 WL 76033 (Bankr. N.D. Ohio 2012) – Plaintiff must establish that the injury is both willful and malicious. Willful requires deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury and includes injury is substantially certain to result from the Debtor's actions. Malicious injury requires action taken in conscious disregard of the Debtor's duties or without just cause or excuse. State Court Judgment in favor of Plaintiff for violation of State Trade Secrets Act constitutes judgment between same parties for purposes of Collateral Estoppel. State Court judgment found that Debtor caused injury and intended to cause injury or that injury was substantially likely to occur when Debtor misappropriated trade secrets. Judgment further determined that Debtor had no legal right to misappropriate the trade secrets constituting malicious actions. Issues in Section 523(a)(6) action were determined in State Court Judgment. Collateral estoppel required summary judgment in favor of Plaintiff determining debt to be non-dischargeable.

(3720) *McCuride v. Strozewski,* 458 BR 397 (Bankr. W.D. Mi. 2011) – Determination as to whether debt results from willful and malicious injury and whether debt should be excepted from discharge lies solely in bankruptcy court. However, court will apply collateral estoppel where there is prior final judgment that incorporates findings of fact and determine whether, based on the facts that were actually and necessarily determined in the other tribunal, matter rises to level of willful and malicious. State Court judgment for intentional infliction of emotional distress established that Debtor either intended to cause harm or was so reckless that reasonable person would now harm would result, and that actions were extreme and outrageous demonstrated that actions were willful and malicious.

(3721) *Busenhart v. Repass,* 2011 WL 6013089 (Bankr. E.D. Ky. 2011) – State Court Judgment holding that actions of Debtor, although potentially libelous, did not cause any damage to Plaintiff collaterally estopped Plaintiff from recovering under Section 523(a)(6). Once the issue of damages had been fully and fairly litigated in State Court action, bankruptcy court would give preclusive effect to State Court judgment.

(3722) *Kenneth E. Watts Real Estate Management v. Lister,* 2011 WL 6908967 (Bankr. E.D. Ky. 2011) – Courts have identified a non-exclusive lists of misconduct that qualifies as willful and malicious, including intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises. Evidence indicated that Debtor intentionally vandalized rented residence. Debtor caused serious damage a. extensive damage to the garage door which required replacement; b. window screening removed in such a manner to require replacement; c. fecal matter on the toilet lid and in the bathtub; d. broken incandescent bulbs in overhead fixtures leaving the screw cap in the socket; e. vandalism to the electric system of the house, including cross wiring of the thermostat; f. a substance spilled on the carpet throughout the house which could not be cleaned and required replacement; g. a towel rod removed; and h. filth and discarded furniture throughout the house and yard. Damage went well beyond "normal wear and tear". Debtor failed to offer any evidence to rebut willful and malicious nature of harm. Debt excepted from discharge.

(3723) *McCallum v. Pixley,* Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a "true default judgment", defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were "actually determined" as part of default judgment. State Court complaint for conversion could meet requirements of "willful and malicious" under Section 523(a)(6) if conversion under Michigan is based on willful and intentional deprivation of another of property. However, allegations of complaint failed to demonstrate willful and malicious where complaint alleged only that Debtor converted property, as Michigan also allows action for conversion for unwittingly converting property or for use of property in improper way or improper purpose, even where use did not actually deprive another of possession. Judgment for conversion, that did not expressly find willful and malicious conversion as opposed to "unwitting" conversion, did not establish all elements of willful and malicious injury.

(3724) *Higbe v. Debaeke,* 2011 WL 5563543 (Bankr. E.D. Mi. 2011) – Section 523(a)(6) requires willful and malicious injury by the Debtor to another entity or to the property of another entity. Conversion may constitute willful and malicious injury depending on whether the Debtor intended to cause the harm or was substantially certain that the harm would occur. Conversion does not require intent to violate property rights of another or knowledge that one is violating property

rights of another. Conversion requires only that party intentionally retain the property even if the holder of the property is unaware of another person's property interest. Debtor converted personal property belonging to plaintiff where Debtor alleged that Debtor held a possessory security interest in the property but could not evidence that parties intended to create security interest as required by Uniform Commercial Code. Instead, it appeared that Debtor's possession of the property and Debtor's later loan to Plaintiff were unrelated transactions and Debtor's alleged security interest was an "afterthought" by the Debtor rather than an agreement between the parties at the time of the loan transaction. Although Debtor may not knowingly or intentionally converted property, Debtor did exert domain over property by refusing to return property to Plaintiff. Further, although Debtor converted property, Debtor's actions did not constitute willful and malicious injury as Debtor believed, albeit mistakenly, that he had the right to withhold possession until repaid. Debtor did not act with intent to cause harm or that Debtor's actions were willful within the scope of Section 523(a)(6).

(3725) *Hoffman v. Anstead,* 448 BR 202 (Bankr. N.D. Ohio 2011) – Debtor's actions in removing property from home of former live in partner prior to partner's death was based on Debtor's reasonable belief that property belonged to Debtor and that he had right to remove property. However, after live in partner died and executors obtained restraining order precluding removal of additional items until ownership could be determined, Debtor's continued removal of property constituted willful and malicious injury.

(3726) *Marshall v. Dickson & Campbell, LLC,* 2011 WL 249500 (S.D. Ohio 2011) – Debtor, an attorney, caused willful injury by releasing proceeds of litigation to client notwithstanding Court Order for Debtor to hold proceeds pending State Court determination of amount owed to client's prior attorney. Debtor intentionally released funds with actual knowledge of both a dispute as to ownership and a State Court Order precluding distribution. Evidence indicated that Debtor either intended to cause harm to prior attorney or that action in releasing funds was aware that the release of the funds would cause harm to the creditor.

(3727) *King's Welding & Fabricating, Inc. v. King,* 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff'd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee's actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to willful and malicious injury for purposes of Section 523(a)(4). No indication that employee's actions were done with intent to harm employer, where employer could not or would not perform the work done by the competing business.

(3728) *Stephens v. Morrison,* 450 B.R. 734 (Bankr. W.D. Tn. 2011) – Willful and malicious injury requires proof of intent to cause harm, not merely proof of act that produced harm and did so with conscious disregard of duties or without just cause or excuse. Debtor's obligation to homeowner non-dischargeable where Debtor obtained funds from homeowner for purposes of performing improvements to homeowner's property but used those funds for another purpose. Funds were given to Debtor specifically for work to be done on homeowner's property and not for other business purposes or debts of Debtor.

(3729) *Ewers v. Cottingham,* 2011 WL 2118247 Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband liable to wife's former employer from whom wife embezzled funds. To hold husband for wife's embezzlement, Plaintiff had to prove that husband had knowledge of wife's embezzlement and that husband participated in a schedule to convert plaintiff's money. Husband and wife had a combined yearly salary of no more than $105,000, yet their annual expenditures were, at the height of their spending, as large as four times that amount. Debtors shared joint bank accounts into and from which many of these funds flowed. Husband not only had access to those accounts to determine what funds were flowing in and out of them, but also that he from time to time wrote checks and made deposits. Husband signed tax returns, corresponded with the IRS over tax liens, and signed the paperwork indicating their financial status for the loan for their new home. Husband was also involved in several key financial decisions including the purchase of his new Jeep Commander that required a down payment of $9,717.00 plus sixty months of payments at $666.72 plus major interior and exterior renovations on home in an amount in excess of $40,000. Husband had knowledge of the $30,000 loan to purchase a new home and participated in a $30,000 spending spree for home improvements. Considering (1) the significant disparity between the Debtors' income and expenses, a disparity that continued to increase over the course of the embezzlement; (2) Husband's access to and participation in the family's finances; (3) the cost of the home improvements; and (4) Husband's knowledge that Patricia had recently pled guilty to embezzling funds from her prior employer, husband could not reasonably have believed that they were living within their means. Husband's use and enjoyment of the embezzled funds rises to the level of the "willful" and "malicious" conduct contemplated by § 523(a)(6).

(3730) *Bush v. Roberts,* 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Creditor must prove that Debtor actually intended injury to occur, not just that Debtor intended an action that resulted in an injury. Breakdown of business relationship including creditor's removal of Debtor's name from business accounts and line of credit. Debtor continued to make payments on line even after he was no longer legally obligated to do so. Debtor believed the money he drew from the business equaled his 40% share of the commissions generated, consistent with the agreed upon business structure. No proof that Debtor either intended to divert money with specific intent to cause harm or that Debtor took more money from business than Debtor was permitted to do under the partnership agreements.

(3731) *Gomez v. Carmona,* Case No. 08-2075 (Bankr. E.D. Mi. 2011) – Plaintiff's claim held non-dischargeable under Section 523(a)(6). Claim arose out of sexual harassment and hostile work environment. Debtor's actions in creating hostile work environment and in pressuring Plaintiff into sexual relationship under threat of loss of employment were "willful and malicious acts" sufficient to support a finding of non- dischargeability.

(3732) *Emergency Restoration Company v. Fiore,* Case No. 08-4685 (Bankr. E.D. Mi. 2011) – Willful and malicious injury requires intent to cause consequences or belief that consequences are substantially certain and no just cause or excuse. Injury must itself be intentional and deliberate, not just that act is intentionally taken and happens to cause injury. Plaintiff failed to prove that Debtor received money on behalf of plaintiff or that Debtor failed to turn over money to plaintiff. At most, evidence indicated a breach of contract which will not support action under Section 523(a)(6).

(3733) *JGR Associates, LLC v. Brown,* 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Under Section 523(a)(6), a debt "for a willful and malicious injury by the Debtor to another entity or to the property of another entity" is not dischargeable. Willful" means that a Debtor must "intend the consequences of an act or believe that the consequences are substantially certain to result. "Malice" means without just cause or excuse or acting in conscious disregard of one's duties. Although Plaintiffs may have demonstrated that manager of LLC wrongfully removed funds from the LLC, there was no evidence that manager did so with the intent of causing injury to the members of the LLC.

(3734) *In re Oxford,* 2010 WL 5050540 (Bankr. W.D. Ky. 2010) – Section 523(a)(6) excludes from discharge those injuries which are both willful and malicious. A "willful" injury is a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. The Debtor must actually intend the injury caused, not merely intend the act that causes the injury. Debtor's failure to repay loans does not constitute an "intentional act" and does not produce an "intentional injury". Debtors' "morally questionable conduct" does not rise to level of non-dischargeability under Section 523(a)(2).

(3735) *Morris v. Paine,* 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor's complaint sought judgment against the Bankruptcy Judges and Trustees in Tennessee pursuant to Section 523(a)(6). Section 523(a)(6) is an action available to creditors to deny the dischargeability of specific claims. Debtor lacks standing to bring actions under this section.

(3736) *Hudson & Muma, Inc. v. Muma,* Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State Court Judgment for misappropriate of trade secrets not entitled to preclusive effect where State Court Judgment did not require finding of either willfulness or malice as required for non-dischargeability under Section 523(a)(6).

(3737) *H. Park Partners, LLC v. Frick,* 427 BR 627 (Bankr. N.D. Ohio 2010) – Lack of direct involvement by Debtor in destruction of property does not preclude finding that debt is non-dischargeable where Debtor instructed third parties to remove property from premises and to cause damage to and destruction of remaining property. Although debt will not be found to be non-dischargeable where damages result from conduct of third party, where third party was hired by and was acting at direction of Debtor, actions were willful and malicious for purposes of Section 523(a)(6).

(3738) *Construction Design and Management, Inc. v. Reveiz,* 2010 WL 3631541 (Bankr. E.D. Tn. 2010) – In order to be successful under Section 523(a)(6), the Plaintiff must prove the existence of a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury and that the Defendant either desired to cause the consequences of his actions or believed with reasonable certainty that such consequences would occur. That a reasonable Debtor _should have known' that his conduct risked injury to others is simply insufficient. Instead, the Debtor must _will or desire harm, or believe injury is substantially certain to occur as a result of his behavior. Acts of conversion may serve the basis for a determination of non-dischargeability under Section 523(a)(6). Debtor hired contractor to construct condominium project, to be financed through construction loan from bank to Debtor. Debtor drew funds from construction loan but did not pay contractor. Contractor failed to prove non-dischargeability where contractor did not have any interest in the construction loan funds and was not party to construction loan agreement. Rather, all funds from construction loan were advanced to Owner generally and not for any specific project. At most, Owner breached contract between Owner and Contractor for payment of expenses, but breach of contract is not sufficient for willful and malicious injury. Further, contractor was aware that Owner was receiving draws and that Owner had used portions for other projects without protest and without contacting construction lender about non-payment of draws. Owner's actions in receiving construction loan draws and not paying contactor was not "malicious" as owner had agreed to or acquiesced in that conduct.

(3739) *Phillips v. Weissert,* Case No. 09-8032 (6th Cir. BAP 2010) - Actions in accusing individual of rape and in pursing those charges found by Bankruptcy court to constitute malicious prosecution constitute willful and malicious injury for purposes of Section 523(a)(6). Bankruptcy Court's factual findings that it was more than likely that the rape did not occur and that Debtor's actions caused person to be wrongfully prosecuted and imprisoned for rape were supported by evidence in the record and would not be disturbed on appeal.

(3740) *Fairdale Area Community Ministries, Inc. v. Hollingsworth,* 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – For the discharge exception under Section 523(a)(6) to apply, a Debtor must: (1) will or desire harm; or (2) believe injury is

substantially certain to occur as a result of his behavior. State Court Judgment for conversion constituted collateral estoppel on issues pertaining to dischargeability under Section 526(a)(6) where State Court found not only that Hollingsworth converted Ministries property, but that he also intended to interfere with Ministries' possession.

(3741) *Holmes Lumber & Building Center, Inc., v. Miller,* 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Section 523(a)(6) does not apply to debts discharged in Chapter 13 unless Debtor seeks hardship discharge. Where Debtor was not seeking hardship discharge, Section 523(a)(6) could not form basis of action to except debt from discharge.

(3742) *Hoffman v. Anstead,* 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a State Court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargeability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be indicative of simple forgetfulness or ignorance-clearly non-culpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(6).

(3743) *Humility of Health Partners v. Garritano,* 427 BR 602 (Bankr. N.D. Ohio 2010) – Injury must be both "willful" and "malicious" for a debt to be excepted from discharge as one for Debtor's "willful and malicious injury." "Willful" injury is one that is done voluntarily, intentionally or deliberately - Debtor must desire to cause consequences of his act or believe that those consequences are substantially certain to result from it "Malicious" injury is one that is done in conscious disregard of one's duties or without just cause or excuse. Chapter 7 Debtor-physician's failure to pay over what were admittedly the net proceeds of his medical practice, to which creditor that paid him his salary was entitled pursuant to terms of professional medical services agreement between them, under circumstances in which Debtor must have realized that his breach of terms of agreement would injure creditor, and without any explanation or excuse for his actions, was in nature of "willful and malicious injury," within the meaning of dischargeability exception. However, underpayments resulting from improper deductions taken by Debtor, which, while not permitted under terms of professional medical services agreement, were consistent with how he had previously operated his practice, were not shown to have been withheld with intent to injure, as required to except Debtor's debt for any such underpayment from discharge on "willful and malicious injury" theory.

(3744) *Kelly v. Aho,* Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Section 523(a)(6) requires injury that is both willful and malicious. Willful means acting with intent to cause injury, not just action that produces injury. Malicious means lack of any just cause or excuse or in conscious disregard of one's duties. Alleged misrepresentations to purchasers of homes to be constructed about construction delays are not sufficient to prove that Debtor intended actions to cause harm or that actions were taken in conscious disregard of Debtor's duties. Award of punitive damages in action for fraud, standing alone, is not sufficient to support finding of willful and malicious under Section 523(a)(6).

(3745) *Guerra & Moore, Ltd. V. Cantu,* 2010 WL 3059175 (5th Cir. 2010) – Section 523(a)(6) excepts from discharge any debt incurred for willful and malicious injury by the Debtor to another entity. "Willful and malicious" is a unitary concept such that an injury is "willful and malicious" where there is either an objective substantial certainty of harm or a subjective motive to cause harm. Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful absent an objective substantial certainty of harm or a subjective motive to cause harm that established a "willful and malicious injury." Tortious "interference" by itself, a sufficient "injury". Party alleging tortious interference must prove four elements to sustain its claim: (1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred. Intentional interference does not require intent to injure, only that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. State Court judgment against Debtor for tortuous interference would not render judgment non-dischargeable absent proof of either subjective intent to cause harm or objective "substantial certainty" of harm.

(3746) *Tennessee Commerce Bank v. Detweiler,* 2010 WL 2756759 (Bankr. N.D. Ohio 2010) – Section 523(a)(6) excepts a debt from discharge only where the debt results from intentional and malicious conduct. Debtor's action in selling personal property that was subject to a security interest without remitting the proceeds to the secured creditor is no *per se* willful and malicious absent proof that by selling property, Debtor intended to cause injury to secured creditor. Debts arising from recklessly or negligently inflicted injuries do not fall with the compass of § 523(a)(6). Although knowingly disposing of a secured creditor's collateral will deprive the creditor of substantial rights that are fundamental to the Debtor-creditor relationship is a perceptible and known injury that is "substantially certain" to cause harm to the creditor, Section 523(a)(6) requires more. Debtor was engaged in business at the time of the disposition. Debtor testified that he intended to remain in business and to use proceeds generated through business to continue to make payments to creditor. Debtor's later default did not result in the debt being non-discharge.

(3747) *West Michigan Community Bank v. Wierenga,* 2010 WL 2403373 (Bankr. W.D. Mi. 2010) – To except a debt from

discharge under discharge exception for willful and malicious injury, creditor must prove three elements: (1) the Debtor's actions caused injury to the property of another entity, (2) the Debtor's actions were willful, and (3) the Debtor's actions were malicious. Kitchen cabinets, bathroom fixtures, interior doors, plumbing and carpet were "fixtures" under Michigan law such that title to the items passed to the bank at the time of the foreclosure sale. Items will be "fixtures" if the items were annexed or attached to the realty, adapted to the use of the realty, and were intended to be permanently affixed to the property. Debtor's removed kitchen cabinets, bathroom fixtures, light fixtures, interior doors plumbing and carpeting after Debtors lost the house at foreclosure sale but during the statutory redemption. Debtor-husbands removal of improvements from the property with intent to sell those improvements and a time when Debtor- husband knew that the property had been sold at foreclosure sale and was owned by the bank constitutes intent to remove improvements with full knowledge that removal of improvements would reduce the value of property, amounting to willful act for purposes of section 523(a)(6). Malice does not require any ill will or specific intent to do harm, only to do an act without just cause or excuse, but that is beyond negligence or recklessness. Debtor-husbands statement that he thought he owned the improvements constituted a mistake of law which is not sufficient to counter the clear intent to remove and sell the bank's property. Loss resulting from Debtor-husband's actions in removing the items would be non-dischargeable. However, loss would not be non-dischargeable as to Debtor wife were evidenced failed to establish that Debtor wife participated in the removal and disposition of the property and were all of the evidence offered pointed to Debtor-husband engaging in the willful and malicious acts without the involvement of Debtor-wife.

(3748) *Baker v. Simerson,* Case No. 08-2107 (Bankr. E.D. Mi. 2009) - Willful and malicious injury requires deliberate or intentionally injury, not merely a deliberate act that leads to injury. There must be intentional act intended or substantially certain to cause injury and a desire to cause injury and done with a conscious disregard of one's duties or without just cause or excuse, but does not require ill will. Debt resulting from automobile accident was dischargeable where Debtor's conduct, driving at a high rate of speed through a busy area, was certainly negligent, but there was no evidence of any intent to cause harm to anyone, much less the Plaintiff specifically. Debtor's failure to maintain insurance is a violation of law, but lack of insurance does not prove intent to cause harm.

(3749) *Hogan v. George,* Case No. 09-5065 (Bankr. E.D. Ky. 2009) – Action under Section 523(a)(6) requires that debt arise from willful and malicious injury. Debt must result from conduct that is both willful and malicious. Willfulness requires intent to cause injury, not merely intentional act that results in injury. Breach of contract will not support finding under Section 523(a)(6) unless defendant intended to cause harm by breaching contract. State Court litigation that permitted finding based on finding of "willful *or* malicious" could not support entry of judgment based on collateral estoppel, as State Court did not find that actions were both willful and malicious.

(3750) *Ormsby v. First American Title Company,* 591 F.3d 1199 (9th Cir. 2010) – Section 523(a)(6) prevents discharge for willful and malicious injury by the Debtor to another entity or to the property of another entity. Willfulness requires that Debtor intend the consequences of the act, not simply the act itself; or the injury must be substantially certain to occur as a result of Debtor's actions. Malicious requires a wrongful act, done intentionally, which necessarily causes injury, and is done without just cause or excuse. Debtor's theft of trade secrets and confidential information of competitor and hiring management level employee of competitor expressly for purpose of gaining access to competitor's trade secrets and confidential information were actions that were substantially certain to cause injury to competitor and were done with no just cause or excuse. Debtor's actions were willful and malicious sufficient to be non-dischargeable.

(3751) *Musilli v. Droomers,* 2010 WL 2222806 (6th Cir. 2010) – Section 523(a)(6) excepts a debt from discharge where the Debtor intended to cause harm or believed that injury is substantially likely to occur as a result of his behavior. Nondischargeability required deliberate or intentional injury, not just an intentional act that causes injury. Debtor who pre-petition transferred money in willful disobedience of State Court Order and knowingly and intentionally transferred money and assets to themselves and others that Debtor knew would injure State Court Plaintiff violated Section 523(a)(6). State Court action found Debtor in criminal contempt of court based on transfers. Contempt penalty constitutes a non-dischargeable willful-and- malicious injury as a matter of law.

(3752) *Double v. Cole,* Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which Debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to wave the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.

(3753) *Murawski v. Campbell,* Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Complaint to deny discharge in Chapter 13 proceeding which referenced Section 523(a)(6) would be treated as action to deny discharge of debt under Section 1328(a). Although Section 1328(a) does not incorporate Section 523(a)(6) as debt which is not dischargeable in Chapter 13, the similarity of the statutory language between Section 523(a)(6) and Section 1328(a)(4) is sufficient to allow the Court to consider the dischargeability of the debt under standards set forth in Section 1328(a)(4). Section 1328(a)(4) excepts from discharge any debt for damages awarded in a civil action arising from personal injury caused

by willful *or* malicious injury, which is a lower standard than Section 523(a)(6) which requires willful *and* malicious injury, but does require that the damages be "awarded". Jury verdict that determined liability and damages for assault and battery would be "award" even though bankruptcy petition prevented State Court from entering judgment based on the verdict. Section 1328(a)(4) does not require that "award" be reduced to an enforceable judgment.

(3754) *In re Merena,* Case No. 08-1342 (9th Cir. BAP 2009) – Under Section 523(a)(6), aggrieved party must present evidence that the Debtor: (a) willfully injured the creditor or the creditor's property, not merely a deliberate or intentional act that leads to injury; and (b) the injury was malicious, constituting a wrongful act, done intentionally, which necessarily causes injury, and is done without just cause or excuse.

(3755) *Tomlin v. Crownover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – To prove a case under §523(a)(6), creditor must establish that Debtor willfully and maliciously caused injury. Conduct must be deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Lack of justification or excuse for Debtor's actions is not enough to prove willful and malicious conduct. Willfulness requires more than proof that Debtor should have known his decision and actions would put plaintiff at risk. Creditor must show by preponderance of evidence that Debtor intended his actions aimed Debtor either intended actions to cause injury or Debtor believe the injury was substantially certain to follow. "Malicious" standard requires a lack of justification to support the actions. State Court award of treble damages under State Consumer Protection Act does not satisfy standard of willful and malicious as State Court act requires only that Debtor intended to take the action that does not require that Debtor intended to cause harm. State Court finding that Debtor breached covenant of good faith did not constitute intent to cause harm but merely amounts to a breach of contract or breach of warranty.

(3756) *Sher v. Dunbar,* Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Creditor's action to deny discharge based on alleged fraud under section 523(a)(2)(a) barred by collateral estoppel and judicial estoppel based on prior unconfirmed state arbitration conclusion that Debtor did not commit fraud in underlying transaction.

(3757) *Issacs Cars, Inc. v. Woods,* 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(6), Plaintiff must prove that Debtor intended to take act that cause harm and did so with intent to cause harm. Debtor who was "aware" of business's financial difficulties did not run business and had no knowledge that business was selling cars "out of trust". When possible sales out of trust were brought to Debtor's attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to harm Plaintiff Financing Agency.

(3758) *Baker v. Wentland,* 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Section 523(a)(6) renders non- dischargeable a debt for willful and malicious injury by the Debtor to another entity or to the property of another entity. Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious and that injury itself was intentional, not just that the injury results from an intentional act. Debtor must either desire to cause the harm or believe that harm is substantially certain to result for injury to be willful and malicious. Malicious requires proof that Debtor acted with deliberate malevolence or that Debtor acted in conscious disregard of duty. Debtor's use of funds withheld from employees for payment of business expenses rather than for the purpose for which they were withheld without just cause or excuse constitutes willful and malicious injury caused by Defendant to extent of funds withheld. However, unpaid medical expenses as a result of Defendant failing to pay the employee health insurance premium did not constitute non-dischargeable debt where Plaintiff has failed to show that Debtor intended the economic injury sustained by Plaintiff or that it was substantially certain to follow from her decision to pay other business expenses instead. There was no evidence that Debtor was aware of the fact that Plaintiff was ill or had been diagnosed with cancer before the employee health insurance plan was cancelled. While it was certainly foreseeable that the Company's employees could incur medical expenses after the health insurance was cancelled, foreseeability does not equate with substantial certainty.

(3759) *Huntington National Bank v. Moore,* 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Section 523(a)(6) requires the Debtor have acted willfully and maliciously. Injury must be deliberate or intentional, and not merely a deliberate or intentional *act* that leads to injury. Debtor's alleged use of materially false financial statements to obtain loans does not constitute intent to willfully or intentionally cause injury.

(3760) *Pearce v. Muncey,* 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(6) requires that Debtor act with the intent to cause injury, not merely that the Debtor acted intentionally but without intent to cause harm. Debtor must desire to cause the consequences of act or believe that the consequences are substantially certain to result. Debtor did not act with intent to cause harm by allegedly failing to disclose full extent of fire damage when Debtor disclosed fire and accurately disclosed damage that Debtor was aware of but was not aware of additional non-disclosed damage.

(3761) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Debt that results from "willful and malicious injury" will be non-dischargeable. Creditor must prove that Debtor desired to cause the consequences of the act or belief that the consequences were substantially certain to result; and (2) no just cause or excuse. Non-dischargeability under Section 523(a)(6) requires deliberate or intentional injury, not merely deliberate or intentional

act that leads to injury. Debtor who received $18 million from Creditor to be paid to vendor instead retained funds acted with conscious disregard for contractual duties without justification and with certainty that actions would cause harm to Creditor. Debt non-dischargeable under Section 523(a)(6).

(3762) *Sanderson Farms, Inc. v. Gasbarro,* 2008 WL 4764118 (6th Cir. 2008) - To prevail in action under Section 523(a)(6), plaintiff must prove either that the defendant intended to cause harm to the plaintiff or, alternatively, that defendant was substantially certain that the actions would cause harm to the plaintiff. Creditor proved that Debtor, while an officer of a corporation, caused the corporation to purchase goods from Creditor while simultaneously causing the corporation to transfer hundreds of thousands of dollars to Debtor's family members and to entities controlled by Debtor and his family members, leaving corporation unable to pay obligations owed to Creditor constituted sufficient evidence of "substantial certainty" that Debtor's conduct would cause harm to support cause of action under 523(a)(6).

(3763) *JP Morgan Chase Bank v. Zwosta,* 2008 Fed App 0016P (6th Cir. BAP 2008) – Debtor's use of money which was subjected to a perfected security interest to instead pay trust fund tax liabilities owed to IRS was not *per se* a willful and malicious injury to the secured creditor which would render the obligation non- dischargeable. Although Creditor had a perfected security interest in the funds which was superior to any claim of the IRS, whether the Debtor's action in paying those funds to the IRS caused any injury to the secured creditor and, if so, whether the injury was both "willful" and "malicious" presented questions of fact which was not appropriate for summary judgment.

(3764) *Whitaker v. Koenig,* 2009 WL 3241744 (Bankr. E.D. Tn. 2009) – To prevail under section 523(a)(6), plaintiff must prove existence of a deliberate intentional injury, not merely a deliberate or intentional act that leads to injury. To be "willful", Debtor must "will or desire harm, or believe injury is substantially certain to occur as a result of his behavior". Bankruptcy Court is required to look into Debtor's mind subjectively in order to determine whether Debtor intended to cause the consequence of his act or believe that the consequences were substantially certain to result. "Malicious" does not require "ill will or specific intent to do harm", but does require more than mere negligence. Debtor, a building contractor, falsely represented to customer that money advanced by customer to Debtor would be used to pay for expenses related to customer's construction. Instead, Debtor used all of the money to pay bills and expenses on projects entirely unrelated to customer's project. Court concluded that Debtor acted "willfully" because at the time Debtor obtained the payment from the customer, Debtor did not intend to use it for the purposes represented to customer, evidencing an intent to convert those funds to Debtor's own use or with a substantial certainty that conversion of those funds would result from Debtor's act. Court found Debtor's actions to be "malicious" because Debtor undertook them "in conscious disregard of these duties to" his customer with no just cause or excuse.

(3765) *Morganroth & Morganroth, PLLC v. Stollman,* Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Section 523(a)(6) excepts from discharge debts resulting from "willful and malicious injury". "Willful" requires desire to cause consequences or knowledge that consequences are substantially certain. "Malicious" means no just cause or excuse. However, "malicious" does not require ill-will or evil intent. Section 523(a)(6) requires deliberate or intentional injury, not just intentional conduct that leads to injury. Conversion, if willful and malicious, constitutes injury to property within scope of Section 523(a)(6). Debtor's actions in obtaining and spending money that was subject to a lien in favor of Plaintiffs, done with full knowledge of Debtor that the money was subject to liens, constituted willful act of conversion of funds. Debtor's only excuse for conduct was she needed the proceeds to pay her own expenses does not constitute just cause or excuse for wrongful conduct. Section 523(a)(6) also supports a finding of non-dischargeability based on a "willful and deliberate breach of contract" accompanied by an "intention to cause economic injury". Debtor's actions evidence a willful and deliberate breach of contract accompanied by aggravating circumstances. Plaintiffs could have exercised rights and seized all proceeds before they were disbursed. Instead, Debtor convinced Plaintiffs not to do so by giving them liens on the proceeds, and then obtained, used and concealed her use of the proceeds in complete disregard for Plaintiffs' interests in the proceeds. Debtor's act of misappropriating the funds for the express purpose of preventing Plaintiffs from enforcing their liens constitutes aggravating circumstances that elevate Debtor's conduct beyond mere breach of contract leaving resulting debt non-dischargeable to extent of proceeds Debtor wrongfully obtained.

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(3766) *US v. Daley,* Case No. 17-10962 (E.D. Ma. 2018) – Ten percent "exaction" when person prematurely withdraws funds from qualified retirement account is not itself "ta" or "compensation for actual pecuniary loss" by government and so is not entitled to priority treatment. In determining whether item is tax or penalty that is priority, court must determine whether charge is pecuniary burden laid on individual or property for purpose of defraying expenses of government. Items I "penalty" if it intended as punishment for unlawful at. Exaction for purposes of Code is penalty where goal is to deter unlawful conduct of prematurely withdrawing funds and not to provide funds to run government, Penalty is not entitled to priority treatment as penalty is not intended as compensation for actual pecuniary loss, as primary purpose is to deter taxpayers from prematurely withdrawing funds. Exaction resulting from premature withdrawal is non-priority penalty characterized as unsecured claim and are dischargeable under Section 1328.

(3767) *Andrews v. Michigan Unemployment Insurance Agency,* 2018 WL 2410808 (6th Cir. 2018) - Penalties assessed for fraudulent conduct are part of damages awarded for fraud and are nondischargeable under Section 523(a)(2). Fact that penalties owed to governmental units may also be included in Section 523(a)(7) does not preclude finding that penalties are part of fraud debt. Various subsections of Section 523 are not mutually exclusive and the same conduct can fall within 2 or more separate subparagraphs. Although debt for penalties owed to governmental unit would be dischargeable under Section 1328, penalties incident to fraud are not dischargeable under Section 523(a)(2) for which Section 1328 does not create an exception.

(3768) *Kozlowski v. Unemployment Insurance Agency,* 2016 WL 6405806 (E.D. Mi. 2016), *aff'd,* Case No. 16-2383 (6th Cir. 2018) – Penalties for fraudulently obtained unemployment benefits are part of "damages" arising from fraud and are non-dischargeable under Section 523(a)(2). While penalties may also be non-dischargeable under (a)(7), sections are not mutually exclusive. Even if penalties under (a)(7) are dischargeable in Chapter 13, penalties that flow from fraud are not excepted from discharge under (a)(2) and are not dischargeable in Chapter 13.

(3769) *Wayne County v. Newell,* 2016 WL 3995940 (E.D. Mi. 2016) – Attorney fees owed to governmental unit are not excepted from discharge where fees are intended to compensate government for actual pecuniary loss. After Debtor sued County, case evaluation resulted in proposed resolution of $290,000. After Debtor rejected offer, action went to trial and resulted in judgment for County awarding Debtor nothing. County then sought award of attorney fees pursuant to Michigan statute governing case evaluation. State statute provided for recovery of "actual costs" and attorney fees. Nothing in statue indicated that award was intended to be punitive in nature. Award instead is for actual pecuniary loss that is dischargeable under Section 523.

(3770) *State of Michigan Unemployment Insurance Agency v. Green,* 2016 WL 4750137 (Bankr. E.D. Mi. 2016) – Overpayment of unemployment benefits is not dischargeable to extent of actual damages under Section 523(a)(2). Statutory penalties are not dischargeable under Section 523(a)(7) where obligation is payable to and for benefit of governmental unit; is in nature of fine, penalty or forfeiture and is not compensation for actual pecuniary loss. Administrative agency is "governmental unit" as defined in Section 101(27). UIA is governmental unit and statutory penalties are payable to and for benefit of Agency. Statutory penalties are not compensation for actual pecuniary loss where penalties are separate part of restitution obligation independent of restitution obligation for actual overpayment. Purpose of penalties is not to reimburse UIA for costs or damages but to punish and deter fraud. Fact that amount of penalties is calculated based on amount of actual overpayment does not alter conclusion that penalties are primarily punitive in nature and are not dischargeable under Section 523(a)(7).

(3771) *In re* McCarthy, Case No. 13-30959 (Bankr. D. Ma. 2016) – Taxes owed based on late filed tax returns filed more than three years before petition date are not dischargeable. However, penalties assessed for failure to file returns are controlled by Section 523(a)(7) which governs penalties, not Section 523(a)(1) which governs taxes. Under Section 523(a)(7), penalties are dischargeable if the event giving rise to the penalty occurred more than three years before petition date. Relevant date for tax penalties is date on which tax returns were due. Penalties where therefore discharged and state violated discharge injunction in attempting to collect those penalties.

(3772) *Auto-Owners Insurance Company v. Smith,* 2016 WL 787119 (E.D. Mi. 2016) – Section 523(a)(7) excepts from discharge fines, penalties, and forfeitures payable to and for the benefit of a governmental unit and that is not compensation for actual pecuniary loss. Restitution orders entered as part of criminal proceedings are excepted from discharge are imposed as part of criminal sentence. Fact that amount of restitution is determined in whole or in part on injuries suffered by victim does not change fact that restitution is inherent part of State Court criminal proceeding and imposed as sanction under criminal law. Victim has no control over whether restitution will be ordered or amount of restitution, and amount is not dependent solely on victim's injuries but reflects penal goals of State and financial condition of defendant. Further, restitution is important aspect of sovereign power of state and Supreme Court has previously stated that Bankruptcy Courts should not invalidate results of state criminal proceedings. Supreme Court in *Kelly* stated that Section 523(a)(7) preserves from discharge any condition a State Court imposes as part of criminal sentence.

(3773) *Branch v. 30th District Court,* 2015 WL 515391 (Bankr. E.D. Mi. 2015) – 11 USC Section 523(a)(7) excepts from discharge any fines, penalties or forfeitures payable to and for the benefit of a governmental unit that is not compensation for any actual pecuniary loss. Traffic tickets issued pre-petition are all for fines and penalties for the benefit of the governmental unit and are not compensation for actual pecuniary loss.

(3774) *Tobin v. Florida Bar,* 2014 WL 4233368 (11th Cir. 2014) – Florida Bar is governmental unit for purposes of Section 523(a)(7).

(3775) *In re Dickerson,* 2014 WL 1761952 (Bankr. D. Idaho 2014) – Fines owed to governmental entities are excepted from discharge. However, statutory "surcharge" was not excepted from discharge where surcharge was designed to reimburse governable agency costs of collection of fines. Further, as fines had already been paid, surcharge imposed by collection agency was not fine or penalty owed to governmental agency, but were owed solely to the collection agency and represented compensation for actual pecuniary loss. Collection agency that recovered fines but then sought judgment to require Debtors to pay surcharge violated discharge injunction warranting aware of attorney fees and costs to Debtors.

(3776) *Mitchell v. Supreme Court of Ohio,* 2014 WL 1024026 (Bankr. N.D. Ohio 2014), *aff'd,* 2015 WL 1530626 (N.D. Ohio 2015) – Bankruptcy does not discharge fine, penalty, or forfeiture payable to or for the benefit of a governmental unit and is not compensation for actual pecuniary loss. Costs imposed as part of attorney discipline proceeding constitute fine or penalty; are payable to governmental unit; and are not compensation for actual pecuniary loss. Assessment of costs is penal in nature and designed to protect the public. Where primary purpose is to protect public, rather than for compensation for the victim, the charge is not to recover actual pecuniary loss but is part of the punitive process. Although cost assessments may look like compensation, goal is not to make government whole but to discourage future conduct as part of quasi-criminal proceeding. Obligation for costs is not dischargeable.

(3777) *Heitmanis v. Rayes,* 2013 WL 3784159 (Bankr. E.D. Mi. 2013) – Section 523(a)(7) excepts from discharge debts that are fines, penalties, or forfeiture payable to or for the benefit of a governmental unit and is not compensation for actually pecuniary loss. Section 523(a)(7) is not applicable if either (a) the penalty is payable to the individual victim who is not a governmental unit; or (b) penalty is strictly calculated in the sum of the victim's damages. Restitution was discharged where restitution was payable to probation department but funds would then be forwarded to the victim and not retained by governmental unit. Fact that government acts as conduit for payment does not make restitution payable to the governmental unit. Further, amount of restitution was based on actual loss by victim and was payable to address that loss.

(3778) *Commonwealth of Pennsylvania v. Styer,* 2012 WL 3717953 (Bankr. E.D. Pa. 2012) – Restitution obligation imposed on defendant as condition for probation are dischargeable. Recognizing split of circuits on issue where restitution is designed to reimburse crime victims, court concluded that although restitution is paid to the government, restitution order was based on specific amounts to be reimbursed to each person harmed, with a specific amount owed to each victim. Section 523(a)(7) requires that the pecuniary benefit of the restitution must flow to the government. Where the government was merely collecting, and would pass along sums to victims themselves, amounts are not excepted from discharge as penalty or fine.

(3779) *Michigan Attorney Grievance Comm'n v. Stasson,* Adv. No. 11-6930 (Bankr. E.D. MI. 2012) - Order issued by Michigan Attorney Discipline Board required attorney to pay restitution and costs does not create nondischargeable obligation under section 523(a)(7). Section 523(a)(7) excepts from discharge a fine, penalty or forfeiture that is not intended as compensation for actual pecuniary loss. An Order to pay restitution to a former client is not a debt "payable to" or "for the benefit of" a governmental unit. Further, any award of restitution is clearly intended to compensate the former client for the client's actual pecuniary loss, and is not intended to be penal nature. Order to pay costs incurred by State Bar, although constituting a debt payable to a governmental unit, constitute an effort to reimburse the State Bar for the out-of-pocket expenses incurred in disciplinary proceedings.

(3780) *In re Browning,* 449 BR 902 (Bankr. W.D. Ky. 2011) – Restitution Order entered in connection with criminal conviction is not dischargeable. Debtor's obligation to pay restitution to clerk of court for benefit of victim constitutes fine, penalty or forfeiture payable to and for the benefit of a governmental unit, even if the funds may ultimately be redirected by the clerk of court to the crime victim.

(3781) *In re Love,* 442 BR 868 (Bankr. M.D. Tn. 2011) – Costs associated with multiple hearings before State Board of Professional Responsibility arising out of series of disciplinary proceedings against Debtor are dischargeable. Costs related to disciplinary proceeding are not in the nature of a fine, penalty or forfeiture, but are attempt to recover costs and expenses incurred by State Disciplinary body, thereby constituting compensation for actual pecuniary loss. State cannot attempt to recover these discharged expenses and may not hold Debtor's law license "hostage" until these expenses are paid.

(3782) *State of Michigan v. Turner,* Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Section 523(a)(7) exempts from discharge debt that constitutes a fine, penalty or forfeiture, but not compensation for actual pecuniary loss. Debt must arise as a punishment or sanction for some type of wrongdoing and must be payable to a governmental unit and for the benefit of a governmental unit. Debtor's wrongful receipt of unemployment benefits required Debtor to repay amount of benefits wrongfully received in the amount of $8,000 plus penalties of $32,000.00. Although $8,000 constituted compensation for the actual pecuniary loss represented by the overpayment, the additional $32,000 was a penalty that was non-dischargeable. Non- dischargeable status of penalty does not depend on dischargeability or non-dischargeability of underlying obligation. Penalty is non-dischargeable even if the damages for the underlying conduct are discharged.

8.207 Section 523(a)(8) – Student Loan Defined

(3783) *In re Locke,* Case No. 15-31022 (Bankr. E.D. Mi. 2018) – "Student loan" includes amounts received by University from United States Department of Education where University is later required to refund money to DOE after student withdraws from classes. Fact that University sued Debtor approximately 3 years before bankruptcy filing but did not allege that obligation constituted "student loan" did not prohibit University from raising status of loan in dischargeability proceedings. Res judicata bars claims that were already litigated plus any claim arising from same transaction but does not require University which filed a lawsuit 3 years before bankruptcy filing to anticipate potential bankruptcy filing 3 years later. Whether debt owed to university was student loan was not issue in state Court proceedings and university was not obligated to raise status of loan in that proceeding. University provided timely notice to Debtor that university returned funds to DOE where regulations in 34 CFR Section 668.22 allowed university 30 days from end of enrollment measured by last day of class or exam to determine whether University was required to refund money to DOE; and additional 30 day period within which to inform Debtor of Debtor's obligation to repay. Last day of classes was April 29 which triggered 30 day period for University to make determination whether funds should be returned; and additional 30 days to notify Debtor that she was required to repay money. University made timely determination that funds needed to be returned to DOE and advised the Debtor approximate 23 days after returning funds.

(3784) *Ramani v. Romo,* Case No. 17-2107 (Bankr. E.D. Mi. 2018) – "Student Loan" is defined as educational benefit overpayment alone made, insured or guaranteed by governmental unit or made under program funded in whole or in part by governmental unit or nonprofit institution; or obligation to repay funds received as educational benefit, scholarship or stipend; or any other educational loan that is qualified education loan. 26 USC Section 221 defines "qualified education loan" as any indebtedness incurred by taxpayer solely to pay qualified higher education expenses incurred on behalf of taxpayer, spouse or dependent; paid or incurred within reasonable period of time before or after indebtedness is incurred; and attributable to education furnished during period for which recipient was eligible student. "Qualified education loan" also includes any indebtedness used to refinance qualified education loan other than indebtedness owed to person related to taxpayer. 26 USC Section 267 defines "related" as brothers, sisters, spouse, ancestors and lineal descendants. Collateral estoppel applies in dischargeability proceedings and bars re-litigation of issue where new action is between same parties or privies; earlier proceeding led to valid final judgment; issue in question was actually and necessarily determined in prior proceeding; and parties had full and fair opportunity to litigate issues. Prior State Court judgment in favor of Plaintiffs and against Defendant conclusively determined that obligation from Defendant to Plaintiffs arose out of Plaintiffs refinancing Defendant's student loan indebtedness; and conclusively determined that Plaintiffs were Defendants in-laws which are not included in definition of "related". State Court judgment resulted from action between same parties. Complaint in state Court action alleged all facts necessary to establish judgment as well as all elements under Section 523(a)(8) and 26 USC Section 2221(d)(1). Defendant had full and fair opportunity to litigate issues but failed to do so resulting in default judgment.

(3785) *DeWine v. Dudley,* 2017 WL 8772047 (Bankr. S.D. Ohio 2017) – "Educational benefit" is not defined anywhere in the Bankruptcy Code must be a form of financial assistance that provides the same function to students but where there is no initial obligation to repay and not necessarily expected at outset but may arise in response to, or be contingent on, conduct of recipient. Section 523(a)(8)(A)(ii) is not 'catch-all' provision designed to encompass any educational claim arising out of any transaction that bestows educational benefit on a debtor. Debtor's debt arose from employment as Designated Financial Officer for Ohio State School Districts and is penalty for improper, or at least incomplete, job performance as found by State Auditor Liability is not obligation to repay educational funds received in form of benefits or conditional grant provided to help finance Debtor's education. Exception from discharge was intended to apply to student loans and other types of financing mechanisms available to enable students to further their education. Debtor's liability for alleged financial mismanagement of School District funds does not fall within the scope of statute.

(3786) *In re Essangui,* 573 BR 614 (Bankr. D. Md. 2017) – Before reaching question of hardship, Court must first determine if obligation is "student loan" within scope of Section 523(a)(8). Section 523(a)(8) excepts from discharge three different categories of obligations. Section 523(a)(8)(A)(i) incudes educational benefit overpayments or loans made, insured or guaranteed by governmental unit; or made under any program funded in whole or part by governmental unit or non-profit institution. Section 523(a)(8)(A)(ii) includes any obligation to repay funds received as educational benefit , scholarship or stipend. Section 523(a)(8)(B) includes any other educational loan as defined in Section 221 of the Internal Revenue Code and is incurred by debtor who is individual. Debtor received Citi-Assist loans which Debtor used to pay fees and purchase books as well as pay rent and living expenses while attending non-accredited educational program. Loan was not within Section 523(a)(8)(i) as loan was not made by governmental unit or non-profit and was not guaranteed by governmental unit. Loan was not within Section 523(a)(8)(B) because loan was not "qualified education loan" where institution was not accredited. Obligation was not within Section 523(a)(8)(A)(ii) as obligation was not "funds received as educational benefit, scholarship or stipend. Section 523(a)(8)(A)(ii) conspicuously excludes reference to "loans" and focuses on items more particularly included as grants that would not have to be repaid but for failure of some condition such as graduation. Congress specifically used phrase "education loan" in other subsection of Section 523(a)(8) and so must have meant something different by reference to "educational benefit". Otherwise, Section 523(a)(8)(A)(ii) would be completely subsumed by other subsections of Section 523(a)(8) and rendered superfluous. Although loans were specifically intended to pay for "educational benefit" and were used for that purpose, private loans were dischargeable as loans did not fall within any of three exceptions set out in Section 523(a)(8).

(3787) *Kashikar v. Turnstile Capital Management, LLC,* Case No. 16-1298 (9th Cir. BAP 2017) – Section 523(a)(8) except from discharge any educational benefit overpayment or loan made, insured or guaranteed by governmental unit or under any program funded in whole or in part by governmental unit or nonprofit institution (Section 523(a)(8)(i)); any obligation to repay funds received as educational benefit, scholarship or stipend (Section 523(a)(ii)); or any other educational loan that is a qualified education loan as defined in 26 USC Section 221 (Section 523(a)(8)(B). "Qualified education loan" requires that loan in question before "eligible education institution" as defined in 26 USC Section 221. Parties agreed that offshore institution was not "eligible education institution" such that exception to discharge found in Section 523(a)(8)(B) did not apply. Section 523(a)(8)(ii) includes funds disbursed to Debtor as well as educational benefits or scholarships or stipends disbursed directly to educational institution. However funds must be "educational benefit, scholarship or stipend". Code draws distinction between "funds received as educational benefit" and "loan made", treating the 2 types of obligations in 2 separate subsections of Section

523(a)(8), with loans being specifically treated in Subsection (i) while "funds received as educational benefit" are treated in Subsection (ii). Loan provided by third-party lender does not constitute "funds received as educational benefit" within scope of Subsection (ii) and, therefore, loan is not within scope of Section 523(a)(8)(A)(ii). Action remanded to Bankruptcy Court for ruling on applicability of Section 523(a)(8)(A)(i) only.

(3788) *In re Meyer,* 2016 WL 3251622 (Bankr. N.D. Ohio 2016) – Student loans advanced by university itself fare not "educational loans" within scope of Section 523(a)(8). University advanced funds to allow Debtor to attend school. Debts were not made, insured or guaranteed by any governmental unit and were not made under any program funded in whole or part by governmental unit or non-profit institution, and were not "qualified education loans" as defined in Internal Revenue code as school was foreign school that was not accredited in United States. Fact that loans were now serviced by US-based servicers did not change fact that amounts owed, while educational "debts" were not educational loans within definition of Section 523(a)(8).

(3789) *Decena v. Citizens Bank,* 2016 WL 1371031 (Bankr. E.D.N.Y. 2016) – Private student loans for Debtor to attend unaccredited and unlicensed foreign medical school are not student loans that are excepted from discharge. Loans were not made, insured or guaranteed by government and so do not fall within Section 523(a)(8)(A)(i); and loans were not "qualified educational loans" as defined by OIRS because school was unlicensed and unaccredited, so that Section 523(a)(8)(B) does not apply. Section 523(a)(8)(A)(ii) does not apply because loans were not "educational benefit, scholarship or stipend" under circumstances of this case.

(3790) *Doyle v. Creeger,* 2016 WL 3049972 (Bankr. N.D. Ohio 2016) – Section 523(a)(8) excepts four categories of educational claims from a Debtor's discharge: (1) loans made, insured, and/or guaranteed by governmental units; (2) loans made under any program partially or fully funded by a governmental unit or a nonprofit institution; (3) claims for funds received as an educational benefit, scholarship, or stipend; and (4) any "qualified educational loan" as that term is defined in the Internal Revenue Code. The term "qualified education loan" means any indebtedness incurred by the Debtor solely to pay qualified higher education expenses (A) which are incurred on behalf of the Debtor as of the time the indebtedness was incurred, (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and (C) which are attributable to education furnished during a period during which the recipient was an eligible student; and includes indebtedness used to refinance indebtedness which qualifies as a qualified education loan. "Qualified higher education expenses" is expenses associated with an "eligible educational institution". Purpose of Section 523(a)(8) is to protect financial integrity of student loan programs so that lenders will loan money to individuals who do not meet traditional underwriting standards. Private individual paying tuition for another person is not a "loan program". Loan was not made by governmental unit or by non-profit entity and expansion to purely private transactions is not consistent with public policy underlying Section 523(a)(8). Nature of transaction also indicated that payments of tuition were more in the nature of an "extension of credit" rather than a qualified educational loan. Debtor and Plaintiff were involved in romantic relationship at time of payments. Obligation to repay was not written down until over 5 years from date of first tuition payment. There were no agreements on terms of any repayment at time tuition was paid and when promissory note was finally executed it made no reference to student loans. Further, there was no evidence that loans were solely for educational expenses or whether loans included expenses other than qualified educational expenses. If loans included both educational and non-educational expenses, loans would not be excepted from discharge as expenses would not meet requirement that loans be solely for educational purposes.

(3791) *Campbell v. Citibank, NA,* 547 BR 49 (Bankr. E.D. N.Y. 2016) – Loan taken out for payment of expenses related to taking bar exam is not a "student loan" as used in Section 523(a)(8). Loan, titled "CitiAssist Bar Exam Loan", is not a loan for an "educational benefit", rejecting the concept that "any loan which related in some way to education" is an educational benefit. Section 523(a)(8) excepts only educational benefits, scholarships or stipends. Educational benefit is not properly understood to encompass any private consumer loan.

(3792) *D'Youville College v. Girdlestone,* 2015 WL 774791 (Bankr. W.D.N.Y. 2015) – To be non-dischargeable, there must be a loan. Debtor signed agreement with school to pay tuition but did not receive any cash distributions. Section 523(a)(8) excepts from discharge certain overpayments and loans but does not except debt for unpaid tuition. Educational indebtedness that does not result from actual loan is not excepted from discharge.

(3793) *Nunez v. Key Education Resources,* 2015 WL 1245003 (Bankr. D. Or. 2015) – Private student loans for Debtor to attend flight school dischargeable. Section 523(a)(8)(A) did not except debt from discharge because, while debt was for educational purpose, lender was not governmental unit or non-profit institution. Section 523(a)(8)(B) did not except debt from discharge because loans were not "qualified" education loans, which are defined by IRS as loans solely to pay qualified higher education expenses, defined as cost to attendance at eligible educational institution, which is defined as institution described in Section 481 of higher Education Act of 1965 and which is eligible to participate in programs under Title IV of that Act. Flight school was not eligible for Title IV aid according to promulgated lists and so were not qualified educational institutions.

(3794) *Institute of Imaginal Studies v. Christoff,* 2015 WL 1396630 (9th Cir. BAP 2015) – Tuition credits extended by school to student are not non-dischargeable student loans. Credits allowed Debtor to attend school at reduced tuition in exchange for promissory note to repay credits in future. Section 523(a)(8) makes non-dischargeable an obligation to repay funds received as educational benefit. Neither Debtor nor school "received" any funds that Debtor would have to "repay". Funds received requires actual relief of funds by Debtor or school, not merely reduced tuition costs.

(3795) *Brown v. Rust,* 2014 WL 1796154 (Bankr. E.D. Ky. 2014) – Section 523(a)(8) makes loans for educational benefits non-dischargeable if the educational benefit was made, insured or guaranteed by a governmental unit or under any program funded in whole or in part by a governmental unit including an obligation to repay funds received as an educational benefit, scholarship or stipend. Debt owed by Debtor to co-maker on student loan was non-dischargeable. Plaintiff co-signed Debtor's student loans. When Debtor defaulted, Plaintiff paid off loans. When Debtor later sought bankruptcy protection, Plaintiff filed action to have debt excepted from discharge. While debt was no longer owed to the lender, nothing in Section 523(a)(8) limits non-dischargeability to debts still owed to the lender, as long as the loan originally was obtained for an educational purpose.

(3796) *Tresedder v. National Collegiate Student Loan Trust 2005-2,* Case No. 12-99011 (W.D. Mi. 2013) – Private student loans are not discharged if the loans qualify as "educational loans" that are either made, insured or guaranteed by a governmental nit; or made under any program funded in whole or in part by governmental unit or by a non-profit institution. Whether loans are made for "educational purpose" depends on lender's intent in making loans and not Debtor's use of proceeds. Loan documents established that creditor intended loans to pay for Debtor's educational expenses Fact that Debtor used some or all of the proceeds to pay for personal expenses other than education does not remove loans from ambit of Section 523(a)(8). All loans were made by private lending institutions which, themselves, are not non-profit institutions. However, each lender purchased a guarantee from The Educational Resource Institute (TERI), a qualified non-profit institution. Although TERI did not make any payments to lenders on or in connection with guaranty, issuance of guarantee itself constitutes "funding" the program.

(3797) *Maas v. Northstar Education Finance, Inc.,* 2013 WL 3872183 (Bankr. W.D. Mi. 2013) – Section 523(a)(8) excepts from discharge loans made, insured or guaranteed by a governmental unit or nonprofit agency; any loan for other funds received as an "educational benefit"; or any other educational loan that is a qualified educational loan as defined in Section 221 of the Internal Revenue Code. Whether loan qualifies as "educational benefit" focuses on the stated purpose for the loan when it was obtained, not on how the loan proceeds were actually used. Section 523(a)(8) is not limited to loans used for tuition and does not exclude loans for items such as living or social expenses, or that enable a student to pay for room, board or other living expenses while in school where the loans have an educational benefit. Loans in question were made for educational purposes and were predicated on Debtor being a student. Loan documents specifically identify loans as "educational assistance loans" made under Total Higher Education Loan Program and loan documents explicitly state that loans are for educational purposes and, at least one of the loans was conditioned on Debtor being in final year of law school and on target to graduate in order to qualify for loan.

(3798) *In re Rumer,* 469 BR 553 (Bankr. M.D. Pa. 2012) – Debtor's claim that student loan debt did not qualify for exception under Section 523(a)(8) because loan was used for purposes other than educational expenses, rejected. In determining whether loan is "student loan", analysis focused on initial purpose of loan, not actual use of loan proceeds.

(3799) *Gorosh v. Posner,* 2010 WL 3489951 (Bankr. E.D. Mi. 2010) - Co-signor of Debtor's student loans who, post-petition, paid off those loans not entitled to except from discharge right to contribution from primary borrower. Plaintiff was not a lender, a governmental unit or a non-profit institution.

8.208 Section 523(a)(8) – Undue Hardship

(3800) *In re Martin,* Case No. 16-9052 (Bankr. N.D. Iowa 2018) – Applying more liberal "totality of circumstances" test, Bankruptcy Court discharged student loans owed by Debtor who had 2 advanced degrees. Debtor had been unemployed for 10 years during which Debtor had applied for hundreds of jobs, received a few interviews, and received no offers of employment. While Debtor was employed, Debtor consistently made payments on student loans and sought deferments when Debtor was unemployed. Debtor was 50-year-old woman whose husband was 66 years old and had family's sole source of income totaling $39,000 per year. Family expenses were modest and even then exceeded income by approximately $200 per month. Original principal balance of loans was $48,000 but had grown to $230,000 with interest. Debtor had paid more than $30,000 toward student loans over the years, but only $4000 was applied to principle. Even if Debtor were to obtain employment, loan balance would continue to grow because Debtor would not be able to pay even amount of accruing interest. Debtor's inability to pay student loans was not due to Debtor's lack of effort and there was evidence that Debtor's husband, age 66, may not be able to work much longer which would further prevent diverting income to pay student loans. Although Debtor would qualify for income-based repayment program, Debtor not required to do so is evidence of good faith where Debtor would be 70 or 75 years old and whatever savings Debtor may accrue would be consumed by tax liabilities which could wipe out all of Debtor's assets.

(3801) *Chenault v. Great Lakes Higher Education Corporation,* 2018 WL 3300118 (6th Cir. BAP 2018) – "Undue hardship" requires that Debtor be unable to maintain minimal standard of living based on current income and expenses; additional circumstances must exist indicating that state of affairs is likely to persist; and Debtor must have made good faith effort to repay loan. Debtor's status as parolee does not establish sufficient certainty of hopelessness rather than mere present inability to fulfill financial commitment. Additional circumstances such as illness, disability, lack of usable job skills or existence of large number of dependents is required; and additional circumstances must be beyond Debtor's control and not borne of free choice. Only circumstance alleged by Debtor was terms of parole which constitute circumstance of Debtor's own making. While Debtor's earning potential may be limited by status as parolee, status is directly attributable to Debtor's own actions for which he cannot escape responsibility.

(3802) *West v. United States Department of Education,* 2018 WL 846539 (Bankr. W.D. Tn. 2018) – Debtor must prove 1) inability to maintain minimal standard of living if forced to repay loans, 2) situation likely to persist for significant portion of repayment period, and 3) Debtor made good faith effort repay the loans. Debtor, 60 years old, had no income other than $194 in food stamps, and lived with aunt rent free. While Debtor had been offered repayment plan that would produce $0 per month payment, fact that payment would be $0 does not mean that payment would not affect Debtor's ability to maintain standard of living and acceptance of repayment plan could lead to large tax consequences at end of repayment period. Fact that Debtor did not enroll in Income Contingent Repayment Plan is not per se lack of good faith, as even $0 per monthly payment plan has consequences including saddling Debtor with student loans for 25 years and taxable event at end of repayment period for cancellation of debt, all of which are counter to Code's purpose of fresh start. Debtor presented evidence that situation was likely to prevail as Debtor had diligently sought work but based on Debtor's age, race and criminal history, he was unable to do so notwithstanding years of effort including door-to-door searches in Memphis Tennessee. While Debtor did not present any third party evidence to support claim, Debtor's testimony was credible and would not be ignored. Court could not determine on Summary Judgment whether Debtor acted in good faith in attempting to pay student loans. Although Debtor had never made any payments, DOE had repeatedly entered into deferment agreements during which Debtor had no duty to make payments, and when loans were not in deferment, debtor had minimal income (usually $10-$15 on and off doing odd jobs) that would not have resulted in any meaningful payment even if Debtor directed 100% of this incidental income to student loan payments. Debtor stayed in touch with DOE and entered into forbearance agreements, and not making payments over ten-year period was also reasonable if Debtor's inability to make payments was no fault of his own. However, while Debtor stated he spent years looking for work and has been unemployed for nearly 30 years, Debtor also stated that he has not seriously looked for work in four or five years, and has essentially given up hope of finding employment. Court could not determine on Summary Judgment whether Debtor exhausted all avenues that might have led to gainful employment.

(3803) *Price v. DeVos,* 2017 WL 2729073 (Bankr. E.D. Pa. 2017), *reversed,* 2018 WL 558463 (E.D. Pa. 2018) – Bankruptcy Court concluded that Debtor met *Brunner* test where Debtor was unable to maintain minimal standard of living if required to repay loan; additional circumstances existed to show that state of affairs is likely to continue "for a significant portion of the repayment period on the student loan"; and that the Debtor had made good faith efforts to repay loan. Creditor conceded that Debtor could not maintain minimal standard of living and that Debtor had made good faith efforts to repay loan. On appeal, District Court reversed, finding that while Debtor presented evidence that Debtor's chosen occupation as vascular sonography was oversaturated, Debtor did not present evidence that Debtor was unable to obtain employment from any employer or that oversaturation of market was expected to continue. While child care expense would increase in short term, Bankruptcy Court did not consider that children would start school in 2 years and Debtor's costs would be reduced. Although debtor was about to lose health insurance previously provided at no cost by separated husband's employer and would face increased costs, there was no evidence that Debtor could not obtain low cost insurance or what any actual insurance would cost.

(3804) *ECMC v. Acosta-Conniff,* Case No. 16-12884 (M.D. Al. 2018) – Debtor cannot meet *Brunner* test if Debtor is eligible for Income Contingent Repayment Plan that would reduce payment to level Debtor can afford. Although Debtor's Schedules indicated that Debtor's expenditures exceeded income even before student loan payments, Bankruptcy Court erred by not performing detailed itemized analysis of budget to determine which items were reasonable and which were not. ICRP would reduce payment which would appear to allow debtor to maintain minimal standard of living if Debtor stopped $220 per month contribution to retirement account. Court suggested that Debtor must spend retirement years in poverty rather than discharge student loans.

(3805) *Piccinino v. US Department of Education,* 2017 WL 6328995 (8th Cir. BAP 2017) – Undue hardship is based on "totality of circumstances" taking into account debtor's past, present and reasonably foreseeable future financial resources; calculation of debtor's reasonably necessary living expenses; and any other relevant facts and circumstances. Debtor did not establish undue hardship where although debtor had nominal income from part time work and SNAP benefits and Medicaid assistance, with total household income of $1453 per month Debtor's underemployment was to some extent self-imposed. Debtor indicated that she worked part time because she had a 6 year old child and could

not afford day care, even if she went to work full time. However, daughter would start school in near future and childcare costs would decrease allowing Debtor to work full time. Based on Debtor's age, health, skill set, and abilities, Debtor did not present any evidence that Debtor would be unable to obtain full time employment in future. Although Debtor's expenses appeared reasonable, expense included rent of $500 paid to Debtor's mother with whom Debtor resided. There was no evidence that if Debtor stopped paying rent, Mother would evict Debtor or sell home or otherwise require Debtor to obtain new housing expense, and evidence indicated that Mother periodically waived Debtor's rent where Debtor lacked resources to pay rent. As rent was neither contractually required nor regularly paid, rent expense did not appear reasonably necessary. Further, Debtor would be eligible for income contingent repayment plan as plan would have monthly payments of $0.00. Fact that Debtor may have tax liability at end of income contingent repayment period ends and loan balance is forgiven is not basis for finding of undue hardship.

(3806) *In re Trbovich,* 2017 WL 5514158 (Bankr. N.D. Ohio 2017) – Framework within which undue hardship claims are analyzed is (1) Debtor cannot maintain minimal standard of living if forced to repay loans;(2) state of affairs is likely to persist for significant portion of repayment period of student loans; and (3) debtor has made good faith efforts to repay the loan. Plaintiff demonstrated inability to pay where Plaintiff and spouse, after minimal expenses for housing and basic living, had only $40 per month remaining. Although Plaintiff had previously held better paying job, he lost job through no fault of his own and had to take new position at significantly lower income, and spouse was unable to work due to medical conditions. Whether circumstances are likely to exist for significant period loan considers factors such as illness, disability, lack of useable job skills, or the existence of large number of dependents. Circumstances must exist beyond debtor's control, and not as product of intentionally choosing low-paying job. Good faith depends on efforts to repay including whether and to what extent payments have been made. Fact that Plaintiff made one payment in Chapter 13 did not establish good faith or lack of good faith, where circumstances changed after that payment.

(3807) *Fern v. US Department of Education,* 2017 WL 490416 (8th Cir. BAP 2017) – Evidence supported finding of undue hardship if Debtor, a single mother of three, had to repay student loans. Debtor had maximized her income and was also receiving food stamps and rental assistance, yet could barely meet living expenses. Court rejected lender's argument that Debtor had ability to pay where under applicable guidelines, Debtor's required payment would be $0.00, which would not affect Debtor's standard of living. Fact that required payment would be $0.00 does not establish "ability to pay" for purposes of *Brunner* test.

(3808) *Conner v. US Department of Education,* 2016 WL 1178264 (E.D. Mi. 2016) – Undue hardship requires Debtor to prove that Debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and Debtor has made good faith efforts to repay the loans. Debtor failed to show that Debtor could not maintain minimal standard of living where Debtor had monthly income in excess of $5,000 per month and after deducting Debtor's claimed expenses, Debtor had $417 per month remaining that could be used to pay student loans while payment under Income Based Repayment plan would be only $267 per month. Debtor's expenses also included substantial expenses for apparel and cell phones as well as a second automobile used by Debtor's daughter, reflecting discretionary expenses that can easily be reduced or eliminated. Debtor also did not present evidence of additional circumstances, where Debtor's only evidence was that she and daughter had medical conditions that were easily controllable and did not interfere with Debtor's employment or income and expenses for those conditions were included in Debtor's budget. Fact that Debtor was 61 years old also was not additional circumstance where that had no effect on Debtor's ability to work and earn a living. Debtor also failed to show good faith where Debtor had stable employment since completing her education yet never made a single payment on loans dating back more than 10 years and Debtor routinely received large tax refunds that Debtor also did not use to even attempt to pay loans. Debtor also steadfastly refused to participate in income based repayment plan that would have allowed her to make payments and would have resulted in forgiveness of substantial amount of debt, although Debtor easily could have afforded payments with minimal adjustments to lifestyle.

(3809) *ECMC v. Acosta-Coniff,* Case No. 16-12884 (11th Cir. 2017) – "Undue hardship" requires that Debtor lack ability to maintain minimal standard of living based on current income if forced to repay loan; additional circumstances exist indicating that state of affairs is likely to persist for significant portion of repayment period of student loan; and Debtor has made good faith efforts to repay loans. Three-pronged test looks at different time periods. First prong focuses on present ability of Debtor to repay. Second prong looks to future to determine unlikelihood that Debtor could become able to repay. Third prong looks to Debtor's past conduct to determine whether actions manifest good faith effort to repay. District Court erred in evaluating second prong, which focuses on future ability of Debtor to pay, by considering Debtor's past conduct in a incurring debt in amount such that Debtor's increased income was unlikely to provide Debtor with ability to service debt. Second prong of the test does not look backward to assess blame for Debtors you financial circumstances. Court left open possibility that Debtor's voluntary decision to unnecessarily and unreasonably amass substantial additional debt at time when Debtor was already obligated to pay student loans and to then argues that additional debt precludes Debtor from paying student loans may lack good faith. Court also left open possibility that incurring substantial student loan debt under circumstances where Debtor knew or should have known that student loan debt would not produce sufficient additional income to make payments on student loan debt may lack good faith.

(3810) *James v. ACS,* 2017 WL 1240217 (Bankr. N.D. Ohio 2017) - Section 523(a)(8) allow student loans to be discharged only where excepting debt from discharge would impose undue hardship on Debtor and Debtor's dependents. Undue hardship requires consideration of (a) whether Debtor can maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans; (b) whether additional circumstances exist indicating that state of affairs is likely to persist for significant portion of repayment; and (c) whether Debtor made good faith effort to repay loans. Whether Debtor can maintain minimal standard of living contemplates whether Debtor can provide for basic needs such as food, clothing, shelter, medical care and transportation and requires Court to evaluate Debtor's household income and expenses with particular focus on expenses which are necessary to maintain a realistic, basic standard of living. Minimal standard of living does not require Debtor to live in abject poverty but Debtor must make significant effort to live within structures of frugal budget for foreseeable future. Debtor's budget indicated some areas which could be reduced including $500 per month for food for a single individual with no dependents; transportation of $300 per month which included trips twice per month to visit grandchildren which could be reduced by forgoing some

trips; plus hairstyling at $95 per month and clothing at $80 per month, both of which could be reduced, as well as Debtor's recreation budget including $137 for recreation plus $30 for DirecTV, $60 for Internet and $180 for "travel and pet care". Although expenses did not indicate unreasonable standard of living, expenses did exceed minimal standard of living required for discharge of student loans. Further, Debtor's automobile payment of $215 per month was about to be paid off which would free up additional funds for payment of student loans. Debtor was eligible for repayment program that would result in payments to student loans of $166 per month or alternate repayment program of $224 per month, either of which fit within Debtor's monthly budget. Debtor also did not present evidence that any adverse financial conditions were likely to extend over significant future. Debtor was employed, working as a full-time professional in the legal profession. Debtor's employment with the Erie County Public Defender allowed Debtor to apply for loan forgiveness after making on-time payments in less than 5 years and there was no indication that Debtor's employment risked any substantial adverse change in the near future. There were no medical conditions which would prevent Debtor from working and Debtor had a lengthy history of continued employment. Debtor failed to demonstrate either an inability to maintain a minimal standard of living or that Debtor's financial circumstances were likely to present any "certainty of hopelessness" over remaining repayment prevented discharge of student loans under Section 523(a)(8).

(3811) *Lewis v. Pennsylvania Higher Education Assistance Agency,* 2017 WL 814247(E.D. Ky. 2017) - Student loan obligations are excepted from discharge without creditor being required to file adversary proceeding or obtain Bankruptcy Order of nondischargeability. Creditor does not bear the burden to prove in bankruptcy case that Debtor could not prove undue hardship as burden is on Debtors seeking discharge of student loans to file adversary proceeding and to demonstrate undue hardship. Student loan creditor does not violate discharge, violate Debtor's sole rights, abuse the Court process, convert assets of Debtor or intentionally inflict emotional distress on Debtor where, after entry of discharge, creditor undertakes collection activities including garnishment.

(3812) *Miraglia v. U.S. Department of Education,* 2016 WL 5854216 (Bankr. N.D. Ohio 2016) – Evidence indicated that Debtor was unable to maintain a minimal standard of living where Debtor's net income for 2016 will be $10,666.12, which is one-third below poverty line. Debtor's expenses for family of two for rent, renter insurance, car insurance, utilities and internet were not expenditures of such a nature that Debtor should be required to further belt tighten and even defendant did not argue that Debtor should be forced to forego any of these expenses to free up money for student loan payments. *Brunner* also requires evidence that conditions are likely to last creating a certainty of hopeless ness, not merely a present inability, such as chronic or long term illness, disability, lack of useful job skills, or existence of large number of dependents, and must be beyond Debtor's control and not result of Debtor's free choice. Plaintiff suffered from unspecified health issues that, if proven at trial, could support finding of dischargeability, and Debtor may at trial be able to offer additional evidence of other factors including lack of useable job skills. Fact that Debtor never made any payments on student loans is not *per se* lack of good faith. Good faith turns on (1) whether a Debtor's failure to repay a student loan obligation is truly from factors beyond the Debtor's reasonable control; (2) whether the Debtor has realistically used all their available financial resources to pay the debt; (3) whether the Debtor is using their best efforts to maximize their financial potential; (4) the length of time after the student loan first becomes due that the Debtor seeks to discharge the debt; (5) the percentage of the student loan debt in relation to the Debtor's total indebtedness; (6) whether the Debtor obtained any tangible benefit(s) from their student loan obligation. Whether Debtor entered into possible alternative arrangement is also factor but alone is not dispositive. However, Debtor's own affidavit indicated that while Debtor began process to have student loans discharged by reason of disability, that application was denied because Debtor failed to submit required documentation to DOE. Debtor's vague and unsupported assertion of "good faith" was insufficient to overcome undisputed fact and complete lack of explanation why Debtor failed to pursue administrative remedies that could have led to complete discharge of student loans. Debtor failed to meet third prong of *Brunner* resulting in student loans surviving discharge.

(3813) *Aaron v. U.S. Dept. of Education,* 2016 WL 3483208 (Bankr. N.D. Ohio 2016) – Prior administrative discharge of student loans based on total and permanent disability does not prevent court from considering whether debt is dischargeable under Section 523(a)(8). Administrative discharge is conditional and may be revoked and loans reinstated, Debt is defined broadly to include contingent and unliquidated debts. Debtor's liability was contingent as DOE could revoke administrative determination and reinstate loans, making Debtor's liability dependent on some future action. To obtain discharge, Debtor must show (1) based on current income and expenses, Debtor cannot maintain a minimal standard of living if forced to repay the loans, (2) the state of affairs is likely to persist for a significant period of the repayment term, and (3) Debtor made a good faith effort to repay the student loans. Debtor failed to demonstrate lack of ability to make payments. Debtor and her non-filing spouse had combined monthly net income of more than $4600 per month and were well above median income. Debtor's spouse continued to contribute to a voluntary retirement program; Debtor's household expenses significantly exceeded IRS housing and utility standards for family of 3 and Debtor's transportation expense significantly exceeded IRS Transportation allowance. While Debtor had no ability to increase income due to extensive medical conditions, Debtor's expenses demonstrate a lifestyle above a minimal standard of living. Her housing expenses are nearly double the standards. And, although there is only one car in the household, the transportation expenses also exceed the standard. A monthly expense of $268.00 for car insurance is unreasonable. The court is not convinced that Debtor attempted any reduction in discretionary expenses, including telephone and cable. In the court's experience, Debtor's utility expenses, specifically electricity and heat, also are on the high side for this area. While the court is willing to accept a modest recreation expense, multiple expenses, including the actual recreation expense of $100.00, the cable and telephone expenses, and the pet care expense, all encompass some form of recreation. There appears to be no effort to minimize expenses. Debtor's expenses demonstrate that she is living above a minimal standard of living. It is not an unreasonable standard of living but the test is much more stringent than a standard of reasonableness. Further, because of administrative release, Debtor does not have to make payments leaving it impossible to conclude that if Debtor is required to make payments she would not be able to afford minimal standard of living. Debtor demonstrated that circumstances were likely to persist where Debtor's medical conditions were debilitating and there was no reasonable likelihood that her health would ever recover to point of allowing her to work. Record also failed to demonstrate good faith where Debtor had been employed for two decades before medical issues began an Debtor did not submit any proof that Debtor ever made any payments or took action. Instead, record indicated that Debtor was at best "apathetic" toward her obligation to repay.

(3814) *Barrett v. U.S. Department of Education,* 545 BR 625 (Bankr. N.D. Cal. 2016) – *Brunner* test requires Debtor to prove (1) Debtor cannot maintain a minimal standard of living if Debtor is required to repay loans; (2) additional circumstances exist to indicate this state of affairs

is likely to persist for significant period of time; and (3) that Debtor made good faith efforts to repay loan. Debtor, a 56 year old attorney with two separate advanced degrees, was unable to maintain standard of living where Debtor's income averaged $70 per month and his already Spartan expenses exceeded his income. Debtor had minimized expenses by stopping payment on multiple state bar dues, discontinuing malpractice insurance, spending little if any on recreation, and driving a 2003 automobile that was long ago paid off. Debtor had no savings or retirement and was behind on his utilities and car insurance. Debtor also demonstrated additional circumstances making it likely that conditions would prevail for significant period of time. Factors must related to Debtor's financial condition and ability to pay, and include but are not limited to serious mental or physical disability; Debtor's obligation to care for dependents; lack of or severely limited education; poor quality education; lack of usable or marketable job skills; underemployment; maximized income potential in chosen field; lack of other more lucrative job skills, limited number of years remaining Debtor's work life; age or other factors that prevent retraining or relocation; lack of assets that could be used to pay loan; potential for increased income offset by anticipated increase in expenses; and lack of any better financial options elsewhere. Debtor demonstrated circumstances as Debtor was 56 years old and had made extensive efforts to find stable job. Debtor had traveled cross country and taken jobs at various law firms only to lose those jobs when the firms closed their doors. There was no likely source of employment even in areas other than Debtor's current location. Debtor's income was modest and demonstrated an inability to operate successfully as a sole proprietor. Debtor also demonstrated good faith. Although Debtor did not apply for Income Contingent Plan that would have reduced payments to $0.00, Debtor had made significant effort to pay loans when Debtor was working including paying $40,000 on other student loans and paying $16,000 on DOE consolidated loans. Income contingent plan would last 20 years, far beyond Debtor's working life and would present risk of huge tax liability if and when plan was completed. Given efforts to pay during working life, Debtor's failure to enroll in ICRP was not lack of good faith.

(3815) *Ng-a-Qui v. College Assist,* Case No. 14-1551 (9th Cir. BAP 2015) – Debtor failed to show that inability to repay loans was due to circumstances likely to persist for significant portion of repayment period. Debtor did not have any serious mental or physical restrictions of disabilities, she had a college degree, she had a number of years remaining in her work life, and she could potentially increase her income. However, Debtor made no effort to find work outside her field (which Debtor admitted was outdated), Debtor made only two attempt to find employment in preceding three years, and Debtor refused to consider any job that was outside the geographical confines of the area in which she chose to live or that paid less than $25 per hour. Any limitations on Debtor's ability to obtain employment were self-imposed and do not constitute circumstances beyond Debtor's control that are likely to persist.

(3816) *Hubbard v. United States Department of Education,* 2015 WL 1805909 (Bankr. E.D. Tn. 2015) – Student loans are dischargeable only if repayment would impose an undue hardship, defined as an inability, based on current income, to maintain a minimal standard of living; additional circumstances indicate that state of affairs is likely to persist for significant portion of repayment time; and Debtor has made good faith efforts to repay. Factors in applying test include amount of debt, interest rate, Debtor's claimed income, earning ability, health, education, dependents, age, wealth and professional degrees; Debtor's claimed expenses and current standard of living and whether Debtor has attempted to minimize expenses; and whether Debtor has attempted to maximize income by seeking or obtaining employment commensurate with education and abilities. Financial circumstances must be result of events out of Debtor's control, and Debtor must have done everything within his power to improve that situation. Debtor failed to show that plaintiff's financial situation was not hopeless. Debtor was young, in good health, not disabled, had useful job skills, and no dependents. Debtor, 25 years old, was only a few credits shy of associates degree and two semesters short of a bachelor's degree. Debtor has excellent communication skills, writes well, and is highly motivated and capable of acquiring knowledge. Debtor has ability to greatly increase earning potential and Debtor has applied for a promotion at Debtor's current employer that would significantly increase his earnings. While Debtor's current income would not be sufficient to service the debt, there was every indication that Debtor's economic fortune would increase over time. Court entered judgment excepting debt for discharge without prejudice to Debtor to renew request if future financial circumstances warrant.

(3817) *Kelly v. Sallie Mae, Inc.,* Case No. 12-35377 (9th Cir. 2015) – Partial discharge of student loans appropriate where Debtor lacked ability to maintain minimal standard of living if required to repay loans in full, and circumstances were likely to persist of significant portion of repayment period. Debtor demonstrated good faith effort to repay by maximizing income and incurring only marginally excessive debt; Debtor had repaid thousands of dollars over 8 year period prior to filing bankruptcy; and Debtor at least minimally investigated payment alternatives including consolidation, deferment, and federal loan repayment programs where Debtor did not apply for programs because Debtor had good faith belief that she was not eligible and that any program would have been futile as Debtor could not afford the payments after consolidation of loans. Loans would not be discharged to the limited extent that Court concluded that expenses were excessive but would discharge remainder of loan balances.

(3818) *Lamento v. U.S. Department of Education,* 2014 WL 6621257 (Bankr. N.D. Ohio 2014) – Debtor entitled to discharge student loans where facts indicated that Debtor lacked ability to maintain ability to maintain minimal standard of living; circumstances indicated that Debtor's financial misfortune likely to continue into foreseeable future; and Debtor did not act in bad faith. Although Debtor completed three years of college, she dropped out under pressure from abusive spouse. Later attempts to obtain education as paralegal and as court reporter also thwarted by abusive spouse. Debtor later divorced spouse but was left to support two minor children without help. Debtor had to live with her parents because she could not afford rent. Debtor drove car with over 160,000 miles because she could not afford vehicle payment. Debtor had never earned more than poverty level and but for support from parents she would be homeless. Debtor lacked any ability to improve her financial condition as Debtor could not find higher paying employment because she had not completed education and lacked ability to do so at least without incurring additional debt. Although Debtor qualified for income contingent repayment plan that would not require payments, entering into plan would require Debtor to sign new, non-dischargeable note under circumstances where Debtor could not afford payments and there was no reasonably likelihood that Debtor would ever be able to maintain payments, such that participation in program would be futile but continued obligation would require Debtor to provide financial information for 25 years and would have substantial negative psychological effects on Debtor.

(3819) *Conner v. U.S. Department of Education,* 2015 WL 225043 (Bankr. E.D. Mi. 2015) *aff'd*, Case No. 16-1588 (6th Cir. 2017) – While repayment of student loan may constitute hardship, Congress specifically required "undue" hardship, reflecting strong legislative policy

against discharge. Debtor must show: (1) that the Debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. Debtor must prove all three prongs, and a failure to satisfy any one will result in finding that loan is not dischargeable. Debtor failed to demonstrate that repayment would leave Debtor unable to maintain minimal standard of living, where Debtor would be able to afford payments under income contingent repayment plan while maintaining standard of living. Debtor had total income of $6,000 per month and net income of $4300 for two people. Expenses on Schedule J totaled $3200 per month even allowing all of Debtor's expenses without reduction. Income contingent repayment amount would be $217 per month, which was less than Debtor's admitted disposable income, indicating that Debtor had ability to make payments while maintaining current standard of living. Even if Debtor's expenses are higher than shown on Schedule J, those additional expenses include items that can be reduced or eliminated including cell phones, internet, cable and recreation, as well as frequent dining out and non-essential purchases. Debtor also failed to demonstrate hopelessness where Debtor was not able to point to any circumstance that would impair Debtor's ability to work. Debtor did not have any physical or mental conditions that would prevent Debtor from working. Debtor had stable income and employment. Although Debtor may be eligible for retirement in the near future, that does not demonstrate certainty of hopelessness as Debtor is able to work and any decision to retire would be voluntary. Finally, Debtor did not demonstrate good faith effort to repay loans where Debtor's only "voluntary" payments were made to stop garnishment and payments stopped when garnishment released; and never made any voluntary payments on second round of loans at all. Failure to make even a single voluntary payment and failure to pursue repayment programs demonstrated lack of good faith. Even after being given an opportunity by bankruptcy court to apply for alternative programs, Debtor failed to do so and steadfastly refused to participate in process that would have allowed far reduced payments that Debtor could easily afford.

(3820) *Sexton v. PHEAA,* 2014 WL 6674975 (Bankr. W.D. Ky. 2014) – Undue hardship requires proof that (1) Debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. Debtor must make effort to minimize expenses, and any frivolity or unnecessary expenses indicate that Debtor has means of improving financial situation without discharging student loan debt. Debtor's expenses of $508 per month for private school for Debtor's two children are extravagant. While Debtor may want best education for kids, that is a luxury where Debtor did not present any evidence of special needs or inadequacy of local school districts. Debtor's additional expenses of $600 per month for telephone, cell phones, and cable is also excessive as were expenses of $800 per month for cleaning of house, cutting of grass and child care. Debtor failed to demonstrate that he had done everything possible to minimize expenses or that Debtor is maintaining only a minimal standard of living. Debtor also failed to show that circumstances would continue for extended period of time. Debtor was not disabled or ill and did not lack usable job skills. Debtor's naked allegation that he as unemployable by any major financial or law firm was not sufficient where Debtor did not present any evidence of any attempt to gain employment; or any evidence why Debtor could not accept lower paying employment at "less exalted" places. Debtor's choice not to work does not support discharge of student loan debts, as Debtor must work diligently to improve financial condition before demonstrating undue hardship. Debtor also lacked good faith. Debtor did not make payments when he could and did not avail himself of any of the temporary deferment or payment programs. While Debtor testified that he had made substantial payments on loans over 22 years since payments started, evidence indicated that he made minimal payment for only a few years producing only minimal reduction in the principal. Further, Debtor took out even more student loans while Debtor's prior loans were in the repayment period, indicating an intent to take on more debt when Debtor deemed it advantageous but then denying payment when it was no longer beneficial. While bankruptcy filing was not triggered by student loan debt and Debtor needed bankruptcy for reasons unrelated to student loans, Debtor's "general apathy" toward repayment does not evidence good faith.

(3821) *Walker v. Sallie Mae Servicing Corp.,* 650 F.3d 1227 (8th Cir. 2014) – In determining whether repayment of loans would be undue hardship, court will consider (1) the Debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the Debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case. Hardship analysis is not limited to circumstances that existed on petition date and can take into consideration post-petition and post-discharge changes in Debtor's financial status and affairs. While court should not speculate on what might happen in the future, that does not prevent court from considering actual financial circumstances at time determination is made. Court used financial information available to it to make informed estimate of Debtor's income, expenses and tax obligations based on paystubs and other financial information admitted into evidence at trial, and did not engage in speculation or guesswork in discerning Debtor's true financial condition. Debtor's purchase of a motor vehicle with a payment of $850 per month was not evidence of bad faith where Debtor had household of seven people. Debtor's incurring of second mortgage to build a deck on Debtor's home, with payments of $375 per month, was troubling but in light of overall budget and income expenses were not overall unreasonable given Debtor's particular financial circumstances particularly including needs of two autistic children. Debtor was not willfully underemployed and did not choose to avoid payments that could have been made, where caring for Debtor's 5 children was her "full time occupation" and given age of children, by the time children reached age of majority, Debtor's education and work skills would be "stale".

(3822) *Trudel v. US Department of Education,* 514 BR 219 (6th Cir. BAP 2014) – Under the *Brunner* test, undue hardship discharge of educational loans requires (1) that the Debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. "Additional circumstances" include illness, disability, a lack of usable job skills, or existence of large number of dependents, and circumstances must have such a damaging impact on Debtor's earning capacity or financial condition as to convey a certainty of hopelessness, not merely a present inability to fulfill the financial commitment. Where Debtor relies on medical condition, Debtor must prove not only that Debtor has condition but that condition will impair Debtor's ability to work in the future. Debtor's testimony that medical conditions including chronic bronchitis and emphysema, and chronic neck and back pain, prevented Debtor from earning more money offset by testimony from Debtor's doctor that Debtor is not permanently disabled and is able to work 4 days per week for 8 hours per day and that

Debtor's condition will not require single continuous time away from work due to medical conditions. Debtor also failed to show good faith where Debtor failed to make any payments under the loans and failed to enroll in a payment program, although Debtor had graduated almost 2 decades before and had ample opportunity to make a payment or enroll in programs.

(3823) *Greene v. U.S. Department of Education,* 2014 WL 5432129 (7th Cir. 2014) – Government is not required to file counterclaim in adversary proceeding instituted by Debtor to declare student loans discharged in order for government to retain right to pursue collection actions if Debtor is unsuccessful in adversary proceeding.

(3824) *Warner v. Bank of America,* 2014 WL 3906459 (Bankr. W.D. Mi. 2014) – Debtor, a clinical psychologist, established inability to maintain minimal standard of living where Debtor's current income was only $4,000 per month gross and Debtor's monthly expense including rent for an apartment and a "modest allowance" for food and other necessities left Debtor with only $31 per month as "discretionary" income. Debtor's budget was frugal, devoid of vacation or retirement savings, Debtor drove high mileage car that was paid off, and Debtor lacked ability to save for a down payment on a new vehicle or any expensive repairs on his current vehicle. However, Debtor did not demonstrate that inability to pay would extend during significant portion of repayment period. Debtor changed careers at age 45, during which Debtor incurred the student loan debt. Debtor was highly educated, and was newly employed in as a psychologist. While his earnings currently are low while he builds a practice, the Bureau of Labor Statistics estimated that within a very short time, his income would increase by $20,000 per year, allowing Debtor to make payments. Debtor had no physical or mental impairments and was highly intelligent and educated and Debtor did not evidence the type of "certainty of hopelessness" that is required to discharge student loans. Debtor also lacked good faith where Debtor had made no effort to pay loans. Debtor had paid only $379 in total payments since graduation, although Debtor received $6,000 tax refund in 2013 and modest refunds in prior years, yet remitted nothing to the lenders. While the amount of debt is substantial and will effectively force Debtor to live frugally for the foreseeable future and probably will prevent Debtor from ever owning a house or a decent car. Debtor has ability to make payments on student loans, precluding discharge under Section 523(a)(8).

(3825) *Trudel v. United States Department of Education,* 2014 WL 4100422 (6th Cir. BAP 2014) – Undue hardship requires inability to maintain, on current income and expenses, a minimal standard of living if Debtor is required to repay student loans; additional circumstances indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and that Debtor has made a good faith effort to repay loans. Debtor established first prong where evidence indicated that Debtor had little income and minimal expenses and would not be able to afford her already meager budget if required to pay on the loans. Debtor failed to prove that existing medical conditions were severe enough to satisfy additional circumstance prong, there was no evidence that medical conditions prevented Debtor from performing her job functions at her employment. While Debtor did establish that she had various medical conditions, there was no evidence to contradict conclusion that she could work full time or that some element of her condition prevented her from working. Debtor also failed to present any evidence that would demonstrate that her medical condition somehow impaired her ability to either increase her income at her current employer or to change employers for a higher paying position. Absent some evidence that Debtor's current income was the limit of her future earning potential, court could not conclude that current conditions were substantially likely to continue. Debtor also failed to demonstrate good faith. Good faith is based on number of factors including repayment history, efforts to obtain employment or maximize income, efforts to minimize expenses, and participation in alternative repayment programs, with no one factor being dispositive. Debtor failed to demonstrate good faith where Debtor declined opportunity to participate in repayment programs because she was concerned that program would impede her ability to borrow money in the future; and Debtor had not, over two decades, made payments or applied for deferments.

(3826) *Johnson v. National Collegiate Student Loan Trust,* 2014 WL 1356600 (Bankr. M.D. Fl. 2014) – Debtor was highly educated divorced 43 year old woman with two kids. Debtor's schedules indicated that Debtor had stable income that exceeded expenses by $900 per month Debt would not be discharged as Debtor had ability, based on Debtor's own schedules, to make payments without depriving Debtor of ability to maintain minimal standard of living. Further, budget contained a number of discretionary expenses that could be further reduced including high costs of vitamins, entertainment, and food for two people. Debtor's financial condition was likely to improve over time as Debtor gained seniority in her employment, and there was no evidence of good faith where Debtor had never made any attempt to make payments to student lenders.

(3827) *Magsino v. U.S. Dept. of Education,* 2014 WL 1341932 (Bankr. W.D.N.C. 2014) – Debtor failed to demonstrate that Debtor would be unable to maintain minimal standard of living if student loans are not discharged. While Debtor's income was nominal, Debtor would be qualified for Income Contingent Repayment Plan that would have monthly payment of $0.00. As Debtor would not be required to actually make any payments, excepting the debt from discharge would have no effect on Debtor's standard of living and would not cause that standard of living to fall below any minimal standard. Further, while Debtor was 62 years old, that did not lead to the conclusion that her circumstances were likely to continue for significant portion of repayment period where Debtor had college education, real estate license and work experience. Debtor also failed to demonstrate good faith as Debtor after graduation sold a house and a condominium and netted over $120,000 yet failed to make any meaningful payment on the student loans, paying only $2,500 since graduation.

(3828) *Hubbard v. Pennsylvania Higher Education Assistance Agency,* 2014 WL 1654703 (Bankr. E.D. Tn. 2014) – Complaint was defective where named defendant was not creditor or guarantor but was only servicer. However, court did not dismiss complaint but allowed pro se Debtor opportunity to amend complaint to name actual lender and guarantor.

(3829) *Fecek v. Sallie Mae, Inc.,* 2014 WL 1329414 (Bankr. S.D. Ind. 2014) – Debtor entitled to partial discharge of student loans. While Debtor perhaps could reduce budget slightly such as cable and internet, even if expenses are fully minimized, Debtor would not be able to maintain a minimal standard of living. Debtor had net income of $3,000.00 per month, while student loan payments were more than $2,650, such that Debtor would not be able to maintain a minimal standard of living if she has to pay loans. While Debtor's income may increase over her remaining work years, evidence indicated that she would never gross more than $70,000 per year which, after taxes, would not leave sufficient income to pay $2650 student loan debt plus living expenses. Loans were private loans not eligible for the various programs to reduce her payments and there was no realistic indicating that she would ever be able to pay even the interest which was accruing between

7.75% and 9.75% per year. Debtor had maximized her income in stable employment and Debtor reached out to lender many times in effort to make arrangements without success. While decision to take on large debt may have been unwise in hindsight, creditor had right to engage in evaluation of her creditworthiness before extending the loans, and there is no indication that Debtor, at the time the loans were acquired, indented to default. However, Debtor's income is above median and Debtor admits that she can make partial payments, particularly where Schedule J shows proposed payment of $250 per month. Debtor can reduce some other expenses without sacrificing minimal standard of living, which would allow Debtor to pay $500 per month total for 180 months without undue hardship. If Debtor's income increases to more than $77,000, Debtor must report to Sallie Mae and agree to new payment amount or seek further relief from the court.

(3830) *Doremus v. U.S. Department of Education,* 2014 WL 1168906 (Bankr. N.D. Ohio 2014) – *Brunner* test requires proof that (1) that the Debtor cannot maintain, based on current income and expenses, a "minimal" standard of living if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. Court can grant partial discharge under Section 105 where undue hardship test is met as to a portion of the debt to be discharged. First prong requires court to evaluate Debtor's household income and expenses, focusing particularly on what expenses are necessary for a basic standard of living and then to determine whether there is income left over to pay student loans. Debtor's schedules indicated that Debtor had no income whatsoever for a number of years, and Debtor was supported entirely by third party, establishing that Debtor lacked any ability to maintain even a nominal standard of living without the help of someone else. Debtor failed to demonstrate that circumstances would persist. Although Debtor indicated that Debtor had experiences certain physical ailments including migraine headaches and a back injury many years earlier, Debtor did not present any medical evidence to support a finding the Debtor was unable to work in any capacity. Debtor had not sought treatment for physical ailments for many years and there was no evidence either that Debtor could not work or that Debtor would not be able to work with proper medical treatment. Debtor was intelligent and well-educated, holding degrees in both radiography and electrical engineering. Record did not demonstrate "certainty of hopelessness" required to discharge student loans. Work history also did not demonstrate that current circumstances were likely to persist, where, since 2000, Debtor had worked only a few months and to extent Debtor had physical limitations (although there was no evidence in the record to support that finding) there was no evidence that limitations prevented Debtor from doing *any* work, rather than just that that limitations impaired Debtor's ability to work in chosen field, and record did not indicate any efforts by Debtor to gain employment of any type in any field for 10 years. Debtor also failed to demonstrate good faith, as Debtor graduated 12 years earlier but has not made payments to lender since graduation. Debtor had no contact with lenders since 2005 when Debtor applied for economic deferment, and Debtor had not pursued any administrative remedies or taken any other steps to address student loan debt.

(3831) *Ablavsky v. U.S. Department of Education,* 2014 WL 268692 (Bankr. D. Mass. 2014) – Student loans discharged where Debtor was substantially impaired by mental illness and cognitive defects and was unable to repay student loans. Debtor graduated from law school but had been suspended for making bomb threats and was involuntarily hospitalized for 9 months. Debtor later practiced law but was indefinitely suspended. Debtor's sole income was social security disability of $991 per month and food stamps. Debtor had to pay child support of $250 per month, rent of $400 and probation costs of $65. Debtor did not own a car and had no non-exempt assets. Debtor suffered severe mental illness that precluded him from holding job other than menial labor and was not able to find permanent part-time employment because of legal troubles; and Debtor did not have car which further reduced employment prospects. Evidence supported finding that Debtor lacked ability to make payments and that inability was likely to continue for extended period of time.

(3832) *Roth v. Educational Credit Management Corp.,* 2013 WL 1623839 (9th Cir. BAP 2013) – Lack of voluntary payments or failure to participate in voluntary alternative repayment programs are not per se evidence of lack of good faith. While attempts to negotiate repayment program are important indicators, failure to do so is not lack of good faith where Debtor lacked any ability to make payments under any possible repayment program. Debtor was 64 years old and had worked for 45 years before having to retire for medical reasons. Debtor's current income did not allow Debtor to make payments and Debtor's attempts to obtain new employment, including applying for over 200 positions without success, indicated that Debtor's circumstances were not likely to change, such that Debtor would not have been required to make payments even if Debtor entered into income contingent repayment plan and it was probable that Debtor would never be required to make payments even if Debtor entered into IBRP. Concurring opinion encouraged reconsideration of Brunner standard as no longer reflecting economic realities of six figure student loan debt and impact of student loan debt on economy as a whole.

(3833) *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.

(3834) *U.S. v. Gray,* 2013 WL 5180980 (E.D. Mi. 2013) – Student loans are not automatically discharged in bankruptcy. Student loans are discharged only if Debtor brings action and demonstrates that repayment would produce undue hardship. Government entitled to summary judgment to collect student loans where bankruptcy records reflected that Debtor never filed an adversary proceeding.

(3835) *Lepre v. U.S.,* Case No. 13-2226 (3d Cir. 2013) – Debtor not able to discharge student loans where Debtor did not provide accurate accounting of income or expenses, without which Debtor could not establish an inability to maintain a minimal standard of living. Debtor understated income and funds on hand as of petition date and expenses included at least one expense that was double counted, and other expenses that he was not actually paying and which may not have existed.

(3836) *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.

(3837) *Jones v. ECMC,* 2013 WL 1882252 (Bankr. E.D. Pa. 2013) – Debtor could discharge student loans where Debtor worked part time in order to stay home with special needs child. Debtor's income was just above poverty line, and any attempt to make payments on student loans would deprive Debtor of minimal standard of living. Debtor faced additional circumstances that aggravated her financial position, as daughter was about to turn age 18 and Debtor would lose Social Security Disability income paid on behalf of daughter. Although Debtor never made a payment, given financial condition Court ruled that failure to make payments was not lack of good faith or abusive. Debtor was a single mom of a special needs child working at a low income job with no real likelihood of improving her financial condition.

(3838) *Hedlund v. Educational Resources Institute, Inc.,* Case No. 12-35258 (9th Cir. 2013) – Finding of good faith by bankruptcy court is reviewed for abuse of discretion. Good faith is measured by Debtor's efforts to obtain employment, maximize income and minimize expenses. Courts also consider Debtor's efforts, or lack of efforts, to negotiate repayment plan, although this alone is not dispositive. Debtor graduated from law school but was unable to pass bar. Debtor's current employment matched his skills and he was unlikely to obtain better employment. Budget was reasonable for Debtor's family size. Debtor filed bankruptcy 4 years after graduation, during which he paid $950 and creditor had garnished wages for more than 16 months. Debtor repeatedly contacted lender seeking alternative repayment plans but lender was unwilling to accept any plan that Debtor could afford, even though at least one offer included large down payment. Debtor investigated Income Contingent Repayment Plan but concluded that he was not eligible as he was in default, and Debtor acted reasonably in turning down offers by lender.

(3839) *Krieger v. Educational Credit Management Corp.,* Case No. 12-3592 (7th Cir. 2013) – Undue hardship requires that the Debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay loans; circumstances indicate that this will persist for significant portion of repayment period; and Debtor has made good faith effort to repay loans. Debtor clearly could not maintain minimal standard of living. Debtor resided with mother in rural community where few jobs were available and lived on a few hundred dollars per month from governmental programs. Debtor lacked sufficient funds to move to new location in search of better employment prospects and her car was old and needed repairs. Debtor did not have internet access which hampered ability to locate employment. Debtor had degree as paralegal and had applied for over 200 jobs in prior 10 years without success. In that time Debtor uses a substantial portion of a divorce settlement to pay as much as possible on her student loans. Section 523(a)(8) does not require proof that Debtor would never be able to repay loans as that would effectively eviscerate Section 523(a)(8) as there is always a possibility that someday the Debtor may be able to make payments. Debtor's failure to enroll in repayment program was not lack of good faith where, even by creditor's admission, Debtor lacked the ability to pay even $1 per month and future did not indicate any likelihood of change.

(3840) *Uhrman v. U.S. Department of Education,* 2013 WL 268634 (Bankr. N.D. Ohio 2013) – Debtor's inability to work due to prior workplace injury was not sufficient to discharge student loans where evidence did not indicate that inability to work would last for the duration of the loan repayment period. Although Debtor presently lacked any ability to make payments without undue hardship, Debtor had already been released by doctor for light duty positions and by plaintiff's own admission her condition had improved over the past 6 months. Evidence also indicated that although Debtor's condition would improve if she took medications, she was not taking those medications and Debtor had not made any effort to secure medical care necessary for Debtor to resume work. Although Debtor was not presently working, evidence indicated that Debtor could work if she works with her medical professionals. Debtor failed to meet burden to show that distressed state of financial affairs was likely to last for significant portion of repayment period.

(3841) *Marlow v. Department of Education,* 2012 WL 4829424 (Bankr. E.D. Tn. 2012), *aff'd,* 2013 WL 3515726 (E.D. Tn. 2013) – Debtor's request to discharge student loans denied. "Minimal standard of living" accommodates shelter that must be furnished, maintained, kept clean, and heated and cooled; basic utilities including electricity, water and natural gas as well as telephones; food and personal hygiene products, clothing and footwear; a vehicle; health insurance or the ability to pay medical and dental expenses; and ability to pay for some small diversions including television or small pet. Debtor is not required to live in poverty but must do some belt-tightening and forego amenities to which he may have become accustomed. Record met "minimal standard of living" test where Debtor had minimal income from multiple sources and had a minimal budget, having already discontinued home telephone, internet, cable, and security system. Debtor relied on substantial support provided by parents including payment of property taxes on home and payment of hundreds of dollars in other expenses; and has received assistance from county to pay utility bills. However, Debtor failed to demonstrate that Debtor had made good faith effort to maximize income. Debtor had law degree but had been denied admission to bar for character and fitness issues. Debtor has had occasional income from odd jobs and temporary positions, although Debtor admitted that he sought employment only on a cursory basis. Debtor did not pursue professional positions outside of five specific employers. Debtor's resume indicated that, even prior to being denied a law license, employment history was sporadic, comprised primarily of part-time or temporary positions and externships. Debtor chose to pursue lawsuits against the Board of Law Examiners and the Tennessee Supreme Court, challenging constitutionality of Tennessee Supreme Court's decision bar admission. Debtor also failed to demonstrate that financial condition was likely to continue and were due to circumstances beyond Debtor's control. Debtor was 31 years old and did not have any medical, physical, or mental disorders or disabilities, any illnesses, substance abuse addictions, or any medical or physical limitations that prevent him from obtaining some sort of employment. Debtor's inability to obtain law license was due to Debtor's own actions including public intoxication citation, the public intoxication arrest, and the large number of motor vehicle citations and conscious choice not to disclose arrest to the Board of Law Examiners. Debtor also failed to demonstrate good faith. Debtor filed bankruptcy less than one year after receiving fourth advanced degree. The student loans amounted to 86% of Debtor's total debt. Debtor had total student loan debt of $247,000 but had made only three payments totaling less than $1,000.00.

(3842) *Wolph v. US Department of Education,* 2012 WL 44865590 (Bankr. N.D. Ohio 2012) – "Undue hardship" denotes heightened standard, requiring showing beyond garden-variety financial hardships experienced by most Debtors in bankruptcy. Debtor must prove that current income and expenses do not permit more than minimal standard of living; additional circumstances that indicate that state of affairs is likely to continue; and Debtor has made good faith effort to pay loans. Evidence indicated that any possibility of Debtor paying loans was "remote", where student loans totaled over $250,000, which was more than ten times Debtor's gross annual income. Even dedicating one-third of her income would take 30 years to pay loans without interest, and there was no evidence that Debtor could afford even this payment where

Debtor's budget was already very small. Past events indicate that her income is not likely to change in the future and there is no evidence that Debtor was willfully underemployed or had not made good faith effort to find new employment. However, evidence did not demonstrate good faith. Good faith turns on degree to which Debtor actually made voluntary payments, although lack of payment is not always dispositive. Although Debtor's income has been low, she has received substantial tax refunds but did not use any of those refunds toward student loan payments, evidencing nonchalant approach to student loans that is inconsistent with good faith. Debtor paid for two "smart phones" which are a luxury that should not be undertaken at cost of student loan payments. Sheer scope of debt raised question as to whether Debtor ever really expected to repay loans. Debtor refused to seek employment in larger metropolitan area where prospects would be better and pay would be higher. Debtor, burdened by her own student loans, incurred another $10,000 in student loan debts to finance child's education. Debtor also made arrangement to pay one of the student loan creditors where her parents had guaranteed payment but wanted to discharge all remaining loans, indicating that Debtor would pay student loans where she deemed doing so "expedient". Debtor failed to pursue any of the repayment programs outside of bankruptcy, although those programs could have provided substantial relief.

(3843) *Educational Credit Management Corporation v. Jorgensen,* Case No. 12-1055 (9th Cir. BAP 2012) – Courts have equitable authority to partially discharge student loans and to determine amount and terms of payment of partial discharge. However, discretion is not unlimited and must meet good faith effort to repay as much of debt as possible while maintaining minimal standard of living. Undue hardship must be more than temporary financial adversity but does not require finding of "utter hopelessness". Debtor met *Brunner* test for undue hardship supporting partial discharge of student loans. Debtor held a PhD but suffered pancreatic cancer that substantially reduced her ability to work and increased her medical costs. Debtor had average monthly income that was less than average monthly expenses. Expenses were larger than would normally be considered "minimal" because Debtor had serious health issues. Debtor's purchase of new car would not constitute unreasonable expense where old car was quite old and in disrepair and needed thousands of dollars in repairs. Food budget, while higher than normal for one person, resulted from health problems that required special diet and Debtor resided in Hawaii where food costs were higher. Debtor's clothing expense of $150- per month was also higher than normal because Debtor's cancer resulted in substantial weight loss that required her to replace entire wardrobe. Evidence did not indicate that problems were temporary or transient. Health issues were constant risk given possibility or recurrence and Debtor's employment was tenuous because health issues may preclude her from continuing to work . Evidence indicated that Debtor was optimally employed and maximized her income. Debtor had made student loan payments prior to becoming ill and had entered into loan repayment plan in good faith. Debtor rejected later Graduate Payment Option because Debtor believed that she would not be able to make the payments given budget and health issues. However, evidence also indicated that while Debtor's schedule J included a rent expense, Debtor would not have an actual rent expense for the next year as Debtor would be a visiting professor at a school where an apartment would be provided; and while Debtor's purchase of a vehicle was not improper, Debtor should not have done so immediately before leaving on her visiting professorship and then placing car in storage while she was gone. Car payments would have been unnecessary and Debtor could have used those payments for her student loans until her return, and purchased a car at that point. Debtor's rejection of a proposed payment arrangement, without more, is not evidence of lack of good faith. Total of car payments that Debtor made on the car while the car was in storage, and the amount budgeted for rent for the time that Debtor would not have a rental expense were funds that could be available to creditor. Student loans excepted from discharge to extent of total rent and car payments during visiting teaching assignment, with balance being discharged.

(3844) *Bene v. Educational Credit Management Corp.,* 474 BR 56 (Bankr. W.D.N.Y. 2012) - Student loan nondischargeability provision forgives most of a Debtor's prior bad or immoral choices, lapses in judgment, or mistakes; what it does not excuse is Debtor's decision either to become or remain poor after bankruptcy petition is filed and while better earning options are available and student loan debt remains unpaid. *Brunner* "undue hardship" test looks to the present and the future, not to the distant past. Debtor's moral choice 24 or more years earlier not to complete her studies and to forego opportunities that she then had to improve herself and optimize her potential to earn more money, so that she could care for her infirm parents, was not relevant. "Minimal standard of living" is safe and decent standard of living and may be approximated by average family income of twice the government-set poverty figure. Sixty-four-year-old Chapter 7 Debtor who had worked on assembly line for past twelve years at hourly wage less than $13.00 and who, as result of leaving school early to care for her infirm parents, had never obtained degree, professional diploma or license and had no prospects of financial improvement satisfied "undue hardship" test. Debtor's current income was insufficient to allow her to maintain minimal standard of living and still make normal payments on student loans. Debtor, while having paid little on her student loan debt, had paid what she could afford and sought to discharge this debt only late in life, more than 24 years after debt was incurred.

(3845) *Smyth v. Edamerica, Inc.,* Case No. 11-8035 (6th Cir. BAP 2012) – Fact that Debtor listed student loans on Schedule F and received discharge does not discharge student loans where Debtor did not file adversary proceeding and did not otherwise request finding of undue hardship. Debtor's reliance on *Espinosa* misplaced, as *Espinosa* was Chapter 13 case that turned on confirmation of plan, neither of which occurred in this Chapter 7 case.

(3846) *Malone v. Higher Education Student Assistance,* 469 BR 768 (Bankr. N.D. Ohio 2012) – "Minimal standard of living" centers on Debtor's income and expenses which are reasonably necessary for Debtor to meet basic needs. Debtor is not expected to live in abject poverty but must use best efforts to maximize income and do some belt-tightening by eliminating amenities to which Debtor may have become accustomed. Debtor had income of $45,000 per year which was not "minimal". Expenses of $249 per month for household supplies included $125 per month for diapers which is reasonably necessary expense. Recreation of $150, while "stretching the envelope" is not unreasonable or extravagant and constituted simple items such as movies or outings to YMCA. However, Debtor's $100 per month "charity" expense was not reasonable where expense was not actually charity but was gifts for children and close family members which are not reasonably necessary for minimal standard of living. However, even adding back in the charity produces minimal positive cash flow, certainly not enough to make any meaningful payment on Debtor's student loans. That Debtor, his girlfriend and their son resided in low-income government subsidized housing was some evidence of financial hardship and Debtor's overall budget was very tight, evidencing an inability to repay student loans while maintaining minimal standard of living. Debtor did not demonstrate that any financial hardship was actually "undue" or beyond scope of hardship normally faced by Debtors in bankruptcy. Debtors children did not appear to have any special needs. Debtor did not evidence a serious medical condition and was only 30 years old. Debtor had recently obtained new employment that appeared

stable and provided the opportunity for future increases, and was consistent with what Debtor anticipated earning when he went to school, indicating that financial condition is not the result of events beyond the Debtor's control such as illness, disability, lack of usable job skills or existence of large number of dependents, and which are not borne of the free choice of the Debtor. Debtor made only a single payment and used a credit card to make that payment. Debtor has not made all efforts to pay where Debtor filed for bankruptcy shortly after filing; and student loans consisted of virtually all of Debtor's debts, which cut against discharge. Debtor filed bankruptcy only a year after graduating. Taken as a whole, evidence indicated that Debtor was fiscally sound and was attempting to use the bankruptcy process to quickly receive a free education Debtor's failure to meet the last two requirements of the *Brunner* test precluded discharge of student loans.

(3847) *Pietras v. U.S. Department of Education,* 2011 WL 4352381 (Bankr. N.D. Ohio 2011) – Debtors who co-signed student loans for daughter did not demonstrate undue hardship sufficient to warrant discharge of student loan obligations. Debts constitute "student loan debts" even if the Debtor was not the student such that liability of co-signor is still non-dischargeable under Section 523(a)(8) absent showing that (1) the Debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the Debtor has made good faith efforts to repay the student loan. Debtors' budget showed areas where significant reductions including $200 per month for time share payments; $225 for cell phones including $70 per month for adult daughter; and $150 for cable television. Budget also proposed to pay $600 per month for home maintenance that included financing for new flooring an carpet. Even if those expenses were reasonable, the financing would soon be paid off, freeing a substantial sum each month that could then be used to pay down the student loans. Although Debtors had chronic medical conditions, there was no correlation between those conditions and inability to pay student loan debt where Debtors had income of $60,000 per year derived solely from governmental benefits that were not likely to be changed or reduced. Although Debtors may not have had sufficient income to repay the loans in full, Debtors' failure to fulfill either of the first two conditions rendered this point moot. Further, Debtors never made any attempt to repay these student loans, which evidences a lack of good faith in seeking to discharge the debt. While the lack of any meaningful attempt by a Debtor to repay a student-loan obligation does not necessarily operate as an absolute bar to a finding of good faith, a viable reason needs to be established for the lack of any meaningful repayment. Debtors, despite having the financial ability to make at least partial payments on student-loan obligations, directed their financial resources to nonessential expenditures and never sought any deferment or alternative payment option.

(3848) *Nixon v. Key Education Resources,* 453 BR 311 (Bankr. S.D. Ohio 2011) – Student loan debt is nondischargeable unless the Debtor can demonstrate that: (1) the Debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the Debtor has made good faith efforts to repay the student loan. Minimal standard of living in modern American society includes shelter that must be furnished, maintained, kept clean, and free of pests; basic utilities such as electricity, water, and natural gas, water for drinking, and telephones; food and personal hygiene products plus clothing and footwear; vehicles, insurance, tags, gasoline, routine maintenance and unexpected repairs; health insurance or have the ability to pay for medical and dental expenses; small amounts of life insurance or other financial savings for burials and other final expenses; and some small diversion or source of recreation, even if it is just watching television or keeping a pet. Debtor's diligent search for employment indicated that Debtor had attempted to maximize her income. Debtor's house payment, although perhaps a little more than "normal" would not be significantly reduced if Debtor sold the house and rented, with the Debtor saving at most $100 to $200 per month. Even reducing Debtor's expenses to minimal standard of living, expenses would still exceed income. However, circumstances did not indicate "certainty of hopelessness" as Debtor was young and well educated and could obtain employment in the future. Using IBR calculator indicated that based on projected income which Debtor could obtain in reasonably near future, Debtor could afford to repay $10,000 per year until Debtor turned 61 years old, which would produce total payments to $210,000.00 including principal and interest. Evidence indicated Debtor's good faith efforts to repay where Debtor attempted to repay loan and made payments for long period, even though Debtor declined to participate in IBR or ICP program Debtor's student loan not discharged to the extent of $210,000 but sums in excess of $210,000 are discharged.

(3849) *Goodman v. U.S. Department of Education,* 2011 WL 2084191 (Bankr. N.D. Ohio 2011) – To prevail on complaint to except student loan debt from discharge, Debtor must prove: (1) that, based on current income and expenses, Debtor cannot maintain a "minimal" standard of living for himself and his dependents if forced to repay loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for significant portion of loan repayment period; and (3) that Debtor has made good faith efforts to repay loans. "minimal standard of living" requires Debtor to make some major sacrifices, both personal and financial, with respect to current style of living. "Additional circumstances," requires circumstances that indicate a certainty of hopelessness, not merely a present inability to fulfill financial commitment of student loans and must be beyond Debtor's control and not caused by Debtor's "free choice". Debtors inability to repay their student loans while still maintaining minimal standard of living resulted chiefly from size of their family and their many dependent children. State of affairs not likely to persist for significant portion of loan repayment period as two of Debtors' children would reach age of majority within one year, and that all but two children would become emancipated within next nine years; Debtor-wife would also be able to work full time when two youngest children entered school; and Debtors experienced an increase in their monthly income while case was pending. Chapter 7 Debtor-husband's decision not to participate in the income contingent repayment plan (ICRP) or income-based repayment plan (IBRP) for satisfaction of student loan debt demonstrated his lack of good faith. Chapter 7 Debtor-wife's decision not to participate in the income contingent repayment plan (ICRP) or income-based repayment plan (IBRP) coupled with her failure to make even a single payment on student loans for past 15 years indicated lack of good faith.

(3850) *Matthews v. Educational Credit Management Corp.,* 2011 WL 197835 (E.D. Ky. 2011) – Debtor seeking a partial discharge of student loans due to "undue hardship" must prove: (1) that the Debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans.

(3851) *Bronsdon v. Educational Credit Management Corp.,* 435 BR 791 (1st Cir. BAP 2010) – "Undue hardship" requires evidence that (1)

Debtor's past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. Court rejected additional prong of *Brunner* test that Debtor show "good faith efforts to repay" as inconsistent with undue hardship standard of Section 523(a)(8). Debtor's failure to seek Income Contingent Repayment Plan is not per se fatal to Debtor's argument of "undue hardship" even if ICRP would have required $0 payment for the foreseeable future.

(3852) *Kennedy v. Access Group Loan Servicing,* 2011 WL 87242 (Bankr. E.D. Tn. 2011) – Undue hardship requires that (1) that the Debtor cannot maintain, based on current income and expenses, a _minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. While a minimal standard of living does not mandate that a Debtor live in poverty to qualify for a discharge of their student-loan obligation, it does mean that the Debtor is expected to do some financial belt-tightening and forego amenities to which he may have become accustomed. A Debtor earning a modest income and living on an unbalanced budget with no unnecessary or frivolous expenses may be discharged based upon an undue hardship, expenditures of items such as internet, cell phones, cable or satellite television, gym or other memberships, and cigarettes are generally unnecessary to maintain a minimum standard of living and the failure to minimize or eliminate these expenditures may not demonstrate a good- faith effort to minimize expenses. Debtor, a licensed attorney, did not have any medical , physical or mental disabilities and had not made reasonable efforts to maximize her income, where she worked only 35 hours per week and billed only 11 and Debtor had not sought income from any source other than her own law practice.

(3853) *Gibson v. ECMC,* Case No. 09-80199 (Bankr. W.D. Mi. 2010) – *Bruner* test for discharging student loans requires (1) Debtor cannot maintain, based on current income and expenses, a minimal standard of living for Debtor and dependents if required to repay loan; (2) additional circumstances exist that indicate that the current state of affairs is likely to continue for a significant portion of the repayment period for the student loans; and (3) Debtor has made a good faith effort to repay loans. Debtor was well-educated 34 year old woman with no physical or mental impairment and with a history of stable full-time employment. Debtor voluntarily left her prior employment and Debtor's prospects for future employment and increased in income were good. Debtor's expenses could be reduced by eliminating dining out and Debtor's children would be emancipated in the immediate future, all of which would create disposable income that could be used to service student loan debt. Debtor failed to evidence good faith by refusing to avail herself of income contingent repayment programs. Debtor's statements that she considered ICF as "arbitrary' and that she should be permitted to enjoy a middle class lifestyle before having to make payments to the student lender constituted unreasonable refusal to pursue available programs.

(3854) *Hart v. ECMC,* 438 B.R. 406 (E.D. Mi. 2010) - *Bruner* test for discharging student loans requires (1) Debtor cannot maintain, based on current income and expenses, a minimal standard of living for Debtor and dependents if required to repay loan; (2) additional circumstances exist that indicate that the current state of affairs is likely to continue for a significant portion of the repayment period for the student loans; and (3) Debtor has made a good faith effort to repay loans. First element requires proof that Debtor is actively minimizing expenses while maximizing income. Debtor's proposed retention of cell phones, cable, internet and recreational expenses totaling $255 per month are not required to maintain minimal standard of living. Debtor also failed to maximize income, where Debtor, an experienced legal secretary, made no effort to approach law firms, went on only one interview, and contacted only a few attorneys with whom Debtor had prior employment relationships. During the 16 months from the end of Debtor's prior employment and the date of trial on the adversary proceeding, Debtor made no attempt to contact other law firms or otherwise seek employment. Debtor's household had income of $39,000 which is more than double the poverty line for a family of 2. Debtor's Chapter 13 Plan had only 2 years remaining, at the end of which Debtor would have an additional $490 available to make payments to the student lender and Debtor had built into her Chapter 13 budget extra money for unexpected expenses including $200 per month for transportation where neither Debtor not her husband worked plus $75 per month for auto maintenance. Debtor failed to demonstrate good faith where Debtor failed to make any effort to qualify for any student loan programs including Income Contingent Repayment programs which would reduce payments to only $120 per month, an amount that would be easily paid with adjustments to Debtor's household budget.

(3855) *Cekic-Torres v. Access Group, Inc.,* Case No. 09-3098 (Bankr. N.D. Ohio 2010) – Undue hardship requires Debtor to show (1) That the Debtor cannot maintain, based on current income and expenses, a `minimal' standard of living for herself and her dependents if forced to repay the loans; (2) The additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; (3) That the Debtor has made good faith efforts to repay the loans. Debtor's sole source of income for her and two children was $1600 per month from disability. Interest only payments on Debtor's $100,000 student loan obligation would be $600 per month, leaving Debtor unable to provide even a minimal standard of living. Debtor owned four parcels of real property – her residence and three other parcels that Debtor indicated were acquired in her name as an accommodation for relatives who were unable to obtain credit in their own names. Court concluded that these properties did not provide a viable means to pay the student loans where the properties were fully encumbered by mortgages leaving no equity for payment of the student loan debt and Debtor intended to surrender these properties to the relatives who occupied those properties. Debtor's disability was likely to persist for the foreseeable future, where it was the result of diabetes and non-healing and infectious leg wounds, and Debtor was morbidly obese leaving Debtor unable to sit in a normal chair or to move around without a cane. Debtor had made a good faith effort to repay although Debtor had never made any payments, where financial position and precipitous decline in health right after graduation prevented Debtor from ever having a meaningful opportunity to repa

(3856) *Jackson v. Sallie Mae,* Case No. 09-5593 (Bankr. E.D. Mi. 2010) – Debtor could not maintain minimum standard of living if Debtor is required to repay loans. Debtor was unemployed with total income of only $725 per month and Debtor had minimized expenses as far as possible and had no discretionary expenses such as cable TV. Although Debtor was only 26 years old, Debtor had made every effort to obtain new employment without success. Even if Debtor were able to gain employment, that likely would be at a rate of $10 to $15 per hour and there is no reasonable likelihood that her rate of pay would increase significantly over time, while her expenses certainly will

increase given "bare bones" nature of current expenses. Given Debtor's financial position, there is no basis to believe that failure to pay the student loans is the result of bad faith. Court can discharge a portion of the student loans. Court found that Debtor will be able to pay $100 per month starting in December, 2012 when Debtor's housing expense stops, at which point there will remain 132 months on the student loan. Debtor therefore to pay $13,200.00 including all interest, penalties and other charges. Any amount in excess of $13,200 is discharged.

(3857) *Marshall v. Student Loan Corp.,* Case No. 09-1106 (Bankr. S.D. Ohio 2010) - Undue hardship requires: (1) that the Debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist which suggest that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. Debtor was 56 year old woman who was primary care giver for disabled husband. Debtor had been laid off from prior employment and had been unable to find new employment although applying at more than 100 possible employers, at least partly because of Debtor's need for flexible work schedule because of husband's disability. Total household income consisted of husband's disability of $1442 per month. Debtor was dependent on daughter to provide place to live. Even without a rent payment, Debtor had "negative" income of $404.00 per month. Largest expense was $580 for health insurance. There did not appear any reasonably likelihood that Debtor's situation would change as husband's condition was likely to deteriorate. Under Income Based Repayment plan, Debtor's payment would still be $0. Even if IBR would produce minimal payment, that is not a part of the test for undue hardship that would prevent discharge of student loan. Debtor's refusal to participate in the IBR may be probative to her intent to repay her loan, it is not a per se indication of lack of good faith. However, under circumstances of this case, Debtor's refusal did not defeat discharge of debt where there was no likelihood that Debtor would ever be able to meet expenses and possible trigger of IBR if Debtor obtained even part time employment would severely jeopardize Debtor's ability to meet day-to-day living expenses.

(3858) *Russell v. U.S.*, 2010 WL 2545182 (Bankr. N.D. Ohio 2010) – Standard of "undue hardship" applies to potential dischargeability of the student loan obligation of nonstudent co-obligor. Undue hardship requires (1) that the Debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the Debtor has made good faith efforts to repay the loans. Good faith standard requires Debtor to act in good faith. Debtor's commencement of bankruptcy proceedings while the loans are not yet in repayment status is not, without more, a lack of good faith which would preclude the discharge of the student loans.

(3859) *Walker v. Sallie Mae Servicing Corp.,* Case No. 09-6022 (8th Cir. BAP 2010) – Discharge Order does not include discharge of student loan unless Debtor affirmatively secures a hardship determination. Action to determine dischargeability of student loan can be brought at any time prior to or after entry of discharge order and closed case may be reopened without payment of a filing fee if necessary. Entry of Discharge Order does not constitute finding that repayment would not pose undue hardship so as to prevent post- discharge action to determine hardship. Court should consider circumstances as they exist at time of adversary proceeding to determine discharge, even if those circumstances have changed significantly since entry of the discharge. Court will apply totality of circumstances test and will consider past, present and reasonably reliable future financial resources, necessary living expenses, and other relevant facts and circumstances. Debtor bears burden of proof of undue hardship. If Debtor's financial resources are sufficient to cover payment of student loan debt while allowing a minimal standard of living, the student loan debt will not be discharged. Debtor is not entitled to hardship discharge if results from self-imposed limitations or if Debtor is eligible for Income Contingent Repayment Program. Court approved hardship discharge where Debtor and her husband, post-discharge, incurred $48,000 second mortgage to add a porch to the home and where husband purchased "fully loaded Chevy Suburban" at a cost of $40,000.00, finding that particular circumstances of this family including special needs children rendered expenses reasonable. Even without those expenditures, Debtor and husband had monthly net income that exceeded monthly budget ($4700.00 per month without the second mortgage and car or $6,000 with the second mortgage and car versus income of $4355.00 per month), resulting in Debtor's inability to maintain even a minimal standard of living if Debtor is required to repay student loans.

(3860) *Gibson v. AES U.S. Department of Education Edusrv National Collegiate Trust,* Case No. 09-50813 (Bankr. E.D. Ky. 2010) – To discharge student loans, Debtor must prove (1) that Debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to pay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment of the student loans; and (3) that the Debtor has made good-faith efforts to repay the loans. Debtor must show circumstances that indicate the certainty of hopelessness, not a mere present inability to fulfill the financial commitment. Student loans would not be discharged where Debtor demonstrated that Debtor could not maintain a minimal standard of living if forced to pay the loans as her expenses exceed your income. However, Debtor has not shown a certainty of hopelessness as the Debtor had stable employment and may continue to receive raises in her current employment or find a better paying job. Debtor was only 26 years old with college degree. Although Debtor had learning disabilities, those disabilities were controlled with proper medication.

(3861) *Cassim v. Educational Credit Management Corp.,* 2008 Fed. App. 0019P (6th Cir. 2008) – Debtor's complaint to determine dischargeability of student loan was not premature and would not be dismissed on grounds of ripeness merely because complaint was brought before Debtor received discharge in underlying Chapter 13 proceeding. Federal Rule of Bankruptcy Procedure 4007 allows a complaint to determine the dischargeability of a debt to be filed by a Debtor at any time. Nothing in the Federal Rules prohibit creditor from filing student loan adversary proceeding before completion of Chapter 13 plan. Contingency of Debtor's ultimate discharge does not create a constitutional ripeness impediment to Bankruptcy Court's resolution of adversary proceeding. Requiring Debtor to wait until completion of Chapter 13 case would deprive Debtor of opportunity to pay non-dischargeable student loan debt through Chapter 13 plan and would unnecessarily delay "fresh start". Whether or not Debtor has completed Chapter 13 plan does not significantly advance Court's ability to deal with the legal issues presented.

8.209 Section 523(a)(8) – Fraud

(3862) *Gumpher v. ECMC,* 2017 WL 187547 (Bankr. N.D. Ohio 2017) – Debtor's Adversary Proceeding to discharge student loans under Section 523(a)(8) based on alleged fraud of school attended by Debtor did not contain sufficient factual allegations to support cause of action. Action for fraud requires complaint to plead specific statements that plaintiff contends were fraudulent; identity of the speaker; where and when the statements were made; and why the statements were fraudulent. Conclusory statements that school misrepresented that Debtor would be able to gain employment on graduation, that school used inflated job statistics to mislead Debtor into thinking that Debtor would be able to secure employment, and Debtor incurred higher than normal student loans based on these representations failed to contain specific information to support claim for fraud. Further, action was not brought against school, but assignee of Debtor's student loans, and complaint did not allege any conduct of student loan assignee that would warrant discharge of student loan debt, such as a scheme with school to defraud Debtor or other strict liability or negligence on part of assignee.

8.210 Section 523(a)(8) – Discharge in Chapter 13 Plan

(3863) *In re Jordan,* 2016 WL 4570414 (Bankr. S.D. Ohio 2016) – Debtor cannot by declaration in Chapter 13 Plan attempt to discharge student loans or to limit student loan creditor's right to collect non-dischargeable debt in full, absent showing of undue hardship. Plan that proposed to permanently enjoin the Debtors' student loan creditors from charging certain late fees, collection fees and other penalties; unilaterally declare that the creditors have waived the default status on the Debtors' student loans upon confirmation of the Plan and require the creditors to (i) remove the default status on the loan accounts as of the date of confirmation of the Plan and (ii) cease reporting the default status to the national credit bureaus; and prohibit the creditors from accruing interest at the default rate from the Petition Date to the date the Debtors receive a discharge was fatally defective as Plan cannot cut off rights of creditor holding non-dischargeable claim to enforce claim immediately following completion of chapter 13 case and cannot require creditor to waive default or to forgo default interest. Once the automatic stay no longer applies, the nondischargeable nature of the debt permits creditors to recover amounts from the Debtors personally to the extent the creditors are otherwise entitled to recover the amounts under applicable law. It is improper for the Debtors, absent a showing of undue hardship, to attempt to permanently enjoin student loan creditors from recovering those amounts from the Debtors. Creditor holding non-dischargeable judgement is entitled to remain in same position as creditor would have been had bankruptcy case never been filed in first instance.

(3864) *United Student Aid Fund v. Espinosa,* 130 S. Ct. 1367 (2010) – Order Confirming Chapter 13 Plan is binding on all creditors and parties with notice. Order is not void for purposes of Rule 60 merely because Plan as confirmed contained provisions that are otherwise prohibited by Bankruptcy Code or other applicable law. Due process requires 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." Fact that actual notice was provided through service of plan rather than service of adversary proceeding was procedural defect that did not alter validity of notice itself. Given the Code's clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error. But the order remains enforceable and binding where the creditor had notice of the error and failed to object or timely appeal. Bankruptcy Court has independent duty, even absent an objection by a party in interest, to insure that the plan complies with the requirements of Section 1325 before confirming the plan. However, Court's confirmation of a plan that does not comply with Section 1325 does not prevent the plan as confirmed from being binding on all parties with notice, even where plan itself clearly violates some statutory provision.

8.211 Section 523(a)(9)

(3865) *Kinder v. Shade,* 2017 WL 4457427 (Bankr. N.D. Ohio 2017) – Section 523(a)(9) excepts from discharge debts for death or personal injury caused by debtor's operation of motor vehicle while intoxicated. Whether Debtor was operating vehicle while intoxicated is matter of state law and does not require Debtor to be driver if Debtor caused operation of vehicle by, for example, grabbing steering wheel while riding as passenger in car. However, Debtor is not in operation of vehicle where Debtor is merely passive passenger in car, even if Debtor had voluntarily surrendered keys to driver who was also impaired. Debtor did not touch steering wheel, brakes or accelerator. Giving keys to third party does not "cause" vehicle movement and is beyond scope of Section 523(a)(9).

(3866) *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.

(3867) *In re Henney*, 2011 WL 1642853 (W.D. Mi. 2011) - Federal court applying section 523(a)(9) should adopt the definition of "intoxication" or "intoxicated" which is supplied by the relevant State's law. At time of accident, Michigan law defined intoxicated as a blood alcohol level of .10 grams or more per 100 milliliters of blood. It is not sufficient to prove that he Debtor was operating the vehicle after consuming alcohol. Court must find that Debtor was operating a motor vehicle while intoxicated. Evidence indicated that at no time did Debtor have a blood alcohol at or in excess of .10 legal standard. Violation of State Zero Tolerance law for persons under age 21 is not relevant as that statute does not attempt to define "intoxicated" and intoxication is not an element of an action for violation of statue. Evidence failed to establish that Debtor was operating a vehicle while actually impaired and evidence was disputed as to whether any alleged intoxication was the proximate cause of accident. Case remanded to bankruptcy court for further proceedings

8.212 Section 523(a)(10)

(3868) *Allen v. Smith,* 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(10) except from discharge any debt that was or could have been listed in a prior case in which the Debtor waived his discharge. Denial of discharge ability of debt in one case renders debt forever

nondischargeable and any subsequent bankruptcy case. Creditor's claim was listed in Debtor's prior Chapter 7 proceeding in which Debtor waived his discharge resulting in debt being nondischargeable in subsequent bankruptcy case.

(3869) *McDermott v. Graft,* 2013 WL 1142864 (Bankr. S.D. Ohio 2013) – Section 523 excepts from discharge debts that were or could have been listed in prior case where discharge was waived, revoked or denied under enumerated sub-sections of Section 727. US Trustee failed to prove that Debtor's prior discharge was revoked for misconduct that would have resulted in denial of discharge in prior case. Debtor's discharge was revoked because Debtor failed to comply with an agreed order to turnover a 2010 tax refund. However, discharge would have been denied only if failure to turn over refund was result of Debtor's refusal to abide by a Court Order. Mere noncompliance is not equivalent of refusal to comply, such that failure or inability to comply, without more, is not sufficient to deny or revoke a discharge. Agreed Order regarding turnover of tax refund did not require finding of refusal to comply as predicate for revocation, and revocation order itself did not include any finding of refusal to comply. Court revoked discharge because Debtor entered into an agreed order that provided for revocation without any finding of refusal to comply.

(3870) *McDermott v. Chapman,* Case No. 09-14461 (Bankr. N.D. Ohio 2010) – United States Trustee lacks standing to bring action to declare debts non-dischargeable as debts that could have been listed but were not listed in Debtor's prior bankruptcy filing. However, United States Trustee has standing to pursue a declaratory judgment regarding the effect of any discharge in the present case on debts that were scheduled or could have been scheduled in the Debtor's 2006 bankruptcy case as part of the United States Trustee's responsibility to protect the public interest and ensuring that cases are conducted according to law. Court in prior case issued Order Denying Debtor a discharge pursuant to Sections 727(a)(4) and (a)(8). Therefore, any debts that Debtor that were or could have been scheduled in Debtor's prior case would not be discharged in Debtor's current case.

8.213 Section 523(a)(11)

(3871) *Risk v. Hunter,* 2015 WL 4643834 (Bankr. N.D. Ohio 2015) – Section 523(a)(11) excepts from discharge any debt provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the Debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union. Non-dischargeability claim under Section 523(a)(11) is not subject to time limitations imposed by Section 523(c), although section uses term "fraud or defalcation while acting in a fiduciary capacity" as does Section 523(a)(4) which is subject to time limitation. However, Scope of Section 523(a)(11) is far narrower than Section 523(a)(4) as Section 523(a)(11) applies only to actions committed with respect to any depository institution or insured credit union and does not apply to individual creditors. Fact that plaintiff obtained pre-petition judgment against Debtor did not bring matter within Section 523(a)(11) as judgment was for breach of contract that had no connection to a depository institution or credit union, and evidence demonstrated that Debtor had never held a fiduciary position with any depository institution or credit union.

8.214 Section 523(a)(12)

8.215 Section 523(a)(13)

(3872) *Church of God v. Carter,* 2018 WL 4201747 (Bankr. E.D. Tn. 2018) – Federal Court Criminal Restitution Order is nondischargeable under Section 523(a)(13) without need to bring adversary proceeding or obtained judgment of nondischargeability. Debt is excepted from discharge without further order of Court. However, Accuracy Court would enter order declaring debt to be nondischargeable where creditor filed adversary complaint and Debtor did not contest entry of judgment.

(3873) *Baker v. Wentland,* 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Criminal restitution debt for misapplication of health insurance premiums, a violation of 18 U.S.C. § 669(a), is non-dischargeable under §523(a)(13).

8.216 Section 523(a)(14)

(3874) *HST Corporate Interiors LLC v. Sherrick,* 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(14) renders a debt nondischargeable when debt is incurred to pay a tax owed to United States and tax owed to United States itself is nondischargeable. Obligation to third-party for funds obtained and used to pay Debtor's prepetition tax liability did not fall within exception to discharge where taxes were for returns which were filed more than 3 years prior to commencement of the case such that underlying tax liabilities themselves would be dischargeable under Section 523(a)(14).

8.217 Section 523(a)(15)

(3875) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) – Obligations arising out of divorce or separation agreement may survive discharge under Section 523(a)(15). Section 523(a)(15) excepts non-DSO claims that are incurred by Debtor in course of divorce or separation or in connection with separation agreement, divorced agree or other Court of record. Antenuptial Agreement (denominated as such even though parties executed agreement before marriage) is not "separation agreement" under Section 523(a)(15) where agreement was executed before marriage while separation agreements are agreements entered into after marriage; agreement said nothing at all about separation for what would happen if parties were to separate during marriage; agreement did not define or limit rights of parties during separation or specified what would occur if parties separated but never divorced; and merely stated that each party would maintain full and continuing rights to "separate property".

(3876) *Al-Hadani v. Al-Akwaa,* Case No. 17-1092 (Bankr. S.D.N.Y. 2018) – Section 523(a)(15) excepts form discharge in Chapter 7 of any obligation "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record." Obligation created in divorce decree is excepted but pre-existing obligation between husband and wife that is recited in decree is not "incurred" in course of divorce. Less than one week before commencing divorce proceedings, Husband agreed to

pay Wife a Dowry of $30,000 as part of an Islamic marriage ceremony. Parties separated 5 days later and divorce judgment stated that dowry was enforceable contact between parties and ordered Husband to pay by specific date. Decree neither created nor altered terms of dowry and merely ordered enforcement of debt such that dowry was not obligation incurred in course of divorce. However, Court was unable on Summary Judgment to determine whether obligation may have been incurred "in the course of a separation or in connection with a separation agreement" as agreement may have been made in contemplation of separation with payment postponed until eventual issuance of divorce decree, particularly where elater issued decree did not provide for payment of alimony or division of property. Court would consider evidence of intent of parties at time of entry of Islamic Decree of Marriage in which Husband agreed to pay Dowry.

(3877) *Krakora v. Martin,* 2017 WL 6333925 (Bankr. N.D. Ohio 2017) – Section 523(a)(15) is irrelevant where debtor filed for relief under Chapter 13. While Chapter 7 discharge excepts debts within section 523(a)(15), general discharge under Chapter 13 does not except those debts. Debtor's obligation to pay mortgage and hold ex-husband harmless if type of agreement that falls within Section 523(a)(15) and will be discharged if Debtor confirms and completes Plan.

(3878) *Basye v. Basye,* 2017 WL 2303501 (Bankr. N.D. Ohio 2017) – Courts use three part test to determine if debt is non-dischargeable: debt must (1) be to spouse, former spouse, or child of debtor; (2) not be a domestic support obligation under Section 523(a)(5), and (3) have arisen during or in connection with domestic relations proceeding. Divorce judgment that required party to refinance or sell marital home and to hold ex-spouse harmless from any deficiency is obligation within scope of Section 523(a)(15). Debtor did not sell home or refinance within time required and ex-spouse brought action to except debt from discharge. Debtor defended by alleging that he attempted to refinance but ex-spouse would not cooperate. Prior to enactment of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Section 523(a)(15) contained two affirmative defenses: (i) inability to pay the debt; or (2) benefit of discharge outweighed detriment to the former spouse/child. BAPCPA eliminated defenses and made property settlement unqualifiedly non-dischargeable. Debtor's defense that ex-spouse would not cooperate could not convert non-dischargeable debt into dischargeable one.

(3879) *Rosenfeld v. Rosenfeld,* 2015 WL 4623586 (Bankr. E.D. Mi. 2015), *aff'd* 2016 WL 4761786 (E.D. Mi. 2016), *aff'd,* 2017 WL 4461037 (6th Cir. 2017) – Attorney fees awarded to creditor by State Court are non-dischargeable where fees were incurred in contempt proceedings brought based on Debtor's alleged failure to comply with Divorce Decree. Fact that fees were awarded for proceedings subsequent to the Divorce Decree did not alter fact that fees were incurred "in connection with" divorce proceedings.

(3880) *Chapman v. Chapman,* 2017 WL 4277127 (Bankr. E.D. Tn. 2017) – Section 523(a)(15) excepts from discharge in Chapter 7 proceeding debt to former spouse other than an award within scope of Section 523(a)(5) and that is incurred in course of divorce or separation or in connection with separation agreement, divorce decree or other order of Court. Post-divorce Order awarding ex-spouse additional sums based on Debtor's non-compliance with original Divorce Decree are within scope of Section 523(a)(15).

(3881) *Levin v. Carlton,* 2017 WL 192954 (10th Cir. BAP 2017) – Attorney fees incurred in litigating validity of pre-nuptial agreement as part of divorce proceedings were not dischargeable under Section 523(a)(15). Attorney fee award was "judgment" owed to spouse or former spouse and was incurred in course of divorce proceeding.

(3882) *Vander Roest v. Vander Roest,* 2017 WL 2627914 (Bankr. W.D. Mi. 2017) – "Anti-Bankruptcy Clause" in judgment of divorce that purports to convert property settlement into nondischargeable alimony in the event one party files for bankruptcy does not automatically render obligations nondischargeable or deprive Bankruptcy Court of authority to determine dischargeability of obligation. Although state courts enjoy concurrent jurisdiction to determine dischargeability, there is no authority to determine dischargeability in advance of any bankruptcy filing. Whether obligation is property settlement or support is not determined by label applied by State Court, although Bankruptcy Court will consider label such as alimony, support or maintenance specified in the decree as well as whether the obligation is paid directly to the former spouse as opposed to assumption of third-party debt and whether payments are contingent upon events such as death, remarriage or eligibility for Social Security. Judgment of Divorce specify that neither party would be entitled to alimony and instead allocated debts and included "hold harmless" clause. Obligation was nonmodifiable, not extendable and nonreviewable and is measured by unpaid obligations under hold harmless clauses rather than any showing of need or capacity to pay. Obligations did not terminate upon death or remarriage of either party, evidencing intent to create property settlement. Judgment of Divorce specify that payments would not be taxable to the recipient and not deductible by the payer, further intending that payments were in the nature of property settlement, because under Internal Revenue Code, alimony payments are deductible on payer's return and taxable to payee. Judgment of Divorce reference obligation as "alimony in gross" which is termed generally used for division of property rather than support. Obligation constituted property settlement under 11 USC Section 523(a)(15) which is dischargeable in Chapter 13 if Debtor confirms a Plan and makes all required payments.

(3883) *Zadeh v. Nelson,* 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – State Courts have concurrent jurisdiction with Bankruptcy Courts to determine whether debt is excepted form discharge under Section 523(a). State Court had previously determined on multiple occasions that obligation owed by Debtor to creditor was not DSO. Action brought in Bankruptcy Court seeking to except debt from discharge blocked by *Rooker-Feldman* as any judgment by Bankruptcy Court would necessarily amount to Federal Court review of State Court judgment.

(3884) *Missouri v. Spencer,* 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.

(3885) *In re Packer,* 2016 WL 5928899 (Bankr. W.D. Mi. 2016) – State Court Order directing Debtor to pay ex-spouse $25,000 to reimburse attorney fees was in nature of support. State Court considered income disparities between parties and attorney fees expended, concluded that ex-wife's attorney fees were direct result of activities of Debtor. Even State Court Ordered support will not be DSO to extent amount

awarded is unreasonable. Debtor presented no evidence that amount awarded was unreasonable. Bankruptcy Court will not sit as "super-divorce" court and second guess determination of State Court that ex-wife had established sufficient basis for attorney fees as DSO.

(3886) *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.

(3887) *Rismiller v. Schweitzer,* 2015 WL 5918031 (Bankr. N.D. Ohio 2015) – Property settlement awards are discharged in Chapter 13 if Debtor receives full discharge under Section 1328(a). However, property settlement awards are not discharged in Chapter 13 if Debtor receives hardship discharge under Section 1328(b). Dischargeability or non-dischargeability is self-executing depending on which type of discharge is granted. Whether obligation is support or property settlement depends on whether debt is owed to or recoverable by former spouse, is in the nature of support, and was established by separation or divorce decree. Debtor's obligation to pay joint mortgage debt is "claim" of spouse as spouse would have right under "hold harmless" provision of decree to recover from Debtor if spouse is required to pay mortgage payment, giving rise to contingent claim. Whether obligation is in nature of support where the decree does not designate it as such depends on whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; if the first two conditions are satisfied, whether the obligation is so excessive as to be unreasonable under traditional concepts of support; to the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Court will look to traditional state law indicia of support including (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits; as well as disparity in earning power of parties, need for economic support and stability, presence of minor children, marital fault, evidence of negotiations or understandings as to intended purpose of assumption of debt. Court could not determine on summary judgment whether Debtor's assumption of mortgage obligation was intended to be support obligation or whether loan assumption enabled Plaintiff to provide a home for their minor children or whether, without the loan assumption, plaintiff could not maintain the daily necessities, such as food, housing and transportation.

(3888) *Liggett v. Schwartz,* 2015 WL 4478033 (6th Cir. 2015) –Divorce decree that awarded wife one-half of retirement account had contract right to recover one-half of the account that was non-dischargeable under Section 523(a)(15). Award constituted property settlement but there was no evidence that settlement was intended to act as alimony or support. Husband's failure to transfer funds amounted to breach of contract and could not constitute conversion as a matter of law.

(3889) *Read v. Read,* 2015 WL 3918137 (Bankr. E.D. Tn. 2015) – Section 523(a)(15) includes any obligation contained in divorce decree that is not for domestic support. Obligations such as requirement that party pay off certain marital debts and requirement that party indemnify and hold other party harmless fall within scope of Section 523(a)(15), as do contempt awards arising out of orders in the court of record for the divorce proceeding.

(3890) *Courtney v. Courtney,* 2014 WL 4723093 (Bankr. N.D. Ohio 2014) – Debtor's obligation to turn over one half of Debtor's tax refund for specific year required Debtor to turn over one half of tax refund as shown on tax return which was not contested by IRS. Fact that Debtor did not receive refund because refund was intercepted by IRS for payment of Debtor's delinquent student loans did not mean that Debtor could withhold remittance where divorce decree required turnover of one half of "all refunds" not limited just to funds actually received.

(3891) *Francis v. Wallace,* 505 BR 914 (9th Cir. BAP 2014) – Divorce decree that required Debtor to hold ex-spouse harmless but did not include indemnity provision carried implied right of indemnity that would survive discharge as obligation arising out of dissolution of marriage.

(3892) *Liggett v. Schwartz,* 2014 WL 1028960 (E.D. Mi. 2014) – Claim under Section 523(a)(15) rendered moot when Debtor never disputed that pursuant to divorce decree Debtor owed ex-wife 50% of IRA and that the debt was non-dischargeable.

(3893) *Bendetti v. Guinness,* 2014 WL 177247 (9th Cir. BAP 2014) – Status of creditor as spouse, former spouse or child of Debtor is prerequisite to except debt from discharge. Debtor and her husband were liable for attorney fees owed to Husband's former spouse for costs of divorce. The lack of any familial connection between Debtor and creditor prevented debt from being within scope if Section 523(a)(15). Court noted that cases that extended scope to persons other than the spouse, former spouse or child involved debts that flowed to the benefit of a member of the listed classes, or where the discharge would adversely affect explicitly covered family members. Debt to spouse's former spouse was not one that would flow to Debtor's family member and did not adversely affect Debtor's family member. Debt was not excepted from discharge.

(3894) *Northedge v. Beckett,* Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Discharge in Chapter 7 does not discharge obligations incurred in action for dissolution of marriage. Obligations pass through bankruptcy unaffected and holder of claims can enforce those claims once the Chapter 7 case is completed.

(3895) *Hamilton v. Kyer,* 2013 WL 3877897 (Bankr. N.D. Ohio 2013) – Section 523(a)(15) excepts from discharge debt where (1) the debt in question is to a spouse, former spouse or child of the Debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred in a separation agreement, divorce decree or other order of a court of record. Debtor's obligation to pay lien on automobile received by Debtor and on which spouse was jointly liable was debt owed to spouse. Fact that debt was to be paid to the lender rather than spouse did not demonstrate that debt was not payable to the spouse where payment was necessary to prevent creditor from seeking payment from spouse. Debt was clearly not for support where separation agreement defined obligation as property settlement and not as support and obligation was not contingent. Although underlying debt was incurred after commencement of divorce proceedings, it was incurred prior to Court Order incorporating Settlement Agreement into divorce judgment, and separation agreement created and

controlled rights between parties, including spouse's right to payment by Debtor to Creditor.

(3896) *Kinkade v. Kinkade,* 2013 WL 450976 (5th Cir. 2013) – Final Judgment in favor of one spouse against other spouse based on alleged loans from one spouse to other spouse constituted non-dischargeable obligation where judgment was entered in connection with divorce proceeding. Prior to marriage, wife loaned money to husband. After marriage, wife made additional loans from her separate property. As part of the divorce, State Court entered judgment in favor of wife for amount outstanding on loans plus interest. Dischargeability under Section 523(a)(15) does not distinguish between marital claims or separate claims. State Court judgment determined that the debt was more than a mere contractual obligation unrelated to the marriage. Bankruptcy court would respect State Court determination on nature of obligation. As obligation resulted from judgment in divorce action, it constituted non-dischargeable debt.

(3897) *Bringhurst v. Adams,* 2012 WL 2467084 (Bankr. E.D. Ky. 2012) – Order directing Debtor to "buy out" ex-spouse's interest in marital property, entered in course of divorce proceeding, was non-dischargeable under Section 523(a)(15). Ex-spouse's later reduction of obligation to money judgment when Debtor failed to make payments did not "convert" obligation into something other than obligation incurred in divorce proceeding.

(3898) *Taylor v. Taylor,* Case No. 11-103 (10th Cir. BAP 2012) – Plain and unambiguous language of Section 523(a)(15) includes any obligation arising out of a separation agreement, divorce decree or order of court of record. Obligation arising out of inadvertent overpayment of support obligation is, itself, a non-dischargeable obligation. The obligation arises out of a domestic support obligation and is owed to an ex-spouse and is not an obligation for support. Obligation to pay alimony was to terminate when spouse co-habitated. Spouse (now Debtor) began to cohabit but did not disclose this to either her ex-spouse or to the court, resulting in continued payments of alimony to which Debtor was not entitled.

(3899) *Baer v. Cabrian,* 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.

(3900) *Murtha v. Spencer,* 2011 WL 4101092 (Bankr. W.D. Mi. 2011) – State Court Judgment of Divorce and subsequent orders of State Court established that obligations from Debtor to ex-spouse constituted Debtors incurred between spouses incurred in the course of a divorce or separation within the scope of Section 523(a)(15). State Court Judgment determined all of the issues required in determining dischargeability of debt and collaterally estopped Debtor from contesting issue.

(3901) *Bevins v. Ballard,* 2011 WL 2133529 (Bankr. E.D. Ky. 2011) – To be excepted from discharge under this provision, the debt must: (1) be to a spouse, former spouse or child of the Debtor; (2) not be of the type described Section 523(a)(5), which excepts domestic support obligations; and (3) have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court. Debtor's failure to comply with Property Settlement that required the Debtor to refinance the debt or to otherwise cause real property to be removed as security for the loan and failure to hold ex-spouse harmless on other debt and to indemnify ex-spouse for attorneys' fees and costs due to the Debtor's failure to abide by the terms of the agreement are debts owed under the Property Settlement that are not a domestic support obligations and are also excepted from the Debtor's discharge pursuant to § 523(a)(15).

(3902) *Reissig v. Gruber,* 2010 WL 2756762 (Bankr. N.D. Ohio 2010) - Debtor's obligation to pay ex-spouse's attorney fees is non-dischargeable obligation. A debt will be excepted from discharge under Section 523(a)(15) when: (1) the debt in question is to a spouse, former spouse or child of the Debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred during the course or in connection with a separation agreement, divorce decree or other order of a court of record. Attorney fees awarded in post-dissolution proceedings constitute and award "in connection with" the divorce decree.

(3903) *Dunne v. Lind,* 2010 WL 1462504 (Bankr. W.D. Mi. 2010) – Divorce decree that required Wife to pay her student loans on which Husband was co-borrower created obligation that would be non-dischargeable in Wife's subsequent Chapter 7 proceeding under Section 523(a)(15). Debt was "incurred … in the course of a divorce or divorce decree" notwithstanding that underlying student loan substantially pre-dated divorce action. Wife's acknowledgement and commitment to pay Debtor in the divorce proceeding resulted in new, legally enforceable obligation owed to Husband. Although Decree did not contain "hold harmless" clause, that is not a requirement under Section 523(a)(15)

(3904) *Cheatham v. Cheatham,* 2009 WL 2827951 (Bankr. N.D. Ohio 2009) - An obligation to a spouse, former spouse, or child of the Debtor and not of the kind described in paragraph (5) that is incurred by the Debtor in the course of a divorce or separation or in connection with a separation agreeent, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit is non-dischargeable. A Debtor's ability to pay is no longer an issue to consider in determining whether the obligation is non-dischargeable. Plaintiff must establish that (1) the debt in question is to a spouse, former spouse or child of the Debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred in a separation agreement, divorce decree or other order of a court of record. BAPCPA added as a condition of non-dischargeability that the debt be "to a spouse, former spouse or child of the Debtor". The fact that the debt is paid to a third party does not mean that the debt is not owed to the Plaintiff. A "claim" under the Bankruptcy Code is broadly construed to include any equitable or legal right to payment. The Final Judgment of Dissolution required Debtor to hold Plaintiff harmless from the mortgage and home equity line obligations. If Debtor defaults, the Creditor can pursue the Plaintiff, at which time the "hold harmless" provision would take effect. Therefore, the ex-spouse holds a contingent and unliquidated claim for bankruptcy purposes, making the underlying obligation one owed "to" the ex-spouse.

8.218 Section 523(a)(16)

(3905) *Goudelock v. Sixty-01 Association of Apartment Owners,* Case No 16-35384 (9th Cir. 2018) – Post-petition assessments are dischargeable under Section 1328. Obligations is pre-petition where owner acquired interest in unit and incurred obligation to pay assessmens pre-petition. Obligation is not discharged in a case under Chapter 7 or in Chapter 13 if Debtor does not complete payments. Section 1328 does not except

debt in Chapter 13.

(3906) *In re Jackson,* 2016 WL 4147641 (6th Cir. BAP 2016) – Discharge does not discharge liability of Debtor for fees, charges and assessments that become due and payable after commencement of case. Debtor is not discharged from post-petition attorney fees incurred in Association's efforts to foreclose property after bankruptcy discharge, as those fees became due and payable by Debtor after commencement of case.

(3907) *Driftwood Manor Homeowners Association v. Borgus,* 544 BR 315 (Bankr. E.D.N.C. 2016) – Homeowners association dues that accrue after filing of chapter 13 but before conversion to Chapter 7 are excepted from discharge. Section 523(a)(16) excepts from discharge homeowners' fees that become due after the "order for relief" not the date of conversion. Except for the narrow circumstances in Section 348(b), a conversion does not change the date of the order for relief. Section 348(b) provides that post-petition, pre-conversion debt is eligible for discharge except as provided in Section 523.

(3908) *In re Kelson.* 2012 WL 3990789 (Bankr. S.D. Fl. 2012) – Under Section 523(a)(16), post-petition fees and assessments are not dischargeable. Special Assessment levied pre-petition is a pre-petition claim, even if assessment cannot be enforced until post-petition. Obligation to pay special assessment arose when Board of Directors adopted assessment at duly noticed meeting, even if payment was not due until later date. Fact that the board of directors opted to provide the members a longer period of time to pay the obligation does not change the fact that the obligation was established when the assessment was adopted. Assessment was pre-petition obligation that is discharged in Debtor's Chapter 13 proceeding.

(3909) *Bank of America v. Pigg,* 453 BR 728 (Bankr. M.D. Tn. 2011) – Bankruptcy Code § 523(a)(16) provides that a Debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the bankruptcy petition is filed as long as the Debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit. In amending Section 523(a)(16) Congress "could not have foreseen the world and United States financial crisis that crashed Wall Street, sunk the real estate market, and affected, to some degree, almost every American". Lenders choose not to foreclose on their collateral leaving homeowners in limbo. A chapter 7 Debtor who has surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage cannot truly be given a fresh start where HOA fees accumulate until lender chooses to foreclose. If the lender never forecloses, that homeowner's liability for the HOA fees continues in perpetuity, thwarting the goals of the entire Bankruptcy Code. Court Ordered that the Chapter 7 trustee sell the property pursuant to 11 U.S.C. § 363 and distribute the proceeds to administrative expenses incurred by the chapter 7 trustee; then the claim of the HOA for all fees and expenses covered by their first priority lien; then the Bank to the extent of its lien; then to the Second mortgage holder to the extent of its lien; then to the chapter 7 estate. Bank and the HOA consented to the sale by their inaction as equity demands that court fashion remedy that balances rights of the lienholders and the right of a Debtor to a fresh start.

(3910) *Maple Forest Condominium Association v. Spencer,* 2010 WL 3909985 (Bankr. E.D. Mi. 2010) – Section 523(a)(16) applies only in Chapter 7 cases. Chapter 13 discharge includes obligations for post-petition association fees and expenses unless Chapter 13 discharge is "hardship" discharge.

(3911) *In re Williams,* Case No. 08-71337 (Bankr. E.D. Mi. 2010) – Debtor cannot abandon Debtor's own interest in the property in an attempt to cut off post-petition condominium fees and assessments under Section 523(a)(16). Upon abandonment, whatever legal or equitable interests the Debtor may have had in the property are no longer included in property of the estate. Property reverts *nunc pro tunc* to its pre-petition status as if no bankruptcy had ever been filed, and Court is divested of jurisdiction over that property.

8.219 Section 523(a)(17)

(3912) *In re Wilcox,* 2014 WL 2208893 (Bankr. W.D. 2014) – Section 523(a)(17) excepts from discharge fees imposed on prisoners by any court for filing a case, motion, complaint or appeal in connection with that filing. Exception did not include debt for supplies "loaned" by prison to Debtor for legal supplies, notary services or legal copies where no court imposed the fees.

8.220 Section 523(a)(19)

(3913) *Lunsford v. Process Technologies Services LLC,* Case No. 16-11578 (11th Cir. 2017) - Section 523(a)(19) renders debt nondischargeable where debt results from violation of State or Federal securities laws and results in a judgment entered by a State or Federal Court even where Debtor did not actually participate in securities law violation. Debtor was executive in company that sold securities to plaintiff who later sued to rescind sale. State Court entered judgment in favor of plaintiff against Company and Debtor jointly. Section 523(a)(19 makes debt nondischargeable even if fraudulent conduct is attributable entirely to third-party as Section 523(a)(19) requires only a violation of securities acts irrespective of the Debtor's particular conduct. Obligation to plaintiff resulted from violation of securities laws and had been reduced to judgment by State Court.

(3914) *Cooley-Linder v. Behrends,* Case No. 15-1420 (10th Cir. 2016) – Section 523(a)(19) requires that debt be for violation of federal or state securities laws, or any regulations or orders issued under federal or state securities laws; or resulting from fraud, deceit or manipulation in connection with a purchase or sale of security; and debt must result from judgment, order, consent order or decree in any federal or state judicial or administrative proceeding, any settlement agreement, or any court or administrative order for damages, fines, penalties, citations, restitution or other payment owed by the Debtor. Arbitration award finding that Debtor committed multiple violations of state and federal securities acts sufficient for purposes of Section 523(a)(19). Arbitration order not required to meet standards of collateral estoppel . Debtor could not avoid effect of arbitration order by allowing arbitration panel award to be entered by default and then claim that award did not demonstrate that panel necessarily considered issue; or that panel did not make sufficient factual findings, which would be required for award to have collateral estoppel effect, as Section 523(a)(19) gives effect to *any* judgment without regard to whether judgment meets collateral estoppel requirements. Complaint filed with arbitration panel contained sufficient factual allegations to establish violation of securities laws and panel specifically found, but did not itemize, numerous violations of both state and federal securities laws.

(3915) *Frankfurter v. Friedman,* 2015 WL 3485748 (Bankr. N.D. Ill. 2015) – Debt that resulted from Debtor's fraudulent inducement that caused

plaintiff to invest in company constituted fraud in connection with the sale of a security, rendering debt non-dischargeable. Final determination by State Administrative Agency established all elements of liability for purposes of Section 523(a)(19).

(3916) *Barton v. Stalter,* 2012 WL 4482058 (Bankr. E.D. Mi. 2012) – Section 523(a)(19) requires a violation of federal securities law or common law fraud in connection with purchase or sale of security; and liability results from judgment or order, settlement agreement, or court or administrative order. Statute requires both that there must be securities violation and a settlement or final resolution. State Court consent judgment was not res judicata on issues where Debtor in State Court judgment expressly did not admit liability or guilt. Neither State Court judgment nor settlement agreement contained any determination of culpability for violation of any securities law or regulation or any fraud. State Court complaint contained multiple counts that were not based on securities violation and judgment did not allow court to determine which count on which agreed judgment was predicated.

(3917) *Oklahoma Department of Securities v. Wilcox,* Case No. 10-6056 (10th Cir. 2012) – Non-dischargeability under Section 523(a)(19) precludes discharge of debt that results from securities law violation. Judgment for unjust enrichment that results from someone else's violation of securities laws is not within scope of Section 523(a)(19). Debtor was investor in what proved to be Ponzi scheme. Debtor received distributions from operation of scheme before scheme collapsed. Oklahoma sued Debtor to recover the distributions under theory of unjust enrichment. There was no evidence that Debtors themselves engaged in any conduct that would constitute violation of securities laws or that Debtor conspired with the operator of the Ponzi scheme to violate securities laws. Judgment against Debtor discharged.

(3918) *Hall v. Little,* 2011 WL 3471481 (Bankr. E.D. Ky. 2011) – Section 523(a)(19) makes non-dischargeable a debt that results from violation of federal securities laws; or for common law fraud, deceit or manipulation in connection with purchase or sale of security *and* results from a judgment, order or settlement. Judgment arising out use of real estate is not a "securities" action within the scope of Section 523(a)(19)

8.221 Other Grounds

(3919) *In re Fagan,* Case No. 15-28694 (Bankr. E.D. Ca. 2016) – Section 523 does not contain exhaustive list of non-dischargeable debts. Debt arising from unearned military reenlistment bonus is not dischargeable under 37 USC Section 303 which provide that a "discharge in bankruptcy does not discharge a person from" a debt to repay an unearned reenlistment bonus. Debtor received bonus for first year of term but was involuntarily discharged only 15 months into term owed unearned portion of reenlistment bonus.

8.222 Recovery of Attorney Fees

(3920) *Lansden v. Jones,* 2018 WL 604821 (Bankr. E.D. Tn. 2018) – Damages included award of attorney fees where ISDA that was product of fraudulent conduct provided for fees to be recovered by prevailing party.

(3921) *Almasudi v. Ibrahim,* 2017 WL 6498026 (Bankr. E.D. Mi. 2017) – Plaintiff cannot recover attorney fees in adversary proceeding to except debt from discharge where there is neither statutory nor contractual basis for award of attorney fees. Courts follow "American Rule" that each party pays own attorney fees absent statutory or contractual basis otherwise.

(3922) *Dardinger v. Dardinger,* 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – Ohio Courts give preclusive effect to prior judgment if (1) there is a Final Judgment on merits in previous case after full and fair opportunity to litigate; (2) issue was actually and directly litigated and necessary to Final Judgment; (3) issue in present suit is identical to issue in prior suit; and (4) party to be estopped was party or in privity with party in prior action. State Court judgment against defendant entitled to preclusive effect in action to deny discharge under Section 523(a)(6) for willful and malicious injury. On at least 37 separate occasions, defendant used a spy camera to surreptitiously video record plaintiff in various stages of undress in her bedroom, bathroom and other private areas of family residence. After plaintiff referred matter to police, defendant made numerous contacts with plaintiff, threatening to cut her off financially and to use media to "ruin" plaintiff's life. Defendant pled guilty and was convicted of illegal use of minor in nudity oriented material, a fifth degree felony. Defendant also assaulted plaintiff by grabbing her arm, twisting it behind her back and slamming her into a wall, amounting to assault and battery under state law. State Court concluded that defendant's conduct was done knowing and intentionally and was done willfully and maliciously and without just cause, warranting award of actual damages of $104,200, punitive damages of $1,850,000, and attorney's fees of $651,400. All issues necessary for determination of dischargeability under Section 523(a)(6) were actually and necessarily litigated as State Court necessarily had to find that Debtor engaged in certain conduct that would be willful and malicious. State Court received evidence from a number of sources and issued specific findings and conclusions to establish that Debtor rises from conduct that was willful and malicious.

(3923) *Poole v. Batson,* 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Plaintiff who successfully objects to dischargeability of debt can recover treble damages, attorney's fees and costs to the extent allowed by contract or statute. Tennessee Consumer Protection Act allows for attorney's fees, expenses and treble damages were a home improvement service provider, with intent to defraud, fails to refund amounts paid under contract for home-improvement services within 10 days after written request for refund. Treble damages are not intended to compensate an injured plaintiff, but rather to punish defendant and deter similar conduct. Debtor's did not violate TCPA where plaintiff's did not request refund of unused construction deposit until after Debtor filed bankruptcy at which point any funds on hand would have constituted property of estate, leading Debtor unable to comply with request. However, Debtor's collection of "impact fee" was violation of Act where impact fee was not required and although Debtor collected impact fee, Debtor never paid, and was now required to pay, impact fee. Accepting payment from plaintiff for unnecessary fee constituted violation of Act allowing plaintiff to recover reasonable fees and costs as well as treble damages. Actual damages measured by amount of impact fee collected, $3300, entitling plaintiffs to additional $9900 and treble damages plus reasonable attorney's fees and costs for prosecuting this violation of Act.

(3924) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Exception from discharge under Section 523(a)(2)(A) requires (1) Debtor obtained money through material misrepresentation that, at time made, Debtor knew was false or was made with gross recklessness for truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representations; and (4) reliance was proximate cause of loss. Debtor induced creditor to invest $100,000 with specific promise that fund would be used for construction of specific home on specific parcel of property. Instead, Debtor immediately transferred funds to Debtor's personal account and other funds to Debtor's general business account for payment of expenses unrelated to development of specifically represented house. While funds were initially deposited into business account rather than Debtor's personal account, indirect benefit is sufficient for purposes of non-dischargeability. Debtor unquestionably obtained benefit by having his company transfer funds to him personally and use other funds for payment of business which was owned solely by Debtor and Debtor's spouse, and caused company to pay Debtor's personal expenses including groceries, vehicle expenses, meals and water bills; and company comingled the funds received from creditor with other funds of business that were unrelated to specific lot in which creditor thought he was investing. Debtor specifically represented that fund would be used to build specific house and that creditor's investment, coupled with Debtor's investment, would be sufficient to complete house, but Debtor did not advise creditor that Debtor did not intend to invest funds but instead intended to obtain construction loan for entire amount of cost of construction. Debtor knew that statements we false as Debtor obtained construction loan almost immediately after receiving creditor's investment, indicating that Debtor never intended to split the risk or to share in the proceeds as repayment of construction loan would consumer almost all of the sale proceeds leaving Debtor unable to repay even principal of investment much less an additional one-half of the proceeds. Intent to deceive is present when Debtor makes false representation knowing or where Debtor should have known that creditor would rely in deciding to advance money, goods or services. Fraudulent intent inferred from Debtor's repeated misstatements including statements that Debtor's business was "going well" when in fact it has been losing money for a number of years and Debtor knew of financial difficulties as he was having trouble obtaining financing for certain proposed developments; and Debtor almost immediately diverted creditor's investment into other properties in which creditor had no interest. Evidence indicated that creditor relied justifiably and that reliance was proximate cause of loss, as without misstatements creditor would not have invested funds and would not have suffered loss. Creditor not entitled to award of interest as interest was contingent and unmatured as of petition date but was entitled to recover attorney fees incurred in adversary proceeding based on provision in promissory note that creditor was entitled to recover attorney fees in any collection by suit or otherwise or to protect security for payment.

(3925) *Casab v. Grand Sky Enterprise Co., Ltd.,* Case No. 15-1378 (6th Cir. 2016) – Collateral estoppel applies in dischargeability actions where (1) same parties were involved in prior action; (2) issue was litigated and resolved in State Court proceeding; (3) party to be estopped had full and fair opportunity to litigate; and (4) state law judgment is clear, definite and unequivocal Plaintiff and Debtor were parties to State Court action, for fraud, and action was based on same elements as elements necessary to except debt from discharge. Damages in adversary to determine debt to be non-dischargeable include all damages that flow from fraudulent conduct. Bankruptcy Court correctly held entire State Court judgment to be excepted from discharge where State Court determined that but for Debtor's fraud, plaintiff would not have entered into contractual relationship, and that measure of damages is amount necessary to compensate plaintiff plus attorney fees, other expenditures, and exemplary damages. All of plaintiff's damages flowed from the fraud and so all were excepted from discharge.

(3926) *Greer Construction, Ltd. v. Compton,* 2015 WL 6445051 (Bankr. N.D. Ohio 2015) – Court can award attorney fees to plaintiff who prevails in action to except debt from discharge only if there is contract or statutory basis. Bankruptcy code does not provide any independent basis to award attorney fees. State law allows award of attorney fees in fraud action if conduct constitutes such gross fraud or malice that award of punitive damages would be warranted. Conduct of Debtor, while sufficient to except debt from discharge under Section 523(a)(2), did not rise to level necessary to award punitive damages, leaving no statutory basis for award of attorney fees to successful plaintiff.

(3927) *Jenkins v. Schmank,* 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Attorney fees can be awarded in action under Section 523 if underlying state law supports award. Where Debtor's conduct constituted intentional misrepresentation, state law allows recovery of all pecuniary losses that flow from actions, including attorney fees necessary to recompense plaintiff for the full amount of the loss.

(3928) *Novotny v. Barnes,* 2014 WL 5771305 (Bankr. N.D. Ohio 2014) – Court could not award attorney fees incurred in Section 523(a)(2) action where there was neither statutory nor contractual basis for award of attorney fees.

(3929) *Jennings v. Bodrick,* 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Section 523(d) allows court to award attorney fees to Debtor if creditor request determination of dischargeability of consumer debt and the debt is discharged. Action arose out of investment transaction was not business debt as transaction was for purpose of achieving a return or profit and not for family or household purposes.

(3930) *Davis v. Music,* 2014 WL 1089849 (Bankr. N.D. Ohio 2014) – Plaintiff in successful Section 523 action may recover costs. However, Plaintiff may not recover attorney fees unless fees are authorized by federal statute or enforceable contract. Action to except debt from discharge under Section 523(a)(6) based on assault did not present any statutory authority for fees, and there was no contractual relationship between parties.

(3931) *McCallum v. Pixley,* 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A "true default judgment" is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment. State Court judgment that awarded attorney fees for conversion based on Michigan conversion statute was non-dischargeable in its entirety, including attorney fees. If Debtor's debt is found to be non-dischargeable, all debt that arises from or is traceable to that conduct, is non-dischargeable.

(3932) *Galindo v. Whited,* Case no. 12-1272 (9th Cir. BAP 2013) – Creditor is entitled to recover attorney fees in non-dischargeability action where underlying contract provided for attorney fees to prevailing party. Court did not abuse discretion in awarding fees and costs totaling $78,000 in action which resulted in non-dischargeability judgment of $1,648.00.

(3933) *Oak Street Funding, LLC v. Blair,* 2013 WL 2154795 (Bankr. E.D. Tn. 2013), *fees awarded in subsequent proceeding,* 2013 WL 3877814

(Bankr. E.D. Tn. 2013) – Creditor can recover attorney fees incurred in action under Section 523 if there is contractual basis for that award. Loan documents between Debtor and creditor contained multiple provisions for award of attorney fees to prevailing party in connection with enforcement of obligations under loan documents. Creditor's action under Section 523(a)(6) was action to recover amounts owed on loan agreement between creditor and Debtor's corporation, where Debtor guaranteed the debt.

(3934) *Hamilton v. Charalambous,* Case No. 13-1042 (9th Cir. BAP 2013) – Under California law, contract provision for recovery of attorney fees is enforceable by prevailing party regardless of whether litigation sounds in contract or tort. Plaintiff successfully brought non-dischargeability actions against Debtor based on Section 523(a)(4) for defalcation. Contract that gave rise to relationship between plaintiff and Debtor had prevailing party attorney fee provision that was enforceable by successful plaintiff to recover fees incurred in Section 523 action.

8.223 Recovery of Interest and Costs

(3935) *Zenovic v. Crump,* Case No. 17-60017 (9th Cir. 2018) – Bankruptcy Court has discretion to award prejudgment interest rate at higher state law rate of interest. Although cause of action was based on federal law under Section 523, trial Court, informed by substantial evidence regarding considerations of fairness and with objective of making wrong party whole has discretion to award prejudgment interest at higher rate. Elements of fraud under Section 523 are much like elements that would be shown under state law fraud claim and if case were in federal Court based on diversity jurisdiction, state law interest rate would apply.

(3936) *Campbell v. Butz,* 2018 WL 1895689 (Bankr. W.D. Ky. 2018) – Correct post-judgment rate of interest under Section 523 is Federal Judgment Rate. Motion to Alter, Amend or Vacate Judgment granted to correct post-judgment interest rate from 15% contact rate of interest to 1.8% federal judgment rate.

(3937) *Poole v. Batson,* 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Plaintiff who successfully objects to dischargeability of debt can recover treble damages, attorney's fees and costs to the extent allowed by contract or statute. Tennessee Consumer Protection Act allows for attorney's fees, expenses and treble damages were a home improvement service provider, with intent to defraud, fails to refund amounts paid under contract for home-improvement services within 10 days after written request for refund. Treble damages are not intended to compensate an injured plaintiff, but rather to punish defendant and deter similar conduct. Debtor's did not violate TCPA where plaintiffs did not request refund of unused construction deposit until after Debtor filed bankruptcy at which point any funds on hand would have constituted property of estate, leading Debtor unable to comply with request. However, Debtor's collection of "impact fee" was violation of Act where impact fee was not required and although Debtor collected impact fee, Debtor never paid, and was now required to pay, impact fee. Accepting payment from plaintiff for unnecessary fee constituted violation of Act allowing plaintiff to recover reasonable fees and costs as well as treble damages. Actual damages measured by amount of impact fee collected, $3300, entitling plaintiffs to additional $9900 and treble damages plus reasonable attorney's fees and costs for prosecuting this violation of Act.

(3938) *In re Jordan,* 2016 WL 4570414 (Bankr. S.D. Ohio 2016) – When debt is excepted from discharge, creditor is entitled to recover interest and costs of collection to extent provided for by contract or statute accruing on claim post-petition, even where claim is otherwise paid in full during life of Chapter 13 case. Proof of Claim properly included only interest accrued through date of filing Chapter 13, and Plan proposed to pay claim including interest accrued through commencement of case in full, but to cut off creditor's right to further accrued interest and collection costs. Plan was fatally defective as Plan cannot cut off Debtor's liability for post-petition accrued interest and costs. Creditor holding non-dischargeable judgement is entitled to remain in same position as creditor would have been had bankruptcy case never been filed in first instance.

(3939) *Oregon v. Egbo,* Case No. 15-1580 (D. Ore. 2016) – Where non-dischargeability action was based on State Court judgment that liquidated damages and provided for post-judgment interest at specified rate. Bankruptcy Court abused discretion in Judgment that declared debt to be excepted from discharge but provided for interest at the lower, Federal judgment rate. Section 523 is intended to protect the full rights of the creditor including the right to receive interest at the rate specified in the pre-bankruptcy State Court judgment.

8.224 Treble Damages

(3940) *Nyman v. Montfort,* 2017 WL 4582171 (Bankr. N.D. Ohio 2017) – Court can impose treble damages where permitted by State Law. Ohio Consumer Protection Act allows treble damages for unfair or deceptive act or practice in connection with consumer transaction and includes actions occurring before, during or after transaction and does not require either intent or knowledge, as long as conduct complained of has likelihood of inducing consumer to believe matter that is not in accord with facts. Plaintiff entered into "consumer transaction" by retaining Debtor's LLC to provide and install pavers and other materials in Plaintiff's backyard for personal, family or household purposes. Although contract was with LLC, Debtor was person who was engaged in business of effecting and soliciting the transaction making Defendant personally liable. Webpage for Debtor's LLC falsely stated that Debtor's LLC was "area's leading contractor, having installed over 550 outdoor living hardscape construction projects since 1996 with over 225,000 sq. ft. of paver and stone surfaces and over 50,000 lineal ft. of retaining walls. We have completed multiple projects over $100,000 and our largest project was nearly $300,000. … [LLC] was founded in 1996 as a full service landscape and irrigation company. Since then we have become the region's largest hardscape construction company." LLC had actually existed for only three months and had not completed any projects over $100,000.00. LLC had not worked on over 100 projects and was not the largest company. Plaintiff's actual damages totaled $8862.50 and Plaintiff entitled to treble damages for total of $46,587.50, which would be excepted from discharge.

(3941) *Poole v. Batson,* 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Plaintiff who successfully objects to dischargeability of debt can recover treble damages, attorney's fees and costs to the extent allowed by contract or statute. Tennessee Consumer Protection Act allows for attorney's fees, expenses and treble damages were a home improvement service provider, with intent to defraud, fails to refund amounts paid under contract for home-improvement services within 10 days after written request for refund. Treble damages are not intended to compensate an injured plaintiff, but rather to punish defendant and deter similar conduct. Debtor's did not violate TCPA where plaintiff's did not request refund of unused construction deposit until after Debtor filed bankruptcy at which point any funds on hand would have constituted property of estate, leading Debtor unable to comply with request. However, Debtor's collection of "impact fee" was violation of Act where impact fee was not required and although Debtor collected impact fee, Debtor never paid, and was now required to pay, impact fee. Accepting payment from plaintiff for unnecessary fee constituted violation of Act allowing plaintiff to recover reasonable fees and costs as well as treble damages. Actual damages measured by amount of impact fee collected, $3300, entitling plaintiffs to additional $9900 and treble damages plus reasonable attorney's fees and costs for prosecuting this violation of Act.

(3942) *Casab v. Grand Sky Enterprise Co., Ltd.,* Case No. 15-1378 (6th Cir. 2016) – Collateral estoppel applies in dischargeability actions where (1) same parties were involved in prior action; (2) issue was litigated and resolved in State Court proceeding; (3) party to be estopped had full and fair opportunity to litigate; and (4) state law judgment is clear, definite and unequivocal Plaintiff and Debtor were parties to State Court action, for fraud, and action was based on same elements as elements necessary to except debt from discharge. Damages in adversary to determine debt to be non-dischargeable include all damages that flow from fraudulent conduct. Bankruptcy Court correctly held entire State Court judgment to be excepted from discharge where State Court determined that but for Debtor's fraud, plaintiff would not have entered into contractual relationship, and that measure of damages is amount necessary to compensate plaintiff plus attorney fees, other expenditures, and exemplary damages. All of plaintiff's damages flowed from the fraud and so all were excepted from discharge.

(3943) *Szachta v. Benner,* Case no. 15-4555 (Bankr. E.D. Mi. 2016) – Where non-dischargeability action is based on state law conversion, plaintiff entitled to statutory treble damages. Debtor's actions were not result of negligence or bookkeeping error. Instead, Debtor, an attorney who represented plaintiff in personal injury action, used the proceeds of that action for Debtor's own personal and firm expenses rather than paying funds to client. Plaintiff also entitled to damages for mental distress where evidence indicated that Debtor's conduct caused plaintiff to become irritable, withdrawn, stressed, panicked, angry, upset and anxious; that plaintiff wakes up at night contemplating Debtor's actions; plaintiff is unable to focus and mind continuously drifts off to Debtor's actions and effect those actions had on plaintiff's life. Court award included $5,000 for mental distress, which was also trebled as part of the damages suffered as a result of Debtor's conversion of funds.

(3944) *Jackson v. Spencer,* 2015 WL 6162945 (Bankr. W.D. Mi. 2015) – State Court award of treble damages was not discharged where underlying conduct created non-dischargeable debt. Exception to discharge includes all liability arising from the underlying conduct including treble damages. Principals of collateral estoppel and res judicata apply in bankruptcy cases to extent prior court made findings of fact that apply to issues. Collateral estoppel does not apply where underlying judgment is on appeal but lower court findings are still binding as res judicata unless underlying judgment is reversed. State Court judgment established facts to find that debt was not dischargeable. Debt must be both willful and malicious to be excepted from discharge. Willfulness requires deliberate or intentional injury, not merely a deliberate or intentional *act* that leads to injury, such that Debtor desired to cause the consequences of his act, or the consequences were substantially certain to result. Injury is "malicious" when a Debtor acts in conscious disregard of duties or without just cause or excuse but does not require ill-will or specific intent to do harm. State Court concluded that Debtor had engaged in "brazen" conversion of creditor's money when Debtor induced creditor to give Debtor funds for Debtor to make specific investments on behalf of creditor and Debtor instead used money for Debtor's personal bills and expenses. Debtor knew that taking funds was in direct contravention of instructions provided by creditor when funds were provided and Debtor knew that consequences of diverting creditor's retirement funds for Debtor's personal use was substantially certain to cause harm to creditor and did, in fact, cause harm as Debtor never returned funds to creditor. Debtor acted maliciously as Debtor disregarded duties with no cause or excuse when Debtor promised to invest funds in certain way and then immediately used them for personal expenses.

(3945) *McCallum v. Pixley,* 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A "true default judgment" is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment. State Court judgment that awarded treble damages for conversion was non-dischargeable in its entirety, including treble damages. If Debtor's debt is found to be non-dischargeable, all debt that arises from or is traceable to that conduct, is non-dischargeable.

8.225 Penalties

(3946) *Andres v. Michigan Unemployment Insurance Agency,* Case No. 16-2383 (6th Cir. 2018) – Penalties assessed for fraudulent conduct are part of damages awarded for fraud and are non-dischargeable under Section 523(a)(2). Fact that penalties are owed to governmental unit may also be included in Section 523(a)(7) does not preclude finding that penalties are part of fraud debt. Various subsections of Section 523 are not mutually exclusive and same conduct can fall within 2 or more separate subparagraphs. Although debtor for penalties owed to governmental unit would be dischargeable under Section 1328, penalties incidental to fraud are not dischargeable under Section 523(a)(2) for which Section 1328 does not create exception.

(3947) *Kozlowski v. Unemployment Insurance Agency,* 2016 WL 6405806 (E.D. Mi. 2017), *aff'd*, Case No. 16-2383 (6th Cir. 2018) – Penalties for fraudulently obtained unemployment benefits are part of "damages" arising from fraud and are non-dischargeable under Section 523(a)(2). While penalties may also be non-dischargeable under Section (a)(7) are dischargeable in Chapter 13, penalties that flow from fraud are excepted from discharge under (a)(2) and are not dischargeable in Chapter 13.

8.226 Punitive Damages

(3948) *Lansden v. Jones,* 2018 WL 604821 (Bankr. E.D. Tn. 2018) – Punitive damages are generally are unavailable in breach of contract cases absent particularly egregious conduct. While Debtor's conduct was fraudulent for purposes of excepting debt from discharge, evidence did not indicate that conduct was so egregious as to warrant punitive damages where amount of non-dischargeable judgement would exceed $1 million which was likely to provide satisfactory deterrent.

(3949) *Almasudi v. Ibrahim,* 2017 WL 6498026 (Bankr. E.D. Mi. 2017) – Plaintiff can recover punitive damages where there is conduct showing particularly egregious, vindictive, or intentionally malicious conduct; or a strong showing that Debtor acted in bad faith or took actions in reckless disregard of law; or took actions in arrogant defiance of law. Punitive damages are intended to punish defendant, to deter acts of a similar nature, and to make public example of him and are appropriate only in most egregious cases supported by clear and convincing evidence that defendant acted intentionally, fraudulently, maliciously, or recklessly. Debtor's particularly egregious, callous, and intentional actions in his dealings with Plaintiff; cavalier and patently contradictory manner in which Debtor testified at the trial and in his deposition; and Court's conclusion that Defendant acted intentionally, willfully, maliciously, and fraudulently; warranted award of punitive damages in the amount $56,000.00 – double the amount of Plaintiff's actual damages.

(3950) *Nyman v. Montfort,* 2017 WL 4582171 (Bankr. N.D. Ohio 2017) – Court would not award punitive damages where evidence did not support finding of malice, hatred, ill will, spirit or revenge or conscious disregard for rights and safety of others.

(3951) *Casab v. Grand Sky Enterprise Co., Ltd.,* Case No. 15-1378 (6th Cir. 2016) – Collateral estoppel applies in dischargeability actions where (1) same parties were involved in prior action; (2) issue was litigated and resolved in State Court proceeding; (3) party to be estopped had full and fair opportunity to litigate; and (4) state law judgment is clear, definite and unequivocal Plaintiff and Debtor were parties to State Court action, for fraud, and action was based on same elements as elements necessary to except debt from discharge. Damages in adversary to determine debt to be non-dischargeable include all damages that flow from fraudulent conduct. Bankruptcy Court correctly held entire State Court judgment to be excepted from discharge where State Court determined that but for Debtor's fraud, plaintiff would not have entered into contractual relationship, and that measure of damages is amount necessary to compensate plaintiff plus attorney fees, other expenditures, and exemplary damages. All of plaintiff's damages flowed from the fraud and so all were excepted from discharge.

(3952) *Jenkins v. Schmank,* 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Punitive damages can be awarded as part of non-dischargeability action under Section 523(a)(6) where there is clear and convincing evidence that Debtor acted intentionally, fraudulently, maliciously or recklessly. While evidence supported finding that Debtor acted willfully and maliciously in obtaining investment from plaintiff, Debtor's conduct did not rise to level of most egregious cases and there was no benefit to making example of Debtor where Debtor would be left with non-dischargeable debt of $11,500.00.

8.227 Sanctions – Section 523(d)

(3953) *Bushkin v. Singer,* Case No. 15-1285 (9th Cir. BAP 2016) – Section 523(d) allows recovery of attorney fees for defeating objection to dischargeability where underlying obligation is "consumer debt". Whether debt is consumer debt as defined in Section 101(8) depends on purposed for which loan was made, not use to which proceeds were ultimately used. If loan was made for purposes of profit making venture, it is not consumer loan. Debtor who borrowed money to pay living expenses while Debtor wrote book, with lender and Debtor to share proceeds if book sold or with repayment with interest if book did not sell was loan for business purpose even where Debtor used proceeds to pay normal living expenses incurred during writing process. Purpose of loan in first instance was to fund attempt at profit making venture, making loan a business loan. Debtor not entitled to recover attorney fees or costs incurred in defense of Section 523 action.

(3954) *Cannon v. Southeast Financial Credit Union,* 2015 WL 3607299 (M.D. Tn. 2015) – Section 523(d) allows award of costs and attorney fees where creditor brings action under Section 523(a)(2) if underlying debt is consumer debt and court concludes that creditor's position was not substantially justified unless court concludes special circumstances would render the award unjust. Purpose of section is to deter creditors from using threats of litigation to induce Debtors to settle even where Debtors would have been entitled to discharge of debt. Court correctly denied Debtor's Motion for Sanctions after Debtor prevailed in action under Section 523(a)(2) where creditor's action had merit and ultimate outcome was "close call".

IX. Chapter 7

A. Standing to Commence

9.1 Corporations

(3955) *In re Przybysz,* Case No. 10-7110 (Bankr. W.D. Mi. 2013) – Chapter 7 Trustee of individual Debtor's estate has authority to cause wholly owned subsidiaries to file independent bankruptcy cases. Trustee initially brought actions to recover as fraudulent transfers money and property transferred by Debtor's wholly owned entities. Actions were dismissed because transfers of property by corporations and LLCs were not transfers of property of the Debtor and were not fraudulent as to the Debtor. Trustee then filed chapter 7 petitions for the corporations and LLCs in order to maintain actions on behalf of those entities.

(3956) *In re Benchmark Capital, Inc.,* 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Personal representative of estate of deceased sole shareholder of administratively dissolved corporation, as person to whom corporation assets passed, had capacity to file Chapter 7 petition on behalf of corporation.

9.2 Guardian Ad Litem – Appointment by Bankruptcy Court

(3957) *In re Drenth,* 2015 WL 5331797 (Bankr W.D. Mi. 2015) – Nothing in bankruptcy code imposes on Debtor a requirent of competency. Any party in interest may perform any act that does not constitute practice of law including agent, attorney in fact, or proxy. Rule 1004.1 requires Bankruptcy Court to appoint Guardian ad litem for an infant or incompetent person who is a Debtor and who is not otherwise represented, although Court does not have to appoint GAL if Debtor has a general guardian, conservator, or similar fiduciary. Debtor's Durable Power of Attorney in favor of sister constitutes imposition of state law fiduciary duties on sister. Fact that attorney-in-fact was appointed informally and without court supervision does not mean that attorney-in-fact is not a "representative" or "fiduciary" for purposes of Rule 1004.1. Court would not appoint GAL where there was no allegation that sister was acting from any motive other than to assist her brother who now resides in nursing home and suffers from dementia. Appointment of GAL was unnecessary on facts of this case.

B. Nature of Business of Debtor

9.3 Health Care Business – Section 101(27A)

(3958) *In re Dias, M.D., P.C.,* Case No. 15-30729 (Bankr E.D. Mi. 2015) – Section 352 governs duties to safeguard patient records when Debtor is a "health care business" defined in Section 101(27). Health care business is one that provides for the diagnosis or treatment of injury, deformity, or defect and provides surgical, drug treatment, psychiatric or obstetric care; *and* includes general or specialized hospital, ancillary ambulatory, emergency or surgical treatment, hospice care, home health agency, and any similar entity; *and* provides long term care including a nursing facility, intermediate care, assisted living, home for the aged, domiciliary care and any health care institution that is primarily engaged in offering room, board, laundry, or personal assistance with daily living. Requirements are stated in the conjunctive, such that Debtor must meet all of the requirements. Medical practice involving patients visiting office for medical treatment including minor surgery is not "health care business". Office did not over specialized, general hospital, or ancillary treatment facility. Office did not offer residence of extended care visitation. Office did not provide administrative support of other doctors or child placing agency. Services were similar to dental practice that offers normal and routine in office services.

C. Dismissal

9.4 *Sua Sponte* Dismissal – Notice

(3959) *Young v. U.S. Dept. of Veterans Affairs,* Case No. 16-0016 (W.D. Va. 2016) – Before court dismisses *pro se* filing, court must advise Debtor of right to hearing. Order entered that required Debtor to pay filing fee by date certain or case may be dismissed did not allow court to *sua sponte* dismiss case after Debtor failed to comply with order absent provision expressly advising Debtor of right to hearing.

9.5 Deadline to File Motion to Dismiss – 707(a)

(3960) *In re Gharraph,* 496 BR 875 (Bankr. S.D. Ohio 2013) – Motions to dismiss for abuse under Section 707(b) and (c) must be brought within 60 days of date first set for first meeting of creditors. However, Motion to dismiss under any other ground, including Section 707(a), or Motion to convert under Section 706(b) can be brought at any time.

9.6 Cause and Bad Faith – Section 707(a)

(3961) *In re Drake,* Case No. 16-12280 (Bankr. N.D. Ga. 2017) - Social Security income does not need to be paid into a Chapter 13 Plan because Social Security benefits are excluded from "current monthly income". Debtor's Plan proposed to allow Debtor to save $900 each month from her Social Security benefits for "unforeseen circumstances" quote resulting in Debtors saving more than $30,000 over life of Plan while paying unsecured creditors only $8000. Section 101 shows clear intent to protect Social Security income from bankruptcy process and Debtor need not disclose disposition of Social Security income he does not intend to use toward Plan. While optics of the situation are not pleasant and raise a specter of unfairness, retaining Social Security income is not sufficient to show lack of good faith because Debtor's withholding of Social Security income is consistent with plain language of Bankruptcy Code.

(3962) *In re Uche,* Case No. 15-3655 (Bankr. M.D. Fl. 2016) – Whether case is to be dismissed for abuse under Section 707(a) and 707(b)(3) depends on totality of circumstances. For individual Debtor with mostly business debts, there must be evidence of deliberate act or omission showing bad faith or abuse of Code. Fact that Debtor was high-income and had ability to pay debts, without more, was not "abuse". Although Debtor had monthly income in excess of $16,000, income was of little significance where debts were primarily business debts.

(3963) *In re McVicker,* 2016 WL 660102 (Bankr. N.D. Ohio 2016) – Section 707(a) allows court to dismiss for lack of good faith. Enumerated

grounds in Section 707(a) are illustrative and not limiting, Court will consider totality of facts and will dismiss where facts evidence concealment or misrepresentation of assets and/or sources of income, excessive and continued expenditures, lavish life style, and intention to avoid large single debt that arose from fraud, misconduct or gross negligence. Debtors had only one single large creditor, but single debt, standing alone, is not sufficient to constitute bad faith where debt is not result of wrongful conduct of Debtor. Debt to creditor was not result of wrongful conduct but of change in Debtor's financial circumstances when Debtor's rental property became uninhabitable through no fault of Debtors. Debtors had relatively small income consisting of pension, social security disability and withdrawals from retirement account totaling $3700 per month, and Debtors are below median income for Ohio. Fact that Debtors had significant balance in retirement account did not amount to bad faith as court cannot force Debtor to use exempt assets to pay creditors. While retirement funds may have provided ability to pay creditors, that consideration alone is not bad faith.

(3964) *BMO Harris Bank v. Isaacson,* Case no. 15-2528 (N.D. Ill. 2015) – Bad faith or other unjustified refusal to pay bills can amount to cause for dismissal of case. After Debtors defaulted on loan, creditor brought action in effort to collect. Day before creditor received summary judgment, Debtors filed Chapter 13. Case was converted to Chapter 11 as Debtors were beyond eligibility limits for Chapter 13. Case was later converted to Chapter 7 when Debtors failed to propose confirmable plan. Debtors' conduct evidenced "litigation gymnastics" by filing chapter 13 knowing they were not eligible, then converting case but making no good faith effort to actually promulgate plan. Debtors had $1 million in debt, and were both employed with combined earnings of more than $250,000 per year, Debtors also failed to schedule State Court judgment in foreclosure case and failed to disclose employment bonuses received during case.

(3965) *In re Tow,* 2016 WL 74741 (Bankr. N.D. Ohio 2016) – Bad faith remains grounds for dismissal under both Section 707(a) and 707(b)(3). Nothing in BAPCPA indicates any intent to repeal or modify pre-existing law allowing court to dismiss Chapter 7 filing for bad faith, and provisions of 707(a) apply to broader range of cases as 707(b)(3) is limited to individual Debtors with primarily consumer debts. Facts of case indicated that Debtor, a now-disbarred attorney, engaged in sustained pattern of fraudulent behavior and operation of various scams and hustles for years. Debtor's pre-petition conduct resulted in criminal charges including corrupt activity, theft and money laundering as a result of which Debtor was now incarcerated. Debtor had history of similar fraudulent activity dating back to 1995 in California and had suffered judgments resulting from his activities and convicted or insurance fraud resulting from staging a boating accident to fake his death. Case did not serve purpose of providing honest Debtor with fresh start. Bulk of debt is tied to either illegal or questionable activities and record disclosed no redemptive characteristics.

(3966) *In re Schwartz,* Case No. 15-1416 (7th Cir. 2015) – "Cause" for dismissal is not limited to three items enumerated in Section 707(a), but encompasses any conduct that, while not a violation of required procedures, avoids repayment of debt without adequate reason. Case dismissed where Debtor had substantial income yet failed to use income to pay debts instead spending extravagantly on luxuries and non-necessities including $800 per month for a Range Rover, extended family vacations, and other expenses totaling $11,100 per month.

(3967) *Arenas v. U.S. Trustee,* 514 B.R. 887 (Bankr. D. Colo. 2014), *aff'd,* Case No. 14-046 (10th Cir. BAP 2015) – Debtor engaged in medical marijuana business, although legal as a matter of State law, violates Federal Law requiring dismissal of case.

(3968) *Rogers v. McDermott,* Case No. 14-13769 (E.D. Mi. 2015) – Bankruptcy Court correctly dismissed case where Debtor was serial filer, was not eligible for a discharge, and filing was done for improper purpose. Debtor lacked any legitimate purpose in filing where Debtor listed no assets and no liabilities, and only apparent purpose was to prevent State Court from dismissing lawsuits brought by Debtor against Canton Police Department. Debtor's ineligibility for a discharge indicated that Debtor had no purpose for filing the case other than to hinder and delay proceedings by State Court. Debtor also had long history of filing cases, as the current case was his 6th filing over 8 years. Filing merely to obtain stay is not a "proper purpose" and warrants dismissal of case.

(3969) *In re Shields,* 2015 WL 79313 (Bankr. E.D. Tn. 2015) – Dismissal of Chapter 7 case is normally without bar to refilling, and debts that would have been discharged in initial case remain dischargeable in later filed case. However, Court has authority to bar refilling, or to declare debts listed in case being dismissed are not dischargeable in later case. Court dismissed case for cause with bar to re-filing for 5 years where Debtor requested dismissal because Debtor was in middle of criminal investigation and was unwilling to provide information that would be necessary to explain financial condition which would likely prevent entry of discharge and Debtor's refusal to answer questions made prosecution of action under Section 727 problematic.

(3970) *In re Baulden,* 2014 WL 5823277 (Bankr. W.D. Mi. 2014) – Section 707(a) allows dismissal where Debtor's conduct causes unreasonable delay that is prejudicial to creditors. Failure to timely file schedules, or failure to timely amend schedules to correct errors and inaccuracies, can constitute unreasonable delay. Debtor has duty to use reasonable diligence in filing schedules and statements in first instance, and obligation regarding accuracy and completeness continue through life of case requiring Debtor to promptly correct errors. Debtor's good faith or bad faith is not determinative where Debtor files inaccurate schedules. Whether accurate disclosure would have made any difference in the conduct of the case does not prevent dismissal where Debtor's schedules manipulate Debtor's financial condition, regardless of motive. Debtor failed to amend schedules even where Debtor admitted at first meeting of creditors that schedules were inaccurate including multiple listing of the same debt creating false impression regarding total debts; Schedule J claimed that Debtor was responsible for disproportionate share of household expenses although Debtor testified that he owned minimal assets and that virtually everything was actually owned by spouse individually; and Debtor's Schedule J showed household expenses exceeded household income by more than $1300 per month. Debtor had multiple opportunities to amend over six months after errors were disclosed at first meeting of creditors yet did not file any amendments or otherwise correct the errors. Delay was prejudicial as creditor was required to attend multiple creditor meetings in effort to obtain accurate information, and creditor was concerned about Debtor's income and expenses for purposes of a possible motion to dismiss under Section 707(b). Debtor's inexcusable delay in failing to correct admittedly erroneous schedules results in prejudice to creditors who are deprived of complete and accurate disclosures.

(3971) *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo. 2014) - Ch. 7 case filed by Colorado marijuana grower dismissed because the Ch. 7 trustee could not control assets in violation of federal law; and case could not be converted to Ch. 13 because it would be involve Ch. 13 trustee

administering funds derived from illegal sources.

(3972) *Bank of America v. Killgrove,* 2014 WL 4187988 (E.D. Mi. 2014) – Section 707(a) allows court to dismiss case where petition is filed in bad faith, such as where Debtor did not have financial calamity, where filing was motivated for non-financial reasons such as causing trouble for ex-spouse, or in egregious cases that entail concealment of assets or income or continued excessive expenditures to sustain lavish life-style, or intent to avoid single debt based on conduct akin to fraud, misconduct or gross negligence. Debtor's case did not lack good faith where filing was result of failure of Debtor's business, unreasonably high rent, mounting financial troubles and substantial decrease in income as result of faltering economy. Debtor did not make any false statements or conceal any assets in bankruptcy filing.

(3973) *Vicars v. Freeman,* 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Debtor's bad faith in seeking relief can constitute a basis to dismiss case. Evidence did not support finding of bad faith. While Debtor filed case only after being sued in State Court and only after allegedly acting with intent to hinder or delay plaintiff from filing or pursuing State Court litigation, timing of filing standing alone is not lack of good faith. Bad faith for purposes of dismissal applies only in egregious cases that entail concealed or misrepresented assets or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence. Debtor did not conceal any financial matters and lived modest lifestyle and owed money to various creditors, precluding any argument that Debtor had only one creditor or filed solely because of one debt.

(3974) *Piazza v. Nueterra Healthcare Physical Therapy, LLC,* Case No. 12-12899 (11th Cir. 2013) – Bankruptcy Court can dismiss Chapter 7 petition for bad faith based on Debtor's pre-petition conduct. Bad faith can exist where Debtor reduced creditors to single creditor before filing; Debtor made no life-style adjustments and continued to live a lavish lifestyle; Debtor filed to thwart pending collection actions; Debtor had only one large debt that Debtor was attempting to discharge; Debtor made no effort to repay debts; Chapter 7 would be unfair; Debtor has sufficient resources to pay debts; Debtor is paying debts of insiders at expense of other creditors; Debtor's schedules inflate expenses to disguise financial well-being; Debtor transferred assets; Debtor employed deliberate and persistent pattern of evading single major creditor; Debtor failed to make candid and full disclosure; Debtor has engage in multiple bankruptcy filings or other procedural gymnastics. Debtor's conduct evidenced intent to evade single large creditor while paying debts to insiders. Debtor transferred substantial assets to wife and paid Aunt's mortgage. Debtor made no effort to adjust lifestyle or to reduce expenses and had ability to pay at least a portion of debts given that Debtor leased a luxury vehicle and transferred thousands of dollars to wife.

(3975) *In re Clark,* 2013 WL 3849610 (E.D. Mi. 2013) – Dismissal for cause is vested in sound discretion of bankruptcy court and will not be reversed absent a clear error of fact of application of erroneous legal standard. Dismissal of Chapter 7 for cause based on failure to pay filing fee was not clear error where Debtor had four prior filings, three of which were dismissed for failure to pay filing fee, file required documents, or attend required hearings. Bankruptcy court was unconvinced that Debtor would do any better in this case.

(3976) *In re M.P. Construction Company, Inc.,* Case No. 12-1306 (9th Cir. BAP 2013) – Chapter 7 dismissal is not limited to circumstances enumerated in Section 707(a). Corporate Chapter 7 dismissed for cause where corporation had no assets for distribution to creditors and filing was done for sole purpose of engineering transfer of contractor's license from corporation to Debtor's principal. State law prevented transfer of contractor license where license was suspended for non-payment of judgment. Debtor filed bankruptcy for sole purpose of reinstating license and transferring license to insider and to avoid liability of corporation to judgment creditor who had been engaged in collection efforts.

(3977) *In re McFadden,* 477 BR 686 (Bankr. N.D. Ohio 2012) – Chapter 7 case can be dismissed for cause, which is not limited to enumerated issues in Section 707(a). Dismissal is not intended as tool to hammer Debtor for being "bad person". Discharge will be denied only in extreme or egregious cases that entail concealment or misrepresentation of assets or sources of income, or excessive and continued expenditures, lavish lifestyle, and intention to avoid single debt based on conduct akin to fraud, misconduct or gross negligence. Motion to dismiss Chapter 7 for bad faith did not allege any factual basis to deny discharge. Creditor attended First Meeting and asked questions subject to Chapter 7 Trustee's decision to stop interrogation. Dispute with the way the Trustee handled Chapter 7 First Meeting is not basis to deny discharge. Given time constraints of First Meetings, Trustee has authority to limit scope or extent of questioning, and creditor can thereafter seek examination pursuant to Rule 2004. Creditor's complaint that Debtor drove a car that is not owned by Debtor does not indicate any abuse absent some evidence that Debtor owned car pre-petition and transferred vehicle to another before filing for little or no value or that Debtor listed payments on schedule J that Debtor was not actually making, but there was no evidence of either of those circumstances. Budgeted expenses were reasonable and well within means test guidelines. Minimal understatement of net income on Schedule I was not sufficient to deny discharge where Schedule I listed net income at $1,615.60 while paystubs calculated net income of $1,777.74, for a difference of $162 per month. Cell phone expense of $200, in a vacuum, would appear unreasonable, but Debtor's overall budget for Debtor and daughter was $1,800 per month, with no expense for water, internet, cable, trash, recreation, medical or dental expenses, or renter's insurance.

(3978) *In re Mehlhose,* 469 BR 684 (Bankr. E.D. Mi. 2012) – Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of Debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, Debtors must have known, and in fact did know, that Schedule I was false when Debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

(3979) *Farmers National Bank v. Lockridge,* 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Cause for dismissal can be based on pre-petition conduct

alone. Court will evaluate 14 factors: whether Debtor reduced creditors to a single creditor in the months prior to filing; Debtor failed to make lifestyle adjustments or continued living and expensive or lavish lifestyle; Debtor filed case in response to judgment or collection action with intent to avoid large single debt; Debtor made no effort to repay debts; unfairness of use of Chapter 7; Debtor has sufficient resources to pay debts; Debtor is paying debts to insiders; schedules inflate expenses to disguise financial well-being; Debtor transferred assets; Debtor is over-utilizing protections of code to unconscionable detriment of creditors; Debtor employed deliberate and persistent pattern of evading single major creditor; Debtor failed to take candid and full disclosures; debts are modest in relation to assets and income; and Debtor has multiple bankruptcy filings or other procedural gymnastics. Motion to Dismiss denied where case was first bankruptcy filing; although Debtor filed on eve of collection procedures, they had already satisfied large portion of debt owed to moving creditor through foreclosure of mortgage; Debtor could have filed earlier and stopped foreclosure but did not do so; Debtors have large unsecured debt beyond that owed to moving creditor. Record contained no evidence that Debtor intended to abuse bankruptcy system or defraud moving creditor. Debtor did not undervalue assets as prior efforts to market assets were unsuccessful and assets were held in trust in which Debtor held minority interest, making family members the only likely purchaser in any forced sale. Record did not indicate any effort to conceal or maintain lavish lifestyle or that Debtor did not attempt to make appropriate lifestyle adjustments.

(3980) *In re Smith,* 468 BR 235 (Bankr. W.D. Ky. 2012) – Debtor's petition did not evidence bad faith requiring dismissal. Debtor filed Chapter 7 to discharge single debt, consisting of deficiency obligation on mortgage that Debtor stopped paying. Debtor did not suffer any sudden calamity, but walked away from house that was "underwater" and on which Debtor no longer desired to continuing paying. Debtor had made mortgage payments for more than three years before walking away and had attempted to negotiate either a short sale or deed in lieu of foreclosure. There was no evidence of any suspicious transfers to insiders or any intentional undervaluing of assets or overstatement of expenses and Debtor did not live lavish or excessive lifestyle, but lived modestly within means.

(3981) *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.

(3982) *In re Herrmann,* 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income Debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the Debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a Debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

(3983) *In re Mains,* 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

(3984) *In re Vandenbosch,* 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

(3985) *In re Westing,* 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income Debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only $165 and would produce dividend of 1.9% while Debtor had disposable income of more than $2,300 if the Social Security was included.

(3986) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a Debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow Debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

(3987) *In re Welsh,* 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a Debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify § 407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a Debtor to include Social Security income on Schedule I.

(3988) *In re Kuhns,* 2011 WL 4713225 (Bankr. N.D. Ohio 2011) – Married Debtor must include income of non-filing spouse on Schedule I unless

Debtor and non-filing spouse are separated. Debtor must also include on Schedule J the full monthly expenses of Debtor and his family. Information is required by forms, and is necessary to evaluate possible dismissal under Section 707(b)(3) as well as whether a presumption of abuse arises under Section 707(b)(2). Spouse's refusal to share financial information is not a basis to fail to provide that information on Schedules I and J or on the Means Test from. Debtor's failure to provide complete information on Spouse's income and expenses constitutes a violation of Section 521, constituting cause for dismissal under Section 707(a).

(3989) *In re Edwards,* Case No. 10-65835 (Bankr. E.D. Mi. 2011) – Lack of good faith constitutes cause for dismissal. Factors for good faith include whether Debtor reduced creditors to a single creditor in the months before filing; Debtor failed to make lifestyle adjustments or continued to live lavish lifestyle; Debtor filed case in response to judgment or collection action with intent to avoid single, large debt; Debtor made no effort to repay; unfairness of discharging debts in Chapter 7; Debtor is paying insiders; schedules inflate expenses to disguise financial well-being; Debtor transferred assets; Debtor is over utilizing protections of bankruptcy to the unconscionable detriment of creditors; Debtor employed deliberate and systematic patter of evading single major creditor; Debtor failed to make candid and full disclosures; debts are modest in relation to assets and income; and multiple bankruptcy filings or other procedural gymnastics. Debtor lacked requisite honesty where Debtor's schedules and From B22 substantially understated income and claimed as "household" parents and brother who did not live with Debtor; Debtor materially understated balance in bank account, listing balance on Schedule B of $10 where Debtor had more than $5200 in that account shortly before filing: Debtor gave mother $5200 shortly before filing because "mother has a gambling problem so mother gives Debtor money to hold for mother" but transfers were not disclosed in schedules of SOFA; Debtor provided copies of tax returns to the creditor and the trustee but failed to disclose that those returns were not actually filed with the IRS or that Debtor had not filed tax returns for some years pre-petition; Debtor materially undervalued her automobile, listing it at $3,225 when value was at least $8,000; and Debtor testified at 2004 exam that Debtor "gave" her 1997 Mercedes to a "friend" named Gary whose last name and address Debtor did not know.

(3990) *In re Drewek,* Case No. 11-42763 (Bankr. E.D. Mi. 2011) – Bankruptcy is designed to help the honest but unfortunate Debtor. There is no constitutional right to a bankruptcy discharge. Section 707(a) lists three non-exclusive reasons for dismissal. Court may also dismiss for lack of good faith even though not expressly listed as basis for dismissal under Section 707. Factors include: Debtor has only a single creditor; Debtor failed to make lifestyle adjustments and continued to live expansive lifestyle; Debtor filed in response to a judgment or pending litigation to avoid a single large debt; Debtor made no effort to repay debt; use of Chapter 7 would be unfair; Debtor has resources to pay debts; Debtor is paying debts to insiders at expense of arms-length creditors; schedules inflate expenses to disguise financial well-being; Debtor transferred assets; Debtor is over-utilizing protections of code to the unconscionable detriment of creditors; Debtor has engaged in persistent pattern to evade major creditor; Debtor failed to make candid and full disclosure; debts are modest in relation to assets and income; and multiple bankruptcy filings or other procedural "gymnastics". Debtor filed bankruptcy to avoid large judgment creditor that resulted from Debtor's embezzlement of trust fund established for Debtor's son over which Debtor was the trustee. Judgment accounted and related charges owed to State totaled 94% of Debtor's total debt. Other than this judgment, Debtor had less than $2,300 of unsecured debt. Debtor made no effort to pay judgment between entry and filing of petition. Discharge in bankruptcy would be contrary to purposes of code, as Debtor is attempting to discharge large judgment that arose out of Debtor's misappropriation of funds. Debtor's embezzlement of funds from legally incapacitated son's account left son financially unable to bring non- dischargeability action. Allowing case to proceed would reward Debtor for stealing from her own son. Debtor failed to make full and complete disclosures where Debtor's schedules did not account for $90,000 that she took from the trust account, and schedules listed personal property worth $3,000 and only $9.12 in the bank.

(3991) *In re Rahim,* 2010 WL 5128944 (Bankr. E.D. Mi. 2010), *aff'd,* 449 BR 527 (E.D. Mi. 2011) – Debtor who is neither "needy" nor "unfortunate" is not entitled to relief under Chapter 7. Debtors had extraordinary budget of more than $500,000 per year, and could easily provide for meaningful repayment to creditors in Chapter 11 proceeding. Debtor lacked good faith by failing to undertaken any "belt tightening" whatsoever. Fact that Debtor's debt was primarily non-consumer debt did not prevent dismissal under Section 707(a).

(3992) *In re Mohr,* 425 B.R. 457 (Bankr. S.D. Ohio 2010) – Court may dismiss case for "bad faith" in both consumer and business debt cases. Bad faith dismissal should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct or gross negligence. Debtors' alleged ability to pay is not a primary consideration under Section 707(a). Post-petition ability to repay debts, while relevant to good faith, does not, standing alone, support a dismissal under §707(a) without the presence of other misconduct.

9.7 Section 707(b)(1)

(3993) *AFF Ohio, LLC v. Jelinger,* 2014 WL 996466 (Bankr. N.D. Ohio 2014) – Section 707(b)(1) applies only to Debtors whose debts are primarily consumer debts. Court would rely on schedules to determine whether Debtor's debts were consumer or business. Debts for personal guarantees of business obligations are not consumer debts as the debts were not incurred for personal or household purposes. Income tax debts are not "consumer debts" as taxes are incurred for public purposes, not for family or household purposes. Debtor's business and tax debts exceeded 50% of total scheduled debt. As such, Section 707(b)(1) did not apply.

(3994) *In re Maura,* 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Once court finds presumption of bad faith that has not been rebutted, Court must dismiss or convert case. Section 707(b)(1) does not afford court flexibility to allow Debtors to remain in Chapter 7.

(3995) *In re Pate,* 2012 WL 6737814 (Bankr. S.D. Tx. 2012) – Section 707(b)(1) does not apply to case filed as Chapter 13 and converted to Chapter 7 if the original filing and later conversion were done in good faith.

9.8 Presumed Abuse – Section 707(b)(2)

(3996) *In re Beigley,* 2018 WL 3031097 (Bankr. W.D. Ky. 2018) – Debtor can rebut presumption of abuse by showing special circumstances. Section 707(b)(2) includes examples of special circumstances such as serious medical condition or call to active duty in Armed Forces, but examples are not limiting. Courts have found other examples of special circumstances including high commuting costs, increased price of gas, additional housing expenses, costs of separate household; and maintaining swimming pool. Determination of whether particular circumstances "special" is made on a case-by-case basis. Student loans may qualify as special circumstances taking into consideration Debtors modest lifestyle; situation where Debtors are not wholly responsible for financial situation such as lost jobs; Debtor who obtain student loan debt for others; or circumstances arising after origination of student loan. Where Debtors live lavish lifestyles, incurred large mortgages beyond ability to pay, purchase expensive automobiles, student loan expenses not special circumstance. Evidence indicated that Debtor's student loans constitute special circumstances where Debtors lived modest lifestyle, financial situation was attributable to other parties, decreased income was due to factors beyond control, and some of student loan debt was for minor child. Debtor's did not purchase large mortgage and did not purchase expensive luxury automobiles. However, even allowing student loan payments as special circumstances does not reduce Debtors disposable income sufficiently such that Debtor's disposable income multiplied by 60 would be less than 25% of unsecured claims. Debtor's did not sufficiently rebut presumption of abuse requiring dismissal of case.

(3997) *In re Arndt,* 2017 WL 5164141 (Bankr. N.D. Ohio 2017) – Test for "presumed abuse" is backward looking test that is mechanically applied and that does not consider future "projected disposable income". Debtor permitted to deduct secured debt payments even where Statement of Intentions indicates Debtor intends to surrender collateral. While debtor cannot deduct as expense payment on a secured debt where there is no such payment (e.g. *Ransom)*, that does not apply where as of the date of the petition, Debtor had a secured debt obligation. After deducting payments on secured claims that Debtor intended to surrender, Debtor's disposable income on the Means Test was below the threshold to trigger a presumption of abuse, requiring denial of Section 707(b)(2) Motion.

(3998) *In re Lugibihl,* 2017 WL 4542960 (Bankr. N.D. Ohio 2017) – Debtor's Chapter 7 is presumptively abusive if Debtor's Current Monthly income exceeds applicable median income and Debtor's CMI, reduced by allowable deductions exceeds the lesser of 25 percent of the debtors nonpriority unsecured claims in the case, or $7,700 whichever is greater; or (II) $12,850. CMI is average monthly income from all sources debtor received during the 6 months period ending on the last day of the calendar month preceding commencement of case. Debtor's Annualized CMI calculated using 6 month average exceeded applicable median income. Debtor presented no evidence to support his calculation using only last 60 days pay advices and Debtor's calculation expressly conflicted with statutory CMI definition. After deducting allowable expenses, Debtor had calculated Net Income of $265.85 per month which would total $15,951.60 over 60 months, rendering Debtor's case presumptively abusive. Debtor did not present any evidence of any special circumstances to rebut presumption. Debtor given 30 days to convert to Chapter 13 or case dismissed.

(3999) *In re Melcher,* 2017 WL 3981110 (Bankr. E.D. Ky. 2017) – Where Debtor's income exceeds annualized median income for debtor's household size, presumption of abuse arises that Debtor can rebut only by showing special circumstances such as call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. Debtor must itemize each additional expense or income adjustment and provide sworn documentation supporting such adjustments and detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Debtor did not itemize any additional expenses or demonstrate any special circumstances. Debtor's assertion that her income was entirely commission driven and could decrease in the future not supported by evidence where Debtor has earned commissions each year and her current annual income is more than double the applicable Median Income. Debtor was not "stockbroker" ineligible of relief under Chapters 11 or 13 as "stockbroker" is defined as person who has customers and Debtor engages in business of trading securities. "Customer" is entity with whom a Debtor deals as principal or agent and that has a claim against Debtor on account of a security received, acquired, or held by Debtor in the ordinary course of such Debtor's business as a stockbroker (i) for safekeeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase;(v) as collateral under a security agreement; or(vi) for the purpose of effecting registration of transfer; and (B) entity that has a claim against a person arising out of--(i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security. Employee who effects transactions while acting on behalf of principal-employer is not stockbroker because person does not have "customers". Debtor, an employee of Fidelity brokerage, was not stockbroker because Debtor did not have customers. While Debtor advised clients regarding investment options including stock transactions she did so as Fidelity employee. Debtor is paid by Fidelity, not by any particular client. Fidelity provides Debtor an office, owns her client list, and does not permit Debtor to provide professional services outside of employment. Clients entrust funds to Fidelity, not Debtor. Debtor holds no client funds in her personal bank account. Debtor may have access to clients' accounts for purpose of initiating investment actions as they direct, but she is not entity holding the clients' deposited funds.

(4000) *In re Weaver,* 2017 WL 1501407 (Bankr. M.D. Tn. 2017) – Section 707(b)(1) allows the Court to dismiss a case filed by Debtor whose debts are primarily consumer debts if granting relief would constitute an abuse of the provisions of Chapter 7. Section 707(b)(2)(A)(i) creates a presumption of abuse if Debtor's current monthly income reduced by allow deductions and multiplied by 60 is greater than $12,850. Section 707(b)(2)(A)(i) identifies the categories of expenses that Debtors may deduct from current monthly income in calculating net disposable income. Once presumption of abuse arises under Section 707(b)(2), Court is required to dismiss case unless Debtor can successfully rebut presumption by demonstrating special circumstances such as serious medical condition or a call or order to active duty in the armed forces, and Debtor can itemize each additional expense or adjustment of income and provide documentation and detailed explanation. Even where presumption of abuse does not arise, Section 707(b)(3) allows Court to dismiss case based on totality of circumstances including whether Debtor's financial situation demonstrates abuse. Most critical element in determining abuse is whether Debtor has ability to repay debts out of future earnings, determined by whether there is sufficient disposable income to fund a Chapter 13 Plan. United States Trustee Motion to Dismiss under Section 707(b)(2) and b(3)granted. Although Debtor's calculations on Means Test indicated that Debtor had monthly disposable income of only $36.40 such that Means Test did not demonstrate presumption of abuse, calculations and adjustments included in Means Test were erroneous resulting in an understatement of Debtor's actual income and expenses. Debtor claimed marital adjustment of

$1100 per month but was able to document only $650 per month. Means Test listed payroll tax deductions based on amount actually withheld from Debtor and Debtor's non-filing spouse's pay rather than Debtor and Debtor's non-filing spouse's actual tax liability. Debtor and Debtor's non-filing spouse's annualized income significantly exceeded applicable state median and adjustments to Means Test calculation indicated that Debtor had disposable income of $758 per month which would pay more than $45,000 to unsecured creditors over 60 months. Debtor did not claim any special circumstances to justify expenses or adjustments of current monthly income and Debtor did not present any evidence of any additional expenses. Inaccuracies on Means Test were also carried over on Debtor's Schedule I and Schedule J and included expenses that were excessive were not properly documented.

(4001) *In re Wenzel,* 2015 WL 1087409 (Bankr. N.D. Ohio 2015) – Debtor's calculation of CMI failed to include $400 per month received by Debtor from employer to reimburse transportation expenses, and failed to include bonus that Debtor received in prior 6 months where Debtor received similar bonuses in 5 of past 19 years at same employer.

(4002) *In re Price,* 2013 WL 4017149 (Bankr. E.D. Ky. 2013) – In considering whether case is abusive under Section 70(b)(2) court can consider not only original petition and schedules but any good faith amendments filed by Debtor. Debtor's original petition and schedules indicates that Debtors had primarily consumer debts. After numerous extensions of the deadline to file 707(b) actions, Debtors amended the schedules to add large business debt and amended the petition to state that debts were primarily non-consumer. Court rejected contention that issue of consumer versus non-consumer debt is determined by face of original documents where evidence indicated that amendments were made in good faith.

(4003) *In re Nabulsi,* 2013 WL 3784188 (Bankr. E.D. Mi. 2013) – Debtor's From 22 and multiple amendments to that from continued to show that Debtor had annualized current monthly income in excess of median, although forms continued to check box that asserted that the presumption of abuse did not arise. Filing is presumptively abusive where Debtor's net disposable income after deducting allowable expenses exceeds lesser of (a) greater of $7,0256 or 15% of total unsecured, non-priority claim; or (b) $11,725.00. Debtor's disposable income was $39,000, which was more than $11,725 but less than 25% of non-priority unsecured claims. Court rejected Debtor's contention that because Debtor "passed" one portion of the means test, filing could not be presumptively abusive, holding that as long as disposable income met one of the two prongs meant the filing was presumptively abusive.

(4004) *In re Wise,* 2011 WL 2133843 (Bankr. S.D. Ill. 2011) – In completing means test for Chapter 7, Debtor cannot deduct income from child support that is expected to end one year post-petition. Although *Hamilton* allows consideration of changes in income for purposes of calculating CMI in Chapter 13, there is no corresponding exception in Chapter 7. Unlike Chapter 13, means test in Chapter 7 is exclusively backward looking. Debtor received support for entire 6 months pre-petition and, therefore, that income must be included in CMI for purposes of determining abuse under Section 707.

(4005) *In re Briggs,* 2010 WL 4272585 (Bankr. N.D. Ohio 2010) – Income received by Debtor from State Pension is included in calculation of CMI. Although pension income is exempt from reach of creditors, CMI does not distinguish between exempt and non-exempt sources. When pension was included in calculation, Debtor was "above median" and had Disposable income sufficient to create presumption of abuse.

(4006) *In re Pollinghorn,* 2010 WL 3463431 (Bankr. N.D. Ohio 2010) – Debtors would not be able to rebut presumption of abuse based on post-petition changes in Debtors' financial situation. Means test is snapshot of financial situation on petition date. Post-petition changes to income and expenses or Debtor's future intentions, while relevant under Section 707(b)(3), are not taken into consideration in determine abuse under Section 707(b)(2). Means test formula lists and limits deductible expenses without regard to reality of Debtor's financial situation. Means test is Congressional determination of allowable expenses for Chapter 7 Debtor. Nothing in means test makes student loans or retirement loans deductible for purposes of Section 707(b)(2).

(4007) *In re Smith,* 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Case dismissed as presumptively abusive where B22A indicated monthly disposable income of $3,544.00, well above presumptive threshold of $182.50.

(4008) *In re Taylor,* 2009 WL 2872997 (Bankr. N.D. Ohio 2009) – Section 707(b)(2) is a mechanical formula for assessing the existence of abuse. If a Debtor's income exceeds "necessary" expenses by an amount set by statute, a presumption that the Debtor is abusing the bankruptcy process will arise. Debtor's income is defined in Section 101(10A). The "means test" also prescribes in exacting detail what expenses of a Debtor will be allowed as a charge against income.

9.9 "Safe Harbor" - Section 707(b)(7)

(4009) *In re Braathun,* 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – Safe harbor under Section 707(b)(7) requires inclusion of current monthly income for non-filing spouse where the Debtor and non-filing spouse are neither separated nor living apart at the time of commencement of the case. If Debtor's annualized CMI and non-filing spouse's annualized CMI combined exceed applicable median income, case is subject to possible dismissal under section 707(b)(2).

9.10 "Special Circumstances"

(4010) *In re Weaver,* 2017 WL 1501407 (Bankr. M.D. Tn. 2017) – Section 707(b)(1) allows the Court to dismiss a case filed by Debtor whose debts are primarily consumer debts if granting relief would constitute an abuse of the provisions of Chapter 7. Section 707(b)(2)(A)(i) creates a presumption of abuse if Debtor's current monthly income reduced by allow deductions and multiplied by 60 is greater than $12,850. Section 707(b)(2)(A)(i) identifies the categories of expenses that Debtors may deduct from current monthly income in calculating net disposable income. Once presumption of abuse arises under Section 707(b)(2), Court is required to dismiss case unless Debtor can successfully rebut presumption by demonstrating special circumstances such as serious medical condition or a call or order to active duty in the armed forces, and Debtor can itemize each additional expense or adjustment of income and provide documentation and detailed explanation. Even where presumption of abuse does not arise, Section 707(b)(3) allows Court to dismiss case based on totality of circumstances including whether

Debtor's financial situation demonstrates abuse. Most critical element in determining abuse is whether Debtor has ability to repay debts out of future earnings, determined by whether there is sufficient disposable income to fund a Chapter 13 Plan. United States Trustee Motion to Dismiss under Section 707(b)(2) and b(3)granted. Although Debtor's calculations on Means Test indicated that Debtor had monthly disposable income of only $36.40 such that Means Test did not demonstrate presumption of abuse, calculations and adjustments included in Means Test were erroneous resulting in an understatement of Debtor's actual income and expenses. Debtor claimed marital adjustment of $1100 per month but was able to document only $650 per month. Means Test listed payroll tax deductions based on amount actually withheld from Debtor and Debtor's non-filing spouse's pay rather than Debtor and Debtor's non-filing spouse's actual tax liability. Debtor and Debtor's non-filing spouse's annualized income significantly exceeded applicable state median and adjustments to Means Test calculation indicated that Debtor had disposable income of $758 per month which would pay more than $45,000 to unsecured creditors over 60 months. Debtor did not claim any special circumstances to justify expenses or adjustments of current monthly income and Debtor did not present any evidence of any additional expenses. Inaccuracies on Means Test were also carried over on Debtor's Schedule I and Schedule J and included expenses that were excessive were not properly documented.

(4011) *In re Brown,* 500 BR 255 (Bankr. S.D. Ga. 203) – Student loans are not normally "special circumstances" for purposes of Section 707. Student loan payments may constitute special circumstance if necessitated by permanent injury, disability or employer closing or layoff as incurrence of student loan debt may not have been truly voluntary decision but was caused by circumstances beyond Debtor's control. However, Debtor's loan payments were not special circumstances where Debtor was never laid off from work or forced to obtain education to keep job. Fact that degree may have later become requirement for employment did not make that degree a requirement at time Debtor incurred debt. Debtor's pursuit of higher education is admirable but not "special circumstance". Private school expenses can be "special circumstnaaces" allowign Debtor to deduct more than standard allowance for education expense where child has medical, auditory and speech disoprders ad is school specificly designed to address student's needs with smaller claass sizes and independent education plans, and Debtor was concerned about possible bullying in public school given child's diffulculty in relating to peers as result of medical consern.

(4012) *In re Copeland,* 2013 WL 1289154 (Bankr. N.D. Ohio 2013) – Debtor's temporary post-petition unemployment while factory is re-tooled is not special circumstances. Unemployment and resulting decrease in income was temporary and Debtor anticipated returning to work when re-tooling was complete and may even have overtime available.

(4013) *In re Nabuli,* Case No. 11-65698 (Bankr. E.D. Mi. 2013) – Special circumstances to avoid presumption of abuse are circumstances such as serious medical condition or call to duty in armed forces. Debtor's affidavit that alleged that Debtor's overtime had ceased in 2011 and that Debtor had 401-k loans were not special circumstances. Reduction in employment is not special circumstance but is quite a common occurrence, as are repayment of 401-k loans.

(4014) *In re Maura,* 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Debtor's Means Test from showed that filing was presumptively abusive. Debtor's attempt to rebut presumption by including additional expense of $900 per month for catholic school expense was not sufficient. Special circumstances are items such as serious medical condition or call or order to active duty, that produce additional expenses or adjustments in current monthly income for which there is no reasonable alternative. Special circumstances are those that are either involuntarily incurred or are highly unusual and not of a type normally encountered by most Debtors. Student loan payments are not special circumstances as those expenses are not beyond the control of the Debtor and are not extraordinary or exceptional. Parochial school expense is not special circumstance where Debtors failed to prove no alternative. UST presented expert testimony that Dearborn Public Schools presented a reasonable alternative that could meet educational requirements of children and there was no evidence that public schools had levels of safety and security that were lower than the parochial schools involved. Preference for religious education is not special circumstance. Further, Congress specifically allowed school expenses not to exceed $1775 per year per child, indicating that Congress specifically intended to provide limited amount which Debtors could claim for purposes of means test.

(4015) *In re Pollinghorn,* 2010 WL 3463431 (Bankr. N.D. Ohio 2010) – Debtors would not be able to rebut presumption of abuse based on post-petition changes in Debtors' financial situation. Presumption can be rebutted only by limited "special circumstances" listed in Section 707(b)(2)(B)(i), consisting of (1) a serious medical condition; or (2) a call or order to active duty in the Armed Forces or circumstances beyond the Debtor's reasonable control, or result from circumstances highly unusual in character and of the type not normally encountered by most Debtors. Student loans and retirement loans are common in bankruptcy cases and are not the types of "highly unusual circumstances" required by Section 707(b)(2). Further, even if these payments are deducted, Debtors still have Net Monthly Income on the Means test of $822 per month, which is still above abuse presumption threshold.

(4016) *In re Taylor,* 2009 WL 2872997 (Bankr. N.D. Ohio 2009) – Code does not define "special circumstances" but does provide two examples: (1) a serious medical condition; or (2) active duty in the armed forces. To qualify as a "special circumstance", Debtor's situation must have "traits in common" with one of these two categories. Debtor must also provide (I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Debtor failed to demonstrate any allowable "special circumstance" where the "special circumstance" was the failure of Debtor's former wife, to hold the Debtor harmless on the mortgage obligation on the marital residence and the former wife's subsequent Chapter 7 filing. An obligation based on the divorce agreement related to the marital homestead "can hardly be said to have, in any meaningful way, traits in common with a serious medical condition or call to active duty in the Armed Forces." Therefore, this additional obligation, while unfortunate, does not constitute a "special circumstance" to rebut the presumption of abuse. Debtor given opportunity to convert case to Chapter 13, failing which case will be dismissed as presumptively abusive.

9.11 Non-presumed Abuse – Section 707(b)(3)

(4017) *In re Beigley,* 2018 WL 3031097 (Bankr. W.D. Ky. 2018) – Court should evaluate potential abuse based on totality of circumstances to determine whether Debtor is merely seeking advantage over creditors or is instead honest and honorable in dealings with creditors and needy where financial predicament warrants discharge of debts. Abuse can be predicated on either lack of honesty or want of need. Court must

consider whether Debtor has ability to repay debt out of future earnings which alone may be sufficient to warrant dismissal. Based on Debtor's schedules, Debtors could pay approximate 75% of unsecured debt assuming that all unsecured creditors filed proofs of claim. Debtors are eligible for relief under Chapter 13 and have regular income that is relatively stable. Debtor's did not demonstrate that they are "needy" where Debtors have more than $1200 in monthly disposable income that would pay over $54,000 and 60 month Plan.

(4018) *In re Equere,* 2018 WL 1635226 (Bankr. E.D. Mi. 2018) – Court must ascertain from totality of circumstances whether debtor is seeking an advantage over his creditors, or instead is "honest," and "needy" in the sense that financial predicament warrants discharge of debts. Abuse can be predicated on either lack of honesty or want of need. Factors include ability to repay his debts out of future earnings which standing alone may be sufficient to warrant dismissal. Debtor's alleged undisclosed income resulted from sporadic overtime and voluntary and not certain to occur and only one paycheck for prior 9 months reflected any overtime. Although Debtor had historically over-withheld and received large refunds, Debtor did not expect large refunds going forward as one of Debtor's children would no longer be dependent and Debtor worked part time in Canada and paid higher Canadian tax rate. Retirement loan payments are not disposable income and would not be considered even though loans would be paid off during plan term and would create fund for payment of creditors. Court did not reach issue of deductibility of retirement contributions where amount of contribution was less than Debtor's monthly shortfall such that eliminating contributions would not produce disposable income that could be used to fund Chapter 13 plan.

(4019) *In re Stackhouse,* 2018 WL 1634119 (Bankr. S.D. Ohio 2018) – In Chapter 7 case in which debts are primarily conumer debts, the court may dismiss case if granting of relief would be abuse of Chapter 7. Court must consider (A) whether debtor filed petition in bad faith; or (B) whether totality of the circumstances demonstrates abuse. Moving party bears burden to prove, by preponderance of evidence, that dismissal is appropriate. Court should consider debtor's ability to repay debts out of future earnings which alone may be sufficient to warrant dismissal. The court should also consider whether debtor enjoys a stable source of future income; whether debtor is eligible for Chapter 13; whether there are state remedies with potential to ease financial predicament; degree of relief obtainable through private negotiations; and whether expenses can be reduced significantly without depriving adequate food, clothing, shelter and other necessities. Disposable income is income received by debtor which is not reasonably necessary for maintenance or support of debtor or dependent of the debtor. Debtor's substantial support for Daughter and Granddaughter in form of $265 monthly car payments and $900 monthly general financial assistance payments were purely discretionary and not reasonably necessary where daughter and granddaughter are not dependents; Debtors did not list them as dependents on schedules and there is no evidence that Debtors have legal obligation to support them or that daughter suffers from debilitating disability that impairs her ability to support herself or her child; and Debtors did not claim them as dependents for tax purposes. Student loan payments for Daughter's student loans are discretionary payments where there was no evidence that Debtors themselves were liable on loans. Voluntary 401(k) contributions are not reasonable and necessary expenses where there is no evidence that Debtors were planning on retiring any time soon, that their employment is unstable, or that Debtors are going to become disabled and have to rely on disability benefits; and even if Debtors lost job, there is no evidence that Debtors cannot be retrained for different employment. Monthly storage unit fee is not reasonable and necessary expense where Debtors have been renting the storage unit for significant length of time but do not use goods stored therein. Without these expenses, Debtors would have $2,285 per month of disposable income, and could repay 93.8% of the Debtors' general unsecured debt. Case dismissed unless Debtors convert case to Chapter 13 within 10 days.

(4020) *In re Lisowski,* 2018 WL 1614756 (Bankr. N.D. Ohio 2018) – Section 707(b)(3) allows Court to dismiss case where debts are primarily consumer debts and either Debtor is presumptively abusive under Section 707(b)(2); or filed in bad faith or lack of need based on the totality of circumstances under Section 707(b)(3). Debtors are "needy" for purposes of Section 707(b)(3) when financial condition warrants discharge, based on development occurring before discharge is granted. Debtors are needy when financial predicament warrants discharge of debts in Chapter 7 case based on ability to repay debts out of future earnings, which alone may warrant dismissal; whether debtor enjoys stable source of future income; whether debtor is eligible for adjustment of debts through Chapter 13; whether there are state remedies with potential to ease financial predicament; degree of relief obtainable through private negotiations; and whether expenses can be reduced significantly without depriving adequate food, clothing, shelter and other necessities. Evidence did not support finding of abuse where Debtor worked a primary job plus three part time jobs. Although Debtor was contributing to retirement and repaying retirement loans. Ongoing contributions were not unreasonable based on Debtor's age, existing retirement savings, annual income, overall budget, amount of the contributions, needs of dependents, and other constraints that make it likely that contributions are reasonably necessary. Contributions were only $216 per month and loan repayment would run additional 4 years. Although Debtor's Domestic Support Obligation would end soon Debtor was likely going to give up two of the part time jobs such that his budget would reflect disposable income of only $187 per month. Debtor and two children all suffer medical issues due to trauma from marriage dissolution resulting in increased medical and psychological costs. Debts largely resulted from then-wife's medical expenses and inability to hold regular employment, and Debtor's testimony regarding support for daughter who lived at college, but expenses were kept to minimum and reflected uncomfortable belt-tightening. Although "close case" given nominal amount of potential disposable income available and Debtor's particular circumstances, court would not dismiss case as abuse.

(4021) *In re Shoup,* 2018 WL 1614188 (Bankr. N.D. Ohio 2018) – Court can dismiss case under Section 707(b)(3) where totality of circumstances indicates that debtors are abusing provisions of Chapter 7. Totality of circumstances allows court to consider both pre-petition and post-petition circumstances including any development occurring before discharge is granted. Debtors are needy when financial predicament warrants discharge of debts in Chapter 7 case based on ability to repay debts out of future earnings, which alone may warrant dismissal; whether debtor enjoys stable source of future income; whether debtor is eligible for adjustment of debts through Chapter 13; whether there are state remedies with potential to ease financial predicament; degree of relief obtainable through private negotiations; and whether expenses can be reduced significantly without depriving adequate food, clothing, shelter and other necessities. Debtors were not needy, and filing was abusive where Debtors would be eligible for relief under Chapter 13; and Debtors had sufficiently stable disposable income to pay creditors. Whether Debtors' ongoing retirement contributions of more than $540 would be allowable expense depends on (1) debtor's age and time left until retirement; (2) amount of debtor's existing retirement savings (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary. Debtors' deduction of retirement contributions not reasonably necessary under facts of case. Debtors were well "above median income" and

disallowing retirement contribution permitted Debtors to pay at least $288 per month to unsecured creditors giving rise to presumption of abuse under Section 707(b)(2) which while not controlling under Section 707(b)(3) is "helpful guidance". Debtors had budget that does not reflect significant belt tightening. During period when Debtors describe being in financial distress, they spent $85,000 on motor vehicles. As bankruptcy approached, Debtors made decision to add additional expense of $338 per month for voluntary retirement contributions. Although Debtors removed netted $38,000 from early withdrawal form retirement account shortly before filing, Debtors could account for only $18,000 of those funds as being paid to student loan creditors with no evidence of payment to any other creditor.

(4022) *In re Arndt,* 2017 WL 5164141 (Bankr. N.D. Ohio 2017) – Section 707(b)(3) allows Court to dismiss case where totality of Debtor's financial circumstances, including both pre-petition and post-petition circumstances, demonstrates that debtor is not needy and that granting discharge would be abuse of Chapter 7. Factors include ability to repay debts out of future earnings (which alone may be sufficient to warrant dismissal under some circumstances); whether debtor enjoys stable source of future income; whether debtor is eligible for adjustment of debts through Chapter 13; whether there are state remedies with potential to ease financial predicament; degree of relief obtainable through private negotiations; and whether expenses can be reduced significantly without depriving debtor of adequate food, clothing, shelter and other necessities. Debtor's petition was abusive where Debtor was eligible for relief under Chapter 13; Debtor's income was reasonably stable, although Debtor had recently suffered demotion at work that reduced her income; Debtor was surrendering numerous items of collateral and would no longer have secured debt payments; Debtor was surrendering her house and was renting from family member, freeing up the difference between the prior mortgage payment and the IRS standard allowance for housing (which was higher than debtor's actual rental where living arrangement is not intended to be long term); Debtor no longer needed expense to "cure" mortgage on residence; Debtor's deduction for utilities was based on Debtor's prior residence and Debtor's actual expense was far less, such that expense would be reduced to IRS allowance. However, Debtor's disposable income would be reduced by actual and unreimbursed job expenses and motor vehicle insurance that was not deducted in original schedules but were actual and necessary expenses. Further, Debtor's historical income was far higher than shown on Schedule I and while Debtor explained some of the reduction, there was still large amount of historic income that was not accounted for or explained. Adjusting Debtor's disposable income to eliminate or cap deductions, increasing expenses not already accounted for, and adjusting Debtor's income to match historical averages, Debtor harosenfelds $500 per month available to pay creditors, which easily allows Debtor to pay all creditors a significant dividend in Chapter 13.

(4023) *In re Buoy,* 2017 WL 3194755 (Bankr. N.D. Ga. 2017) - Section 707(b)(1) allows Court to dismiss Chapter 7 case where debts are primarily consumer debts and granting relief would be abuse, defined as either (a) filing the petition in bad faith; or (b) where totality of circumstances of Debtors financial condition indicates abuse. Financial circumstances will support dismissal where financial circumstances indicate ability to repay debts out of future earnings, which alone may warrant dismissal. Court may also consider whether the Debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Even accepting Debtors' statement of expenses which included a number of items that were either unnecessary or overstated, Debtors still had at least $400 per month available to pay unsecured creditors when Debtors' income was correctly calculated using bi-weekly pay frequency rather than semi-monthly frequency used by Debtors' counsel.

(4024) *In re Goldberg,* 2017 WL 3098095 (Bankr. N.D. Ohio 2017) – Section 707(b)(1) allows dismissal of a case for abuse only if filed by an individual Debtor with primarily consumer debts. Debtors owned a home and two business properties. Although two business properties were worth less than mortgage balances owed, evidence indicated that Debtors operated businesses at profits each month. Operation of profitable businesses, even if businesses have negative net worth, is not lack of good faith or abuse. Totality of circumstances did not warrant finding of abuse. Factors to consider include Debtors' ability to repay debts out of future earnings; whether Debtors enjoy stable source of future income; whether Debtors are eligible for Chapter 13; whether there are state remedies with potential to ease Debtors' financial predicament; degree of relief obtainable through private negotiations; whether Debtors' expenses can be reduced significantly without depriving them of adequate food, clothing, shelter and other necessities; and whether Debtors' financial situation is result of unforeseen catastrophic event. Of these factors, ability to repay is major factor. Debtors would not have ability to make payments in Chapter 13 where, even considering social security income and support provided by Debtor's mother, Debtors' expenses exceed income. Although Debtors' home mortgage payment was higher than IRS guidelines, there was no evidence that median price of house significantly exceeded average for area or was in two-third, top 10% or some other segment of market. Fact that mortgage exceeds IRS allowance, without more, is not evidence of abuse. While Debtors operated two businesses out of two separate spaces, there was no evidence that Debtors could adequately conduct both businesses from one space and Debtors operated both businesses profitably. Evidence indicated that it was unlikely that income would increase in future ads business income had been in decline for a number of years and given age and health of Debtors there was no reason to believe that would turn around. Although Debtors were eligible for relief under Chapter 13 they lacked ability to make any payments to unsecured creditors in Chapter 13 as expenses exceeded income. There was no evidence presented of any available state law remedies or any ability of Debtors to further reduce expenses.

(4025) *In re Weaver,* 2017 WL 1501407 (Bankr. M.D. Tn. 2017) – Section 707(b)(1) allows the Court to dismiss a case filed by Debtor whose debts are primarily consumer debts if granting relief would constitute an abuse of the provisions of Chapter 7. Section 707(b)(2)(A)(i) creates a presumption of abuse if Debtor's current monthly income reduced by allow deductions and multiplied by 60 is greater than $12,850. Section 707(b)(2)(A)(i) identifies the categories of expenses that Debtors may deduct from current monthly income in calculating net disposable income. Once presumption of abuse arises under Section 707(b)(2), Court is required to dismiss case unless Debtor can successfully rebut presumption by demonstrating special circumstances such as serious medical condition or a call or order to active duty in the armed forces, and Debtor can itemize each additional expense or adjustment of income and provide documentation and detailed explanation. Even where presumption of abuse does not arise, Section 707(b)(3) allows Court to dismiss case based on totality of circumstances including whether Debtor's financial situation demonstrates abuse. Most critical element in determining abuse is whether Debtor has ability to repay debts out of future earnings, determined by whether there is sufficient disposable income to fund a Chapter 13 Plan. United States Trustee Motion to Dismiss under Section 707(b)(2) and b(3)granted. Although Debtor's calculations on Means Test indicated that Debtor had monthly

disposable income of only $36.40 such that Means Test did not demonstrate presumption of abuse, calculations and adjustments included in Means Test were erroneous resulting in an understatement of Debtor's actual income and expenses. Debtor claimed marital adjustment of $1100 per month but was able to document only $650 per month. Means Test listed payroll tax deductions based on amount actually withheld from Debtor and Debtor's non-filing spouse's pay rather than Debtor and Debtor's non-filing spouse's actual tax liability. Debtor and Debtor's non-filing spouse's annualized income significantly exceeded applicable state median and adjustments to Means Test calculation indicated that Debtor had disposable income of $758 per month which would pay more than $45,000 to unsecured creditors over 60 months. Debtor did not claim any special circumstances to justify expenses or adjustments of current monthly income and Debtor did not present any evidence of any additional expenses. Inaccuracies on Means Test were also carried over on Debtor's Schedule I and Schedule J and included expenses that were excessive were not properly documented.

(4026) *In re Jones,* 556 BR 327 (Bankr. E.D. Mi. 2016) – In determining whether Debtor's filing is an abuse, court will consider whether Debtor could pay debts out of future earnings, which, standing alone, may be grounds to dismiss case. Other factors include whether Debtor enjoys stable source of income; whether Debtor is eligible for relief under Chapter 13; whether there are state remedies with potential to relieve financial pressures; degree of relief obtainable through private negotiations; and whether expenses can be reduced without depriving Debtor of adequate food, clothing, shelter and other necessities. Debtor did not live extravagant lifestyle and after payment of student loans, she had very little money left. However, fi Debtor filed Chapter 13 and paid student loans with other general unsecured claims, creditors could receive approximately 20% of claims. Further, there was no evidence that Debtor made any effort under state law to address her financial condition; and no evidence that Debtor made any effort to pursue restructuring of student loans that would reduce payment and provide Debtor with extra funds to pay other debts. Debtor afforded opportunity to convert case to chapter 13, failing which the case would be dismissed.

(4027) *Palmer v. Laying,* Case No. 15-2856 (D. Colo. 2016) – Whether student loans are "consumer debts" depends on purpose of incurring loans. Student loans can be considered "non-consumer" if they are incurred primarily as business investment in oneself. Debtor is not required to show that education relates to existing business or current employer or that education is required to comply with mandate or for advancement or for higher income. Debtor must only show that student loans were incurred with intent to realize profit, even if profit is never actually realized. Nurse striving for professional development would be considered business investment in nature. However, if loans are taken out where Debtor aims for job that would require no education loans are consumer in nature as there is no profit motive behind obtaining loans in first instance.

(4028) *In re Jones,* Case No. 15-32931 (Bankr. E.D. Mi. 2016) – Section 707(b) allows a court to dismiss a case for abuse only where the Debtor's debts are primarily consumer debts. Abuse can be shown either by showing that Debtor has acted dishonestly; or that Debtor is not needy, such that his financial situation does not warrant discharge. In determining whether Debtor is needy, Court will examine whether Debtor could fund a hypothetical Chapter 13 case, which standing alone may compel dismissal. Other factors which may show existence or lack of neediness include whether Debtor enjoys stable income; whether Debtor is eligible for relief under Chapter 13; whether there are stat remedies with potential to ease financial problems; degree of relief obtainable through private negotiations; and whether expenses can be reduced without depriving Debtor of adequate food, clothing and shelter. Debtor was a registered nurse and enjoyed stable income. Debtor's debts fell well within limits for Chapter 13 and Debtor could repay as much as 20% to unsecured creditors if Debtor's student loans are included in unsecured claims. Vast majority of Debtor's debts were student loans yet there was no evidence that Debtor had sought either to adjust those payments or to negotiate with Debtor's primary non-student loan creditor, or that Debtor sought State Court remedies that would stay further garnishments by creditor. There was no evidence that Debtor could reduce her expenses as here budget was already modest. Debtor indicated that if Debtor filed Chapter 13 and paid student loans as general unsecured creditors, Debtor would end up owing more to the student loan creditors at the end of the case than at the beginning because of continuing accruing interest. Court held that case was "abuse" as Debtor had ability to pay unsecured creditors in Chapter 13, and Debtor had failed to take advantage of either state law remedies to negotiate installment payment of judgment Debtor or that Debtor has attempted unsuccessfully to restructure student loan debts.

(4029) *In re Uche,* Case No. 15-3655 (Bankr. M.D. Fl. 2016) – Whether case is to be dismissed for abuse under Section 707(a) and 707(b)(3) depends on totality of circumstances. For individual Debtor with mostly business debts, there must be evidence of deliberate act or omission showing bad faith or abuse of Code. Fact that Debtor was high-income and had ability to pay debts, without more, was not "abuse". Although Debtor had monthly income in excess of $16,000, income was of little significance where debts were primarily business debts.

(4030) *In re Patterson,* 2016 WL 4087290 (Bankr. N.D. Ohio 2016) – Where debts are primarily consumer debts, court may dismiss Chapter 7 petition if it finds that the totality of the circumstances demonstrate that granting relief would be an abuse of the provisions of Chapter 7. Primary factor is ability to repay debts out of future earnings, which alone may be sufficient to warrant dismissal under some circumstances. Other factors include whether the Debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, and whether expenses can be reduced without depriving the Debtor or his dependents of any necessities. Debtor's filing was dismissed for abuse where Debtor's Schedules I and J show monthly income of $4,276.83 and expenses of $4,274.90 but do not disclose Debtor's social security income of approximately $1,059 or income of live-in girlfriend that is deposited into joint account. Even if Debtor's SSI and girlfriend's income are not included, Debtor's Schedule J included significant discretionary expenses include $429 as payment on a Harley–Davidson motorcycle plus a $435 expense for a leased vehicle; and $270 as payment of unsecured debts owed to Bay Area Credit Union. If Debtor eliminated one vehicle and payments on unsecured loans that are subject to discharge, Debtor would have $700 per month to fund Chapter 13 plan and pay significant amount of unsecured debt.

(4031) *In re Witty,* 2016 WL 47616 (Bankr. W.D. Ky. 2016) – Section 707(b)(3) allows court to dismiss case filed in bad faith or when discharge would be abuse of Chapter 7 based on totality of circumstances. Debtor's rent expense of $1600 plus $500 for utilities was not unreasonable where Debtor needed a two bedroom apartment for when her minor children (who lived with their father) came for visitation. Debtor's lease of a BMW automobile at $558 per month was not considered because the vehicle was repossessed prior to the petition date although that payment was still deducted on Schedule J as an ongoing expense. Debtor's expenditures for furniture and furnishing were reasonable as

Debtor's husband obtained all of the household goods and furnishings from the marital household as part of the divorce, requiring Debtor to purchase new items. Debtor's expense of $200 per month for clothing and $100 for personal expenses were not unreasonable where Debtor was a professional whose employment required her to dress professionally. Court Ordered obligations for alimony and support were high and Debtor was also required to pay balance of marital debt including payments on the former marital home and utilities and upkeep. Debtor's travel expenses were high because Debtor had to travel from North Carolina to Kentucky for visitation with her children and flying was the best method of transportation for weekend visitation, resulting in travel expenses for visitation of $2200 to $3800 per month. Debtor's expenses, while high, are commensurate with her lifestyle and job requirements as a high wage earner.

(4032) *In re In re Floyd,* 2015 WL 4549589 (Bankr. N.D. Ohio 2015) – Section 707(b)(3) allows a court to dismiss case where, based on totality of circumstances, Debtor is not "needy". Debtor's ability to pay Debtors our of future earnings, standing alone, may be sufficient to warrant dismissal. Other factors include whether the Debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Case dismissed where Debtor would be eligible for Chapter 13; Debtor now has stable income and has income well above median income for her family size, so Applicable Commitment Period would be 60 months; Debtor is contributing $266.67 per month to retirement plan which is not allowable expense; Debtor was actually contributing to her Flex Medical Spending account far less than shown on Schedule I; and Debtor likely will have federal tax refunds that could also be used to pay creditors. Debtor could make significant payment to unsecured creditors with minimal belt tightening. Debtor also sought to maintain expenses for home in which Debtor no longer resided plus apartment where Debtor did reside, as Debtor wanted to "keep her options open" about a possible return, and Debtor was expending money to have property maintained as well as travel expenses for returning to property from time to time, none of which was necessary.

(4033) *In re Adamski,* 2015 WL 1607326 (Bankr. N.D. Ohio 2015) – Debtors were not "needy" for purposes of Section 707(b)(3) where Debtor's budget showed expenses that were grossly excessive. Student loan payments should not be deducted as those payments should be directed to all creditors equally, freeing up $865 per month for a Chapter 13 plan payment. Repayment of loan for purchase of time share was not reasonably necessary. If Debtors eliminated these two expenses and contributed tax refunds to a chapter 13 plan, based on historic refunds, Debtors would pay average of $350 per month. Debtor's budget also failed to evidence any belt tightening where, for example, budget included $600 per month for transportation where the Debtors had daily commutes of 5 miles. Debtors had ability to adjust living expenses and to make meaningful distribution to unsecured creditors in Chapter 13 without deprivation of reasonable expenses for food, shelter, clothing and other necessary expenses.

(4034) *In re Robinson,* 2015 WL 1087316 (Bankr. N.D. Ohio 2015) – Chapter 7 filing dismissed for abuse where Debtor could provide meaningful return to unsecured creditors in Chapter 13. Debtor routinely received tax refunds of $2,500 per year and Debtor could stop paying both student loans and 401-k loans during pendency of case. Debtor was relatively young such that interruption of 401-k loan payments would not impose unfair burden on Debtor, such that payments were not reasonably necessary. Combining tax refunds, 401-k loan payments and student loan payments in Chapter 13 would allow Debtor to pay approximately 50% to unsecured claims.

(4035) *In re Nadeau,* 2014 WL 5325224 (Bankr. D.R.I. 2014) – Debtors' Chapter 7 filing dismissed for lack of good faith. Debtors decided to file for Chapter 7 bankruptcy protection because they could not afford to also continue paying their substantial credit card debt. After they received bankruptcy counseling from their attorney, engaged him to prepare and file a Chapter 7 bankruptcy case, and completed the mandatory credit counseling course, they traded in the Camry for the more expensive 370Z incurring $12,000 in additional debt and a new monthly installment payment that was $133 greater than their prior car payment for the Camry. Debtors' explanation that they did not believe their prior car was safe after car had been repaired following accident was not credible where Debtors produced no evidence that the vehicle was unsafe, other than the subjective, self-serving statements of Debtor-husband; they never pursued additional repairs to the vehicle, nor did they notify or complain to their insurance company, which had paid more than $10,000 for the repairs; and Debtors continued to drive the car for about seven months after it was repaired until after they had decided to file for bankruptcy and seek a discharge of their unsecured debt. Debtors were determined, irrespective of the added expense, to acquire a new vehicle before they filed their bankruptcy petition. New vehicle, a two door sports car, was not a reliable car for Rhode Island's often harsh winters further undermining Debtors' explanation that they sought need a reliable and dependable vehicle for his work commute. Totality of circumstances also warranted dismissal. Debtors had ability to pay meaningful dividend to unsecured creditors out of future disposable income. Even allowing for the higher car payment, Debtors had $222 per month disposable income; and had Debtors not purchased new car on eve of case, Debtors would have had more than $350 per month disposable income. Debtors took unfair advantage of creditors in purchasing new car after deciding to file Chapter 7.

(4036) *In re Wiseman,* 2014 WL 3939269 (Bankr. S.D. Ohio 2014) – Section 707(b)(3) requires wide ranging view of Debtor's financial circumstances including financial condition at time of filing and any post-petition changes, and whether there is sufficient income to fund meaningful distribution under Chapter 13. Debtors had ability to make payments where budgeted expenses included $730 garnishment by IRS that stopped when case filed, providing additional disposable income to fund Chapter 13. Debtors had substantial income in excess of $7800 per month. By Debtors' own calculations, they could fund a Chapter 13 plan that would yield as much as 45% to unsecured creditors. While the UST calculation produced higher dividend based on allegedly excessive discretionary expenses, court would not resolve that dispute as the specific payment and dividend would be worked out through the Chapter 13 process. For purposes of Section 707, court only needed to determine that Debtors could produce a meaningful dividend.

(4037) *In re Thompson,* 2014 WL 3734138 (Bankr. S.D. Ohio 2014) – Case is abusive where Debtor had sufficient monthly income to fund a chapter 13 plan and Debtor had not been completely candid in disclosure of assets. Debtor obtained employment post-petition that would allow Debtor to make plan payments as much as $2,000 per month. Debtor failed to list assets including one year pre-paid rent; a lawn tractor, and educational savings accounts, in either schedule B or Statement of Financial Affairs. Debtor failed to list all creditors including an America Express account that she used on a regular basis. Debtor had to amend schedules multiple times to correct omissions and non-

disclosures. Debtor was highly skilled and has history of significant income and could propose a Chapter 13 plan that would pay as much as 15% to unsecured creditors. Debtor given 30 days to convert or case dismissed.

(4038) *In re Gomez,* 2014 WL 1168983 (Bankr. N.D. Ohio 2014) – Abuse can be based on either lack of honesty or lack of need, based on totality of circumstances. Debtor's petition did not evidence abuse where Debtors purchased two new cars on eve of filing at a total cost of $67,000 with monthly payments in excess of $1296 per month. Debtors both worked and Debtors' prior vehicle had broken down and could not be repaired. Debtors could not use single vehicle as Debtors both worked and jobs were at opposite ends of the city, meaning car-pooling impossible. Purchase of new vehicles, rather than used vehicles, was not done to obtain head start at expense of creditors. Debtors had attempted to purchase less expensive vehicles but were unable to obtain financing other than through seller who would extend financing only if Debtors purchased certain vehicles. Total debt service of $1267 is on high side, and exceeds IRS standards of $1034 per month, but overall budget was not unreasonable. While timing of purchase was proximate to filing, purchase was not undertaken in contemplation of bankruptcy but was to allow Debtors the ability to work relatively new jobs and Debtors did not have more affordable or better alternative. Totality of circumstances did not indicate that Debtor was dishonest or attempting to obtain advantage over creditors.

(4039) *In re Pittman,* 2014 WL 946570 (Bankr. S.D. Ohio 2014) – Debtor not permitted to deduct voluntary 401-k contributions in calculating disposable income. Debtor must also increase disposable income upon final payment of 401-k loans. Terminating contributions and increasing payment when loan ends would provide dividend of at least 24% to unsecured creditors, rendering Debtor's case abusive under Section 707(b)(3). Debtor's alleged anticipated tax liabilities and medical expenses and potential lost income from shoulder complications did not alter conclusion that case was abusive where Debtor failed to present any corroborating testimony or documentation from any health care providers regarding injuries or potential medical expenses.

(4040) *In re Gharraph,* 2013 WL 4033662 (Bankr. S.D. Ohio 2013) – Section 707(b)(3) is not applicable where Debtor's debts are primarily non-consumer.

(4041) *In re Manlove,* 2013 WL 1385747 (Bankr. E.D. Wa. 2013) – Debtor's voluntary contributions were not reasonably necessary where Debtor was participant in employer funded pension plan and Debtor would not be retiring for at least 20 years. Debtors had sufficient income to fund a plan of reorganization, resulting in Debtor's Chapter 7 being abusive under Section 707(b)(3).

(4042) *In re Weixel,* 494 BR 895 (6th Cir. BAP 2013) – Debtors' case dismissed for abuse. Debtors had monthly take home income in excess of $10,000. Debtors had income significantly higher than median income for household size, and Debtors made no attempt to adjust lifestyle over several years to address financial condition including house they could not afford and taxes they were not paying. Debtors' budget included anticipated rent of $3500 per month plus thousands of dollars in connection with husband's hobby, playing poker at various casinos in Las Vegas and Atlantic City. Debtors had for years lived well beyond their means, including purchasing home for $590,000 with no money down and then refinancing to pull out an additional $50,000; expensive vacations; eating out; and non-filing of tax returns and accrual of significant tax debt plus consumer debt. Debtors did not experience any interruption in income and did not suffer any unforeseen or catastrophic events leading to bankruptcy; and made no effort to find more affordable housing or reduce other expenses prior to filing bankruptcy. Court properly disregarded Debtors' proposed housing expense where there was no evidence of an inability to obtain suitable housing at a significantly lower cost or why Debtors should receive a housing expense more than three times the IRS standard. The Court also did not err in disregarding Debtors' tax debt where Debtors made no proposal to pay that debt, although Debtors proposed $3,500 per month for housing. Debtors' failure to file returns made determination of exact tax debt impossible, and Debtors failure to pursue any compromise with the IRS further undercut Debtors' contentions.

(4043) *In re Matthews,* 2013 WL 1385221 (Bankr. E.D. Va. 2013) – Court can dismiss Chapter 7 filing for abuse where debts are not primarily consumer debts. Although dismissal under Section 707(b)(2) is limited to Debtors with primarily consumer debts, Section 707(b)(3) is not so constrained.

(4044) *In re Pate,* 2012 WL 6737814 (Bankr. S.D. Tx. 2012) – Case filed under Chapter 13 and later converted to Chapter 7 can be dismissed under Section 707(b)(3) for lack of good faith. Debtor was engaged in bitter custody battle before filing case and knew of the issues before Debtor filed Chapter 13. Other financial difficulties were of Debtor's own makings. Debtor had serious tax liabilities because Debtor failed to file tax returns for several years. Debtor admitted that he claimed 9 exemptions for withholding instead of the two he was entitled to, which constituted providing false information to the IRS which is a crime. Debtor did not file Chapter 13 in good faith – instead, he filed with no hope for success, did not even attempt to perform, and then filed misleading schedules.

(4045) *In re McFadden,* 477 BR 686 (Bankr. N.D. Ohio 2012) – Chapter 7 case can be dismissed for cause, which is not limited to enumerated issues in Section 707(a). Dismissal is not intended as tool to hammer Debtor for being "bad person". Discharge will be denied only in extreme or egregious cases that entail concealment or misrepresentation of assets or sources of income, or excessive and continued expenditures, lavish lifestyle, and intention to avoid single debt based on conduct akin to fraud, misconduct or gross negligence. Motion to dismiss Chapter 7 for bad faith did not allege any factual basis to deny discharge. Creditor attended First Meeting and asked questions subject to Chapter 7 Trustee's decision to stop interrogation. Dispute with the way the Trustee handled Chapter 7 First Meeting is not basis to deny discharge. Given time constraints of First Meetings, Trustee has authority to limit scope or extent of questioning, and creditor can thereafter seek examination pursuant to Rule 2004. Creditor's complaint that Debtor drove a car that is not owned by Debtor does not indicate any abuse absent some evidence that Debtor owned car pre-petition and transferred vehicle to another before filing for little or no value or that Debtor listed payments on schedule J that Debtor was not actually making, but there was no evidence of either of those circumstances. Budgeted expenses were reasonable and well within means test guidelines. Minimal understatement of net income on Schedule I was not sufficient to deny discharge where Schedule I listed net income at $1,615.60 while paystubs calculated net income of $1,777.74, for a difference of $162 per month. Cell phone expense of $200, in a vacuum, would appear unreasonable, but Debtor's overall budget for Debtor and daughter was $1,800 per month, with no expense for water, internet, cable, trash, recreation, medical or dental expenses, or renter's insurance.

(4046) *Ng v. Farmer,* 2012 WL 3890063 (9th Cir. BAP 2012) – Case found to be abusive where Debtor's expenses included contribution of $520 per month to 401-k account and $340 per month repayment of 401-k loan. Retirement contributions were not reasonably necessary where Debtor and his wife were in their early 40's and it good health, and Debtor already was already receiving a military pension. Debtor intended to work at least another 20 years, such that a 3-5 year interruption in contributions would not have substantial impact on retirement savings and Debtor, after completing Chapter 13, would still have ample time to find a second pension fund. 401-k loan repayments are not deductible. Loan payment to retirement income is considered disposable income because Debtor is in essence repaying a loan to himself. It would be unfair to allow Debtor to commit part of earnings to repayment of Debtor's own retirement fund. Debtor's proposed deduction of $400 per month to pay a back tax debt was excessive where Debtor in Chapter 13 could repay that debt in full with a payment of only $170 per month, freeing up substantial funds for distribution to other creditors. Court is also permitted to consider post-petition increases in income in determining ability to repay. Evidence indicated that Debtor received increase in income post-petition which, when combined with disallowed expenses, would produce substantial dividend to unsecured creditors in Chapter 13.

(4047) *In re Walterhouse,* Case No. 11-32645 (Bankr. E.D. Mi. 2012) – Court's order denying motion to dismiss not erroneous. Debtor's testimony that he pays money to parents in various amounts to help parents financially when they needed it did not evidence any wrongful payment of pre-petition debts. Debtor's pre-petition transfer of property to brother was in connection with brother's agreement to provide financial help to parents and did not indicate any intend 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.

(4048) *In re Farkas,* 2012 WL 3257855 (Bankr. E.D. Mi. 2012) – Case dismissed as abusive where Debtor's expenses included retirement loan repayments that are not reasonable necessary, Retirement account contributions are not per se allowed or disallowed but must be evaluated on case by case basis looking at totality of circumstances including amount of existing savings, Debtor's age, and years left until retirement. Debtor's 401-k loan payments were not reasonably necessary where Debtor, age 39, already had $127,000 in retirement savings plus separate pension plan through employer. Debtor was relatively young and had many years remaining before retirement. Disallowing retirement loan payments as reasonably necessary would produce plan that repaid 29%. Even assuming Debtor's testimony of need to replace vehicle during Chapter 13 case was accurate, Debtor could still produce 14% dividend. Filing was abusive and would be dismissed unless Debtor elected to convert to chapter 13.

(4049) *In re Golematis,* 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Court must consider disposable income, defined as income that is not reasonably necessary for maintenance or support of Debtor or a dependent. While Debtor will not be required to live in poverty, Debtor must engage in belt-tightening. Debtor had disposable income. Debtor would not be allowed to deduct cost of private school expenses absent compelling circumstances, such as a special educational need or proof that the public school alternative would be academically inadequate. Mere preference for private or religious schooling is not sufficient. Expenses for children's' sports, figure skating, baseball and soccer were not excessive where Debtors' total family recreational budget was $200 including these activities. Debtor-wife's 401-k contributions were not unreasonable where Debtor-wife was 45 years old and had only $14,000 in total retirement savings. Home maintenance expenses of $266 were not unreasonable where $120 was payment on a balance owed for roof repairs and $146 was for general maintenance. Without the roof repair, house would have been uninhabitable; and balance of $146 was "far less" than what other courts have concluded is excessive. Proposed payments to one unsecured creditor that resulted from Debtor's purchase of law practice while simultaneously paying nothing to other unsecured creditors would not be permitted in chapter 13, requiring court to add back into income the amount of this payment. After adjusting expenses, Debtors could pay a 100% dividend over a 60 month chapter 13 plan. Chapter 7 petition was abusive, requiring dismissal or conversion.

(4050) *In re Pearce,* 2012 WL 3042305 (Bankr. E.D. Ky. 2012) – Case was abusive under Section 707(b)(3). Debtors had $542,610.00 in exempt retirement assets and a $43,250 homestead exemption. Husband earned $8,432.67 gross monthly income and Wife received $1600 in unemployment benefits. Debtors purchased three separate vacant lots ranging from $80,000 to over $300,000 as possible locations for a retirement home. Debtors then decided to a purchase home for $432,000.00, although at the time Debtors were renting a substantially less expensive residence. Debtors also used borrowed 401(k) funds to pay off their sons' student loans, Debtors' other debts and some living expenses in order to qualify for the mortgage loan with a payment of $1,009.67 per month. In September 2010, Debtors purchased a 2010 Toyota Prius for $35,664.80 and also purchased a 2010 Honda CR–V for $30,892.39. As soon as Debtors closed on their new home, Debtors stopped paying on the mortgages on the three prior lots. In October 2010, as the mortgage payments for their newly constructed home began, Debtors ceased payments on the debts on the lot in Russell County and the two lots in South Carolina. Prior to this time, Debtors had timely paid and were current on their obligations, including the mortgage debts for the three vacant lots. Debtors clearly are not needy. Debtors were a family of two enjoying an annual gross income in excess of $100,000.00. Debtors have the ability to repay a portion of their debt in a Chapter 11 plan. Majority of debt arose as result of poor decision making with regard to the purchases of three different parcels of real property on which Debtors intended to build retirement homes. Debtors built a larger, more expensive home and moved out of their smaller rented home. They purchased two new vehicles and in the following month stopped servicing the debt on the three "retirement" lots. Debtors could reduce their spending in any number of areas allowing for a meaningful repayment to creditors. Debtors spend more than double the average housing expense servicing the two mortgages, paying maintenance and homeowners association dues on their personal residence. Debtors also spend more than $1,100.00 each month servicing vehicle debt. Debtors spent $300 each month for the care of adult children with college educations, paid for by Debtors. Several debt payments will be fully repaid within a five year term of a Chapter 11 repayment plan.

(4051) *In re Modiri,* 474 B.R. 511 (Bankr. E.D. Mi. 2012) – Section 707(b)(3) requires court to view totality of circumstances to determine if

Debtor's financial situation indicates abuse. It is an abuse of Chapter 7 for a Debtor to seek a discharge of debts that the Debtor can pay, as the purpose of Chapter 7 is to provide relief to Debtors who cannot pay debts. While ability to repay debts is not the sole factor, Debtor's overall financial situation including income, expenses, assets and liabilities may demonstrate abuse. Abuse found where Debtor moved to California and rented apartment on beach facing Pacific Ocean at excessive cost of $3,000 per month. Rental of ocean-view apartment at a premium rental is not reasonable. IRS local standards for California county where Debtor resided had housing and utility expense of $1,999.00. Using that would create extra $1,000 in disposable income. Debtor's transportation expense was also unreasonable. Debtor chose the most expensive means of obtaining transportation – short term car rentals and purchasing insurance through the rental company. Transportation cost of $1000 per month exceeded IRS allowance for operating and ownership costs by more than $200.00. Unnecessary expenses for these two items would free up $1200 per month which, over 60 month plan term, would produce significant dividend on $81,000 of scheduled unsecured debt.

(4052) *In re Smith,* 468 BR 235 (Bankr. W.D. Ky. 2012) – Debtor's petition did not evidence abuse for purposes of Section 707(b)(3). There was no evidence of any suspicious transfers to insiders or any intentional undervaluing of assets or overstatement of expenses and Debtor did not live lavish or excessive lifestyle, but lived modestly within means. Debtor had only $54 per month remaining after paying reasonable living expenses. Even if tax refunds were factored into income, those averaged less than $2,000 per year and would still not allow Debtor to make meaningful payments to unsecured creditors.

(4053) *In re Beckerman,* 381 BR 841 (Bankr. E.D. Mi. 2008) – Retirement contributions are not per se included or excluded in calculating disposable income for purposes of Section 707(b)(3). Retirement contributions must be reasonably necessary for maintenance or support of Debtor or a dependent of the Debtor. Debtors' contribution of $469 per month was reasonably necessary where Debtors were 55 years old, had no savings for retirement and had no significant personal or real property. Although both Debtors enjoyed stable employment and neither planned on retiring for a number of years, combination of age and lack of any meaningful retirement savings demonstrated that Debtors would not be able to sustain retirement without continuing contributions. Amounts contributed were reasonably necessary and would be deducted in determining disposable income for purposes of Section 707(b)(3).

(4054) *In re Elias,* Case No. 11-55426 (Bankr. E.D. Mi. 2012) – Case was abusive under Section 707(b)(3) where schedules I and J as filed showed monthly surplus of $540.00. Further, budget contained unnecessary or unreasonable expenses including payments on a boat; maintenance expenses for a surrendered condominium; and continued payments for a back tax liability would end in approximately 17 months which would make an additional $1000 per month available for creditors. Debtors had ability to pay reasonable Chapter 13 case with no changes to lifestyle or any meaningful belt tightening. There was no evidence of any bad-faith conduct by Debtors pre-petition, but pre-petition good faith or bad faith is not a factor under Section 707(b)(3). Debtor's concern of possible loss of employment at some unspecified date in the future did not change the outcome where Debtor had no information as to whether, or when, any loss of employment may ever occur, and Section 1329 allowed for modification of a confirmed plan if Debtor did at some point lose employment.

(4055) *In re Mathis,* 2012 WL 909517 (Bankr. N.D. Ohio 2012) - Case would be dismissed under section 707 where Debtors had monthly disposable income of approximately $400 plus had an additional $400 which budget contributed to payment of student loans which would not be entitled to priority under chapter 13. Debtors had reasonably stable income and, using $800 per month as disposable income, had the opportunity to pay a meaningful portion of unsecured debts out of future income without depriving Debtors or their dependents of adequate housing, food, clothing, or other necessities.

(4056) *In re Mains,* 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

(4057) *In re Vandenbosch,* 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

(4058) *In re Westing,* 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income Debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only $165 and would produce dividend of 1.9% while Debtor had disposable income of more than $2,300 if the Social Security was included.

(4059) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a Debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow Debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

(4060) *In re Welsh,* 440 BR 836 (Bankr. D. Montana 2010), *aff'd* 465 BR 843 (9th Cir. BAP 2012) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a Debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify § 407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a Debtor to include Social Security income on Schedule I.

(4061) *In re Herrmann,* 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income Debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the Debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a Debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

(4062) *In re Meyers,* Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; Debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where Debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and Debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit Debtor to adequately fund her retirement.

(4063) *In re Kehl,* Case No. 10-65068 (Bankr. E.D. Mi. 2011) – Court must view request for dismissal under Section 707(b)(3) using totality of circumstances and determine whether Debtor is honest and needy. Honest requires that Debtor have been honorable and undeceptive in dealing with creditors. Needy requires that Debtor's financial predicament warrants discharge of debts in exchange for liquidation of assets. Debtors are not needy where income is stable and Debtors are eligible for relief under Chapter 13, and Debtors could reduce monthly expenses to produce dividend to unsecured creditors of as much as 60%. Voluntary retirement contributions are not per se unreasonable and must be evaluated on case by case basis, looking to factors such as amount of existing retirement savings, Debtor's age and expected time until retirement, annual income and overall budget, amount of monthly retirement contributions, and needs of any dependents. Contributions were not reasonable where Debtors were in their early 30s and had $22,000 in retirement savings. Debtors had annual income in excess of $97,000 and proposed contribution was $423 per month. If the Debtors stopped contributing only during Chapter 13 plan and then resumed contributions, Debtors would have more than $230,000 in retirement savings by age 60. Debtors also had historically received tax refunds of $4,000 per year that would be available for funding of a plan, further indicating a lack of need. Debtor testified that income decreased in the prior year but did not present any credible evidence that future decreases were likely or anticipated, and even if those occur, Debtors can deal with that decrease either by modifying plan or by reconverting if decrease warrants.

(4064) *In re Divazio,* Case no. 10-74441 (Bankr. E.D. Mi. 2011) – Retirement contributions are not per se necessary, and depend on amount of existing retirement savings, Debtor's age and time left to retirement, annual income and overall budget, amount of monthly contributions, and needs of dependents.

(4065) *In re Peterlin,* 457 BR 630 (Bankr. N.D. Ohio 2011) – Chapter 7 case that would produce no dividend to unsecured creditors dismissed as abusive where Debtor and non-filing spouse earned over $120,000 per year and annually received large tax refunds Court is not be justified in concluding that Debtor is needy and worthy of discharge where disposable income permits liquidation of debts with relative ease. Factors include whether Debtor enjoys a stable source of future income, whether Debtor is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease financial predicament, the degree of relief obtainable through private negotiations, and whether expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Debtor and spouse had stable employment. Debtor sought to retain home valued at more than $300,000 and with a mortgage payment in excess of $3,000 per month. Expenses included more than $550 per month for parochial school tuition which, if eliminated, could produce more than $30,000 for unsecured creditors. In the bankruptcy context private school tuition is considered a luxury expense that amounts to a Debtor requiring his or her creditors to donate toward his children's education absent evidence that the available public schools are insufficient or that children have special needs that require private school. Debtor had at least one car loan that would be paid off within plan term, allowing for additional payments to creditors.

(4066) *In re Ryan,* Case No. 10-69825 (Bankr. E.D. Mi. 2011) – Court will consider (1) whether case was filed in bad faith; or (2) whether the totality of circumstances indicates abuse. Debtors' 401-k loans would be paid off in 33 months, leaving 27 months for those funds to be dedicated to plan payments. Debtors would not be permitted to deduct tuition and child care expenses that are incurred solely for Debtor to attend college, as doing so would force creditors to subsidize Debtors' expenses designed to enhance future earnings. Debtors deducted $1200 for housing expense even though Debtors did not have that expense as Debtors were living in the home pending foreclosure proceedings. Scheduled, but non-existent, expense would be available to repay creditors at least through the expiration of redemption. Debtors receive significant tax refunds, more than $3,000 for the last tax year that would also be available in Chapter 13. Totality of circumstances indicated that Debtors could reduce expenses and produce dividend of at least 15% and as much as 30% to unsecured creditors, resulting in Chapter 7 proceeding being dismissed as abusive.

(4067) *In re Groscost,* 2011 WL 4498871 (Bankr. N.D. Ohio 2011) – Honest Debtor can have case dismissed where Debtor's pre-bankruptcy conduct was unreasonable. Debtor voluntarily quit job after 32 years of employment, spent his savings including lengthy trip to California to walk on the beach and meet interesting people, accumulated significant credit card debt, used credit card cash advances to purchase car and motorcycle he later had to sell when he ran out of money, allowed home to fall into foreclosure, and continuously believed that Debtor would win lottery to solve all financial problems, and used one credit card to pay another until he ran out of available credit. Debtor made no effort to obtain new employment or to otherwise repay debt or stem accumulation of more debt while unemployed. "Debtor created his own misfortune. The gross indifference Debtor exhibited cannot be condoned. This is not a single instance of poor judgment, it is a pattern of persistently inexplicable judgment with the cumulative effect of willful blindness. While Debtor might not have been dishonest in the sense of inaccuracy or concealment, he was not dealing with creditors candidly. He was not even candid with himself.

Rewarding him with a discharge would be an abuse of the bankruptcy system. Evidence indicated that while Debtor could not presently make payments on a Chapter 13 plan, in another year Debtor would start to receive pension and had finally obtained job paying $1500 per month which would allow Debtor to make payments and make at least some effort to pay something on his debt.

(4068) *In re Duncan,* Case No. 10-72730 (Bankr. E.D. Mi. 2011) – Court considers totality of circumstances, including ability to repay debts from future earnings; whether Debtor has stable source of income; whether Debtor is eligible for Chapter 13; whether there are state remedies that could ease Debtor's financial predicament; whether relief can be obtained through private negotiations; and whether expenses can be reduced without depriving Debtor of adequate food, clothing, shelter and necessities. Voluntary contributions to retirement plans are not *per se* unreasonable and must be examined on case-by-case basis looking to amount of existing retirement savings; Debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Debtor was 42 years old and would likely retire in 20 years. Even reducing Debtor's 401-k contributions by half would allow Debtor to accumulate significant retirement savings while still paying 50% of unsecured debt. Further, Debtor could strip second mortgage in Chapter 13, further freeing up substantial income. Debtors were not "needy" and could, with adjustments to expenses, pay significant portion of unsecured debt.

(4069) *In re Edwards,* Case No. 10-65835 (Bankr. E.D. Mi. 2011) – Court must review totality of circumstances to determine whether Debtor is honest and needy. Honesty requires that Debtor's relationship with creditors has been honorable and non-deceptive. Needy requires that Debtor's financial predicament warrants discharge of debts in exchange for liquidation of assets. Factors include whether Debtor has ability to repay debts from future income; whether Debtor has stable source of future income; whether Debtor is eligible for relief under Chapter 13; whether there are state remedies available to ease Debtor's financial issues; whether relief can be obtained through private negotiations with creditors; and whether expenses can be reduced without depriving Debtor of adequate food, shelter and clothing. Debtor lacked requisite honesty where Debtor's schedules and From B22 substantially understated income and claimed as "household" parents and brother who did not live with Debtor; Debtor materially understated balance in bank account, listing balance on Schedule B of $10 where Debtor had more than $5200 in that account shortly before filing: Debtor gave mother $5200 shortly before filing because "mother has a gambling problem so mother gives Debtor money to hold for mother" but transfers were not disclosed in schedules of SOFA; Debtor provided copies of tax returns to the creditor and the trustee but failed to disclose that those returns were not actually filed with the IRS or that Debtor had not filed tax returns for some years pre-petition; Debtor materially undervalued her automobile, listing it at $3,225 when value was at least $8,000; and Debtor testified at 2004 exam that Debtor "gave" her 1997 Mercedes to a "friend" named Gary whose last name and address Debtor did not know.

(4070) *Calhoun v. United States Trustee,* 2011 WL 1651228 (4th Cir. 2011) – Debtor had ability to repay creditors warranting dismissal for abuse. Debtors had been in pre-petition debt counseling arrangement in which Debtors were paying more than $2,000 per month for 22 months, evidencing substantial disposable income. Debtor shad not had any sudden illness or calamity. Budget of more than $7,000 for two people bordered on extravagant and left ample room for reduction. Debtors budgeted $930 per month for food and had significant expenses for cable, internet, laundry and dry cleaning and could not justify an excessive transportation expense. Even without considering husband's social security income, Debtors had ability to pay substantial dividend to unsecured creditors.

(4071) *In re Smith,* 447 BR 832 (Bankr. N.D. Ohio 2011) – Debtors' schedules revealed sufficient income to make pay reasonable dividend to unsecured creditors, where Debtors' expenses included $250 per month for cell phone and internet expense with no evidence to support reasonableness or that expense could not be reduced; and Debtors' proposed expense of $500 per month for child care did not appear reasonable and Debtors failed to provide evidence that less expensive alternatives were not available.

(4072) *In re Hoke,* 447 BR 835 (Bankr. N.D. Ohio 2011) – For purposes of an ability to pay analysis under §707(b)(3), a Debtor's disposable income is defined generally as that income received by a Debtor that is not reasonably necessary to be expended for the maintenance or support of the Debtor or a dependent of the Debtor. Court is not required to accept at face value the financial figures put forth by the Debtor but may make downward adjustments in a Debtor's expenses where it is determined that such expenses are not reasonably necessary; or may impute income to the Debtor when it would be equitable to do so such as when the Debtor is voluntarily underemployed. Budget of $6,067.65 was unreasonable for family of two people. Court would add back Debtors' voluntary 401-k contributions totaling over $600 per month where Debtors are young and in good health and there was no evidence of any exigency such as health or impending retirement. Proposed expenditures of $220 for cell phones and $133 for "cable, phone and internet" are not reasonably necessary and are excessive where there are less expensive alternatives. Insurance premium of $3,400 for home insurance was unreasonable and excessive absent evidence that adequate insurance cannot be obtained at a lesser cost. Budgeted transportation expense of $800 per month was almost double the allowance under Section 707(b)(2) and was unreasonable and excessive and could be reduced. Further, Debtors proposed to retain a 2007 Mustang, a luxury item for which the expenditures are not reasonably necessary. Debtors failed to produce evidence of requisite "belt tightening" or that they could not adjust expenses to produce meaningful dividend to unsecured creditors in Chapter 13.

(4073) *In re Briggs,* 2010 WL 4272585 (Bankr. N.D. Ohio 2010) – Income received by Debtor from State Pension is included for purposes of determining abuse under Section 707(b)(3). Although pension income is exempt from reach of creditors, Section 707 does not distinguish between exempt and non-exempt sources for purposes of determining whether filing is abusive. Debtor's ability to pay their debts is an important and often dispositive component when assessing whether a Debtor's case should be dismissed for abuse based upon the 'totality of the circumstances'. When Debtor's pension income was included, Debtor had between $500 and $600 per month available to pay creditors which would produce meaningful dividend to unsecured creditors whose claims totaled only $45,000.00.

(4074) *In re Stampley,* 437 BR 825 (Bankr. E.D. Mi. 2010) – Chapter 7 case is subject to dismissal where Debtor can pay meaningful dividend to creditors in Chapter 13 case. Where married Debtor files individually, court calculates disposable income on Debtor's family budget including income and expenses of non-Debtor spouse. Failure to do so would leave Debtor's unsecured creditors to subsidize spouse's expenses. Household expenses should be allocated between Debtor and spouse based on proportionate income. Debtor who earned 66% of the household income would be allocated 66% of household expenses plus any sole expenses such as car payment and car insurance for Debtor's car. Those expenses are then deducted from Debtor's income to determine if Debtor could produce a meaningful dividend

to unsecured creditors. Although Debtor's Schedule J indicated total disposable income of only $165, allocation of expenses produced excess income of Debtor of $802 which would produce 100% dividend to unsecured creditors. Permitting Debtor to allocate more than her proportionate share of income to the household expenses would unfairly prejudice Debtor's creditors and would amount to a "gift" by Debtor to her non-filing spouse.

(4075) *In re Beckett,* 2010 WL 3894429 (Bankr. N.D. Ohio 2010) – Debtor was not "needy" for purposes of Section 707(b)(3) where Debtor admittedly had had $400 per month of disposable income that could be paid to creditors. Debtor and her allegedly estranged husband (with whom Debtor still resided) enjoyed substantial lifestyle, with annual gross income of more than $104,000 per year. Even if husband's income is not considered, Debtor still has income of more than $49,000, which exceeded the state median income for a household of one person. Debtor would not be permitted to deduct expenses paid for non-Debtor spouse or emancipated child where the person has the financial means to support themselves. Debtor will not be permitted to use Chapter 7 as means to divert financial resources away from creditors and to family members. Evidence indicated that non-filing spouse had more than sufficient income to pay his own expenses and that Debtor's 26 year old son was "perfectly capable of supporting himself". Debtor also not permitted to deduct student loan debt payments as Code does not authorize special or preferred treatment of those obligations absent "exceptional circumstances" where (1) there existed a large student-loan obligation which, given its non-dischargeable character, would continue to increase in principal during the duration of a Chapter 13 plan; and (2) as compared to the student-loan obligations, the distribution to the Debtor's other unsecured creditors would be minimal under a Chapter 13 plan – circumstances not present in this case.

(4076) *In re Jackson,* 2010 WL 3743878 (Bankr. N.D. Ohio 2010) – Court can dismiss case under Section 707(b)(3) based on finding either that Debtors are not "needy" or that Debtors have demonstrated a lack of honesty in dealing with creditors and financial affairs. Debtors were clearly "needy" where Debtors had a modest income and faced a mountain of debt and had no ability to fund a chapter 13 plan that would result in a meaningful repayment to creditors; and Debtors' situation would soon become more difficult after the termination of Mrs. Jackson's spousal support from her prior marriage. Case would be dismissed for lack of honesty where record demonstrated history of spending far in excess of their income. The Debtors' bank statements show that their monthly spending outstripped their income by almost $1,500 per month in the months leading up to the petition date. Much of the spending has been on luxuries, especially eating out; and the Debtors' spending actually accelerated in the month following the petition date suggesting that the Debtors failed to embrace a new attitude of financial responsibility as a result of filing for bankruptcy. Fact that Debtors were funding this lifestyle by borrowing from relatives and by diverting "excess" portions of student loans and from other unsustainable sources merely confirmed that Debtors were living beyond means.

(4077) *In re Slone,* 2010 WL 3767317 (Bankr. N.D. Ohio 2010) – Ability to repay their unsecured debts, is a prime and often dispositive consideration when determining whether, under the "totality of the circumstances" standard of Section 707(b)(3)(B), a case should be dismissed for abuse. Court will not conclude that Debtor is needy and worthy of a discharge where disposable income permits liquidation of consumer debts with relative ease. Court must scrutinize a Debtor's expenses, and make downward adjustments where necessary, so as to ensure that the Debtor's expenses are reasonable, and a court may impute income to the Debtor when it would be equitable to do so such as when the Debtor is voluntarily underemployed. Absent unique circumstances, Court will not permitted Debtors to expense payments made to repay loans taken against employer-sponsored benefit plans. Debtor is generally not allowed Debtors to make voluntary contributions to retirement accounts. Debtor is not permitted to expense student-loan payment as doing so would permit Debtor to prefer one creditor over another, similarly situated, creditor. Single Debtor with no dependents failed to demonstrate that expense for life insurance was reasonable; $225 per month to insure auto worth only $10,000 was excessive; $60 per month for snow removal and $60 per month for lawn care was excessive as Debtor would not be required to pay for both in the same month and expense appeared double counted; Debtor received tax refunds each year between $2,000 and $3,000, indicating that Debtor was "overpaying" her tax obligations by $200 per month; Debtor has stable employment, with a meaningful level of income; the Debtor appeared to be in good health; and there was no evidence that the Debtor was forced to file bankruptcy because of unforeseen or catastrophic events and Debtor's need for relief resulted from a long and continuous accumulation of consumer debts. After making adjustments to income and expenses, Debtor had sufficient resources to make an attempt to repay creditors.

(4078) *In re Seiler,* Case No. 09-37252 (Bankr. N.D. Ohio 2010) – In determining whether case should be dismissed for lack of honesty or good faith, Court must determine from the totality of the circumstances whether Debtor is merely seeking an advantage over his creditors, or instead is honest in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings. Factors that may be relevant include: (1) the Debtor's good faith and candor in filing schedules and other documents, (2) whether the Debtor has engaged in "eve of bankruptcy purchases," and (3) whether he was forced into Chapter 7 by unforeseen or catastrophic events. Inadvertent errors in bankruptcy schedules, including failure to disclose in Statement of Financial Affairs Question 18 of a business in which Debtor- husband was an officer or director; failure to disclose in Schedule B Debtor-Husband's ten percent interest in that business; or Debtor-Wife's interest in a 401-k pension plan. Debtor-Husband's president of the company was disclosed in Schedule I and Schedule I included Debtor-Wife's 401(k) plan loan payment, leading to conclusion that omissions were inadvertent rather than intentional. Court can also dismiss under Section 707(b)(3) where the Debtor the ability to repay debts out of future earnings and whether the Debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Debtor's ability to maintain retirement loan repayments depends on whether these savings are reasonably necessary for maintenance or support of Debtor or Debtor's dependents, based on (1) the Debtor's age and time left until retirement; (2) the amount of the Debtor's existing retirement savings; (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of any dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary expenses for this particular Debtor. Debtors were in their mid-50s; Debtor-wife had accumulated retirement savings of approximately $60,000, less the amount owed on her loan of $30,000; Debtor-husband had no retirement savings; Debtors owned their home, in which they have no equity at this time, and real estate used in the family business. Debtor-wife's monthly 401(k) plan loan payment is approximately 4.5% of Debtors'

income, which amount is not unreasonable. Given Debtors' ages and minimal retirement savings, the modest amount being paid by Wife as a repayment of her 401(k) plan loan was a reasonably necessary expenditure. However, Debtors' budget continued to include ownership and insurance expenses on real property and a boat that the Debtors had already surrendered; overstated Debtors' ongoing mortgage payment by more than $100; Debtors paid for both cable and satellite television, one of which would not be reasonably necessary; Debtors' food budget of $1200 for family of 5 could be reduced; and Debtor-Wife's 401k loan would be paid during pendency of Chapter 13 which would free up additional money for plan payments. Debtors have ability to make meaningful distributions to creditors, resulting in cause for dismissal under Section 707(b)(3).

(4079) *In re Meyers,* Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Factor most applicable to analysis is whether Debtor's expenses can be significantly reduced without depriving her of adequate food, clothing, shelter and other necessities. Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; Debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where Debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and Debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit Debtor to adequately fund her retirement. Further, Debtor's Amended Schedule J significantly increased expenses over those disclosed in original Schedule J, and Debtor's budget showed many expenses that could be reduced including telephone ($231); and recreation at $150 that was patently unreasonable. Telephone expense should not exceed $100 and recreation should not exceed $20. Debtor should not deduct for both cell phones and a home phone, and Debtor is not permitted to deduct costs of cell phones provided for 58 year old sister and 47 year old brother. The balance of increased expenses lacked credibility including medical expenses (increased from $180 to $450) and transportation (increased from $250 to $550). Debtor is not permitted to deduct costs of automobiles owned and driven by brother and sister, neither of whom work. Debtor not permitted to deduct payments made to friend of brother in repayment of loan to brother and is not permitted to deduct expense of sister's storage unit. Debtor's home maintenance reduced from $200 to $100 where Debtor failed to account for excessive home maintenance expense. With these deductions, Debtor could pay over 70% to unsecured creditors, making Chapter 7 abusive under Section 707(b)(3).

(4080) *In re Roach,* Case No. 09-76184 (Bankr. E.D. Mi. 2010) - Where court already concluded that Chapter 7 was abusive under Section 707(b)(2), it is unnecessary for court to consider dismissal under Section 707(b)(3). Court noted that under Chapter 13 Debtor could pay 401-k loan in full which would create disposable income that could be used to pay over $50,000 to creditors.

(4081) *In re McPhail,* 2010 WL 3463438 (Bankr. N.D. Ohio 2010) – A determination that abuse has occurred can be predicated on either a lack of honesty or a lack of need. In determining whether a Debtor is honest, courts should determine if the Debtor is merely seeking an advantage over his creditors, or instead is "honest" in the sense that his dealings with creditors have been marked by essentially honorable and undeceptive dealings. Factors to be considered in determining whether a Debtor is honest include the Debtor's good faith and candor in filling out schedules and other' documents, whether the Debtor has engaged in "eve of bankruptcy" purchases, and whether the Debtor was forced into chapter 7 by unforeseen or catastrophic events. Debtors' course of conduct leading up to their bankruptcy demonstrates dishonesty as that term is used in bankruptcy law. This was the Debtors' second bankruptcy and Debtors knew the consequences of irresponsible financial management. Nevertheless, they used no less than 27 credit cards and accumulated over $100,000 in unsecured debt to live, in Debtor's own words, "beyond their means." Debtors either knew or should have known that repayment would be impossible and that they would be back in bankruptcy. Debtors were attempting to take advantage of their creditors and were dishonest as that term is used in bankruptcy law. Debtor-husband's job loss did not alter this conclusion as the Debtors were already in over their heads before Debtor-husband lost his job. Although Debtors argue that they ceased using credit cards in July of 2008, Debtors made no effort on any of the eleven pages of creditors comprising Schedule F to indicate the dates on which they incurred their unsecured debts. The Debtors' omission of the dates on which their unsecured debts were incurred is equivalent to an affirmative statement that they do not know when the debts were incurred. Omission was not inadvertent because Debtors clearly had some knowledge of the date on which their debts were incurred because they testified they were incurred before July of 2008 and Debtors also had a motive to conceal the dates on which their debts were incurred. Debtors also failed to demonstrate need for relief where Debtors proposed to pay second mortgage that could be stripped in Chapter 13; Debtors would not be permitted to pay student loans directly which would reduce expenses by that amount; Court would not allow Debtors to deduct cost of cell phones where Debtors also had home phone; Debtors would not be permitted to retain motorcycle with payment of $150 per month in Chapter 13; Debtors would be able to spread out debt to IRS to reduce monthly payment and increase amount available for other creditors; and Debtors could modify or strip down claims secured by Debtors' automobiles thereby reducing the amount of the monthly payments.

(4082) *In re Lapke*, 428 B.R. 839 (8th Cir. BAP 2010) – Debtor's case would be dismissed for substantial abuse where case was filed immediately following dismissal of prior case filed by Debtor and wife where prior filing was found to be abuse and Debtor had no change in financial circumstances since dismissal of prior case. Second case was merely attempt to circumvent prior court ruling that Debtor chose not to appeal.

(4083) *In re McClellan,* 428 B.R. 737 (Bankr. N.D. Ohio 2010) - Debtor's ability to repay debts, for purposes of determining whether Chapter 7 case should be dismissed for abuse based on the totality of the circumstances, is normally ascertained by reference to the amount of disposable income that Debtor has available and whether that income could adequately fund a Chapter 13 plan, with "disposable income" defined generally as that income received by Debtor which is not reasonably necessary to be expended for the maintenance or support of Debtor or dependent of Debtor. For purposes of determining whether Debtor has disposable income that could adequately fund Chapter 13 plan, such that Debtor's Chapter 7 case should be dismissed for abuse under the totality of the circumstances, the reasonable necessity of an expense is determined by first looking to whether the expenditure serves a valid household purpose, and, if it does, whether the amount of the expenditure is appropriate. Bankruptcy law does not require that a Debtor live a monastic lifestyle, and a Debtor is not expected to live in poverty to pass scrutiny where motion to dismiss is brought on grounds that case is abuse of Chapter 7 under the totality of the circumstances, but Debtor is required to do some financial belt-tightening, and may be required to forgo amenities to which they had been accustomed. Debtors' budget failed to demonstrate requisite belt tightening where: Debtors continued to make monthly payments on retirement plan loan where both Debtors were relatively young and had ample time to accumulate additional resources for retirement;

Debtors' monthly student-loan payments could not be charged against their "disposable income" in determining whether Debtors could adequately fund Chapter 13 plan where Debtors offered no justification as to why their student loan obligations should be accorded priority over their other unsecured debts; Debtors allocation of $700 per month for transportation, excluding debt payment, was excessive where neither Debtor was required to travel frequently as part of employment; Debtors included expense of $600.00 per month for telephone, cellular telephone, cable television, and internet service, and costs incurred by Debtor beyond that required to obtain a basic level of service will not be considered reasonably necessary; Debtors' claimed monthly expenses of $1,200.00 for food and $225.00 for clothing were excessive for family with two young children; and Debtors failed to document either existence or reasonableness of $470.00 monthly expense for automobile insurance. The primary factor in deciding whether a Debtor is needy is whether the Debtor can repay his debts out of his future earnings. Other factors the court may consider include whether the Debtor enjoys a stable source of income, whether the Debtor's expenses can be reduced, and whether the Debtor's financial situation is the result of an unforeseen catastrophic event.

(4084) *In re Scarberry*, 428 B.R. 403 (Bankr. N.D. Ohio 2010) - Chapter 7 case filed by Debtors who were not forced into bankruptcy by unforeseen circumstances, and whose annual income of roughly $90,000 was about $10,000 in excess of median income for family of five in Ohio, would be dismissed, based on totality of circumstances of Debtors' financial situation, as "abuse" of provisions of that chapter, where Debtors, even though their budgeted expenses in amount of $1,200 per month for food and $277 for monthly telephone service did not reveal an appropriate attempt at belt-tightening, still disclosed modest monthly surplus that could be used to pay creditors. While Chapter 7 Debtor is not required to live in poverty, he may still be required to engage in some good, old-fashioned belt tightening to avoid having case dismissed as abusive based on totality of circumstances of his financial situation.

(4085) *In re Speith,* 427 B.R. 621 (Bankr. N.D. Ohio 2010) - Chapter 7 case filed by Debtors that claimed to have disposable income of just $75.57 per month available for payment of unsecured claims would be dismissed, based on totality of circumstances of their financial situation, as abuse of provisions of that chapter, where Debtors' budgeted expenses included monthly payment of $328.84 on loan from Debtor-husband's employee retirement plan, a loan that was essentially owed to Debtor-husband himself and that should not be repaid at unsecured creditors' expense; Debtors' budgeted expenses also included car loan expense of which they would soon be relieved when car loan was paid off; and where income claimed by Debtors did not include tax refunds that they historically received, in amount of around $2,800 per year. After appropriate adjustments were made, it was clear that Debtors, whose yearly income exceeded median level for Debtors in Ohio, had ability to repay at least a portion of their secured debt out of future income.

(4086) *In re Smith,* 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Whether a Debtor has the ability to repay their unsecured debts has developed to become a prime, and often dispositive consideration when determining whether, under the "totality of the circumstances" standard of Section 707(b)(3)(B), a case should be dismissed for abuse. A court would not be justified in concluding that a Debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Debtor's Schedules J disclosed that Debtors had more than $1300 in monthly disposable income after payment of expenses, while Chapter 13 plan could produce 100% dividend over 60 months with payments of only $670 per month. Both Debtors had steady employment and, although neither of them indicated any risk of diminution in salary, there was ample room to absorb any possible diminution over the life of a Chapter 13 plan.

(4087) *In re Hicks,* Case No. 09-68742 (Bankr. E.D. Mi. 2010) – Court must determine whether Debtor has been "honest" in dealings with creditors; and "needy" in the sense that the financial predicament warrants discharge in exchange for liquidation of assets. Factors to determine "need" include Debtor's ability to pay debts out of future earnings; whether Debtor has stable source of future income; whether Debtor is eligible to file Chapter 13; availability of state remedies that can ease financial predicament; possibility of private negotiations with creditors; and whether expenses can be reduced significantly without depriving Debtor of adequate food, clothing or shelter. "Need" is not demonstrated when Debtor is paying child support obligation and other obligations of Debtor's unemployed non-filing spouse for which Debtor is not liable. Debtor is not able to discharge individual debts while maintaining payments on debts for which Debtor is not obligation. Debtor's redirection of $225 per month that was allocated in budget for payment of non- filing spouse's expenses, standing alone, would produce meaningful dividend to Debtor's creditors, rendering case abusive.

(4088) *In re Rooney,* 2010 WL 2630245 (Bankr. N.D. Ohio 2010) – Court may dismiss a Chapter 7 petition if granting of relief would be an abuse of the provisions of Chapter 7. Court is required to consider (A) whether the Debtor filed the petition in bad faith; or (B) the totality of the circumstances of the Debtor's financial situation demonstrates abuse. Factors relevant to determining whether a Debtor is "needy" include the ability to repay debts out of future earnings; whether the Debtor enjoys a stable source of future income; whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code; whether there are state remedies with the potential to ease his financial predicament; the degree of relief obtainable through private negotiations; and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Court must determine whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan. Debtors made meaningful efforts to decrease their expenses by surrendering both the Olympic Drive rental property, a camper and two vehicles, but Debtors' $3,851 budgeted monthly housing expense is excessive where the payment was interest only on a $510,000 construction loan for their home that has matured and is in default. Debtors have not made a payment on the mortgage for over a year, so this budgeted amount is not presently an expense they are actually paying and relief from the automatic stay has already been granted. Debtors' uncompleted home that secures the loan is valued at sixty percent of the amount owed on the mortgage debt and Debtors estimate that they will have to expend another $25,000 in order to complete the home. Debtors have continued to pour money into the property at the expense of unsecured creditors. They may not continue to do so while seeking a discharge of their unsecured debt as the ultimate subsidy of construction of the home. Debtors' Amended Schedule J also includes other expenses related to the property, such as at least a portion of the $400 in budgeted taxes, and $300 a month in budgeted maintenance costs. Alternative housing can be obtained and that Debtors can thereby significantly reduce their overall housing expenses to make funds available to pay their unsecured creditors. Non-dischargeability of a student loan is not, without more, a basis to permit a Debtor to treat the student loan creditor more favorably than other unsecured creditors. Debtors' budget includes a monthly expense of $1,600 for payment of Debtor-husband's student loans which could be ratably distributed among Debtors' unsecured creditors to produce a significant distribution to those creditors. Debtors both enjoy stable employment and regular income. Debtors' eligibility for

adjustment of their debts through Chapter 13 is unclear but may still pursue relief through Chapter 11.

(4089) *In re Green,* 2010 WL 2521077 (Bankr. S.D. Ohio 2010) – Section 707(b)(2)(D) exemption from "any form of means testing" exempts member of National Guard or Reserves from means testing under Section 707(b)(2) but does not exempt Debtor from Section 707(b)(3) dismissal based on totality of circumstances. An ability to pay argument under § 707(b)(3)is a continuation of pre-BAPCPA law and is not a means test any more than pre-BAPCPA § 707(b) was a means test. Section 707(b)(3) serves a different purpose than Section 707(b)(2), and is designed to avoid abuse of provisions of Chapter 7 case where presumption of abuse does not arise under Section 707(b)(2) and is not a means test.

(4090) *In re Gilmore,* 2010 WL 2342441 (Bankr. N.D. Ohio 2010) – A determination of abuse can be predicated on either a lack of honesty or a lack of need. In determining whether a Debtor is honest, courts should determine if the Debtor is merely seeking an advantage over his creditors, or instead is honest in the sense that his dealings with creditors have been marked by essentially honorable and undeceptive dealings. Factors include the Debtor's good faith and candor in filling out schedules and other documents, whether the Debtor has engaged in "eve of bankruptcy" purchases, and whether the Debtor was forced into chapter 7 by unforeseen or catastrophic events. The primary factor in deciding whether a Debtor is needy is whether the Debtor can repay his debts out of his future earnings. Courts will dismiss cases of Debtors who can make substantial payment to their general unsecured creditors in a chapter 13 plan considering whether the Debtor enjoys a stable source of income, whether the Debtor's expenses can be reduced, and whether the Debtor's financial situation is the result of an unforeseen catastrophic event. Debtors ran up a large amount of debt and then intentionally decreased their present income and dramatically increased their expenses by Debtor- wife returning to school resulting in both a loss of income and substantial expenses for Debtor-wife's schooling. Debtors have over $1000 per month in child care costs as a direct result of Debtor-wife returning to school and the Debtors' educational expenses wipe out any recovery by the unsecured creditors. Debtors' second mortgage could be stripped as completely unsecured in a chapter 13 plan which would substantially increase Debtors' projected disposable income. Debtors failed to sacrifice cell phones where evidence did not suggest a special need for cell phones and the Debtors have a working ground line. Debtors could propose a chapter 13 plan that pays their general unsecured creditors at least a 20% dividend over 36 months. Debtors' ability to pay a meaningful dividend to their general unsecured creditors impels the conclusion that their case be dismissed or converted to a chapter 13. Debtors' dishonesty in failing to list their student loans debts on their bankruptcy petition also supports conversion or dismissal. Although Debtor-husband suffered unexpected job loss, the Debtors were likely to find themselves in financial trouble sooner or later because of their reckless borrowing habits and sudden increases in child care and education expenses. Debtors' Chapter 7 petition constituted abuse under Section 727(b)(3).

(4091) *In re Rodger,* Case No. 09-61845 (Bankr. E.D. Mi. 2009) – Inquiry is totality of circumstances. An important factor is whether or not the Debtors can pay their debts out of future earnings, although that alone is not a sufficient basis on which to dismiss for abuse. Debtors who filed jointly were separated although no divorce proceedings had been filed. Proper analysis is to consolidate separate Schedules I and J to determine whether filing may be abusive. Although Debtor-husband had large mortgage payment (in excess of $3,000 per month) and testified that he had not made up his mind whether to retain house or surrender and look for less expensive housing, Court would consider full mortgage payment in determining whether Debtors had excess available income, and would not base conclusion on possibility that Husband would later obtain less expensive housing. Debtor-wife was employed by Detroit School District and was facing downward adjustments in her income. Debtors' combined Schedules J did not indicate that expenses can be significantly reduced. While Debtors enjoy apparently stable sources of income and are otherwise eligible for chapter 13 relief, the facts considered as a whole do not demonstrate abuse.

(4092) *In re McGowan,* Case No. 09-19075 (Bankr. N.D. Ohio 2010), *aff'd sub nom McGowan v. McDermott,* 445 BR 821 (N.D. Ohio 2011) – Section 707(b)(3) permits the court to dismiss a case for "abuse" where the presumption of abuse does not arise under Section 707(b)(2). "Cause" can be found either by bad faith of the Debtor or by a totality of the circumstances. Under totality of circumstances, Court must determine more than just whether the Debtor can pay his debts from disposable income. Court must also consider whether Debtor enjoys stable source of income, whether Debtor is eligible for relief under Chapter 13, whether there are non-bankruptcy State Court remedies that could provide relief, possibility of relief through private negotiations, and whether expenses can be reduced without depriving Debtor of adequate food, clothing, shelter and other necessities. In reviewing expenses, Court must scrutinize Debtor's claimed expenses and make downward adjustments where appropriate. Debtor need not live in poverty, but Code does contemplate some level of sacrifice to obtain relief. Debtor's monthly expenses included $2450 for college tuition of Debtor's two children; $220 for books; $626 for student loan repayments; $498 for food for Debtor's two children at school; and $433 for a 401-k loan payment. Court has consistently disallowed expenses for adult children – while admirable, payment of those expenses is not proper in considering Debtor's disposable income. Student loan payments will not be considered in calculating disposable income as a Debtor is not permitted to prefer one creditor over another and student loan debts are not entitled to superiority over other unsecured creditors. Debtor amended Schedule J on eve of hearing to further decrease disposable income by increasing mortgage payment based on a 15 year amortization although Debtor's mortgage amortized over 30 years and Debtor had never made the higher payment. Debtor's property valued at $380,000 had two mortgages totaling $540,000, with payments totaling at least $2210 per month, or more than double the IRS National Standard of $1080.00. Married Debtors had joint income of $130,000 and there was no indication that Debtors' income was unstable. Totality of circumstances evidenced "abuse" for purposes of section 707(b)(3).

(4093) *In re Kelly,* Case No. 09-21440 (Bankr. N.D. Ohio 2010) – Section 707(b)(3) permits the court to dismiss a case for "abuse" where the presumption of abuse does not arise under Section 707(b)(2). "Cause" can be found either by bad faith of the Debtor or by a totality of the circumstances. Under totality of circumstances, Court must determine more than just whether the Debtor can pay his debts from disposable income. Court must also consider whether Debtor enjoys stable source of income, whether Debtor is eligible for relief under Chapter 13, whether there are non-bankruptcy State Court remedies that could provide relief, possibility of relief through private negotiations, and whether expenses can be reduced without depriving Debtor of adequate food, clothing, shelter and other necessities. In reviewing expenses, Court must scrutinize Debtor's claimed expenses and make downward adjustments where appropriate. Debtor need not live

in poverty, but Code does contemplate some level of sacrifice to obtain relief. Debtors cannot rely on alleged student loan payments as evidence of lack of ability to pay, as student loans are not entitled to priority treatment under Chapter 13. Although Debtors have large mortgage on house that is now underwater, there was no evidence that Debtors incurred the debt in bad faith or with the intent to file bankruptcy. However, Debtors traded in two relatively new automobiles only 4 months prior to filing, which impaired Debtors' ability to repay creditors and would decrease funds available in a Chapter 13 plan; Debtors intended to retain those vehicles at a monthly expense of $817 per month while seeking to discharge unsecured debt in excess of $134,000.00; and Debtors' tax refunds alone could produce 24% dividend to unsecured creditors over the life of a Chapter 13 plan. Court can consider impact of future tax refunds where those refunds are reasonably expected to continue in the future. Debtors testified that they had received tax refunds consistently for the past few years and could not dispute presumption that refunds would continue in the future. Court dismissed case for "abuse".

(4094) *In re Srikantia,* 2009 WL 3495998 (Bankr. N.D. Ohio 2009) – Debtor's case can be dismissed for abuse upon either bad faith (i.e. lack of honesty) or where the totality of the circumstances of the Debtor's financial situation demonstrates abuse (i.e. want of need), even in absence of presumption of abuse under Section 707(b)(2). Court will consider "totality of circumstances" including whether Debtor's disposable income permits liquidation of his consumer debts with relative ease; whether the Debtor enjoys a stable source of future income; whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code; whether there are state remedies with the potential to ease his financial predicament; the degree of relief obtainable through private negotiations; and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Court must scrutinize those provided expenses and make downward adjustments where necessary as Bankruptcy Code envisions some sacrifice on the Debtor's part in granting him relief. Case dismissed as abusive where Debtor had been gainfully employed as a full-time college professor for eight years, earning (even without including his non-filing spouse's income) a gross salary in excess of $100,000 per year. Although Debtor testified that he expected his income to decrease, it would not drop below his "base' salary of $68,000.00. Debtor could trim budget – food expense of $700 for two people and transportation of $359 per month were excessive. Budgeted expenses for child's art and music lessons and summer camps, such expenses are, in and of themselves, unreasonable as was expense of $100 per month for "books and CDs". Debtor could reduce or eliminate several expenses without depriving Debtor or dependent of necessities which would permit Debtor to provide at least some payment to unsecured creditors.

(4095) *Moutousis v. United States Trustee,* Case No. 08-14268 (E.D. Mi. 2009) – Debtors are entitled to evidentiary hearing on Motion of United States Trustee to dismiss for abuse under Section 707(b)(3). Abuse does not require finding of "bad faith" or "dishonesty" by Debtors. Bankruptcy Court must examine totality of circumstances. Dismissal based on a single factor – the size of Debtors' mortgage payment – fails to take into account totality of circumstances. Debtors' ability to pay a substantial portion of unsecured claims is a primary and potentially dispositive factor, but ability to pay standing alone is not conclusive. Debtors must be provided the opportunity to present evidence concerning whether the Debtors are "needy" such as whether their disposable income permits payment of consumer debts with relative ease; whether Debtors have stable sources of future income; whether Debtors are eligible for relief under Chapter 13; whether there are State Court remedies available if the case is dismissed; the degree of relief obtainable through private negotiations; and whether expenses can be reduces significantly without depriving Debtors of adequate food, clothing, shelter and necessities.

(4096) *In re Ramlow,* 2009 WL 2601256 (Bankr. N.D. Mi. 2009) – Congressional policy is to encourage Debtors to repay their debts. A Debtor's ability to repay is a significant, and often dispositive, factor in determining whether under the totality of the circumstances case should be dismissed. Debtor's ability to repay is determined by "disposable income" defined as income received by the Debtor but not reasonable necessary for the maintenance of support of Debtor or Debtor's dependents. The United States Trustee claimed that Debtor's expenses were overstated by the amount of a student loan payment, a garnishment and Debtor's 401-k contribution. Debtor asserted that her income was about to be reduced by a reduction in child support and that Debtor had back tax liabilities that Debtor had to pay. Court concluded that even allowing for the adjustments put forth by Debtor, Debtor had ability to pay up to $24,000 to unsecured creditors through a Chapter 13 Plan. Even where Debtor has ability to pay a substantial amount of debt, Court must still consider totality of circumstances. Debtor's financial difficulties stem from a recent divorce, a factor that was beyond Debtor's control. Debtor's expenses are in line with a reasonable budget for a family of three people and Debtor has made a good faith effort to minimize her expenses. Debtor does not appear to be misusing the Bankruptcy process or using money for luxury goods. Debtor's only asset was a car valued at $700.00, and a minimal amount in her 401-k, approximately $3,000.00. Debtor has substantial non- dischargeable student loan debt and a large amount of unsecured debt, meaning that the percentage distribution in a Chapter 13 would be minimal at best. Based on the totality of circumstances, Debtor is not seeking to take advantage of her creditors. Debtor appeared to be an honest person trying to honestly handle unexpected financial difficulties.

(4097) *In re Goble,* 401 BR 261 (Bankr. S.D. Ohio 2009) – Although Debtor qualified for relief under Means Test, case would be dismissed for Abuse under Section 707(b)(3). Debtor was single and had stable income. Debtor surrendered her home and had substantial reduction in housing expenses resulting in disposable income on Schedules I and J in excess of $850 per month. For purposes of Section 707(b)(3), Court would focus on realities of Debtor's circumstances as they exist at the time and as they would change over life of Chapter 13 Plan. Debtor has ability to pay substantial portion of debts out of disposable income.

(4098) *In re Osting,* 2009 WL 2611222 (Bankr. N.D. Mi. 2009) – "Abuse" can be based on either lack of honesty or want of need. Factors to consider include the ability to repay debts which alone can be sufficient to find abuse under certain circumstances; whether Debtor is eligible for relief under Chapter 13; whether there are state remedies that could ease his financial predicament; degree of relief available through private negotiations; and ability to reduce expenses without depriving Debtor of adequate food, clothing, shelter and other necessities. Debtor's expenses included over $1,000 for a house owned by Debtor's wife as a rental property from which Debtor derived no income. Debtor's unsecured creditors cannot fairly be expected to shoulder the burden of that property. Debtor was also paying $900 per month for a 401-k loan repayment. Contributions to a retirement plan depend on (1) the Debtor's age and time left until retirement; (2) the amount of the Debtor's existing retirement savings; (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of any dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary expenses for this

particular Debtor. Debtor's repayment of 401-k loan was not reasonably necessary where Debtor had income significantly above State median and had accumulated over $200,000 in his 401-k. Debtor is only 52 years old and has no intention of retiring in the near future, allowing at least 10 more years to save for retirement. Debtor's debt rendered Debtor ineligible for Chapter 13 but could obtain relief under Chapter 11. Filing abusive where Debtor (1) has stable, regular income; (2) he has the ability to significantly reduce his expenses without depriving himself or his dependents of any necessity; (3) although his financial circumstances are structured in a manner that results in his ineligibility for Chapter 13 relief, he has other alternatives available, including converting to a Chapter 11 case; and (4) Debtor has the ability to repay a meaningful portion of his unsecured debt.

(4099) *In re Phillips,* 2009 WL 3019815 (Bankr. S.D. Ohio 2009) – Above median income Debtor who "passes" means test may still have case dismissed under Section 707(b)(3) if the Court finds the filing to be "abusive". Court will determine ability to pay based on Debtor's financial condition as disclosed on Schedules I and J as they exist and as they are likely to change over course of Chapter 13 case. Debtor enjoyed relatively high and stable income and was paying $436 per month to repay 401-k loans that would be paid off between 7 and 36 months into plan, allowing Debtor to increase Plan payments and produce 30% payment to unsecured creditors.

(4100) *Long v. Smith,* 2009 WL 1924791 (Bankr. E.D. Tn. 2009) - Section 707(b)(3) allows parties in interest to seek dismissal of a case if granting relief would be an abuse of the Bankruptcy Code. Plaintiff must prove three elements: (1) the Debtor is an individual; (2) the debts are primarily consumer debts; and (3) granting relief to the Debtor under Chapter 7 would be a "substantial abuse." Court must look at the totality of the circumstances and whether the Debtor is seeking an advantage over creditors or is "honest" and "needy" warranting the discharge of debts in exchange for liquidation of assets. Court may find substantial abuse if a Debtor has acted dishonestly or is not financially needy such that a discharge is warranted. Plaintiff's complaint which listed eight specific expenditures which if determined to be unreasonable or excessive, sufficient to state claim under Section 707(b).

(4101) *In re Kunkelman,* 2009 WL 2824871 (Bankr. N.D. Ohio 2009) – Under Section 707(b)(3), court must determine whether Debtor filed in bad faith or whether the totality of circumstances of Debtor's financial situation indicates "abuse". Debtor's ability to pay unsecured debts is the prime, and often dispositive, consideration under the totality of circumstances test. Dismissal for "abuse is intended to uphold creditors' interests in obtaining repayment where such repayment would not be a burden." Court must look to "disposable income" defined as the income received by Debtor which is not reasonably necessary for the maintenance or support of Debtor or Debtor's dependents. Court will generally not permit Debtors to deduct allocations made for retirement savings such as 401-k contributions. However, Court will allow those deductions if Debtor is near retirement age and has minimal savings for retirement; or where there are issues of Debtor's health. Court concluded that Debtor was younger and in good health and so retirement contributions would not be deducted for purposes of determining disposable income. The resulting disposable income would allow Debtor to pay Debtor's debts in full over 60 months through a Chapter 13 plan. A Debtor with an ability to repay 100% of their unsecured obligations through a Chapter 13 plan will necessarily find it very difficult to justify their need for relief under Chapter 7 of the Bankruptcy Code. Ability to pay will not dictate finding of abuse if other considerations mitigate against dismissal. However, no such circumstances exist in this case.

(4102) *In re Pandl*, 407 B.R. 299 (Bankr. S.D. Ohio 2009). Chapter 7 case filed by Debtors whose housing expense was 1.75 times that allowed by IRS guidelines was abusive.

9.12 "Primarily Consumer Debts"

(4103) *Aspen Skiing Co. v. Cherrett,* Case No. 14-60079 (9th Cir. 2017) – Whether debts are "primarily consumer" depends on primary purpose for which debt was incurred. Residential mortgages are normally, but not exclusively, consumer debts. Debtor's multiple motives in incurring debt required Court to engage in factual, rather than legal, inquiry. Standard of review of Bankruptcy Court decision is clear error, not *de novo*.

(4104) *In re Goldberg,* 2017 WL 3098095 (Bankr. N.D. Ohio 2017) – Section 707(b)(1) allows dismissal of a case for abuse only if filed by an individual Debtor with primarily consumer debts. Debtors had "primarily consumer debts" where Debtors marked on petition that debts were primarily consumer and parties stipulated to debts being primarily consumer, although actual evidence would have raised issues given magnitude of mortgages owed on business properties.

(4105) *Palmer v. Laying,* Case No. 15-2856 (D. Colo. 2016) – Whether student loans are "consumer debts" depends on purpose of incurring loans. Student loans can be considered "non-consumer" if they are incurred primarily as business investment in oneself. Debtor is not required to show that education relates to existing business or current employer or that education is required to comply with mandate or for advancement or for higher income. Debtor must only show that student loans were incurred with intent to realize profit, even if profit is never actually realized. Nurse striving for professional development would be considered business investment in nature. However, if loans are taken out where Debtor aims for job that would require no education loans are consumer in nature as there is no profit motive behind obtaining loans in first instance.

(4106) *In re Jones,* Case No. 15-32931 (Bankr. E.D. Mi. 2016) – Section 707(b) allows a court to dismiss a case for abuse only where the Debtor's debts are primarily consumer debts. "Consumer debts" are defines as those incurred primarily for personal, family or household purpose. Whether debt is consumer depends on the purpose for which the debt was incurred and, if incurred for more than one purpose, the primary purpose. Student loans may be non-consumer debts if Debtor demonstrates that loan was incurred purely or primarily as business investment; but will be consumer loans if incurred for purposes of supporting one personally or one's family. Debtor judicially estopped from asserting that student loans were non-consumer debts. Debtor's initial bankruptcy petition indicated that Debtor's debts were primarily consumer debts. Debtor's initial Means Test included required calculations assuming that debts were consumer, and Debtor did not file a Statement of Exemption for Presumption of Abuse on which Debtor would have indicated that debts were non-consumer. After the US Trustee filed a Motion to Dismiss under Section 707(b)(3), Debtor amended the petition and means test, and filed the Statement of Exemption all of which asserted for the first time that the student loans were not consumer debts. Judicial estoppel applies where party takes contrary position under oath earlier in the proceeding and that position was accepted by the court. Debtor can avoid effect of judicial estoppel by showing that

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

(4107) *Bushkin v. Singer,* Case No. 15-1285 (9th Cir. BAP 2016) – Whether debt is consumer debt as defined in Section 101(8) depends on purposed for which loan was made, not use to which proceeds were ultimately used. If loan was made for purposes of profit making venture, it is not consumer loan. Debtor who borrowed money to pay living expenses while Debtor wrote book, with lender and Debtor to share proceeds if book sold or with repayment with interest if book did not sell was loan for business purpose even where Debtor used proceeds to pay normal living expenses incurred during writing process. Purpose of loan in first instance was to fund attempt at profit making venture, making loan a business loan.

(4108) *In re McVicker,* 2016 WL 660102 (Bankr. N.D. Ohio 2016) – Section 707(b) applies only to Debtors with primarily consumer debts. Debtor's debts were not primarily consumer where Debtor had one large commercial debt and minimal other unsecured debt, and minimal mortgage on Debtor's residence.

(4109) *In re De Cunae,* 2013 WL 6389205 (Bankr. S.D. Tx. 2013) – Student loan debts will be considered "non-consumer" debts where Debtor's motivation in attending school was to increase earning power. Court would use "profit test" to determine whether debts were consumer or non-consumer, such that a debt incurred with an eye toward profit would be classified as noon-consumer. While Debtor enjoyed "personal enhancement" as result of education, primary purpose was to obtain a skill that would improve his ability to earn future income, which is the hallmark of incurring a debt with an eye toward profit. Once student loans were considered non-consumer, Debtor's debts were primarily non-consumer, preventing dismissal under Section 707(b).

(4110) *In re Hernandez,* 2011 WL 1541691 (Bankr. E.D. Ky. 2011) – Case cannot be dismissed under Section 707(b)(2)(A) where Debtor's debts are not primarily consumer debts. Court will determine amounts of claims based on scheduled amounts. Debtor had total debt of $373,000.00, including Debtor's scheduled the secured claim for Debtor's commercial property of $189,000.00. As "business" debt amounted to 50.6% of the total debt, Debtor had primarily non-consumer debts for purposes of Section 707.

(4111) *In re Braathun,* 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – Section 707(b)(1) permits the court to dismiss a case where the Debtor has primarily consumer debts. "Consumer debts" are those incurred primarily for family or household purposes. Although Debtor's petition indicated that debts were primarily consumer debts, evidence failed to demonstrate that debts were "primarily" consumer debts where it appeared that Debtor's largest debt, his home mortgage, was taken out for purposes of funding Debtor's business operations and expenses. Motion to Dismiss denied where U.S. Trustee did not carry burden of proving that Debtor's debts are primarily consumer debts.

(4112) *In re Lapke,* 428 B.R. 839 (8th Cir. BAP 2010) - Funds obtained by Debtor to finance or refinance his home constituted "consumer debt". Loans represented claims against Debtor's property and, as such, were claims against Debtor; Debtor intended to obtain funds from lender to finance or refinance his home; the debts were incurred, whether by Debtor or his wife or both of them, for personal, family, or household purposes; and, in Debtor's prior, joint Chapter 7 case, he and his wife included the subject loans as their consumer debt.

(4113) *In re Mohr,* 425 BR 457 (Bankr. S.D. Ohio 2010) – Debtor had primarily non-consumer debts precluding dismissal under Section 707(b)(2). Debtors were lessors of commercial property. Debtors scheduled the obligation at the full balance owed on the lease, resulting in Debtors' business debts exceeding consumer debts. United States Trustee argued that liability on commercial lease would be limited by Section 502(b)(6) and, as capped, resulted in Debtors' consumer debts exceeding business debts. Court concluded that threshold inquires such as eligibility must consider debts as they existed at the moment of filing and not after a subsequent hearing. Congress and rule makers intended that the matter be decided early in a case prior to the litigation and other contested processes that determine ultimate debt levels. Court found no evidence that Debtors had improperly manipulated amount of debt or that Debtors otherwise acted in bad faith in scheduling liability. Further, Section 502(b)(6) is not an automatic determination of the amount of a claim. Section 502(b)(6) is only a limitation on the claim amount – the actual effect of Section 502(b)(6) depends on multiple facts that occur after the filing of the case and, in particular, the filing of a claim by the landlord and an objection to that claim. Because the § 502(b)(6) cap is only activated by optional and unpredictable post-petition bankruptcy events, the court concludes it is not appropriately applied to threshold inquires that are focused on the initial schedules and the calculation of debt existing on the date of the bankruptcy filing.

(4114) *In re Swartzentruber,* 2009 WL 28730003 (Bankr. N.D. Ohio 2009) – Section 707(b)(2) applies only to Debtors with "primarily consumer debts". A "consumer debt" is one incurred by an individual primarily for a personal, family, or household purpose. A "business debt" is one incurred with an eye toward profit. Debtors testified that they acquired condominium in Florida for investment purposes, although the mortgage documents stated that the unit was being acquired as a "second residence". Debt found to be business debt where Debtors did not have the means to finance and maintain the Florida condominium without rental income. Debtors did not list any expenses for the Florida condominium included on Schedule J making it is impossible to conclude that Debtors would have been able to afford the condominium as a second residence. Debtor was told he would make $4,000 per month and that the rental income from the property was imperative to pay the mortgage and the related expenses of the condominium. Debtor testified that his family had been vacationing in the area for fifteen years and they were aware of how rapidly the price of real estate increased from 1999 to 2005 in the area. Debtor always looked at the transaction as an investment. Debtor signed the rental agreement with the management company before he signed the mortgage and for at least two years the expenses were treated as business losses on Debtors' tax returns. Condo was only 400 square feet, not large enough for Debtor's family which included three small children and local ordinances prohibited him from occupying unit for more than 30 days in any year.

9.13 Bad Faith – Section 707(b)(3)

(4115) *In re Tow,* 2016 WL 74741 (Bankr. N.D. Ohio 2016) – Bad faith remains grounds for dismissal under both Section 707(a) and 707(b)(3). Nothing in BAPCPA indicates any intent to repeal or modify pre-existing law allowing court to dismiss Chapter 7 filing for bad faith, and provisions of 707(a) apply to broader range of cases as 707(b)(3) is limited to individual Debtors with primarily consumer debts. Facts of case indicated that Debtor, a now-disbarred attorney, engaged in sustained pattern of fraudulent behavior and operation of various scams and hustles for years. Debtor's pre-petition conduct resulted in criminal charges including corrupt activity, theft and money laundering as a result of which Debtor was now incarcerated. Debtor had history of similar fraudulent activity dating back to 1995 in California and had suffered judgments resulting from his activities and convicted or insurance fraud resulting from staging a boating accident to fake his death. Case did not serve purpose of providing honest Debtor with fresh start. Bulk of debt is tied to either illegal or questionable activities and record disclosed no redemptive characteristics.

9.14 Failure to File Documents

(4116) *In re Coppenvolle,* Case No. 11-65164 (Bankr. E.D. Mi. 2011) – Motion for Extension of Time denied for failure to comply with local rules. Motion failed to indicate whether attorney attempted to obtain concurrence of Trustee in the relief requested; and failed to indicate that objections must be filed within three days. Further, Debtor did not file required documents even after filing motion and before motion date requested in motion for extension.

(4117) *In re Dedvukaj,* Case No. 10-75109 (Bankr. E.D. Mi. 2010) – Case dismissed for failure to file proper petition where name on petition did not match Debtor's name inputted by Debtor's counsel; and Debtor failed to file Petition Cover Sheet and Statement of Social Security Number within time permitted by Rule 1007.

(4118) *In re Farah,* Case No. 10-70577 (Bankr. E.D. Mi. 2010) - Debtor failed to serve on the Matrix an Amended Bankruptcy Petition Cover Sheet, an Amended Petition, and a Notice stating that the only Debtor was the individual and this was not a joint filing within time required by Order of Court mandated dismissal.

(4119) *In re Davis,* Case No. 10-70480 (Bankr. E.D. Mi. 2010) - Case dismissed where Debtor failed to timely file Matrix and other documents and failed to file a Motion for Extension of Time until after deadline expired. Motion for extension of time was untimely and failed to demonstrate good cause.

(4120) *In re Akpabio,* Case No. 10-70057 (Bankr. E.D. Mi. 2010) - Case dismissed where Debtor failed to timely file Schedules and Statement of Financial Affairs and failed to file a Motion for Extension of Time until 7 days after deadline expired. Motion for extension of time was untimely and failed to demonstrate good cause.

(4121) *In re White,* Case No. 10-64239 (Bankr. E.D. Mi. 2010) - Motion to Extend Time to File Documents that requested "a little more time" denied as being too vague in stating the relief requested. Case had already been pending for more than 30 days including more than two weeks after Motion filed, but no completing documents had been filed. Case dismissed.

(4122) *In re Henderson,* Case No. 09-56172 (Bankr. E.D. Mi. 2009) - Case dismissed when Debtor failed to file a voluntary petition and instead filed only Schedule I. Section 301 requires that a case be commenced by the filing of a Voluntary Petition. "[A]bent the filing of a voluntary petition, no bankruptcy case is commenced."

(4123) *In re Parent,* Case No. 09-55888 (Bankr. E.D. Mi. 2009) - Case was dismissed because counsel failed to file required documents within 15 days of the petition date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable ...." Local Rule 1007-1 which provides for automatic dismissal for failure to timely file documents does not conflict with Section 707 provision that case can be done "only after notice and a hearing". Requirement of Local Rule that documents be filed within 15 days does not conflict with Section 521(I)(1) which provides for mandatory automatic dismissal after 45 days as nothing in Section 521 precludes dismissal sooner than 45 days.

(4124) *In re Ayres,* Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Court dismissed Debtor's case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).

(4125) *In re Haines,* Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted.

9.15 Failure to Appear at 341 Meeting

(4126) *In re McMillian,* Case No. 15-40417 (Bankr. E.D. Mi. 2015) – Rule 2005 allows court to enter order compelling Debtor to attend Section 341 meeting on motion of any party in interest, supported by an affidavit, alleging that the examination of the Debtor is necessary for proper administration of the estate and there is reasonable cause to believe that Debtor is about to leave or has left residence or place of business to avoid examination; or that Debtor has evaded service of a subpoena or order to attend; or that Debtor has willfully disobeyed a subpoena or order to attend. Court may then enter order to the marshal or other officer authorized by law to bring Debtor before court without unnecessary delay and if court finds at the hearing that the allegations are true, the court shall cause Debtor to be examined forthwith. Court could not grant order to compel where Motion was not accompanied by affidavit. Court also could not grant relief to the extent the Motion sought order for marshal to incarcerate Debtor until Section 341 meeting could be held. However, Motion and court record demonstrates sufficient cause to enter order for Debtor to appear at a hearing regarding Debtor's failure to attend the 341 meeting and to show cause why the court should not compel attendance at a rescheduled 341 meeting.

(4127) *In re Moore,* 2012 Bankr. LEXIS 3897 (Bankr. S.D. Ga. August 24, 2012) - Incarcerated Debtor's appearance at Section 341 meeting of creditors could not be waived.

(4128) *Sicherman v. Warner* 2011 WL 6140856 (Bankr. N.D. Ohio 2011) – Debtor's failure to appear for 341 meeting constitutes unreasonable delay that is prejudicial to creditors, constituting cause for dismissal under section 707(a). Debtor failed to appear at three of four re-scheduled first meetings of creditor and failed to provide requested financial records and documents requested by Trustee. Failure to cooperate was prejudicial to creditors as Debtor's failure to provide the trustee with the requested records compelled the trustee to file his adversary proceeding and incur costs that will constitute administrative expenses against the estate pursuant to section 503(b)(2). If no assets are recovered, the trustee as creditor will have incurred administrative expenses that will go unpaid. If assets are recovered, creditors with claims that are lower in priority will likely receive less as a result of the trustee having to initiate this adversary proceeding. Further, the Debtor's unreasonable delay in producing the requested documentation prevented the trustee from ascertaining the extent of the Debtor's interest in Warner's World of Cars and whether the Debtor had any unreported income.

(4129) *Dunn v. Rund,* Case No. 09-1176 (6th Cir. BAP 2010) – Section 707(a) permits dismissal of a Chapter 7 Case "for cause". Section 707 lists types of conduct that would constitute cause, but the list is not exclusive. Cause for dismissal is determined first by whether the asserted cause is contemplated by a specific provision of Chapter 7, in which case the conduct cannot constitute cause under Section 707. If the asserted cause is not contemplated by a specific code provision, then the Court must determine whether the conduct rises to "cause" sufficient to warrant dismissal.

9.16 Failure to Cooperate With Trustee.

(4130) *Sicherman v. Warner* 2011 WL 6140856 (Bankr. N.D. Ohio 2011) – Debtor's failure to provide documents requested by Trustee constitutes grounds for dismissal. Debtor failed to appear at multiple adjourned meetings of creditors, and appeared at the third adjourned meeting without requested documentation. In response to discovery requests in this adversary proceeding, the Debtor only provided his From 1099 from 2009 and undated W–2 information from one of the businesses for which he had previously worked. The Debtor failed to provide the majority of the requested records. Debtor's attorney reported that the Debtor appeared to be unable or unwilling to produce the requested records which were necessary to complete the section 341 examination. Trustee lacked any information as to Debtor's business activity went on as a broker, and had no way of finding out. Trustee unable to administer estate when Trustee unable to determine what the estate consist of.

9.17 Dismissal for Cause – Procedure

(4131) *Rogers v. McDermott,* Case No. 14-13769 (E.D. Mi. 2015) – Debtor had adequate, actual notice of hearing on Motion of United States Trustee to dismiss case. Debtor seeking adjournment of hearing must show good cause for adjournment. Debtor's Motion properly denied where motion failed to allege any legal or factual basis for an adjournment.

(4132) *Dunn v. Rund,* Case No. 09-1176 (6th Cir. BAP 2010) – Section 707(a) and Rule 1017 allow dismissal only after notice and a hearing. Adequate notice and adequate opportunity for hearing are flexible concepts that depend on the circumstances of the case. Notice must be reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present objections; and must provide a reasonable time for those interested to make an appearance. First Meeting of Creditors notice did not warn of possible dismissal for failure to appear, and notice of adjourned First Meeting stated only that if Debtor failed to dismiss, the Trustee may file a Motion to Dismiss. Neither notice indicated that dismissal could occur without a Motion being filed or another hearing set. Failure to give notice was harmless error, however, where Debtor had filed own Motion to Voluntarily Dismiss, and dismissal on request of Trustee provided same relief that Debtor had sought on her own behalf.

9.18 Death of Debtor

(4133) *In re Moore,* 2017 WL 4417582 (Bankr. N.D. Ohio 2017) – Deceased Debtor in Chapter 13 cannot convert case to Chapter 7 and receive discharge. Rule 1016 allows case to either be dismissed or proceed with case administration. Rule does not mention conversion as option. Further, Section 1307 allows conversion only if Debtor would be eligible for relief under Chapter 7. Decedent's estate, which is the surviving "debtor" in the Bankruptcy Case, would not be eligible for relief under Chapter 7.

(4134) *White v. Corcoran,* 2016 WL 6962754 (E.D. Mi. 2016) – Death of Debtor in pending Chapter 7 case does not abate liquidation and estate can be administered to same extent as if death had not occurred. However, only duly appointed personal representative has standing to represent interests of decedent. Fact that Debtor's husband "is likely to be appointed" is not sufficient to allow husband to act for Debtor. Personal Representative's powers do not commence until appointment, which had not yet occurred. Further, even duly appointed PR cannot appear on behalf of the decedent, but must retain counsel to act for decedent. Appeal filed by husband on behalf of himself and his deceased wife dismissed as to wife as husband had not been appointed PR and was attempting to represent the interests of his wife without retention of counsel.

9.19 Voluntary Dismissal

(4135) *In re Allman,* 2018 WL 1320152 (Bankr. M.D. Tn. 2018) – Chapter 7 Debtor does not have right to dismiss. However, Court can allow dismissal at request of Debtor where Chapter 7 Trustee supports request and parties agree to appropriate safeguards. Debtor's case dismissed where Chapter 7 Trustee had fully investigated possibility of administering assets; debtor agreed to permanently waive discharge for any debt existing on petition date; and Debtor agreed to 2-year bar on any refiling anywhere in US. Sanctions were appropriate to address concerns of creditors including parties who initially opposed dismissal.

(4136) *In re Blazer,* 2017 WL 6002945 (Bankr. W.D. Ohio 2017) – Court can dismiss Chapter 7 case only "for cause", in contrast to o Chapter 13 where Debtor can request dismissal at any time. Debtor who chooses to place oneself in bankruptcy may not choose to terminate proceedings, even if unforeseen consequences arise, such as when property might be obtained by the Trustee that will satisfy at least part of the debtor's obligations or where creditors have been or will be prejudiced by dismissal. Debtor's request for dismissal based on debtor's incarceration and alleged lack of assets did not constitute cause where Trustee had reported potential assets available for administration including potentially avoidable transfers. Fact that Debtor will not be entitled to discharge is not controlling factor. Creditors would also be prejudiced

given time and effort expended by creditors in participating in case, and if Court dismisses case Debtor could re-file at some future date.

(4137) *Segal v. O'Connell,* Case No. 15-1525 (E.D.N.Y. 2016) – Denial of Debtor's Motion to Dismiss Chapter 7 Case is not final or appealable order. Even if initial filing was improperly signed by attorney rather than Debtor, Debtor ratified filing by signing amended petition; and Debtor acted in bad faith by using bankruptcy to forestall foreclosure suit. Although denial of motion to dismiss would result in liquidation of estate by trustee, leaving Debtor unable to recover property if appellate court reverses denial of dismissal, that does not create right of appeal by Debtor.

(4138) *In re Smith,* Case No. 16-41600 (Bankr. E.D. Mi. 2016) – Debtor does not have right to voluntarily dismiss Chapter 7 case. Debtor seeking to dismiss must establish cause for dismissal and demonstrate that dismissal will not cause prejudice to creditors. Debtor's Motion denied where only basis asserted was that after filing Debtor discovered that her home was worth far more than originally estimated creating substantial non-exempt equity that would be available for creditors. Dismissal would prejudice creditors by denying creditors ability to obtain payments from non-exempt equity.

(4139) *In re Dzierzawski,* 2015 WL 1612092 (Bankr. E.D. Mi. 2015) – Debtor does not have absolute right to dismiss Chapter 7 case. Dismissal for "cause" under Section 707 depends on factors such as whether all of the creditors have consented; whether the Debtor is acting in good faith; whether dismissal would result in a prejudicial delay in payment; whether dismissal would result in a reordering of priorities; whether there is another proceeding through which the payment of claims can be handled; whether an objection to discharge, an objection to exemptions, or a preference claim is pending; whether dismissal is in the best interest of the Debtor; whether dismissal is in the best interest of the creditors; whether dismissal would result in an abuse or manipulation of the system; and whether dismissal is justified by compelling equitable principles. Some courts have also considered "the Debtor's ability to repay creditors outside of bankruptcy" and the length of time that a Debtor has enjoyed the protections of the automatic stay before filing a motion to voluntarily dismiss the case. Debtor's request for voluntary dismissal denied where dismissal would be prejudicial to creditors. While Debtor proposed to dismiss case and to bar dischargeability of debt in any future proceeding, Debtor could nonetheless discharge the unpaid portion of the debt through Chapter 13. Further, creditor's primary remedy was cause of action to set aside fraudulent transfer to Debtor's spouse which would be avoidable under bankruptcy law but would not be avoidable under Michigan state law, where remedy would be limited to imposition of charging order allowing creditor to receive any distributions to the members of the LLC. Debtor and spouse would be able to manipulate LLC to avoid distributions to members while allowing Debtor and spouse to enjoy benefits of LLC. While creditor would be prejudiced by dismissal, Debtor will suffer no prejudice if dismissal is denied. Debtor's proposal to pay trustee sufficient funds to pay only two remaining unsecured creditors did not weigh in favor of dismissal where two remaining creditors were owed relatively nominal amounts compared to the debt owed to the largest creditor.

(4140) *In re Simmons,* 2014 WL 457594 (Bankr. W.D. Ky. 2014) – Debtor does not have absolute right to voluntarily dismiss Chapter 7 case. Dismissal is warranted only if creditors would not be prejudiced. Debtor alleged that shortly after filing Chapter 7, Debtor inherited a sum sufficient to pay creditors in full and so Debtor no longer needed bankruptcy protection. Court concluded that creditors would be prejudiced where motion made only conclusory allegations that Debtor intended to pay creditors. Debtor presented no proof that she intended to pay creditors in full or faster than creditors would be paid in chapter 7 and Debtor did not present any plan for payment or specific time frame for those payments. Mere fact that Debtor now has funds to pay creditors is not, standing alone, grounds for dismissal.

(4141) *In re Knibbe,* Case No. 10-14592 (Bankr. W.D. Mi. 2011) – Debtor's letter to court failed to establish cause for dismissal under Section 707. Debtor who voluntarily seeks Chapter 7 protection has no right to dismiss merely because Debtor may have to surrender valuable assets to the Chapter 7 Trustee. Debtor's statement that he "no longer consent[s] to, or accept[s] the court[']s authority" is not a basis for dismissal.

(4142) *In re Arquette,* 2010 WL 2465233 (Bankr. N.D. Ohio 2010) – Debtor does not have the right to dismiss chapter 7 case. Chapter 7 case may be dismissed only "for cause", unlike corresponding dismissal provision in chapter 13 which permits a Debtor to voluntarily dismiss at any time. Court will deny requests to voluntarily dismiss chapter 7 case where creditors have been or will be prejudiced by dismissal; or when property has been or will be obtained by the trustee that will satisfy at least part of Debtor's obligations. Court will deny Debtor's request to voluntarily dismiss where Debtor intends to re-file and list post-petition debts, as that action would cause prejudice to creditors. Debtor who incurred potential post-petition court liability would not be permitted to voluntarily dismiss chapter 7 were stated intention was to re-file another chapter 7 to include the post-petition tort claim.

(4143) *In re Williams,* Case No. 10-58654 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Dismiss denied without prejudice where Debtor failed to attach required 21 day Notice of the Motion and a certificate of service showing that the 21 day notice and the Motion were served on the Trustee and all creditors.

(4144) *In re Fink,* 2009 WL 2823734 (Bankr. N.D. Ohio 2009) – Debtor has no right to voluntarily dismiss Chapter 7 Case. Court will dismiss Chapter 7 only for "cause" demonstrated by movant. Court must consider interests of both Debtor and creditors, and a Motion to Dismiss is to be denied if voluntary dismissal would prejudice creditors. Debtor's post-petition inheritance would constitute property of the estate that would provide material recovery to unsecured creditors, which constitutes grounds to deny Motion. Debtor failed to demonstrate any detailed or concrete plan to satisfy creditors outside of bankruptcy. Debtor's schedules indicate that Debtor had no other non-exempt assets and current income from unemployment that was not sufficient to cover day-to-day living expenses. Court has no reason to believe that inheritance would be voluntarily used to pay creditors.

(4145) *In re Tomek,* Case No. 07-32621 (Bankr. E.D. Mi. 2009) (unreported decision) - Debtor's Motion to Dismiss his Chapter 7 case conditionally granted. Debtor failed to disclose multiple assets and failed to disclose the transfer of $14,000 in motor vehicles to Debtor's wife immediately preceding filing bankruptcy. Creditor and the Trustee filed Section 727 Complaints to deny the discharge. Creditor also filed a Section 523 action to have its debt declared non-dischargeable based on fraud. At some point, a "White Knight" purchased all of the claims against the estate. Debtor then sought to dismiss the case, and the purchasing "creditor" joined in that request. The Court noted that voluntary dismissal of a Chapter 7 proceeding is permitted unless "plain legal prejudice" to creditors would result. As the only

creditor joined in this request, dismissal would not result in prejudice to the creditors. However, prejudice would result to the Trustee as the Trustee had expended a "significant amount of time and effort" to investigate, market and liquidate assets of the Debtor. Further, Section 105 allows the Court to enter additional orders to protect the purposes of the bankruptcy code. The Court made the dismissal of the case conditional on Debtor's reimbursement of the Trustee, Attorney for the Trustee, and the Broker hired by the Trustee to liquidate assets.

9.20 Dismissal – Section 305

(4146) *In re Dzierzawski,* 2015 WL 1612092 (Bankr. E.D. Mi. 2015) – Debtor does not have absolute right to dismiss Chapter 7 case. Court can also dismiss case under Section 305(a)(1) if interests of creditors and Debtor would be better service by dismissal. Dismissal under Section 305 is extraordinary remedy and should not be used as substitute for motion to voluntarily dismiss. Factors to consider under Section 305 include who filed the bankruptcy petition; the availability of another forum to resolve the pending disputes, the necessity of federal proceedings to achieve a just and equitable solution, the expense of the federal proceedings in comparison with the proceedings in another forum; the purpose of the party seeking to remain in bankruptcy court; the economy and efficiency of having the bankruptcy court handle the matter and the possible prejudice to various parties as well as the economy and efficiency of administration in the bankruptcy court; whether federal proceedings are necessary to reach a just and equitable solution; whether there is an alternative means of achieving an equitable distribution of assets; whether the Debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; the purpose for which bankruptcy jurisdiction has been sought; and the effect that a bankruptcy proceeding will have on the Debtor's ongoing business. Debtor's request for voluntary dismissal denied where dismissal would be prejudicial to creditors. While Debtor proposed to dismiss case and to bar dischargeability of debt in any future proceeding, Debtor could nonetheless discharge the unpaid portion of the debt through Chapter 13. Further, creditor's primary remedy was cause of action to set aside fraudulent transfer to Debtor's spouse which would be avoidable under bankruptcy law but would not be avoidable under Michigan state law, where remedy would be limited to imposition of charging order allowing creditor to receive any distributions to the members of the LLC. Debtor and spouse would be able to manipulate LLC to avoid distributions to members while allowing Debtor and spouse to enjoy benefits of LLC. While creditor would be prejudiced by dismissal, Debtor will suffer no prejudice if dismissal is denied. Debtor's proposal to pay trustee sufficient funds to pay only two remaining unsecured creditors did not weigh in favor of dismissal where two remaining creditors were owed relatively nominal amounts compared to the debt owed to the largest creditor.

9.21 Dismissal With Bar to Re-filing

(4147) *In re Allman,* 2018 WL 1320152 (Bankr. M.D. Tn. 2018) – Chapter 7 Debtor does not have right to dismiss. However, Court can allow dismissal at request of Debtor where Chapter 7 Trustee supports request and parties agree to appropriate safeguards. Debtor's case dismissed where Chapter 7 Trustee had fully investigated possibility of administering assets; debtor agreed to permanently waive discharge for any debt existing on petition date; and Debtor agreed to 2-year bar on any refiling anywhere in US. Sanctions were appropriate to address concerns of creditors including parties who initially opposed dismissal.

(4148) *In re Packard Square, LLC,* 2017 WL 6508970 (Bankr. E.D. MI. 2017), *affd,* 2018 WL 219791 (E.D. Mi. 2018) – Dismissal of Chapter 11 case with 2 year bar to refiling warranted where Court had little doubt that Debtor would file a new Chapter 11 bankruptcy case promptly after dismissal which would reimpose automatic stay and bring all construction and state court receivership case to halt, leading to more delay; Debtor would seek to relitigate same issues that Court decided in current case; and if Court barred only Debtor from refiling, but did not also bar other parties in interest, one or more creditors could file involuntary bankruptcy case against Debtor, leading to same result as if Debtor had filed new case. Bar appropriate to avoid abuse of bankruptcy system that would be caused by any attempted evasion of Court's decisions in current case.

(4149) *Franco v. U.S. Trustee,* Case No. 15-1281 (9th Cir. BAP 2016) – Dismissal with bar to re-filing is warranted where filing indicates bad faith by Debtor. Bad faith does not require fraudulent intent. Factors to be considered include whether Debtor misrepresented facts in petition, unfairly manipulated code, or acted in inequitable manner; Debtor's history of filing and dismissals; whether Debtor intended only to defeat State Court litigation; and other egregious behavior. Case dismissed with one year bar to re-filing where Debtor obtained credit counseling 4 years prior to filing of current case; Debtor was not eligible for a discharge as Debtor received discharge within prior 8 years; Debtor had flied multiple bankruptcy case in past 4 years; dole reason for case was to stay foreclosure; and Debtor had no reason to believe that he was eligible for relief. Debtor failed to disclose in petition all cases filed within prior 8 years; Debtor falsely represented that he had received credit counseling within prior 180 days; and three of Debtor's four filings in the last 4 years were either voluntarily dismissed or dismissed for failure to prosecute.

(4150) *Rogers v. McDermott,* Case No. 14-13769 (E.D. Mi. 2015) – Sections 105 and 349 permit court to dismiss case with bar to refiling for whatever length of time court believes necessary to deter Debtor from frivolous filings, and can warrant permanent bar in the appropriate case. Bankruptcy Court correctly dismissed case with bar to refiling where Debtor had filed 6 separate petitions over 8 year period, Debtor had no hope for a discharge under Section 727(a)(8), and repeated filings were merely for purposes of hindering and delaying State Court dismissal of proceedings brought by Debtor against police department. Bar extended only to new petitions under Chapter 7 and bar expired on first date on which Debtor could file a new Chapter 7 and receive a discharge (8 years from date of filing of case in which Debtor actually received discharge).

(4151) *In re Gilbert,* Case No. 15-45780 (Bankr. E.D. Mi. 2015) – Bankruptcy Court can dismiss case with bar to refilling unless Debtor first pays filing fees owed for current and prior case. Section 105 gives court power to enforce requirement to pay filing fees, and Section 707(a)(2) allows court to dismiss case for nonpayment of any fees required in Title 28, Chapter 123, United States Code. Fees for prior cases are fees required to be paid, and Section 707 is not limited to fees in current case but any unpaid fees in any prior case.

(4152) *In re Shields,* 2015 WL 79313 (Bankr. E.D. Tn. 2015) – Dismissal of Chapter 7 case is normally without bar to refilling, and debts that

would have been discharged in initial case remain dischargeable in later filed case. However, Court has authority to bar refilling, or to declare debts listed in case being dismissed are not dischargeable in later case. Court dismissed case with bar to re-filing for 5 years where Debtor requested dismissal because Debtor was in middle of criminal investigation and was unwilling to provide information that would be necessary to explain financial condition which would likely prevent entry of discharge and Debtor's refusal to answer questions made prosecution of action under Section 727 problematic.

(4153) *Edwards v. Wexford Parkhomes Condominium Association,* Case No. 13-11146 (Bankr. E.D. Mi. 2014) – Bankruptcy Court has discretion to dismiss case with bar to re-filing for 150 days. Debtor commenced case under Chapter 7 and later converted to Chapter 13 but then refused to prosecute case notwithstanding multiple Court Orders and case was dismissed. Debtor promptly filed a second case which the court dismissed based on Debtor's clear pattern of delay, recalcitrance, failure to comply with Court Orders, and uncooperativeness, with bar to filing for 150 days. Although court could have imposed longer bar, court acted within discretion in limiting bar to 150 days without any requirement that court specifically identify basis for shorter prejudice period.

(4154) *Simon v. Amir,* 2013 WL 5302549 (Bankr. N.D. Ohio 2013) – Court enjoined Debtor from filing any documents in bankruptcy case or any subsequent or related cases and any causes of action against trustee, trustee's attorneys, purchasers of property from estate, without prior written approval of bankruptcy court. Court has authority under Section 105, Rule 9011 and inherent power of court to enjoin Debtor from filing any new pleadings or documents without prior written consent of bankruptcy court. Injunction appropriate where Debtor repeatedly filed frivolous actions, appeals, and other documents hindering the efficient and timely administration of the bankruptcy proceedings with frivolous arguments interposed solely to delay resolution of case. Filings delayed the distribution of funds to creditors, while trustee, estate, and other parties incur expenses litigating additional filings by the Debtor that are either frivolous or unintelligible. Debtor's persistent, frivolous filings and threats to continue instituting new litigation against court personnel and involved parties for the foreseeable future, constitutes good cause to require Debtor to obtain prior written approval from Court for all future filings that relate to his bankruptcy case. Other protections against frivolous or bad faith filings such as denial of discharge are likely to have little effect as Debtor's discharge already denied and the Debtor currently serving a criminal sentence of 151 months, leaving little left to deter the Debtor from further frivolous or bad faith filings.

(4155) *In re Henderson,* 2012 WL 4498887 (Bankr. S.D. Ohio 2012) – Section 105 and Section 349 authorize court to permanently bar Debtor from filing subsequent petition under Title 11. Court must permanently bar Debtor only for most egregious behavior that demonstrates bad faith and that prejudices creditors. Debtor or her agent caused a forged court document to be sent to creditor in attempt to recover vehicle that had been repossessed. Debtor filed new case at time when Debtor was not eligible for relief based on Debtor's voluntary dismissal of prior case after creditor had sought relief from stay. Debtor did not attend the first meeting of creditors and did not appear at the hearing to show cause why the case should not be dismissed. Debtor had serial filings dating back almost two decades that have repeatedly prevented creditors from collecting what is owed, 4 separate Chapter 13 proceedings, all of which were dismissed prior to completion and without discharge; and 3 separate Chapter 7 proceedings, two of which did result in discharges.

(4156) *In re King,* Case No. 12-60371 (Bankr. E.D. Mi. 2012) – Debtor's tenth bankruptcy case dismissed with prejudice. Debtor failed to pay filing fees in 5 of the prior 9 bankruptcy cases and sought waiver of filing fee in this case as well. All 9 of Debtor's prior cases were dismissed based on Debtor's failure to perform duties under bankruptcy code in addition to failure to pay filing fees totaling over $1,000.00. Debtor's case dismissed with prejudice to Debtor filing any further petitions until balance of filing fees from prior cases are paid in full.

(4157) *In re Rice,* Case No. 11-68514 (Bankr. E.D. Mi. 2011) – Debtor's case dismissed with prejudice where Debtor had four prior cases within preceding 15 months, each of which was dismissed for failing to pay filing fees. Debtor's actions racked up large amounts of unpaid filing fees. Allowing Debtor to file another case would be an abuse of the bankruptcy process.

(4158) *In re Drewek,* Case No. 11-42763 (Bankr. E.D. Mi. 2011) – Section 349 allows court to dismiss bankruptcy case with prejudice. "Cause" can include bad faith, egregious behavior, contumacious actions, or abuse of bankruptcy process. Debtor's case dismissed where Debtor embezzled funds from incapacitated son's trust account over which Debtor served as trustee, dismissed with prejudice. Filing was bad faith abuse of bankruptcy process.

(4159) *In re Carter,* Case No. 08-70934 (Bankr. E.D. Mi. 2009) - Debtor's case dismissed for failure to pay filing fee. Case was Debtor's sixth case in which Debtor had failed to pay filing fee. Court entered Order to Show Cause directing that Debtor pay filing fee in instant case and also pay outstanding filing fees from prior cases totaling $1,055.00 or case would be dismissed with prejudice. Debtor failed to comply with Order to Show Cause and case dismissed with 180 day bar.

9.22 Filing in Violation of Bar

(4160) *In re Wilson,* Case No. 15-44055 (Bankr. E.D. Mi. 2015) – Debtor's case dismissed where Debtor failed to pay filing fees in either of two prior cases, although court in dismissing prior order barred Debtor from filing another petition until prior filing fees were paid.

(4161) *In re Ollis,* Case no. 12-61697 (Bankr. E.D. Mi. 2012) – Case dismissed by court sua sponte where Debtor filed voluntary petition in violation of Order dismissing prior case with 180 day bar from filing another petition. Debtor filed less than 90 days after entry of prior dismissal order.

(4162) *In re O'Broem,* 2012 WL 4928915 (Bankr. N.D. Ohio 2012) – Debtor voluntarily dismissed prior case after creditor filed request for relief from stay, resulting in dismissal of prior case with 180 day bar to re-filing. Debtor re-filed less than 90 days after dismissal. Case dismissed by court sua sponte, without need for notice or hearing.

(4163) *In re Ervin,* Case No. 10-50129 (Bankr. E.D. Mi. 2010) - Debtor prohibited from filing another petition either personally or by any other person on her behalf for two years unless Debtor is represented by counsel. Debtor's second petition filed one day before entry of Order dismissing prior case with 2 year bar was "inconsistent" with Order of dismissal, mandating dismissal of the second case.

(4164) *In re Rush,* Case No. 10-55737 (Bankr. E.D. Mi. 2010) – Debtor prohibited for filing another petition jointly or individually without an attorney for period of 180 days. Debtor's filing 175 days after entry of order dismissed by Court *sua sponte.*

(4165) *In re Nln,* Case No. 09-43126 (Bankr. E.D. Mi. 2009) – Case filed in violation of bar to refiling dismissed by Court *sua sponte.*

(4166) *In re Green,* Case No. 08-63810 (Bankr. E.D. Mi. 2008) - Debtor's first case dismissed with prejudice to Debtor filing another petition for 180 days. Debtor filed a new petition within the prejudice period. Court dismissed second case sua sponte as filed in violation of 180 day bar.

9.23 Dismissal for Abuse – Deadline for Motion

(4167) *In Persaud,* 2013 WL 427921 (Bankr. E.D.N.Y. 2013) – Deadline to seek dismissal for abuse under Section 707(b)(2) is "not later thn 10 days after the date of the first meeting of creditors." Where first meeting is not concluded on the date first set and is adjourned to a later date, 10 day deadline runs from conclusion of the first meeting, not the date first set. Motion timely where filed more than 10 days after the date first set for the meeting of creditors but fewer than 10 days after the adjourned date at which the meeting was concluded

D. Conversion to Chapter 11

9.24 Request of Debtor

(4168) *In re Mercury Data Systems, Inc.,* 2018 WL 2970720 (Bankr. E.D. Ky. 2018) – Section 706(a) generally allows conversion from Chapter 7 in Debtor's discretion. Court may deny conversion if cause exists to confer or dismiss had case been filed under Chapter 11 in first instance or were denial of conversion prevents abuse of process. Debtor bears burden to prove that it has not previously converted, is eligible for relief under Section 109, and conversion will achieve purpose permitted by Bankruptcy Code. Once Debtor makes prima facie showing, burden shifts to creditor to prove conversion is not justified, considering whether Debtor is seeking to convert in good faith; whether Debtor can propose confirmable Plan; impact of denying conversion weighed against prejudice to creditors caused by conversion; effective conversion on an efficient administration of estate; and whether conversion would further abuse of bankruptcy process. Motion to Convert denied where Debtor's principal had abrogated management responsibilities for a number of months and blamed others for corporations failure to pay expenses which was principal's primary responsibility; principal made no effort to address companies cash needs or secure additional funding to allow completion of companies only viable product; principal did not ensure that company filed all required tax returns; principal presented unreasonable project completion data and presented unrealistic and unworkable budget.

(4169) *In re Gordon,* 2015 WL 5553506 (Bankr. M.D. Tn. 2015) – Right to convert is not absolute where cause may exist to re-convert or dismiss under chapter to which case is to be converted, or where denial is necessary to prevent an abuse of process. Debtor bears burden to show that case has not previously been converted, that Debtor is eligible for relief under chapter to which conversion is sought, and that conversion is for purposed permitted under proposed chapter. Objecting party then bears burden to prove cause or bad faith using "cause" factors under chapter to which conversion is sought as well as whether Debtor has any business to reorganize, Debtor's assets and liabilities, business operations and whether a separate business infrastructure exists. If only purpose is to liquidate, conversion may not be appropriate as Chapter 7 is more compatible with liquidation. Court would not convert case where Debtor was 80 year old woman with no meaningful business other than ownership of one parcel of commercial property, Debtor's proposal after conversion was to sell that property and pay creditors, Debtor would have to withdraw at least $4,000 per month from funds already generated by Chapter 7 Trustee to pay living expense and service secured debt on commercial property until sale, and after sale of building Debtor would lack any funds to pay toward Chapter 11 claims. Proposed plan was one of slow liquidation and presented no reasonable likelihood of rehabilitation.

(4170) *In re Miller,* 2013 WL 3865111 (Bankr. E.D. Tn. 2013) – Authority of Debtor to convert from Chapter 7 to Chapter 11 is not absolute and conversion may be denied where cause would exist to convert or dismiss under the chapter to which Debtor seeks to convert, or converting case would be abuse of process. Court will consider whether Debtor has business to reorganize, business assets, operations and whether a separate business infrastructure exists, whether purpose of conversion is merely to liquidate which can be better achieved in Chapter 7, timing of the motion to convert; the Debtor's motive in filing the motion; and whether the Debtor has been forthcoming with the bankruptcy court and creditors; whether the Debtor can propose a confirmable plan; impact on the Debtor of denying conversion weighed against the prejudice to creditors caused by allowing conversion; the effect of conversion on the efficient administration of the bankruptcy estate; and whether conversion would further an abuse of the bankruptcy process. Evidence did not support finding of bad faith. Any omissions in the schedules were attributable to oversights and were promptly corrected by Debtor. Debtor's business did not show any waste of assets or diminution of value of estate. Debtor adequately accounted for all pre-petition income of Debtor and use of income to pay ongoing business debts including tax liens and judgments and business related bills. Debtor had substantially cut his own salary in effort to conserve cash in business. Debtor had business that could be reorganized by selling certain assets and retaining other, valuable assets; all funds were accounted for in DIP accounts; and there was no evidence that a Chapter 7 Trustee would be able to liquidate assets on terms more favorable than could be achieved by Debtor.

(4171) *In re Sammut,* 486 BR 404 (Bankr. E.D. Mi. 2012) – Section 706(a) does not afford Debtor absolute right to convert case from Chapter 7 to Chapter 11. Court can deny request to convert where conversion is done in bad faith, including but not limited to concealment of assets. Conversion denied where Court had already entered judgment denying discharge under Section 727(a)(4) for knowingly and fraudulently making false oath or account. Denial of discharge "places Debtor squarely within the category of Debtors who, under *Marrama*, are not eligible for conversion out of Chapter 7, into either Chapter 11 or 13, under [Section] 706(a)."

(4172) *Levesque v. Shapiro,* Case No. 11-1742 (9th Cir. BAP 2012) – Debtor in Chapter 7 does not have absolute right to convert case to proceeding under Chapter 11. Chapter 7 Trustee has standing to oppose conversion. Debtor not entitled to convert when conversion would be in bad

faith or done with intent to abuse letter and spirit of Code. Debtor was involved in auto accident pre-petition. Debtor did not disclose in the bankruptcy schedules any potential causes of action and reaffirmed at the first meeting of creditors that the schedules were accurate. Several months after obtaining a discharge, Debtor instituted suit to recover damages arising from the accident. After the defendant learned of the non-disclosure, Debtor sought to convert the case to Chapter 11. Court concluded that after *Marrama*, there is no absolute right to convert to Chapter 11. Conversion would reward Debtor for non-disclosure of claim and would sanction Debtor's failure to accurately disclose assets.

E. Conversion to Chapter 13

9.25 Request of Debtor

(4173) *In re Moore,* Case No. 17-11368 (Bankr. D. Mass. 2017) – Court can deny request to convert from Chapter 7 to Chapter 13 where conversion is in bad faith. Debtor's request to convert case permitted where Chapter 7 Trustee was attempting to sell Debtor's home. Proposed sale price would pay only mortgage and portion of secured tax lien, plus trustee fees and fees for trustee's counsel, producing no benefit to unsecured creditors. Although Debtor lacked any disposable income to fund Chapter 13 plan and likely would default and allow case to be dismissed. Conversion would not adversely affect secured creditors who can "take care of themselves", and fact that conversion may appear futile should not deprive Debtor of right to confirm chapter 13 plan by reducing expenses or increasing income.

(4174) *Arenas v. U.S. Trustee,* 514 B.R. 887 (Bankr. D. Colo. 2014), *aff'd,* Case No. 14-046 (10th Cir. BAP 2015) – Debtor engaged in medical marijuana business, although legal as a matter of State law, violates Federal Law requiring dismissal of case. Court can deny request to convert where Debtor would not be eligible for relief under Chapter 13 or where conversion would constitute lack of good faith. Reorganization efforts would be funded from profits of ongoing criminal activity under federal law and would necessarily require Chapter 13 Trustee to administer and distribute funds derived by Debtors from operation of business in violation of federal law failed to comply with Section 1325(a)(3) which requires the plan to be proposed in good faith and not by any means forbidden by law. Monthly income from other sources was not sufficient to fund a plan and Debtors' ages and health issues indicated that there was on likely ability to increase income and Trustee's acts in administering case would themselves constitute federal crimes.

(4175) *In re Phillips,* Case No. 14-21741 (Bankr. E.D. Mi. 2015) – Debtor may convert Chapter 7 case to Chapter 13 absent evidence that conversion is in bad faith. Factors to be considered include (1) Debtor's income and expenses; (2) anticipated attorney fees; (3) expected duration of Chapter 13 Plan; (4) sincerity of Debtor's request for relief under Chapter 13; (5) potential future earnings; (6) any special circumstances such as unusually high medical bills; (7) frequency of any prior petitions in bankruptcy; (8) circumstances under which debt was incurred; (9) amount of payments offered as indicative of Debtor's sincerity in paying debts; (10) burden of case administration on Chapter 13 Trustee; and (11) statutorily mandated policy that bankruptcy protections be construed liberally in favor of Debtor. Debtor's proposed plan indicated that plan was feasible and creditors would receive far more in Chapter 13 than would be received if estate were liquidated under Chapter 7. Debtor had stable income and expected annual increases of roughly 2% per year which would assist Debtor in making payments. Debtor's budget was modest and attorney fees were reasonable at $3,500.00. Debtor sincerely requested and needed relief in bankruptcy and Debtor had not previously filed for bankruptcy protection. All of Debtor's debts were normal debt incurred over years mainly through use of credit cards and a small balance owed to the IRS. Plan produces more for creditors than Chapter 7 and case would not pose any burden of administration on Chapter 13 Trustee. Plan length of 5 years was negative as creditors will have to wait extended time to receive payments while Chapter 7 would produce more immediate return, but that factor alone is not sufficient to deny request to convert. Conversion is subject to Debtor's payment of Chapter 7 administrative expenses.

(4176) *In re Hale,* 511 BR 870 (Bankr. W.D. Mi. 2014) – Bankruptcy court can deny motion to convert when there is fraudulent conduct by an atypical litigant who has demonstrated that he is not entitled to relief available to typical Debtor. Atypical conduct includes, but is not limited to, failure to disclose transfers of property, concealment of assets, or attempts to assert exemptions to which Debtor is not entitled, or where Debtor has manipulated the system in an attempt to thwart the Chapter 7 Trustee's attempts to administer estate including failure to appear for Section 341 meetings, refusals to answer questions notwithstanding Court Orders, and refusing trustee access to market and sell property of the estate. Debtor's motion to convert denied where Debtor failed to disclose ownership of real property, false representation that Debtor leased the property that Debtor in fact owned, Debtor's repeated efforts to thwart trustee's ability to market property and administer estate, incomplete disclosure of insurance claims, Debtor's objection to retention of realtor with no good faith basis, and Debtor's lack of any possibility of proposing a confirmable plan where Debtor had negative monthly income.

(4177) *In re Nelson,* 2014 WL 1884323 (Bankr. W.D.N.C. 2014) – "Bad faith" to warrant denial of request to convert case from Chapter 7 to Chapter 13 requires conduct that is atypical and extraordinary. Debtor's undervaluation of vacant real estate resulted from opinion of value received from real estate broker While valuation was low there was no evidence that Debtors knew valuation was erroneous. Debtor's failure to list beneficial interest in two trusts was counsel's error, where counsel did not ask Debtors about any beneficial interest and did not review any documents that would have disclosed that Debtor had interest in two trusts rising from Debtor's father's estate but from which Debtors had not received any benefit and there was no evidence that Debtors were aware of beneficial interests. While omissions and misstatements were serious, there was no evidence that omissions and misstatements were intentional or the result of any intent to deceive.

(4178) *In re Sammut,* 486 BR 404 (Bankr. E.D. Mi. 2012) – Section 706(a) does not afford Debtor absolute right to convert case from Chapter 7 to Chapter 11. Court can deny request to convert where conversion is done in bad faith, including but not limited to concealment of assets. Conversion denied where Court had already entered judgment denying discharge under Section 727(a)(4) for knowingly and fraudulently making false oath or account. Denial of discharge "places Debtor squarely within the category of Debtors who, under *Marrama*, are not eligible for conversion out of Chapter 7, into either Chapter 11 or 13, under [Section] 706(a)."

(4179) *In re Potter,* 2012 WL 3867424 (Bankr. D. Utah 2012) – Court can deny Debtor's request to convert case to Chapter 13 where Debtor's conduct evidences dishonesty or misconduct. Debtor failed to list pending lawsuit in schedules and testified at 341 meeting that Debtors

had no pending claims. However, trustee learned that Debtor had brought action against third party and only 2 days after 341 meeting Debtor settled that action for $420,000, none of which was disclosed to the court. Debtors also refused to cooperate with trustee in investigation of assets. Debtors' assertion, that their failure to disclose significant assets was inadvertent was not credible. Debtors had knowledge of action yet failed to disclose and failed to amend Schedules and Statement of Financial Affairs. Debtors were obviously aware at the time of the 341 meeting that mediation on Debtor's against third party was scheduled to begin two days after the 341 meeting. Notwithstanding the Trustee's questioning, the Debtors failed to disclose this litigation as well as other assets. Without the Trustee's knowledge or consent, Debtors participated in the mediation and compromised a claim that was property of the estate and subsequently converted the settlement payment which was property of the estate. The Trustee's questioning and Debtors' knowledge of the meditation clearly put them on notice that their Schedules and Statement of Financial Affairs were inaccurate. Debtor's continued concealment of assets in the face of questioning by the Trustee and conversion of estate assets after they are put on notice that their Schedules and Statement of Financial Affairs are materially inaccurate evidenced bad faith and attempt to abuse bankruptcy process.

(4180) *In re Yarborough,* 2012 WL 4434053 (Bankr. E.D. Tn. 2012) – Under Section 706(a), Debtor may convert case to Chapter 13 at any time if the case has not previously been converted to Chapter 7. However, right to convert is not absolute and conversion may be denied where cause would exist to convert or dismiss a Chapter 13 proceeding under Section 1307, including inability to confirm a plan due to bad faith. Factors include (i) whether the Debtor is seeking to convert to chapter 13 in good faith (including a review of facts such as the timing of the motion to convert; the Debtor's motive in filing the motion; and whether the Debtor has been forthcoming with the bankruptcy court and creditors); (ii) whether the Debtor can propose a confirmable chapter 13 plan; (iii) the impact on the Debtor of denying conversion weighed against the prejudice to creditors caused by allowing conversion; (iv) the effect of conversion on the efficient administration of the bankruptcy estate; and (v) whether conversion would further an abuse of the bankruptcy process. Good faith depends on all facts and circumstances both past and present, including (1) the Debtor's income; (2) the Debtor's living expenses; (3) the Debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the Debtor has petitioned for relief under Chapter 13; (6) the Debtor's potential for future earning; (7) any special circumstances the Debtor may be subject to, such as unusually high medical expenses; (8) the frequency with which the Debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by Debtor as indicative of the Debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the Debtor; (13) the accuracy of the plan's statement of debts, expenses and percentage of repayment, including whether any inaccuracy is an attempt to mislead court; (14) whether debts would be non-dischargeable; (15) timing of petition; (16) Debtor's treatment of creditors before and after filing and how Debtor's actions would impact creditors; and (17) whether Debtor has been forthcoming with court and creditors. Court must also consider whether Debtor's proposed plan appears confirmable, although court does not have to hold full confirmation hearing. Debtor's Motion to Convert denied. Debtor's motivation in seeking to convert was adversary filed by creditor to except debt from discharge and fact that debt which resulted from overpayment of child support by ex-spouse to Debtor, while not dischargeable in Chapter 7, would be in Chapter 13. Although Debtor had not filed a Plan, Debtor's Amended Schedule I and J raised serious questions as to feasibility of any plan, as Debtor's income was not steady and fluctuated from week to week and month to month; and as a teacher her employment depended semester to semester on enrollment in her class. Debtor did not demonstrate any ability to reduce expenses if income did not materialize. After filing bankruptcy, Debtor and her husband were forced to move from mother-in-law's home and to rent a new residence at a higher (but reasonable) amount; Debtor's husband has an automobile payment that cannot be reduced; and Debtor testified that she would need a new car with a new, as yet unbudgeted, payment. Case was Debtor's second case in last four years and prior Chapter 13 was dismissed when Debtor failed to make payments. After dismissal of prior case, Debtor incurred more than $92,000 in additional debt. Debtor's prior Chapter 13 case indicated that Debtor was aware of that option when Debtor chose to file this case under Chapter 7, belying any assertion that Debtor wanted to convert case to pay creditors to extent possible. Taken as a whole, facts and circumstances indicated that Debtor did not seek to convert in good faith.

(4181) *In re Tufano,* 2011 WL 1473384 (Bankr. M.D. Pa. 2011) – Debtor in Chapter 7 does not have absolute right to convert case to proceeding under Chapter 13. Motion to Convert is to be determined by reference to "totality of circumstances" which would support dismissal under Section 1307, including (i) whether the Debtor is seeking to convert to chapter 13 in good faith (including a review of facts such as the timing of the motion to convert; the Debtor's motive in filing the motion; and whether the Debtor has been forthcoming with the bankruptcy court and creditors); (ii) whether the Debtor can propose a confirmable chapter 13 plan; (iii) the impact on the Debtor of denying conversion weighed against the prejudice to creditors caused by allowing conversion; (iv) the effect of conversion on the efficient administration of the bankruptcy estate; and (v) whether conversion would further an abuse of the bankruptcy process. Debtors acted on advice of counsel in transferring residence from husband's name alone to name of husband and wife. Debtors properly disclosed existence of home. Debtors failed to list the transfer on Statement of Financial Affairs and when asked at the 341 meeting whether they had transferred any assets, Debtors denied any transfers, as instructed by bankruptcy counsel. Debtors did not conceal assets and generally attempted to cooperate with the Trustee and filed various amendments through new counsel that appeared to be good faith attempt to correct deficiencies and inaccuracies in original documents. There was no evidence of any other pre- petition misconduct, the Debtors acted quickly to correct issues, and no creditor opposed conversion or sought relief from stay. Motion to convert filed in good faith and case converted.

(4182) *Marrama v. Citizens Bank of Mass.,* 549 US 365, 127 S. Ct. 1105, 166 L.Ed.2d 956 (2007) – Section 707 does not afford Debtor absolute right to convert to Chapter 13 where Debtor's conduct constitutes pre-petition bad faith. Section 707 allows conversion only to chapter under which Debtor could have proceeded initially. Section 1307 allows a Debtor in chapter 1 only where Debtor proceeds in good faith and allows dismissal or conversion of proceeding filed in bad faith. Section 1307 prevents conversion of case from Chapter 7 to Chapter 13 where converted case would be in bad faith and would result in case being immediately re-converted back to Chapter 7. Debtor's bankruptcy schedules materially undervalued or omitted assets and Debtor entered into numerous pre-petition transfers that were allegedly fraudulent or otherwise avoidable. When the Chapter 7 Trustee advised Debtor that the Trustee would pursue recovery of the transferred assets, Debtor sought to convert proceeding to Chapter 13. Court concluded that concealment and undervaluation constituted lack of good faith that would

supersede otherwise apparent right to convert under Section 707.

9.26 Effect of Chapter 7 Discharge

(4183) *In re Estrada,* 2017 WL 2589322 (Bankr. C.D. Cal. 2017) – Conversion to Chapter 13 after entry of discharge in Chapter 7 is "generally inappropriate". Court has authority to revoke discharge on request of debtor who desires to convert case to Chapter 13. Although Section 727 does not authorize revocation of discharge based solely on request of debtor. Rule 60(b)(6) allows court to revoke discharge for exceptional circumstances. Evidence warranted vacating discharge and converting case where Debtor's original counsel gave Debtor inaccurate and incomplete advice and information regarding effect of bankruptcy and effect bankruptcy may have on his ability to keep home that had significant non-exempt equity; no creditor participated in case and only claims were filed by Chapter 7 Trustee after entry of discharge; and Debtor proposed Chapter 13 Plan that would pay 100% dividend to creditors. Revocation would not meaningfully impair rights of creditors and would fulfill prerequisite to conversion to Chapter 13 facilitating payment to creditors. "Unique circumstances" made it unlikely that Court would grant similar relief and would not lead to surge of Motions under Rule 60(b)(6) to vacate discharges.

(4184) *In re Walker,* 2017 WL 2414441 (Bankr. N.D. Ohio 2017) - Section 1328(f)(1) denies Debtor discharge under Chapter 13 if Debtor received a discharge in a case filed under Chapter 7 during the 4 years preceding the date of the order for relief in the Chapter 13 case. Debtors filed current Chapter 13 case in 2017. Debtor entitled to discharge where Debtor's filed Chapter 13 in 2010 and case was converted to Chapter 7 in 2014. Operative date for determining four-year "look back" is date of filing prior case as there is only one "order for relief" in a case. Debtor's subsequent conversion of case from Chapter 13 to Chapter 7 did not constitute new order for relief. Although conversion occurred within 4 years of current bankruptcy filing and Debtor received Chapter 7 discharge after conversion of prior case, filing date of initial case, not conversion date, controls.

(4185) *In re Williams,* Case No. 14-1038 (Bankr. W.D. Mi. 2014) – Court cannot grant discharge in Chapter 13 where discharge was entered in Chapter 7 prior to conversion. Section 727(a)(10) allows Debtor to waive discharge. However, waiver of discharge must be filed before entry of the discharge. After discharge entered, it is too late for Debtor to waive. No creditor or other party in interest was requesting that discharge be vacated and there were no allegations by Debtor of any conduct that would warrant revocation of discharge under Section 727(d). Fact that Debtor realized after entry of discharge that debt to State for overpayment of unemployment benefits would be non-dischargeable in Chapter 7 did not constitute cause to revoke discharge and allow Debtor to obtain discharge under Chapter 13.

(4186) *In re Voshell,* Case No. 13-0454 (Bankr. W.D. Mi. 2013) – Section 1328(f) precludes entry of a discharge in Chapter 13 if the Debtor received a discharge in a case filed under chapter 7 during the preceding 4 years. Debtor received a discharge in the current case, precluding Debtor from receiving a subsequent discharge if Debtor's case is converted. Debtor cannot waive prior discharge as Section 727 allows a Debtor to waive a discharge only before the discharge is entered, and there is no basis for a Debtor to revoke his own discharge. Debtor did not allege that discharge was result of fraud, where only issue was continued enforcement action by ex-wife holding non-dischargeable domestic support obligation order and there was no indication that ex-wife in any way committed some bad act that led to entry of discharge. Debtor's regret at proceeding under Chapter 7, or belief that Debtor would be better off in another chapter, is not a basis to set aside a discharge. As Debtor would not receive a discharge in Chapter 13 if case is converted, it was not clear whether Debtor still wanted to convert case. Court denied motion to convert without prejudice to Debtor filing another motion within 14 days, in which case the court would grant the motion without delay.

9.27 Reconversion

(4187) *In re Gwilt,* 2018 WL 718940 (Bankr. W.D. Mi. 2018) – Case converted from Chapter 7 to Chapter 13 would not be reconverted to Chapter 13. Although authority of court to reconvert is in doubt in first instance, even if court has authority doing so would result in procedural confusion and delay and expense where at least one creditor sought and obtained stay relief and debtors have incurred post-conversion debts and spent post-conversion income in reliance on earlier conversion. After *Harris*, there are significant questions regarding effectiveness of previously confirmed plan. If Debtors want to be in Chapter 13, more prudent course is to dismiss current case ns file new cause under Chapter 13.

(4188) *In re Yao,* 2016 WL 1316066 (Bankr. D. N. Mex. 2016) – Debtor who converts Chapter 13 to Chapter 7 and then reconverts back to Chapter 13 picks up case where he left off at time of initial conversion. Conversion does not nullify plan or Confirmation Order. Reconversion serves to reappoint Trustee and Section 1327 once again binds Debtor and creditors to terms of confirmed plan. Debtor is not required to attend new Section 341 meeting or promulgate and confirm new chapter 13 plan.

(4189) *In re Gaines,* Case No. 04-63830 (Bankr. E.D. Mi. 2008) – Case which has previously been converted from Chapter 13 to Chapter 7 cannot be re-converted to Chapter 13. Section 706(a) permits conversion from Chapter 7 to Chapter 13 only "if the case has not been converted under section … 1307 …." Court lacks authority to re-convert case from Chapter 7 to Chapter 13. Section 706(d) only limits when a case may be converted if otherwise permitted, but does not override express prohibition against re-conversion found in 706(a).

9.28 Based on Finding of Presumed Abuse

(4190) *Advanced Control Systems, Inc. v. Justice,* 2011 WL 1843404 (8th Cir. 2011) – Court finding that Chapter 7 would be presumptively abusive under Section 707(b)(2) can either dismiss case or, with the consent of the Debtor, convert the case to Chapter 13. Case originally filed as Chapter 13 and converted after Debtor could not confirm plan. In Chapter 7, Court found relief would be abusive under Section 707(b) and, with the consent of the Debtor and over the objection of a creditor, ordered the case re-converted to Chapter 13. Although Debtor cannot voluntarily convert a Chapter 7 to a Chapter 13 if the case has been previously converted from Chapter 13 to Chapter 7, Section 707(b)(1) does not limit the Court's ability to order conversion where conversion is in the best interests of creditors, even though the Debtor must consent to that conversion. Consent to the Court's Order of conversion is not the equivalent of voluntary conversion.

F. Denial of Discharge – Grounds

9.29 Section 727(a)(1)

(4191) *In re Liberator Technologies, LLC,* Case No. 08-41376 (Bankr. E.D. Mi. 2010) - Corporate Debtor is not entitled to a discharge. Creditor's objection to Chapter 7 Trustees Report of No Distribution would be sustained to the extent the report indicated that the trustee sought discharge of claims.

9.30 Section 727(a)(2)

(4192) *Krieger Craftsmen, Inc. v. Ostosh,* Case No. 16-80072 (Bankr. W.D. Mi. 2018) – Debtor will be denied discharge under Section 727(a)(2)(A) where evidence indicates that Debtor disposed of or concealed property with subjective intent to hinder, delay or defraud creditors. Concealment may result from transferring title to property will retain benefit of ownership; or withholding knowledge or information required by law to be made known. Intent can be established by circumstantial evidence including Debtors sophistication to appreciate responsibly to disclose assets; whether Debtor is represented by counsel; presence of inordinately high number of omission; and pattern of reckless behavior towards Court. Plaintiff alleged only that Debtor transacted personal financial business using only cash, effectively concealing assets and spending from creditors. Debtor credibly testified that he used cash for purposes of avoiding bouncing checks and incurring fees. While the validity of reasoning may be questionable, Debtor's testimony regarding subject of motivation was credible and unrefuted.

(4193) *Cooper v. Crocker,* 2018 WL 1907448 (M.D. Tn. 2018) – Denial of discharge under Section 727(a)(2) requires proof that debtor, with intent to hinder, delay, or defraud creditor or an officer of transferred, removed, destroyed, mutilated, or concealed**,** or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of debtor, within one year before date of filing of petition. Concealment is withholding of knowledge of asset by failure or refusal to divulge information required by law to be made known. Fraudulent concealment may be inferred from circumstances in which debtor makes material misrepresentations knowing they are false debtor acted with reckless disregard as to truth. However, if debtor divulges false information based on mistake or inadvertence, debtor is entitled to a discharge. Debtors did not disclose personal property valued at over $60,000; did not disclose pending lawsuit; did not disclose sale of firearms for $23,000; did not disclose 100% ownership of business; undervalued home by roughly $75,000; and did not disclose loan application completed within two years before filing. Debtors' explanation that omissions were errors lacked credibility. Debtors were educated with significant business experience. Debtors also had experience in bankruptcy due to Chapter 11 petition filed in Nevada; and Debtor-wife Katherine Cooper had two Chapter 7 petitions in 1980s and 1990s, where she received discharges. Fact that Debtors allowed Trustee's Appraiser access to home with all personal possessions in plain view did not mitigate failure to disclose.

(4194) *Carter-Jones Lumber Co. v. Beatty,* 2018 WL 316978 (Bankr. N.D. Ohio 2018) – To deny discharge, Plaintiff must prove 1) disposition of property, such as concealment, and 2) subjective intent to hinder, delay or defraud creditor through disposing of the property. "Transfer" includes any disposition of possession, custody or control , and concealment is overt acts of disguise, placing assets beyond reach of creditors, or withholding knowledge of assets by failure to divulge owed information. Debtor did not disclose ownership of automobile housed at Debtor's residence in Schedules or at Section 341 meeting and Debtor originally testified that car belonged to friend, constituting improper concealment. Debtor evidenced intent to deceive by affirmatively denying ownership of automobile.

(4195) *McDermott v. Kerr,* 2017 WL 3880875 (Bankr. N.D. Ohio 2017) – Section 727(a)(2) allows Court to deny discharge where debtor, with intent to hinder, delay or defraud creditors, transfers property within one year pre-petition or transfers property of estate post-petition. Plaintiff must prove disposition of property and subjective intent of Debtor to hinder, delay or defraud. Property transferred or concealed must have been property of debtor and transfer or concealment must have occurred within one year. Concealment involves withholding of knowledge or information required by law to be made known and does not require transfer of property or concealment of transfer. Transfer made more than one year pre-petition is not basis to deny discharge under Section 727(a)(2), but can provide evidence of concealment if debtor retains secret benefit of ownership within one year of filing. Concealment can also exist if concealment began more than one year pre-petition but Debtor continued to actively conceal property within one year of petition. Debtor concealed property where Debtor transferred property to wholly owned LLC but did not disclose Debtor's ownership interest in LLC and Schedule B specifically stated "none". However, Debtor did not conceal property within on one year as property was subject to receivership for more than one year pre-petition, Debtor had been incarcerated for more than one year pre-petition, and Debtor did not retain "secret interest" in property as receivership was in total control of property, such that Debtor did not have any interest to conceal in the one year pre-petition. However, Debtor's post-petition conduct warranted denial of discharge under Section 727(a)(2)(B) where Debtor did not disclose information clearly required by Schedules and SOFA including name and addresses of creditor with whom Debtor had been litigation prior to Bankruptcy filing as well as creditors who obtained judgments against Debtor, and it took Debtor more than one year to amend Schedules to disclose omitted creditors. Debtor also did not list causes of action that Debtor believed he had against various unlisted creditors and Debtor specifically advised Trustee in answer to Interrogatory that Debtor did not have any causes of action against any third party. Failure to disclose creditor information and potential causes of action evidenced intent to hinder and delay both creditors and the Chapter 7 Trustee sufficient to warrant denial of discharge.

(4196) *Prescription Supply, Inc. v. Musa,* 2017 WL 4118157 (Bankr. E.D. Mi. 2017) – Section 727(a)(2) allows Court to deny discharge if Debtor with intent to hinder, delay, or defraud a creditor ... has ... concealed–(A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition. Debtor's initial omission of 4 shell corporations was inadvertent where debtor immediately amended schedules to disclose and corporations were valueless. False information that is result of mistake or inadvertence will not warrant denial of discharge.

(4197) *McDermott v. Meifert,* 2017 WL 830360 (Bankr. N.D. Ohio 2017) - Denial of discharge under Section 727(a)(2) requires plaintiff to prove a disposition of property and a subjective intent on Debtor's part to hinder, delay or defraud a creditor. Debtor's transfer of mortgage which Debtor assigned to daughter to allow daughter to receive payments from mortgage or did not warrant a denial of discharge where Debtor believed that she did not use her own funds to invest in the mortgage nor did she believe that it was her property, and transferring the note and mortgage to her daughter was done to accommodate her daughter was entitled to proceeds of mortgage. Debtor's testimony sufficiently

indicated that Debtor never had any intent to personally benefit from the sale of the property or the receipt of the mortgage or payments under the mortgage, and that the actual beneficial interest in the transaction was held at all times by Debtor's daughter.

(4198) *HIJ Industries, Inc. v. Roy,* 2017 WL 377930 (Bankr. E.D. Ky. 2017) - Section 727(a)(2)(A) prevents entry of discharge where Debtor has disposed of property with a subjective intent to hinder, delay or defraud creditors. Debtor's transfer of ownership in a motor vehicle from Debtor to Debtor and Debtor's non-filing spouse jointly was not done with intent to hinder, delay or defraud a creditor. Although transfer made it harder for creditor to collect judgment later rendered against the Debtor, transfer was done as part of Debtor's attempt to borrow money to recapitalize business. Lender required Debtor and Debtor's spouse to jointly guarantee the debt and required vehicles to be pledged just Collateral. As part of loan process, Debtor's spouse was added to the titles. The loan and transfer applications occurred before any State Court judgments had been entered against Debtor in favor of creditor and transfers were done solely in connection with loan on which Debtor's spouse would be personally liable.

(4199) *McDermott v. Koch,* 2017 WL 151590 (Bankr. E.D. Mi. 2017) – Section 727(a)(2)(A) allows court to deny discharge where Debtor with fraudulent intent has transferred, removed, destroyed, mutilated or concealed property of the Debtor within one year of petition. Intent requires actual intent, not just constructive intent. Debtor failed to disclose that Debtor transferred title to two vehicles to daughter less than one year pre-petition. Debtor, a sophisticated businessperson, knew of transfers within one year, particularly where transfers happened just 16 days pre-petition. Debtor has paramount duty to provide truthful and complete information and answers. Debtor also failed to correct record or disclose transfers at Section 341 meeting of creditors or at any other time before UST commenced action. Debtor's serious omissions and false statements warranted denial of discharge, and Debtor's new attorney's attempt to save discharge by providing information 10 months after commencement of the bankruptcy case and after US Trustee filed action to deny discharge was too late. "Reliance on counsel" can provide defense to intent element if Debtor shows that he made full disclosure of all facts to attorney and in good faith relied on counsel's advice. Debtor could not rely on counsel where Debtor was sophisticated businesswoman and omissions went to most basic information including failure to disclose all businesses Debtor owned and transfers that occurred just days pre-petition.

(4200) *Lashley v. Lashley,* 2016 WL 6875890 (Bankr. D. Neb. 2016) – Complaint that alleged only that "in the event Debtor disposes of any property during the pendency of this matter, Debtor should be denied a discharge" sufficient to state cause of action. Complaint suggested either that transfers had not occurred yet or that she did not have knowledge of facts sufficient to bring action before discharge entered. Complaint did not allege sufficient facts to conclude that action was brought untimely. Motion to dismiss denied.

(4201) *McDermott v. Capra,* 2016 WL 5106994 (Bankr. N.D. Ohio 2016) – Section 727(a)(2) will deny discharge where Debtor, with intent to hinder, delay or defraud creditor, transferred, removed, destroyed, mutilated or concealed property of Debtor within one year pre-petition. Moving party must prove disposition of property, such as transfer or concealment; subjective intent on part of Debtor to hinder, delay or defraud creditor through act of disposing of property; Debtor's ownership of property at issue; and disposition occurred within one year of commencement of case. Fraudulent intent can be based on lack of adequate consideration for property transferred; family or close relationship between parties; retention of possession by Debtor for future use and benefit; financial condition of transferor before and after transfer; cumulative effect of transactions and course of conduct after onset of financial difficulties; and general chronology and timing of events. UST failed to show that Debtor made transfer with intent to hinder, delay or defraud creditors, where Debtor acted merely as accommodation for son who was purchasing property, by having Debtor close on sale in his own name using son's money, and then transferring property to corporation owned solely by son. Debtor never intended to keep property and had engaged in similar transactions at least 5 other times for purposes of assisting son in son's business. At most, Debtor's failure to disclose transfer was good faith mistake by Debtor rather than evidence of fraudulent intent to conceal.

(4202) *Crocker v. McWhorter,* 2016 WL 4928001 (Bankr. E.D. Ky. 2016) – Section 727(a)(2) denies discharge where Debtor transfers, removes, conceals, destroys, mutilates, or conceals assets with intent to hinder, delay or defraud creditors. Intent is key element and may be determined by overall pattern of conduct to determine subjective intent. Debtor concealed interests in a Corvette, a Motor Home, and a boat and trailer by failing to disclose those assets in Schedule B. Debtor testified that he transferred the assets to his father pre-petition in exchange for $60,000 but transfer documents were not executed until October, 2014, only one month pre-petition. Although Debtor produced check from father dated January, 2013, there were no notes on check indicating that check was payment of purchase of vehicles, there were no other documents to indicate that the check was sale proceeds, and check was one of a series of checks from father to Debtor all of which are otherwise described as personal loans. Neither Debtor not father could explain 22 month delay in recording transfer of title. Even if Debtor did transfer assets in January, 2013, Debtor failed to disclose that transfer in SOFA which requires disclosure of all transfers within 2 years pre-petition, which would have included any transfers in January, 2013. Debtor continued to pay incidental costs of ownership and possession well beyond January, 2013, by paying boat insurance and automobile insurance. Vehicles continued to be located at Debtor's residence and Debtor continued to use them while father who allegedly purchased them never used them. Debtor also transferred separate vehicle to father one month before filing. Father testified that he bought the car for Debtor to attend college and that it was always the intent that when Debtor finished school, he would transfer title back to father. However, Debtor graduated from college more than 20 years ago yet transfer did not happen until eve of bankruptcy filing. Evidence also indicated that Debtor transferred partial interest in home to wife shortly before filing. Original deed to property from Debtor's father to Debtor did not include wife. Two years later, Debtor's father signed a new quit claim deed to both Debtor and wife. While transaction standing alone would not indicate fraud, but rather attempt to correct earlier error in omitting wife from deed, when asked by Trustee for deed, Debtor did not produce original deed but only quit claim deed, which made it appear that the property had been initially transferred to Debtor and spouse jointly. Failure produce initial deed coupled with Debtor's transfers of other assets raised presumption that second deed was fraudulent attempt to transfer Debtor's interest to wife. Debtor failed to disclose season tickets to University of Kentucky basketball which had value as of petition date as well as interests in two companies that had failed some years earlier. Debtor had duty to disclose assets, even those he thought valueless, and failure to do so is further evidence of fraudulent intent.

(4203) *McDermott v. Kerr,* 2016 WL 4410572 (Bankr. N.D. Ohio 2016) – Section 727(a)(2)(A) results in denial of discharge where Debtor with

intent to hinder, delay or defraud a creditor transfers, removes, destroys, mutilates, or conceals, or permits destruction, transfer, concealment or mutilation of property of Debtor within one year of commencement of case. Transfer of property outside one year can be basis for denial under continuous concealment doctrine where Debtor transferred property more than one year prior to commencement of case but retained secret benefit of ownership within the year preceding commencement of case. More than one year prior to commencement of case, and while facing multiple judgments, Debtor transferred four parcels of property from his name to an LLC in which Debtor was sole member. When Debtor filed bankruptcy, he did not list either properties or the LLC as an asset, and omitted the names and addresses of known creditors including the judgment holders from the schedules. Record created sufficient inference of fraudulent intent to defeat summary judgment motion brought by Debtor.

(4204) *McDermott v. Hamrick,* 2016 WL 2865355 (Bankr. N.D. Ohio 2016) – Section 727(a)(2) denies Debtor discharge if Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed (A) property of the Debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition. Plaintiff must prove (1) a disposition of property; (2) subjective intent on the Debtor's part to hinder, delay or defraud a creditor through the act disposing of the property; (3) the property disposed of must be property of the Debtor; and (4) the disposition occurred either (a) within one year before the date the petition was filed, or (b) was property of the bankruptcy estate and the disposition occurred after the filing of the petition. Debtor's actions in causing corporation in which Debtor was 56% shareholder to transfer corporate assets to new corporation is not transfer of Debtor's interest in property. Corporation is considered separate entity from Debtor and Debtor has no direct or indirect ownership interest in specific assets. Absent transfer of Debtor's interest in property, there was no basis to deny discharge under Section 727(a)(2).

(4205) *DeNoce v. Neff,* Case No. 14-60017 (9th Cir. 2016) – Section 727(a)(2) allows court to deny discharge where, within one year preceding case, Debtor transferred assets in effort to hinder, delay or defraud creditors. One year "look back" is statute of repose as one year runs from date of event rather than date on which creditor becomes aware, and time period does not encourage prompt action by creditor as one year does not set any time limit after filing of case within which action must be brought. Debtor entitled to discharge where Debtor fraudulently transferred property to trust to keep it from reach of creditors, then filed Chapter 13 case. Chapter 13 dismissed 45 days later, and Debtor filed another chapter 13 case, disclosing the existence of the trust but not of the transfer of the property to the trust. Debtor voluntarily dismissed second Chapter 13 case 18 months later. Debtor then filed Chapter 7 case and creditor brought action to deny discharge based on transfer of condominium. Creditor admitted that transfer was more than one year before filing of Chapter 7 but argued that limitations period should be tolled during pendency of prior Chapter 13 cases. Court concluded that Section 727(a)(2) is statute of repose that is not subject to equitable tolling. If the transfer occurred more than one year before filing, Section 727(a)(2) did not apply regardless of what actions Debtor took or may have taken to delay prosecution of that action, including serial Chapter 13 filings.

(4206) *HIJ Industries, Inc. v. Roy,* 2016 WL 1126272 (Bankr. E.D. Ky. 2016) – Section 727(a)(2) allows court to deny discharge where Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the Debtor, within one year before the date of the filing of the petition. Plaintiff must prove a disposition of property, such as concealment, and a subjective intent on the Debtor's part to hinder, delay or defraud a creditor. Complaint sufficiently stated cause of action where complaint alleged that Debtor transferred title to motor vehicle within one year of petition date with intent to hinder, delay or defraud creditors. State of mind of defendant may be pled generally and statements made by defendant after entry of State Court judgment that Debtor had no intention of paying judgment and then admitted that Debtor transferred vehicle to thwart collection efforts sufficiently pled cause of action.

(4207) *Cosby v. Baltrip,* Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Section 727(a)(4) allows court to deny discharge if Debtor transfers, removes, destroys, mutilates or conceals property with intent to hinder, delay or defraud creditors. Plaintiff must prove both disposition of property within one year preceding commencement of case and subjective intent of Debtor to defraud. Transfers or property more than one year prior to petition date cannot constitute basis unless transfers are within "continuing concealment" doctrine. Continuing concealment is transfer made more than one year prior to commencement of case where Debtor retains secret beneficial interest in property. Complaint alleged only that Debtor transferred property but did not allege that Debtor retained secret interest failed to state cause of action as to transfers that were more than one year pre-petition. However, complaint did state cause of action where Debtor sold property within one year pre-petition and gave some or all of the proceeds to third party and alleged that Debtor concealed interests in other real property. However, Debtor did not conceal interest by failing to disclose engagement ring where Debtor had not remarried. Under Michigan law, engagement is conditional gift that remains sole property of person giving ring and becomes completed gift only upon marriage. As Debtor had married, Debtor had no interest in the engagement ring that Debtor could have concealed.

(4208) *Gold v. Demeter,* 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Denial of discharge under Section 727(a)(2) requires proof that Debtor transferred property prior to commencement of case. Debtor's removal of name from bank accounts previously jointly owned by Debtor and mother did not constitute transfer of property of Debtor as Debtor did not have interest in bank accounts where all funds in accounts were mother's funds and Debtor's name was on accounts solely for estate planning purposes.

(4209) *Apartments at Cambridge Company, LLC v. Lewiston,* 2015 WL 5443713 (Bankr. E.D. Mi. 2015) – Denial of discharge under Section 727(a)(2) requires disposition of property such as concealment; and subjective intent to hinder, delay or defraud creditor through act of disposing of property. Evidence indicated that Debtor failed to account for interests or property that Debtor previously had but no longer owned as of commencement of case. However, evidence also indicated that Debtor had been in business for 30 years and had a very complex business structure involving multiple entities in various forms with multiple layers of ownership, and Debtor over the years Debtor signed hundreds of documents, letters and memoranda regarding his business dealings. Evidence indicated that Debtor's alleged concealment was result of inadvertent errors and mistakes where Debtor in good faith thought that disclosure was not required. Debtor was aware before case was filed that Plaintiff would take aggressive stance and engage in full effort to contest all aspects of bankruptcy case and Debtor made extra efforts to be particularly complete and provide extraordinary attention to preparation of schedules and statement of financial affairs and

provided full information in response to inquiries by Trustee, none of which reflected any intent to deceive. Further, given magnitude of debts to be discharged, it would not have made sense for Debtor to risk discharge where amount involved in alleged non-disclosures was minimal compared to total debt.

(4210) *U.S. Trustee v. Varner,* 2015 WL 4039390 (Bankr. N.D. Ohio 2015) – Denial of discharge under Section 727(a)(2) requires proof that Debtor, with intent to hinder, delay or defraud a creditor, transfers, removes, destroys, mutilates or conceals property of Debtor within one year before filing of case. Plaintiff must prove (1) the disposition of property, such as a transfer or concealment, (2) a subjective intent on the Debtor's part to hinder, delay, or defraud a creditor through the act of disposing of the property, (3) the property at issue must be property of the Debtor, and (4) the disposition occurred within one year of filing for bankruptcy. Debtor's use of third party's bank account to pay Debtor's personal expenses was not fraudulent even where stated intention was to avoid IRS garnishment of funds if Debtor placed funds into his own account and Debtor specifically was attempting to keep funds out of reach of creditors. Evidence did not support finding of subjective fraudulent intent where account was used to pay normal day-to-day expenses of Debtor and only amounts necessary to pay expenses were deposited by Debtor into account and did not reflect either an accumulation of funds or an attempt to retain undisclosed assets through bankruptcy process. Debtor used account as "tool" for payment of expenses that were recurring and were too difficult to pay with cash or without a bank account, and while Debtor was using account he was simultaneously reducing liabilities to creditors including decreasing tax debt from $8 million to $1.6 million.

(4211) *Risk v. Hunter,* 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Section 727(a)(2) will deny discharge where Debtor with intent to hinder, delay or defraud a creditor or the estate, transfers, removes, mutilates, destroys or conceals property. Complaint failed to state cause of action where complaint failed to allege any specific transfer of property or any concealment or retention of "secret interest" by Debtor. Only specific transfer occurred 18 months prior to commencement of case which is beyond limitation contained in Section 727(a)(2). Reconveyance of property back to Debtor within 12 months does not revive action where initial transfer occurred outside the one year limitation.

(4212) *McDermott v. McGregor,* 2015 WL 4628018 (Bankr. N.D. Ohio 2015) – Court will deny discharge where Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—(A) property of the Debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition. Plaintiff must demonstrate 1) a disposition of property, such as concealment, and 2) a subjective intent on the Debtor's part to hinder, delay or defraud a creditor through the act disposing of the property. Debtor's failure to respond to request for admissions established that Debtor withdrew $2,300 from bank on date of petition yet listed in schedules only $40 in cash and $102.71 in the bank. Debtor's actions intended intent to conceal property of the estate warranting denial of discharge.

(4213) *McDermott v. Schwartz,* 2015 WL 1010490 (Bankr. E.D. Mi. 2015) – Section 727(a)(2)(A) allows court to deny discharge where Debtor, with intent to hinder, delay or defraud creditor or officer of estate of property, transfers, conceals, mutilates, destroys or removes property within one year prior to commencement of case. Section 727(a)(2)(A) has two elements, a disposition of property; and subjective intent to hinder, delay or defraud creditor. In year preceding case, Debtor transferred 98% ownership interest in company to business acquaintance for no consideration, while allowing Debtor to continue to use entity's bank account to hide proceeds of sales of assets by Debtor; the deposit of funds into that account from sale of membership interest in LLC; Debtor's later transfer of proceeds of sale of LLC from the account; and the transfer of an automobile owned solely by Debtor to Debtor and wife jointly. Debtor admitted that sale of ownership interest was done because "purchaser" wanted to help Debtor evade collection efforts, and Debtor freely admitted that he put proceeds of sale of LLC into entity's account for purposes of hiding them from creditor. Debtor's argument that creditor had personal vendetta against Debtor and that Debtor just wanted to have funds to pay living expenses did not avoid conclusion that Debtor transferred property with actual intent to hinder, delay or defraud creditors.

(4214) *US Trustee v. Bane,* 2014 WL 1378313 (4th Cir. 2014) – Debtor's transfer of 90% interest in real property to Debtor's mother on eve of bankruptcy filing, coupled with Debtor's retention of fractional interest and continued use of property, supported finding that property had been transferred with intent to hinder, delay or defraud creditors warranting denial of discharge.

(4215) *Vogt v. Hastings,* 2014 WL 2212159 (Bankr. N.D. Ohio 2014) – Letter to court construed as complaint under Section 727(a)(2) failed to state cause of action. Statement that Debtor did not account for thousands of dollars in personal property did not allege time when Debtor owned the assets or that Debtor still had assets or took steps to either conceal or dispose of assets.

(4216) *Bank of America v. Killgrove,* 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd*, 2014 WL 4187988 (E.D. Mi. 2014) – Court will deny discharge where Debtor, with intent to hinder, delay or defraud a creditor or the estate, transfers, removes, destroys, mutilates, or conceals property. Lender's complaint failed to state cause of action where action was based on alleged transfer of collateral that was property of Debtor's PC, and was not the Debtor's property. While Debtor owned the PC, the assets of the PC were not assets of the Debtor. Absent transfer of property of the Debtor, creditor could not maintain action under Section 727(a)(2).

(4217) *Eifler v. Wilson & Muir Bank & Trust,* 2014 WL 314473 (W.D. Ky. 2014) – Debtor is not entitled to discharge if Debtor, within one year preceding commencement of the case, transfers, removes, destroys, mutilates, or conceals property of the Debtor within one year preceding commencement of the case. Transfer of funds from joint account of Debtor and spouse into separate accounts of Debtor and spouse constitutes transfer of property to extent of funds transferred to spouse's individual account. Whether transfer is "fraudulent" is determined by facts and circumstances of transfer, including (i) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question by the Debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question; (v) the conveyance of all of the Debtor's property; (vi) the secrecy of the conveyance; (vii) the existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and (viii) the general chronology of events and

transactions under inquiry. Transfers to spouse and to spouse's sister were transfer to insiders, and the funds were then used for the benefit of Debtor (payment of children's private school tuition). The transfers left Debtor with only $521 in his account where Debtor, only 9 months prior, had withdrawn $340,000 from a HELOC. All of the transfers to spouse and sister-in-law were for no consideration. Court rejected argument that distribution of joint account into Debtor and spouse separately constituted lawful division of money, as Debtor alleged that he had no interest in spouse's 50% of the funds in the joint account. However, all of the funds in the joint account in the first instance were derived solely by Debtor, and totality of evidence indicated that transfer was part of scheme to evade creditors as Debtor made at least 6 separate transfers that effectively divested Debtor of $340,000.00. Alleged reliance on counsel was not sufficient to overcome appearance of improper intent where it was not reasonable to believe that it would be appropriate to transfer a significant portion of assets within months, or weeks, of bankruptcy filing. Debtor did not need to understand complexity of bankruptcy to know that creditors would be extremely concerned about transfers. Evidence supported finding that Debtor took multiple deliberate steps to shield assets from creditors supporting denial of discharge under Section 727(a)(2).

(4218) *General Motors, LLC v. Gunner,* 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – Debtor will be denied discharge where Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the Debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition. Alleged overpayments to Debtor's wholly owned corporation and retained by the corporation did not constitute "property of the Debtor's estate" and could not support action under Section 727(a)(2). While Corporation may have wrongfully received and retained those proceeds, assets of the corporation are not assets of the Debtor. However, complaint stated cause of action in alleging that after the corporation closed, Debtor engaged in a fraudulent scheme by creating new corporation owned by girlfriend and then artificially manipulating his salary by taking "suspiciously low salary" while allowing girlfriend to receive bulk of income (although she lacked any experience in the business) and using her income to pay Debtor's living expenses. Debtor's actions in setting up scheme to conceal actual income after Debtor had suffered a judgment in favor of Plaintiff could constitute actions to hinder, delay or defraud creditor in violation of Section 727(a)(2).

(4219) *Barbacci v. Worrell,* 2013 WL 4525227 (Bankr. N.D. Ohio 2013) – Less than 60 days before filing, Debtors received tax refunds totaling $8500.00. Debtors used money to repay loans to family members ($1,700); pay attorney fees and purchase clothes for third party ($1,500); gambling trip ($1,000); second gambling trip ($600); third gambling trip ($629); admission for 6 people to "Autorama" ($552.00): souvenirs and food at Autorama ($200.59); and restaurant dining ($340). Debtor-husband is employed and earns $1,740 per month, while Debtor-wife was not employed outside the home. Total assets equaled $3,865.00; and total scheduled unsecured debt was $12,600.00. Debtors' dissipation of money constituted transfer of property. Debtors spent seventy-six percent of the tax refund in callous disregard of their creditors. While they didn't retain an interest in the funds, they exercised complete control over the dissipation. Debtors received nothing of tangible value in exchange for the amounts they spent. Debtors were clearly insolvent before, during and after the tax refunds were spent. Although Debtors did not conceal or hide expenditures and disclosed repayments to insiders on SOFA, fund would have been sufficient to pay substantial portion of scheduled debt, and amount of refund was more than twice the total of the Debtors' assets; and equaled 5 months of gross income for the household. Debtors' actions were either taken with intent to hinder, delay or defraud; or with reckless disregard of and indifference toward creditors. Summary judgment not appropriate where court could not conclude as matter of law that Debtors had subjective intent to cause harm or whether Debtors were merely attempting to express gratitude to family members who had helped them out. However, court did not resolve issue of whether party could have ill intent in disposing of property that would have been exempt in the first instance.

(4220) *In re Dent,* 2013 WL 4588837 (E.D. Mi. 2013) – Section 727(a)(2)(A) requires proof that Debtor 1) transferred property; (2) belonging to the Debtor; (3) within one year of filing the bankruptcy petition; and (4) with actual intent to hinder, delay, or defraud creditors or an officer of the estate. A "continuing concealment" is an exception to the one year limitation, where Debtor retains a secret benefit of ownership at some point within the preceding year. Debtor retained beneficial interest in marital home, where Debtor was permitted by the spouse to live in the home while the home was not rented out. Although Debtor's ability to remain was subject to permission by the spouse, evidence indicated that Debtor resided there for significant periods, from 60 to 80 days per year. Debtor kept his name on 2 mortgages and received substantial tax advantages as a result. Evidence indicated that transfer by Debtor to spouse was with actual intent, where (1) the transfer was made to an insider, the defendant's wife; (2) the defendant retained the ability to use the property when it was not rented out; (5) the transfer accounted for substantially all of Debtor's assets; (8) the value of the consideration received by the Debtor from his wife was likely less than the reasonably equivalent value of his interest in the property; and (9) Debtor was insolvent at the time the transfer was made. Although transfer of legal title was public record, Debtor's retention of a right to possess was not a public matter constituting concealment. Debtor transferred property immediately after suffering judgment.

(4221) *Adamovic v. Lazarevic,* 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Section 727(a)(2) applies to dispositions of assets within one year of commencement of case. Where evidence indicated that all of the sales of the assets and dispositions of the proceeds occurred in 2007 and 2008, those dispositions could not from the basis of an objection to discharge in a case filed in 2011.

(4222) *Von Kiel v. U.S.,* 486 BR 327 (E.D. Pa. 2013) – Discharge denied for fraudulent transfer or concealment of assets where Debtor purportedly took vow of poverty and assigned all income as doctor to religious organization, but continued to enjoy benefits of income and maintain style of living as result of "gifts" received from the religious organization.

(4223) *Wilson & Muir Bank & Trust Co. v. Eifler,* 2013 WL 3300639 (Bankr. W.D. Ky. 2013) – Court will deny discharge if Debtor within one year of filing its petition, transfers property with the intent of frustrating creditors by keeping the property out of its reach, then the Debtor is not entitled to a discharge. This section encompasses two elements: 1) a disposition of property, such as concealment, and 2) a subjective intent on the Debtor's part to hinder, delay or defraud a creditor through the act disposing of the property. Transfers that occurred well before one year prior to commencement of case would not support denial of discharge. Creditor failed to prove "fraudulent concealment" merely because Debtor did not notify lender of transfers or provide updated financial statement reflecting transfers, where underlying loan

documents did not impose any obligation to do so. Evidence also failed to demonstrate intent to hinder delay or defraud where transfers were made as part of normal estate planning and were done as suggestion of Debtor's estate planning attorney, shortly before Debtor went on overseas trip and with goal of equalizing assets between Debtor and spouse. However, within one year preceding filing of case, and after Debtor had consulted with bankruptcy attorney, Debtor made at least six transfers worth more than $300,000, to insiders. Factors to consider in determining whether transfers were made with fraudulent intent include (1) the transfer was to an insider; (2) the Debtor retained possession or control of the property transferred after the transfer; (3) the transfer was disclosed or concealed; (4) before the transfer was made, the Debtor had been sued or threatened with suit; (5) the transfer was of substantially all the Debtor's assets; (6) the Debtor absconded; (7) the Debtor removed or concealed assets; (8) the value of the consideration received by the Debtor was reasonably equivalent to the value of the asset transferred; (9) the Debtor was insolvent or became insolvent shortly after the transfer was made; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the Debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the Debtor. Transfers were made with fraudulent intent where transfers were all to insiders (Debtor's wife and sister in law) or for benefit of insiders (children's tuition); and money transferred to wife and sister remained in control of Debtor; and transfers were all made after Debtor had been sued by creditors. Transfers left Debtor with only $600 in the bank and Debtor received no consideration in exchange for any of the transfers Debtor filed bankruptcy just months, or weeks, after making transfers. Defense of reliance on advice of counsel did not avoid conclusion where any alleged reliance was neither reasonable nor in good faith. Debtor knew his financial condition was worsening and he was aware that the funds retained by him would be part of a bankruptcy estate which would be distributed to his creditors. Creditors had filed multiple suits and Debtor had been having bankruptcy discussions with counsel about a possible bankruptcy for months. Rather than conserving assets, Debtor took multiple, deliberate steps to shield his assets from creditors. Debtor knew he was going to file for bankruptcy and was attempting to shield his assets from the legitimate claims of his creditors and "whole pattern of conduct" supported a finding of fraudulent intent.

(4224) *Ereren v. Marshack,* Case No. 12-1542 (9th Cir. BAP 2013) – Court can deny discharge where Debtor disposed of or permitted disposal of property with intent to hinder, delay or defraud creditor or trustee, within one year prior to commencement of case. Plaintiff must prove disposition of property and subjective intent to hinder, delay or defraud creditors. Evidence supported finding that Debtors engaged in transfers with intent to hinder and defraud creditors. After husband suffered large judgment related to gambling debts, Debtors traded in two automobiles and received more than $50,000 in cash. Debtors then transferred more than $175,000 to family members in Turkey, allegedly to repay loans owed to a Turkish bank. Timing and circumstances were sufficient to warrant inference that transfers were done with requisite intent to deny discharge. Fact that transfer may have also been avoidable as preference does not exclude transfers from Section 727(a)(2).

(4225) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Section 727(a)(2) requires proof that Debtor disposed of or concealed property with subjective intent to hinder, delay or defraud creditors. Concealment includes withholding of knowledge of asset by failing or refusing to divulge information required by law to be made known.

(4226) *Barcume v. Fox,* Case no. 11-12036 (E.D. Mi. 2012) – Intent to hinder, delay or defraud can be found based on lack or inadequacy of consideration; transferee is family, friend or close associate; Debtor retains possession, benefit or use of property; financial condition of the recipient both before and after the transaction; existence of cumulative pattern of transfers after incurring Debtor onset of financial difficulties; and general chronology of events and transactions. Creditor did not establish intent to hinder, delay or defraud creditors by Debtor's pre-petition sales of assets where creditor did not present evidence that transfers were for less than reasonably equivalent value and any lingering relationship between Debtor and business that Debtor sold was "insignificant". Transfer of Jeep to Debtor's daughter did not evidence intent to hinder, delay or defraud where Jeep was purchased by former spouse specifically for daughter and was titled in Debtor's name solely for insurance purposes, and Debtor transferred title when daughter graduated from college.

(4227) *Hulsing Hotels Tennessee, Inc. v. Steffner,* 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Section 727(a)(2)(A) requires disposition of property, such as concealment; and subjective intent to hinder, delay or defraud creditor through act of disposing of property. Creditor's complaint did not allege that Debtor concealed any property. Creditor's allegations were based entirely on actions taken by Debtor's single member LLC including alleged concealment by LLC of assets and transfers of LLC's assets. Creditor failed to present sufficient evidence to pierce corporate veil/ Absent piercing, Bankruptcy Court recognizes distinction between corporate and shareholders or members individually. Section 727(a)(7) would allow denial of discharge to Debtor who, as insider, causes entity to engage in concealment of assets where the entity is also a Debtor in bankruptcy. In this case, Debtor's single member LLC did not file for relief and was not a Debtor in bankruptcy, precluding application of Section 727(a)(7).

(4228) *U.S. Trustee v. Zhang,* 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Debtor's use of multiple corporations to hide cash and conceal transfers supported denial of discharge. Debtor manipulated wholly-owned corporations in such a way as to transfer large amounts of money from those corporations into other corporations and into Debtor's own accounts for purposes of hindering creditors of the transferring corporations. Debtor also retained funds in corporate accounts that were then used for personal and family purposes, demonstrating that the funds in these accounts, although titled in corporate names, were actually personal funds that were knowingly concealed from creditors. Court would look past corporate formalities to determine actual intent of Debtor. Debtor also "shifted" salary income from wholly owned corporations to Debtor's wife and then claimed substantially lower income on bankruptcy schedules. Debtor was the only person who performed meaningful services for businesses and scheme to transfer salary to wife was clearly scheme to keep Debtor's income from the reach of creditors. Debtor continued to conceal assets and use corporate funds for personal use post-petition, continuing the pre-petition pattern of conduct.

(4229) *Cornwell Quality Tools Company v. Paavo,* Case No. 11-10831 (E.D. Mi. 2011) – Debtor's failure to disclose "business credits" for goods purchased from supplier and later returned for credit was not failure to disclose income. Credits represented sales by Debtor that were financed by creditor and for which customers paid creditor directly. Debtor did not fail to disclose proceeds that were not paid to Debtor. Record did not show that Debtor failed to disclose tools and equipment where uncontroverted testimony at trial was that Debtor had sold all tools and equipment prior to filing bankruptcy.

(4230) *Midwest Community Federal Credit Union v. Olds,* 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Minor understatement of balance in bank account, stated as $700 when balance was actually $1600, was not evidence of fraud absent explanation by Credit Union of timing of deposits and withdrawals, where it was possible that Debtor had written checks or made withdrawals that had not posted to credit union records as of the petition date.

(4231) *Newton v. Sims,* 2011 WL 2619106 (Bankr. E.D. Tn. 2011) – Section 727(a)(2) provides a mechanism for creditors to deal with abusive Debtor. Section 727(a)(2)(A) requires proof that the Debtor disposed of, transferred, or concealed property within one year of filing of bankruptcy petition with intent to either hinder or delay or defraud creditors by disposing of her property. Badges of fraud include: (1) the lack of adequate consideration for the transfer; (2) the family, friendship, or close relationship between the parties; (3) the retention of possession, benefit, or use of the property in question by the Debtor; (4) the financial condition of the party sought to be charged prior to and after the transaction in question; (5) the conveyance of all of the Debtor's property; (6) the secrecy of the conveyance; (7) the existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; (8) the general chronology of events and transactions under inquiry; (9) whether the transfer was conducted at arm's length; (10) whether the Debtor was aware of the existence of a significant judgment or over-due debt; (11) whether a creditor was in hot pursuit of its judgment or claim and whether the Debtor knows this; and (12) the timing of the transfer relative to the filing of the petition. Pre-petition, Debtor sold her residence and attempted to purchase a new one, but could not obtain financing. Debtor transferred proceeds of sale ($150,000) to son. Son purchased new residence in his own name, using $150,000 as down payment and obtaining mortgage for balance of price. Court found that transfer was not done for improper purpose or with goal of removing funds from Debtor's estate. After transfer and purchase of home, Debtor continued to pay creditors for at least 8 months until Debtor could no longer afford payment as she had not obtained new employment.

(4232) *Barracco v. Unger,* 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – To succeed in denial of Debtor's discharge for concealment, Trustee must show both the concealment of property of the estate or of the Debtor and Debtor's subjective intent to hinder, delay or defraud Trustee through the concealment. Debtor who owned two corporations through which Debtor operated chiropractic office did not conceal equipment as schedules listed equipment with no detailed listing. Schedules were unclear as to whether equipment was owned by Debtor personally or by corporations, and Trustee acknowledged this uncertainty even prior to the first meeting of creditors. Confusion and possible overlap of ownership was apparent from the start of the case. Transfer of equipment from one corporation to another, both controlled by Debtor, could not constitute transfer under Section 727 as Debtor did not own the assets allegedly transferred. Debtor provided detailed list of equipment at or prior to the 341 meeting and walked through the corporate offices with the Trustee to show the location of the equipment.

(4233) *Barcume v. Fox,* Case No. 09-3514 (Bankr. E.D. Mi. 2011) – Section 727(a)(2) requires proof of a transfer or concealment; by the Debtor; within one year pre-petition; and with actual intent to hinder, delay or defraud. Intent can be proven by references to "badges of fraud". Debtor's sale of an asset, concealment of income by depositing business income into personal account, and transfer of title to a motor vehicle (while retaining possession) evidenced transfers within one year of petition. Evidence failed to demonstrate requisite intent where Debtor testified that she sold business because it was failing and on verge of closing and where price was determined based on good faith estimate of value of equipment. Debtor had long history of using personal accounts to collect receivables and pay business and personal obligations and did not evidence new course of action designed to hinder creditors. Debtor fully disclosed all accounts including accounts that Debtor had previously closed and the use of her personal account for business purposes. Transfer of vehicle title was done pursuant to properly perfected security interest when Debtor became unable to repay loan.

(4234) *Holmes Lumber & Building Center, Inc., v. Miller,* 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Section 727(a) does not apply to case pending under Chapter 13 and cannot be used to deny discharge. Discharges in Chapter 13 are controlled by Section 1328.

(4235) *Laughlin v. Novae Body and Tan, LLC.,* 602 F.3d 417 (5th Cir. 2010) - Section 727(a)(2) denies a Debtor a discharge if the Debtor transferred, removed or mutilated property within one year before the filing of the petition. A "transfer" includes each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property. Debtor's pre-petition renunciation of inheritance is not a transfer for purposes of Section 727. Renunciation of inheritance acts as if the person renouncing predeceased the decedent, such that the party renouncing the property never acquired any interest in the property. Because the Debtor never acquired any interest in the property by virtue of the renunciation, the renunciation cannot constitute a transfer of the Debtor's interest for purposes of Section 727.

(4236) *McDermott v. Wallace,* 2010 WL 2696790 (Bankr. N.D. Ohio 2010) – Section 727(a)(2) encompasses two elements: (1) a disposition of property, such as concealment, and (2) a subjective intent on the Debtor's part to hinder, delay, or defraud a creditor through the act of disposing of the property. Evidence supported finding that Debtor concealed or disposed of property prior to the commencement of the case to hinder, delay or defraud creditors. Debtor was managing partner of a business. Debtor was stealing money from the Business and made improper charges against the business accounts in connection with the Debtor's side business as a youth baseball coach. An inventory of the business inventory revealed that $26,000 in merchandise was missing. Debtor transferred $12,190 dollars in ATM and counter check withdrawals from the business without any clear business purpose. Debtor misappropriated $23,100 of business income over a 2 month period. Debtor maintained a separate bank account into which Debtor made several suspicious deposits consisting of checks written to the business.

(4237) *Jahn v. Fleming,* 2010 WL 2803631 (Bankr. E.D. Tn. 2010) – Section 727(a)(2)(A) requires 1) a disposition of property, such as concealment, and 2) a subjective intent on the Debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property. Party objecting to discharge bears burden of proof on all elements. Intent can be established through circumstantial evidence including (I) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question by the Debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question: (v) the conveyance of all of the Debtor's property; (vi) the secrecy of the conveyance; (vii) the existence or cumulative effect of a pattern or series of transaction or course of conduct after incurring of debt, onset of financial difficulties, or

pendency or threat of suit by creditors; and (viii) the general chronology of events and transactions under inquiry. Debtor did not transfer automobile with intent to hinder or delay creditors where Debtor's home needed new roof and Debtor had been advised that homeowners insurance would be cancelled unless repairs were completed. Debtor sold automobile and used proceeds to pay roofing contractor. Debtor disclosed sale of automobile in schedules and Debtor's decision to liquidate Debtor's only asset of sufficient value to pay for repairs did not evidence requisite intent.

(4238) *Retz v. Samson,* 606 F.3d 1189 (9th Cir. BAP 2010) – Party seeking denial of discharge under § 727(a)(2) must prove (1) a disposition of property, such as transfer or concealment, and (2) a subjective intent on the Debtor's part to hinder, delay or defraud a creditor through the act [of] disposing of the property. Debtor's intent need not be fraudulent to meet the requirements of § 727(a)(2) – discharge will be denied if the Debtor indented to hinder or delay a creditor. Factors include (1) a close relationship between the transferor and the transferee; (2) that the transfer was in anticipation of a pending suit; (3) that the transferor Debtor was insolvent or in poor financial condition at the time; (4) that all or substantially all of the Debtor's property was transferred; (5) that the transfer so completely depleted the Debtor's assets that the creditor has been hindered or delayed in recovering any part of the judgment; and (6) that the Debtor received inadequate consideration for the transfer. Complicated scheme whereby Debtor transferred house to Debtor's brother valued at $220,000 for a price of $160,000 where the purchase agreement was signed within one year preceding the commencement of the case, Debtor was in poor financial condition and Debtor was involved in State Court litigation at the time of the sale. Sale had been approved by State Court presiding over litigation, but State Court had not been advised that the purchaser was Debtor's brother or that the price paid was $60,000 less than appraised value.

(4239) *Retz v. Samson,* 606 F.3d 1189 (9th Cir. BAP 2010) – Discharge can be denied under Section 727(a)(2)B) where the Debtor transfers or conceals property of the estate after the date of filing the petition. Debtor held a 6% interest in a family corporation. After Debtor filed for bankruptcy, the corporation sold all of its assets to Debtor's mother in exchange for a promissory note payable over 30 years. Court denied discharge where it appeared that at least one of the purposes of the transfer was to insulate the property from Debtor's creditors and Debtor participated in the transaction without disclosing the proposed transaction to the Trustee who, as a result of the petition, held the 6% ownership stake.

(4240) *Coady v. D.A.N. Joint Venture III, L.P.,* 588 F.3d 1312 (11th Cir. 2009) – To successfully object to a discharge under § 727(a)(2)(A), a creditor must establish (1) that the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the Debtor, and (4) that the act consisted of transferring, removing, destroying, or concealing any of the Debtor's property. Debtor who worked for company wholly owned by Debtor's spouse without compensation wrongfully diverted the fruits of his labor to increase the value of his wife's businesses and then used business assets to support his personal lifestyle. Debtor was the sole person actually and actively involved in the business and it success depended solely on his continued efforts. Debtor devoted time and talents to increasing the business value, but whatever increase in equity came about through his labor that value would be protected from his creditors, while being available for his benefit or to fulfill his legal obligations of support for his family. Debtor used business accounts for personal purposes as well as providing support for wife in lieu of regular compensation for his services. Through this arrangement, Debtor acquired and concealed an equitable interest in his wife's business. This equitable interest would have become property of the estate under Section 541. Section 727(a)(2) requires either a transfer or a concealment of assets. Debtor's failure to schedule the equitable interest constituted "concealment". Although concealment began many years prior to the bankruptcy petition, Section 727(a)(2) would apply to "continuing concealment" where Debtor keeps assets out of creditor's reach for more than one year before petition was filed, in order to prevent Debtor from receiving benefit of wrongful conduct.

(4241) *Montedonico v. Beckham*, 2009 WL 1726526 (6th Cir. BAP 2009) – Discharge denied under Section 727(a)(2) and (a)(4). Schedules and Statement of Financial Affairs failed to list income of $47,000 received in the 7 months prior to the filing of the petition; gambling losses in excess of $16,000 in the year prior to the filing; additional checks to or withdrawals from ATMs located at various casinos in Mississippi in excess of $37,000 during the year prior to the filing; failure to list any antiques even though Debtor spent over $3600 at antique stores in the year prior to the filing and over $800 in the 45 days prior to the filing; failed to disclose Debtor's ownership interest in real estate located in Oklahoma or any leases related to that property or any income derived from that property, although her tax returns listed rental income for the prior calendar year; failed to disclose a pending EEOC claim against her former employer; Debtor's status as executrix and beneficiary of the estate of Debtor's deceased mother and receipt of rental income from property included in her mother's estate; property allegedly held by other people located at Debtor's residence; Debtor's ownership interest in a Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower; the post-petition sale of the Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower for $12,000, with the proceeds routed through Debtor's daughter and two of Debtor's neighbors so the proceeds could not be tracked. Debtor compounded her non-disclosure by willfully failing and refusing to cooperate in discovery in the adversary proceeding. Court concluded that Debtor clearly, repeatedly and knowingly concealed assets and misrepresented her financial situation in her bankruptcy case through multiple material omissions and misrepresentations justifying denial of discharge under Section 727(a)(2)(A) and (B). Further, Debtor's false statement about Debtor's income, gambling losses, and interests Debtor held in real and personal property justified denial of discharge under Section 727(a)(4)(A). "The bankruptcy Court found it incredulous that the Debtor did not know the statements to be false and simply forgot that she received income of $197,000 in the year preceding the bankruptcy, or that she spent nearly $800 in antiques stores in the 45 days immediately preceding the filing of her case."

(4242) *Morgan v. Mankins,* 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(2) must be premised on conduct that occurred either within one year of the date that the Debtor filed his bankruptcy petition, or while the Debtor's bankruptcy case was pending. Debtor's alleged actions in March, 2007, would not support 727(a)(2) action for bankruptcy filed November, 2008.

(4243) *D.A.N Joint Venture, III, L.P. v. Shekerjian,* Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) – To deny discharge under section 727(a)(2)(A), plaintiff must prove that better disposed of or concealed property and that Debtor had a "subjective intent" to hinder, delay or defraud creditors. Section 727(a)(2)(B) requires proof that Debtor transferred, removed, destroyed, mutilated or concealed property of bankruptcy

estate with actual intent to hinder, delay or defraud creditors or an officer of the state and where the transfer, removal, destruction, mutilation or concealment occurred after the petition date. Plaintiff's complaint that alleged that Debtor failed to disclose ownership interest in at least two corporations, at least one of which was formed by the Debtor after the commencement of Debtor's Chapter 11 case but before conversion to Chapter 7 and that Debtor failed to disclose income received from those corporations stated claims under section 727(a)(2)(A) and (B).

(4244) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Debtor's intent to hinder, delay or defraud can be based on circumstantial evidence or inferred from Debtor's conduct. Even one wrongful act can be sufficient, although continuing pattern is stronger indication of wrongful intent. Debtor's contract with Plaintiff required Debtor to collect sums from Plaintiff and use those to pay obligations to third party vendor on Plaintiff's behalf. Debtor's actions in transferring, disposing of or concealing up to $1.8 million and then concealing that by refusing to provide accounting notwithstanding State Court Order to do so; refusing to disclose disposition of funds under oath; and refusing to provide written answers to discovery in adversary proceeding constituted violations of Section 727(a)(2) compelling denial of discharge.

9.31 Section 727(a)(3) - Destroy or fail to keep records

(4245) *Ryan v. Morris,* 2018 WL 1940382 (Bankr. WD. Ky. 2018) – Court may deny discharge where debtor conceals, destroys, mutilates, falsifies or fails to keep or preserve recorded information including books, documents, records and papers from which debtor's financial condition or business transaction might be ascertained, unless such act or failure to act was justified under all of circumstances of case. Plaintiff must make *prime facie* showing that debtor failed to maintain adequate records. Debtor can justify by showing extenuating circumstances or where failure to keep and preserve records was justified and objectively reasonable, based on reasonably prudent person in the same or similar circumstances. Debtor-wife did not maintain any books or records of business transactions. Debtor-wife asserted that Debtor-husband operated business and she relied on husband to maintain records. Debtor-wife's actions relying on husband to maintain business records not objectively reasonable. Debtor was involved in husband's business; Debtor initiated legal proceeding to have her name changed for the express purpose setting up a trust through which over fifty real estate transactions were performed with Debtor signing documents as the Trustee; Debtor was not innocent bystander who only benefitted indirectly and instead was active participant in these actions. Transactions directly benefitted Debtor as transactions were sole source of income to household; all proceeds of transactions were deposited into household accounts and used by Debtor to purchase goods and services for family; and some of properties involved were titled in name of Debtor's Trust in which Debtor was trustee. Debtor's failure to maintain any records or to inquire reasons for her involvement in transactions were not those of reasonably prudent person in the same or similar circumstances, and debtor's active participation on her part that supported denial of discharge.

(4246) *Campbell v. Butz,* 2018 WL 314871 (Bankr. W.D. Ky. 2018) – Court may deny discharge where debtor conceals, destroys, mutilates, falsifies or fails to keep or preserve recorded information including books, documents, records and papers from which debtor's financial condition or business transaction might be ascertained, unless such act or failure to act was justified under all of circumstances of case. Code requires debtors to provide creditors with enough information to ascertain debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period past to present. Plaintiffs must prove either (1) that Debtors failed to keep or preserve recorded information; or (2) Debtors, or someone acting for the Debtors, committed act of destruction, mutilation, falsification or concealment. Once this is shown, burden shifts to debtors to justify the lack of records. In response to Rule 2004 exam, Debtors did not produce tax returns, corporate tax returns, bank statements, bank records, or check ledgers. Although Plaintiff was able to locate some document through subpoenas to third parties, that does not excuse Debtor's lack of production. Debtors were both well educated, sophisticated business people. Failure to produce basic business documents shows either utter disregard for complexities of venture they undertook using hundreds of thousands of dollars of their relatives' money or purposeful deceit. Plaintiffs established that Debtors did not adequately preserve or maintain adequate records in order to ascertain the Debtors' financial condition with substantial completeness.

(4247) *DeWine v. Dudley,* 2017 WL 8772047 (Bankr. S.D. Ohio 2017) - Court may deny discharge where debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information from which debtor's financial condition or business transaction might be ascertained unless Debtor was justified under circumstances of case. Code requires debtors to provide creditors with enough information to ascertain debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period. Sufficiency of records is evaluated on case by case basis and what is reasonable under circumstances considers debtor's occupation, financial structure, education, experience, sophistication, and any other circumstances that should be considered in interest of justice. Objecting party must offer evidence of general nature of Debtor's business or personal financial position and types of transactions about which recorded information is sought; present evidence identifying recorded information that has been concealed, destroyed, mutilated, falsified or not kept or preserved by Defendant; and show how missing recorded information might enable Debtor's actual financial condition or business transactions to be ascertained. Once the inadequacy of records has been established, burden shifts to debtor to show that failure to maintain adequate records was justified under circumstances. Debtor was Designated Fiscal Office for Ohio public school system charged by Sate following audit of school records of (1) transactions that were insufficiently documented; (2) transfers of public funds pursuant to contracts that violated state law; and (3) payments of illegal bonuses and stipends; aggregating well over $1 million. State produced evidence that Debtor did not keep or preserve recorded information of numerous transactions from which legitimacy of transactions can be ascertained, and that failure resulted in personal liability to Debtor. Record contains substantial evidence of Debtor's activities as DFO and very precise and detailed evidence identifying records that were not kept or preserved by Debtor. Missing documentation, however, is not of type from which debtor's financial condition or business transactions might be ascertained as missing records are associated with financial transactions of community schools themselves, with no connection to Debtor's personal financial condition or business transactions. Debtor may have signed checks or authorized transfers, but transactions in question were not transfers of Debtor's personal funds and did not have any direct effect on his financial condition. Missing records may indicate whether expenditure was approved by board and used for a public purpose; but they not help Debtor's creditors better understand financial circumstances, or help locate missing or undisclosed assets, or help trace the flow of funds through Debtor's accounts, or otherwise provide insight into Debtor's financial condition. Court would not deny discharge

under Section 727(a)(3) absent link between missing records and Debtor's personal financial condition.

(4248) *Ryan v. Morris,* 2017 WL 6512215 (Bankr. W.D. Ky. 2017) – Court may deny discharge where debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information from which debtor's financial condition or business transaction might be ascertained unless Debtor was justified under circumstances of case. Code requires debtors to provide creditors with enough information to ascertain debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period. Once this is shown, the burden shifts to debtors to justify the lack of records. Although Debtor was a real estate broker, Debtors' Petition listed only 4 parcels of property as being owned in prior 2 years, when Debtors had actually held title to at least 87 parcels. Documents produced by Debtors response to discovery requests did not include any records of non-disclosed properties. Debtors also claimed that certain properties were owned by Trust in Wife's name but could not produce any records of Trust. Debtor's explanation that he kept records in his car (he had no office) or is barn, and that he periodically threw away records and that his pigs had destroyed other records strained credulity. Although Husband was broker primarily responsible for maintaining records, Wife was not innocent party as she was Trustee of Trust and had her name legally changed from married name to maiden name so she could sign Trust documents under to conceal transactions done under wife's maiden name. Bank accounts were joint accounts with Debtor and Wife and Wife used funds for personal expenses. Wife also owed creditors duty to preserve records and failure to do so warranted denial of discharge for both Husband and Wife.

(4249) *Nadeau v. Fraser,* 2017 WL 5064155 (Bankr. N.D. Ohio 2017) – Section 727(a)(3) allows Court to deny discharge where Debtor conceals, destroys, mutilates, falsifies, or does not keep or preserve recorded information from which Debtor's financial condition or business transactions may be ascertained unless the Debtor's actions were justified under circumstances. Purpose is to give Court and creditors complete and accurate information concerning Debtor's affairs and to test accuracy of disclosures in bankruptcy, as well as to provide creditors with dependable information to be used to trace Debtor's financial history. Plaintiff must (1) offer evidence of general nature of Debtor's business or personal financial position and types of recorded information sought; (2) identify recorded information allegedly concealed, destroyed, mutilated, falsified or not kept; and (3) show how missing information might enable Debtor's actual financial condition to be ascertained. Plaintiff did not demonstrate the Debtor did not keep records where transactions complained of, involving alleged sales of music recorded by Debtor, were conducted by third party that third party had licensed from plaintiff. Any recordkeeping regarding sales would have been done by third party and Plaintiff. Debtor had no rights in songs and no rights under license agreements and so no reason to keep any records relating to sales of records. Although Debtor was also offering directly for sale a prior recording, there was no evidence that Debtor ever sold any records and so no basis to determine the Debtor could or should have maintained records and books relating to sales.

(4250) *Dewine v. Scott,* 2017 WL 1164904 (Bankr. N.D. Ohio 2017) – Section 727(a)(3) allows Court to deny Debtor a discharge where Debtor has failed to keep or preserve recorded information, books, documents, records or papers from which financial condition or business transactions might be ascertained unless failure to maintain documents was justified under circumstances. Debtor must produce sufficient records so that creditors are not required to risk concealment of assets under guise of chaotic or incomplete records. Plaintiff must 1st show that Debtor failed to keep adequate records, at which point purchased 2 Debtor to explain why failure is justified. Adequacy of records is case-by-case determination but generally requires Debtor to provide creditors with enough information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for a reasonable period of time. Courts will consider Debtor's sophistication, education, business experience, financial structure and occupation and measure adequacy of books and records against type which would be maintained by reasonably prudent Debtor was same occupation, financial structure, education and experience. Debtor was educated businessman holding a PhD who founded 2 different community schools and owned an educational service company that received substantial payments from the schools. Debtor also served as principal of both schools and exercise control over bank accounts that received operating funds for schools. Debtor illegally expended school funds in excess of $1 million and failed to produce any records at all related to his work or dealings with state agencies or provide any information whether there was any applicable bond or insurance coverage when asked to do so by state. Evidence met burden of going forward to demonstrate that Debtor had failed to maintain records, shifting burden to Debtor to explain failure. Debtor failure to provide any explanation for why failure would be justified under circumstances, warranting denial of discharge under Section 727(a)(3).

(4251) *Stein v. Stubbs,* Case No. 1678025 (6th Cir. BAP 2017) - Section 727(a)(3) and (6) allow court to revoke discharge where Debtor fails and refuses to abide by lawful order. Trustee's Complaint to revoke discharge stated cause of action where complaint alleged that Debtor was served with order requiring Debtor to appear for a 2004 examination and to produce documents that Debtor failed to appear or respond in any way. Order was clear and definite and required production of specific documents and appearance at specific place and time. There is no requirement that Debtor's conduct be willful with the Debtor intended not to comply with Court Order. Plaintiff is required only to show that Debtor had knowledge of word which is said to have been violated; that Debtor did in fact violate order; and that order was clear, specific and definite. Debtor's refusal to comply with order setting rule 2004 examination, which is reasonable and usual method to compel chapter 7 Debtor to provide information, constituted sufficient basis to revoke discharge required reversal of Bankruptcy Court's dismissal of adversary proceeding.

(4252) *Gaft v. Sheidler,* 2016 WL 1221656 (6th Cir. BAP 2016) – In order to sustain an objection to discharge under § 727(a)(3), the evidence must show that:(1) either that the Debtor failed to keep or preserve any recorded information, including books, documents, records and papers, or that the Debtor or someone acting for him destroyed, mutilated, falsified, or concealed any recorded information including books, documents, records and papers; and (2) that as a result, it is impossible to ascertain the financial condition and material business transactions of the Debtor.

(4253) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Plaintiff must show that Debtor failed to keep adequate records. Records need not be perfect or complete as long as records provide plaintiff with enough information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period of time. Court an consider Debtor's education, sophistication, and other relevant factors. If Plaintiff establishes prima facie case, burden shifts to Debtor to explain why failure to keep

records is reasonable under the circumstances. Debtor's testimony coupled with general ledger sheets and bank statements showed how Debtor spent funds invested by creditor. The party seeking denial of a discharge has the burden of proving the inadequacy of the Debtor's records. However, once a Debtor's records are determined to be inadequate, the burden is on the Debtor to establish any justification therefor. Creditor failed to produce any evidence of any failure to preserve or keep records and failed to ask any questions or introduce any exhibits at trial.

(4254) *Apartments at Cambridge Company, LLC v. Lewiston,* 2015 WL 5443713 (Bankr. E.D. Mi. 2015) – Action to deny discharge under Section 727(a)(3) requires proof that (1) either that the Debtor failed to keep or preserve any recorded information, including books, documents, records and papers, or that the Debtor or someone acting for him destroyed, mutilated, falsified, or concealed any recorded information including books, documents, records and papers; and (2) that as a result, it is impossible to ascertain the financial condition and material business transactions of the Debtor. The party seeking denial of a discharge has the burden of proving the inadequacy of the Debtor's records. Once a Debtor's records are determined to be inadequate, the burden is on the Debtor to establish any justification therefore. Plaintiff failed to prove that Debtor failed to keep records. Debtor produced more than four years bank statements, tax returns and financial records. While certain entries in the financial records may have been unclear, there was no evidence that Plaintiff or Trustee ever asked Debtor for more information or that Debtor refused to provide additional information. Debtor's objections to discovery requests in adversary proceeding do not amount to concealment of records where Plaintiff never requested court to rule on objections or to compel production of information. Plaintiff also failed to show how lack of records prevented parties from gaining understanding of Debtor's business transactions and Chapter 7 Trustee conceded that he had not been prevented or impeded in efforts to administer estate. At trial, plaintiff produced "mountains of records" in effort to prove that Debtor omitted assets from schedules, which further indicates that Debtor did not conceal records or prevent plaintiff or the trustee from understanding Debtor's financial condition.

(4255) *Smith v. Morse,* 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Court can deny discharge where Debtor fails to maintain, conceals, mutilates, falsifies or destroys records unless the failure to maintain was reasonable under circumstances. Plaintiff must first establish prima facie case that Debtor failed to keep adequate records. Records need not be perfect or even complete as long as records provide plaintiff with enough information to ascertain Debtor's financial condition and track financial dealings with substantial accuracy for reasonable period, taking into account Debtor's business experience, sophistication or any other relevant factor. Once plaintiff meets this burden, Debtor must then demonstrate that failure to keep records was justified. Debtor's failure to maintain records in any semblance of order prevented summary judgment. Debtor was sophisticated businessman but failed to keep any records that allocated income or expenses between projects and just threw invoices into a box with no organization or structure. Debtor produced over 1,200 pages of records but in no organized fashion that would be helpful to determine how Debtor used money invested by plaintiff and Debtor was unable to explain how he spent the money.

(4256) *Crocker v. Stiff,* 2014 WL 4966316 (Bankr. E.D. Ky. 2014) – Purpose of Section 727(a)(3) is to remove risk that Debtor is concealing or withholding assets belonging to Debtor. Cash withdrawals from Debtor's personal and business accounts were adequately explained where funds were withdrawn over extended period of time were not within scope of Section 727(a)(3) where Debtor fully and credibly explained that he spend the cash on living expenses, vacations, jewelry and gambling, as well as payment of business expenses. Debtor was able to present adequate records dating back three years which was reasonably given the nature of the expenditures.

(4257) *Crocker v. Stiff,* 2014 WL 3513219 (Bankr. E.D. Ky. 2014) – Section 727(a)(3) requires party objecting to discharge to prove that Debtor failed to keep records, and that records are of the kind described in Section 727(a)(3) and are material to the Debtors financial affairs. At that point, burden shifts to Debtor to satisfactorily explain loss or inadequacy of records. Fact that records predate filing of case by more than two years does not, as a matter of law, preclude action under 727(a)(3). There is no "per se reasonableness" regarding failure to keep records for more than two years or that records more than two years old are irrelevant to Debtor's financial condition or business transactions. Whether it is reasonable for a Debtor to keep records that are more than two years old may be valid response based on Debtor's recordkeeping practices on a case by case basis. Record was insufficient to allow court to determine reasonableness on Debtor's motion for summary judgment where record contained no indication regarding complexity of Debtor's business or Debtor's sophistication.

(4258) *Hussein v. Malik,* Case No. 13-1465 (9th Cir. BAP 2014) – Section 727(a)(3) does not require absolute completeness but only that Debtor maintain records sufficient to determine Debtor's true state of financial affairs and allow creditors and the court to reasonably ascertain present financial condition and to follow business transactions for reasonable period prior to commencement of case. Creditor must demonstrate prima facie case that Debtor failed to maintain adequate records and that failure left it impossible to determine Debtor's financial condition. Burden then shifts to Debtor to justify lack of records. Debtor did not present adequate records where only records turned over were personal tax returns, although for at least 4 years Debtor owned and operated gas stating that maintained separate records. Debtor did not produce any revenue logs, account statements or credit card statements pertaining to inventory purchases. Debtor's explanation that he delivered all documents to his accountant was not sufficient to excuse production where Debtor failed to indicate what documents he had delivered to accountant. Where a business is involved, simply producing a bottom line number for income and expenses is not sufficient, particularly where business is "cash intensive".

(4259) *Schuchardt v. Gandy,* 2014 WL 1374050 (Bankr. E.D. Tn. 2014) – Court can deny discharge where Debtor fails to produce documentation with enough information to ascertain financial condition and track financial dealings with substantial accuracy for reasonable period past to present. While records do not have to be perfect or even necessarily complete, they must contain sufficient information concerning financial history and financial affairs to allow trustee and creditors to gain full and accurate financial picture. Factors include (1) whether the Debtor was engaged in business, and if so, the complexity and volume of the business; (2) the amount of the Debtor's obligations; (3) whether the Debtor's failure to keep or preserve books and records was due to the Debtor's fault; (4) the Debtor's education, business experience and sophistication; (5) the customary business practices for record keeping in the Debtor's type of business; (6) the degree of accuracy disclosed by the Debtor's existing books and records; (7) the extent of any egregious conduct on the Debtor's part; and (8) the Debtor's courtroom demeanor. Creditor did not meet burden of proof where transactions were more than three years old which was not reasonable time period under facts of case. Documents provided were sufficient to allow creditors to object to discharge based on misrepresentations in Means Test,

Schedules and SOFA which constitutes sufficient information to determine Debtor's financial condition.

(4260) *Smith v. Morse,* 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Plaintiff must establish prima facie case that Debtor failed to keep records with enough information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period of time. Debtor is not required to produce perfect or even necessarily complete records, and should take into account Debtor's education, business experience, sophistication and any other relevant factor. Once plaintiff makes prima facie case, Debtor must explain why failure to keep records, under circumstances of case, is justified, and court must evaluate reasonableness of explanation given Debtor's sophistication and materiality of the records themselves. Although Debtor received $100,000 loan from creditor for specific business purpose, Debtor did not use the loan for that purpose and was not able to explain where the money went, and failed to explain large cashier's checks including $30,000 check to Debtor himself; and was unable to explain multiple transfers between Debtor and wholly owned corporation or another LLC in which Debtor was a member. Debtor offered no explanation for lack of records regarding funds invested by creditor, or transactions between Debtor and related entities.

(4261) *Lunn Real Estate Investments, LLC v. Ward,* 2013 WL 5429767 (Bankr. E.D. Tn. 2012) – Section 727(a)(3) requires Debtor to produce documentation with enough information to ascertain financial condition and track financial dealings with substantial accuracy for a reasonable period. Records need not be perfect or even necessarily complete, as long as records provide trustee and creditors with enough information to understand past and current financial affairs. Plaintiff bears initial burden to show that Debtor failed to maintain adequate books and records rendering it impossible to determine true financial condition. Burden then shifts to Debtor to prove that failure to maintain records was justified under specific circumstances of case. Intent is not element of action and court will determine adequacy of books and records on case by case basis. Adequacy of records should be measured against type of records kept by reasonably prudent Debtor with same occupation, financial structure, education and experience, considering 1) whether the Debtor was engaged in business, and if so, the complexity and volume of the business; (2) the amount of the Debtor's obligations; (3) whether the Debtor's failure to keep or preserve books and records was due to the Debtor's fault; (4) the Debtor's education, business experience and sophistication; (5) the customary business practices for record keeping in the Debtor's type of business; (6) the degree of accuracy disclosed by the Debtor's existing books and records; (7) the extent of any egregious conduct on the Debtor's part; and (8) the Debtor's courtroom demeanor. Although Debtor produced some records, Debtor did not produce bank statements, cancelled checks, or other documents to explain large deposits to and withdrawals from bank accounts. Debtor's explanation that his wife was primarily responsible for household finances and record keeping was not sufficient where Debtor was sophisticated businessman yet could not provide any documents regarding bank records or bank transactions.

(4262) *Adamovic v. Lazarevic,* 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Section 727(a)(3) requires Debtor to produce sufficient books and records to allow a party to ascertain the Debtor's financial condition and track financial dealings with substantial completeness for a reasonable period of time. In considering the adequacy of the records, court should consider Debtor's education, business experience, sophistication, and other relevant factors. Debtor had a high school education and, while Debtor lacked any formal business or real estate education, Debtor was engaged in extensive real estate transactions involving hundreds of thousands of dollars. Debtor used a CPA to assist in compiling and file taxes and employed multiple title companies because of volume of transactions. Debtor used cash for many of the transactions, yet Debtor did not maintain any records to account for these transactions or for cash spent to improve Debtor's residence or the six other homes Debtor bought and sold in 2007. Debtor's records also had a problem with accuracy, evidenced by loan applications that contained gross errors with respect to income; and failure to include at least one real estate transaction on tax returns. However, as to specific assets and transactions of which creditor complained, Debtor was able to produce sufficient records to account for disposition of assets and the use of the proceeds. While Debtor's records may have been suspect in other areas, these areas were not alleged by creditors as a basis to deny discharge.

(4263) *In re Boyajian,* 486 R 306 (Bankr. D.N.J. 2013) – Creditor objecting to the discharge must show (1) that the Debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the Debtor's financial condition and material business transactions." justification for inadequate documentation would include consideration of the following: (1) Debtor's education; (2) Debtor's sophistication; (3) volume of Debtor's business; (4) complexity of Debtor's business; (5) amount of credit extended to Debtor in his business; (6) any other circumstances that should be noted in the interest of justice. Denial of discharge does not require any intent to conceal financial condition – mere failure to maintain appropriate records is sufficient. Debtor held degrees in Finance from University of Pennsylvania and law degree from Rutgers University and operated at least 22 entities including two law firms and was long standing and sophisticated businessman. Debtor's records were inadequate where the records were in very poor or were indistinguishable or virtually worthless. Debtor's failure to produce records for more than 2 years warranted denial of discharge where records were utterly inadequate to account for more than $35 million in development project funding, more than $4 million in income received by a wholly owned entity, over $1 million in financing for Debtor's home, or enough net income to have paid for Debtor's acquisitions dating back 5 years prior to commencement of case.

(4264) *Sheehan & Assoc., PLLC v. Lowe,* 2012 WL 3076251 (E.D. Mi. 2012), *aff'd* 2013 WL 1188987 (6th Cir. 2013) – Sixth Circuit requires Debtor to provide creditors with enough information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period past to present. Creditor bears initial burden to prove inadequacy of Debtor's records, and Debtor then bears burden to prove that failure to keep records was justified under circumstances. Debtor failed to maintain any records of money allegedly borrowed from Debtor's parents to pay legal fees, without which creditors could not determine the total loan amount of how much may have been repaid, although total borrowed exceeded $100,000.00. Fact that Debtor allegedly produced voluminous source materials that a creditor could sort through and find information was not sufficient to meet Debtor's duties. Debtor must provide the information. Burden is not on creditor to investigate and acquire necessary records. Debtor could not show that producing information was "impossible" as records involve loans from parents. That information may be difficult to obtain or that creditor may have the ability to find information elsewhere did not excuse Debtor's obligation to account for loans from parents or payments to parents. Debtor did not demonstrate that failure to maintain records was due to some lack of education or training where missing documents were not sophisticated

business records but were records loans from parents and Debtor failed to maintain any records at all.

(4265) *McDermott v. Swanson,* Case No. 12-6028 (8th Cir. BAP 2012) – Denial of discharge requires proof that Debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve recorded information unless the act or failure to act was justified under the circumstances. Once the party objecting to the discharge shows that records are inadequate, burden shifts to Debtor to offer justification. However, ultimate burden of proof remains on the objecting party. Plaintiff's naked allegation that Debtor failed to keep and maintain records, without more, was not sufficient to meet initial burden. Therefore, Debtor's failure to offer evidence of justification would not support denial of discharge.

(4266) *Lim v. Storozhenko,* Case No. 11-6552 (Bankr. E.D. Mi. 2012) – Court will deny discharge where Debtor either failed to keep or preserve recorded information and books, or that someone acting for the Debtor destroyed, falsified or concealed records; as a result of which it is impossible to ascertain financial condition and material business. Although Debtor settled personal injury action only three months prior to commencement of case, Debtor failed to produce any records regarding how she allegedly spent the proceeds or, in fact, whether she actually spent it or still has it in her control. Although Debtor allegedly sent more than $33,000 to her mother in Russia in the two months pre-petition, Debtor had no records and no receipts for any of those transfers.

(4267) *U.S. Trustee v. Welling,* 2012 WL 1965664 (Bankr. N.D. Ohio 2012) – Section 727(a)(3) requires proof that Debtor failed to keep or preserve adequate records and that the failure makes it impossible to ascertain Debtor's financial condition. Once plaintiff presents evidence on these two issues, burden shift to Debtor to demonstrate justification for lack of records. Debtor is not required to maintain impeccable system of bookkeeping, but must be sufficient to allow one to review financial condition of Debtor and his business transactions for a reasonable period of time. Debtor must run over records in Debtor's possession plus records in possession of third parties from whom Debtor could obtain those records. Types of records that must be preserved are those of a type kept by a reasonably prudent Debtor with the same occupation, financial structure, education and experience as Debtor, based on (1) volume of Debtor's business; (2) amount of Debtor's debts and obligations; (3) whether failure to keep books and records was fault of Debtor; (4) Debtor's education, experience and sophistication; (5) customary practices for record keeping in Debtor's type of business; (6) degree of accuracy in existing books and records; (7) extent of any egregious conduct of Debtor; and (8) Debtor's courtroom demeanor. Evidence indicated that Debtor's bookkeeper maintained significant records that were not turned over to the UST until after litigation commenced, and that records that were turned over were incomplete, fulfilling UST's burden of proof. Bank statements produced by Debtor had significant gaps and omitted records of accounts being used for Debtor's business entirely. Debtor used bank accounts in the names of third parties to avoid garnishments, but failed to produce any records for those accounts. Debtor produced tax returns which differed materially from the returns actually filed with the IRS. Debtor's business was small, and Debtor left financial issues to bookkeeper who managed all financial aspects and maintained 100% of the financial records of Debtor's business. Justification for failure to produce documents requires an objective standard. Debtor's honest belief that the records did not need to be kept is not sufficient justification. Debtor's failure was justified under circumstances, where it appeared that the bookkeeper was refusing to cooperate with Debtor and refusing to provide books and records notwithstanding requests by Debtor, where bookkeeper (as co-obligor on business debts) would benefit from denial of Debtor's discharge. Debtor failed to produce records not because he did not want to, but because of continued "stonewalling" by bookkeeper. Debtor was as cooperative as possible with Chapter 7 trustee, producing numerous records that Debtor did have including police reports on stolen property, all records for four years on transactions with one particular company, information on vehicles, and authorized Chapter 7 Trustee to speak directly to IRS in connection with an ongoing federal tax audit. Failure to produce records was not fault of Debtor, but was entirely caused by bookkeeper, establishing justification for Debtor's failure to comply.

(4268) *U.S. Trustee v. Zhang,* 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Discharge denied where Debtor failed to maintain any personal or business records from which financial condition could be determined, Although Debtor had complex series of corporations and was sophisticated businessman, Debtor could not produce even minimal records of either corporate or personal financial dealings. Debtor's explanation that business records had been seized by another governmental agency was not sufficient as Debtor also testified that records were in car that had been stolen. Also, even if corporate records were not available, Debtor also failed to produce any personal records even from immediately prior to commencement of bankruptcy case. Without records, it was impossible to determine Debtor's true financial status.

(4269) *Cornwell Quality Tools Company v. Paavo,* Case No. 11-10831 (E.D. Mi. 2011) – Debtor did not fail to maintain records where records were maintained on computer that later crashed. Debtor's destruction of hard drive from computer that crashed was not unreasonable where hard drive contained personal information on customers including credit card numbers and social security numbers. Debtor did not destroy any paper backup records that contained accounting or business information or which were necessary for legal purposes or federal and state tax records.

(4270) *General Electric Capital Corp. v. Wickard,* 2011 WL 3348094 (Bankr. W.D. Mi. 2011) – To receive discharge, Debtor must produce records that provide enough information to allow creditors to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period. Although Debtor produces large volume of documents, the documents were deficient in material ways including transfers of assets to and between insider-companies; promissory notes held by Debtor; and other actions of Debtor designed to place assets beyond reach of creditors after judgment had been entered by State Court. Information that was provided appeared unreliable and inaccurate in material respects and failed to provide sufficient information to explain other items. Debtor was sophisticated businessman holding degree in accounting and was familiar with accounting practices, balance sheets and other financial statements. "Profound gaps" in records warranted denial of discharge.

(4271) *Barbacci v. Ungar,* 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – Delay in producing records will not support denial of discharge under Section 727(a)(3) where records were ultimately produced. Delay in production is not the same as concealment.

(4272) *Stephens v. Morrison,* 2011 WL 2144577 (Bankr. W.D. Tn. 2011) – Section 727(a)(3), does not require perfect, or even necessarily complete, records. Debtor must provide enough information to ascertain the Debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present. Objecting party must demonstrate that Debtor failed to

maintain and preserve adequate records leaving it impossible to ascertain his financial condition and material business transactions. Court can consider the Debtor's education, business experience, sophistication, or any other relevant factor. Debtor would not be denied discharge where Debtor produced bank statements for his business account that show every transaction into and out of those accounts for the covered months and Debtor provided copies of the receipts for materials he alleges he used .failed to produce several records. First, although he transferred money back and forth between the 2625 Account, the 6163 Account and his savings account at First Bank, Morrison failed to produce copies of the bank statements for the 6163 Account and the savings account for the entire June 2006 through February 2008 time period. Plaintiff did not present any evidence to the Court that Debtor failed to comply with the standard for record keeping for independent home improvement contractors similar in size to Debtor's business.

(4273) *Settembre v. Fidelity & Guarantee Life Insurance Co.,* 2011 WL 1750295 (W.D. Ky. 2011) – Debtor's record must not be (a) chaotic or incomplete, (b) in such a condition that a creditor is required to speculate as to the financial history or condition of the Debtor, or (c) in such a condition that a creditor is compelled to organize and reconstruct the Debtor's business affairs. Records must be such that a third party such as a trustee or creditor could determine from those records what was happening in the Debtor's business which is an objective standard. A sophisticated Debtor is generally held to a higher level of accountability in record keeping, and the more complex the Debtor's financial situation, the more numerous and detailed the Debtor's financial records should be. Debtor was college-educated and worked in the insurance industry for over thirty years, during the majority of his career in managerial-level positions. He was 50% owner of his company and held the position of chairman and president/CEO. Debtor and his company borrowed $500,000 from Life Event Advantage Division of Life Insurance Company of the Southwest; $200,000 from Fidelity & Guaranty Life Insurance Company; $800,000 from Reliastar; $200,000 from the Hartford; and $1,000,000 from National City Bank, all over a 3–year time period. Debtor maintained only one bank account in the business name which he used for both business and personal expenses; he kept no ledgers; sources of many deposits could not be identified; many checks were made out to Debtor personally with no notation as to how the money was spent; various wire transfers contained no notation concerning the purpose for the transfer of funds; Debtor produced no records concerning his brokerage account and produced some but not all tax returns for the years 2000 through 2005, mostly unsigned and unsupported by documentation. Debtor's financial records were not sufficient to allow creditors or the Trustee to gain an accurate understanding of Debtor's financial affairs, warranting denial of the discharge.

(4274) *Michael v. Michael,* 2010 WL 2942625 (Bankr. N.D. Ohio 2010) – In order to sustain an action to deny a Debtor's discharge under Section 727(a)(3), one of two conditions must be first shown to exist: (1) the Debtor failed to keep or preserve any recorded information, including books, documents, records, and papers; or (2) the Debtor, or someone acting for the Debtor, committed an act of destruction, mutilation, falsification, or concealment of any recorded information, including books, documents, records, and papers. After the party objecting to discharge has shown that either or both of the initial conditions to sustain an action under Section 727(a)(3) are met, the objecting party must then go on to show that the lack of financial records makes it impossible to ascertain the Debtor's financial condition. Section 727(a)(3) does not impose upon a Debtor an obligation to keep and preserve financial records forever, but only imposes upon a Debtor a duty to keep and preserve financial records for a reasonable period of time, with two years having been used as a minimum point of reference. Failure to keep records or destruction of records will not defeat a discharge if the Debtor's act or failure to act was justified under all of the circumstances of the case. However, the Bankruptcy Code imposes a positive duty on a Debtor to keep and maintain books and records related to their financial affairs. Section 727(a)(3) permits denial of discharge where the failure to adequately keep and preserve business records makes it impossible to ascertain the Debtor's financial condition and the Debtor is unable to sufficiently justify the lack of records. A Debtor who owns and/or controls numerous business entities and engages in substantial financial transactions and who fails to maintain recorded information related to those entities and transactions establishes a *prima facie* case for an action to deny discharge as there is a natural inference arises that the person is attempting to obfuscate his financial dealings Discharge would be denied for sophisticated Debtor who failed to maintain any records and could not produce check registers or a simple accounting ledger of any kind regarding any of his businesses; and Debtor had not filed tax returns for many or all of the most recent tax years. Defendant's lack of intent to cause harm and lack of any wrongful intent are not relevant as Section 727(a)(3) does not require intent on the part of a Debtor to hide or conceal financial information or an intent to defraud a particular creditor or trustee. Standard for inadequacy or lack of financial records is an objective one, focusing on whether others in like circumstances would ordinarily keep financial records.

(4275) *Astro Building Supplies, Inc., v. Slavik,* 2010 WL 2772509 (E.D. MI. 2010) *aff'd* Case No. 10-2206 (6th Cir. 2011) - Section 727(a) (3) operates to deny a Debtor a discharge where the Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the Debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. As a precondition to discharge Debtors must produce records which provide creditors with enough information to ascertain the Debtor's financial condition and track his financial dealings with substantial accuracy for a reasonable period past to present to give creditors complete and accurate information concerning the status of the Debtor's affairs and financial history and to test the completeness of the disclosure requirements to a discharge. Plaintiff is not entitled to perfect, or even necessarily complete, records, but enough information to ascertain the Debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present. Plaintiff must establish a prima facie case showing the Debtor failed to keep adequate records. General allegations that Debtor failed to maintain specific records but did not detail those records or explain how those records would more accurately detail Debtor's financial condition was not sufficient to support action under Section 727. Debtor's relationship with Plaintiff was one based on open account and Plaintiff had no reasonable expectation that Debtor would maintain each and every project file showing where specific supplies were delivered or how those supplies were paid for as Plaintiff had no right to payment from any specific job or source.

(4276) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Denial of discharge appropriate where Debtor fails to provide trustee and creditors with sufficient information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for a reasonable period past to present. Debtor's refusal to produce any documents related to business or financial condition based on alleged Fifth Amendment grounds constituted basis to deny discharge.

(4277) *Kappell v. Bunch,* 2009 WL 3055338 (Bankr. E.D. Ky. 2009) – Discharge will be denied under Section 727(a)(3) where the Debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records and papers from which the Debtors' financial condition or business transactions may be ascertained, unless such act or failure to act was justified under the circumstances of the case. Debtor has duty to maintain sufficient records to allow Trustee and creditors to trace Debtor's financial history for a reasonable period, past to present. Once it is determined that a Debtor's records are inadequate, the burden is on the Debtor to establish any justification for it. Discharge would be denied where Debtors had no business records whatsoever, including bank accounts making it impossible to trace any of Debtors' business activities through their own records. Debtors' income tax records did not accurately reflect the fact that $100,000 passed through their hands on the Plaintiffs' job. Debtors' Schedules that indicated only $207 of income for 2007 were simply not credible. Debtor-Wife's testimony that she had fallen off a ladder and suffered a closed head injury that caused her to forget things was not credible. Debtors owned and operated a construction business. Debtor wife bid every job for the business including determining what materials would be used, the cost of the materials and how long the job would last. On the Plaintiffs' job, Mrs. Bunch had the bid figured in detail to the penny. Debtors also had two prior bankruptcy filings, which would have alerted them to need for accurate record keeping.

(4278) *Corcoran v. Kind,* Adv. No. 06-3231 (Bankr. E.D. Mi. 2008) - Pro Se Debtor denied a discharge where Debtor failed to keep adequate records of the Debtor's financial affairs. Trustee demonstrated by preponderance of evidence that Debtor failed to keep records of a type "kept by a reasonably prudent Debtor with the same occupation, financial structure, education and experience. ... Where Debtors are sophisticated in business, and carry on a business involving significant assets, creditors have an expectation of greater and better record keeping." Debtor failed to list her ownership interest in various limited liability companies and corporations and failed to provide documents to the trustee. Debtor "at best, failed to keep or preserve recorded information ... or, at worst, concealed this information". Debtor did not produce basic records including listing of tenants, addresses, and basic lease terms. Trustee ultimately obtained some of these documents from third parties, and some were never located at all. Debtor who was "generally knowledgeable" about business and had post-high school education could not assert reliance on accountant or attorney to escape Debtor's duty to provide records and information.

(4279) *Roberts v. Debusk,* 2009 WL 1256891 (E.D. Tn. 2009) - Section 727(a)(3) prohibits discharge if the Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the Debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. The adequacy of records is determined on a case-by-case basis, considering Debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice. Debtor's failure to produce records from Debtor's business constituted failure to produce records from which to ascertain his financial status. Debtor's claim that a computer virus had destroyed many of the records of the business did not excuse failure to produce records where Debtor was articulate and sophisticated, having started an internet marketing business in 2004. Debtor could be expected to maintain better records of his business, as well as a backup system of some sort. Debtor's failure to keep any backup whatsoever was not justified. Further, records produced were inconsistent making it impossible to reconcile financial information. Debtor's failure to produce various records and inconsistencies in those records produced do not inspire confidence as to whether Debtor's banking and credit card statements tell the full story of Debtor's financial status.

(4280) *Corcoran v. Powell,* Adv. No. 08-3100 (Bankr. E.D. Mi. 2009) - Section 727(a)(3) requires Debtor to provide enough information to ascertain the Debtor's financial condition and to track finances with substantial accuracy for a reasonable period in the past to the present. Intent is not an element of a 727(a)(3) exception to discharge. Debtor in her Schedules and Statement of Financial Affairs were wrong and failed to disclose Debtor's interest in various businesses. Debtor misstated the details of the sale of one of Debtor's businesses including amount of sale, and nature of the assets transferred was incorrect. Debtor's statements regarding the pre-petition payment to judgment creditor were incorrect, creating impression that potential preference action existed when payment was actually made by someone other than the Debtor. Debtor belatedly produced a number of documents to the Plaintiff but did not correct or amend the schedules and statement of financial affairs. Debtor failed to retrieve books and records from third parties. Trustee should not have to guess as to the nature, extent, and value of the Debtor's assets.

9.32 Section 727(a)(4)

(4281) *Krieger Craftsmen, Inc. v. Ostosh,* Case No. 16-80072 (Bankr. W.D. Mi. 2018) – Court will deny discharge under Section 727(a)(4)(A) where Debtor (one) makes statement under oath; (two) that is false; (three) that Debtor knew was false; (four) made with fraudulent intent; and (five) statement related materially to bankruptcy case. Evidence did not support allegation that Debtor misstated gross income where tax return showed higher gross income where Debtor explained that he calculated income by multiplying weekly earnings to arrive at annualized figure. While figures may have differed from gross amount shown on tax return, that did not amount to material misrepresentation. Debtor's nondisclosure of various transfers under Statement of Financial Affairs did not amount to material misrepresentation where Statement of Financial Affairs does not require disclosure of transfers in ordinary course of business or financial affairs. Payments made by Debtor to and four children and wife or in ordinary course of Debtor's financial affairs where evidence established he consistently paid educational and living expenses for children, provide spending money for wife, and paid for travel to California as well as attendance at child wedding in Hawaii. Payments were made incrementally, in cash and at request of Debtor's wife and were entirely consistent with how Debtor ordinarily conducted financial affairs. Debtor's sale snowblower, televisions, furniture and yard and likely that were not in ordinary course and should have been listed but plaintiff did not present evidence indicating that nondisclosure was intended to deceive. Other transactions were sufficiently disclosed to make creditors aware of existence of transactions and did not indicate that Debtor knowingly or fraudulently made false oath.

(4282) *Siewe v. Locci,* Case No. 17-15014 (11th Cir. 2018) – False Oath can include false testimony given under oath in connection with adversary proceeding to except debt from discharge. Creditor filed claim based on promissory note and filed complaint to except debt from discharge. Debtor defended, asserting that he owed creditor only $9000 and that signature on note was forged. Bankruptcy Court found that Debtor lied

multiple times in testifying that he did not signed note where 2 other witnesses testified at trial that they saw Debtor signed note; handwriting expert testified that signature was "probably" Debtor's; and bank records show that creditor advanced at least part of loan to Debtor. Bankruptcy Court did not commit error in finding that Debtor "knowingly and fraudulently made false oath in connection with the adversary proceeding" warranting denial of discharge.

(4283) *Cooper v. Crocker,* 2018 WL 1907448 (M.D. Tn. 2018) – Denial of discharge under Section 727(a)(4) requires proof that debtor knowingly and fraudulently makes false oath or account. Trustee must prove: 1) debtor made statement under oath; 2) statement was false; 3) debtor knew statement was false; 4) debtor made statement with fraudulent intent; and 5) statement related materially to bankruptcy case. Debtors did not disclose personal property valued at over $60,000; did not disclose pending lawsuit; did not disclose sale of firearms for $23,000; did not disclose 100% ownership of business; undervalued home by roughly $75,000; and did not disclose loan application completed within two years before filing. Debtors' explanation that omissions were errors lacked credibility. Debtors were educated with significant business experience. Debtors also had experience in bankruptcy due to Chapter 11 petition filed in Nevada; and Debtor-wife Katherine Cooper had two Chapter 7 petitions in 1980's and 1990's, where she received discharges. Fact that Debtors allowed Trustee's Appraiser access to home with all personal possessions in plain view did not mitigate failure to disclose.

(4284) *In re Heath,* 2018 WL 702825 (Bankr. E.D. Tn. 2018) – To Defendant's discharge, Plaintiff must prove Debtor (1) made statement under oath; (2) statement was false; (3) Debtor knew statement was false when made; (4) Debtor fraudulently intended to make statement; and (5) statement materially related to bankruptcy case. Debtor's statements and schedules are executed under penalty of perjury and can form basis of denial of discharge. Fraudulent intent is discerned from debtor's conduct, demonstrated through material representations or omissions that known to be false and likely to create erroneous impression, or reckless disregard or indifference for truth through patterns of omissions and/or false statements. Knowledge that statement is false can be evidenced by showing that debtor knew truth but failed to give information or gave contradictory information. Statements resulting from ignorance or carelessness do not reside to the level of knowing and fraudulent and debtor who mistakenly or inadvertently provides false information or fails to disclose pertinent information but takes steps to correct schedules prior to or during meeting of creditors generally does not possess fraudulent intent. Debtor's initial Schedule A/B listed all of Debtor's assets except Debtor's clothing. At Section 341 meeting, Debtor acknowledge oversight and filed Amended Schedule A/B that listed *only* Clothing, but none of the other assets originally disclosed. Creditor filed adversary proceeding alleging that Debtor's Amended Schedule A/B was materially false as Debtor did not disclose any assets except clothing. Debtor then filed Second Amended Schedule A/B to list all assets on original Schedules plus Clothing, providing complete accounting of al of Debtor's assets. Evidence did not support finding that Debtor's original omission of clothing was anything other than inadvertent oversight and Debtor promptly took action to cure. Evidence also did not indicate that Debtor's Amended Schedule A/B was made with fraudulent intent where amendment resulted from ambiguity in Local Rule that stated that Amendment should include only the items being changed, without restating prior information. Although Counsel's interpretation of Rule was incorrect, Court acknowledged that error was understandable and Court had already amended rule to clarify duties in amendments.

(4285) *Carter-Jones Lumber Co. v. Beatty,* 2018 WL 316978 (Bankr. N.D. Ohio 2018) – Fundamental purpose of Section 727(a)(4)(A) is to insure that trustee and creditors have accurate information without having to do costly investigations. Statements in bankruptcy schedules and at 341 meetings are given under penalty of perjury and any false statement made by debtor in schedules, at creditors' meeting held pursuant to § 341, or during 2004 examination or deposition relating to debtor's assets and financial circumstances, could lead to denial of a debtor's discharge. Plaintiff must prove 1) debtor made statement under oath; 2) statement was false; 3) debtor knew statement was false; 4) debtor made statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Reckless disregard as to whether representation is true will satisfy intent requirement but omissions that result from mistake or inadvertence are not sufficient. False oath is material if it bears relationship to Debtor's business transactions or estate, or concerns discovery of assets, business dealings, or existence and disposition of property. Debtor made false oath by omitting automobile from Schedules later falsely testifying under oath at the 341 hearing that vehicle belonged to friend. Debtor knew testimony was false because Debtor later admitted that he owned vehicle. Debtor's non-disclosure and later testimony attempting to cover up non-disclosure demonstrated fraudulent intent. Non-disclosure was material as Debtor's testimony regarded vehicle which bore relationship to Debtor's business or estate and concerned discovery of assets.

(4286) *Ryan v. Morris,* 2017 WL 6512215 (Bankr. W.D. Ky. 2017) – Court will deny discharge where Debtor knowingly and fraudulently, in or in connection with the case makes false oath or account. Debtor testified at Rule 2004 Exam that he did not produce certain records because Debtor's computer was seized and later destroyed by Kentucky State Police when County Sheriff testified credibly that police seized computer, sent it to FBI for examination and returned it to Debtor in same condition when investigation had completed. Coupled with Debtor's overall lack of credibility, Court concluded that Debtor's statements regarding computer were false and fraudulent.

(4287) *Nadeau v. Fraser,* 2017 WL 5064155 (Bankr. N.D. Ohio 2017) – Court can deny discharge where Debtor makes false oath or account. Plaintiff must prove (1) Debtor made statement under oath; (2) statement was false; (3) debtor knew statement was false; (4) debtor made statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Debtor's original schedules erroneously disclosed patent in song written by Debtor where Debtor actually held copyright was not material and Debtor corrected record at Section 341 meeting. Debtor did not disclose second copyright for sales video but it did not appear omission was with fraudulent intent where there was no evidence Debtor ever profited from it or would ever profit from it. While Debtor's lack of profit does not excuse non-disclosure, absent evidence of fraudulent intent, Court will not deny discharge.

(4288) *McDermott v. Kerr,* 2017 WL 3880875 (Bankr. N.D. Ohio 2017) – Court can deny discharge where Debtor makes statement under oath that is false and was known by Debtor to be false when made and Debtor made statement with fraudulent intent, and statement relates materially to Bankruptcy case. Statements are material if they bear relationship to Debtor's business transactions or estate or conceal assets, businesses dealings or dispositions of property. Intent requires material representation that is known to be false or is an omission that is known to create erroneous impression. Debtor's Petition, Schedules and SOFA must be reliable, accurate and thorough, and complete and accurate disclosure is prerequisite to privilege of discharge. Statements made in Bankruptcy Petition. Schedules and SOFA, statements made at Section 341

Meeting and answers to interrogatories are all statements made under oath. Discharge denied where Debtor did not list names and addresses of known creditors although Rule 1007 requires listing of all creditors in Schedules and filing of complete emailing matrix with names and addresses of all creditors; did not accurately list business interests in which Debtor had ownership; Debtor did not disclose causes of action allegedly held against third parties; Debtor's Schedule B listed "none" for each and every item including clothing and personal effects; Debtor did not disclose prior bankruptcy filing although prior case had been filed and dismissed only months before filing current case; Debtor's response to interrogatory promulgated by Chapter 7 Trustee listed Debtor's prior bankruptcy filings in 19999 and 2000 but not case filed just months before current case; Debtor did not disclose amounts allegedly owed to him by third parties; and Debtor's Petition misstated Debtor's residential address. Debtor did not attempt to amend Schedules until 21 months post-petition and more than 12 months after omitted creditors first appeared in Bankruptcy case. Debtor cannot make false filing and evade consequences by belated amendments field only after falsity had been or was about to be discovered. While one or two misstatements might have been plausibly explained, multiple and significant false statements could not be excused as "mere inadvertence".

(4289) *Peplinski v. Whitaker,* 2017 WL 354314 (Bankr. D.N.M. 2017) – Debtor-wife's failure to list all aliases used in prior 8 years was not basis to deny discharge where name disclosed was conglomeration of Debtor's maiden name, middle initial and married name, which would allow creditors to discern Debtor's financial dealings. Debtor-husband's failure to disclose middle initial also insufficient to deny discharge as there was no evidence of intent to deceive and no evidence that creditors were confused or misled by omission. However, Debtor's failure to disclose ownership interest in two inoperable trucks constituted knowing and fraudulent false oath. Debtor's insistence that one truck was title din father's name was "incredible" where Debtor's father passed away well prior to the filing of the case and Debtors used that truck and second truck as their own. Failure to list trucks could not be explained as inadvertence, honest error or mistake and evidenced reckless disregard for duty to disclose all assets. Debtors' belated amendment of schedules did not avoid conclusion that schedules initially were false where Debtors did not amend schedules until after Creditor questioned omissions.

(4290) *Prescription Supply, Inc. v. Musa,* 2017 WL 4118157 (Bankr. E.D. MI. 2017) – Section 727(a)(4) allows Court to deny discharge where debtor knowingly and fraudulently, in or in connection with case, makes false oath or account.

(4291) *McDermott v. Dunne,* 2017 WL 1190611 (Bankr. N.D. Ohio 2017) – Court has authority to revoke Debtor's discharge under 11 USC Section 727(d)(1) if discharge was obtained by fraud and party requesting revocation of discharge did not know of fraud until after granting of discharge. Plaintiff must prove that fraud would have prevented discharge had been brought to courts attention prior to discharge and that plaintiff was unaware of Debtor's fraud prior to discharge. Debtor misrepresented marital status as single and maintain that representation by providing trustee with a copy of tax return that indicated that Debtor was not married. Debtor's failure to disclose true marital status constitutes a knowing and fraudulent false statement in connection with a case sufficient to warrant a denial of discharge under Section 727(a)(4)(A), which precludes entry of discharge where Debtor makes statement under oath that is false and that Debtor knew to be false, was made with fraudulent intent, and statement related materially to bankruptcy case. There was no dispute that Debtor made false statements on schedules and at Section 341 meeting and that all of the statements were under oath. Debtor new representation regarding marital status was false and was intended to create false impression that Debtor was single. Further, Debtor displayed throughout case a reckless indifference to truth regarding marital status leading to conclusion that Debtor falsely intended to misrepresent marital status. Statements are material to bankruptcy case if statement related to assets and disposition of property. Debtor's marital status is essential piece of information generally affecting Means Test calculations and in determining whether filing would be abusive Chapter 7; and concerns discovery of assets and/or existence of property of the estate including Debtor's income tax refund. Fact that Debtor acknowledged inaccuracies of statements in answer to adversary complaint does not cure prior misrepresentations or result in "no harm, no foul".

(4292) *McDermott v. Meifert,* 2017 WL 830360 (Bankr. N.D. Ohio 2017) - Denial of discharge under Section 727(a)(4)(A) requires proof that (1) Debtor made false statement under oath; (2) Debtor knew statement was false; (3) Debtor made statement with fraudulent intent; and (4) statement related materially to bankruptcy case. Intent to defraud requires representation that is known to be false or constitutes an omission that is known to create erroneous impression; or statement made with reckless disregard as to whether statement is true. Defendant's failure to disclose mortgage which Debtor assigned to her daughter within one year preceding bankruptcy case and that allowed daughter to receive $25,000 repayment by mortgage or was not fraudulent where it defendant demonstrated that the initial $25,000 loan was made from Debtor's daughters funds, Debtor never consider the money to be hers, Debtor's daughter had requested Debtor to invest money for daughter's behalf while daughter was out of town, and defendant believe that she was returning daughter's money to her when she transferred mortgage. Defendant did not know statements made in Statement of Financial Affairs and in testimony at Section 341 meeting or false or creating erroneous impressions.

(4293) *Robinson v. Worley,* Case No 15-2346 (4th Cir. 2017) – Section 727(a)(4) provides for the denial of a discharge if the Debtor knowingly and fraudulently in or in connection with the case, makes a false oath or account. Debtor must have made statement under oath which he knew to be false when made, he made statement willfully and with intent to defraud, and statement must relate to a material matter. Debtor made false oath by materially undervaluing interest in limited partnership. Debtor valued 49% share in limited partnership at $2500. Statement of value of an asset is a statement on Schedule B counted as an "oath". Debtor used valuation method which Debtor new did not produce accurate valuation where limited partnership assets consisted of undeveloped and rural farmland earning only incidental income. Managing partner testified that Debtor's minority stake would sell for approximate 20% of face value, which would be at least $26,000. Debtor had contributed $65,000 to acquire his interest only a few years before filing and Debtor's capital account indicated a value of $67,500. On eve of trial, limited partnership sold the majority of its farmland producing $100,000 for distribution to the limited partnership. Debtor was a sophisticated, well-educated and highly experienced financial professional and knew or must have known that stated value of minority stake was so low as to be unrealistic. Although statement made by mistake or inference is not sufficient, reckless indifference to truth constitutes functional equivalent of fraud. Debtor acts with the requisite intent would statement is incompatible with his own knowledge. Debtor's handpicked valuation methodology intentionally produced a minimal value where Debtor's background knew that the chosen method would not produce anything reasonably close to an actual value. Debtor also failed to consult with the managing partner of the limited partnership or make any independent effort to value his interest. Instead, Debtor valued interest in a minimal amount, filing bankruptcy petition has "no

asset" case in effort to persuade trustee to abandon property. Reliance of counsel can absolve Debtor of fraudulent intent if Debtor relies on counsel's advice in good faith after providing counsel with all necessary facts and circumstances, but advice of counsel is not defense which should have been obvious to Debtor that attorney was mistaken. Debtor testified he made complete disclosure of financial affairs but there was no indication he discussed capital contribution or subsequent K-1 statements with attorney or that Debtor had not sought any information or assistance from any third party to assist in valuation, evidencing pattern of outright dissemblance or cavalier indifference. Statements were material given magnitude of undervaluation even if trustee ultimately would have investigated and discovered value of assets. Debtor intended to lowball the value of his interest, sending message to trustee that there was no reason to conduct further investigation. Trustee should not have to expend time trying to conduct independent examinations to obtain facts which Debtor was under duty to disclose.

(4294) *Brady v. Firth,* 2017 WL 744244 (E.D. Mi. 2017) – Section 727(a)(4) will deny Debtor a discharge if the Debtor knowingly and fraudulently makes a false oath or account. Bankruptcy Court's factual finding that Debtors false statements were not made with fraudulent intent is reviewed using "clearly erroneous" standard. Debtor admitted that he did not disclose loans from plaintiffs (Debtor's mother and stepfather) in initial schedules and testified at first meeting of creditors that Debtor had listed all debts and liabilities and there were no errors or omissions in bankruptcy paperwork. Debtor later amended schedule F to add debt owed to plaintiffs. Debtor's admittedly strained relationship with Plaintiffs did not amount to intention to not repay loans when obtained. Evidence indicated that Debtor wanted to pay loans back but simply was unable to do so. Debtor did not list plaintiffs in original schedules as Debtor was attempting to avoid any contact with plaintiffs for personal reasons, rather than any intent to hinder, delay or defraud. While Debtor should have disclosed creditors in initial schedules, Debtor's failure to do so was not result of fraudulent intent or reckless disregard and did not meet "fraud" 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".

(4295) *Kohut v. Wandrie,* 2017 WL 541396 (Bankr. E.D. Mi. 2017) – Section 727(a)(4)(A) allows Court to deny discharge where Debtor has knowingly and fraudulently in or in connection with case made a false oath. Plaintiff must prove that Debtor made statement under oath; statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Reckless disregard as to whether statements are true will also satisfy intent requirement. Subject defaults oath is material if it bears relationship to bankruptcy business transactions or estate, concerns discovery of assets, business dealings or existence and disposition of property. Debtor's statements made in petition, schedules and statement of financial affairs are considered to be under oath. Debtors statements and schedules or false and related materially to bankruptcy case where schedules and statements contained at least 20 separate misstatements or omissions. Number and magnitude of omissions indicated that Debtor was guilty, at minimum, of reckless disregard for truth. Debtor is college-educated and intelligent and who had been preparing to file bankruptcy for several months. Debtor had long period of time to assemble required information and to review schedules and statement of financial affairs for accuracy. Debtor worked with attorney for more than two months prior to filing bankruptcy and met with attorney for several hours to review information needed. Debtor admitted that she reviewed every question in schedules and spent hours with attorney reviewing schedules and related paperwork. Debtor's defensive "reliance on counsel" was not credible and was refuted by evidence of pattern of false and misleading information strongly indicating conscious intent by Debtor to conceal information. Debtor's failure to disclose interest in residence or to disclose payments made for that residence or obvious misstatements that could not be attributable to any misunderstanding by Debtor. Debtor represented to attorney that land contract by which residence was being purchased was solely in non-filing spouse's name and that land contract had expired prepetition, yet Debtor continue to reside in home and continued to make payments on land contract. At best, Debtor misled her own attorney resulting in misstatements in schedules and statement of financial affairs. Debtor had motive for concealing land contract and land contract payments including risk of losing interest in land contract and Debtor's strong desire to avoid involving husband and his parents in bankruptcy case. Debtor's argument that Debtor and husband had no equity in land contract did not resolve problem that statements and omissions were false in the first instance. Whether or not property had value does not alter Debtor's duty to disclose.

(4296) *McDermott v. Koch,* 2017 WL 151590 (Bankr. E.D. Mi. 2017) – Section 727(a)(4)(A) allows court to deny discharge where Debtor knowingly and fraudulently makes false oath or account Plaintiff must prove (i) Debtor made statement under oath; (ii) statement was false; (iii) Debtor knew statement was false; (iv) Debtor made statement with fraudulent intent; and (v) statement related materially to bankruptcy case. Statements in petition, schedules, Statement of Financial Affairs, and those made at the 341 meeting are all statements made under oath. Debtor was asked whether she disclosed all assets and liabilities and answered affirmatively; and was asked whether there were any corrections or changes, and she answered negatively. Fact that Debtor's attorney's son, also an attorney, appeared with Debtor was not basis to excuse false statements, as Debtor never stated at the meeting that she did not understand the questions or ask for clarification. Debtor knew that she had not disclosed to attorney, and had not disclosed in schedules, that she had $350,000 debt to Debtor's father, and Debtor admitted that she intentionally did not disclose this creditor, amounting to omission sufficient to deny discharge. Debtor has paramount duty to provide truthful and complete information and answers. Debtor also failed to correct record or disclose transfers at any time before UST commenced action. Debtor's new attorney's attempt to save discharge by providing information 10 months after commencement of the bankruptcy case and after US Trustee filed action to deny discharge was too late. "Reliance on counsel" can provide defense to intent element if Debtor shows that he made full disclosure of all facts to attorney and in good faith relied on counsel's advice. Debtor could not rely on counsel where Debtor was sophisticated businesswoman and omissions went to most basic information including failure to disclose all businesses Debtor owned and transfers that occurred just days pre-petition.

(4297) *Church Joint Venture, LP v. Blasingame,* 2016 WL 6575046 (6th Cir. BAP 2016) – Denial of discharge under Section 727(a)(4) requires proof that Debtor made a statement under oath; statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Statements made in Schedules, SOFA, 341 meeting, and testimony

at Rule 2004 exams, are all made under oath. Statements are material if they concern discovery of assets or existence and disposition of Debtor's property. Debtor has knowledge of statement if Debtor knew the truth but nonetheless failed to give the information or gave contradictory information. False statement that is made with reckless indifference to truth suffices as grounds to deny discharge. Discharge denied where Debtors' SOFA and Schedules contained multiple omissions including several trusts, corporations, household goods, multiple annuities, property held for others, several bank accounts, several liabilities and at least one on assignment to third party. At the 341 meeting, the Trustee required Debtors to sign an affidavit affirming that Debtor had read and signed the petition, schedules, statements and related documents; that they were personally familiar with the contents; and that to the best of their knowledge the documents were true and correct. At the 341 meeting, Debtors also testified under oath that they helped prepare, read and signed the petition; that the schedules listed all assets and liabilities; that information in schedules and SOFA were true; and that statements in 341 Affidavit were also true. Debtors did not deny inaccuracies or omissions but argued they relied on advice of counsel as to what needed to be disclosed. Debtors repeatedly asserted that they did not review the documents before the signed them and that any errors were the fault of counsel as Debtors neither read the documents nor understood them. Debtors' testimony supported finding that 341 Affidavit and testimony at 341 were both materially false as Debtors repeatedly asserted that they had read the documents, understood them, and they were true, compete and accurate. Even if Debtors did disclose all assets to attorneys and attorneys failed to include them, Debtors nonetheless made additional false oaths at the 341 and in the 341 Affidavit when they confirmed that the documents were complete, and there was no evidence that attorneys told Debtors to lie at the 341 meeting or to assert that documents were complete when Debtors knew they were not. Even if attorney told Debtors to lie, Debtors could not reasonably rely on that advice.

(4298) *Premier Capital, LLC v. Crawford,* 2016 WL 6569228 (1st Cir. 2016) – To deny discharge for "false oath", Court must find that Debtor (i) knowingly and fraudulently made a false oath, (ii) relating to a material fact. Oath is material if subject matter bears relationship to Debtor's business transactions or estate, or concerns discovery of assets, business dealings, or the existence and disposition of his property. Valuation does not determine materiality. Non-disclosure of asset is material even if asset it otherwise valueless. Disclosure of an asset's value does not dispense with the materiality question if falsehood has prevents or delays identification of asset. Debtor committed "false oath" when Debtor's Schedule B listed a single retirement account when Debtor had two separate accounts. Both accounts were located at same financial institution and both accounts were treated on one monthly account statement. Schedules identified one of the accounts but listed the value of that account the full value of *both* accounts. Debtor's failure to specifically identify second retirement account crated false impression that Debtor had only one account rather than two, preventing creditors from determining existence of second account. Fact that Debtor fully accounted for values of both accounts and produced to the Trustee and creditor account statements showing both accounts did not overcome failure to list both account.

(4299) *McDermott v. Capra,* 2016 WL 5106994 (Bankr. N.D. Ohio 2016) – Section 727(a)(2) will deny discharge where Debtor knowingly and fraudulently makes a false oath or account. Objecting party must prove that Debtor made statement under oath; that statement was false; that Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to case. Statements made on Schedules, SOFA and at 341 meeting are all statements made under oath. Statement is false and with fraudulent intent where Debtor knew the truth but nonetheless failed to give information or gave contradicting information and did so with actual fraudulent intent. False statement resulting from ignorance or carelessness is not sufficient to deny discharge, but pattern of false statements can give rise to cumulative effect generating inference of intent to deceive, and statement made without adequate care for accuracy can be sufficiently reckless to justify denial of discharge. Whether statements were false and whether statements were made with requisite intent are questions of fact. Materiality requires only that the subject of the false statement ear some relationship to Debtor's business transactions or estate, or that statement concerns discovery of assets, business dealings or disposition of property. UST established that Debtor failed to disclose transfer of property in SOFA within two years of commencing case, but did not show that Debtor knew statement was false or made with fraudulent intent. Debtor explained that he did not view transfers as business activity but merely efforts by father to help out his son, and that Debtor received no compensation from business other than living free in homes that were built and were awaiting sale. UST also failed to demonstrate that Debtor's failure to disclose business interests was made with fraudulent intent, where there was no evidence that Debtor considered transfers as "business interests" as Debtor consistently described transfers as accommodations to son, Debtor was not listed as officer or director in corporation and Debtor's tax returns confirmed that Debtor received no income from the property. Debtor failed to disclose purchase and sale contract in Schedule G regarding executory contracts, although contract was signed before petition but closed after petition. Evidence was unclear whether Debtor knowingly omitted contract or whether Debtor misunderstood the scope of Schedule G, either of which are plausible explanations.

(4300) *Crocker v. McWhorter,* 2016 WL 4928001 (Bankr. E.D. Ky. 2016) – Debtor is not entitled to discharge under Section 727(a)(4) where Debtor knowingly and fraudulently makes false oath or account. Plaintiff must prove that Debtor made statement under oath; statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Debtor made statements under oath by signing Petition, Schedules and by testimony at two Section 341 meetings, a Rule 2004 Exam, and a deposition in the adversary proceeding. Debtor's belated amendments, made after false statements have been discovered, does not cure the initial falsity or provide defense to denial of discharge. Debtor was sophisticated businessman who owned and operated several companies for years and had invested in numerous other entities,; and was a member of the local Bank Board of Directors. Statements were clearly material as Debtor failed to disclose at least 5 vehicles , existence of which would clearly bear material relationship to the bankruptcy case. Debtor concealed interests in a Corvette, a Motor Home, and a boat and trailer by failing to disclose those assets in Schedule B. Debtor testified that he transferred the assets to his father pre-petition in exchange for $60,000 but transfer documents were not executed until October, 2014, only one month pre-petition and even if Debtor did transfer assets in January, 2013, Debtor failed to disclose that transfer in SOFA which requires disclosure of all transfers within 2 years pre-petition.

(4301) *Gandy v. Schuchardt,* 2016 WL 1381882 (6th Cir. 2016) – Debtor will be denied discharge where Debtor knowingly and fraudulently, in or in connection with a case, makes a false oath or account. Moving party must prove (1) Debtor made a statement under oath; 2) the statement was false; 3) Debtor knew the statement was false; 4) Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Intent to defraud involves material representation known to be false, or an omission that you know

to create an erroneous impression. Reckless disregard as to whether a representation is true will also satisfy the intent requirement, although a mistake or inadvertence is not sufficient. Information is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property and does not turn on an asset's value, but on whether the omission was detrimental to creditors and does not require intent to injure creditors. Debtor made material misstatement in Chapter 13 means test and reiterated in Chapter 7 means test when Debtor understated his monthly income by approximately $400 per month. Misstatement was material even if Debtor would have been eligible for Chapter 7 had he used correct figures. Debtor had adequate notice of issues regarding paystubs after being ordered to file stubs with the court, which put Debtor on notice of issues, yet Debtor repeated misstatements two years later in connection with conversion of his case from Chapter 13 to Chapter 7. Debtor relied on incorrect figures for years and continued to dos o even as Chapter 13 Trustee repeatedly challenged veracity.

(4302) *McDermott v. Kerr,* 2016 WL 4410572 (Bankr. N.D. Ohio 2016) – Section 727(a)(4) results in denial of discharge where Debtor knowingly and fraudulently in or in connection with the case makes a false oath or account. Aggregate of misstatements and omissions of fact can demonstrate pattern of reckless disregard for truth sufficient to constitute intent to conceal information for Court and creditors. Misstatements are "material" if they bear relationship to bankrupt's business transactions. Issue is not value of omitted assets or whether omission was detrimental to creditors. More than one year prior to commencement of case, and while facing multiple judgments, Debtor transferred four parcels of property from his name to an LLC in which Debtor was sole member. When Debtor filed bankruptcy, he did not list either properties or the LLC as an asset, and omitted the names and addresses of known creditors including the judgment holders from the schedules. Record created sufficient inference of fraudulent intent to defeat summary judgment motion brought by Debtor.

(4303) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – A false oath or account for purposes of Section 727(a)(4) requires that Debtor make a statement under oath; the statement was false; Debtor knew the statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Statements made in schedules, statement of financial affairs, and at 341 meeting are all statements under oath. Debtor did not make false statement when testifying that funds received from Debtor were to be used by Debtor's company where Debtor id, in fact, use the funds for that purpose. Statements related to Debtor's intention with respect to loan and how he used proceeds. While Debtor's use of funds may have differed from creditor's intended use, nothing indicated that Debtor obtained funds with any intent other than to use funds for Debtor's business.

(4304) *Gandy v. Schuchardt,* 2016 WL 1381882 (6th Cir. 2016) – Court can deny discharge where Debtor knowingly and fraudulently, in connection with the case, makes a false oath or account. Plaintiff must prove that Debtor made statement under oath; statement was false; Debtor new statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Intent to defraud involves material misrepresentation that is known to be false or an omission that is known to create erroneous impression. Reckless disregard for truth will also satisfy intent requirement. Materiality is not limited to value of assets, but whether omission was detrimental to creditors, and does not require intent to cause injury. Misrepresentations made in initial Chapter 13 filings including Schedule I and Means Test forms constituted misrepresentations in case that would warrant denial of discharge after conversion of case. Debtor's initial schedules and B22 from in Chapter 13 understand Debtor's income based on Debtor's own pay advices, resulting in determination that Debtor was "below median income" when Debtor was actually above median. Misrepresentation continued in chapter 7 as means test indicated that Debtor was below median, removing Debtor from provisions for dismissal for abuse under Section 707(b). Even if initial statements were result of math errors, Debtor was on notice from objections and motions filed that he needed to recheck math, yet Debtor failed to take any steps to either investigate or correct errors. Debtor's failure to correct schedules for more than 2 years after first being apprised if issue evidenced fraudulent intent. Schedules were internally inconsistent as some showed Debtor as married and others showed that he was single and residing with his girlfriend. Debtor also failed to explain $147 per month expense for education of minor child where Debtor's schedules indicates that Debtor's only dependents were girlfriend and her 27-year-old son. While correct information may not have changed Debtor's eligibility for a discharge under Chapter 7, standard does not require that correct information would have changed outcome, only that information bears relationship to case, and statements of income and expenses as well as statements on Means Test from clearly bear significant relationship to case.

(4305) *Cosby v. Baltrip,* Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Section 727(a)(4) allows court to deny discharge if Debtor knowingly and fraudulently in connection with the case, makes a false oath or account. Plaintiff must prove that Debtor made false statement under oath; statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to case. Statements are material if the bear relationship to bankrupt party's business transactions or estate, or concern discovery of assets, business dealings or existence and disposition of property. Debtor's failure to disclose prior maiden name and statement that Debtor was not engaged to but was only friends with third party, and statements regarding properties that third party did or did not own, were not material to estate. Debtor's failure to list interests in a Polaris utility vehicle and three watches were not fraudulent where record indicated that Debtor did not own those items as of the petition date. However, allegations that Debtor failed to disclose interests in real property, large sums of cash, expensive pool cue cases, and engagement ring, wedding band and diamond ring she received from deceased spouse stated cause of action.

(4306) *Apartments at Cambridge Company, LLC v. Lewiston,* 2015 WL 5443713 (Bankr. E.D. Mi. 2015) – Action to deny discharge under Section 727(a)(4) requires proof that 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Fraudulent statement must be made with an actual and knowing intent to defraud creditors which may be inferred from circumstantial evidence such as a series or pattern of errors or omissions. However, discharge is not to be denied when the untruth was the result of a mistake or inadvertence. Debtor must disclose assets, even those thought by Debtor to be worthless. Evidence indicated that Debtor failed to disclose various business interests but failed to show that omissions were made with fraudulent intent. Debtor had an explanation for every omission and evidence failed to indicate that Debtor knew that any of his statements regarding his interests, transfers or positions in business entities were false, or that he made such statements with intent to deceive. Debtor's inclusion in schedules of receivables knowing that receivables were not collectable was not false statement where Debtor believed that claims any have had some value at time bankruptcy case commenced and

never represented to trustee or creditors that claims had any particular value instead listing at least one of the claims at an unknown value. Debtor had a sincere belief that each of these accounts receivable were truly owed to him triggering duty to disclose them. Debtor has an unqualified statutory duty of disclosure if he believes that he owns these assets regardless of whether the claims are of dubious value, or just plain worthless. Had Debtor had failed to list either the claims or the accounts receivable, Debtor would have been subjected to allegations that Debtor intentionally concealed or failed to disclose claims. Plaintiff also failed to show Debtor listed claims with the intent to mislead the Trustee in an attempt to somehow curry the Trustee's favor and misdirect the Trustee's efforts to administer the Debtor's estate where there was no evidence in the record regarding the Debtor's intent in listing these assets other than the Debtor's own uncontroverted testimony and Trustee was not actually lulled into pursuing these assets in lieu of taking action against the Debtor.

(4307) *McDermott v. Spencer,* 2015 WL 5970735 (Bankr. N.D. Ohio 2015) – Fundamental purpose of Section 727(a)(4) is to insure that trustee and creditors have accurate information without having to do costly investigations. Bankruptcy trustee has neither time nor resources to conduct in-depth review of every case, necessitating accurate initial disclosures as key feature of bankruptcy process. Denial of discharge under Section 727(a)(4) requires proof that l)the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Intent to defraud is a material representation that Debtor knows to be false, or an omission that Debtor knows will create an erroneous impression, and includes statements made with reckless disregard as to whether statement is true. False information that is the result of mistake or inadvertence is not sufficient. A statement is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. Debtor's Schedules and Statement of Financial Affairs and testimony at 341 were materially false where Debtors failed to disclose expensive items of personal property, artwork and jewelry, and answered "none" when asked about gifts to family members where Debtors had transferred substantial amounts of jewelry to Debtor's daughter. Debtors also failed to disclose alleged sales of expensive artwork although that artwork continued to be listed on Debtors' insurance policy after dates of alleged sales. Debtors' testimony that they thought "property" included only real property was hyper-technical at best and contradictory at worst. Even after Debtors amended Schedules and SOFA, the continued to fail to disclose assets and transfers, and listed only single gift to daughter valued at $200 notwithstanding multiple gifts to daughter of jewelry valued at tens of thousands of dollars per item. Debtors knew that statements were false when made, as Debtors were aware that they has given away or sold multiple items of personal property, some of which were as recent as 5 months pre-petition. Debtors made statements with fraudulent intent or, at best, reckless indifference for truth, where Debtors omitted from their SOFA several gifts of jewelry and artwork they had given to friends and family in the year prior to their filing, and numerous pieces of personal property they had sold in the two years prior to their filing. Debtors were also under oath during their testimony regarding gifts and other transfers of property at the § 341 Meeting and continued to affirmatively represent that schedules were complete and that Debtors had not made any gifts or transfers that were not disclosed. Despite being put on notice by the Trustee's request for a detailed listing of their household goods on Schedule B, just seven (7) days prior to their 341 Meeting, Debtors did not file an amended SOFA, and at the 341 meeting of creditors, Debtors each answered "No" when asked if they had given away, sold or transferred any property in the last year and again answered "No" when asked if they had transferred property into the names of friends or family members in the last four years. Trustee specifically asked the Defendants if they had forwarded any property or jewelry to their daughter or transferred any property either to storage or to a third party and Debtors again stated, "no" although Debtors had given property to their daughter earlier that year, as well as having sold several pieces of jewelry to third parties within the previous two years. It was only after requests by the Trustee for complete insurance riders, and a deposition conducted by the UST, wherein the UST conducted a line-by-line review of Defendants' insurance riders, that the Defendants answered truthfully regarding the disposition of their personal property prior to filing. Even after the deposition was conducted and it became clear that numerous items were sold and/or gifted such that they should have been listed under questions 7 and 10 of their SOFA, Defendants failed to amend said SOFA for over a year. Number of errors and failure to amend timely to correct errors (and even when amendments were filed, they continued pattern of omissions) belied any claim by Debtors that omissions were errors or misunderstandings. However, evidence was not sufficient to deny Debtor-wife a discharge where evidence indicated that wife had cognitive and other memory problems and lacked ability to process complex information.

(4308) *U.S. Trustee v. Varner,* 2015 WL 4039390 (Bankr. N.D. Ohio 2015) – Denial of discharge under Section 727(a)(4) requires a knowing and fraudulent false oath or account in connection with a case. Plaintiff must prove (1) the Debtor made a statement under oath; (2) the statement was false; (3) the Debtor knew the statement was false; (4) the Debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Debtor's statements in schedules or made at Section 341 meeting constitute statements made under Oath. Statement is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence or disposition of his property. Debtor's failure to disclose all income received from wholly owned "S" Corporation constituted false statements that were material to administration of bankruptcy case. Fraudulent intent must be actual, not constructive, and includes an omission that Debtor knows will create false impression; or must constitute making statements with reckless disregard for truth of statements. Omissions of income from SOFA were not made with fraudulent intent where omitted income included withdrawals from S Corp where S Corporation's income dropped to Debtor's personal tax return in prior years and Debtor previously paid taxes on that undistributed income, such that Debtor did not realize when Debtor later took draws from Corporation or caused corporation to pay personal expenses, those funds constituted "income" for purposes of Bankruptcy. Debtor's error on Schedule I listing Gross income in negative amounts was not fraudulent where disclosure was actually net income after expenses and application of net operating loss and matched amounts shown on Debtor's tax returns, and clarity of error was not likely to mislead trustee and was more likely result of misunderstanding or error. Although Debtor was sophisticated businessperson, complexities of tax code and application of S Corporation status indicated that Debtor was legitimately confused about how to transfer information from Tax returns to Bankruptcy Schedules. Debtor also lacked motive to make false statements as amounts involved were relatively small and correct disclosure would not have altered course of bankruptcy case, and Debtor was seeking to discharge over $23 million in debt. Debtor's failure to list third party's bank account also constituted false statement where Debtor deposited money into third party account and third party used that money to pay Debtor's personal expenses. Although Debtor was not on account, Debtor had interest in funds in account such that account should have been disclosed. Debtor also failed to disclose repeated deposits into that account as required. Any omission was not result of fraud where amounts deposited were only the amounts necessary to pay Debtor's expenses and there was no indication that funds in account were used for any other purpose,

there was some confusion about whether account had to be listed as Debtor was not named account holder, and Debtor's explanation for account was both practical and credible. Debtor's failure to list gifts consisting of a $900 necklace, payment of a $2,200 watch repair bill, and purchase of $2800 computer for Debtor's child were not omitted with fraudulent intent. Purchase of laptop computer for child was normal parental purchase that is not a gift in normal parlance such that failure to list transfer does not indicate fraud. Omission of watch repair and necklace were more likely oversights where amounts involved were minimal in relation to magnitude of debt being discharged, and inclusion would not have materially altered administration of case.

(4309) *Risk v. Hunter,* 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – To deny discharge under Section 727(a)(4), plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Statement must be material and must have been known to be false or is an omission that Debtor knows will create erroneous impression. Reckless disregard for truth will also satisfy intent requirement. Complaint failed to state cause of action where complaint failed to allege any specific allegation as to what false oath or account was made and failed to allege facts supporting finding of fraudulent intent or to give rise to inference of fraud.

(4310) *McDermott v. McGregor,* 2015 WL 4628018 (Bankr. N.D. Ohio 2015) – Court will deny discharge where Debtor knowingly and fraudulently, in or in connection with case, makes a false oath or account. Plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor's failure to respond to request for admissions established conclusively that Debtor falsely listed on schedules that Debtor had $40 in cash and $102.71 in bank accounts, yet on same date as Debtor filed case Debtor withdrew $2,300 from bank account in order to generate bank statement showing balance of $102.71. Efforts were designed to conceal $2,300 so Debtor would have money to move after she was evicted from her home. Debtor also failed to comply with Court Order that she deliver $2,340 to Trustee after trustee had located money and sought turnover of funds. Evidence demonstrated that Debtor made false oath when she signed schedules that misstated Debtor's actual assets.

(4311) *Smith v. Morse,* 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Plaintiff must demonstrate (1) the Debtor made a statement under oath; (2) the statement was false; (3) the Debtor knew the statement was false; (4) the Debtor made the statement with fraudulent intent; and (5) that the statement related materially to the bankruptcy case. Statements made in schedules, statement of financial affairs, and at 341 meeting are all statements made under oath. Complete financial disclosure is a prerequisite to the privilege of discharge. Intent to defraud involves a material representation known to be false, or an omission that is known to create an erroneous impression, and may be satisfied by a reckless disregard as to whether a representation is true. However, a Debtor is entitled to discharge if false information is the result of mistake or inadvertence. The subject of a false oath is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. Debtor's alleged failure to list loan in schedules was not sufficient for summary judgment where Debtor testified that he considered funds to be an investment in Debtor's business rather than as a loan.

(4312) *Schuchardt v. Gandy,* 2015 WL 4331017 (E.D. Tn. 2015) – Section 727(a)(4) allows court to deny discharge where (1) Debtor made a statement under oath; (2) statement was false; (3) Debtor knew that statement was false; (4) Debtor made statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Fraudulent intent can be evidenced by facts and circumstances of case, but Debtor will not be denied discharge if false information results from mistake or inadvertence. Debtor's "means test" from in Chapter 13 and new from filed after case converted were both false. Debtor's Chapter 13 means test materially understated his average income for the preceding 6 months and Debtor carried through false number two years later after the case was converted. Debtor knew from the very start of the Chapter 13 case that creditors argued that Debtor understated income. Bankruptcy court confirmed plan but required Debtor to submit paystubs to the trustee every 90 days, and the amend plan if he earned additional income. Chapter 13 trustee later moved to dismiss case because paystubs submitted indicated that Debtor had significant additional income that he neither disclosed nor contributed to the plan. In response, Debtor converted case but submitted post-confirmation "means test" from that still used earlier, lower figures. Debtor knew or reasonably should have known of the need to re-check the income figures, particularly where, if correct figures were used, Debtor would have been "above median" income, Debtor would have had to complete entire means test from, and creditor would have had standing to request dismissal for abuse under Section 707. Statements of income and each of the two means tests were made under oath, and contained statements that were, at best, made with reckless disregard for truth, evidencing fraud.

(4313) *Sefton v. Delia,* 2015 WL 1379616 (Bankr. E.D. Mi. 2015) – Section 727(a)(4) denies a discharge to a Debtor who makes a false statement under oath; where the Debtor knew the statement was false or made the statement with reckless disregard for the truth; made the statement with fraudulent intent; and the statement materially relates to the bankruptcy case. Debtor's Statement of Financial Affairs failed to disclose transfers of two automobiles. However, Debtor disclosed transfers at 341 meeting and promptly amended SOFA to correct error. Debtor thought that one vehicle was in father's name and father sold vehicle, not realizing that father had not filed certificate of title to change ownership. Debtor transferred second vehicle to father some time before filing in payment of various loans made by father to Debtor. Omissions appeared to be result of inadvertence or good faith mistake, particularly where balance of schedules and SOFA correctly and accurately disclosed Debtor's finances. Inadvertent or good faith error does not rise to level of "fraudulent intent" for purposes of Section 727.

(4314) *McDermott v. Schwartz,* Case No. 13-4622 (Bankr. E.D. Mi. 2015) – Section 727(a)(4) allows court to deny discharge where (1) Debtor makes false statement under oath; (2) Debtor knew statement was false; (3) Debtor made statement with fraudulent intent; and (4) statement related materially to bankruptcy case. Intent to defraud includes material misrepresentation that Debtor knows to be false of that Debtor makes statements that knowingly create false impression. Mere mistake or inadvertence is not sufficient. Statement is material if it bears relationship to business transactions or estate, or concerns discovery of assets, business dealings or existence and disposition of property. Debtor's Schedule B failed to disclose interest in corporation; SOFA failed to disclose transfer of 98% interest in another corporation or transfer of proceeds of sale of LLC interest into bank account of third party. SOFA also failed to list $35,607 received from sale of LLC or any other commissions or revenues received and deposited into third party's account for safe keeping; and failed to disclose Debtor's transfer

of interest in automobile to Debtor's wife. Debtor's Schedule I falsely stated that Debtor's only income was social security. Debtor also falsely testified at both the Section 341 meeting and the 2004 Examination that Debtor had borrowed money from his wife to purchase the automobile where Debtor later admitted that he did not in fact borrow money from his wife. Debtor's defense that errors in schedules and SOFA were fault of counsel and that Debtor's misstatements at 341 meeting and 2004 examination were result of "stress and panic" unavailing given substantial number of misstatements involving undisclosed assets, undisclosed transfers, undisclosed income, and payments to creditors, coupled with Debtor's pre-petition conduct where he admittedly used bank account in name of third party to hinder creditor's collection efforts. Statements were made with, at minimum, reckless disregard for truth and related materially to Debtor's bankruptcy case.

(4315) *Becker v. McInerney,* 2014 WL 1647015 (Bankr. E.D. Mi. 2014) – To deny discharge under Section 727(a)(4)(A), plaintiff must prove that Debtor made statement under oath; that statement was false; that Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to case. Debtor, an attorney, failed to disclose in schedules and statement of financial affairs multiple items including wedding ring, expensive watch, cause of action. Pre-petition employment agreement, pre-payment of membership to Country Club, lease of BMW, mortgage on Debtor's home. Artwork. And University of Michigan Football tickets, all of which constituted false statements under oath. Statements are made "knowingly" if statements are made with knowledge of falsity or with reckless disregard for truth. However, reckless disregard alone does not compel denial of discharge unless facts and circumstances as a whole indicate that Debtor had fraudulent intent. Debtor knew he omitted items when he filed schedules and involved assets Debtor knew he owned and were important to him. Debtor was intelligent and knew when he checked "none" for jewelry that he was not listing his watch or wedding ring, and omission could not have been inadvertent. Debtor's statement that he did not consider watch to be jewelry but was "functional piece of business equipment" was both false and frivolous. Statement that he did not consider wedding ring as jewelry but as "token of wife's affection" was similarly false and frivolous. While Debtor could have listed assets and exempted them, Debtor's decision not to list the assets at all constituted material misstatement for purposes of Section 727. Similarly Debtor's failure to list lease of BMW could not have been inadvertent. Debtor's testimony that he did not understand what an "executory contract" is did not explain Debtor's failure to list "unexpired lease" as required on Schedule G. Fact that leased vehicle did not have value to Debtor or estate does not excuse failure to list as Schedules require listing of all assets without regard to value. Debtor also filed to list claim against related company for $290,000. Although Debtor later amended Schedule B to disclose, Debtor's failure to disclose in first instance constituted false statement. Debtor's statement that he thought assets were limited to tangible property that has value was unavailing as schedules call for all assets including intangible assets such as causes of action. Debtor failed to disclose agreement with company that Debtor would assist in marketing of product with Debtor to receive 10% of sales price. Debtor's testimony that non-disclosures were inadvertent or oversights or misunderstandings not credible given magnitude of omissions and false statements and Debtor's conduct in pre-petition litigation in which Debtor specifically admitted that he committed fraud as to his own attorneys in State Court litigation.

(4316) *Duree v. Dunn,* 2014 WL 1612232 (Bankr. E.D. Ky. 2014) – Section 727 requires proof that Debtor made statement under oath that was false, and that Debtor knew the statement was false and made statement with fraudulent intent, and that the statement be materially related to bankruptcy case. Matter is "material" if it concerns discovery of assets or existence and disposition of estate property. Omissions or misstatements of value is relevant to materiality but materiality does not depend on value. Even an asset of modest value can be considered material if it became estate property. Complaint that alleged that Debtor filed malpractice action against attorney 11 days prior to commencement of bankruptcy case yet failed to schedule that claim sufficient to state cause of action.

(4317) *Schuchardt v. Gandy,* 2014 WL 1374050 (Bankr. E.D. Tn. 2014) – Section 727(a)(4) allows court to deny discharge if Debtor (1) made a statement under oath; (2) the statement was false; (3) Debtor knew that the statement was false when he made it; (4) Debtor fraudulently intended to make the statement; and (5) the statement materially related to the bankruptcy case. Statements can be affirmative false statements or omissions and include statements made in schedules, SOFA, creditors meeting, deposition or 2004 Exam. Statements are material if related to bankruptcy estate, existence and disposition or property, business enterprises or transaction, or are pertinent to discovery of assets. Debtors in Chapter 7 have continuing duty to disclose assets, liabilities and income to ensure that statements are complete and reliable. Fraudulent intent can be demonstrated by material representations or omissions that Debtor knows are false or are likely to create false impressions, and may be inferred from circumstantial evidence. Knowingly making false statements includes knowing the truth but failing to give correct information or giving contradictory information. However, false statement resulting from ignorance or carelessness is not knowing and fraudulent. Debtor's Means Test from in Chapter 13 and Means Test from in subsequently converted Chapter 7 materially understated income such that Debtor's means test reflected "below median" income with 36 month plan where Debtor was actually above median with minimum plan length of 60 months. Debtor's own paystubs demonstrated that means test calculation was incorrect and Debtor failed to provide credible explanation for incorrect statements. Furthermore, Debtor repeated error in Chapter 7 means test even after creditor had raised issues of discrepancies in Chat[per 13 means test. Means test forms also stated that Debtor was not married when Debtor was undeniably married; and means test claimed deduction for two minor children's education expenses when Debtor's Schedule I listed only "live in girlfriend" and a 27 year old disabled son, neither of which qualified as a dependent under 18. Schedule I also significantly understated income, and income reported on SOFA for current and prior years was also materially understated and failed to account for bonus income received by Debtor in addition to understating income from salary. Debtor failed to disclose bank account that Debtor closed four months prior to filing of bankruptcy case notwithstanding SOFA 11 requires disclosure of all bank accounts closed in preceding year. Number and degree of incorrect statements leads to finding that Debtor made false oaths with fraudulent intent, particularly where Debtor had ample opportunity to amend after alleged deficiencies had been brought to court's attention, yet Debtor either did not amend or reiterated incorrect information in the amendments.

(4318) *Bank of America v. Killgrove,* 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd,* 2014 WL 4187988 (E.D. Mi. 2014) – Debtor did not make false oath where Debtor listed in schedules Debtor's 100% stock ownership of PC but did not separately list assets of PC. Schedule B requires Debtor to disclose Debtor's interest in property. Debtor did not personally have any interest in assets of PC. Therefore, Debtor's failure to list those assets in Debtor's Schedule B was not inaccurate or false.

(4319) *Smith v. Morse,* 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Debtor makes "false oath" where Debtor makes statement under oath; statement

is false; Debtor knew statement was false when made; Debtor made statement with fraudulent intent; and statement related materially to case. Statements made in bankruptcy schedules, statement of financial affairs, and at 341 meeting are all statements made under oath. Debtor's statement at 341 meeting that creditor loaned Debtor money as an investment in general and not for any specific project was false statement where creditor advanced loan proceeds for specific project and Debtor diverted funds for other uses. However, there was no evidence that Debtor-wife made any false statement at the section 341 meeting or elsewhere for purposes of Section 727.

(4320) *Eifler v. Wilson & Muir Bank & Trust,* 2014 WL 314473 (W.D. Ky. 2014) – Debtor is not entitled to discharge if has made "false oath" in connection with bankruptcy statement. Debtor's answers to Statement of Financial Affairs were false where Debtor failed to list transfer of $177,000 from joint account of Debtor and spouse to spouse's individual account; transfer of two weeks' salary made 2 weeks before filing; transfer of $20,000 to sister in law; pre-payment of private school tuition for children; a brokerage account; a separate joint investment account; and a currency trading account. Debtor also falsely testified at the first meeting of creditors regarding the balance of funds from Debtor's HELOC that remained in the spouse's individual account. Debtor's statement that he was confused by the term "transfer" was not credible where Debtor was sophisticated businessman who is expected to answer with more care and accuracy than an unsophisticated Debtor, and Debtor consulted with attorney more than a hear prior to filing, affording Debtor ample opportunity to ask what the term "transfer" meant. Omissions were not responsibility of counsel where Debtor did not present any evidence that counsel told Debtor not to disclose transfers. While counsel may prepare the documents, it is not sufficient that a Debtor merely dump financial information on counsel and then fail to determine accuracy of schedules. Debtor bears ultimate burden to review documents and to spot and correct errors, and to ensure that schedules accurately disclose all requested information. Even after errors and omissions were discovered, Debtor never amended schedules or Statement of Financial Affairs or take any other affirmative steps to correct mis-statements, further evidencing a lack of "openness" by Debtor as to financial affairs.

(4321) *Daniels v. Agin,* Case No 12-2376 (1st Cir. 2013) – Debtor knowingly or with reckless indifference made false statements during bankruptcy proceedings by continuing to fail to disclose assets of estate. Debtor was administrator of pension plan in which Debtor was sole beneficiary. Plan had engaged in numerous prohibited transactions such that plan was no longer qualified under Internal Revenue Code Section 401 yet Debtor continued to fail to disclose assets nominally held by plan for Debtor's benefit. Omitted information was material as it demonstrated that Debtor had moved more than $470,000 from pension plan into two separate IRAs ostensibly as "roll over" transactions that were not permitted roll overs, yet Debtor failed to list the IRAs into which the funds had been transferred and at least implicitly indicated that IRA s had not been funded by including in Schedule B the values of the IRAs s part of the disclosure of Debtor's pension rather than being indicated where schedules call for IRA disclosures.

(4322) *Newell v. Skeens,* 2013 WL 5494107 (Bankr. N.D. Ohio 2013) – Section 727(a)(4) requires proof that 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Intent to defraud requires a material representation that the Debtor knew to be false or omission that will create erroneous impression. However, mere mistake or inadvertence is not sufficient. Complaint sufficiently stated cause of action where complaint identified specifically and with particularity assets that were not listed in the bankruptcy schedules but that plaintiff has personally observed in Debtor's possession shortly before the filing.

(4323) *Lunn Real Estates Investments, LLC, v. Ward,* 2013 WL 5429767 (Bankr. E.D. Tn. 2013) – Section 727(a)(4) requires proof that Debtor (1) made a statement under oath; (2) the statement was false; (3) Debtor knew that the statement was false when he made it; (4) Debtor fraudulently intended to make the statement; and (5) the statement materially related to the bankruptcy case. False can be either affirmative false statement or omission. Statements or omissions are material if related to the estate, existence and disposition of property, business enterprises or transaction, or matters pertinent to discovery of assets, and includes statements or omissions in schedules and statement of financial affairs, at the section 341 meeting, or at Rule 2004 exams. Fraudulent intent can be discerned from conduct including pattern of misrepresentations or omissions that Debtor knows are false and likely to create erroneous impressions, or reckless disregard for or indifference to the truth. Knowledge requires evidence that Debtor knew the truth but either failed to give the information or gave contradictory information. Debtor's discharge denied where Debtor failed to disclose a number of material facts, including listing on Schedule I that Debtor was unemployed where Debtor was working for at least 2 months prior to filing; Debtor failed to list payments from income on SOFA #1; Debtor understated interest in prior year tax refund, listing value at $2500 when refund was actually $8,700 and Debtor knew that refund was understated based on prior year tax return where Debtor's gross income was roughly the same and Debtor received $8,000 refund; SOFA failed to disclose that Debtor had in his possession an automobile owned by former mother in law; failed to disclose unexpired lease for Debtor's home, or security deposits attendant to that residence; Debtor failed to list his IRA.

(4324) *Adamovic v. Lazarevic,* 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Section 727(a)(4) requires proof that (1) the Debtor made a statement under oath; (2) the statement was false; (3) the Debtor knew the statement was false; (4) the Debtor made the statement with fraudulent intent; and (5) that the statement related materially to the bankruptcy case. Statements made by a Debtor in his bankruptcy schedules, his personal statement of financial affairs, and at 341 meetings are all statements made under oath. Debtor falsely stated in response to SOFA question 18 that Debtor had not been a partner, sole proprietor, self-employed or the owner of more than 5% of the stock of an entity within the 6 years preceding commencement of the case. Evidence indicated that Debtor engaged in multiple real estate purchases and sales with a partner and in the names of various business entities. The Debtor never disclosed the existence of the partnership or the business entities and never disclosed the name of the partner, although Debtor and the partner were clearly engaged in transactions for profit in which they were sharing in the profits of the ventures. Debtor also was employed as property manager for at least one entity, but never disclosed his self-employment as property manager even though Debtor was engaged in that business as of the date of commencement of the case. Debtor's pattern of mistakes and inaccuracies regarding Debtor's business activities and his relationship to his partner established that Debtor's omissions in the SOFA were done with intent to deceive. Omissions of business relationships were material as disclosure would have resulted in significant inquiries as to Debtor's financial dealings as well as money and property transferred by Debtor to the partner or assets transferred by the partnership that would have constituted partnership property in which Debtor held an interest. Evidence also indicated that Debtor's response to Sofa 14 regarding property held by Debtor for another was materially false where Debtor stated "none" but later testified

at trial that he held 120 pieces of jewelry for the benefit of sister's children. Given level of animosity between Debtor and sister's children, nondisclosure in SOFA was certainly motivated by intent to conceal the existence of the jewelry and to prevent questions concerning ownership and possession of the jewelry.

(4325) *Wilson & Muir Bank & Trust Co. v. Eifler,* 2013 WL 3300639 (Bankr. W.D. Ky. 2013) – Debtor has a continuous, affirmative duty to disclose in a complete and accurate manner: (a) a list of creditors; (b) schedules of assets, liabilities, current income, and current expenditures; and (c) a statement of financial affairs. Debtor has an affirmative duty to disclose all of its assets to the bankruptcy court. Court will deny discharge where Debtor makes false statement under oath that was false when made and was known to Debtor to be false, and was made with fraudulent intent and materially related to bankruptcy case. False oaths may be in the form of either false statements or omissions on the schedules and statement of financial affairs or false statements by the Debtor during the course of the bankruptcy proceedings—at the 341 meeting of creditors or at testimony given at Rule 2004 exams made under oath. Statements are material if they concern the discovery of assets or the existence and disposition of a Debtor's property. Debtor has knowledge of the statement if the Debtor knew the truth, but nonetheless failed to give the information or gave contradictory information, or were made with reckless indifference to the truth. Discharge would be denied where Debtor failed to disclose $177,000 transfer to wife, $20,000 transfer to sister-in-law, and pre-payment of children's' tuition. Debtor's Schedule J falsely stated that Debtor had ongoing tuition expense where Debtor had prepaid that expense and had no further tuition payments. Each non-disclosure related to existence of assets and had transfers been disclosed, that could have led to recovery of assets by Chapter 7 Trustee. Debtor's inaccurate schedules and SOFA impaired Trustee's ability to investigate assets or to trace assets to third parties. Omissions were not *de minimum* oversights but were material omissions and misstatements that directly affected administration of case. While a single error may have indicated mistake or oversight, number and magnitude of omissions let to conclusion that Debtor either acted intentionally in not disclosing assets or that he did so with reckless disregard. Debtor could not rely on advice of counsel defense where it was transparently plain that assets must be disclosed. Debtor had duty to review documents before signing to ensure accuracy and must accept responsibility for information or lack of information.

(4326) *Ereren v. Marshack,* Case No. 12-1542 (9th Cir. BAP 2013) – Section 722(a)(4) requires proof that Debtor made statement under oath; that statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. False statement or omission in schedules or statement of financial affairs may constitute false oath for purposes of Section 727(a)(4). Debtors' failure to disclose sale of two vehicles shortly prior to commencement of case constituted false statement. Whether transaction impacted estate does not control whether failure to disclose was material. A fact is material if it bears a relationship to Debtor's business transactions or estate or concerns discovery of assets, business dealings, or existence and disposition of property. Omission was clearly material as vehicles belonged to Debtors and they obtained $59,000 from sale. Debtors' later disclosure of transfers at first meeting of creditors did not preclude finding that original omission was knowing failure to disclose. Purpose of Section 727(a)(4) is to incentivize Debtors to provide complete and accurate information so that trustee does not need to conduct costly investigations. Whether creditor may have been aware of transaction through non-bankruptcy litigation, or whether trustee may have subsequently learned of transaction did not excuse failure to disclose in first instance. Omission is made with fraudulent intent if Debtor makes misrepresentation that Debtor knows was false or is made with reckless indifference, with intent to deceive creditors. Evidence supported finding of fraudulent intent given nature and timing of transactions. Alleged disclosure to bankruptcy counsel did not excuse Debtors' obligation to make sure schedules and statement of financial affairs was accurate.

(4327) *CMAF, Inc. v. Phillips,* 2013 WL 832331 (Bankr. N.D. Ohio 2013) – Section 722(a)(4) requires proof that Debtor made statement under oath; that statement was false; Debtor knew statement was false; Debtor made statement with fraudulent intent; and statement related materially to bankruptcy case. Debtor's alleged mis-scheduling of debt between Debtor and creditor as lease rather than security interest did not indicate fraudulent intent. Fact that Debtor scheduled debt incorrectly, without more, is not evidence of fraud. Further, scheduling debt as lease did not alter true nature of the debt.

(4328) *Jahn v. Hughes,* 2013 WL 1558098 (Bankr. E.D. Tn. 2013) – To prevail on complaint to deny discharge based on false oath, plaintiff must demonstrate: (1) Debtor made statement under oath; (2) statement was false; (3) Debtor knew statement was false; (4) Debtor made statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Statements made by Debtor in bankruptcy schedules, SOFA, and at 341 meetings are all statements made under oath. Debtors' Statement of Financial Affairs was materially false where Paragraph 2 failed to disclose $43,000 received by Debtors from settlement of pre-petition lawsuit; Paragraph 4 failed to list lawsuit itself, although action had been pending and settled less than one year prior to bankruptcy filing; Paragraph 7 failed to disclose two gifts to children of $3500 each made less than 90 days prior to filing; paragraph 3 failed to list loan repayment to aunt made within 90 days pre-petition; and failed to list at least four other transfers to creditors made within the prior 90 days. Debtors knew of falsity of the statements at the time SOFA was signed. Debtors either intentionally omitted transactions or were reckless in making representations without any attempt to read the questions and answers to insure accuracy. Number and magnitude of omissions evidenced fraudulent intent, particularly when coupled with transactions which occurred while the Debtors were under financial distress at a time close to the bankruptcy filing; undisclosed transfers that were gifts to family members and that represented transfers for no consideration at a time the Debtors were insolvent; and undisclosed cash payments to creditors. Debtors' failure to read the answers is not a satisfactory response. Debtors failed to take any action to correct errors until after Trustee discovered omissions at the first meeting of creditors, and even then demonstrated a lack of willingness to cooperate, leading to conclusion that but for actions of trustee, omissions would never have been corrected. "The ruling in the case should not be read as a holding by this court that a Debtor can never correct a mistake in his petition, SOFA or Schedules. A Debtor should never consider that a second false oath is the best way to remedy a false statement, and coming forward with the correct information as soon as possible is the best course of conduct following discovery of a mistake. However, coming forward does not guarantee that a right to a discharge may be regained. For that reason, the best practice is to avoid mistakes in the beginning and that requires reading the questions and thoughtfully preparing the answers. In this case, the Debtors are being denied their discharge because their only explanation for their false statements is that they did not focus on the questions and their answers, despite being informed that false statements might result in fines and imprisonment. The court cannot tell from the testimony at trial, how thoroughly the questions were explained to the Debtors by their attorney or whether the reason for the questions was explained to ensure that correct answers were given. The court expects Debtors' attorneys to be diligent in

their efforts to ensure that Debtors understand the significance of their representations in the filing documents. The court also expects the Debtors to take responsibility for reading and understanding what they are representing to the court regarding their past financial transactions and their current assets and liabilities."

(4329) *Crocker v. Abad,* 485 BR 369 (Bankr. W.D. Ky. 2013) – To prevail on complaint to deny Debtor a discharge based on his false oath(s), plaintiff must prove the following: (1) that Debtor made statement under oath; (2) that statement was false; (3) that Debtor knew statement was false; (4) that Debtor made statement with fraudulent intent; and (5) that statement related materially to bankruptcy case. Debtor's reckless disregard as to whether a representation is true will satisfy intent requirement of "false oath" discharge exception. Chapter 7 Debtor's testimony at first meeting of creditors that had not filed tax return was false and was known to be false. Debtor personally prepared tax return one day before filing petition, and Debtor received refund of more than $26,000 post-petition and only three weeks before first meeting of creditors. Debtor failed to mention refund when questioned by trustee as to how he could continue to pay expenses claimed on his bankruptcy schedules when his only disclosed income was unemployment compensation. Testimony was only deliberately false, and related materially to his bankruptcy case and was made with fraudulent intent of concealing tax refund, such that his discharge could be denied on "false oath" grounds.

(4330) *Sheehan & Assoc., PLLC v. Lowe,* 2012 WL 3076251 (E.D. Mi. 2012), *aff'd* 2013 WL 1188987 (6th Cir. 2013) – Section 727(a)(4) requires proof that Debtor made a statement under oath; statement was false; Debtor knew the statement was false; Debtor made the statement with fraudulent intent; and statement related materially to the bankruptcy case. Fact that omitted assets were allegedly worthless does not excuse failure to disclose. Omission is material even if omission is one of allegedly valueless asset or omission is not detrimental to creditors. Debtor failed to disclose loans from Debtor's parents in excess of $100,000 or any payments that Debtor may have made on those loans. Non-disclosed information bore a relation to bankruptcy case. Debtors are not permitted to determine what is relevant or important for case administration. Nature of non-disclosed information evidenced that Debtor either knew of omission or acted with reckless disregard for truth, or knew that omission would create erroneous impression of Debtor's financial affairs, which establishes fraudulent intent.

(4331) *Advantage Bank v. Starr,* 2012 WL 4714978 (Bankr. N.D. Ohio 2012) – False oath requires 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Intent requires that the Debtor knew the statement to be false or that an omission to speak will create an erroneous impression. Information is material if it bears a relationship to Debtor's business transactions or estate or pertains to existence and disposition of property. Bank failed to prove that Debtor omitted bank account. Debtor listed three separate bank accounts on schedules. Bank's evidence indicated that a year earlier, Debtor had four accounts, but evidence did not indicate that as of petition date Debtor still had four accounts. Erroneous statements regarding property owned by Debtor where property was actually owned by Debtor's trust did not evidence intent, where Debtor was relatively unsophisticated and did not have clear understanding of distinction between Debtor and trust. Debtor's statement of intention that Debtor would continue to make payments on mortgage held by business partner was not knowingly false. Although Debtor did not continue to make regular payments, statement of intention did not state that Debtor intended to make normal and regular payments pursuant to the contract terms. Errors concerning value of trust were not material where Debtor also separately listed the assets in the trust and the values of those assets. Bank introduced no evidence that errors were part of scheme to defraud the Trustee or the creditors and the alleged falsities were not material where schedules listed all assets, although some of those assets may have been incorrectly denominated.

(4332) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – False oath requires that Debtor made statement under oath, which can include statements in schedules, statement of financial affairs, or at 341 meetings; that statement was false and that Debtor knew was false; Debtor made the statement with fraudulent intent; and statement related materially to case. Debtor's alleged omissions of interests and assets on schedules, if proven, could support denial of discharge.

(4333) *Barcume v. Fox,* Case no. 11-12036 (E.D. Mi. 2012) – Section 727(a)(4) requires proof that Debtor made a statement under oath; that the statement was false; that the Debtor knew the statement was false; that Debtor made the statement with fraudulent intent; and the statement materially related to bankruptcy case. Debtor inadvertently stated on SOFA that Debtor sold Toyota Yaris for $12,000 when vehicle sold was actually Toyota Spyder. Debtor was fully candid about circumstances of later transfer of Yaris for $5,700. There was no evidence that Debtor knew of error or that error was anything other than miscommunication between Debtor and attorney.

(4334) *Kaler v. Charles,* Case No. 12-6016 (8th Cir. BAP 2012) – Debtor willfully undervalued Debtor's interest in two separate businesses owned by Debtor; substantially undervalued residence and overstated debt against it, making it appear that Debtor had no equity in property; Debtor failed to disclose income in the two years pre-petition including $15,000 in distributions from company that Debtor valued at $1.00. Debtor purchased interest in business for $25,000 less than 2 years prior to filing, and valued interest at $63,000 approximately one year before filing; and business owned real estate worth over $600,000. Existence of buy-sell agreement did not indicate that interest was worth only $1.00. Accounting for marketability of interest and minority ownership discounts, business interest was worth substantially more than $1.00. Statements made in schedules constitute statements made under oath for purposes of Section 727(a)(4). Statements were made with reckless indifference to truth sufficient to regard statements as intentionally false. Statements that bear relationship to business transactions or estate, or concerns the discovery of assets, business dealings, or existence and disposition of property are "material" for purposes of Section 727. Omission of even a relatively modest asset will merit denial of discharge if made with knowledge and fraudulent intent. Debtor's representations that business interests were worth only $1.00 were made with intent to "sen[d] a message to the Trustee that there was no need to inquire further."

(4335) *Lim v. Storozhenko,* Case No. 11-6552 (Bankr. E.D. Mi. 2012) – Bankruptcy requires complete financial disclosure. Presentation of information that Debtor knows to be false or is omission that creates false impression constitutes misrepresentation. False misrepresentation can be result of intentional acts of statements made in reckless disregard of truth. Debtor made false oath sufficient to deny discharge. Debtor's schedule B failed to disclose proceeds of personal injury x of $5,400 that Debtor still had in her possession as of petition date. Statements in Schedules are considered to be under oath. Debtor's statement that she had only $30 in cash on hand, rather than the $5,500

she actually had, constitutes a false statement. Statement related materially to bankruptcy case as it bore a relationship to business transactions or estate, and concerned discovery of assets, business dealings, and existence or property. Debtor knew the statements were false and were made intentionally and were not the result of mere mistake or inadvertence.

(4336) *Humphrey v. Morgan,* 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Statements made in schedules, statement of financial affairs, and at the 341 meetings are all statements made under oath. Debtor's statements were materially false where statements indicated that Debtor-husband and Debtor-wife had total monthly income for past 3 years of only $3,000 per month, yet bank statements and other documents showed deposits that substantially exceeded that amount and withdrawals totaled more than $100,000 per year. Circumstantial evidence supported intend to deceive where there were substantial errors made in disclosure of income for three years and a total failure to disclose any income for Debtor-wife. Allegations supported finding that omissions were done knowingly, where levels of deposits into and withdrawals from the joint bank account combined with Debtors' joint purchase of a new residence allowed inference that Debtor-husband had knowledge of falsity of statements. Schedules also failed to disclose hundreds of thousands of dollars transferred to Debtors' children in the one year preceding the bankruptcy petition, transfers that were made by gifts and payment of expenses from the joint bank account maintained by Debtor-husband and Debtor wife.

(4337) *U.S. Trustee v. Zhang,* 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Debtor's use of multiple corporations to hide cash and conceal transfers supported denial of discharge. Debtor manipulated wholly-owned corporations in such a way as to transfer large amounts of money from those corporations into other corporations and into Debtor's own accounts for purposes of hindering creditors of the transferring corporations. Debtor also retained funds in corporate accounts that were then used for personal and family purposes, demonstrating that the funds in these accounts, although titled in corporate names, were actually personal funds that were knowingly concealed from creditors. *De minimus* discrepancies in bank balances that were disclosed would not support denial of discharge where discrepancy was explained by mat error and failure to account for deposit made shortly before filing. Debtor's statement of income on schedule I was materially understated. Debtor had monthly income of $17,000, not $2,600 listed on schedule I. Debtor's testimony that schedule I was Debtor's "anticipated" income was not credible where evidence showed that Debtor's income had consistently been the higher amount. Scheduled values of corporations as "unknown" and $100" were not deceptive where value of one corporation was unclear as assets were primarily patents that may or may not have had market value; and schedules disclosed assets owned by corporation sufficient to place parties on notice of existence and potential value of assets. Debtors' failure to list debts owed to family members indicated a failure to carefully review schedules but did not demonstrate an intent to defraud those family creditors.

(4338) *Lincoln Savings Bank v. Freese,* Case No. 11-6055 (8th Cir. BAP 2011) – Debtor knowingly omitted material information from schedules and SOFA sufficient to warrant denial of discharge. Debtor failed to disclose and failed to satisfactorily explain the omissions of: (1) the existence of the Debtor's livestock business; (2) the gross income from his livestock business; (3) income from 2007; (4) transfers of certain equipment which constituted part of the bank's collateral; and (5) co-ownership of the car his wife drove. Evidence supported findings under Section 727(a)(4)(A) that: (1) Debtor made a statement under oath; (2) the statement was false; (3) Debtor knew the statement was false; (4) Debtor made the statement with fraudulent intent; and (5) the statement related materially to the Debtor's bankruptcy case. Some of the reasons given by the Debtor were simply not the law, such as his argument that his failure to disclose gross income from his livestock business was excused by the fact that the operation did not generate a profit. Court would not adopt a subjective standard that would allow each individual Debtor to make their own determination of what is meant by the questions on the Schedules and Statement and make disclosures accordingly. Debtor's omissions were material. Value of the undisclosed asset does not determine whether the subject matter of the false oath is material and failure to disclose an asset with a minimal value may be material. Even if discovery of the Debtor's property interests results in no recovery for his estate omissions in this case were directly related to the Debtor's business and his assets, defining them as "material" for purposes of Section 727(a)(4)(A).

(4339) *Stevenson v. Taylor,* 2011 WL 5075693 (E.D. MI. 2011) – Debtor, an attorney, failed to disclose in Bankruptcy Schedules Debtor's 2009 state and federal tax refunds; accounts receivable associated with law practice; certain gas royalties and rental incomes; and a potential cause of action against Detroit Police Department. Section 727(a)(4) met where Debtor made material representation known to be false with intent to create erroneous impression. Reckless disregard for truth will satisfy element of intent as will pattern of reckless or cavalier disregard for truth, but mistake or inadvertence will not. Although Debtor's failure to list any one of these omitted assets may have been "innocent mistake", cumulative effect evidenced disregard for truth. Debtor, an attorney practicing 19 years, was not unsophisticated and understood obligation to accurately disclose information to court. Debtor never attempted to amend schedules to disclose omitted assets once assets were discovered and failed to provided documents such as Accounts Receivable ledgers, which indicated intent to cover up misrepresentations, furthering cavalier attitude.

(4340) *U.S. Trustee v. Waits,* 2011 WL 4015680 (Bankr. E.D. Ky. 2011) – To prevail, the United States Trustee must prove, by a preponderance of the evidence: (1) the Debtor made a statement under oath; (2) the statement was false; (3) the Debtor knew the statement was false; (4) the Debtor made the statement with fraudulent intent; and (5) the statement materially related to the bankruptcy case. Statements under oath as defined in Section 727(a)(4)(A) include testimony given by a Debtor at the first meeting of creditors, in a deposition, or in a 2004 examination, as well as statements made by a Debtor in the schedules and statement of financial affairs and includes both affirmative false statements and omissions. Debtor's failure to volunteer information to correct a misstatement by Debtor's counsel at the first meeting is not a statement under oath by the Debtor, particularly where there was no direct question asked or pending when or after the misstatement was made. Debtor's statement in Schedules that tax refund belonged solely to the non-filing spouse, while inaccurate, did not indicate that statement was knowingly or fraudulently made or made with reckless indifference. Debtor's accountant testified that Debtor's statement was correct from an accounting standard and Debtor's overall approach to management of business coupled with troubled marriage and later separation adequately explained Debtor's ignorance. For purposes of Section 727(a)(4)(D), Trustee must prove by a preponderance of the evidence that (1) the Debtor or someone whose conduct for which the Debtor is legally responsible; (2) knowingly and fraudulently; (3) withheld recorded information including books, documents, records and papers; (4) relating to the Debtor's "property or financial affairs"; (5) from an officer of the estate entitled to possession of it under title 11. Debtor did not fail to turnover books and

records where Debtor turned over only the first two pages of his tax return but then submitted the complete return upon request by the Trustee.

(4341) *General Electric Capital Corp. v. Wickard,* Case No. 08-80498 (Bankr. W.D. Mi. 2011) – Plaintiff must prove that Debtor made statement under oath that Debtor knew was false, and was made willfully and with intent to defraud. Debtor failed to disclose ownership interest in several companies. Debtor did not deliberately undervalue ownership interest in disclosed company where Debtor used different method to measure value than Debtor used in financial statements given prior to commencement of bankruptcy and there was no evidence of actual value to resolve conflict or determine which value was correct. Debtor failed to disclose receipt of payments on promissory notes in Statement of Financial Affairs and indicated that Debtor had stopped receiving those payments long before commencement of case, where evidence indicated that Debtor continued to receive those payments up to and after commencement of case. Debtor's alleged payment of proceeds of promissory notes to lender also was not disclosed in Statement of Financial affairs even though money was paid to Debtor and Debtor later determined to pay proceeds to creditor. Debtor also failed to disclose ownership of various businesses in Statement of Financial Affairs Question 18 and continued to deny ownership even though documents introduced in evidence t hearing clearly established ownership. Evidence established that magnitude of deficiencies were not the product of mere inadvertence, but inferentially could only result from intent to deceive.

(4342) *Midwest Community Federal Credit Union v. Olds,* 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Knowing and fraudulent requirement of Section 727(a)(4) means Debtor either acted with intent to defraud, by making material representation known to be false; or by statement made in reckless disregard of truth. Statements are "material" if they bear a relationship to Debtor's business or estate, or concern discovery of assets, business dealings, or existence and disposition of property. Debtor's inconsistent statements of value of automobile will not support finding of fraud where credit union did not produce evidence of actual value of vehicle. Prior financial statements do not evidence fraud where statements of income in SOFA relate to different financial years than those set forth in the financial statements; and discrepancy could be result of lack of Debtor's financial sophistication and confusion between gross revenue of business and gross income of Debtor. However, Debtor's representation in statement filed pursuant to Section 521(a)(1)(B)(iv) that Debtor was unemployed would warrant denial of discharge where Debtor owned and operated own business and continued to operate business even post-petition. Debtor clearly had knowledge of business and knowledge of falsity of statement in affidavit.

(4343) *Newton v. Sims,* 2011 WL 2619106 (Bankr. E.D. Tn. 2011) – Pre-petition, Debtor sold her residence but was unable to obtain mortgage to purchase new one. Debtor gave proceeds of sale ($150,000) to her son who purchased a new home in his name alone, using the $150,000 as the down payment and obtaining mortgage for the balance. Debtor did not disclose the transfer of the $150,000 to son in her SOFA. Defendant knowingly made false statements in her statements and schedules by failing to disclose the Purchase Agreement and the $145,000.00 transfer to her son and that she did so with the requisite intent to justify a denial of her discharge. Transfer of $145,000.00 eight months prior to filing for bankruptcy was a material transaction involving the Defendant's assets. Defendant's attorney had been informed about the details of the condominium purchase by the Defendant. When questioned at trial as to why Debtor did not disclose these transactions, the Defendant testified that she "never thought of it." Defendant is not an unsophisticated Debtor. From 2002 to 2007, she was a sales associate with a large, private real estate company in New Jersey. For sixteen years prior to her work in real estate, the Defendant was the administrator for a church in the New Jersey town where she resided. Although Debtor was aware that the Trustee was concerned by and questioning these omissions when he filed a motion to extend the time to file an objection to her discharge, Defendant did not file an Amended SOFA until more than four months after her meeting of creditors, twenty days after her 2004 examination and two days after the Plaintiff filed the Complaint initiating this adversary proceeding. Defendant's failure to amend in light of the Plaintiff's pursuit of information and subsequent filing of this adversary proceeding evidences bad faith or, at a minimum, a reckless indifference for the truth, which provides the foundation and justification for a denial of her discharge.

(4344) *Barbacci v. Ungar,* 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – Section 727(a)(4) requires proof that 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor's failure to list two corporate entities owned by Debtor in Schedule B was not concealment where Debtor did disclose those two entities in the Statement of Financial Affairs, and Trustee went letter to Debtor prior to First Meeting inquiring about those two entities. Debtor's alleged undervaluation of household goods did not evidence fraudulent intent where Debtor valued assets at $2500 and Trustee's appraisal indicted $10,000.00. Debtor testified truthfully at the 341 meeting that no item was worth more than $1,000, and all amounts listed in Trustee's appraisal are well within the allowed exemptions. To prevail under subsection (a)(4)(D), Trustee must prove) the Debtor withheld documents relating to the Debtor's property or financial affairs; 2) in connection with a case; 3) from an officer of the estate entitled to possession; 4) and such withholding was [done] knowingly and fraudulently. Debtor's ongoing willingness to produce information combined with confusion regarding whether Debtor's two wholly owned corporations would also file bankruptcy indicted that Debtor did not fraudulently withhold information.

(4345) *McDermott v. Edwards,* 2011 WL 2619193 (Bankr. E.D. Ky. 2011) – Debtor's attempt to mislead creditors by deliberately undervaluing assets constitutes fraudulent statements in violation of Section 727(a)(4). Debtor improperly used lower tax assessed values for real estate when Debtor had recent appraisals that showed much higher values and where Debtor had represented much higher values only 6 months pre- petition.

(4346) *Silagy v. Dupal,* 2011 WL 2213975 (Bankr. N.D. Ohio 2011) – Court can deny a discharge when "the Debtor knowingly and fraudulently, in or in connection with the case ... made a false oath or account." Trustee must establish 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor failed to schedule a personal injury action although Debtor had commenced personal injury litigation only two weeks prior to filing bankruptcy; and Debtor repeatedly disclaimed any interest in any personal injury action during the First Meeting of Creditors.

(4347) *Kentucky Neighborhood Bank v. Ireland,* 441 BR 572 (Bankr. W.D. Ky. 2011) – Plaintiff must show by a preponderance of the evidence that the Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account. Evidence did not support fraud

regarding valuation of Debtor's closely held corporation where the Chapter 7 Trustee investigated and did not contest the value. Although corporation owned real property worth $100,000, other business difficulties could have rendered Debtor's ownership interest worthless which supported Debtor's statement of value of $0. Debtor's actions in significantly reducing income for the 6 months prior to filing evidenced intent to manipulate income to avoid means test for above-median Debtor; and substantial reductions in asset values from prior financial statement issued one year prior to filing which listed assets of over $1 million versus bankruptcy documents which listed assets totaling only $26,000; were both troublesome, court would rely on trustee's inaction regarding assets and value and the liberal construction of discharge in rejecting creditor's claims under Section 727(a)(4).

(4348) *Barcume v. Fox,* Case No. 09-3514 (Bankr. E.D. Mi. 2011) – Section 727(a)(4) requires a false statement or omission in the schedules or a false statement by the Debtor at an examination in the course of the case. Plaintiff must prove that: (1) the Debtors made a statement under oath; (2) the statement was false; (3) the Debtors knew the statement was false; (4) the Debtors made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Even if all elements are supported, Debtor will still receive discharge if Debtor has credible explanation for omission or misstatement. Debtor's schedules and statements misrepresented payment received for sale of vehicle; failed to disclose a transfer of another motor vehicle; failed to disclose the existence of a lien on a third motor vehicle. Defendant's failure to list vehicles were the result of inadvertence or mistake where Debtor misunderstood information requested or applicability of questions to Debtor's financial affairs.

(4349) *Tower Credit, Inc. v. Davis,* 2011 WL 1396851 (Bankr. M.D. La. 2011) – To prevail on discharge objection creditor must prove that: (1) the Debtors made a statement under oath; (2) the statement was false; (3) the Debtors knew the statement was false; (4) the Debtors made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Debtor's statement in the means test from that she was unmarried was incorrect where Debtor was married, although she had been separated for some time; and means test failed to include income information for husband was material as it related to the bankruptcy case and to the eligibility of Debtor for relief under Section 707(b)(2). However, statements were not made with fraudulent intent as Debtor relied on advice of counsel after advising that she and her husband were on bad terms and not living together. Debtor's counsel erroneously prepared means test from that says "unmarried' and did not include husband's income, although schedules reflected that Debtor was separated.

(4350) *US Trustee v. Eerdmans,* Case No. 09-80456 (Bankr. W.D. Mi. 2011) – Section 727(a)(a)(A) requires proof that the Debtor knowingly and fraudulently made a false oath or account. Plaintiff must prove (1) Debtor made a statement under oath; (2) the statement was false; (3) Debtor knew the statement was false; (4) Debtor made the statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Unrepresented Debtor did not knowingly make false statement when he included name of estranged wife as Joint Debtor where Debtor and wife had substantial joint debt and Debtor did not sign or attempt to sign wife's name to petition. Debtor, relying on unwise and incomplete advice from an attorney who did not actually represent Debtor, mistakenly believed that Debtor had to list wife as joint Debtor because Debtor and wife had joint debts. Debtor also testified at the First Meeting of Creditors that petition was drafted by attorney but later stated that he could not recall whether attorney drafted petition or whether Debtor did while discussing issues with attorney. Evidence indicated that numerous documents were faxed between Debtor and attorney on the evening before the petition was filed and attorney admitted that he assisted in the drafting, even if the Debtor actually prepared the physical document. Debtor's misstatement about attorney's role in preparing petition was a statement under oath related materially to the bankruptcy case, Court could not conclude that statement was knowingly or intentionally false or made with fraudulent intent.

(4351) *In re Fries,* 2010 WL 3700205 (Bankr. W.D. Ky. 2010) – Creditor failed to state cause of action under Section 727(a)(4) where all allegedly wrongful conduct occurred prior to commencement of case. Section 727(a)(4) is limited to fraudulent actions in connection with the case, which excludes pre-petition conduct as a matter of law.

(4352) *McDermott v. Wallace,* 2010 WL 2696790 (Bankr. N.D. Ohio 2010) – Section 727(a)(4) allows the Court to deny a discharge where the Debtor makes a statement under oath that is false where the Debtor knew the statement was false, maybe statement with fraudulent intent, any statement relating materially to the bankruptcy case. A statement is "material" if it bears a relationship to the Debtor's business transactions or estate, or concerns discovery of assets, business dealings, or existence and disposition of property. Section 727(a)(4) will not deny a Debtor a discharge if the false information is the result of mistake or inadvertence. Debtor's discharge denied where bankruptcy petition and schedules signed under oath were false with regard to his interest in his IRA, his interest in a business, and his interest in his counterclaims pending in State Court at the time of commencement of the bankruptcy case. Debtor knew about the omitted assets at the time Debtor commenced the case and certainly knew about these assets when his *amended* schedules were filed following the meeting of the creditors. Debtor omitted his interests in the business and his counterclaim with the intent of avoiding inquiries into his underhanded business dealings. Debtor's omissions were clearly material because they relate to the discovery of assets of the estate.

(4353) *Jahn v. Flemings,* 2010 WL 2803631 (Bankr. E.D. Tn. 2010) – The five elements which the Plaintiff must prove in an action under Section 727(a)(4) are: 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor made false statements under oath when Debtor's Schedules and Statement of Financial Affairs failed to disclose loan repayments to Debtor's mother made two days before Debtor signed the Statements and Schedules as required in Statement of Financial Affairs Question 3. Debtor also failed to disclose three additional payments to creditors which should have been listed in the responses to her statement of financial affairs and is designed to help a trustee discover avoidable transfers. Debtor omitted a $1000 cash payment to the roofing contractor and two payments exceeding $600 to the roofing supplier totaling $1584.23. Trustee had strong circumstantial evidence that the Debtor knew that the statements were false: Debtor is a finance manager; Debtor provided a copy of her own checkbook register showing careful accounting of her transactions; Debtor produced the cash tickets and invoices from the creditors; Debtor was able to reconstruct the payments down to the penny for trial; Debtor discussed the payments while preparing the schedules, but did not disclose the payment to her mother; Debtor repaid her mother in cash on the night she sold her car; Debtor did not claim that she was rushed to file or that the omission was a mistake or that he forgot about the transfer; Debtor was carefully rationing her cash proceeds up to the day she filed and even planning in advance

for electronic deductions from her bank account to insure that she paid what she wanted to. Debtor knew that she had paid her mother, an insider, within a year of her filing and that it should have been listed on the schedule. Fraudulent intent involves a material representation that the Debtor knows to be false, or an omission that the Debtor knows will create an erroneous impression. A reckless disregard as to whether a representation is true will also satisfy the intent requirement but fraudulent intent will not be found if false information is the result of mistake or inadvertence. The omission of all transfers to creditors in the statement of financial affairs leaves impression that there are no avoidance actions to investigate, and if appropriate, pursue. Circumstantial evidence supported finding that omissions were intentional: the party who received the transfer which she omitted was her mother; the transfer was all in cash; the mother- daughter relationship; the Debtor's serious financial condition; her mother's limited financial resources; the Debtor's course of conduct after the onset of financial difficulties in picking and choosing which creditors would be paid and which discharged; the omission of the loan payment; and the proximity of the payment to the filing are all badges of fraud. Debtor's belated disclosure of the transfers does not insulate Debtor from denial of discharge. While a Debtor who fully discloses his property transactions at the first meeting of creditors or who mistakenly or inadvertently give false information and who seek to amend their schedules or report omissions prior to or during the meeting of creditors are not perceived as possessing the requisite intent. Debtors who disclose only when confronted by the trustee may be found to possess that intent. Debtor has never claimed that the omission was the result of mistake or inadvertence, other than her comment at trial that she did not think that the transfer to her mother "counted." The Debtor did not claim mistake at the meeting of creditors. She showed no confusion about whether she was repaying a loan to her mother when confronted by the trustee about where she deposited the proceeds of the Camaro sale. Debtor has not tried to make a correction. Debtor's testimony at the creditor's meeting was not made as a pre-emptive correction of an inadvertent omission but only in response under oath to direct questioning by the trustee. The Debtor's disclosures came when she was faced with telling the truth or making additional false oaths. The information about the timing of the repayment to her mother was only disclosed when the trustee asked about whether Mrs. Flemings was listed as a creditor when he followed up on the issue of the proceeds of the Camaro sale. The Debtor's first responses at the creditors meeting left the trustee with the impression that she had only failed to list a creditor and never amend her schedules to accurately reflect her prepetition payments to creditors. Transfer will be material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. Materiality does not mean that a significant amount of money is involved; only that the subject matter of the false oath bears a relationship to the bankrupt's estate or concerns the discovery of assets, business dealings, or the existence or disposition of property. The concealment of a potential preference action clearly bears a relationship to the bankrupt's estate. Failure to disclose minimal or even worthless assets constitutes material omissions that can preclude discharge. Trustee and the creditors should be able to rely on accurate schedules and a complete statement of financial affairs. Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.

(4354) *Retz v. Samson,* Case No. 08-60023 (9th Cir. BAP 2010) – Discharge can be denied under Section 727(a)(4)(A) where the Debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. Plaintiff must show (1) the Debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. Debtor's schedules and Statement of Financial Affairs were substantially incomplete when filed and Debtor admitted he knew they were incomplete and made no effort to even read them before they were filed. Debtor's schedules omitted valuable watches, a bank account, a 1984 Cadillac, a 2002 Audi purchased through TCI, and the sale of a helicopter and hangar. Statement of Financial Affairs Questions 3 and 10 failed to list multiple transfers pre-petition including prepayment of Debtor's home mortgage with the proceeds from the sale of his helicopter and hangar just before he petitioned for bankruptcy; at least two prepetition transactions involving Debtor's father, a check for $38,287.30; and a check to in the amount of $12,181.00; a series of transfers in September 2003 from Debtor's credit cards to a corporation owned and operated by the Debtor's family, totaling approximately $160,000. Debtor was unable to explain where $80,000 he received from the corporation shortly before filing. These omissions were material because they bore relationships to Debtor's business transactions and concern the discovery of assets, business dealings and the disposition of Debtor's property and detrimentally affect case administration. Evidence supported finding that omissions were deliberate and knowingly where Debtor deliberately and consciously signed the Schedules and SOFA knowing that they were incomplete. Fraudulent intent requires a pattern of falsity, reckless indifference to and disregard of the truth, and demonstrated by a course of conduct. Intent is usually proven by circumstantial evidence or by inferences drawn from the Debtor's conduct. Reckless indifference or disregard for the truth may be circumstantial evidence of intent, but is not sufficient, alone, to constitute fraudulent intent. A Debtor who in good faith acts in reliance on the advice of his attorney generally lacks the intent required to deny him a discharge of his debts. Advice of counsel is not a defense when the erroneous information should have been evident to the Debtor. Debtor cannot escape a finding of fraudulent intent by his reliance on the advice of his counsel where Debtor signed the Schedules and SOFA without reading them and where the significant number of falsehoods and omissions, together with the failure to amend the Schedules and SOFA in the three years between the petition and trial, evidenced fraudulent intent.

(4355) *In re Merena,* Case No. 08-1342 (9th Cir. BAP 2009) – Debtor who knowingly and fraudulently makes false oath or account in the course of a bankruptcy case can be denied a discharge. A fault statement or omission in schedules or statement of financial affairs can constitute a false oath. Plaintiff seeking to deny discharge must prove by a preponderance of evidence that Debtor made a false statement or omission regarding a material fact and did so knowingly and fraudulently. A false statement that has no impact on the bankruptcy is not material and does not provide grounds for denial of discharge under section 727. Debtor's failure to list three pending actions (a divorce action, a cohabitate abuse proceeding, and a custody proceeding); two payments to her divorce attorney aggregating $6500; a resulting credit balance in Debtor's account at her law firm; and certain items of personal property (including a Roth IRA for $380, a 19 inch television, a laptop computer and an iPod) about which Debtor later informed the trustee and amended her schedules, with results of the Debtor's misunderstanding as Debtor believed she needed to only list actions that have a financial impact on her or the bankruptcy case. The chapter 7 trustee stated that while the lawsuits should have been listed, they were not particularly important because they did not involve claims that belong to the bankruptcy estate and could not generate any recovery for creditors. Debtor's failure to list miscellaneous items of personal property with your result of a mere oversight and the Debtor's valuation of her automobile appeared reasonable after inspection of the vehicle and consulting blue book values. Debtor's failure to disclose a prepetition sale of a condominium was done "out of ignorance" and the trustee was fully aware of the sale of the condominium notwithstanding its omission but deemed the

sale to be insignificant. Debtor was ultimately forthcoming about all needed assets and she promptly amended her schedules to correct omissions. Although Debtor's schedules contained a number of omissions, there was no proof that the omissions were done knowingly or with fraudulent intent or that any of the omissions were material where all of the omitted assets had little value and no impact on bankruptcy case.

(4356) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Discharge will be denied where Debtor knowingly and fraudulently makes a false oath or account. Plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Failure to fully provide all information required in Schedules or Statement of Financial Affairs is sufficient to deny discharge. Debtor's Statement of Financial Affairs grossly understated Debtor's income and failed to disclose that Debtor was entitled to large tax refund that Debtor ultimately received post-petition. Debtor also caused large sums to be transferred from one wholly owned corporation into other wholly owned corporations for purpose of purchasing CDs for Debtor's benefit. When asked about these transfers, Debtor falsely denied that transfers had occurred. Debtor's numerous false statements established intent to deceive sufficient to deny discharge.

(4357) *Montedonico v. Beckham*, 2009 WL 1726526 (6th Cir. BAP 2009) – Discharge denied under Section 727(a)(2) and (a)(4). Schedules and Statement of Financial Affairs failed to list income of $47,000 received in the 7 months prior to the filing of the petition; gambling losses in excess of $16,000 in the year prior to the filing; additional checks to or withdrawals from ATMs located at various casinos in Mississippi in excess of $37,000 during the year prior to the filing; failure to list any antiques even though Debtor spent over $3600 at antique stores in the year prior to the filing and over $800 in the 45 days prior to the filing; failed to disclose Debtor's ownership interest in real estate located in Oklahoma or any leases related to that property or any income derived from that property, although her tax returns listed rental income for the prior calendar year; failed to disclose a pending EEOC claim against her former employer; Debtor's status as executrix and beneficiary of the estate of Debtor's deceased mother and receipt of rental income from property included in her mother's estate; property allegedly held by other people located at Debtor's residence; Debtor's ownership interest in a Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower; the post-petition sale of the Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower for $12,000, with the proceeds routed through Debtor's daughter and two of Debtor's neighbors so the proceeds could not be tracked. Debtor compounded her non-disclosure by willfully failing and refusing to cooperate in discovery in the adversary proceeding. Court concluded that Debtor clearly, repeatedly and knowingly concealed assets and misrepresented her financial situation in her bankruptcy case through multiple material omissions and misrepresentations justifying denial of discharge under Section 727(a)(2)(A) and (B). Further, Debtor's false statement about Debtor's income, gambling losses, and interests Debtor held in real and personal property justified denial of discharge under Section 727(a)(4)(A). "The bankruptcy Court found it incredulous that the Debtor did not know the statements to be false and simply forgot that she received income of $197,000 in the year preceding the bankruptcy, or that she spent nearly $800 in antiques stores in the 45 days immediately preceding the filing of her case."

(4358) *Kappell v. Bunch,* 2009 WL 3055338 (Bankr. E.D. Ky. 2009) – Discharge will be denied under Section 727(a)(4)(A) where Debtors made (1) a statement under oath; (2) that was false; (3) that Debtors knew was false when made; (4) that Debtors fraudulently intended to make the statement; and (5) the statement was materially related to the bankruptcy case. The false statement may include either a statement or omission in the Schedules. Intent includes a statement made with reckless disregard for the truth. The statement is material if it relates to Debtor's business transactions or concerns discovery of assets. Debtors' Statements, sworn to under oath, failed to list multiple assets including a couch, tools for the business, insurance policies, home furnishings and a mule and were either intentionally false or were made with reckless disregard for the truth.

(4359) *Long v. Smith,* 2009 WL 1924791 (Bankr. E.D. Tn. 2009) - Denial of discharge under § 727(a)(4) requires proof that the Defendant made a statement under oath which was false, that Debtor knew the statement was false when made, that Debtor made the statement with fraudulent intent, and that the statement materially related to Debtor's bankruptcy case. Both affirmative false statements and omissions fall within the scope of § 727(a)(4)(A), and statements are material if related to a Debtor's business enterprises or transactions, the bankruptcy estate, the discovery of assets, and/or the existence and disposition of property, as are matters pertinent to the discovery of assets. Complaint that alleged that the Defendant made false statements at meeting of creditors and in statements and schedules concerning residence, the ownership of horses and movable horse partitions, testimony concerning the payment of debts, involvement in a State Court lawsuit, and monthly living expenses sufficient to state claim which, if proven, would result in denial of discharge.

(4360) *Morgan v. Mankins,* 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(4) must be based on conduct that occurred within context of bankruptcy case. Debtor's alleged action in forging Plaintiff's signature on check and misrepresentations regarding repairs to Plaintiff's automobile had nothing to do with bankruptcy case where bankruptcy not filed until more than one year later.

(4361) *Roberts v. Debusk,* 2009 WL 1256891 (E.D. Tn. 2009) – Discharge will be denied where Debtor knowingly and fraudulently makes a false oath or account. Plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Whether Debtor's failure to list gambling losses was intentional or only result of mistake or inadvertence is question of fact for Bankruptcy Court and will be reversed only if "clearly erroneous". Gambling losses were material as those losses bore a "relationship to Debtor's bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property". Debtor intentionally failed to list gambling losses on Statement of Financial Affairs, Debtor testified at Section 341 Meeting that losses were $10,000, and Debtor later admitted actual losses of $25,000 to $40,000.

(4362) *D.A.N Joint Venture, III, L.P. v. Shekerjian,* Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) – To deny a discharge under section 727(a)(4)(A), plaintiff must prove that Debtor knowingly made materially false statements under oath. Section 727(a)(4)(A) encompasses both affirmative false statements and omissions, and includes statements and schedules which are executed under oath and penalty of perjury as well as testimony given at meeting of creditors. Complaint that alleged that schedules omitted creditor who was owed in excess of $2.5 million

pledged sufficient facts to state a claim under section 727(a)(4)(A).

9.33 Section 727(a)(5)

(4363) *Krieger Craftsmen, Inc. v. Ostosh,* Case No. 16-80072 (Bankr. W.D. Mi. 2018) – Section 727(a)(5) allows Court to deny discharge where plaintiff establishes that Debtor had ownership interest in specific asset at time not too far removed from when petition is filed; and Debtor cannot satisfactorily explain loss or deficiency of assets. Issue is whether explanation satisfactorily describes what happened to asset, not whether what happened to asset was proper, and it does not matter that asset was used for illegal activities as long as explanations reasonable and creditor and satisfies Court that creditors have no cause to wonder where assets went. Explanation need not be far-reaching or comprehensive but must be more than vague, indefinite or uncorroborated and while supporting documentation is helpful, lack of supporting documentation, alone, does not prevent explanation from being satisfactory. Court will evaluate explanation based on nature of Debtor's business, education, and financial sophistication. Plaintiff produced evidence that Debtor had significant – assets from personal income and years leading up to bankruptcy filing. During two years preceding filing of case, Debtor had income in excess of $200,000 per year plus income of $170,000 for counter year in which bankruptcy case was filed; and that Debtor had consistently earned same level of prepetition income in converted income to cash to pay general living expenses. Debtor did not provide detailed records accounting for expenditure of money because Debtor operated on "cash basis". However, Debtor gave specific, credible testimony that he handled finances on cash basis for much of prepetition period during which Debtor was not sophisticated businessmen or particularly astute financially as evidenced by Debtor's agreement to become personally liable for loans extended to Debtor's employer when Debtor was not officer, director or stockholder in employer. Debtor presented summary of expenditure prepetition income extending back approximately 10 years which collaborated Debtor's testimony that nearly every dollar Debtor earned was spent on living expenses including repayment of personal loans; educational and living expenses for children; and weddings for children. Although summary provided may not have been perfect accounting, gaps in information did not demonstrate that Debtor concealed income or attempted to hide assets and instead suggested that Debtor had been forthcoming throughout bankruptcy process.

(4364) *Carter-Jones Lumber Co. v. Beatty,* 2018 WL 316978 (Bankr. N.D. Ohio 2018) – Bankruptcy Code emphasizes full and honest disclosure as prerequisite to relief of discharge and requires debtor to explain any substantial loss of assets incurred during lead-up to petition. Court will deny discharge where debtor has failed to explain satisfactorily loss of assets or deficiency of assets to meet debtor's liabilities. Failure to satisfactorily explain what happened to monies withdrawn from business accounts is sufficient to deny a discharge. Party seeking to deny discharge has burden to identify assets which debtor at one time owned but Debtor claims in schedules no longer possessed. Debtor's explanation while not necessarily needing to be comprehensive, must be satisfactory. Debtor withdrew a total of $264,130.00 from owned business entities during the two year follow-up to the filing of his Petition and Debtor's 2014 and 2015 tax returns report an income of $302,408.00. Debtor failed to provide any documentation or even a generalized oral explanation. Without a proper explanation, Debtor appears to have engaged in a prolonged divestiture of corporate assets by making personal withdrawals that he has not accounted for in depositions, or in any affidavit or citation to the record. Analysis of the adequacy of the explanation cannot come into play where there is complete absence of any explanation.

(4365) *McDermott v. Kerr,* 2017 WL 3880875 (Bankr. N.D. Ohio 2017) – Court can deny discharge where Debtor does not satisfactorily explain loss of assets or deficiency of assets. Plaintiff must identify assets that Debtor at one time owned but now asserts no longer exists. Debtor must then offer satisfactory explanation of loss of assets. Section 727(a)(5) does not have element of wrongful intent or any other affirmative defense. Plaintiff did not establish that Debtor did not explain loss of assets. Debtor did not own assets on date of Bankruptcy petition where Debtor had disclosed transfers of real estate to Debtor's wholly owned LLC and LLC had later been placed in receivership. All facts of transactions were known and fully disclosed and adequately explained why assets that Debtor formerly owned were no longer available.

(4366) *Lashley v. Lashley,* 2016 WL 6875890 (Bankr. D. Neb. 2016) – Complaint that alleged only that "in the event Debtor disposes of any property during the pendency of this matter, Debtor should be denied a discharge" sufficient to state cause of action. Complaint suggested either that transfers had not occurred yet or that she did not have knowledge of facts sufficient to bring action before discharge entered. Complaint did not allege sufficient facts to conclude that action was brought untimely. Motion to dismiss denied.

(4367) *Crocker v. McWhorter,* 2016 WL 4928001 (Bankr. E.D. Ky. 2016) – Section 727(a)(5) denies discharge where fails to identify assets that Debtor at one time owned but no longer does, and Debtor lacks satisfactory explanation. Debtor's financial statement signed less than 2 years pre-petition listed assets valued at $14 million while schedules listed assets valued at only $425,000, meeting plaintiff's burden to prove that Debtor had assets at time reasonably proximate to commencement of case but no longer has those assets. Burden then shifts to Debtor to provide adequate explanation. Debtor's testimony that he did not really review the statements and that he did not prepare them; that some of the businesses suffered financial difficulties causing diminished value; and that other businesses were closely held and are difficult to value, provide some justification for decrease but does not explain Debtor's valuation on financial statement of home at $1.1 million, a motor home at $128,000, and vehicles ($175,000). Only evidence of actual values of assets was trustee's sale of (or abandonment of) assets. Debtor's testimony was that financial statements were overstated in first instance which sufficiently calls into question accuracy of earlier valuation, sufficiently rebutting claim that values were lost or diminished. Evidence did not support finding under Section 727(a)(5) but did bolster nondischargeability under Sections 727(a)(2) and (4) as further raising issues regarding Debtor's inconsistent testimony and credibility issues.

(4368) *McDermott v. Kerr,* 2016 WL 4410572 (Bankr. N.D. Ohio 2016) – Section 727(a)(5) results in denial of discharge where Debtor fails to explain in satisfactory manner the loss of assets or deficiency of assets, and specifically any transfers for zero consideration. Purpose is to relieve creditors and the court from burden of reconstructing Debtor's financial history and condition. Plaintiff is not required to prove that Debtor acted fraudulently or knowingly and there is no intent element of Section 727(a)(5). There is no hard and fast rule regarding the length of time pre-petition Debtor must account for assets and courts have denied discharges based on assets going back as far as 9 years pre-petition. General rule is that time must not be too remote from bankruptcy that Debtor owned identifiable assets; on the day of the petition he no longer owned those assets; and schedules and pleadings do not offer adequate explanation. Debtor's explanation of loss

of assets must (1) be supported by documentation; and (2) documentation must eliminate need for Court to speculate as to what happened to assets. More than one year prior to commencement of case, and while facing multiple judgments, Debtor transferred four parcels of property from his name to an LLC in which Debtor was sole member. When Debtor filed bankruptcy, he did not list either properties or the LLC as an asset, and omitted the names and addresses of known creditors including the judgment holders from the schedules. Debtor's failure to offer evidence as to disposition of assets constituted basis to deny Debtor's Motion for Summary Judgment.

(4369) *Smith v. Morse,* 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Section 727(a)(5) required proof that at a time not too remote from the bankruptcy, Debtor owned identifiable asset; that on date of bankruptcy petition Debtor no longer owned that asset; and schedules or pleadings in case do not adequately explain disposition of asset. Section 727(a)(5) does not have an intent requirement – instead, Section 727(a)(5) imposes strict liability. Debtor adequately explained loss of funds invested by creditor before filing by showing that funds were used for personal and business expenses. While creditor may not have intended funds to be used for that purpose, Debtor nonetheless adequately explained disposition of funds.

(4370) *Cosby v. Baltrip,* Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Section 727(a)(5) allows court to deny discharge if Debtor fails to satisfactorily explain loss of assets or deficiency of assets to meet liabilities. Allegations that Debtor failed to account for life insurance received following death of spouse, a sauna formerly located in Debtor's home, an expensive pool cue case, and proceeds of sale of motorcycle stated cause of action.

(4371) *Apartments at Cambridge Company, LLC v. Lewiston,* 2015 WL 5443713 (Bankr. E.D. Mi. 2015) – Section 727(a)(5) allows denial of discharge where Debtor fails to satisfactorily explain any loss or deficiency of assets to meet liabilities. Objecting party must show evidence that assets disappeared and Debtor must then come forward with explanation for loss or disappearance. Although evidence indicated that as recently as 2006 Debtor had income in excess of $32 million, bankruptcy schedules filed in 2012 listed total bank accounts of only $253.00, warranting explanation of apparent loss of assets. Debtor satisfactorily explained apparent loss based on tax status of Debtor's businesses which were taxed on a "pass through" basis, artificially inflating Debtor's income for tax purposes by including non-cash items such as depreciation recapture and earnings retained and not distributed by businesses. Debtor produced all bank records from 2007 to 2012 which showed various investments and expenses. Debtor lived very expensive lifestyle including $6.5 million for payments to banks; $9.8 million for advances and contributions to entities he owned; $3.5 million for business expenses; $1.8 million for taxes; $1.1 million for credit card charges; $6.8 million for family and family support obligations; $125,000.00 for charitable contributions; and $1.2 million on a jet aircraft. While evidence indicated that Debtor lived lavish lifestyle, Debtor did account for diminution of assets and income sufficient to explain Debtor's financial condition.

(4372) *Risk v. Hunter,* 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Complaint failed to state cause of action where complaint failed to allege any assets which plaintiff claims were lost or diminished and there was no evidence in the record which when viewed in light most favorable to plaintiff supported finding that Debtor had assets but no longer has those assets.

(4373) *Smith v. Morse,* 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Court will deny discharge where "he Debtor fails to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the Debtor's liabilities. Initial burden is on Plaintiff to establish the loss or deficiency of assets by demonstrating that (1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question. The Plaintiff is not required to prove that the Defendant acted knowingly or fraudulently. Statute imposes strict liability without regard to intent or any other affirmative defense. Court denied plaintiff's motion for summary judgment where evidence indicated that plaintiff invested $100,000 in Debtor's company shortly before filing but schedules reflected no equity in company, but Debtor indicated that business records would provide accounting for funds although Debtor was, in response to summary judgment, unable to provide explanation other than by reference to 1,200 pages of records already provided to court.

(4374) *Crocker v. Stiff,* 2014 WL 4966316 (Bankr. E.D. Ky. 2014) – Purpose of Section 727(a)(5) is to ensure Debtor can account for lost assets. Cash withdrawals from Debtor's personal and business accounts were adequately explained where funds were withdrawn over extended period of time were not within scope of Section 727(a)(5) where Debtor fully and credibly explained that he spend the cash on living expenses, vacations, jewelry and gambling, as well as payment of business expenses. Debtor was able to testify in great detail about cash expenditures including multiple trips to Hawaii, Paris, :as Vegas and the Caribbean for which Debtor paid cash, and expenses pertaining to Debtor's business. While Debtor's explanation may not have been meritorious or proper, Debtor did adequately explain loss of assets and demonstrated that Debtor had not hidden away any assets. Further, some of the withdrawals and cash expenditures were many years old such that Debtor's inability to account for every dollar was not unreasonable.

(4375) *Crocker v. Stiff,* 2014 WL 3513219 (Bankr. E.D. Ky. 2014) – Section 727(a)(5) requires moving party to identify assets which Debtor at one time owned but asserts in schedules that the no longer possesses. Burden then shifts to Debtor to offer satisfactory explanation of loss of assets. There is no absolute "cutoff" date beyond which the court may not go further back, and court can examine transactions dating back more than two years where there were lost assets of a substantial value relative to liabilities. Trustee met burden to show loss of assets based on transactions including cash withdrawals of more than $194,000; lost assets totaling approximately $284,000 in cash and notes payable; and funds allegedly used by Debtor to purchase horses for breeding business. Although transactions dated back as far as ten years, the assets were of sufficient value and magnitude to warrant extending lookback to 9 years preceding commencement of bankruptcy case. Court could not determine materiality of missing assets or whether Debtor had satisfactory explanation on summary judgment.

(4376) *Vogt v. Hastings,* 2014 WL 2212159 (Bankr. N.D. Ohio 2014) – Letter to court construed as complaint under Section 727(a)(5) failed to state cause of action. Statement that Debtor did not account for thousands of dollars in personal property did not allege time when Debtor owned the assets or that Debtor still had assets or took steps to either conceal or dispose of assets.

(4377) *Smith v. Morse,* 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Court will deny discharge where Debtor fails to satisfactorily explain any loss

or deficiency of assets to meet liabilities. Plaintiff must show that at a time not too remote from bankruptcy, Debtor had identifiable assets; that on date of commencement of case, Debtor no longer had those assets; and schedules and pleadings did not offer adequate explanation for disposition of assets. Plaintiff is not required to prove that Debtor acted knowingly or fraudulently and Section 727(a)(5) acts as strict liability statute. Debtor could not satisfactorily explain loss of $100,00 advanced by creditor including where those funds were transferred to or how those funds were used. Loss of assets was sufficient to warrant denial of discharge of Debtor-spouse although she had no dealings with the money advanced by creditor, where evidence indicated that she benefitted from the funds but could not explain ultimate disposition of funds.

(4378) *Hazelrigg v. U.S. Trustee,* Case No. 13-1230 (9th Cir. BAP 2013) – Debtor failed to explain loss of assets for purposes of Section 727(a)(5). After creditors commenced involuntary action against Debtor, Debtor filed Schedules and Statement of Financial Affairs that were blank but for an assertion of a Fifth Amendment Privilege. After Court Ordered Debtor to amend, Debtor filed schedules that listed a single vehicle and disclosed sale of two other cars within prior two years, but with no information concerning the vehicles sold or any details of the transactions. UST, based on Debtor's pre-petition financial statements, alleged that Debtor owned 5 luxury vehicles valued at $459,000; and real estate and personal property worth more than $49 million. Debtor refused to appear for examination under Rule 2004 again based on Fifth Amendment and refused to provide documents regarding Debtor's assets, liabilities and financial dealings to the UST for the same reason. Debtor's vague statements to court regarding assets included no details and no supporting documentation and failed to account for many assets or many of Debtor's financial records.

(4379) *Newell v. Skeens,* 2013 WL 5494107 (Bankr. N.D. Ohio 2013) – Section 727(a)(5) requires proof that the Debtor has failed to explain satisfactorily a loss or deficiency of assets. Objecting party must first identify assets that Debtor possessed at one time but no longer does, and Debtor must then provide satisfactory explanation. Section 727(a)(5) does not require proof of fraudulent intent – it is sufficient that Debtor had assets and cannot satisfactorily explain loss or deficiency. Complaint sufficiently stated cause of action where complaint identified specifically and with particularity assets that were not listed in the bankruptcy schedules but that plaintiff has personally observed in Debtor's possession shortly before the filing.

(4380) *Lunn Real Estates Investments, LLC, v. Ward,* 2013 WL 5429767 (Bankr. E.D. Tn. 2013) – Court has broad power to deny discharge where Debtor does not adequately explain shortage, loss or disappearance of assets. Plaintiff must first demonstrate that (1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question. Plaintiff does not have to prove fraudulent intent – Section 727(a)(5) imposes strict liability on Debtor who fails to account for assets without regard to intent. Once plaintiff shows deficiency of assets, Debtor bears burden to provide satisfactory explanation, which must be more than vague, uncorroborated statements and must be reasonable and credible, such that the court can determine that the Debtor is acting in good faith. Evidence indicated that for 2 years prior to filing case, Debtor had been employed earning more than $200,000 per year. Bank records showed substantial deposits, mostly direct deposits of Debtor's paychecks, totaling more than $182,000 in a 12 month period; and that Debtor made large withdrawals over the same time period totaling more than $154,000.00; yet Debtor could not explain any of those transactions and none of these transactions were disclosed in SOFA as required. Schedule B listed total assets of only $33,000 notwithstanding the substantial household income. Defendant was, immediately prior to and even after the filing of his 2012 Bankruptcy Case, in possession of large sums of money that he was no longer in possession of and could not adequately account for.

(4381) *Northedge v. Beckett,* Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Discharge in Chapter 7 does not discharge obligations incurred in action for dissolution of marriage. Obligations pass through bankruptcy unaffected and holder of claims can enforce those claims once the Chapter 7 case is completed.

(4382) *Wilson & Muir Bank & Trust Co. v. Eifler,* 2013 WL 3300639 (Bankr. W.D. Ky. 2013) – Bankruptcy court may deny the discharge of debts when Debtor fails to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the Debtor's liabilities. Satisfactory explanation must consist of more than vague, indefinite, and uncorroborated assertions by the Debtor. Plaintiff has preliminary burden of presenting evidence that demonstrates that the Debtor formerly owned substantial, identifiable assets that are now unavailable to distribute to creditors. Debtor then has the burden of establishing a "satisfactory" explanation for the asset reduction. Evidence indicated that Debtor had more than $300,000 withdrawn from a line of credit within year preceding bankruptcy yet Debtor had only $600 in cash on filing date. However, Debtor adequately explained that assets were used for normal expenses or were transferred to insiders or deposited into stock trading accounts. Debtor was not evasive or vague and was forthcoming about disposition of assets sufficient to defeat action under Section 727(a)(5).

(4383) *U.S. Trustee v. Ross,* 2013 WL 414474 (Bankr. N.D. Ohio 2013) – Section 727(a)(5) denies a discharge where Debtor cannot explain any loss of assets or deficiency of assets to meet liabilities. Plaintiff must show that Debtor had ownership interest in assets or specific funds at a time not too far removed from the petition date. Once this burden is met, Debtor must then present evidence that explains loss of assets. Section 727(a)(5) does not require wrongful intent or ill will. Explanation will be satisfactory if reasonable under the circumstances and can be reasonably verified. US Trustee carried burden based on Debtor's schedules which showed more than $100,000 in debt but only $760 in assets coupled with evidence that Debtor had purchased assets using credit cards (now listed as liabilities) reasonably close to filing of case. Debtor's explanation of missing assets not satisfactory. Debtor testified that she gave away assets to unknown persons. Debtor could not identify what property she gave away and could not identify even one person to whom she gave the property, leaving the trustee and creditors without ability to verify Debtor's explanation. Debtor's unwillingness or inability to identify even one recipient of the property indicated a lack of good faith in explaining the loss of the property to the Court. Although Debtor apparently suffered from depression and was taking medications, which may have partially accounted for inability to provide satisfactory explanation, mere chemical dependency is not sufficient to explain loss of assets and Debtor did not present any medical testimony concerning Debtor's mental state or the effect that the medications may have had on her ability to explain loss of assets.

(4384) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Plaintiff must establish loss or deficiency of assets by demonstrating that (1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question. The Plaintiff is not required to prove that the Defendant acted knowingly or fraudulently.

(4385) *McDermott v. Swanson,* Case No. 12-6028 (8th Cir. BAP 2012) – Denial of discharge requires proof that Debtor failed to explain satisfactorily any loss of assets or deficiency of assets to meet liabilities. Debtor's burden to explain the loss is not triggered until plaintiff establishes that actual loss of assets has occurred. Plaintiff's naked allegation that Debtor lost assets, without more, was not sufficient to meet initial burden. Therefore, Debtor's failure to offer evidence of justification would not support denial of discharge.

(4386) *U.S. Trustee v. Zhang,* 2012 WL 75432 (Bankr. S.D. Ohio 2012) – UST failed to demonstrate basis to deny discharge based on Debtor's alleged failure to disclose various military contracts to which Debtor, or a corporation wholly owned by Debtor, were parties. Although Debtor failed to list the contracts, UST did not establish the value of those contracts. Burden is on plaintiff to demonstrate both failure to list assets and that assets were significant or material.

(4387) *Retz v. Samson,* Case No. 08-60023 (9th Cir. BAP 2010) – Party objection to discharge under Section 727(a)(5) must demonstrate: (1) Debtor at one time, not too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the Debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets. Once the creditor has made a prima facie case, the Debtor must offer credible evidence regarding the disposition of the missing assets. Debtor's substantial omissions from Schedules and Statement of Financial Affairs, included valuable watches, a bank account, a 1984 Cadillac, a 2002 Audi purchased through TCI, and the sale of a helicopter and hangar; multiple transfers pre-petition including prepayment of Debtor's home mortgage with the proceeds from the sale of his helicopter and hangar just before he petitioned for bankruptcy; at least two prepetition transactions involving Debtor's father, a check for $38,287.30; and a check to in the amount of $12,181.00; and a series of transfers in September 2003 from Debtor's credit cards to a corporation owned and operated by the Debtor's family, totaling approximately $160,000. Debtor was unable to explain where $80,000 he received from the corporation shortly before filing. Debtor went on a spending spree just before filing for bankruptcy to benefit both himself and his wholly owned corporation, purchasing computers, office furniture, servers, luxury cars, a helicopter and hangar, and making gambling trips where he lost thousands of dollars. Debtor stated that he did not know where excess loan proceeds and credit card funds purportedly used to effect these purchases went. Debtor failed to explain how the Trustee should have found the relevant information, if Debtor himself was unable to discover it in the 28,000-plus pages of records he provided to the Trustee. "In the end, there simply is no basis in the voluminous but nevertheless woefully incomplete record before the bankruptcy court from which anyone could explain satisfactorily Retz's deficiency of assets to meet his liabilities. Retz certainly has not done so."

(4388) *General Motors Corp. v. Heraud,* Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Discharge can be denied where Debtor fails to satisfactorily explain loss of assets or deficiency of assets to meet liabilities. Section 727(a)(5) is "broad enough" to include any unexplained disappearance or shortage of assets. Although Debtor diverted $1.8 million, Debtor was unable to explain how any of that money was used or why Debtor lacked sufficient assets to pay liabilities. Debtor's vague answers and refusal to explain based on assertion of Fifth Amendment privilege sufficient to deny discharge.

(4389) *Corcoran v. Powell,* Adv. No. 08-3100 (Bankr. E.D. Mi. 2009) - Discharge will be denied under Section 727(a)(5) if Debtor fails to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the Debtor's liabilities." There is no requirement of malicious intent or scienter and it does not matter under Section 727(a)(5) how the loss or deficiency occurred. Section 727(a)(5) is simply concerned with the adequacy of the Debtor's explanation. Trustee must show that the Debtor had a cognizable ownership interest in a specific asset, and that Debtor's interest existed at a time not too far removed from when the petition was filed. Debtor must then satisfactorily explain the loss. Debtor failed to account for her assets. Debtor held herself out as being a competent tax preparer and bookkeeper since the early 1980's and holds an associate's degree and has undoubtedly gained decades of experience in the financial sector.

(4390) *Roberts v. Debusk,* 2009 WL 1256891 (E.D. Tn. 2009) – Discharge will be denied where Debtor could not explain disposal of loan proceeds of $69,000. An unexplained disposition of loan proceeds constitutes a failure to explain any loss of assets or deficiency of assets to meet liabilities.

9.34 Section 727(a)(6)

(4391) *Suhar v. Gray-Morgan,* 2018 WL 3956614 (Bankr. N.D. Ohio 2018) – Section 727(d)(3) allows Court to revoke discharge if Debtor refuses to obey lawful Order of Court pursuant to Section 727(a)(6). Standard is one of civil contempt which does not require willful or intentional refusal to obey Court Order. Plaintiff must only prove that Debtor had knowledge of Order; Debtor violated Order; and Order was specific and definite. Evidence established that Debtor had knowledge of Order directing turnover where Debtors response to adversary complaint confirmed that Debtor had knowledge. Debtor admittedly did not turn over funds as ordered and turnover Order was specific and definite as to amount to be turned over. Once moving party establishes prima facie case of contempt, Debtor has obligation to explain non-compliance. Impossibility or inability to comply notwithstanding all reasonable efforts is valid defense to action to revoke discharge but must be supported by evidence to explain noncompliance. Mere assertion of inability to comply without supporting evidence demonstrating efforts taken to comply is not sufficient.

(4392) *Baumgart v. Hartson,* 2018 WL 1887326 (Bankr. N.D. Ohio 2018) – Court has discretion to deny discharge where debtor refuses to obey lawful order of Court. "Refuse" requires some element of intent, demonstrated by evidence that Debtor had knowledge of Order which he is said to have violated; Debtor did in fact violate order; and Order was specific and definite. Impossibility or inability to comply with order are valid defenses if Debtor introduce supportive evidence showing that all reasonable efforts to comply have been undertaken. Debtor

violated court's Order Setting Examination under Rule 2004 where Debtor did not appear for Examination and did not produce any documents required to be produced by Order. Debtor admittedly had knowledge of Order and admittedly did not appear or produce documents. Good faith belief that 2004 examination was going to be changed to later date is not valid defense to continued failure to produce requested documents where Debtor did not allege any facts to establish that Debtor made all reasonable efforts to comply.

(4393) *Campbell v. Butz,* 2018 WL 314871 (Bankr. W.D. Ky. 2018) – Court has discretion to deny discharge where Debtor refuses to obey lawful Order of Court. Refused requires more than failure. Debtors did not produce all documents required by Order Setting 2004 Exam, although Plaintiffs were later able to obtain records via subpoenas. Debtors' testimony that they lacked ability or it was impossible to comply with Rule 2004 Exam unsupported where there was no reason Debtors could not have obtained at least the same documents Plaintiffs obtained from third parties.

(4394) *U.S. Trustee v. Rael,* 2017 WL 2539758 (Bankr. D. Wyo. 2017) – Denial of discharge under Section 727(a)(6) requires proof that debtor refused to obey lawful order of Bankruptcy Court. Plaintiff bears burden of proving that Debtor violated Order and Debtor bears burden of showing that any failure to comply was on "refusal". Although Court Order allowed Debtor to sell property and required payment of proceeds to lender, Debtor instead sold property, held proceeds for one year, then paid his attorney, an IRS lien and accounting fees. Although Debtor clearly violated Court Order to pay proceeds to lender, Court held that violation did not amount to "refusal" where Debtor reasonably relied on advice of counsel in distributing funds. Debtor's attorney was fully aware of all facts and understood consequences of bankruptcy Counsel had a number of events that caused doubts as to validity of initial sale order, and Debtor's reliance on counsel was reasonable, not willful.

(4395) *McDermott v. Horvath,* 2017 WL 1401281 (Bankr. N.D. Ohio 2017) – Court can revoke discharge under Section 727(d)(3) where Debtor fails to comply with lawful orders of Court under Section 727(a)(6). Refusal to produce documents in orderly, coherent fashion in response to Order Setting 2004 Exam may violate Section 727(a)(6) where the Order is clear and Debtor refuses to comply. Court Order required Debtor to turn over "any and all documents supporting the asset identified" in Schedule B including documents related to Debtor's beneficial interest in Trust and final Estate Tax Return for Debtor's Mother that funded Trust in first instance. Debtor produced Estate documents, Trust Tax Returns, and documents showing that Trust had no assets, which complied with requirement that Debtor turnover documents concerning Debtor's interest in Trust. While Debtor did not produce any documents showing initial funding of trust or any subsequent finding of trust by settlor during her lifetime, those documents were not clearly required by terms of Order Setting 2004 Exam. Further, while Debtor did not produce Mom's final estate tax return, UST had already obtained copy of Return from State Probate Court, and Debtor did not oppose UST's efforts to obtain that Return which complies with Debtor's obligations under Court Order. Evidence did not support finding that Debtor failed to comply with clear Order of Court or that Debtor "refused" to comply where Debtor produced substantial documentation including documents not specifically asked for by UST and any documents not produced were not clearly required by terms of Court Order.

(4396) *Stein v. Stubbs,* Case No. 1678025 (6th Cir. BAP 2017) - Section 727(a)(3) and (6) allow court to revoke discharge where Debtor fails and refuses to abide by lawful order. Trustee's Complaint to revoke discharge stated cause of action where complaint alleged that Debtor was served with order requiring Debtor to appear for a 2004 examination and to produce documents that Debtor failed to appear or respond in any way. Order was clear and definite and required production of specific documents and appearance at specific place and time. There is no requirement that Debtor's conduct be willful with the Debtor intended not to comply with Court Order. Plaintiff is required only to show that Debtor had knowledge of word which is said to have been violated; that Debtor did in fact violate order; and that order was clear, specific and definite. Debtor's refusal to comply with order setting rule 2004 examination, which is reasonable and usual method to compel chapter 7 Debtor to provide information, constituted sufficient basis to revoke discharge required reversal of Bankruptcy Court's dismissal of adversary proceeding.

(4397) *Moyer v. Denham,* 2017 WL 1102848 (Bankr. W.D. Mi. 2017) - Section 727(a)(6) allows Court to deny or revoke discharge where Debtor refuses to obey lawful order. "Refusal" requires more than just a failure to comply and requires willful conduct which amounts to civil contempt. Party objecting to discharge must demonstrate that Debtor received Order in question and failed to comply with terms. At that point, Debtor bears burden of explaining noncompliance. Debtor received Court Order requiring Debtor to turnover tax refund and Debtor failed to do so. Debtor did not appear at the hearing or provide any evidence to explain noncompliance. Although Court was reluctant to vacate discharge and revive $130,000 in scheduled debts over failure to remit $1736 in nonexempt tax refunds, 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.

(4398) *Barbacci v. Stockert,* 23017 WL 187551 (Bankr. N.D. Ohio 2017) – Section 727(d)(3) allows Court to revoke discharge where Debtor fails to obey any lawful order of court. Standard for determining whether Debtor failed to comply with Order is one of civil contempt, and does not require higher standard of willfulness or actual intent to disobey or disregard Order. Moving party must demonstrate that alleged contemnor had knowledge of Order; alleged contemnor did in fact violate Order; and Order violated was specific and definite. Order requiring Debtor to turnover records pertaining to Trust in which Debtor is beneficiary was clear and definite and Debtor was admittedly aware of Order. Once elements are shown, Debtor bears burden to establish a defense, such as inability or impossibility of compliance. Court unable on summary judgment to determine whether Debtor took all possible steps to obtain documents where Debtor filed affidavit that he contacted Trust's accountant three separate times; Debtor also telephoned accountant three separate times; Debtor was able to obtain only partial information after multiple contacts with accountant and trustee of Trust; and Debtor repeatedly provided information to accountant and trustee to obtain information needed. While affidavit raised at least colorable defense, affidavit was self-serving and lacked any corroborating evidence and there was some evidence that Debtor dragged feet and did not actually contact accountant to obtain information until after commencement of adversary proceeding to request documents for first time.

(4399) *Helbling v. Payne,* 2015 WL 1000166 (Bankr. N.D. Ohio 2015) – Section 727(a)(6) allows court to deny discharge if Debtor refuses to obey lawful order of court. Refusal does not have to be willful or malicious, only that party had knowledge of order, that party violated the order; and that order was specific and definite. Once plaintiff establishes elements, Debtor must then explain non-compliance. Debtor can defend by showing inability to comply notwithstanding all reasonable efforts to comply have been undertaken. Debtor failed to comply with Court Order requiring Debtor to pay to the Trustee funds received by Debtor as result of refund of pre-petition garnishment within preference period. Although Debtor made vague allegation as to inability to pay, Debtor did not present any evidence to show that Debtor lacked ability or that Debtor had made reasonable efforts to do so. Debtor's conclusory statement of inability to pay insufficient to defeat showing that Debtor failed to comply.

(4400) *Parker v. McNeill,* 2015 WL 393413 (Bankr. N.D. Ohio 2015) – Debtor's repeated failures to attend 341 meeting, even following entry of order compelling attendance, warranted denial of discharge under Section 727(a)(6). Order to appear for 341 meeting was clear and definite; Debtor had notice of order as Debtor was served with copy of the order by mail and the mailing was not returned undeliverable; and Debtor's failure to appear was violation of order.

(4401) *Lewis v. Casab,* 2015 WL 264974 (Bankr. E.D. Mi. 2015) – Court will deny discharge where Debtor refused to obey any lawful order of court other than an order to respond to a material question or to testify. Section 727(d) allows court to revoke discharge if Debtor refuses to obey Court Order. Debtor violated Court Order setting Rule 2004 examination by failing to produce documents listed in that order. Order was not limited to documents in Debtor's possession but included documents that could be obtained by reasonable effort, such that order included bank account statements that Debtor made no effort to obtain from the banks. Failure to obey was willful and intentional where Debtor made no effort to comply even after multiple orders compelling Debtor to produce documents, including issuance of a contempt citation for failure to produce documents. Debtor testified that he made no effort to obtain bank statements from banks or from DEA which had allegedly seized Debtor's copies; Debtor took no steps to produce his tax returns for 2010 through 2012 because it "didn't feel right"; Debtor made no effort to obtain or produce records relating to Debtor's real estate holdings or titles to his motor vehicles; Debtor made no effort to obtain from DEA a receipt of itemized list of items seized from Debtor; and Debtor consistently refused to make any attempts to obtain documentation.

(4402) *French v. Williams,* 2014 WL 1017604 (Bankr. N.D. Ohio 2014) – Debtor not entitled to discharge where Debtor refuses to obey any lawful order of court. Party opposing discharge must prove that Debtor had knowledge of order; Debtor did in fact violate order; and order was sufficiently specific and definite to advise Debtor of required conduct. Actual knowledge of order is not required if party had opportunity to know of Court Order but chose not to gain actual knowledge. Party cannot simply claim ignorance where party had opportunity to know of order but refused to do so. Debtor had proper notice of initial Section 341 and Order requiring Debtor to appear at rescheduled Section 341 meeting. However, orders were not specific and definite where order required Debtor to appear for initial first meeting of creditors and Debtor did appear, but did not specifically require attendance at continued first meeting of creditors.

(4403) *McDermott v. Graft,* 2013 WL 1142864 (Bankr. S.D. Ohio 2013) – Section 523 excepts from discharge debts that were or could have been listed in prior case where discharge was waived, revoked or denied under enumerated sub-sections of Section 727. US Trustee failed to prove that Debtor's prior discharge was revoked for misconduct that would have resulted in denial of discharge in prior case. Debtor's discharge was revoked because Debtor failed to comply with an agreed order to turnover a 2010 tax refund. However, discharge would have been denied only if failure to turn over refund was result of Debtor's refusal to abide by a Court Order. Mere noncompliance is not equivalent of refusal to comply, such that failure or inability to comply, without more, is not sufficient to deny or revoke a discharge. Agreed Order regarding turnover of tax refund did not require finding of refusal to comply as predicate for revocation, and revocation order itself did not include any finding of refusal to comply. Court revoked discharge because Debtor entered into an agreed order that provided for revocation without any finding of refusal to comply.

(4404) *Parker v. Johnston,* 2012 WL 6757281 (Bankr. N.D. Ohio 2012) – Showing necessary to deny discharge under Section 727(a)(6) is same standard as is required for contempt. Statute requires that Debtor refused to comply, rather than just failed to comply. Debtor knew of the specific order in question, knew order required him to take action by specific date, but failed and refused to comply and failed to respond to Trustee's complaint or motion for summary judgment in the Section 727 adversary.

(4405) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Section 727(a)(6) provides for denial of discharge where Debtor has refused, in the case to obey any lawful order of the court, other than an order to respond to a material question or to testify. Refusal requires more than a mere failure to comply with a Court Order. Plaintiff must prove (1) that Debtor had knowledge of the order which he is said to have violated; (2) Debtor did in fact violate the order; and (3) the order violated must have been specific and definite. Evidence indicated that Court issued order requiring Debtor to disclose information but there was no evidence that Debtor failed to do so. No motion to compel or for sanctions had been filed and record was devoid of any evidence that Debtor had the information or documents that he allegedly failed to disclose or that any failure to disclose was done with intent to violate order.

(4406) *Parker v. Banks,* 2012 WL 1966138 (Bankr. N.D. Ohio 2012) – Section 727(a)(6) requires that Debtor refused to abide by a Court Order, not just that the Debtor failed to do so. Debtor must have known of the order; must have violated the order; and the order must have been definite and specific. Debtor must then explain non-compliance. Court Order properly mailed to Debtor required Debtor to produce specific records and documents. Order was presumed to have been received and had not been returned by the Post Office as undeliverable. Order was definite and specific on documents to be turned over and Debtor failed to produce any of the listed documents. Discharge denied.

(4407) *Jahn v. Clayton,* 2012 WL 112940 (Bankr. E.D. Tn. 2012) – To deny discharge under Section 727(a)(6), plaintiff must establish that Debtor knew of Court Order and an ability to comply. Trustee failed to demonstrate that Debtor knew of Order compelling Debtor to appear at adjourned Section 341 meeting where record showed that Order was mailed to address that was not used by Debtor. Although the address was the one listed by the Debtor in the petition, it was substantially certain Debtor no longer resided there as Debtor's Chapter 13 plan surrendered the property more than two years prior to case being converted to Chapter 7. Trustee failed to demonstrate willful refusal to

comply where Debtor, upon being advised of initial post-conversion 341 meeting, contacted trustee to advise that Debtor would not attend the first meeting as Debtor lacked sufficient funds to pay for gas for the trip; and Debtor was not aware of subsequent order requiring Debtor to appear.

(4408) *U.S. Trustee v. Waits,* 2011 WL 4015680 (Bankr. E.D. Ky. 2011) – Section 727(a)(6) requires more than a failure to comply with a Court Order and requires a "refusal" to comply. Debtor explained that failure to initially provide complete copy of tax return was due to misunderstanding that he needed to provide only the return, but not the schedules and statements attached to the return. When Debtor learned that he needed to provide complete return, he did so.

(4409) *Standiferd v. US Trustee,* 2011 WL 1368779 (10th Cir. 2011) – Debtor's refusal to obey Court Order while in Chapter 13 can bar subsequent discharge after conversion to Chapter 7. Debtor willfully refused to comply with terms of Order Confirming Chapter 13 Plan that required Debtor to keep Trustee apprised of ongoing financial condition including monthly operating reports and copies of tax returns. The Chapter 13 Confirmation Order is a "lawful order of Court" for purposes of Section 727(a)(6). Bankruptcy Code is not designed to allow a Chapter 13 Debtor to avail himself of the Code's protections, willfully disobey the bankruptcy court's confirmation order by concealing post-petition income increases that could otherwise be used to pay creditors, and then, once his misconduct is discovered, convert his case to Chapter 7 in order to obtain a guaranteed discharge of his debts.

9.35 Section 727(a)(7)

(4410) *Apartments at Cambridge Company, LLC v. Lewiston,* 2015 WL 5443713 (Bankr. E.D. Mi. 2015) – Section 727(a)(7) allows court to deny discharge if Debtor committed any act specified in Section 727(a)(2), (3), (4), (5), or (6), within one year preceding the commencement of this case in connection with another case under Title 11 that concerns an insider. The act must be committed by the Debtor; (2) the act must be within those described in Sections 727(a)(2) through (a)(6); (3) the time frame is limited to one year pre-petition, or during the case; and (4) the act must have been committed in connection with another case concerning an insider. An "insider" is one defined as such in section 101(31). While evidence showed various transactions by third parties, there was no evidence that any of those third parties had ever filed for bankruptcy. Section 727(a)(7) requires proof of transactions in connection with another case filed by an insider – where the alleged insider never filed bankruptcy, Section 727(a)(7) does not apply.

(4411) *Adamovic v. Lazarevic,* 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Section 727(a)(7) allows court to deny discharge if Debtor committed any act specified in Section 727(a)(2), (3), (4), (5), or (6), within one year preceding the commencement of this case in connection with another case under Title 11 that concerns an insider. Debtor must have committed the specific act, and must have done so in connection with bankruptcy case concerning insider. Complaint failed to allege the existence of any case ever filed by anyone who would be considered an "insider" of Debtor.

9.36 Section 727(a)(8)

(4412) *In re Holloway,* Case No. 18-51115 (Bankr. E.D. Mi. 2018) – Debtor is not eligible for discharge in Chapter 7 where Debtor received discharge in prior Chapter 7 in case commenced within 8 years before the date of filing of petition in current case. Debtor not eligible for discharge where prior case filed on August 10, 2010 and current case filed August 10, 2018, 8 years to day after Debtor filed prior Chapter 7. Automatic stay continued with respect to property of estate until property is no longer property of estate; automatic stay as to action other than action against terminates upon entry of Order Denying Discharge.

(4413) *In re Kramer,* 2016 WL 3632810 (Bankr. E.D. Mi. 2016) – Section 727(a)(8) denies discharge to Debtor who received discharge in prior Chapter 7 or Chapter 11 filed within 8 years of the filing of the current case. Under Section 1141, confirmation of Chapter 11 plan constitutes discharge as of date of confirmation of plan, and terms of plan itself clearly specified that Debtor would receive a discharge upon confirmation. Fact that Debtor post-confirmation failed to make all payments required by plan did not revoke or alter fact that discharge had been entered.

(4414) *Rogers v. McDermott,* Case No. 14-13769 (E.D. Mi. 2015) – Bankruptcy Court correctly concluded that Debtor was not eligible for discharge in Chapter 7 where Debtor received discharge in Chapter 7 filed less than 8 years prior to commencement of current case.

(4415) *In re Thompson,* Case No. 09-44770 (Bankr. E.D. Mi. 2011) – Conversion from Chapter 13 to Chapter 7 does not constitute new commencement date. Debtor who obtained discharge in Chapter 7 and within 8 years filed case under Chapter 13 not eligible for discharge in second case after case was converted to Chapter 7. Debtor could not seek successive Chapter 7 discharges in cases filed within 8 years regardless of which chapter cases were commenced.

(4416) *In re Skinner,* 2010 WL 3469993 (Bankr. S.D. Miss. 2010) – Conversion from Chapter 13 to Chapter 7 does not constitute new date of commencement of case for purposes of Section 727(a)(8). Debtor filed Chapter 13 less than 8 years after petition in prior Chapter 7 that produced discharge. Debtor then converted case to Chapter 7 just over 8 years following commencement of the prior Chapter 7. Section 727 precludes discharge in Chapter 7 case where case is commenced within 8 years of commencement of prior Chapter 7. Section 348 provides that the date of the petition is unaffected by conversion of the case. Section 727(a)(8) measures only time from petition to petition and chapters under which discharges are sought, and not the particular chapter under which either case was filed.

(4417) *In re Nicholson,* 2011 WL 1789965 (Bankr. D. Colo. 2011) – Conversion from Chapter 13 to Chapter 7 does not constitute new date of commencement of case for purposes of Section 727(a)(8). Debtor filed Chapter 13 less than 8 years after petition in prior Chapter 7 that produced discharge. Debtor then converted case to Chapter 7 just over 8 years following commencement of the prior Chapter 7. Section 727 precludes discharge in Chapter 7 case where case is commenced within 8 years of commencement of prior Chapter 7. Section 348 provides that the date of the petition is unaffected by conversion of the case. Section 727(a)(8) measures only time from petition to petition

and chapters under which discharges are sought, and not the particular chapter under which either case was filed.

(4418) *United States Trustee v. Stone,* Case No. 09-32346 (Bankr. N.D. Ohio 2009) – Section 727(a)(8) is designed to prevent creation of serial Debtors who would otherwise seek Chapter 7 relief every time they found themselves unable to repay their debts. Eight year interval prescribed by section 727(a)(8) is measured from petition to the petition. The date of entry of the discharge in the first case is not relevant. Debtor's first petition was filed on September 28, 2001. Debtor's second case, filed April 13, 2009, was filed within the eight year time period proscribed by section 727(a)(8). Although Debtor's first case was filed at a time when Section 727(a)(8) contained a six-year limitation, the applicable provision of section 727 is governed by the date on which Debtor filed the most recent case in which Debtor now seeks a discharge. Although Debtor may have had an expectation in 2001 that she would again be eligible for bankruptcy relief in six years, Debtor derived no substantive right from expectancy and is subject to the eight-year limitation period of Section 727(a)(8) in effect on the date of Debtor's second bankruptcy petition.

(4419) *In re Johnson,* Case No. 05-73633 (Bankr. E.D. Mi. 2009) – Chapter 7 petition filed less than 6 years after commencement of prior case in which Debtors received discharge – Debtors not entitled to discharge in this pre-BAPCPA case. Court also extended stay as to property of estate but terminated stay for all other purposes.

(4420) *In re Phelps,* Case No. 09-63000 (Bankr. E.D. Mi. 2009) - Debtor-wife's discharge denied in joint Chapter 7 case where Debtor-wife received discharge in case commenced within 8 years before the commencement of instant case.

(4421) *In re Dawson,* Case No. 06-42140 (Bankr. E.D. Mi. 2009) – Debtor denied discharge in Chapter 13 proceeding where Debtor received discharge in prior chapter 7 filed less than 4 years prior to the Order for Relief in the Chapter 13 Case.

(4422) *In re Smith,* Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case reopened by Court *sua sponte* and discharge vacated where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Discharge in this case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

9.37 Section 727(a)(9)

(4423) *In re Ward,* 2010 WL 4922713 (Bankr. E.D. Mi. 2010) – Section 727(a)(9) precludes the discharge of a Debtor if he obtained a Chapter 13 discharge within the preceding six years unless the Chapter 13 case either paid 100% of allowed unsecured claims or both paid 70% of those claims and the plan was proposed in good faith and constituted the Debtor's best effort. Debtor not entitled to discharge where Debtor's prior Chapter 13 case provided for only a 36 month plan term. Although Chapter 13 plan yielded 76% to unsecured creditors, creditors would have done significantly better had the plan term been 60 months. Debtor's plan term of only 36 months was not Debtor's "best efforts" for purposes of Section 727(a)(9).

(4424) *In re French,* Case No. 08-67234 (Bankr. E.D. Mi. 2009) - Pre-BAPCPA case - Debtor who filed Chapter 7 less than 6 years after fling prior Chapter 13 case entitled to discharge under Section 727 where record indicated that Debtor paid at least 70% of allowed unsecured claims.

(4425) *White v. Lewis,* Case No. 04-60231 (E.D. Mi. 2008) – Section 727(a)(9) precludes the discharge of a Debtor if he obtained a Chapter 13 discharge within the preceding six years unless the Chapter 13 case either paid 100% of allowed unsecured claims or both paid 70% of those claims and the plan was proposed in good faith and constituted the Debtor's best effort. Section 727(a)(9) does not apply where the prior Chapter 13 case was dismissed prior to entry of a discharge. Section 727(a)(9) is not jurisdictional. Even if Debtor's Chapter 7 occurred within six years of the discharge in the Chapter 13 case, creditor's failure to assert this issue until after entry of the discharge in the Chapter 7 precluded creditor from attacking or attempting to void the Chapter 7 discharge.

9.38 Section 727(a)(10)

9.39 Section 727(a)(11)

(4426) *In re DeRoche,* Case No. 10-41072 (Bankr. E.D. Mi. 2010) – Court unable to exempt Debtor from completing post-petition Financial Management Course. Motion did not allege that Debtor was unable to complete the course because or any incapacity or disability and Debtor was not on active military duty in a combat zone. Debtor left for Iraq a month after commencing case under Chapter 7 but failed to take Course in that time, and Debtor failed to demonstrate why he could not take course by telephone or internet while in Iraq.

9.40 Effect – Termination of Automatic Stay

(4427) *In re Holloway,* Case No. 18-51115 (Bankr. E.D. Mi. 2018) – Debtor is not eligible for discharge in Chapter 7 where Debtor received discharge in prior Chapter 7 in case commenced within 8 years before the date of filing of petition in current case. Debtor not eligible for discharge where prior case filed on August 10, 2010 and current case filed August 10, 2018, 8 years to day after Debtor filed prior Chapter 7. Automatic stay continued with respect to property of estate until property is no longer property of estate; automatic stay as to action other than action against terminates upon entry of Order Denying Discharge

(4428) *Belleba v. Grigorian,* 2016 WL 8115418 (E.D. Mi. 2016) – Order denying discharge under Section 727 automatically terminated automatic stay. Creditor's efforts to collect judgment after entry of order denying discharge not stayed even though Chapter 7 case remained open and in administration. There was no indication that allowing collection effort would result in double recovery where creditor had filed proof of claim but there were no assets in estate to make distributions.

G. Deadline for Objecting to Discharge

9.41 Generally

(4429) *Lashley v. Lashley,* 2016 WL 6875890 (Bankr. D. Neb. 2016) – Rule 4004 sets deadline to bring action to deny discharge as 60 days after first date set for first meeting of creditors. Rule 4004 provides that deadline can be extended after expiration of original deadline where (a) objection is based on facts that, if learned after the discharge, would constitute grounds to revoke discharge; and (b) movant did not have knowledge of facts in time to object to the discharge. Complaint that alleged only that "in the event Debtor disposes of any property during the pendency of this matter, Debtor should be denied a discharge" sufficient to state cause of action. Complaint suggested either that transfers had not occurred yet or that she did not have knowledge of facts sufficient to bring action before discharge entered. Complaint did not allege sufficient facts to conclude that action was brought untimely. Motion to dismiss denied.

(4430) *McDermott v. Syroka,* 2016 WL 5173230 (Bankr. N.D. Ohio 2016) – State statutes of limitations have no bearing on whether adversary proceeding objecting to discharge or seeking to dismiss for bad faith. Fact that state statute of limitations may have run on unsecured creditors ability to avoid allegedly fraudulent transfers has no bearing on discharge or dismissal. Complaint timely filed when filed within time permitted by Federal Rules of Bankruptcy Procedure, which sets out only applicable deadline for bringing action.

(4431) *Lewis v. Casab,* Case No. 14-4205-PJS (Bankr. E.D. Mi. 2015) – Complaint seeking to deny discharge must be filed before discharge is entered. Once discharge is entered, sole remedy is to revoke discharge under Section 727(d). Debtor had not received discharge as Debtor never filed from certifying that he had completed post-petition financial management program. Although adversary complaint was filed after deadline to object to discharge, Court would extend deadline even though trustee did not request extension before deadline expired, where all of the operative facts occurred after deadline for objecting expired. As of deadline, trustee had no reason to believe that Debtor would refuse to cooperate in discovery or to refuse to produce documents. Where matters are discovered for the first time after deadline runs, and actions would have been sufficient to revoke discharge had discharge already been entered, Rule 4004 allows court to retroactively extend deadline on request made promptly after discovery of facts underlying action. Although trustee did not file motion to extend time as contemplated by Rule 4004, trustee's institution of adversary proceeding considered equivalent of motion to extend time.

(4432) *Five Star Laser, Inc. v. Height,* Case No. 10-6125 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 1480265 (E.D. Mi. 2011) – Rule 4007 requires complaints objecting to discharge or dischargeability to be filed within 60 days of the date first set for the meeting of creditors. Deadline is not jurisdictional and court can consider deadline to be "equitably tolled" where creditor establishes lack of actual notice of filing requirement, lack of constructive knowledge of filing requirement, diligence in pursuing one's rights, absence of prejudice to the Debtor, and plaintiff's reasonableness in remaining ignorant of requirements. Court would not equitably toll deadline where creditor's failure to act was not due in any way to any improper conduct of Debtor and creditors were fully aware of all relevant facts well before date set for the first meeting of creditors. Adjournments of the meeting of creditors is not basis to equitably toll that deadline. Court can also extend deadline for "equitable estoppel" where creditor can establish that failure to timely commence adversary was due to improper conduct on Debtor's part. Debtor did not misrepresent scope of extension of deadline where stipulation and order expressly limited extension to the Trustee only. Adversary case dismissed where Creditor failed to obtain extension of deadline before expiration of deadline.

(4433) *White v. Lewis,* Case No. 04-60231 (E.D. Mi. 2008) – Deadline for complaint objecting to discharge is 60 days after the first date set for the First Meeting of Creditors. Rule 4004 permits the Court, for cause, to extend the time for filing a complaint as long as the Motion for Extension is filed before the time has expired. Creditor's Motion to Extend deadline denied where creditor had filed another adversary proceeding in a timely manner and creditor failed to seek discovery before the deadline passed through a Rule 2004 exam either in the main case or through discovery in the pending adversary case.

(4434) *In re Caldwell,* Case No. 08-61418 (Bankr. E.D. Mi. 2009) - Creditor's Motion to Reopen Case or Declare that Debt Owed to [Creditor] is Not Discharged" denied where case had been closed prior the filing of the Motion. Before Court can consider merits of Motion, creditor must file Motion to Reopen case and must pay the $260 filing fee. Court will consider merits of motion only if and when creditor pays the requisite filing fee.

9.42 Tolling – Equitable Concealment

(4435) *Coady v. D.A.N. Joint Venture III, L.P.,* 588 F.3d 1312 (11th Cir. 2009) –Debtor's failure to schedule the equitable interest constituted "concealment". Although concealment began many years prior to the bankruptcy petition, Section 727(a)(2) would apply to "continuing concealment" where Debtor keeps assets out of creditor's reach for more than one year before petition was filed, in order to prevent Debtor from receiving benefit of wrongful conduct.

(4436) *Morgan v. Mankins,* 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(2) must be premised on conduct that occurred either within one year of the date that the Debtor filed his bankruptcy petition, or while the Debtor's bankruptcy case was pending. Debtor's alleged actions in March, 2007, would not support 727(a)(2) action for bankruptcy filed November, 2008.

9.43 Extension of Time

(4437) *McDermott v. St. George,* 2017 WL 1379321 (6th Cir. BAP 2017) - In Chapter 7 deadline to object to discharge under Section 727 is 60 days after first date set for creditors meeting. Court may for cause extend time to object to discharge, which will be granted rarely and only on showing of cause, including (1) whether creditor received sufficient notice of deadline and information to file objection; (2) complexity of case; (3) whether creditor exercised of diligence; (4) whether Debtor refused in bad faith to cooperate; and (5) possibility that proceedings pending in another form will result in collateral estoppel. United States Trustee failed to set forth sufficient cause to extend deadline. UST attended first meeting of creditors and questioned Debtor extensively. Court granted UST's first motion for additional time because UST was a waiting on production of documents by Debtor. Second motion for additional time was filed 116 days after initial meeting of creditors at which point UST for first time requested 2004 examination. UST provided no explanation why no action occur during first extension or

during days between second motion for additional time and date of hearing. UST had sufficient notice of deadline and information to file objection; although case was not typical based on significant retainer paid to Debtor's attorney, there were no other factors in case demonstrating unusual complexity; and there was no evidence that Debtor in bad faith failed to cooperate in providing information.

(4438) *In re Kinsey,* 2015 WL 5675586 (Bankr. E.D. Tn. 2015) – Motion to extend deadline to object to discharge denied where Debtor had at least 11 days' notice of possible grounds before expiration of deadline but Debtor did not file either adversary proceeding or motion to extend deadline until 9 days after deadline passed.

(4439) *Lewis v. Casab,* Case No. 14-4205-PJS (Bankr. E.D. Mi. 2015) – Complaint seeking to deny discharge must be filed before discharge is entered. Once discharge is entered, sole remedy is to revoke discharge under Section 727(d). Debtor had not received discharge as Debtor never filed from certifying that he had completed post-petition financial management program. Although adversary complaint was filed after deadline to object to discharge, Court would extend deadline even though trustee did not request extension before deadline expired, where all of the operative facts occurred after deadline for objecting expired. As of deadline, trustee had no reason to believe that Debtor would refuse to cooperate in discovery or to refuse to produce documents. Where matters are discovered for the first time after deadline runs, and actions would have been sufficient to revoke discharge had discharge already been entered, Rule 4004 allows court to retroactively extend deadline on request made promptly after discovery of facts underlying action. Although trustee did not file motion to extend time as contemplated by Rule 4004, trustee's institution of adversary proceeding considered equivalent of motion to extend time.

(4440) *In re Gandy,* 2013 WL 3216130 (Bankr. E.D. Tn. 2013) – Rule 4004 allows court to extend deadline to file action under Section 727 for cause, within the court's discretion. Whether movant establishes cause depends on (1) whether the creditor has received sufficient notice of the deadline and the information to file an objection; (2) the complexity of the case; (3) whether the creditor has exercised diligence; (4) whether the Debtor has refused in bad faith to cooperate with the creditor; and (5) the possibility that proceedings pending in another forum will result in collateral estoppel of the relevant issues. Plaintiff's unopposed motion for extension of time granted and deadline extended pending resolution of motion to dismiss case under Section 707.

(4441) *In re Ulrich,* 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Rule 4004(a) requires discharge to be entered no later than 60 days after date first set for Section 341 meeting. An request for extension must be made before deadline expires. Section 105 does not authorize or empower Court to extend time to file adversary complaint where deadline has already expired.

(4442) *In re Burrow,* Case No. 10-65846 (Bankr. E.D. Mi. 2011) – Stipulation to extend time to file Section 727 complaint rejected by Court where stipulation was not filed with Court until after deadline to file complaints had expired. Rule 4004 requires any request to extend the deadline to be filed prior to expiration of deadline. Court lacks jurisdiction to extend deadline where motion is not timely filed.

(4443) *Five Star Laser, Inc. v. Height,* Case No. 10-6125 (Bankr. E.D. Mi. 2010) –Stipulated Orders that extended deadlines for Section 523 and 727 actions between Debtor and Trustee and that were expressly limited to the Trustee only did not extend deadline for creditors to commence adversary proceedings. Although Orders extending the deadlines may extend to creditor other than the moving party when surrounding circumstances indicate that a general extension was intended, where the extension is expressly limited to the Trustee, extension does not apply to creditor body as a whole. Court can consider deadline to be "equitably tolled" where creditor establishes lack of actual notice of filing requirement, lack of constructive knowledge of filing requirement, diligence in pursuing one's rights, absence of prejudice to the Debtor, and plaintiff's reasonableness in remaining ignorant of requirements. Court would not equitably toll deadline where creditor's failure to act was not due in any way to any improper conduct of Debtor and creditors were fully aware of all relevant facts well before date set for the first meeting of creditors. Adjournments of the meeting of creditors is not basis to equitably toll that deadline. Court can also extend deadline for "equitable estoppel" where creditor can establish that failure to timely commence adversary was due to improper conduct on Debtor's part. Debtor did not misrepresent scope of extension of deadline where stipulation and order expressly limited extension to the Trustee only. Adversary case dismissed where Creditor failed to obtain extension of deadline before expiration of deadline.

(4444) *In re Lockhart,* Case No. 09-68234 (Bankr. E.D. Mi. 2010) - Deadline to file complaints objecting to discharge can be extended only on motion or stipulation filed before deadline expires. Stipulation for extension of deadline filed after expiration of initial deadline denied.

(4445) *In re Abulabon,* Case No. 10-48427 (Bankr. E.D. Mi. 2010) – Deadline to file complaints objecting to discharge can be extended only on motion or stipulation filed before deadline expires. Stipulation for extension of deadline filed 30 days after expiration of initial deadline denied.

H. Parties Entitled to Object to Discharge

9.44 Standing

(4446) *Ryan v. Morris,* 2018 WL 1940382 (Bankr. W.D. Ky. 2018) – Creditor has standing under Section 727(c)(1) where creditor holds claim against debtor that arose before petition. "Claim" is right to payment, including judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured and requires only that there is chance alleged creditor has allowed claim. Plaintiffs had standing where Plaintiffs had state court action pending against both Debtors on date of Petition; Debtors listed Plaintiffs on Schedule F; claim listed as contingent, unliquidated and disputed; Plaintiffs had filed proof of claim against both Debtors to which Debtors did not object. Listing claim as "disputed" did not prevent Plaintiffs from having standing as doing so would allow debtors to eliminate creditor's ability to challenge debtor's discharge. Creditor maintains claim and status as creditor, until claim is disallowed. Debtors had not challenged Plaintiffs' Proof of Claim and Plaintiffs' claim had not been disallowed.

(4447) *D. C.-B. v. Brooks,* Case No 18-80031 (Bankr. W.D. Mi. 2018) – Rule 1017 incorporating Federal Rule 17 allows guardian to bring action on behalf of minor. Parent is guardian who may sue as minor's representative. Guardian is not required to obtain court permission. However, Guardian is not party and cannot represent ward without counsel. Cause of action belongs to child and not parent.

(4448) *Rosenfeld v. Rosenfeld,* 2015 WL 4623586 (Bankr. E.D. Mi. 2015), *aff'd* 2016 WL 4761786 (E.D. Mi. 2016), *aff'd,* 2017 WL 4461037 (6th Cir. 2017) – Creditor holding claims that were all excepted from discharge under Section 523(a)(5) and (15) lacks standing to seek to deny discharge under Section 727. Denial of discharge would not improve creditor's position and lacks standing to object to object to discharge solely on behalf of other creditors. Plaintiff cannot assert standing by arguing that denial of discharge benefits larger creditor community or that denial of discharge protects federal judicial system by preventing abuse of the bankruptcy process. Creditor has on personal stake in outcome of action where Creditor will not suffer any concrete or particularized injury. Creditor alleged only generalized grievance that is not sufficient to constitute standing. There was no actual case or controversy as the Court lacked the ability to grant creditor any relief beyond that which creditor already received.

(4449) *Reed v. Blount,* 2016 WL 6211691 (E.D. Mi. 2016) – Court lacks jurisdiction over adversary proceeding to deny discharge where plaintiff holds claims that are entirely non-dischargeable as a matter of law, such that denial of discharge would not benefit pecuniary or other interests of plaintiff. Absent a concrete and definite interest in the outcome of the litigation, there is no "case or controversy" over which Bankruptcy Court or District Court could assert jurisdiction. Default judgement denying discharge in adversary proceeding brought by holder of non-dischargeable Domestic Support Obligation vacated.

(4450) *Valdiva v. Hauk,* 2016 WL 39912029 (E.D. Mi. 2016) – Bankruptcy Court abused discretion in denying Rule 60 Motion to set aside Order in Adversary Proceeding declaring unpaid property settlement to be non-dischargeable and liquidating debt. Creditor holding claims that were all excepted from discharge under Section 523(a)(5) and (15) lacks standing to seek to deny discharge under Section 727. Denial of discharge would not improve creditor's position and lacks standing to object to object to discharge solely on behalf of other creditors. There was no actual case or controversy as the Court lacked the ability to grant creditor any relief beyond that which creditor already received. Although Debtor failed to raise issue before Bankruptcy Court either in first instance or in Rule 60 Motion, issue of standing is question of law and Bankruptcy Court erred in failing to determine that Plaintiff had standing in first instance.

(4451) *Doyle v. Howie-Cox,* 515 BR 533 (Bankr. E.D. Mi. 2014) – Plaintiff lacked standing to bring action under Section 727 where evidence indicated that plaintiff was not a creditor of Debtor. Evidence indicated that funds advanced by plaintiff to Debtor (plaintiff's niece) were gifts and not loans.

(4452) *Hussain v. Malik,* Case No. 13-1465 (9th Cir. BAP 2014) – Only a panel trustee, creditor or the UST may object to discharge. Creditor is an entity that holds a claim that arose before the date of the order for relief and includes a broad definition including contingent, unmatured, and unliquidated claims; and claim must be one that would be affected by a discharge. Creditor had sufficient standing where creditor received two checks signed by Debtors from Debtor's agent in repayment of loans, and both checks bounced. Debtors, through their agent, delivered to creditor two negotiable instruments signed by Debtors, creating quasi-contractual relationship between Debtors and creditor.

(4453) *Bankers Healthcare Group, Inc. v. Bilfield,* 2013 WL 3062037 (Bankr. N.D. Ohio 2013) – Action under Section 727 may be brought only by trustee, creditor or US Trustee; and plaintiff must bring action to assert its own legal rights rather than based on legal rights or interests of third parties or based on a generalized grievance shared by large class of citizens. Standing must exist at time of commencement of action and cannot be acquired after commencement. A "creditor" is one who holds an enforceable right to payment. Debtor's scheduling of debt is not admission that party actually holds the debt, only that a debt is owed, and is insufficient to establish party as "creditor". Filing of proof of claim does not establish standing as proof of claim may be filed only by creditor. Party who lacks standing to file claim in first instance cannot rely on defective claim to establish standing. Bank originated loan and sold loan to third party. At time of bankruptcy filing and at time of commencement of adversary, loan was held by third party. Bank lacked standing to commence action as Bank was not creditor as of commencement of either case or adversary. Fact that Bank repurchased loan after commencement of adversary did not establish that Bank had right to payment as of commencement of adversary. AS such, Bank lacked standing and adversary complaint was dismissed.

(4454) *Mapley v. Mapley,* 2010 WL 3702366 (Bankr. E.D. Mi. 2010) - Plaintiff whose debt has been determined non-dischargeable under Section 523 lacks standing to prosecute action under Section 727. Plaintiff would suffer no injury if Debtor receives discharge. No party who would be affected by discharge is party to adversary. Under circumstances, there is no live case or controversy as required for subject matter jurisdiction.

(4455) *D.A.N Joint Venture, III, L.P. v. Shekerjian,* Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) –Party's standing to object to discharge is dependent upon party having claim against the Debtor. Promissory notes executed in favor of financial institution were later assigned to plaintiff. Plaintiff did not have and could not produce original notes. Lack of possession of original notes does not preclude plaintiff from enforcing notes if plaintiff can establish that financial institution demonstrated that it was in possession of the notes and entitled to enforce the notes prior to the transfer of the notes to the Plaintiff.

9.45 Procedure

(4456) *In re McFadden,* 477 BR 686 (Bankr. N.D. Ohio 2012) – Motion seeking to object to Debtor's discharge must be denied as procedurally improper. Action to deny discharge under Section 727 must be brought by adversary proceeding.

I. Discharge

9.46 Timing

(4457) *In re Martin-MacLin,* Case No. 06-45989 (Bankr. E.D. Mi. 2010) – Debtor not entitled to discharge where Debtor received discharge in Chapter 7 case filed within 4 years prior to the date of the Order for Relief in the second case. Determination that Debtor is not entitled to discharge required termination of automatic stay under Section 362 as to any act other than an act against property of the estate.

(4458) *In re Slack*, Case No. 09-42599 (Bankr. E.D. Mi. 2009) - Motion to delay entry of discharge denied as moot. Debtor sought to delay discharge to allow Debtor time to enter into reaffirmation agreement with creditor. Record reflected that Debtor and creditor entered into reaffirmation agreement and agreement was filed with Court prior to entry of discharge. Therefore, Debtor's Motion to delay discharge was rendered moot.

9.47 Motion to Delay Entry of Discharge

(4459) *In re Wilson,* 2017 WL 1956853 (Bankr. W.D. Mi. 2017) – Rule 4004(c)(2) allows a maximum of 2 Motions to Defer Entry of Discharge. First Motion will allow deferral for 30 days. Second Motion will allow deferral to "date certain" as long as second Motion is filed within initial 30 day period. Rule 4004 does not limit "date certain" to particular period, allowing Debtor seeking a second extension to extend date sufficiently far in future to accommodate reason for deferral. Court would deny third Motion for Deferral of Discharge as neither Rule 4004 nor Section 707 allow or contemplate a third Motion to Defer Discharge. Clerk directed to enter discharge immediately upon satisfaction of all other prerequisites to entry within scope of Rule 4004.

9.48 Scope of Discharge – Generally

(4460) *In re Joseph,* 2018 WL 770509 (Bankr. E.D. Ky. 2018) – Secured creditor can pursue recovery against collateral but cannot pursue debtor personally for deficiency. Property Tax Certificates held by private parties operate to allow holder to enforce tax lien and to pursue property owner personally. However, Debtor discharged personal obligations on tax certificates such that post-discharge attempts to collect debt violated discharge injection and subjected creditor to sanctions. Fact that tax certificate holders were not listed in Chapter 7 schedules did not prevent discharge of debt in no-asset case. Creditors willfully pursued collection notwithstanding actual knowledge of bankruptcy discharge, although finding of willfulness is not required to impose sanctions consisting of attorney fees and costs.

(4461) *In re Livensparger,* 2015 WL 1803922 (Bankr. W.D. Mi. 2015) – Discharge has two effects – it voids judgment sand it enjoins collection of claims as personal obligations of Debtor. Discharge does not extinguish claim and does not affect liability of any other entity on the debt. State Court plaintiff not prevented by discharge injunction from joining discharged Debtor as nominal defendant solely for purposes of recovering from Debtor's liability insurance carrier.

(4462) *Jennings v. Bodrick,* 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – In general, discharge affects only creditors who had notice of proceedings in time to file claim. Debtor's publication of notice of bankruptcy that was directed to "unknown" creditors did not operate to discharge debt of Plaintiff. Plaintiff was known creditor, or potential creditor, as of petition filing. Debtor actually knew of business relationship with Plaintiff prior to commencement of case yet did not list Plaintiff as creditor. Fact that claims themselves did not mature or become fully known as to extent did not mean that Plaintiff was "unknown". Known creditor is one whose identity is either known or reasonably ascertainable by Debtor.

(4463) *Smith v. Missouri,* Case No. 12-6060 (8th Cir BAP 2013) – Discharge affects liability only for pre-petition obligations. Under Missouri law, state could upon imprisonment file civil action against inmate for current and future expenses of incarceration. State brought action against inmate and obtained judgment for amount representing anticipated costs for duration of incarnation. Inmate later filed for Chapter 7 and received discharge. Although Section 524 voids any judgment at any time obtained, to extent that judgment contained recovery for post-petition incarceration costs, judgment survived discharge. Judgment discharged only to extent that it included incarceration costs incurred prior to commencement of Chapter 7 case. State did not violate discharge injunction by seeking to recover sums awarded that represented post-petition costs.

(4464) *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.

(4465) *In re Caldwell,* Case No. 08-61418 (Bankr. E.D. Mi. 2009) - Creditor's Motion to Reopen Case or Declare that Debt Owed to [Creditor] is Not Discharged" denied where case had been closed prior the filing of the Motion. Before Court can consider merits of Motion, creditor must file Motion to Reopen case and must pay the $260 filing fee. Court will consider merits of motion only if and when creditor pays the requisite filing fee.

(4466) *Hunt v. LAJ, Inc.,* 424 BR 340 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, then the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was

attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a "new" claim based on the treatment in the confirmed Plan. Creditor's action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.

9.49 Scope of Discharge – State Court Jurisdiction to Determine

9.50 Scope of Discharge – Attorney Fees

(4467) *In re Beauregard,* 533 BR 826 (Bankr. D.N. Mex. 2015) – Unpaid attorney fees in Chapter 13 case at time of conversion of case to Chapter 7 cannot be paid by Chapter 13 Trustee following *Harris*. Unpaid fees for services in Chapter 13 become general unsecured claim in Chapter 7 case that is discharged to extent unpaid in Chapter 7 proceeding.

9.51 Scope of Discharge – Unscheduled Creditors

(4468) *Markley v. Department of Treasury, Internal Revenue Service,* 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Exclusive remedy for violation of discharge injunction is action for contempt. Contempt requires proof that defendant violated definite and specific order of Court requiring defendant to perform or refrain from performing particular act with knowledge of Court Order. Whether Creditors actions filing to discharge injunction depended on whether taxes at issue were discharged in first instance. Claim for unpaid taxes in Chapter 13 proceeding was not discharged because Internal Revenue Service did not have notice of bankruptcy case and time to file proof of claim. Section 523(a)(3) provides that a debt is not discharged if the creditor did not discover the bankruptcy case and time to file a proof of claim. Debtor listed IRS tax liability and schedules at address which is not IRS designated address under Rule 5003(e). IRS did not obtain actual knowledge until more than two years after expiration of the claims bar date, at a time when IRS could not timely file a proof of claim. Fact that IRS later filed and then withdrew untimely filed proof of claim does not convert that into dischargeable debt where IRS did not have opportunity to timely file claim in first instance.

(4469) *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.

(4470) *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.

(4471) *In re Scales,* Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Discharge includes unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled.

(4472) *In re Lyons,* Case No. 07-43761 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled.

(4473) *In re Williams,* Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled.

9.52 Scope of Discharge – Secured Claims

(4474) *Skaags v. Nationstar Mortgage,* 2017 WL 1371077 (W.D. Mi. 2017) – 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 did not render mortgage void as "without a debt" as the debt continues to exist. Discharge in bankruptcy does not render debt invalid or eliminate outstanding debt and lenders continued acceptance of payment was not result of fraud or misrepresentation and did not unjustly enrich 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.

(4475) *Fialka v. US Bank,* 2014 WL 5361988 (E.D. Mi. 2014) – Chapter 7 discharge does not discharge security interest. Lender can proceed with foreclosure proceedings in rem. Discharge affects only Debtor's personal liability on the note and prevents lender from pursuing deficiency judgment.

(4476) *Gleason v. GVL Lake Properties LLC,* 2014 WL 1779442 (Bankr. E.D. Ky. 2014) – Discharge affects only personal liability of Debtor and does not alter in rem rights. Debtor's ownership interest in LLC was property. Creditor's efforts, after interest had been abandoned back to Debtors and discharge entered, to dissolve LLC did not constitute any attempt to obtain *in personam* relief but sought only in rem relief against property interest.

(4477) *Northedge v. Beckett,* Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Discharge in Chapter 7 does not affect lien rights of holders of properly perfected judgment liens that were not avoided in Chapter 7 case.

(4478) *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.

(4479) *In re Baer,* 2012 WL 2368698 (6th Cir. BAP 2012) – Discharge prevents any attempt to collect personal liability of Debtor on discharged debt. Discharge does not prevent creditor from exercising rights in collateral post-discharge. Creditor's actions in repossession automobile post-discharge did not violate the discharge injunction. Creditor did not violate discharge injunction by answering Debtor's question as to why the vehicle was being repossessed by informing Debtor of amount of arrearage owed. Creditor did not demand payment nor indicate that creditor would forego repossession if Debtor paid amounts owed. Creditor did nothing more than provide answer to Debtor's question.

(4480) *In re Burkpile,* 2010 WL 3501814 (Bankr. N.D. Ohio 2010) – Discharge is not a magic wand that, with a wave, makes contracts disappear. The discharge injunction prevents the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the Debtor. A Claim, is a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. Discharge does not affect *in rem* rights as those proceedings cannot result in personal liability of the Debtor. Debtors can also be permissibly drawn into post-discharge lawsuits when the Debtor's liability can serve as the basis for indemnification by or recovery against a third party, including suits seeking insurance indemnification or enforcement of third-party guaranties.

9.53 Scope of Discharge – Student Loans

(4481) *Lewis v. Pennsylvania Higher Education Assistance Agency,* 2017 WL 814247(E.D. Ky. 2017) - Student loan obligations are excepted from discharge without creditor being required to file adversary proceeding or obtain Bankruptcy Order of nondischargeability. Creditor does not bear the burden to prove in bankruptcy case that Debtor could not prove undue hardship as burden is on Debtors seeking discharge of student loans to file adversary proceeding and to demonstrate undue hardship. Student loan creditor does not violate discharge, violate Debtor's sole rights, abuse the Court process, convert assets of Debtor or intentionally inflict emotional distress on Debtor where, after entry of discharge, creditor undertakes collection activities including garnishment.

(4482) *Walker v. Sallie Mae Servicing Corp.,* Case No. 09-6022 (8th Cir. BAP 2010) – Discharge Order does not include discharge of student loan unless Debtor affirmatively secures a hardship determination. Entry of Discharge Order does not constitute finding that repayment would not pose undue hardship so as to prevent post-discharge action to determine hardship.

9.54 Scope of Discharge – Equitable Remedies

(4483) *Dalvit v. United Airlines, Inc.,* Case No. 08-1283 (10th Cir. 2009) – Claims for equitable relief are dischargeable if they can be reduced to a monetary obligation, including equitable claims that have alternative remedy involving right to payment. Equitable remedies, such as requests for prospective injunctions, are not discharged if the claim is not reducible to a monetary obligation. Employee's complaint to require employer to remove disciplinary actions and notes from personnel files does not have monetary equivalent and so is not discharged.

9.55 Scope of Discharge – Police Powers

(4484) *In re Hann,* 2009 WL 2872813 (E.D. Mi. 2009) - State's continuation of forfeiture proceedings constituted exercise of its police powers furthers important state policy against criminal conduct. State enforcement of police power does not violate discharge injunction as State action is not one to collect or recover debt but rather is enforcement of State criminal law.

(4485) *In re Price,* Case No. 05-53137 (Bankr. E.D. Mi. 2008) - Motion to Reopen Chapter 7 Proceeding to Allow Filing of Amended Schedule to List Pre-Petition Debt denied as unnecessary. Debtor's Chapter 7 case was discharged and closed as a "no asset" case. As such, even unscheduled debts are discharged just as if it had been properly scheduled in the first instance.

9.56 Scope of Discharge – Insurance and Indemnification Claims

(4486) *Hunter v. Lake Cumberland Regional hospital, LLC,* 2014 WL 1159674 (E.D. Ky. 2014) – Discharge in bankruptcy does not discharge liability of any other entity or the property of any other entity for the debt. Discharge injunction does not prevent plaintiff from naming Debtor as a nominal defendant solely for purposes of recovering against any applicable insurance policy.

(4487) *Travelers Indemnity Co. v. Bailey,* 129 S. Ct. 2195 (2009) - Chapter 11 Plan confirmed that required Insurance Company to contribute to Debtor's "Personal Injury Settlement Trust" in exchange for release of claims based on Debtor's insurance policies cut off not only causes of action against Insurer under terms of insurance policies themselves, but also cut off State Court actions that alleged that Insurer violated State Consumer Protection statutes based on Insurer's administration of the insurance policies and handling of claims made prior to confirmation of the Plan. Allegations that Insurer violated state law by influencing Debtor's purported failure to disclose knowledge about asbestos hazards; Insurer defended Debtor; Insurer advanced the state of the art defense; and Insurer coordinated Debtor's national defense effort. Direct action claims were inextricably intertwined with Insurer's long relationship as Debtor insurer.

9.57 Scope of Discharge – Misapplied Payments

(4488) *Beal Bank, SSB v. Prince,* 2009 WL 2584769 (Bankr. M.D. Tn. 2009) – Creditor found to be in contempt of court for misapplying mortgage payments received post-discharge and wrongfully foreclosing on Debtor's home. To prevail in civil contempt action, Plaintiff must prove that Defendant violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. In the context of the discharge injunction, this means that the Debtor must demonstrate that the defendant (i) violated the discharge injunction (and thus the order granting the discharge) and (ii) did so with knowledge that the injunction was in place. At conclusion of Chapter 13 Case, Court entered order finding that Debtor's long term debt was current and defaults cured. Following discharge, Debtor missed some payments and Creditor foreclosed. Creditor later determined that payments had been misapplied during and following Chapter 13 and that mortgage was actually current. Court: (1) reinstated the Princes' mortgage in the stipulated, agreed upon amount of $33,729.82 effective as of October 1, 2009; and (2) awards compensatory damages to the Prince's in the form of forgiving their payment of $198 (in rent or mortgage payment) from November 7, 2005 through September 30, 2009, and an additional $2,000.00 for their time and inconvenience in dealing with the defendants mistakes.

9.58 Scope of Discharge – Non-compete Agreements

(4489) *Cybertron International Inc. v. Capps,* Case No. 17-5099 (D. Kan. 2018) – Covenant not to compete is not discharged in Chapter 7 bankruptcy. Breach of covenant not to compete is not "claim" because it cannot be satisfied by money alone as breach also gives rise to equitable remedy. Although plaintiff may have right to both damages and injunction, availability of damages as part of remedy does not convert breach of covenant into "claim".

(4490) *Innerwood & Co. LLC v. Privett,* 2016 WL 4697662 (S.D. Ohio 2016) – Whether enforcement of injunction against Debtor for violation of non-compete agreement is stayed depends on whether injunction amounts to "claim". The right to equitable relief, such as the right to an injunction to enforce a non-compete agreement, constitutes a claim only if it is alternative to right to payment or if compliance with equitable order will require Debtor to pay of money. Right to equitable relief might be dischargeable "claim" if breached non-compete agreement could be reduced to money damages. Debtor's payment of legal fees to defend action to enforce an injunction is not the type of expense that constitutes a "requirement that Debtor pay money" to satisfy injunction. Bankruptcy Court must determine (1) whether Debtor is required to expend money to comply with obligations under the non-compete agreements or the preliminary injunction order and (2) whether Debtor is subject to money damages for breach of the non-compete agreements or the preliminary injunction order.

(4491) *Market Graphics Research Group, Inc. v. Berge,* 2014 WL 2155009 (M.D. Tn. 2014) – Discharge under Chapter 7 does not discharge Debtor's obligation not to compete under valid non-competition agreement. Other party cannot pursue monetary relief for alleged violations but can enforce non-compete through injunctive relief without violating discharge injunction.

9.59 Scope of Discharge – Post-Petition Obligations

(4492) *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.

(4493) *In re Wilcox,* 2014 WL 2208893 (Bankr. W.D. 2014) – Discharge does not alter or affect post-petition obligations. However, creditor bears burden to prove that obligation arose post-petition, failing which Court will presume obligation is pre-petition and creditor's later collection activities would violate discharge injunction.

(4494) *Whitaker v. Bank of America,* 2013 WL 2467932 (Bankr. E.D. Tn. 2013) – Discharge does not alter or affect post-petition obligations. To determine whether obligation is pre- or post-petition, court must determine when the right to payment arose. Generally, when obligation arises out of contractual relationship, obligation will be deemed to have accrued as of date of contract even if obligation is contingent on future actions. Creditor's post-petition advances for payment of homeowner's insurance were pre-petition debts that were discharged, as Debtor's obligation to repay creditor for those advances was based on pre-petition contract. Fact that contingency that triggered repayment occurred post-petition did not convert obligation into post-petition debt.

9.60 Scope of Discharge – Arbitration Agreements

(4495) *In re Bateman,* Case No. 14-5369 (Bankr. M.D. Fl. 2018) - Arbitration agreement in contract between consumer and creditor did not require arbitration of class action brought by consumer alleging creditor violated discharge injunction. Although federal policy has strong presumption in favor of arbitration, and arbitration clauses survives discharge of underlying debt, before ordering arbitration, Court must first decide whether parties actually agree to arbitrate and, if so, whether there are any legal constraints for closing arbitration. Arbitration clause in contract lacked any nexus with alleged discharge violation because resolution of discharge violation would not entail reference to or construction of contract; and complained of conduct involved breach of duty imposed by law, not breach of customer agreement. Further, Bankruptcy Court has significant interest in enforcing any injunction issues including discharge injunctions, and arbitration of contempt proceeding for discharge injunction inherently conflicts with Bankruptcy Code and undermines Court authority.

(4496) *Allen v. Equifax Information Systems, Inc.,* 2017 WL 5762414 (W.D. Ky. 2017) – Court must engage in limited review to determine if dispute is arbitrable, based on (1) whether there is agreement arbitrate; (2) the scope of arbitration agreement; (3) whether Congress intended claims to be subject to arbitration; and (4) if some but not all claims are subject to arbitration whether to stay remaining proceedings pending arbitration. Plaintiff's claims under FCRA and FDCPA based on alleged incorrect reporting of accounts on credit report where accounts had been discharge in bankruptcy subject to arbitration. Plaintiff agreed to terms when Plaintiff used credit card, and standard terms provided that all disputes would be subject to arbitration and specifically included disputes regarding credit reporting as subject to arbitration. Court would excuse arbitration of dispute that was within scope of arbitration clause only on most extenuating and explicit circumstances none of which were present here where arbitration agreement specifically included disputes at issue. Discharge in bankruptcy eliminates personal

obligation of Plaintiff but did not terminate contract and arbitration clause survived discharge and remained fully enforceable. There was no indication that Congress either expressly or impliedly intended to preempt arbitration of FCRA and FDCPA claims based on discharge in bankruptcy and arbitration not inconsistent with "fresh start" purpose of Bankruptcy Code where Creditor's actions were not attempt to collect debt and did not constitute violation of discharge injunction.

9.61 Notice - Known Creditors

(4497) *Witz v. Fishman Group, PC,* 2017 WL 3386381 (E.D. Mi. 2017) – Discharge of debt is effective only if creditor received actual written notice of bankruptcy proceeding. Defendant who allegedly violated discharge injunction by pursuing collection post-discharge or pre-petition debt has proper notice of bankruptcy case when Debtor's counsel provided both telephonic and written information that Debtor had filed for bankruptcy, Notice to party's counsel of bankruptcy filing is sufficient notice to party itself for purposes of discharge.

(4498) *Palmer v. Wayne County Sheriff,* 2016 WL 3922630 (E.D. Mi. 2016) – Notice in bankruptcy case must be sufficient to satisfy due process, which is satisfied if notice is reasonably calculated to reach interested parties, reasonably conveys all required information and permits a reasonable time for response. Claims of creditors who are not given reasonable notice cannot be constitutionally discharged. If a creditor is known to the Debtor, notice by publication is not constitutionally reasonable, and actual notice of the relevant bar dates must be afforded to the creditor. Known creditors are defined as creditors that a Debtor knew of, or should have known of, when serving notice of the bar date. Among known creditors may be parties who have made a demand for payment against a Debtor in one form or another before the compilation of a Debtor's schedules. Typically, a known creditor may have engaged in some communication with a Debtor concerning the existence of the creditor's claim. This communication by itself does not necessarily make the creditor known. Direct knowledge based on a demand for payment is not, however, required for a claim to be considered "known." A known claim arises from facts that would alert the reasonable Debtor to the possibility that a claim might reasonably be filed against it. Motion to Dismiss denied where record was unclear whether plaintiff was "known" creditor before expiration of claims bar date as Defendant did not proffer any evidence that Defendant was unaware of plaintiff's claim before plaintiff commenced litigation some moths after expiration of claims bar date.

9.62 Notice - Unknown Creditors

(4499) *Palmer v. Wayne County Sheriff,* 2016 WL 3922630 (E.D. Mi. 2016) – Notice in bankruptcy case must be sufficient to satisfy due process, which is satisfied if notice is reasonably calculated to reach interested parties, reasonably conveys all required information and permits a reasonable time for response. Claims of creditors who are not given reasonable notice cannot be constitutionally discharged. When a creditor is unknown to the Debtor, publication notice of the claims bar date may satisfy the requirements of due process. Known creditors are defined as creditors that a Debtor knew of, or should have known of, when serving notice of the bar date. Among known creditors may be parties who have made a demand for payment against a Debtor in one form or another before the compilation of a Debtor's schedules. Typically, a known creditor may have engaged in some communication with a Debtor concerning the existence of the creditor's claim. This communication by itself does not necessarily make the creditor known. Direct knowledge based on a demand for payment is not, however, required for a claim to be considered "known." A known claim arises from facts that would alert the reasonable Debtor to the possibility that a claim might reasonably be filed against it. Motion to Dismiss denied where record was unclear whether plaintiff was "known" creditor before expiration of claims bar date as Defendant did not proffer any evidence that Defendant was unaware of plaintiff's claim before plaintiff commenced litigation some moths after expiration of claims bar date.

9.63 Scope of Discharge – Setoff

(4500) *Newell v. Wayne County,* 2016 WL 2732992 (E.D. Mi. 2016) – Right of setoff survives discharge and allows defendant to setoff otherwise discharged obligation owed by Debtor for defensive purposes. Defendant cannot use setoff to achieve affirmative relief but can assert setoff of debt as long as right of setoff existed as of petition date. Debtor's cause of action and defendant's claim against Debtor both existed pre-petition and constituted mutual debts for purposes of setoff under Michigan law.

(4501) *The Gladys Ragsdale Trust v. Tostige,* 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Right of setoff survives Chapter 7 discharge as long as setoff meets requirements of Section 553. Trust under which Debtor was beneficiary could offset against Debtor's beneficial interest to recover pre-petition loan notwithstanding entry of discharge.

J. Discharge Injunction

9.64 Generally

(4502) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) - Claim for bankruptcy purposes is any debt that arose before date of order for relief and includes contingent, unliquidated, disputed, matured, unmatured, legal, equitable obligations or any other right to equitable remedy for breach of performance if breach gives rise to payment. Fact that debt may no longer be enforceable or that Court subsequently determines that creditor does not hold *valid* claim does not prevent debt from constituting claim. Creditor's attempt post-discharge to enforce claim under Antenuptial Agreement constituted "debt" such that creditors action and filing suit to enforce Antenuptial Agreement violated discharge injunction unless obligations are otherwise excepted from discharge.

(4503) *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.

(4504) *IRS v. Murphy,* 892 F.3d 29 (1st Cir. 2018) – Creditors alleged reasonable belief that that was not discharge is not defense to action for contempt for violation of discharge injunction. Section 524 does not require that violation be "willful", only that actions be taken intentionally and with knowledge of the existence of discharge. IRS violated discharge injunction in attempting to collect debts allegedly excepted from discharge under Section 523(a)(1)(A) based on Debtor's alleged willful evasion of tax liabilities. Debtor brought adversary proceeding in Bankruptcy Court seeking declaration that that had been discharged and the Bankruptcy Judge granted summary judgment in favor of Debtor. Debtor then set sanctions for violation of discharge injunction and IRS alleged that any violation was based on good faith but mistaken belief that taxes have not been discharged. First Circuit concluded that good faith does not allow creditor to escape consequences of intentional violation of discharge injunction.

(4505) *In re Taggart,* Case No. 16-35402 (9th Cir. 2018) – Creditor who has subjective good faith belief that discharge injunction does not apply to State Court claim for post-petition attorney fees, even if unreasonable, cannot be held in contempt for violation of discharge injunction. Discharge injunction does not protect Debtor from recovery of post-petition attorney fees in state Court action where Debtor "returns to fray" by voluntarily returning to state Court and taking an active role in litigation. Although creditors were aware of discharge injunction and knowingly proceeded with efforts to recover attorney fees, sanctions not warranted and list creditor knows discharge injunction was applicable and intended actions which violate injunction. Although creditors believe that Debtor had returned to the fray was later rejected by District Court, at time creditor sought to recover attorney fees, creditor subjectively believe that attempt to recover fees did not violate stay.

(4506) *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 fcontemnor 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.

(4507) *Gray v. Nussbeck,* 2017 WL 2484824 (Bankr. D. Kan. 2017) – Judgment entered in violation of Discharge Injunction is void ab initio and unenforceable. Void judgment is not entitled to collateral estoppel or res judicata or full Faith and credit.

(4508) *Hollis v. Ardahji,* 2015 WL 12516202 (W.D. Tn. 2015) – Discharge under Bankruptcy Code operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the Debtor, whether or not discharge of such debt is waived. Upon entry of discharge in favor of Debtor, Plaintiffs are barred from collecting any alleged debt related to actions or conduct occurred prior to his petition and discharge in bankruptcy. Plaintiff's complaint for alleged violation of Fair Labor Standards Act dismissed.

(4509) *Bates v. CitiMortgage, Inc.,* 2016 U.S. Dist. LEXIS 16247 (D.N.H. 2016) – Creditor violates discharge injunction when creditor made recorded phone call seeking current insurance information on property that had been foreclosed. Although call did not demand that Debtors obtain insurance, call improperly coerced or harassed Debtor.

(4510) *Mitchell v. Anderson,* 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Creditor cannot be held to have willfully violated discharge injunction where creditor did not have notice of the discharge. Debtor failed to list creditor in matrix. Although creditor had actual knowledge of bankruptcy petition from outset of case, creditor did not receive notice of the discharge because of Debtor's failure to either include creditor in matrix or timely amend the matrix. Actions taken by creditor after discharge entered but before creditor had notice of the discharge are not actions taken in willful violation of discharge injunction (although the actions may have violated the automatic stay).

(4511) *In re Livensparger,* Case No. 12-10361 (Bankr. W.D. Mi. 2015) – Discharge has two effects – it voids judgment and it enjoins collection of claims as personal obligations of Debtor. Discharge does not extinguish claim and does not affect liability of any other entity on the debt. State Court plaintiff not prevented by discharge injunction from joining discharged Debtor as nominal defendant solely for purposes of recovering from Debtor's liability insurance carrier.

(4512) *Tanner v. Tanner,* 2014 WL 5488495 (Bankr. N.D. Ohio 2014) – Debtor's sister violated discharge injunction by attempting to collect pre-petition unsecured debt post-discharge. Sister's parents borrowed money secured by their home and loaned money to Debtor. Thereafter, Debtor filed bankruptcy and obtained a discharge. Sister, who had inherited property, refinanced mortgage and then attempted for require Debtor to pay refinanced debt. Sister's actions were attempt to collect pre-petition obligation which was not altered by post-petition refinance of mortgage. There was no evidence that Debtor agreed to waive discharge or reaffirm debt as part of sister's refinance, and Debtor did not receive any consideration independent of the discharged loan in exchange for any alleged reaffirmation. Sanctions awarded for attorney fees, costs, lost wages and mileage incurred by Debtor from and after date on which Sister received notice of the discharge.

(4513) *In re Wright,* 2014 WL 4418564 (Bankr. N.D. Ohio 2014) – Lender violated discharge injunction by sending statements to Debtor and demanding payment for alleged post-petition debt, where "debt" was result of successful prosecution by Trustee of avoidable transfer action against creditor. After trustee filed preference action, creditor refunded $6,120 to the trustee, then showed that amount as a new "charge" on Debtor's credit card statement for a "purchase". Creditor then issued a statement requiring payment by a due date. The following month, creditor issued another statement also demanding payment and adding a late fee and interest. Debtor repeatedly contacted creditor but creditor failed to correct error or update account and instead reported account to credit bureaus as delinquent. Creditor had actual notice of discharge but took steps that violated discharge injunction warranting sanctions including costs and lost waged incurred to attend hearing

plus ordering creditor to address credit reporting consequences plus a fine of $1,000 which will be abated if creditor cures credit reporting consequences within 45 days.

(4514) *In re Dickerson,* 2014 WL 1761952 (Bankr. D. Idaho 2014) – Fines owed to governmental entities are excepted from discharge. However, statutory "surcharge" was not excepted from discharge where surcharge was designed to reimburse governable agency costs of collection of fines. Further, as fines had already been paid, surcharge imposed by collection agency was not fine or penalty owed to governmental agency, but were owed solely to the collection agency and represented compensation for actual pecuniary loss. Collection agency that recovered fines but then sought judgment to require Debtors to pay surcharge violated discharge injunction warranting aware of attorney fees and costs to Debtors.

(4515) *In re Hopkins,* 2014 WL 1329163 (Bankr. S.D. Iowa 2014) – Debtor's voluntary payments after discharge and Debtor's statements that Debtor intended to repay debt notwithstanding discharge did not except debt from discharge or constitute reaffirmation agreement. Creditor's acceptance of voluntary payments was not violation of discharge injunction, but creditor's actions to collect after voluntary payments stopped constituted violations of discharge injunction. Creditor was aware of bankruptcy discharge and willfully violated injunction warranting award of actual damages, attorney fees and punitive damages.

(4516) *Kreuz v. Fischer,* 2014 WL 2765696 (Bankr. N.D. Ohio 2014) – Discharge injunction prevents any action to collect discharged debts from Debtor. Discharge injunction does not prevent actions to recover accounting fees from Debtor's wholly-owned corporations for services rendered to those corporations at Debtor's request. Creditor's State Court complaint did not seek to recover anything from Debtor personally and so did not violate Debtor's discharge injunction.

(4517) *In re Wilcox,* 2014 WL 2208893 (Bankr. W.D. 2014) – Michigan Department of Corrections violated discharge injunction by setting off against prisoner account to recover payment of pre-petition obligations for alleged damages to property. State did not bring action under Section 523(a)(6) to except debt from discharge and debt was discharged. State ordered to restore $49.12 to prisoner account representing funds wrongfully setoff. However, setoffs for payment of post-petition debts was not violation of discharge injunction.

(4518) *Gleason v. GVL Lake properties, LLC,* 2014 WL 1779442 (Bankr. E.D. Ky. 2014) – In rem actions taken against Debtor's property are not precluded by discharge injunction. Action by one member of LLC to dissolve LLC in which Debtor was other member was action directed at Debtor's property rights, consisting of Debtor's membership, and not against Debtors personally. However, if action is one taken not to enforce in rem rights but instead to coerce payments, actions can violate discharge injunction. Record indicated that plaintiff's action was not taken to coerce payments but were taken to cause LLC to liquidate assets and pay debts for which plaintiffs were otherwise liable.

(4519) *In re Stewart,* 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Creditor violates discharge injunction when creditor violates a clear and specific order of Court requiring creditor to take or refrain from taking particular act and creditor, with knowledge of order, fails to comply. Creditor who did not take any action to collect debt did not violate discharge injunction. Good faith mistake by creditor as to right to retain property located in premises that creditor purchased from former landlord did not constitute a willful attempt to collect discharged obligation.

(4520) *In re Ramos,* 2013 WL 5461859 (Bankr. S.D.N.Y. 2013) – Bank of America violated stay by continuing to send collection notices for mortgage note that had been discharged in bankruptcy. While secured creditor has right to enforce obligation against collateral, lender does not have right to collect from Debtor himself. Notices sent by bank went well beyond advising of bank's right to enforce lien or to inform Debtor of steps that Debtor may take to avoid enforcement. Bank's communications lacked any clear or conspicuous disclaimers or notices that communications sere limited to possible foreclosure and repeatedly made demand for payment stating "You need to pay this debt" ND "Bank of America N.A. will proceed with collection actions until your account is brought fully current" and "You are responsible for paying the bill" and similar language. Bank was fully aware of filing of case and entry or discharge, and Bank continued to send notices and demands not only after bank was advised of discharge but after repeated communications by Debtor's counsel asking and demanding that bank cease collection activities. Bank has been repeatedly sanctioned by other Courts for similar conduct, but sanctions so far have not been sufficient to coerce compliance. Court imposed sanctions of $10,000 per month for any further violations as well as an award of Debtor's counsel's attorney fees incurred as result of bank's actions.

(4521) *Davis v. Weinstein & Riley, P.S.,* 2013 WL 5428740 (N.D. Ohio 2013) – Violation of Discharge Injunction can from basis of action under Fair Debt Collection Practices Act. While violation of discharge injunction itself would be remedied by contempt action in bankruptcy Court, that does not preclude separate action for conduct that amounts to violation. FDCPA prohibits attempts to collect legally unenforceable debt. Debt collector violated FDCPA by attempting to collect debt that had been subject to discharge, rendering creditor liable under FDCPA.

(4522) *Reichgott v. Flagstar Bank, NA,* 2013 WL 5492532 (Bankr. N.D. Ohio 2013) – Complaint failed to state cause of action for violation of discharge injunction where complaint alleged only that defendant falsely threatened to report derogatory information to credit agencies in attempt to collect discharged debt; and that defendant violated discharge injunction by transferring or assigning claim after discharge had entered. Post-discharge transfer of claim can give rise to violation of discharge injunction if creditor turned over discharged debt with reason to believe that assignee would seek to collect account. Complaint failed to allege that transfer of claim was done with knowledge that assignee would wrongfully attempt to collect or any other facts that would establish that creditor acted with contempt of discharge injunction in transferring claim.

(4523) *Myers v. Asta,* 2012 WL 2501124 (Bankr. E.D. Wi. 2012) – Discharge entered in Chapter 7 proceeding did not discharge obligations from Debtor's wholly owned company. Debtors did not have personal guarantee and creditor was not attempting to collect from Debtors. Creditor's collection proceedings, directed solely at corporate entity, not barred by discharge injunction.

(4524) *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.

(4525) *In re Moore,* 2012 WL 3561973 (Bankr. W.D. Mi. 2012) – Creditor violated discharge injunction by garnishing Debtor's state tax refund post-discharge. Creditor ordered to refund garnished funds to Debtor and, if creditor fails to pay by date specified, amount would increase by $10 per day until paid in full.

(4526) *In re Baer,* 2012 WL 2368698 (6th Cir. BAP 2012) – There is no private cause of action for alleged violation of discharge injunction. Debtor has standing to seek contempt against creditor who repossessed vehicle post-discharge. Discharge injunction prevents any attempt to collect personal liability of Debtor on discharged debt. Discharge does not prevent creditor from exercising rights in collateral post-discharge. Creditor's actions in repossession automobile post-discharge did not violate the discharge injunction. Creditor did not violate discharge injunction by answering Debtor's question as to why the vehicle was being repossessed by informing Debtor of amount of arrearage owed. Creditor did not demand payment nor indicate that creditor would forego repossession if Debtor paid amounts owed. Creditor did nothing more than provide answer to Debtor's question. Fact that Debtor may have had equity in the collateral does not alter creditor's right to repossess the collateral or to otherwise enforce the security interest post-discharge.

(4527) *Taylor v. Javitch, Block & Rathbone, LLC,* 2012 WL 2375494 (N.D. Ohio 2012) – There is no private cause of action for alleged violation of discharge injunction.

(4528) *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.

(4529) *Seibert v. Horton,* Adv. No. 11-6651 (Bankr. E.D. Mi. 2012) - Unscheduled debt is generally dischargeable in no asset chapter 7 case. However, unscheduled debt that is not otherwise non-dischargeable under section 523(a)(2), (4), or (6), is not automatically discharged if the potential creditor did not have knowledge of the bankruptcy case. Unscheduled creditor did not violate discharge injunction by filing post discharge State Court complaint alleging nondischargeable debt based on alleged theft of money. If proven, debt would be nondischargeable under section 523(a)(6) notwithstanding the general discharge for otherwise unscheduled debts.

(4530) *In re Martin,* Case No. 11-8052 (6th Cir. BAP 2012) - Creditor willfully violated discharge injunction when he filed a post-discharge State Court lawsuit where the parties had not entered into a reaffirmation agreement during the pendency of the Debtor's case. Debtor's voluntary post-petition payment did not obligate her to continue making payments to the creditor or somehow waive benefit of discharge of underlying obligation. Parties did not enter into a new contract for payment of the debt because mutual assent and consideration independent of the discharged debt were both lacking. The creditor's mistaken belief that his actions were somehow outside the scope of 524(a)(2) does not remedy a violation of the discharge injunction. Debtor was entitled to an award of actual damages for the violation, including attorneys' fees.

(4531) *Stevens v. Citizens Tri-County Bank,* 2011 WL 6812807 (Bankr. E.D. Tn. 2011) – Section 524 does not create a private right of action for damages. Remedy for alleged violation is through Motion for contempt for violation of injunction. Adversary complaint for damages dismissed.

(4532) *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.

(4533) *In re Ulrich,* 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Bankruptcy Court retains jurisdiction following discharge for purposes of enforcing discharge injunction.

(4534) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Once an order granting a discharge is entered, Section 524(a) gives rise to an injunction against an act, to collect, recover or offset any debt discharged under Section 727 as a personal liability of the Debtor. Creditors who have willfully violated the discharge injunction are in contempt of the Court that issued the discharge order. Adversary Proceeding that sought to impose private cause of action dismissed as Section 524 does not create a private right of action for damages.

(4535) *In re Baer,* 2011 WL 3667511 (Bankr. E.D. Ky. 2011), *aff'd,* 2012 WL 2368698 (6th Cir. BAP 2012) – Creditor did not violate discharge injunction by repossession of collateral post-discharge. Creditor's lien rights survive bankruptcy and as long as creditor effects in rem relief only with no attempt to impose *in personam* liability on Debtor, creditor's actions are not barred by discharge injunction.

(4536) *In re Schultz,* Case No. 11-0045 (Bankr. W.D. Mi. 2011) – Discharge operates to preclude efforts to collect against third party based on writ of garnishment. However, discharge does not preclude action against third party based on third party's own misconduct independent of actions of Debtor or obligation of Debtor to creditor.

(4537) *Bar Plan Mutual Insurance Company v. Guarino-Sanders,* 201 WL 52418 (W.D. Ky. 2011) – Discharge in bankruptcy voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtor with respect to any debt discharged and operates as injunction as against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset such debt as a personal liability of the Debtor. Case commenced against Debtor prior to commencement of bankruptcy case dismissed with prejudice after discharge entered.

(4538) *Plan Administrator for the Bail & Rice, Inc., Profit Sharing Plan v. Gail & Rice, Inc.,* 2011 WL 110904 (E.D. Mi. 2011) – Discharge under Section 524 discharges Debtor's personal liability for debt but does not extinguish the debt itself. Creditor can proceed against Debtor for pre-petition debt as long as creditor does not seek to hold Debtor personally liable, including an action to liquidate debt of Debtor for purposes of collecting from third party.

(4539) *LaVoie v. LaVoie,* 2011 WL 2464169 (Bankr. W.D. Mi. 2011) – Bankruptcy Court has jurisdiction to consider adversary proceeding for violation of discharge injunction. Action is core proceeding as it involves administration of the case and is an action created or determined by a provision of Title 11.

(4540) *Buke, LLC v. Eastburg,* 447 BR 624 (10th Cir. BAP 2011) – Bankruptcy Court has discretion to modify discharge injunction to allow State Court litigation to liquidate amount of claim that is alleged in Bankruptcy Adversary Proceeding to be non-dischargeable. Although Bankruptcy Court has exclusive jurisdiction to determine dischargeability under Section 523(a)(2), (4) and (6), State Court has concurrent jurisdiction to determine amount of the debt allegedly non-dischargeable. Bankruptcy Court can, but is not required to, liquidate debt as part of dischargeability proceeding. Debt that is subject to adversary proceeding is "presumptively dischargeable" and, therefore, is included within the discharge injunction unless and until a final judgment of non-dischargeability is entered. Whether or not the validity and extent of a debt is better litigated in the bankruptcy Court or the State Court is left to the bankruptcy Court's discretion based on judicial economy and efficiency; the burden and expense to the parties; whether there are additional integral parties to the State Court action over which the bankruptcy Court does not have jurisdiction; the right to a jury trial in State Court; whether the State Court proceeding negatively impacts the bankruptcy estate; and whether the State Court proceeding would impair a Debtor's reorganization efforts.

(4541) *In re Johnson,* 2010 WL 4235399 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 1983339 (E.D. Mi. 2011) – Lien survives bankruptcy and is unaffected by discharge. Lender does not violate discharge injunction by making reasonable and non-coercive inquiries regarding validity of lien or status of underlying collateral. Lender is not required to prove validity of lien in order to take actions that attempt to determine validity and extent of lien. Creditor who held alleged security interest in annuity did not violate discharge injunction by contacting annuity company to inquire about status of annuity and amounts remaining to be paid under annuity.

(4542) *In re Reuss,* 2011 WL 1522333 (Bankr. W.D. Mi. 2011) – Discharge injunction prevents any attempt to collect or recover on discharged obligation. Discharge releases personal liability only and secured creditor's rights in the collateral pass through and survive the bankruptcy. Upon termination of the automatic stay, secured creditor can take any appropriate action to enforce the lien as long as the creditor does not pursue *in personam* relief against the Debtor. Correspondence from creditor to Debtor's counsel asking about the Debtor's intentions regarding the property was not attempt to enforce personal liability but was "Courtesy and convenience" to determine whether Debtor intended to keep or surrender property. Reasonable and non-coercive communications to Debtor or counsel directed toward enforcement of secured lien do not violate discharge injunction.

(4543) *Lassiter v. Moser,* Case No. 09-8067 (6th Cir. BAP 2010) – Creditor's commencement of litigation in State Court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although creditor argued in response to Motion for Contempt that State Court action was intended to be limited to post-petition actions by Debtor, complaint itself encompassed actions that occurred pre-petition and which were discharged. All events on which creditor based complaint occurred pre- petition, even if the harm and damages continued post-petition, resulting in discharge of obligations.

(4544) *In re Johnson,* 2010 WL 4235399 (Bankr. E.D. Mi. 2010) - Alleged violation of discharge injunction does not create private right of action under Section 524, but can warrant imposition of compensatory damages for civil contempt. Creditor's efforts to enforce security interest following discharge does not violate discharge injunction. Debtor validly pledged disability benefits to secure loans prior to commencement of bankruptcy. Debtor's right to receive disability benefits is a "contract right" within the scope of the pledge as either an "account receivable" or "general intangible". Spendthrift clause that prevents assigning rights or interests is not enforceable to the extent it purports to prohibit or restrict creating of security interest in an account or general intangible. Disability benefits are not "insurance" for purposes of Article 9 of the Uniform Commercial Code as "insurance" requires payment of a premium by the insured. In this case, the premiums were paid by Debtor's employer depositing funds into a self-funded trust for payment of benefits, without any insurance policy, insurance company, named insured, or premiums. ERISA does not pre-empt assignment of employee welfare benefit plan. ERISA does pre-empt assignment of pension plan only.

(4545) *In re Burkepile,* 2010 WL 3501814 (Bankr. N.D. Ohio 2010) – Discharge is not a magic wand that, with a wave, makes contracts disappear. Defendant in action brought by Debtor does not violate discharge injunction by seeking to enforce forum selection clause in contract nor assert right of setoff that would not result in affirmative liability of the Debtor.

(4546) *In re Morris*, 430 B.R. 824 (Bankr. W.D. Tenn. 2010) - Suit against Debtor as nominal defendant in order to recover from insurance company did not violate the discharge injunction. While there would be some burden on the Debtor – in attending depositions and trial – those were not burdens alleviated by the discharge injunction.

(4547) *In re Lipa,* Case No. 04-74608 (Bankr. E.D. Mi. 2010) – Pre-petition open ended personal guarantee of corporate open account is contingent claim that is discharged in its entirety. Guarantee does not survive bankruptcy even to the extent of post-bankruptcy purchases by corporation. Creditor's attempt to collect on guarantee for corporate debts incurred post-discharge violated discharge injunction.

(4548) *Kovacs v. U.S.,* 2010 WL 2944048 (7th Cir. 2010) – IRS willfully violated discharge injunction by pursuing collection of discharged taxes. 26 USC Section 7433(e) provides exclusive remedy for IRS violation of discharge injunction. Bankruptcy Code does not provide alternative basis for recovery. Section 7433 has two-year statute of limitations running from the date on which the taxpayer had a reasonable opportunity to discover all elements of the cause of action. Debtor had reasonable opportunity to discover all elements when IRS sent notices of intent to levy after entry of the discharge. Later violations may constitute new violations but will not save prior violations under "continuing wrong" theory.

(4549) *Beaumont v. Dept. of Veteran Affairs,* 586 F.3d 776 (10th Cir. 2009) – Veterans Affairs did not violate Discharge injunction by withholding from post-discharge veteran benefits amounts to recover pre-petition benefit overpayments. "Recoupment" is an equitable doctrine in bankruptcy that allows one party to a transaction to withhold funds due another party where the debts arise out of the same transaction. Recoupment is an equitable exception to the discharge injunction and allows a party to recover a pre- petition debt out of payments owed to the Debtor post-petition. Obligation to repay arises from the same transaction where both debts must arise out of a single integrated transaction so that it would be inequitable for the Debtor to enjoy the benefits of that transaction without also meeting its obligations. Court must examine the equities of the case, and determine whether the claims are so closely intertwined that allowing the Debtor to escape its obligation would be inequitable.

(4550) *Dalvit v. United Airlines, Inc.,* Case No. 08-1283 (10th 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.

(4551) *Saleh v. Bank of America, N.A.,* Case No. 08-36592 (Bankr. S.D. Ohio 2010) – Discharge Injunction does not stay actions against third party co-obligors. Discharge Injunction will not extend to Debtor's wholly owned corporation on theory that corporation and Debtor are the same entity. Corporation is separate entity not protected by discharge in principal's bankruptcy case.

(4552) *In re Waldo,* 417 BR 854 (Bankr. E.D. Tn. 2009) – Attorney "willfully" violated discharge injunction by depositing post-petition checks for payment or unpaid attorney fees in Chapter 7 case after entry of discharge. Unpaid balance of attorney fees in Chapter 7 case were dischargeable debt and Debtor's obligation to pay those fees terminated upon entry of discharge. Attorney liable for sanctions for violation of Section 524, required to disgorge all fees received both pre-petition and post-petition in connection with Chapter 7 filing and to return to Debtors all remaining post-dated checks still in attorney's possession.

(4553) *In re Greenspan*, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd,* Case No. 10-8019 (6th Cir. BAP 2011) – Creditor violated discharge injunction filing two State Court lawsuits against Debtors in an attempt to collect a discharged debt. Although Discharge injunction provides no private right of action for violation, Court can award sanctions for contempt of Court. Sanctions awarded in the amount of $12,510.00 representing attorney fees incurred in defending State Court litigation on behalf of Debtors. Court denied additional fees incurred in defending non-Debtor co-defendants in State Court litigation. Extraordinary amount of fees appropriate given creditor's persistence in pursuing the State Court litigation, his opposition to the motion to reopen Chapter 7 case, his opposition to the Debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.

9.65 Discharge Injunction – Bringing or Maintaining Action

(4554) *Bennett v. Morton Buildings, Inc.,* 2015 WL 9491184 (Bankr. N.D. Ohio 2015) – Even if State Court ultimately determined that Debtor owed no debt to State Court plaintiff and so there was no debt to except from discharge, action of State Court plaintiff in bringing action in first instance would still violate discharge injunction.

9.66 Discharge Injunction – Credit Reporting

(4555) *In re Van Buren,* 2015 WL 363192, 2015 Bankr. LEXIS 329 (Bankr. W.D. Mi. 2015) – Lender does not violate discharge injunction by reporting debt as "charged off" rather than "discharged" where there was nothing in record to indicate that debt had not been charged off, that lender continued collection efforts, or that lender offered to change status of reporting in exchange for payment. Bankruptcy discharge acts as injunction against collection activity, but does not require lender to take any affirmative action.

(4556) *Bowen v. Mountain Commerce Bank,* 2010 WL 2430777 (Bankr. E.D. Tn. 2010) – Discharge injunction prohibits creditors from taking any action to collect a discharge the debt. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Reporting of credit information about a Debtor or refusing to remove credit information posted about a Debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor's refusal to update the status of a debt on a credit report after a request has been made by the Debtor can constitute a discharge injunction if the creditor deliberately refuses to change reporting of debts from "past due or owing, charged off as bad debt" rather than "discharged in bankruptcy" notwithstanding request by Debtor to update credit report. Debtor's complaint alleged only that bank failed to remove a negative reference from a credit bureau without alleging that bank did so with the intent to course the Debtor to pay obligation. Complaint failed to identify in any respect what the Debtor's claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to "negative reference" without providing any factual explanation for the allegations.

(4557) *Small v. University of Kentucky Federal Credit Union,* 2011 WL 1868839 (Bankr. E.D. Ky. 2011) – Creditor who correctly reported to credit bureaus a pre-petition charge off of an account is under no duty to correct or update that information, unless the creditor's actions are in furtherance of effort to collect discharged debt. However, a coercive motive may be inferred if the Debtor contacts the creditor and asks that the information be corrected. Creditor who does not take any action to collect discharged debt and who was never contacted by Debtor about the information in the credit report did not violate discharge injunction by failing to unilaterally take steps to correct the information.

9.67 Discharge Injunction – Secured Creditors Generally

(4558) *Witt v. Partners for Payment Relief DE II, LLC,* 2018 WL 3966692 (Bankr. N.D. Ohio 2018) – Discharge Injunction prevents commencement or continuation of action to collect, recover or offset any discharge debt as personal liability of Debtor. Discharge injunction does not terminate secured creditors in rem rights unless lien was avoided during bankruptcy. Creditor who willfully violates discharge injunction is in contempt of Court and discharge injunction may be enforced through contempt proceedings brought by motion or by adversary proceeding.

Mortgage holder did not violate discharge injunction by filing foreclosure action even where property has market value less than balance owed on first mortgage and Second Mortgage holder would receive nothing on account of foreclosure action. There is no "equity requirement" before Second Mortgage holder may enforce a lien. There was no evidence that Second Mortgage holder's motive was to coerce Debtor to pay otherwise non-dischargeable at risk of losing property.

(4559) *In re Joseph,* 2018 WL 770509 (Bankr. E.D. Ky. 2018) – Secured creditor can pursue recovery against collateral but cannot pursue Debtor personally for deficiency. Property Tax Certificates held by private parties operate to allow holder to enforce tax lien and to pursue property owner personally. However, Debtor discharged personal obligations on tax certificates such that post-discharge attempts to collect debt violated discharge injection and subjected creditor to sanctions. Fact that tax certificate holders were not listed in Chapter 7 schedules did not prevent discharge of debt in no-asset case. Creditors willfully pursued collection notwithstanding actual knowledge of bankruptcy discharge, although finding of willfulness is not required to impose sanctions consisting of attorney fees and costs.

(4560) *Skaags v. Nationstar Mortgage,* 2017 WL 1371077 (W.D. Mi. 2017) –Plaintiff could not demonstrate likelihood of success on merits where claims were based on mistaken belief that discharge in bankruptcy avoided mortgage and 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 enrich 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.

(4561) *In re Jackson,* 2016 WL 4147641 (6th Cir. BAP 2016), *affd,* 2017 WL 8160941 (6th Cir. 2018) – Reversing bankruptcy Court decision, BAP concluded that lender does not violate discharge injunction by continuing post-discharge a pre-petition foreclosure action to collect secured debt. Creditor's right to continue foreclose is not dependent on whether there is equity available for foreclosing creditor. Fact that Debtor may face choice of losing property to foreclosure or paying pre-petition, discharged obligations, does not convert foreclosure into attempt to collect pre-petition debt. Condo association also entitled to add to amounts owed any charges that became payable after commencement of the Chapter 7 case including attorney fees incurred by creditor in rescheduling foreclosure sale that had originally been scheduled pre-petition. Creditor's secured claim passed through bankruptcy unaffected and right to enforce lien is independent of any right to collect debt, such that creditor can foreclose for pre-petition and post-petition defaults even though Debtor no longer had personal liability. Bankruptcy Court abused discretion in enjoining Condo Association from continuing pre-petition foreclosure action or from attempting to include in foreclosure any amounts that came due before bankruptcy case was filed.

(4562) *In re Goldston,* 2016 WL 1238220, 2016 Bankr. LEXIS 1064 (Bankr. S.D. Ohio 2016) - Alleged telephone calls by mortgage holder in attempt to pressure Debtor to sign loan modification documents in were made because creditor expected the calls to work, resulting in Debtors signing loan modification documents and effectively agreeing to repay discharged debt. Creditor continued to call and threatened even more calls even after Debtor made it clear that he was not going to sign the loan modification documents and did not want to receive more calls. Such calls, if proven, would constitute violations of the discharge injunction. Creditor's constant stream of written communications, totaling at least 38 over 16 months were not intended to enforce security agreement as Debtor already indicated to creditor that Debtor had no intention of keeping property and wanted lender to foreclose. Some of the communications failed to include any disclaimer that communication was solely for informational purposes and includes statements that additional advances for insurance and taxes would become part of the debt, without stating that lender could not seek to collect these additional sums from Debtors personally.

(4563) *In re Biery,* 2015 WL 8608804, 543 BR 267 (Bankr. E.D. Ky. 2015) – Secured creditor does not violate discharge injunction if creditor retains security interest in real property that is Debtor's principal residence, the act or communication with Debtor is in the ordinary course of business of Debtor and creditor, and the act or communication with Debtor is limited to seeking or obtaining periodic payments in lieu of pursuit of in rem relief. Courts are split on how creditor complies with this requirement. Majority hold that billing statement must contain clear and prominent disclaimer that creditor is seeking payment solely as substitute for pursuing in rem rights. Other Courts hold that disclaimers are not necessary as long as creditor, while sending statements, also refrains from pursuing in rem relief. Court concluded that majority view is correct. Section 524 contemplates statement or notice that differs from the one routinely sent to non-Debtor borrowers. Further, whether statement violates discharge injunction cannot be question of creditor's subjective intent. Purpose of statement must be determined on face of statement itself. Document that on its face appears to require payment of mortgage debt as personal liability is act to collect discharged debt even if sender subjectively intends notice for informational purpose only. Statement must announce that purpose on its face, in sufficiently clear language, such that an ordinary consumer Debtor receiving the statement would understand its informational and voluntary purpose. Outstanding amounts to be paid to prevent foreclosure should generally be described as voluntary, rather than as "due," and the communication must omit language that demands payment. A statement lacks a valid informational purpose, and is an enjoined act to collect a discharged debt as personal liability, if it is identical to the statement a discharged Debtor received prior to filing for bankruptcy. Such statements inescapably convey the message that the creditor sending them seeks to collect a discharged debt as a personal liability.

(4564) *Botson v. Citizens Banking Co.,* 2015 WL 3486616 (Bankr. N.D. Ohio 2015) – Creditor did not violate discharge injunction by refusing to withdraw UCC-1 Financing Statement or by filing UCC-3 Continuation Statement post-discharge. Discharge prevents any act to collect, recover or offset a debt as a personal liability of the Debtor. Valid liens that were not avoided in bankruptcy case pass through and creditor has right to look to property securing debt for satisfaction of pre-petition lien. Creditor can exercise any valid lien rights without violating discharge injunction. Renewal of pre-petition lien is lawful exercise of right to enforce unavoided pre-petition lien. Lien continued in products and proceeds of collateral but would not be continued as to property first acquired by Debtor post-petition under Section 552 which

avoids after-acquired property clauses in pre-petition security agreements.

(4565) *In re Teal,* 2015 WL 1206802 (E.D. Tn. 2015) – Discharge injunction extinguishes right to collect from Debtor but does not extinguish lien or prevent creditor from exercising *in rem* rights. Debtors can agree to voluntary payments in exchange for creditor withholding action against collateral without creditor violating discharge injunction. If collateral is Debtor's primary residence, Section 524(j) specifically allows creditor to act in the ordinary course of business for purposes of seeking or obtaining periodic payments in lieu of pursuit of *in rem* relief.

(4566) *In re Black,* 2014 WL 690159 (Bankr. E.D. Mi. 2014) – Creditor who held lien on Debtor's residence and also on 50% of Debtor's pension did not violate discharge injunction by foreclosing mortgage and then collecting the deficiency by withholding 50% of pension distributions. Discharge injunction prevents actions to collect debt from Debtor personally, but does not prevent creditor from exercising in rem rights as to collateral securing the loan. Creditor held properly perfected lien in both residence and pension benefits that rode through the bankruptcy unaffected. Fact that Debtor claimed pension as exempt does not remove pension from scope of voluntarily conveyed security interest. Although Pension Fund may have violated State Law by attempting to recover deficiency judgment, that violation is not violation of discharge injunction and should be brought in State Court.

(4567) *Whitaker v. Bank of America,* 2013 WL 2467932 (Bankr. E.D. Tn. 2013) – Creditor who attempts to collect discharge debt violates discharge injunction. However, discharge affects only ability to collect against Debtor *in personam*, but leaves intact the right of the creditor to enforce the debt *in rem.* Section 542 expressly excludes from the injunction actions by secured creditor who retains security interest in real property that is the principal residence of the Debtor, where the act is in the ordinary course of business between Debtor and creditor and is limited to seeking or obtaining periodic payments in lieu of pursuit of *in rem* relief. Discharge injunction does not preclude all communication between Debtor and creditor, only those designed to enforce the personal liability of the Debtor. Creditor did not violate discharge injunction by sending monthly statements to Debtor in connection with mortgage on Debtor's residence. Statements did not suggest that Debtor was personally liable for the balance or that creditor was requesting that Debtor make payments. Statements were informational and not attempts to obtain payment. Letters from creditor to Debtor requesting proof of insurance and advising that creditor would force place insurance are not *per se* violations. Court must determine whether communications were merely for informational purposes or whether language was coercive in the context in which the letters were sent.

9.68 Secured Creditors – Section 524(j) Safe Harbor

(4568) *In re Goldston,* 2016 WL 1238220, 2016 Bankr. LEXIS 1064 (Bankr. S.D. Ohio 2016) – Safe harbor provision of Section 524(j) allows secured creditor to contact Debtor for purposes of obtaining payments on secured debt only where creditor retains security interest in property that is Debtor's principal residence and contacts are within normal scope and course of business. Safe harbor did not apply to property that Debtors had ceased to use as principal residence some years prior to filing bankruptcy (but after creditor extended loan) as property was not, at time of commencement of case, Debtors' principal residence.

9.69 Discharge Injunction – Failure to Credit Payments

(4569) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of Debtor. Enforcement of Discharge Injunction is within exclusive control of District Court (or Bankruptcy Court) that entered discharge in first instance. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current. Thus, Tennessee Court has jurisdiction to rule on Plaintiff's complaint that Defendant failed to properly credit payments or deem account current as ordered by Texas Court and relief is not within exclusive control of Texas Court that entered discharge in first instance.

(4570) *In re Jackson,* 2016 WL 4147641 (6th Cir. BAP 2016), *affd,* 2017 WL 8160941 (6th Cir. 2018) – Reversing bankruptcy Court decision, BAP concluded that lender does not violate discharge injunction by continuing post-discharge a pre-petition foreclosure action to collect secured debt. Creditor's right to continue foreclose is not dependent on whether there is equity available for foreclosing creditor. Fact that Debtor may face choice of losing property to foreclosure or paying pre-petition, discharged obligations, does not convert foreclosure into attempt to collect pre-petition debt. Condo association also entitled to add to amounts owed any charges that became payable after commencement of the Chapter 7 case including attorney fees incurred by creditor in rescheduling foreclosure sale that had originally been scheduled pre-petition. Creditor's secured claim passed through bankruptcy unaffected and right to enforce lien is independent of any right to collect debt, such that creditor can foreclose for pre-petition and post-petition defaults even though Debtor no longer had personal liability. Bankruptcy Court abused discretion in enjoining Condo Association from continuing pre-petition foreclosure action or from attempting to include in foreclosure any amounts that came due before bankruptcy case was filed.

(4571) *Moore v. Caliber Home Loans, Inc.,* 2015 WL 5162482 (S.D. Ohio 2015) – Section 524(i) provides that lender's willful failure to credit payments received under confirmed Chapter 13 Plan violates discharge injunction if the failure to credit payments caused material injury to Debtor.

9.70 Eviction Proceedings

(4572) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Creditor violated discharge injunction by filing eviction action against Debtor post-discharge seeking not only possession of property but also award of unpaid rent accruing after entry of discharge. Section 502(g) treats a claim for post-petition damages for breach of an unexpired prepetition lease as prepetition, discharged claim. Any debt owed to landlord on lease deemed rejected under Section 365 including post-petition rent arrearage is deemed prepetition debt. Abandonment of property under Section 554 does not render Debtor liable for post-petition rental payments. Property had not yet been abandoned by Chapter 7 estate as Chapter 7 case remained pending and Court had not entered Order deeming property to be abandoned. There was no indication that Debtor

entered into new post-petition lease agreement where Debtor did not make any payments nor offer to make any payments. Holdover tenants are not liable for post-petition rent simply because they wait for landlord to take steps to complete eviction action.

9.71 Surrendered Collateral

(4573) *In re Kurzban,* Case No. 09-30656 (Bankr. S.D. Fla. 2017) – "Surrender prevents Debtor from contesting foreclosure in action pending or ripe for filing when bankruptcy case in which property is surrendered is filed. However, decision to surrender does not last in perpetuity no matter what might occur after Debtor "surrenders" property. Debtor not prevented from contesting foreclosure where, after Debtor surrendered property, Lender voluntarily dismissed foreclosure action and engaged in loan modification efforts. Over 7 years after Debtor obtained discharge and more than 5 years after dismissal of prior action, lender instituted new action to foreclose mortgage based on new, post-bankruptcy defaults. Debtor's prior surrender of property was not binding in subsequent foreclosure action relating to defaults that did not exist as of date on which Debtor made decision to surrender.

(4574) *In re Ryan,* Case No. 09-1604 (Bankr. D. Hawaii 2016) – "Surrender" does not alter any substantive right of the Debtor or require Debtor to waive any defenses to foreclosure proceedings. "Surrender" means only that Debtor waives any right to redeem collateral or to reaffirm debt or exempt the property. Code specifies that consequence of stated intention to surrender, in certain circumstances, terminates the automatic stay; only the Trustee has authority to compel Debtor to carry file and carry out statement of intentions; "hanging paragraph" of Section 521()2) specifically reserved any substantive rights of Debtor; and there is no reason to read "surrender" to give secured creditors a free pass to violate foreclosure laws. Failure to relinquish possession of property or raising issues objecting to foreclosure is not violation of discharge as discharge is entirely independent of statement of intentions, and grounds for denial of discharge under Section 727 do not include anything to do with statement of intentions or surrender of property.

(4575) *Failla v. Citibank, NA,* Case No. 15-15626 (11th Cir. 2016) – "Surrender" requires that Debtor relinquish rights in collateral and take no action inconsistent with that designation. Surrender survives abandonment of property by trustee and duty to surrender collateral continues. Debtors filed Chapter 7 and indicated in statement of intentions that they would surrender their home. There was no dispute that mortgage was valid, that Debtors had defaulted on payments, or that value of property was less than balance owed. After trustee abandoned the home, Citibank continued foreclosure and Debtors then contested foreclosure action. Creditor sought order from bankruptcy Court Ordering Debtor to stop contesting foreclosure action. Bankruptcy Court entered Order directing Debtors to stop contesting foreclosure or risk losing discharge. District Court affirmed and 11th Circuit affirmed.

(4576) *In re Plummer,* 2014 WL 1248039 (Bankr. M.D. Fl. 2014) – Lender violated discharge injunction when, after Debtor indicated that collateral would be surrendered, lender obtained foreclosure judgment that purported to impose personal liability against Debtors for attorney fees and costs. Surrender of collateral requires only that Debtors make collateral available for secured creditor to exercise state law rights. Surrender does not obligate Debtors to "deliver' property or to otherwise take any affirmative action. Debtor "surrenders" collateral when he allows the secured creditor to obtain possession by available legal means. Debtor is not required to convey title. Debtor did not violate Code or act inconsistent with stated intent to "surrender" when Debtor refused to sign deed in lieu of foreclosure. Debtor took no steps to impede foreclosure process or to otherwise hinder creditor's exercise of state law rights. Debtor's continued occupancy of property, and rental of property after bankruptcy filing but before foreclosure, did not interfere with secured creditor's ability to seek possession by legal means, as mortgagee had no right to possession until after transfer of title following foreclosure sale. State Court's order that Debtor failed to "surrender" the property by refusing to transfer title, thereby supporting award of attorney fees was premised on incorrect assumption regarding effect of surrender as Debtor had no obligation to transfer property. Court awarded Debtors actual damages representing attorney fees and costs incurred in defending against post-discharge collection efforts plus lost wages and out of pocket expenses for travel costs.

(4577) *Canning v. Beneficial Maine, Inc.,* 462 BR 258 (1st Cir. BAP 2011) , *aff'd* Case No. 12-9002 (1st Cir 2013) – Creditor does not violate stay or discharge injunction by refusing to release lien or foreclose against property. Surrender under Section 521 requires that Debtor make collateral available to secured creditor but does not obligate secured creditor to accept possession of collateral unless refusal to accept collateral is subterfuge to coerce payment by the Debtor of the discharged debt. Lender was not demanding that Debtors pay debt in full to obtain release of lien and offered to release lien through settlement or short sale, which provided ability of Debtor to sell property and indicated intent by creditor to recover no more than value of collateral.

9.72 Discharge Injunction – Reaffirmed Debts

(4578) *Gray v. Nussbeck,* 2017 WL 2484824 (Bankr. D. Kan. 2017) – Improperly executed Reaffirmation Agreement is void and unenforceable. State Court Judgment obtained after entry of discharge based on ineffective Reaffirmation Agreement is, itself, void as violation of Discharge Injunction. *Rooker-Feldman* does not deprive Bankruptcy Court of jurisdiction to void State Court Judgment where State Court Judgment is void and a legal nullity. Although *Rooker-Feldman* precludes federal Court from you reviewing a state Court decision that is merely "wrong", there is substantial difference between "incorrect" judgment in judgment which is void.

(4579) *Venture Bank v. Lapides,* Case No. 14-3085 (8th Cir. 2015) – To be enforceable, reaffirmation agreement must contain all essential elements of a contract under state law and must be executed prior to entry of discharge. "Change in Terms" agreement the extended maturity date of loan 6 months and contained unqualified promise of Debtor to pay was invalid where agreement was entered after discharge and without Court approval. Creditor could have elected to allow Debtor to continue to make voluntary payments without execution of agreement. But once agreement was signed, subsequent payments were not voluntary and violated discharge injunction, even where lender fully complied with terms of Agreement and extended (multiple times) the maturity date of the loan. That Debtor received consideration for terms of Agreement what would have been sufficient to support agreement, failure to execute or file agreement within time permitted under Section 524 rendered agreement unenforceable by lender.

(4580) *In re Gavitt,* 2014 WL 4058956 (Bankr. S.D. Ohio 2014) – Creditor's post-discharge efforts to enforce reaffirmed debt do not violate discharge

injunction. Reaffirmation of debt waives Debtor's right to have the debt discharged and Debtor remains personally liable on the reaffirmed debt. Lender's foreclosure action sought only to recover amounts under the reaffirmed debt and to hold Debtor personally liable for any deficiency. Had lender's action sought to collect more than the reaffirmed debt, lender may have violated discharge injunction.

9.73 Discharge injunction – Debtor as Nominal Defendant

(4581) *Desert Pine Villa Homeowners Association v. Kabiling,* Case No. 15-1380 (9th Cir. BAP 2016) – Mere filing of complaint against Debtor is not violation of discharge injunction if Debtor is joined solely as putative or nominal party to allow plaintiff to collect form collateral source such as insurance policy. However, complaint must make it clear that it is not naming Debtor as a party for anything other than formal reasons. HOA violated discharge injunction by failing post-discharge action to quiet title that named Debtors as defendants without indicating that Debtors were named solely as putative or nominal parties against whom no relief was sought. Complaint sought award of attorney fees from Debtors, alleged that Debtors had failed to pay assessments, failed to mention that personal liability had been discharged, made no effort to communicate that Debtors were joined only as putative or technical parties, failed to state that no amounts were being sought from Debtors, or that only circumstance which may give rise to fees would be if Debtors opposed the relief requested.

(4582) *In re Livensparger,* 2015 WL 1803922 (Bankr. W.D. Mi. 2015) – Discharge has two effects – it voids judgment sand it enjoins collection of claims as personal obligations of Debtor. Discharge does not extinguish claim and does not affect liability of any other entity on the debt. State Court plaintiff not prevented by discharge injunction from joining discharged Debtor as nominal defendant solely for purposes of recovering from Debtor's liability insurance carrier.

9.74 Discharge Injunction – Subsequent Proof of Claim

(4583) *In re Luzier,* 580 BR 725 (Bankr. N.D. Ohio 2014) – Mortgagee willfully violated discharge injunction when, in second bankruptcy case filed by Debtor, it filed proof of claim that included claim for amounts that had been discharged in Debtor's prior Chapter 13 case and refused to amend its proof of claim to eliminate claim for any discharged debt unless Debtor first assured it that she would not attempt to hold it liable for any deficiencies in amended claim; even if mortgagee had acted inadvertently in including discharged debt in proof of claim that it filed in Debtor's second case, it refused to amend claim with knowledge that it included a claim for discharged debt. Creditor could not include in Proof of Claim amounts allegedly unpaid prior Chapter 13 case where Creditor did not file response to Rule 3002.1 Notice of Final Cure or otherwise assert in prior case that Mortgage was not current as of date of plan completion.

(4584) *Green Point Credit, LLC v. McLean,* Case No. 14-14002 (11th Cir. 2015) – Creditor violated discharge injunction by filing proof of claim in current case for debt that was discharged in prior case.

9.75 Dischargeability Actions

(4585) *In re Wilcox,* 2015 WL 1851356 (Bankr. W.D. Mi. 2015) – Creditor did not violate discharge injunction by bringing post-discharge action against Debtor for fraud and malicious prosecution. Creditor was not listed in schedules or matrix and had no notice of bankruptcy proceeding until after entry of discharge when Debtor wrote letter to State Court asserting discharge as defense. State Court has concurrent jurisdiction to determine whether claims were excepted from discharge under Section 523(a)(6). Section 523(a)(3) generally discharges even unscheduled debts in no asset Chapter 7, unless underlying debt would have been excepted from discharge under Section 523(a)(6) had creditor been properly noticed in first instance. State Court action allowed to proceed with Debtor or creditor asking State Court to make finding of dischargeability of debt.

(4586) *In re Philpott,* 509 BR 134 (Bankr. S.D. Ohio 2014) – Discharge does not divest bankruptcy Court of jurisdiction to conclude adversary proceeding to determine dischargeability of claim. Creditor entitled to pursue non-dischargeability action notwithstanding discharge injunction.

9.76 Discharge Injunction – Non-Dischargeable Debts

(4587) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of Debtor. Enforcement of Discharge Injunction is within exclusive control of District Court (or Bankruptcy Court) that entered discharge in first instance. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current. Thus, Tennessee Court has jurisdiction to rule on Plaintiff's complaint that Defendant failed to properly credit payments or deem account current as ordered by Texas Court and relief is not within exclusive control of Texas Court that entered discharge in first instance.

(4588) *Missouri v. Spencer,* 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.

(4589) *In re Spencer,* Case No. 15-6030 (8th Cir. BAP 2016) – Order of Bankruptcy Court reducing allowed amount of non-dischargeable claim does not preclude creditor from pursuing collection of entire claim, including disallowed amount, and creditor's actions do not violate discharge injunction.

9.77 Secured Creditors – Attorney Fees

(4590) *Desert Pine Villa Homeowners Association v. Kabiling,* Case No. 15-1380 (9th Cir. BAP 2016) – HOA violated discharge injunction by filing post-discharge action to quiet title that also sought recovery of attorney fees against Debtors. Creditor violates discharge injunction by acting with knowledge that discharge has been entered and that discharge applies to creditor's claim; and creditor intentionally takes actions that violate discharge injunction, although creditor is not required to have specific intent to violate injunction, intent to take action that is violation is sufficient. HOA had full knowledge of discharge and acknowledged that it applied to HOA. HOA nonetheless filed complaint to quiet title that named Debtors as defendants, sought award of attorney fees from Debtors, alleged that Debtors had failed to pay assessments, failed to mention that personal liability had been discharged, made no effort to communicate that Debtors were joined only as putative or technical parties, failed to state that no amounts were being sought from Debtors, or that only circumstance which may give rise to fees would be if Debtors opposed the relief requested. Entitlement to attorney fees was based entirely on pre-petition conduct of Debtors including acquiring unit subject to HOA, pre-petition default in payments and the post-bankruptcy foreclosure based on pre-petition defaults. Discharge includes liability for debt arising before petition is filed. Debt is liability on claim. Debtors' entirely liability is based on prepetition acts including purchase of unit and default in assessments.

(4591) *In re Jackson,* 2016 WL 4147641 (6th Cir. BAP 2016), *affd,* 2017 WL 8160941 (6th Cir. 2018) – Reversing bankruptcy Court decision, BAP concluded that lender does not violate discharge injunction by continuing post-discharge a pre-petition foreclosure action to collect secured debt. Creditor's right to continue foreclose is not dependent on whether there is equity available for foreclosing creditor. Fact that Debtor may face choice of losing property to foreclosure or paying pre-petition, discharged obligations, does not convert foreclosure into attempt to collect pre-petition debt. Condo association also entitled to add to amounts owed any charges that became payable after commencement of the Chapter 7 case including attorney fees incurred by creditor in rescheduling foreclosure sale that had originally been scheduled pre-petition. Creditor's secured claim passed through bankruptcy unaffected and right to enforce lien is independent of any right to collect debt, such that creditor can foreclose for pre-petition and post-petition defaults even though Debtor no longer had personal liability. Bankruptcy Court abused discretion in enjoining Condo Association from continuing pre-petition foreclosure action or from attempting to include in foreclosure any amounts that came due before bankruptcy case was filed.

(4592) *Malin v. JPMorgan Chase Bank,* 2014 WL 820003 (E.D. Tn. 2014) – Debtor's prior bankruptcy discharge does not insulate Debtor from liability for attorney fees and costs in litigation against mortgage lender where Debtor voluntarily commenced litigation post-petition to contest validity of mortgage and loan documents. By voluntarily reinstituting litigation, Debtor assumed risk of incurring litigation expenses that were not discharged.

9.78 Tax Forms

(4593) *Bates v. CitiMortgage, Inc.,* 2016 U.S. Dist. LEXIS 16247 (D.N.H. 2016) – Creditor does not violate stay by issuing form 1099-A informing Debtors that foreclosure sale may have resulted in reportable gain or loss. Creditor is required to provide notice to Debtors after foreclosure and is not attempt to collect debt. Checking box on from that states that Debtor was personally obligated to pay debt. Statement, even if incorrect, was not effort to impose liability or to seek to impose any tax liability on Debtors or to collect anything.

9.79 Tax Claims

(4594) *Markley v. Department of Treasury, Internal Revenue Service,* 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Exclusive remedy for violation of discharge injunction is action for contempt. Contempt requires proof that defendant violated definite and specific order of Court requiring defendant to perform or refrain from performing particular act with knowledge of Court Order. Whether Creditors actions filing to discharge injunction depended on whether taxes at issue were discharged in first instance. Claim for unpaid taxes in Chapter 13 proceeding was not discharged because Internal Revenue Service did not have notice of bankruptcy case and time to file proof of claim. Section 523(a)(3) provides that a debt is not discharged if the creditor did not discover the bankruptcy case and time to file a proof of claim. Debtor listed IRS tax liability and schedules at address which is not IRS designated address under Rule 5003(e). IRS did not obtain actual knowledge until more than two years after expiration of the claims bar date, at a time when IRS could not timely file a proof of claim. Fact that IRS later filed and then withdrew untimely filed proof of claim does not convert that into dischargeable debt where IRS did not have opportunity to timely file claim in first instance.

(4595) *Wendt v. U.S.,* 2013 WL 6198348 (Bankr. S.D. Fl. 2013) – Tax return filed after last date on which return could be timely filed is not "return" for purposes of Section 523 or discharge. Return filed late is considered "unfiled" such that tax liability is excepted from discharge under Section 523(a)(1), although return had actually been filed more than four years pre-petition. Actions by IRS to collect taxes did not violate discharge injunction where tax liability itself was not discharged.

9.80 Criminal Proceedings

(4596) *Branch v. 30th District Court,* 2015 WL 515391 (Bankr. E.D. Mi. 2015) – 11 USC Section 523(a)(7) excepts from discharge any fines, penalties or forfeitures payable to and for the benefit of a governmental unit that is not compensation for any actual pecuniary loss. Traffic tickets issued pre-petition are all for fines and penalties for the benefit of the governmental unit and are not compensation for actual pecuniary loss. Actions in post-petition issuance of bench warrant, refusing to cancel warrant when advised of bankruptcy filing, and reporting or secretary of state resulting in further suspension of license did not violate discharge injunction where liability on underlying tickets was excepted from the discharge.

(4597) *Legendary Stone Arts, LLC v. Maness,* Case No. 13-6037 (8th Cir. BAP 2013) – Section 362(b)(1) I a clear and straightforward declaration that excepts criminal prosecution from the automatic stay with no exception based on prosecutorial purpose or bad faith. Fact that prosecution may result in restitution to victim does not remove prosecution from exception to stay or subject prosecuting creditor to liability.

(4598) *Smith v. Missouri,* Case No. 12-6060 (8th Cir BAP 2013) – Discharge affects liability only for pre-petition obligations. Under Missouri law, state could upon imprisonment file civil action against inmate for current and future expenses of incarceration. State brought action against

inmate and obtained judgment for amount representing anticipated costs for duration of incarnation. Inmate later filed for Chapter 7 and received discharge. Although Section 524 voids any judgment at any time obtained, to extent that judgment contained recovery for post-petition incarceration costs, judgment survived discharge. Judgment discharged only to extent that it included incarceration costs incurred prior to commencement of Chapter 7 case. State did not violate discharge injunction by seeking to recover sums awarded that represented post-petition costs.

(4599) *Johnson v. Cougar Oil, Inc.,* 2012 WL 3905176 (Bankr. S.D. Al. 2012) – Motion for contempt arising out of violation of discharge injunction requires proof that the creditor knew of the discharge injunction and intended to take the action which would constitute a violation. Discharge injunction allows Bankruptcy Court to enjoin state criminal proceedings to collect a debt. Creditor did not contact Debtor for purposes of instituting criminal prosecution, but rather that creditor intended to force Debtor to pay discharged debt. Creditor's initial letter required by criminal code did not violate stay or discharge injunction. At that point, creditor could have proceeded with criminal proceeding. However, creditor instead reached oral agreement with Debtor not to prosecute if Debtor would agree to sign over beer license to store owned by creditor and did not inform the prosecutor of this agreement. Creditor also changed policy regarding NSF checks. Debtor purchased gasoline for retail resale from creditor and routinely paid for the purchases with checks that, when issued, were not covered by sufficient funds. Creditor would hold the checks until Debtor had the funds in the account and never prosecuted Debtor for NSF checks prior to discharge. Only when Debtor filed for bankruptcy did creditor end its cooperation with Debtor. Creditor's conduct caused extreme emotional distress as Debtor spent three days in jail, supporting award of actual damages of $3,000.00. Punitive damages were not warranted. Although creditor's conduct was intentional, evidence did not support finding of egregious conduct.

(4600) *Nash v. Clark County,* 464 BR 874 (9th Cir. BAP 2012) – Criminal prosecution arising out of "bad markers" for gambling debt did not violate discharge injunction or automatic stay. Although underlying debts themselves had been discharged, that did not preclude state from pursuing criminal proceedings based on Debtor's presentment of bad checks. Creditor's contact with prosecutor post-discharge did not violate injunction where contact was initiated by prosecutor in connection with investigation of possible criminal charges. Bankruptcy Courts should not invalidate results of state criminal proceedings. Fact that state criminal proceedings may result in restitution does not alter fact that state's decision to enforce criminal statutes must be respected by bankruptcy Courts. Criminal prosecution is, by definition, on behalf of all citizens of the state and discretion to bring charges lies solely with the government, not to any complaining witness. Strong public policy advised against any interference by the bankruptcy Court in the decisions of the state prosecutors to pursue criminal charges, and those proceedings will not be sanctionable as alleged violation of either automatic stay or discharge injunction.

(4601) *Michalski v. Coulson,* 2011 WL 6415052 (6th Cir. 2011) – County Prosecutor did not violate discharge injunction by commencing criminal proceedings against Debtor based on bad checks after entry of the discharge. Mere fact that debt has been discharged in bankruptcy does not preclude criminal proceeding based on alleged criminal conduct in relation to the debt. Prosecution of Debtor for writing bad checks was not precluded merely because, after writing bad checks, Debtor filed for bankruptcy. Record indicated that prosecution was not motivated by desire to obtain restitution but that prosecution was designed to enforce criminal statute and would have been undertaken even if restitution was not an available remedy.

(4602) *In re Fidler,* 442 BR 763 (Bankr. D. Nv. 2010) – Bankruptcy Court cannot enjoin prosecution of action for writing bad checks where debts themselves were discharged in bankruptcy. However, Court can sanction complaining witnesses to extent that they are attempting "end run" around discharge by attempting to collect debts as restitution. Bankruptcy Court will not disrupt sovereign determination by state Prosecutor to bring charges simply because the Bankruptcy Court believes that there is economic motive behind statute or prosecution.

9.81 Domestic Support Obligation

(4603) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) – Domestic Support Obligations survive discharge under Section 523(a)(5). Obligations arising out of divorce or separation agreement may survive discharge under Section 523(a)(15). Section101(14A) defines "domestic support obligation" as obligation owed to or recoverable by spouse, former spouse or child; in the nature of alimony, maintenance or support regardless of whether debt is expressly designated as such; established by separation agreement, divorced agreement or property settlement agreement, order of Court of record or determination made under applicable nonbankruptcy law by governmental unit; and that has not been assigned to nongovernmental agency. Section 523(a)(15) excepts non-DSO claims that are incurred by Debtor in course of divorce or separation or in connection with separation agreement, divorced agree or other Court of record. Antenuptial Agreement (denominated as such even though parties executed agreement before marriage) is not "separation agreement" under Section 523(a)(15) where agreement was executed before marriage while separation agreements or agreements entered into after marriage; agreement said nothing at all about separation for what would happen if parties were to separate during marriage; agreement did not define or limit rights of parties during separation or specified what would occur if parties separated but never divorced; and merely stated that each party would maintain full and continuing rights to "separate property". Antenuptial Agreement constituted "property settlement agreement or purposes of Section 523(a)(5) where agreement defined respective property rights of parties during marriage, in event of divorce, and in the event of death. Agreement specifically defined "separate property" and provide that parties would retain separate property during marriage; and defined "marital property" and provided that each would receive one-half of marital property in event of divorce; and provided that parties would have no rights against each other in event of divorce or death except as stated in Agreement. Provisions were clearly settlement of property interest between parties such that Antenuptial Agreement constituted "property settlement agreement". However, Court was unable to determine on summary judgment whether obligations were in nature of alimony, maintenance or support. If obligation is labeled "support" or is labeld as something other htan "support" by State Court Order, Court should consider label applied by State Court; whether obligation is direct payment to former spouse rather than assumption of 3rd-party debt; and whether payments are contingent upon events such as death, remarriage or eligibility for Social Security. If state Court has not specifically labeled obligation, Court must look behind award and make independent factual inquiry to determine whether award is in nature of support, taking into account nature of obligation; structure and language of divorce decree; whether other lump-sum or periodic payments are also provided; length of marriage; relative earning power of parties; age, health and work skills of parties; adequacy of support absent obligation in question; and evidence of negotiation or other understandings. Antenuptial Agreement did not label obligations. Obligation

involved in either direct payment to former spouse or assumption of third-party debt but instead required plaintiff to assign life insurance benefits to defendant. Obligation did not involve payments that were contingent upon future events as obligation did not involve payments on all but rather designation of other party as beneficiary under life insurance policy. Although receipt of life insurance benefits would provide helpful support, that does not make obligation "in nature of support" as every obligation including assumption of joint loan obligation would in broad cents at least indirectly contribute to support. Although defendant understood intent by life insurance provision to ensure that defendant would be able to live in manner in which 2 parties had become accustomed, that was not sufficient to establish obligation is domestic support obligation where there was no evidence that obligation would have actual effect of providing support.

(4604) *Missouri v. Spencer,* 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.

(4605) *In re Peake,* 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Discharge injunction does not preclude efforts to collect non-dischargeable domestic support obligation. Debtor's request for sanctions against ex-wife denied.

(4606) *State of Florida v. Davis,* Case No. 11-15040 (11th Cir. 2012) – State is not barred by discharge injunction from collecting past-due child support even where State has filed claim in Bankruptcy Court and claim had been disallowed. After confirmation of Debtor's Chapter 11 plan, and well past the claims bar date, the State filed a claim for outstanding child support. Bankruptcy Court disallowed the claim as late filed. Denial of claim in by Bankruptcy Court does not preclude later attempt to collect debt. Discharge injunction precludes only efforts to collect discharged obligations. Domestic Support Obligations are non-dischargeable as a matter of law and, therefore, is beyond the terms of the discharge injunction. To the extent that the Bankruptcy Court disallowed the claim, that ruling precluded payment through the confirmed plan but did not prohibit State from seeking payment other than through plan or from property of bankruptcy estate.

9.82 Recoupment

(4607) *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.

(4608) *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.

9.83 Garnishment

(4609) *Lewis v. Pennsylvania Higher Education Assistance Agency,* 2017 WL 814247(E.D. Ky. 2017) - Student loan obligations are excepted from discharge without creditor being required to file adversary proceeding or obtain Bankruptcy Order of nondischargeability. Creditor does not bear the burden to prove in bankruptcy case that Debtor could not prove undue hardship as burden is on Debtors seeking discharge of student loans to file adversary proceeding and to demonstrate undue hardship. Student loan creditor does not violate discharge, violate Debtor's sole rights, abuse the Court process, convert assets of Debtor or intentionally inflict emotional distress on Debtor where, after entry of discharge, creditor undertakes collection activities including garnishment.

(4610) *Nichols v. Roosen, Varchetti & Oliver, PC,* 2015 WL 5936335 (E.D. Mi. 2015) – FDCPA does not require collector to release writ of garnishment that has expired on its own terms. 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.

9.84 Post-Discharge Perfection of Lien

(4611) *Johnson v. Williams,* 490 BR 236 (Bankr. W.D. Ky. 2013) – Discharge in Chapter 7 discharges only *in personam* liability and does not affect validity of lien. Creditor did not violate injunction by perfecting previously unperfected mortgage after entry of discharge in Chapter 7 case. Lien was valid and unavoidable in subsequent Chapter 7 proceeding where there was no basis to avoid as preferential or fraudulent.

9.85 Utilities

(4612) *Palazzola v. City of Toledo,* 2103 WL 4462568 (Bankr. N.D. Ohio 2013) – Remedy for violation of discharge order is through contempt proceedings. Contempt requires notice of order that has been allegedly violated, that party violated that order, and that order was specific and definite. City violated discharge order by continuing to attempt to collect pre-petition utility charges that had been discharged. City knew

of bankruptcy filing and entry of discharge order. City sent multiple bills to Debtor including pre-petition charges. Although charges also constituted lien on property that could be foreclosed post-discharge, notices and invoices were clearly directed to Debtor individually in effort to obtain payment, not merely to enforce lien. City also violated discharge injunction by cutting off utility service based on Debtor's failure to pay pre-petition balance. City's termination of services was action designed to compel Debtor to pay, rather than action to enforce statutory lien to collect balance. Living conditions at Debtor's home that resulted from termination of utility services constituted compensable injury, plus attorney fees and costs incurred to rectify the violation.

9.86 Sanctions – Jurisdiction

(4613) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of Debtor. Enforcement of Discharge Injunction is within exclusive control of District Court (or Bankruptcy Court) that entered discharge in first instance. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current. Thus, Tennessee Court has jurisdiction to rule on Plaintiff's complaint that Defendant failed to properly credit payments or deem account current as ordered by Texas Court and relief is not within exclusive control of Texas Court that entered discharge in first instance.

(4614) *In re Jorge,* 2017 WL 2333587 (Bankr. N.D. Ohio 2017) - Motion for Contempt for alleged violation of automatic stay and discharge injunction derived exclusively from provisions of Bankruptcy Code and are unique to Bankruptcy Code. Issue related to whether creditor violated discharge injunction, which is injunction entered by Bankruptcy Court such that Bankruptcy Court can and should determine if there has been a violation. Parties cannot, through pre-dispute arbitration agreement, strip Court of its inherent power to enforce its own orders. Violations of the discharge injunction are inherently nonarbitrable and arbitration of those claims would conflict with purposes of Bankruptcy Code.

(4615) *Jones v. CitiMortgage, Inc.,* Case No. 15-14853 (11th Cir. 2016) – Although Bankruptcy Court is "unit" of bankruptcy Court and district Courts have original jurisdiction, Bankruptcy Court alone has jurisdiction to enforce discharge or enter sanctions for violation of discharge injunction. District Court should not have entered any order or reached any decision on merits. Matter reversed and remanded to district Court with direction to remand case to bankruptcy Court.

9.87 Sanctions – Procedure

(4616) *Witt v. Partners for Payment Relief DE II, LLC,* 2018 WL 3966692 (Bankr. N.D. Ohio 2018) – Section 524 does not create private right of action for alleged violation of discharge injunction. Proper remedy is motion for contempt. Plaintiff can also bring action by adversary proceeding which, although not required, provides greater due process protections to defendant than are required in the contested matter.

(4617) *Pfeffer v. National Credit Systems, Inc.,* 2017 WL 3600437 (S.D. Ohio 2017), *report and recommendations approved,* 2017 WL 3966758 (S.D. Ohio 2017) – Assuming that debt collector violated discharge injunction, there is no private right of action for damages and complaint must be dismissed. Sole remedy is motion for contempt brought in Court in which discharge issued.

(4618) *Kehren v. JPMorgan Chase Bank,* 2017 WL 373513 (S.D. Ohio 2017) - There is no private cause of action for damages to enforce discharge injunction. Remedy for alleged violation of discharge injunction is action to hold party in contempt. Complaint seeking damages for violation of discharge injunction dismissed.

(4619) *West v. Home Savings & Loan,* 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Complaint that is jumble of allegations and mélange of statutory citations is stated caused of action where Court could glean sufficient facts to indicate that Debtor received a discharge under Chapter 7 and was now bringing suit against creditor for violation of discharge injunction. However, complaint did not state viable legal theory as there is no private right of action for damages for violation of discharge injunction. Remedy lies in contempt proceedings, not separate lawsuit for damages.

(4620) *Ramirez v. Medcentral Professional Foundation, LLC,* 2014 WL 4198899 (Bankr. N.D. Ohio 2014) – Action for contempt for violation of discharge injunction is brought by motion, not adversary complaint. Complaint for violation of discharge injunction must be dismissed. Debtor's request to "convert" adversary proceeding to motion for contempt denied as there is no procedural vehicle to convert an adversary proceeding into a motion. However, dismissal would be without prejudice to Debtor to bring motion where action had been pending for less than two months, prejudice to defendant is minimal, and dismissal without prejudice would allow Court to ultimately rule on merits of motion if Debtor pursues that recovery.

(4621) *Biery v. Beneficial Kentucky, Inc.,* 2013 WL 4602698 (Bankr. E.D. Ky. 2013) – Claim for violation of discharge injunction must be brought by motion for contempt in main case. Adversary proceeding requesting damages and injunctive relief for alleged violation dismissed.

(4622) *Whitaker v. Bank of America,* 2013 WL 2467932 (Bankr. E.D. Tn. 2013) – Action for damages for alleged violation of discharge injunction must be brought by Motion for Contempt. Adversary complaint seeking damages dismissed without prejudice to Debtor filing Motion for Contempt.

9.88 Sanctions – Contempt

(4623) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) – Discharge Injunction is enforced through civil contempt proceedings under Section 105 and inherent authority of Court to enforce compliance with Court orders. Party seeking contempt must show that opposing party violated definite and specific order of Court. Responding party must then present evidence that party took all reasonable steps within power to comply with Court order. Good faith is not defense to civil contempt but in possibility is defense. If Court finds party in contempt, Court has discretion whether to award relief. Without reaching the issue of whether defendant's conduct constituted contempt, Court concluded that

in any event Court would not grant monetary relief for plaintiff. Issues were complex and outcome was far from certain. Further, sanctions would be limited to reasonable fees and costs incurred by plaintiff in moving state Court litigation to Bankruptcy Court as proceedings in Bankruptcy Court seeking to determine whether debt was excepted from discharge does not constitute contempt.

(4624) *Witt v. Partners for Payment Relief DE II, LLC,* 2018 WL 3966692 (Bankr. N.D. Ohio 2018) – Contempt for violation of discharge injunction requires proof that alleged contemnor had knowledge of order said to be violated; alleged contemnor did violate order; and order violated was specific and definite. Discharge Injunction prevents commencement or continuation of action to collect, recover or offset any discharge debt as personal liability of Debtor. Discharge injunction does not terminate secured creditor's in rem rights unless lien was avoided during bankruptcy. Mortgage holder did not violate discharge injunction by filing foreclosure action even where property has market value less than balance owed on first mortgage and Second Mortgage holder would receive nothing on account of foreclosure action. There is no "equity requirement" before Second Mortgage holder may lien. There was no evidence that Second Mortgage holder's motive was to coerce Debtor to pay otherwise non-dischargeable at risk of losing property.

(4625) *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.

(4626) *IRS v. Murphy,* 892 F.3d 29 (1st Cir. 2018) – Creditors alleged reasonable belief that that was not discharge is not defense to action for contempt for violation of discharge injunction. Section 524 does not require that violation be "willful", only that actions be taken intentionally and with knowledge of the existence of discharge. IRS violated discharge injunction in attempting to collect debts allegedly excepted from discharge under Section 523(a)(1)(A) based on Debtor's alleged willful invasion of tax liabilities. Debtor brought adversary proceeding in Bankruptcy Court seeking declaration that that had been discharged and the Bankruptcy Judge granted summary judgment in favor of Debtor. Debtor then set sanctions for violation of discharge injunction and IRS alleged that any violation was based on good faith but mistaken belief that taxes have not been discharged. First Circuit concluded that good faith does not allow creditor to escape consequences of intentional violation of discharge injunction.

(4627) *In re Taggart,* Case No. 16-35402 (9th Cir. 2018) – Creditor who has subjective good faith belief that discharge injunction does not apply to state Court claim for post-petition attorney fees, even if unreasonable, cannot be held in contempt for violation of discharge injunction. Discharge injunction does not protect Debtor from recovery of post-petition attorney fees in state Court action where Debtor "returns to fray" by voluntarily returning to state Court and taking an active role in litigation. Although creditors were aware of discharge injunction and knowingly proceeded with efforts to recover attorney fees, sanctions not warranted and list creditor knows discharge injunction was applicable and intended actions which violate injunction. Although creditors believe that Debtor had returned to the fray was later rejected by District Court, at time creditor sought to recover attorney fees, creditor subjectively believe that attempt to recover fees did not violate stay.

(4628) *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.

(4629) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Remedy for violation of discharge injunction is entry of Order holding party in contempt. To support Order of contempt, moving party must present clear and convincing evidence that defendant violated definite and specific order of Court requiring defendant to perform or refrain from performing particular act but does not require proof of specific intent. Creditor had knowledge of discharge injunction when creditor filed State Court Amended Complaint seeking money damages against Debtor for time Debtor remained on premises after bankruptcy discharge. Creditor had received notice of discharge and also received cautionary language in Court's prior Order denying Creditor's Motion for Relief from Automatic Stay warning that any eviction action must be limited to restitution of premises and may not include money judgment.

(4630) *In re Hamaoui,* 2016 WL 4991504 (Bankr. N.D. Ohio 2016) – Attorney for creditor cannot be held in contempt for alleged violation of Discharge Injunction where evidence did not indicate that attorney was aware of either Bankruptcy case or the entry of the discharge. Civil contempt requires clear and convincing evidence that creditor violated a definite and specific order of the Court requiring creditor to perform or refrain from performing a particular act or acts with knowledge of the Court's order. There is no requirement to show intent beyond knowledge of the order. Constructive knowledge is not sufficient – party to be charged must have actual knowledge of discharge. Schedules listed original creditors but debt had been assigned to third party and third party hired counsel. There was no evidence that either third party or attorney were aware. Once Debtor made attorney aware of discharge, all collection efforts ceased.

(4631) *Forson v. Nationstar Mortgage, LLC,* 2016 WL 2727973 (Bankr. S.D. Ohio 2016) – Sole remedy for alleged violation of discharge injunction is through contempt proceedings. Section 524 does not create independent private cause of action. Power of Court is limited to effort to

enforce Court's own order. Complaint that sought to certify class action against lender for violation of discharge injunction that defined class as all Debtors in bankruptcy proceedings anywhere in United States did not support jurisdiction as class would include Debtors who received discharges other than in the Southern District of Ohio. Court lacked jurisdiction to enforce orders of other Courts through contempt proceedings. Court did allow certification of all Debtors who received discharges in the Southern District of Ohio.

(4632) *Kilbourne v. CitiMortgage, Inc.,* 2015 WL 12513459 (Bankr. S.D. Ohio 2015) – Sole remedy for alleged violation of discharge injunction is through contempt proceedings. Section 524 does not create independent private cause of action. Power of Court is limited to effort to enforce Court's own order. Complaint that sought to certify class action against lender for violation of discharge injunction that defined class as all Debtors in bankruptcy proceedings and who received discharges in the Southern District of Ohio. Court had jurisdiction over class action as action was limited to Debtors in the Southern District of Ohio. Although only Court that issued discharge can enforce it, that is not limited to each individual judge. Each bankruptcy judge in the Southern District is part of the "Court" allowing a single class action to include all cases from that Court without regard to any particular judge.

(4633) *Emmert v. Taggart,* Case No. 15-1119 (9th Cir. BAP 2016) – Contempt for violation of discharge injunction requires proof that party alleged to have violated discharge be aware of discharge order and that conduct violated specific and definite provision of that order. Burden then shifts to alleged violator to demonstrate that party was unable to comply with discharge order. Party must have actual knowledge of issuance of discharge and must intend to take actions that are alleged to have violated injunction. Focus is not on subjective intent of party or intent of party, but whether conduct complied with requirement of code. General knowledge that party filed for bankruptcy protection is insufficient to support finding that party was actually aware of entry of discharge and is factual inquiry that cannot be presumed or imputed. Party must also have knowledge that injunction applied to party's specific actions and is fact based inquiry that turns on party's subjective belief even if unreasonable. Discharge injunction does not protect Debtor from claims for post-discharge attorney fees and costs in State Court litigation where Debtor voluntary returns to the fray as an active party after entry of discharge as party cannot use discharge as shield to enable party to undertake risk-free post-petition litigation. Whether Debtor voluntarily returned to fray is factual issue and party's request for Court to determine whether Debtor voluntarily re-entered fray is not barred by discharge injunction, and determination can be made by State Court in pending litigation over claim itself. Once State Court makes determination that Debtor voluntarily returned to fray, opposing party can rely on that determination in seeking award of fees and costs.

(4634) *Mitchell v. Anderson,* 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Debtor not entitled to recover damages for creditor's violation of discharge injunction where creditor continued to prosecute, and Debtor continued to defend, multiple State Court actions after entry of discharge. Damages were easily avoidable had Debtor notified State Courts of entry of discharge rather than continuing to defend actions for more than one year. Any minimal costs that would have been incurred in notifying Courts were already compensated by State Court award of sanctions against creditor under state vexatious litigation statute. Bankruptcy Court lacks ability to award punitive damages for violation of discharge injunction as those sound in nature of criminal contempt and are beyond Bankruptcy Court jurisdiction, and there were insufficient grounds to warrant referral to District Court for further proceedings.

(4635) *Venture Bank v. Lapides,* Case No. 14-3085 (8th Cir. 2015) – Creditor can allow Debtor to continue to make voluntary payments without violation of discharge injunction. Payments were not "voluntary" were Debtor and Creditor, post-discharge, entered into "Change in Terms" Agreement that extended maturity date of loan and specifically required Debtor to make monthly payments. Any subsequent payments were not voluntary and violated discharge injunction, even where lender fully complied with terms of Agreement and extended (multiple times) the maturity date of the loan. That Debtor received consideration for terms of Agreement what would have been sufficient to support agreement did not avoid conclusion that payments, made under compulsion per the terms of the Agreement, were not voluntary. Creditor ordered to return to Debtor all funds received from Debtor after entry of discharge.

(4636) *Moore v. Caliber Home Loans, Inc.,* 2015 WL 5162482 (S.D. Ohio 2015) – There is no private right of action outside bankruptcy Court for alleged violation of discharge injunction. Remedy is civil contempt that must be issued by Court that issued discharge in first instance.

(4637) *West v. Home Savings & Loan,* 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Complaint that is jumble of allegations and mélange of statutory citations is stated caused of action where Court could glean sufficient facts to indicate that Debtor received a discharge under Chapter 7 and was now bringing suit against creditor for violation of discharge injunction. However, complaint did not state viable legal theory as there is no private right of action for damages for violation of discharge injunction. Remedy lies in contempt proceedings, not separate lawsuit for damages.

(4638) *In re Wilcox,* 2015 WL 1851356 (Bankr. W.D. Mi. 2015) – Contempt requires proof that creditor knew of discharge and intentionally took action inconsistent with discharge. Creditor did not violate discharge injunction by bringing post-discharge action against Debtor for fraud and malicious prosecution. Creditor was not listed in schedules or matrix and had no notice of bankruptcy proceeding until after entry of discharge when Debtor wrote letter to State Court asserting discharge as defense. Creditor without notice could not have acted with knowledge of and in direct disregard for injunction. Once creditor had notice, creditor had right to ask State Court to determine whether debt was excepted from discharge under Section 523(a)(6). State Court has concurrent jurisdiction to determine whether claims were excepted from discharge under Section 523(a)(6). Section 523(a)(3) generally discharges even unscheduled debts in no asset Chapter 7, unless underlying debt would have been excepted from discharge under Section 523(a)(6) had creditor been properly noticed in first instance. State Court action allowed to proceed with Debtor or creditor asking State Court to make finding of dischargeability of debt.

(4639) *In re Teal,* 2015 WL 1206802 (E.D. Tn. 2015) – Sanctions for violation of discharge injunction requires action by creditor that is willful, and amounts to a deliberate act with actual knowledge of bankruptcy case. Discharge injunction extinguishes right to collect from Debtor but does not extinguish lien or prevent creditor from exercising *in rem* rights. Debtors can agree to voluntary payments in exchange for creditor withholding action against collateral without creditor violating discharge injunction. If collateral is Debtor's primary residence, Section 524(j) specifically allows creditor to act in the ordinary course of business for purposes of seeking or obtaining periodic payments in lieu of pursuit of *in rem* relief. Negotiation of new agreement whereby Debtor would make voluntary payments in exchange for lender

forbearing from foreclosing on Debtor's residence did not violate discharge injunction. Agreement was not improper reaffirmation agreement and agreement specifically allowed Debtor to withdraw from agreement at any time without penalty.

(4640) *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.

(4641) *In re Hopkins,* 2014 WL 1329163 (Bankr. S.D. Iowa 2014) – Debtor's voluntary payments after discharge and Debtor's statements that Debtor intended to repay debt notwithstanding discharge did not except debt from discharge or constitute reaffirmation agreement. Creditor's acceptance of voluntary payments was not violation of discharge injunction, but creditor's actions to collect after voluntary payments stopped constituted violations of discharge injunction. Creditor was aware of bankruptcy discharge and willfully violated injunction warranting award of actual damages, attorney fees and punitive damages.

(4642) *Young v. Safe Home Security, Inc.,* 2014 WL 1379111 (Bankr. D. Mass. 2014) – Creditor violated discharge injunction by sending five separate demand letters to Debtors although creditor was listed in schedules. Creditor claimed that letters were result of human error and immediately ceased activities upon being contacted by Debtor's counsel. Court awarded $100 for each of the five letters. Court then awarded attorney fees but reduced fees by half as time entries "lumped together" various services preventing Court from determining amount of time spent on any particular item or determining whether the time spent was reasonable. Court also found some time entire excessive, including 7.25 hours to draft two-page demand letter and 10 hours to draft discovery request that consisted of 6 interrogatories, 13 requests for admission and 20 document requests

(4643) *In re Hager,* 510 BR 131 (Bankr. W.D. Mi. 2014) – Attorney's suit against Debtor for attorney fees incurred pre-petition in connection with Debtor's child custody dispute constituted violation of discharge injunction. Evidence established by clear and convincing evidence that attorney knew of bankruptcy discharge yet filed complaint to recover fees for pre-petition services. Post-petition payments for post-petition services do not violate discharge injunction. State Court judgment vacated to extent it included effort to recover pre-petition balance but left judgment unaltered to extent that is awarded post-petition fees for post-petition services.

(4644) *In re Wilcox,* 2014 WL 2208893 (Bankr. W.D. 2014) – Court can enforce discharge injunction through civil contempt, designed to be compensatory and coercive. Court lacks jurisdiction to use criminal contempt designed to punish. State's action in setting off on prisoner account was willful warranting finding of contempt. Court Ordered state to refund money to prisoner but denied any further relief as state took action based on incorrect legal advice from State Attorney General. Evidence indicated that there was no intent to disobey Court Order.

9.89 Sanctions – Attorney Fees

(4645) *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.

(4646) *In re Hancock,* 2018 WL 3203383 (Bankr. N.D. Ohio 2018) – Court has inherent authority and authority under Section 105 to enforce orders including imposition of sanctions. Sanctions must be imposed with restraint and discretion, and sanction must be commensurate with egregiousness of conduct. Section 362 also allows Court to impose damages for violations of automatic stay where action violated stay, action was willful, and action caused actul damages. Willfulness requires that offending party be aware of stay and took intentional actions that violated stay. Although Creditor knew that debt was discharged in 2010 bankruptcy case, Creditor was not aware that Debtor had filed second case in 2016 and efforts to collect debt during pendency of Debtor's second case would not be willful violation of stay.

(4647) *In re Luzier,* 580 BR 725 (Bankr. N.D. Ohio 2014) – Mortgagee willfully violated discharge injunction when, in second bankruptcy case filed by Debtor, it filed proof of claim that included claim for amounts that had been discharged in Debtor's prior Chapter 13 case and refused to amend its proof of claim to eliminate claim for any discharged debt unless Debtor first assured it that she would not attempt to hold it liable for any deficiencies in amended claim. Creditor had affirmative duty to amend claim where creditor knew claim included discharged debt. Court scheduled further evidentiary hearing to determine amount of fees.

(4648) *In re Joseph,* 2018 WL 770509 (Bankr. E.D. Ky. 2018) – Secured creditor can pursue recovery against collateral but cannot pursue Debtor personally for deficiency. Property Tax Certificates held by private parties operate to allow holder to enforce tax lien and to pursue property owner personally. However, Debtor discharged personal obligations on tax certificates such that post-discharge attempts to collect debt violated discharge injection and subjected creditor to sanctions. Fact that tax certificate holders were not listed in Chapter 7 schedules did not prevent discharge of debt in no-asset case. Creditors willfully pursued collection notwithstanding actual knowledge of bankruptcy discharge, although finding of willfulness is not required to impose sanctions consisting of attorney fees and costs.

(4649) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Sanctions for violation of discharge injunction generally include actual damages and, where necessary to effectuate purpose of discharge, Debtor may be awarded reasonable attorney fees. Creditor filed action to recover unpaid rent after entry of discharge in violation of discharge injunction. Sanctions included Order directing creditor to dismiss State Court action and to pay Debtor $900 in attorney fees. Although $900 in attorney's fees was probably less than Debtor's attorney's actual fees,

creditor's delay in obtaining relief from stay and pursuing eviction action permitted Debtor to remain in premises for over six months without paying $1300 per month rent provided for in lease. Court reserved jurisdiction to award additional sanctions if creditor failed to timely comply with Order. However, punitive damages are not appropriate in civil contempt proceeding for violation of discharge injunction and lies beyond authority of Bankruptcy Court

9.90 Sanctions – Actual Damages

(4650) *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.

(4651) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Sanctions for violation of discharge injunction generally include actual damages and, where necessary to effectuate purpose of discharge, Debtor may be awarded reasonable attorney fees. Creditor filed action to recover unpaid rent after entry of discharge in violation of discharge injunction. Sanctions included Order directing creditor to dismiss State Court action and to pay Debtor $900 in attorney fees. Although $900 in attorney's fees was probably less than Debtor's attorney's actual fees, creditor's delay in obtaining relief from stay and pursuing eviction action permitted Debtor to remain in premises for over six months without paying $1300 per month rent provided for in lease. Court reserved jurisdiction to award additional sanctions if creditor failed to timely comply with Order. However, punitive damages are not appropriate in civil contempt proceeding for violation of discharge injunction and lies beyond authority of Bankruptcy Court

9.91 Punitive Damages

(4652) *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.

(4653) *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.

(4654) *Bates v. CitiMortgage, Inc.,* 2016 U.S. Dist. LEXIS 16247 (D.N.H. 2016) – Court acted within discretion in awarding punitive damages and attorney fees where creditor, will full knowledge of discharge, nonetheless placed automated telephone call to Debtors seeking information regarding insurance on foreclosed property. Creditor violates discharge injunction when creditor made recorded phone call seeking current insurance information on property that had been foreclosed. Although call did not demand that Debtors obtain insurance, call improperly coerced or harassed Debtor.

(4655) *Mitchell v. Anderson,* 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Debtor not entitled to recover damages for creditor's violation of discharge injunction where creditor continued to prosecute, and Debtor continued to defend, multiple State Court actions after entry of discharge. Damages were easily avoidable had Debtor notified State Courts of entry of discharge rather than continuing to defend actions for more than one year. Any minimal costs that would have been incurred in notifying Courts were already compensated by State Court award of sanctions against creditor under state vexatious litigation statute. Bankruptcy Court lacks ability to award punitive damages for violation of discharge injunction as those sound in nature of criminal contempt and are beyond Bankruptcy Court jurisdiction, and there were insufficient grounds to warrant referral to District Court for further proceedings.

9.92 Sanctions - IRS

(4656) *In re Hamilton,* 2014 WL 231967 (Bankr. D. Montana 2014) – Before bringing action against IRS for alleged violation of discharge injunction, Debtor must an administrative claim with the Chief, Local insolvency Unit and exhaust administrative remedies. Debtor can bring action if administrative claim is filed and no decision is rendered within 6 months of filing of the claim; or once the claim is determined if within that six-month period. Debtor's claim for damages for violation of discharge injunction denied where Debtor admittedly did not comply with administrative procedures as required in 26 CFR Section 301.7433-2.

(4657) *In re Parham,* 2013 WL 3933938 (Bankr. E.D. Tn. 2013) – 26 USC Section 7433 expressly waives IRS sovereign immunity for actions

arising out of alleged violation of discharge injunction. Bankruptcy Court can award damages against IRS limited to actual damages suffered plus costs of action, but not to exceed $100,000 if violation was result of negligence or $1 million if violation is result of intentional conduct. Before bringing action in bankruptcy Court, Debtor must first exhaust administrative remedies and must mitigate damages, and any action must be brought within 2 years of alleged violation. Motion for contempt denied without prejudice to Debtors pursuing administrative remedies.

9.93 Violation – Arbitration of

(4658) *In re Bateman,* Case No. 14-5369 (Bankr. M.D. Fl. 2018) - Arbitration agreement in contract between consumer and creditor did not require arbitration of class action brought by consumer alleging creditor violated discharge injunction. Although federal policy has strong presumption in favor of arbitration, and arbitration clauses survives discharge of underlying debt, before ordering arbitration, Court must first decide whether parties actually agree to arbitrate and, if so, whether there are any legal constraints for closing arbitration. Arbitration clause in contract lacked any nexus with alleged discharge violation because resolution of discharge violation would not entail reference to or construction of contract; and complained of conduct involved breach of duty imposed by law, not breach of customer agreement. Further, Bankruptcy Court has significant interest in enforcing any injunction issues including discharge injunctions, and arbitration of contempt proceeding for discharge injunction inherently conflicts with Bankruptcy Code and undermines Court authority.

(4659) *Credit One Financial v. Anderson,* 553 BR 221 (S.D. N.Y. 2016), *aff'd,* 884 F.3d 382 (2d Cir. 2018) – Class Action Claim for violation of discharge injunction is not subject to arbitration even where underlying agreement has valid arbitration clause. While Federal Arbitration Act generally supports arbitration clause. Bankruptcy Court can override clause if lawsuit is core proceeding that either is inherently in conflict with Federal Arbitration Act, or that arbitration would necessarily jeopardize purposes of Bankruptcy Code. Discharge injunction is Core proceeding because discharge is right created by bankruptcy code, and arbitrating claims would necessarily jeopardize objectives of Code. Denial of arbitration would also further goal of uniformity as arbitration creates risk of wildly divergent decisions.

(4660) *Williams v. Navient Solutions LLC,* Case No. 16-1244 (S.D. Fl. 2017) - Federal Arbitration Act favors arbitration of any matter within scope of valid arbitration agreement. Court can override arbitration agreement if arbitration inherently conflicts with underlying purposes of Bankruptcy Code. Arbitration of post discharge dispute regarding dischargeability of student loan did not inherently conflict with Bankruptcy Code. Bankruptcy case had been closed, precluding any interference with distribution of the estate or ongoing reorganization and Debtor's request for class action status weighed in favor of arbitration. Bankruptcy Court does not have exclusive jurisdiction to determine whether claims are excepted from discharge. Bankruptcy adversary proceeding dismissed and parties compelled to proceed to arbitration.

(4661) *Campos v. Bluestem Brands, Inc.,* Case No. 15-629 (D. Or. 2016) – Class action suit for alleged violation of discharge injunction was subject to arbitration provision in credit agreements. Although action brought by Debtor solely may not be subject to arbitration as action would be core proceeding and arbitration would be inconsistent with underlying provisions and purposes of Code. However, action brought as class action is admission that claim is not integral to bankruptcy.

(4662) *Belton v. GE Capital Consumer Lending, Inc.,* 2015 WL 6163083 (S.D.N.Y. 2015) – Claim for violation of discharge injunction is subject to arbitration where underlying credit agreement contained valid arbitration clause. Complaint sought damages for alleged failure to correct references on credit reports to show debts discharged rather than "charged off". Credit card agreements specifically discuss credit reporting, including process to challenge inaccurate or erroneous information to credit reporting agencies. Allegations underlying claims touch matters covered by credit card agreements. Nothing in the Bankruptcy Code expressly mentions arbitration or either expressly or impliedly supports holding that Congress intended to exclude bankruptcy matters from scope of arbitration clause. Fact that issues involve important, even fundamental, provisions of the Code is not sufficient to override arbitration clause.

K. Revocation of Discharge – Section 727(d)

9.94 Grounds Generally

(4663) *Suhar v. Gray-Morgan,* 2018 WL 3956614 (Bankr. N.D. Ohio 2018) – Section 727(d)(3) allows Court to revoke discharge if Debtor refuses to obey lawful Order of Court pursuant to Section 727(a)(6). Standard is one of civil contempt which does not require willful or intentional refusal to obey Court Order. Plaintiff must only prove that Debtor had knowledge of Order; Debtor violated Order; and Order was specific and definite. Evidence established that Debtor had knowledge of Order directing turnover where Debtors response to adversary complaint confirmed that Debtor had knowledge. Debtor admittedly did not turn over funds as ordered and turnover Order was specific and definite as to amount to be turned over. Once moving party establishes prima facie case of contempt, Debtor has obligation to explain non-compliance. Impossibility or inability to comply notwithstanding all reasonable efforts is valid defense to action to revoke discharge but must be supported by evidence to explain noncompliance. Mere assertion of inability to comply without supporting evidence demonstrating efforts taken to comply is not sufficient.

(4664) *Rainsdon v. Anderson,* Case No. 17-8046 (Bankr. D. Id. 2018) – Section 727(a)(6) allows Court to revoke discharge where Debtor repeatedly refuses to abide by lawful order of Court following entry of discharge. Order is "lawful" where Court had personal and subject matter jurisdiction". Debtor's argument that turnover order was erroneous does not render order unlawful. Court entered order requiring Debtor to turnover assets to Trustee. Debtors appealed turnover order but did not obtain stay pending appeal. During the pendency of appeal, Trustee demanded several times that Debtor turnover property. Evidence indicated that Debtor had ability to comply with turnover order but willfully and intentionally refused to obey turnover order. Debtor's action constituted willful and intentional refusal to obey Court order warranting vacating discharge notwithstanding that turnover order was later reversed on appeal.

(4665) *McDermott v. Fonner,* 2017 WL 4273142 (Bankr. S.D. Ohio 2017) – Court can revoke discharge where Plaintiff demonstrates known, intentional and materially false statement under oath, where Plaintiff did not know of fraud until after granting of discharge. Debtor has duty of candor in disclosure of assets and liabilities, and counsel for Debtor shoulders significant measure of responsibility to ensure all legal

and equitable interests are disclosed and made available to the Trustee. Debtor did not disclose existence of multiple oil and gas leases under which Debtor received significant income, including three signed only one month pre-petition. Debtor did not disclose the receipt of over $55,000 in "signing bonuses" for the three leases either in the Means Test or his schedules and SOFA. Debtor did not disclose sale of three valuable musical instruments from which Debtor netted over $3,000 on eve of bankruptcy filing. At the Section 341 meeting, Debtor testified that his schedules an SOFA were accurate and complete and that Debtor disclosed all assets, but Debtor did not disclose existence of leases or income, making only partial disclosures of some potential leases where it was not credible that Debtor would have "forgotten" signing bonuses received one month before filing or musical instrument sales. Debtor did not amend Schedules of SOFA for over 18 months evidencing lack of candor. Debtor cashed check for one royalty payment post-petition even after having been advised by Trustee not to do so. Had Debtor correctly disclosed all income including the signing bonus, Debtor would have been above median and presumptively abusive. Plaintiff did not know and lacked any reason to know of fraud prior to discharge, where Plaintiff did not receive any financial information that may have disclosed oil and gas leases until post-discharge; and while Trustee may have received some information at the 341 meeting, Debtor did not provide complete disclosures and instead provided "trickles of information" from time to time during course of case, not amending schedules to accurately disclose assets until 18 months post-petition.

(4666) *William Wayne Brothers v. Maddox,* 2017 WL 3126976 (Bankr. E.D. Tn. 2017) - Revocation requires a plaintiff to prove (1) Debtor obtained discharge by fraud and (2) plaintiff did not know of fraud until after discharge had been granted. Issue is whether Debtor committed fraud in obtaining discharge, not Debtor's discharge vis-à-vis the creditor, and requires proof of a type of fraud that would have prevented entry of discharge in first instance listed in Section 727(a) including transferring property within one year of bankruptcy with intent to hinder, delay, or defraud creditor; concealing, destroying, or falsifying records the Debtor's financial condition or business transactions; making false oath; withholding recorded information; and failing to explain loss of assets. Schedule F that listed Plaintiff as "creditor" for $400,000 was not fraudulent. Plaintiff's contention that Debtor identified him as "Creditor" instead of "fraud victim" in attempt to conceal nature of Debtor's pre-petition conduct was not fraudulent as Plaintiff is a "Creditor" as defined in Section 101(5)(A) and identifying Plaintiff as "creditor" was correct as matter of law. Debtor's Statement of Financial Affairs was incorrect where Debtor's answer to Question 3 stated that Debtor had not made any pre-petition transfers when Debtor had made hundreds of payments within 90 days many of which exceeded disclosure threshold. Debtor's failure to disclose preferential transfers is material misstatement that can give rise to denial of discharge. However, Plaintiff was well aware of omission from SOFA prior to entry of discharge where Plaintiff was the recipient of 69 payments aggregating in excess of $1.3 million. If Plaintiff has notice of possible fraud prior to discharge, he may not seek to revoke it. Creditor has "notice" where creditor has knowledge of facts that place creditor on notice of possible fraud. Creditor does not need to have full knowledge of fraud or have complete knowledge of all facts leading to alleged fraud. Plaintiff, as the recipient of a number of non-disclosed payments, had sufficient notice of facts prior to entry of discharge.

(4667) *McDermott v. Dunne,* 2017 WL 1190611 (Bankr. N.D. Ohio 2017) – Court has authority to revoke Debtor's discharge under 11 USC Section 727(d)(1) if discharge was obtained by fraud and party requesting revocation of discharge did not know of fraud until after granting of discharge. Plaintiff must prove that fraud would have prevented discharge had been brought to courts attention prior to discharge and that plaintiff was unaware of Debtor's fraud prior to discharge. Debtor misrepresented marital status as single and maintain that representation by providing trustee with a copy of tax return that indicated that Debtor was not married. Debtor's failure to disclose true marital status constitutes a knowing and fraudulent false statement in connection with a case sufficient to warrant a denial of discharge under Section 727(a)(4)(A), which precludes entry of discharge where Debtor makes statement under oath that is false and that Debtor knew to be false, was made with fraudulent intent, and statement related materially to bankruptcy case. There was no dispute that Debtor made false statements on schedules and at Section 341 meeting and that all of the statements were under oath. Debtor new representation regarding marital status was false and was intended to create false impression that Debtor was single. Further, Debtor displayed throughout case a reckless indifference to truth regarding marital status leading to conclusion that Debtor falsely intended to misrepresent marital status. Statements are material to bankruptcy case if statement related to assets and disposition of property. Debtor's marital status is essential piece of information generally affecting Means Test calculations and in determining whether filing would be abusive Chapter 7; and concerns discovery of assets and/or existence of property of the estate including Debtor's income tax refund. Fact that Debtor acknowledged inaccuracies of statements in answer to adversary complaint does not cure prior misrepresentations or result in "no harm, no foul".

(4668) *Stein v. Stubbs,* Case No. 1678025 (6th Cir. BAP 2017) - Section 727(a)(3) and (6) allow court to revoke discharge where Debtor fails and refuses to abide by lawful order. Trustee's Complaint to revoke discharge stated cause of action where complaint alleged that Debtor was served with order requiring Debtor to appear for a 2004 examination and to produce documents that Debtor failed to appear or respond in any way. Order was clear and definite and required production of specific documents and appearance at specific place and time. There is no requirement that Debtor's conduct be willful with the Debtor intended not to comply with Court Order. Plaintiff is required only to show that Debtor had knowledge of word which is said to have been violated; that Debtor did in fact violate order; and that order was clear, specific and definite. Debtor's refusal to comply with order setting rule 2004 examination, which is reasonable and usual method to compel chapter 7 Debtor to provide information, constituted sufficient basis to revoke discharge required reversal of Bankruptcy Court's dismissal of adversary proceeding.

(4669) *Barbacci v. Stockert,* 23017 WL 187551 (Bankr. N.D. Ohio 2017) – Section 727(d)(3) allows Court to revoke discharge where Debtor fails to obey any lawful order of court. Standard for determining whether Debtor failed to comply with Order is one of civil contempt, and does not require higher standard of willfulness or actual intent to disobey or disregard Order. Moving party must demonstrate that alleged contemnor had knowledge of Order; alleged contemnor did in fact violate Order; and Order violated was specific and definite. Order requiring Debtor to turnover records pertaining to Trust in which Debtor is beneficiary was clear and definite and Debtor was admittedly aware of Order. Once elements are shown, Debtor bears burden to establish a defense, such as inability or impossibility of compliance. Court unable on summary judgment to determine whether Debtor took all possible steps to obtain documents where Debtor filed affidavit that he contacted Trust's accountant three separate times; Debtor also telephoned accountant three separate times; Debtor was able to obtain only partial information after multiple contacts with accountant and trustee of Trust; and Debtor repeatedly provided information to accountant and trustee to obtain information needed. While affidavit raised at least colorable defense, affidavit was self-serving and lacked

any corroborating evidence and there was some evidence that Debtor dragged feet and did not actually contact accountant to obtain information until after commencement of adversary proceeding to request documents for first time.

(4670) *In re Davis,* 2015 WL 5770780 (Bankr. S.D. Ohio 2015) – Revocation of discharge based on failure to disclose or turnover property of estate requires proof that Debtor acted knowingly and fraudulently. Shortly after entry of the discharge and within 180 days of commencement of case, Debtor's father passed away and Debtor became entitled to a lump sum life insurance and inheritance. Debtor did not advise counsel for 2 months during which Debtor used portion of money to pay bills and expenses. Although Debtor did not disclose inheritance within 14 days of becoming entitled, Debtor did amend schedules to disclose proceeds and also remained in close contact with attorney, factors that weigh against any intent to defraud. Attorney did not advise Debtor that proceeds were property of estate or that Debtor should not use or dispose of proceeds. Debtor voluntarily turned over nearly $120,000 of insurance proceeds and inheritance but did not turn over $18,000 that had already been spent.

(4671) *Helbling v. Payne,* 2015 WL 1000166 (Bankr. N.D. Ohio 2015) – Court can revoke discharge where Debtor refused to comply with order of court. Section 727(a)(6) allows court to deny discharge if Debtor refuses to obey lawful order of court. Refusal does not have to be willful or malicious, only that party had knowledge of order, that party violated the order; and that order was specific and definite. Once plaintiff establishes elements, Debtor must then explain non-compliance. Debtor can defend by showing inability to comply notwithstanding all reasonable efforts to comply have been undertaken. Debtor failed to comply with Court Order requiring Debtor to pay to the Trustee funds received by Debtor as result of refund of pre-petition garnishment within preference period. Although Debtor made vague allegation as to inability to pay, Debtor did not present any evidence to show that Debtor lacked ability or that Debtor had made reasonable efforts to do so. Debtor's conclusory statement of inability to pay insufficient to defeat showing that Debtor failed to comply.

(4672) *Harrington v. Mazzone,* 2014 WL 180680 (Bankr. D. Mass. 2014) – Discharge revoked where Debtors failed to disclose that there was a man living in their basement. Debtors failed to disclose rent received in from of contributions to household expenses. Debtors obtained discharge by withholding information concerning income; UST was unaware of false statements until after discharge entered; and timely disclosure of income would have resulted in denial of discharge.

(4673) *Lyon v. Coates,* 2014 WL 2727119 (Bankr. E.D. Ky. 2014) – Section 727 allows revocation of discharge where Debtor acquired property that is property of the estate or became entitled to acquire property that would be property of the estate but knowingly and fraudulently fails to report the acquisition or entitlement or fails to deliver or surrender the property to the trustee. Fraudulent intent includes actions that are so reckless as to justify a finding that the Debtor acted fraudulently, such as reckless indifference to truth, and may be inferred from facts and circumstances. Debtors falsely stated that one month prior to commencement of case, Debtors sold vehicle and paid secured claim. In fact, Debtors traded in vehicle and obtained $20,000 "credit" against future purchase of vehicle, with the secured creditor on the prior vehicle, a family friend, releasing the lien for no payment. Debtors also failed to disclose the existence of this unused credit. Debtors' alleged lack of education does not excuse failure to disclose where Debtors had ample opportunity to correct misstatements before signing schedules and SOFA. Debtor's testimony that he expected the credit to be given to the secured creditor was not credible as Debtor used the credit himself a few months post-petition to purchase a new vehicle. Debtors cannot absolve themselves of responsibility by blaming counsel, as reliance on counsel is defense only if reasonable and done in good faith. Debtor cannot blame counsel where Debtor had ample opportunity to review documents for accuracy and inaccuracy was plainly visible to Debtor. Trustee also entitled to recover value of the "credit" less whatever trustee was able to recover from sale of new vehicle.

(4674) *Bilfield v. Ohio Commerce Bank,* 2014 WL 1323185 (Bankr. N.D. Ohio 2014) – Revocation of discharge under Section 727 requires showing that Debtor obtained discharge through fraud, and requesting party did not know of fraud until after discharge was entered. Fraud must have been in connection with procurement of discharge, not just underlying transaction between Debtor and creditor. Debtor concealed bank accounts into which Debtor, an attorney, deposited legal fees, and failed to disclose accounts receivable that were owed to him as of date of bankruptcy petition. Debtor failed to disclose the existence of these accounts receivable on Schedule B, Question 16 as of the filing of the schedule sand did not amend schedules to reflect receivables even after he received payment during the pendency of bankruptcy indicating that Debtor acted with fraudulent. Debtor's concealment of assets constitutes knowingly making a false statement under oath that is materially related to the bankruptcy case warranting revocation of the discharge. Court revoked discharge only as to creditor that brought adversary proceeding.

(4675) *Lyon v. Coates,* 2014 WL 308959 (Bankr. E.D. Ky. 2014) – Section 727(d)(2) allows a court to revoke a discharge if the Debtor acquired property, or became entitled to acquire property that would be property of the estate but fraudulently and knowingly failed to report the acquisition or deliver the property to the Trustee. Complaint stated cause of action where Debtor, prior to commencement of case, traded in a vehicle and received $22,000 as credit on purchase of new vehicle, but listed on Statement of Financial Affairs that $22,000 used to pay off prior lien on vehicle. Trustee subsequently discovered that there was no lien on the prior vehicle and the person disclosed as allegedly receiving the $22,000 payment did not receive any money at all. However, Court would deny summary judgment where Debtor denied that he acted fraudulently and filed affidavit specifically denying any fraudulent intent. The affidavit created a sufficient issue of material fact to preclude summary judgment.

(4676) *Daniels v. Agin,* Case No 12-2376 (1st Cir. 2013) – Court would revoke discharge where Debtor failed to disclose two IRA accounts valued at almost $500,000. Debtor failed to disclose existence of either account and instead included these two accounts under the general description of "pension", although Debtor had used pension plan for prohibited transactions and was no longer "qualified" and Debtor had removed $490,000 from pension to IRAs in non-qualified roll-over yet failed to disclose either the existence of the IRAs or the funding of those accounts. Non-disclosures were material as involving substantial funds that would be property of estate based on non-qualified roll-overs; and non-disclosures were, at a minimum, grossly negligent. Failure to maintain profit-sharing plan in substantial compliance with applicable tax law resulting assets in profit-sharing plan being part of bankruptcy estate with Debtor failing to disclose his interests in account allowing court to revoke discharge; and also deprived Debtor of ability to exempt plan assets or interest. Debtor's scheduling of the account as tax deferred qualified pension was incorrect as pension was not qualified plan based on prohibited transactions. Plan violated IRS

regulations by entering into loan transaction with Debtor's son, a "disqualified person". Although IRS did not take adverse action when transactions were discovered, that did not alter conclusion that prohibited transaction had occurred and that account was no longer tax preferred under IRS regulations. Debtor also permitted or caused plan to accept deposits from third parties that were not permitted transfers and allowed plan to accept assignment of interest of Debtor's wife in a realty trust although wife was not plan participant. Multiple prohibited transactions removed plan from scope of Internal Revenue Code 401 and removed account from exclusion from property of estate and disqualified plan from claimed exemption for qualified retirement accounts.

(4677) *Coleman v. McLean,* 2013 WL 5863718 (Bankr. E.D. Tn. 2013) – Section 727(d) allows a court to revoke a discharge where discharge was procured by fraud and party seeking to revoke discharge was unaware of the fraud until after entry of the discharge. Fraud must be fraud in fact on the part of the Debtor, not implied fraud or mistake, and must have been sufficient that, had the court known of the fraud prior to entry of the discharge, the court would have denied the discharge in the first instance. Debtor knowingly made fraudulent statements that would have warranted denial of discharge under Section 727(a)(4) where Debtor did not disclose income from Debtor's occupation as a tattoo artist; did not disclose any ownership of or income from a separate corporate entity; did not disclose any trade names that were used by a web page owned by Debtor. However, omissions were not sufficient under Section 727(d) because the moving creditor, Debtor's former live-in girlfriend, had full knowledge of omissions prior to entry of the discharge. Creditor had notice of proceedings where creditor's attorney was advised via pleadings filed in State Court litigation, even if creditor was not listed in schedules or on the matrix. However, Debtor's improper filing of joint case with spouse from whom he had been divorced, coupled with representation that Debtor and ex-spouse were still married, constituted violation of Section 727(a)(4) where creditor had no reason to know that Debtor and ex-spouse were already divorced or that Debtor and ex-spouse were not eligible to file joint petition Had court known of true state of facts prior to entry of discharge, court would have denied discharge as Debtor was not eligible for joint filing under Section 302.

(4678) *Johnson v. Johnson,* Case No. 13-1034 (8th Cir. 2013) – Section 727(d)(1) allows court to revoke discharge upon showing of fraud that establishes that the entire discharge would not have been granted but for Debtor's fraud. Section 727(a)(2) and (a)(4) allow court to deny discharge if Debtor with intent to hinder, delay or defraud a creditor or officer of estate transfers or conceals property within one year of the petition; or if Debtor knowingly and fraudulently in connection with case makes false oath. Debtor failed to disclose that Debtor held either a reversionary interest or a mortgage on property that Debtor sold to parents, where transfer included clause allowing Debtor to reacquire title by repaying parents the money paid to Debtor by parents. Supposed "sale" was sham transaction designed to make it appear that Debtor had no assets when Debtor had undisclosed retained interest in the property where transaction, cast as a sale, was intended as security for parent's loan to Debtor with Debtor intended to retain equitable interest either in property or in from of right to redeem, and Debtor failed to disclose true nature of the transaction at any point prior to entry of the discharge.

(4679) *U.S. Trustee v. Langley,* Case no. 12-80187 (Bankr. W.D. Mi. 2013) – Section 727(d) allows a court to revoke a discharge if the discharge was obtained by fraud; or the Debtor acquired property of the estate or became entitled to acquire property that would be property of the estate but knowingly and fraudulently failed to report or deliver the property to the trustee. Debtor's discharge revoked where Debtor failed to list ownership of stock in schedules and failed to account income from stock on Schedule I. Debtor falsely told his attorney that the stock in question was owned by Debtor's mother, and Debtor repeated that assertion to the Chapter 7 trustee. However, although Debtor filed bankruptcy in 2010 and made the representations at time, Debtor's mother had died in 2008. Further, Debtor's statement that he omitted income from Schedule I as any income he received was only as a gift from mother that was not likely to occur in the future was false for the same reason. Debtor's concealment of stock caused Chapter 7 trustee to issue report of no distribution and to declare estate fully administered, which caused court to issue discharge. Had Debtor disclosed ownership of stock at 341 meeting, Chapter 7 trustee would have been afforded opportunity to investigate assets, and the trustee, UST and creditors would have been afforded the opportunity to object to the discharge in the first instance. Debtor's belief that stock was worthless did not excuse failure to disclose stock to his attorney or to the Chapter 7 trustee, or to Debtor's continued failure to acknowledge ownership of stock even when asked by Chapter 7 trustee whether Debtor had any assets that were not schedule. Further, Debtor, having been fully advised of the Chapter 7 trustee's attempts to recover stock, did not turn over stock to the trustee but instead redeemed the certificate and received $77,000 which Debtor also failed to turnover to the trustee. Fact that Debtor ultimately settled turnover action with Trustee and paid in most of the proceeds of the stock did not excuse Debtor's failure to disclose stock in first instance, or Debtor's redemption of the stock and retention of the proceeds.

(4680) *Seaver v. Klein-Swanson,* Case no. 12-6054 (8th Cir. BAP 2013) – Section 727(d)(2) allows court to revoke discharge if the Debtor acquires property of the estate or becomes entitled to acquire property of the estate and knowingly and fraudulently fails to report the property or deliver the property to the Trustee. Debtor's bonus received post-petition was not property of Chapter 7 estate. As of date of commencement of case, employer had not declared or determined any bonuses. Whether to declare bonus and, if so, amount, remained entirely within the discretion of the employer. Debtor's alleged contingent interest in bonus, if employer decided to declare one, was not sufficient to make later received bonus property of estate, even if later-declared bonus was based on pre-petition financial results of company. Debtor's later receipt and retention of the bonus did not constitute acquisition of property of estate as estate never had interest in bonus.

(4681) *In re Wilkerson,* 470 BR 398 (Bankr. W.D. La. 2012) – Debtor's discharge revoked where Debtor failed to schedule or disclose existence of two safe deposit boxes containing more than $70,000 in cash.

(4682) *Sicherman v. Gates,* 2012 WL 1302626 (Bankr. N.D. Ohio 2012) – Revocation of Discharge under Section 727(a)(6) for refusal to obey lawful order of court requires proof that (1) Debtor had knowledge of the order that is said to have been violated; (2) the Debtor did, in fact, fail to abide by the order; and (3) the order was specific and definite. Revocation of Discharge under Section 727 (a)(6) does not require proof that Debtor willfully and intentionally refused to obey Court Order. Debtor must then explain non-compliance. Impossibility or inability to comply are valid defenses to action to revoke discharge. Debtor must introduce evidence showing that all reasonable efforts to comply have been undertaken but Debtor remains unable to comply. Discharge revoked where Debtor failed to turnover to Trustee non-exempt portion of tax refund notwithstanding prior Court Order to do so. Although Debtor turned over the majority of the refund, Debtor did not turnover balance and did not present any evidence to demonstrate inability to do so.

(4683) *In re Bass,* Case No. 11-61823 (Bankr. E.D. Mi. 2011) – Case reopened, discharge vacated and case dismissed where Debtor failed to pay the filing fee for the current case or the as yet unpaid filing fee for Debtor's prior case. Discharge order entered in error where filing fee not paid as ordered by Court.

(4684) *Thunberg v. Wallick,* Case No. 10-1705 (1st Cir. 2011) – Discharge revoked where Debtor acquired property that was property of the estate and knowingly and fraudulently failed to report the acquisition of or entitlement to property of the estate or to surrender the property to the trustee. Debtor falsely represented that a stream of future payments from Debtor's pre-petition divorce proceedings were secured by liens and that proceeds were being paid to secured creditors, when only a portion of those proceeds were secured and Debtor was retaining the other portion. Debtor also accelerated payments by private agreement with his ex-wife without advising the trustee, thereby allowing Debtor to take possession of property that should have been paid to the trustee; Debtor then used the money which was property of estate for Debtor's own purposes; and the liens on which Debtor relied to shelter the funds had not been properly perfected. Debtor was culpable in permitting attorney to make incorrect statements to court and allowed Court and trustee to believe incorrect understanding of facts.

(4685) *In re Scott,* Case No. 07-45854 (Bankr. E.D. Mi. 2009) - Court *sua sponte* vacated discharge where Debtor received Chapter 7 discharge in prior case filed 7 years prior. Court could not determine whether Debtor was eligible for discharge in this case, vacated discharge and set hearing to show cause.

(4686) In *re Cooper,* Case No. 10-48370 (Bankr. E.D. Mi. 2010) – Chapter 7 discharge vacated, and case dismissed where Debtor failed to pay filing fees as required by Order Approving Payment of Filing Fee in Installments. Debtor paid only a portion of the fees as required. Court's entry of discharge was error and was inconsistent with prior Order of Court.

(4687) *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.

(4688) *Swope v. Scott,* 2009 WL 2877080 (Bankr. N.D. Ohio 2009) – Discharge will be revoked pursuant to Section 727(a)(3) where Debtor fails to obey a lawful order of the court, other than an order to respond to a material question or to testify. Court Ordered Debtor to account for tax refund that Debtor improperly retained by paying Trustee $1,535.78 per month for 10 months. Debtor allegedly paid only $100.00. However, Trustee failed to accompany Motion for Summary Judgment with any affidavit or other evidence to support allegations. Motion for Summary Judgment denied without prejudice.

9.95 On Request of Debtor

(4689) *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.

(4690) *In re Estrada,* 2017 WL 2589322 (Bankr. C.D. Cal. 2017) – Court has authority to revoke discharge on request of debtor who desires to convert case to Chapter 13. Although Section 727 does not authorize revocation of discharge based solely on request of debtor. Rule 60(b)(6) allows court to revoke discharge for exceptional circumstances. Evidence warranted vacating discharge and converting case where Debtor's original counsel gave Debtor inaccurate and incomplete advice and information regarding effect of bankruptcy and effect bankruptcy may have on his ability to keep home that had significant non-exempt equity; no creditor participated in case and only claims were filed by Chapter 7 Trustee after entry of discharge; and Debtor proposed Chapter 13 Plan that would pay 100% dividend to creditors. Revocation would not meaningfully impair rights of creditors and would fulfill prerequisite to conversion to Chapter 13 facilitating payment to creditors. "Unique circumstances" made it unlikely that Court would grant similar relief and would not lead to surge of Motions under Rule 60(b)(6) to vacate discharges.

(4691) *In re Vozza,* 2017 WL 2992481 (Bankr. E.D. Mi. 2017) – Court will not reopen case and set aside discharge to allow Debtor to execute reaffirmation agreement where reaffirmation agreement was not executed by parties before entry of discharge. Setting aside discharge would not cure defect as discharge has already been entered, cutting off time for executing reaffirmation agreement. Further, Rule 4008 requires reaffirmation agreement to be filed with Court within 60 days of First Meeting of Creditors. Deadline long ago expired and no party sought, before expiration, to extend time to execute reaffirmation.

(4692) *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 no later than 60 days after date first set for 341 meeting. Where deadline passed without Debtor or creditor filing reaffirmation agreement, court lacked authority to approve reaffirmation even if case reopened. Rule 4004 allows court to extend deadline but only on motion to extend filed before expiration of initial deadline and in any event requires reaffirmation agreements to be "made" before entry of the discharge. Reaffirmation agreement is made when agreement is signed by both Debtor and creditor. Parties did not sign reaffirmation agreement before discharge precluding entry of an order approving the reaffirmation. Court also would not vacate discharge to permit making and filing of untimely reaffirmation notwithstanding equities of situation and potential hardship faced by Debtor as there is no basis in the Code to vacate a discharge on request of the Debtor or for purposes of executing a reaffirmation agreement.

(4693) *In re Glenn,* Case No. 14-55663 (Bankr. E.D. Mi. 2015) – 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 signed reaffirmation agreement after discharge such that there is no enforceable agreement that can be approved by court. 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.

(4694) *In re Wills,* 2015 WL 1321488 (Bankr. N.D. Ohio 2015) – Court lacks statutory authority to set aside discharge on request of Debtor. Although Debtor and creditor intended to sign and file reaffirmation agreement, they did not do so prior to discharge as required by Section 524 and Rule 4008. Court would not set aside discharge to allow belated execution and filing of reaffirmation agreement. Motion failed to allege any basis for relief under either Rule 59 or Rule 60 and there was no basis to revoke the discharge under Section 727.

(4695) *In re McNeal,* 2013 WL 5494322 (Bankr. N.D. Ohio 2013) – There is no legal basis to revoke a discharge at the request of Debtor merely to allow Debtor to enter into otherwise untimely reaffirmation agreement. Rule 4008 allows extension of deadline to execute reaffirmation, but power to extend time ends once discharge is entered.

(4696) *In re Smith,* 2012 WL 441322 (Bankr. N.D. Ohio 2012) – Rule 4008(a) requires reaffirmation agreements to be filed not later than 60 days after the first date set for the first meeting of creditors. Rule 4004 provides a vehicle for delaying entry of discharge at the request of the Debtor. Debtor's Motion to Vacate Discharge for purposes of allowing belated reaffirmation agreement denied. Section 524 makes clear that reaffirmation agreements are not enforceable if not made before entry of reaffirmation.

(4697) *In re Smith,* 467 BR 122 (Bankr. W.D. Mi. 2012) – Debtors' alleged uneasiness at not having reaffirmation agreement with residential mortgage lender and possible foreclosure if Debtors default in post-petition payments did not warrant setting aside discharge order. Section 105 does not provide basis to disregard or limit or expand express statutory provisions. Court must exercise equitable powers only within the confines of the Code and to carry out, but not countermand, provisions of Title 11.

(4698) *In re Harris,* Case No. 05-46057 (Bankr. E.D. Mi. 2010) – Discharge vacated where Debtor, after receiving discharge in Chapter 7, converted case to Chapter 13.

(4699) *In re Crawford,* Case No. 11-59787 (Bankr. E.D. Mi. 2011) – Motion to Reopen Case to allow filing of reaffirmation agreement denied. Section 524 requires reaffirmation agreement to be made and filed prior to entry of discharge.

(4700) *In re Russell,* Case No. 11-61160 (Bankr. E.D. Mi. 2011) – Motion to Vacate Discharge for purposes of allowing late filing of reaffirmation agreement denied. Motion failed to allege that reaffirmation agreement had been executed prior to entry of discharge, which prevents enforceable agreement. Court cannot "cure" the failure to execute the discharge agreement by vacating the discharge. Further, deadline to file reaffirmation agreement is 60 days after first meeting of creditors unless an extension of time is obtained before discharge is entered. Court cannot extend deadline after discharge and cannot vacate discharge and create new deadlines.

(4701) *In re Ocheltree,* 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Section 727(d) outlines four specific foundations supporting revocation: (1) the discharge was obtained by Debtor's fraud, (2) the Debtor knowingly and fraudulently failed to account to the estate for after-acquired estate property, (3) the Debtor disobeyed a Court Order or did not respond to a material question, and (4) the Debtor did not cooperate in a 28 U.S.C. § 586(f) audit. Revoking a discharge for missing a reaffirmation deadline is not one of the foundations, nor does the conduct rise to the level of the bad action underpinning revocation.

9.96 Knowledge of Alleged Fraud

(4702) *McDermott v. Fonner,* 2017 WL 4273142 (Bankr. S.D. Ohio 2017) – Court can revoke discharge where Plaintiff demonstrates known, intentional and materially false statement under oath, where Plaintiff did not know of fraud until after granting of discharge. Plaintiff did not know and lacked any reason to know of fraud prior to discharge, where Plaintiff did not receive any financial information that may have disclosed oil and gas leases until post-discharge; and while Trustee may have received some information at the 341 meeting, Debtor did not provide complete disclosures and instead provided "trickles of information" from time to time during course of case, not amending schedules to accurately disclose assets until 18 months post-petition.

(4703) *McDermott v. Larson,* 2016 WL 3547961 (Bankr. W.D. Mi. 2016) – Section 727(a)(1) provides that Court "shall" revoke a discharge that is obtained through fraud of the Debtor where the party requesting revocation did not know of the fraud until after entry of the discharge. Fact that Debtor advised Chapter 7 Trustee prior to discharge of facts that would suggest that Debtor fraudulently undervalued assets, that knowledge was not imputed to US Trustee where parties agreed that UST did not have notice of alleged fraud until after discharge had been entered. Section 727(d)(1) recognizes that UST has right independent of Trustee to bring action and Section 727(a)(1) provides only that "the requesting party" lack knowledge of fraud. Chapter 7 Trustee is not agent of UST for purposes of imputation of knowledge where UST never represented to Chapter 7 Trustee that Trustee had authority to act on behalf of or to bind UST; and UST never made representations that would cause Debtor to reasonably believe that Chapter 7 Trustee had authority to act on behalf of UST. Limited direction under Section 341 for Chapter 7 Trustee to hold 341 meeting, at most, made Trustee a representative of UST only to extent of events occurring at the 341 meeting. Debtor in this case did not divulge sale of property until after conclusion of 341 meeting such that knowledge was imparted to Trustee outside scope of Trustee's authority as representative of UST.

9.97 Partial Revocation

(4704) *Bilfield v. Ohio Commerce Bank,* 2014 WL 1323185 (Bankr. N.D. Ohio 2014) – Court can revoke discharge only as to specific creditor where evidence indicates that Debtor's pre- and post-petition conduct constituted fraud on that creditor and that creditor brought and prosecuted action under Section 727(d)(1)

9.98 Deadline for Bringing Action

(4705) *Weil v. Elliott,* 2017 WL 2562051 (9th Cir. 2017) – One year deadline set out in Section 727 is non-jurisdictional statute of limitations that must be raised as affirmative defense or is waived.

(4706) *Elliott v. Weil,* Case No. 14-1321 (9th Cir. BAP 2015) – Deadline set out in Section 727(e) is jurisdictional and may be considered by appellate court *sua sponte*. Section 727(e)(1) requires complaint to revoke discharge to be filed within one year after entry of the discharge. Although deadline to object to discharge in first instance, which is set by rule and not statute, is not jurisdictional, deadline to revoke discharge is statutory and is not modifiable or subject to equitable tolling.

(4707) *Blackstone Financial Group Business Trust v. Myler,* 477 BR 227 (Bankr. D. Utah 2012) – Deadline for action to revoke discharge on basis of fraud or failure to report acquisition of estate property is essential prerequisite and is not subject to equitable tolling.

(4708) *Cadle Co. v. Andersen,* Case No. 11-092 (1st Cir. BAP 2012) – Section 727(e) requires action to revoke discharge be brought within one year after later of granting of discharge or closing of case. Section 727(e) created jurisdictional limitation. Neither equitable tolling nor general equitable concepts can be used to override strict limitations set out in Section 727(e).

9.99 Defense – Laches

(4709) *Stein v. Stubbs,* Case No. 1678025 (6th Cir. BAP 2017) – Laches is not available as a defense to an action to revoke discharge under Section 727. Revocation of discharge requires violation of lawful order of court. Compliance with Court Orders is essential to effective administration of bankruptcy estate. Laches is potential equitable defense that cannot be used to circumvent the requirement that a party comply with a lawful Court Order. Further, laches does not apply where trustee brought action to revoke discharge within the specific and relatively short statute of limitations set forth in Section 727(e)(2) absent showing of extensive and undue delay. Trustees delay in this case was only six months from entry of discharge to filing of complaint to revoke discharge, well within one year time limits set out in Section 727(e). Laches also requires evidence of a lack of diligence by not seeking a delay or denial of entry of discharge in first instance. Trustee acted with high degree of diligence where trustee went to great lengths to secure tax returns in timely fashion, taking graduated steps intended to achieve desired result before ultimately filing action to revoke discharge. Trustee's decision to conclude 341 meeting and request tax return which had not yet been filed was reasonable where Debtor had not given any indication that Debtor would not cooperate in providing 2014 tax return or otherwise complying with requests of court until after discharge had already been entered.

9.100 Standing

(4710) *In re Williams,* Case No. 14-1038 (Bankr. W.D. Mi. 2015) – Section 1328(f) precludes entry of a discharge in Chapter 13 if the Debtor received a discharge in a case filed under chapter 7 during the preceding 4 years. Debtor received a discharge in the current case, precluding Debtor from receiving a subsequent discharge if Debtor's case is converted. Debtor cannot waive prior discharge as Section 727 allows a Debtor to waive a discharge only before the discharge is entered, and there is no basis for a Debtor to revoke his own discharge. Debtor did not allege that discharge was result of fraud, where only issue was continued enforcement action by ex-wife holding non-dischargeable domestic support obligation order and there was no indication that ex-wife in any way committed some bad act that led to entry of discharge. Debtor's regret at proceeding under Chapter 7, or belief that Debtor would be better off in another chapter, is not a basis to set aside a discharge. As Debtor would not receive a discharge in Chapter 13 if case is converted, it was not clear whether Debtor still wanted to convert case. Court denied motion to convert without prejudice to Debtor filing another motion within 14 days, in which case the court would grant the motion without delay.

(4711) *In re Voshell,* Case No. 13-0454 (Bankr. W.D. Mi. 2013) – Section 1328(f) precludes entry of a discharge in Chapter 13 if the Debtor received a discharge in a case filed under chapter 7 during the preceding 4 years. Debtor received a discharge in the current case, precluding Debtor from receiving a subsequent discharge if Debtor's case is converted. Debtor cannot waive prior discharge as Section 727 allows a Debtor to waive a discharge only before the discharge is entered, and there is no basis for a Debtor to revoke his own discharge. Debtor did not allege that discharge was result of fraud, where only issue was continued enforcement action by ex-wife holding non-dischargeable domestic support obligation order and there was no indication that ex-wife in any way committed some bad act that led to entry of discharge. Debtor's regret at proceeding under Chapter 7, or belief that Debtor would be better off in another chapter, is not a basis to set aside a discharge. As Debtor would not receive a discharge in Chapter 13 if case is converted, it was not clear whether Debtor still wanted to convert case. Court denied motion to convert without prejudice to Debtor filing another motion within 14 days, in which case the court would grant the motion without delay.

(4712) *In re Smith,* 467 BR 122 (Bankr. W.D. Mi. 2012) – Debtors do not have standing under Section 727 to request revocation of discharge.

(4713) *In re Ocheltree,* 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Court lacks jurisdiction to revoke discharge for purposes of allowing parties to enter into reaffirmation agreement. Section 727 governs revocation of discharge, and allows relief only at request of creditor, trustee or United States Trustee. Debtor lacks standing to request revocation of discharge.

9.101 Procedure

(4714) *In re Juarez,* Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion to Revoke Discharge denied without prejudice. Action to revoke discharge under Section 727 must be brought by adversary proceeding.

L. Executory Contracts and Unexpired Leases

9.102 Executory Contract and Lease Defined

(4715) *Cybertron International Inc. v. Capps,* Case No. 17-5099 (D. Kan. 2018) – Contract for sale of business that included covenant not to

compete and barred seller from disclosing proprietary information or soliciting customers was not "executory" as the buyer had no further duties under contract after buyer had terminated Debtor's employment. Executory contract is one where there are obligations of both parties so far unperformed that failure of either to perform would constitute breach. Contract from buyer's side had been fully executed. Purchase and sale agreement not automatically rejected where agreement was not "assumed" within time permitted as there was no executory contract to assume or reject. Covenant not to compete is not discharged in Chapter 7 bankruptcy. Breach of covenant not to compete is not "claim" because it cannot be satisfied by money alone as breach also gives rise to equitable remedy. Although plaintiff may have right to both damages and injunction, availability of damages as part of remedy does not convert breach of covenant into "claim".

(4716) *CMH Liquidating Trust v. National Union Fire Insurance Co. of Pittsburgh,* Case No. 14-2082 (Bankr. E.D. Mi. 2018) (proceedings after remand) – D&O insurance policy is property of Bankruptcy Estate where policy was purchased, and majority of facts and events occurred prior to filing Chapter 11 petition. D&O policy is executory contract as both sides have affirmative duties to perform, failure of which would constitute breach. Section 365 prohibits termination of modification of executory contract based solely on insolvency or financial condition of debtor; commencement of bankruptcy case; or appointment of trustee. Insurer obligated to provide coverage where policy allowed Insurer to terminate coverage attend of policy term only if Insurer purchased "tail liability" coverage, and Insurer did not do so Policy continued in effect and could not be terminated without violating Section 365.

(4717) *Ulrich v. Walker,* 2016 WL 3213665 (9th Cir. BAP 2016) – Prepetition agreement under which Debtor paid counsel a pre-paid retainer that was deemed earned when paid in exchange for counsel's agreement to represent Debtor in post-petition adversary proceedings to except debt form discharge was executory contract that could be assume or rejected post-petition. Whether contract is executory depends on whether material performance is due on both sides, such that failure to perform by either party would be material breach excusing other party from further performance. Attorney's part of contact was clearly executory as of moment of petition as contract contemplated solely for post-petition services. Client's obligations were also executory as client was responsible for payment of all out of pocket expenses including service of process fees, filing fees, witness fees, computer research fees, travel, expenses of depositions, investigative costs, copying and other incidental expenses, and client's failure to pay would consistent material breach allowing firm to terminate further representation. Trustee would post-petition reject executory contract and recover that portion of pre-petition retainer that did not represent payment to attorney for services performed as of date of rejection.

(4718) *In re FKA, FC, LLC,* 2016 WL 690854 (Bankr. W.D. Mi. 2016) – Contract is executory where both parties have as-yet unperformed obligations.

(4719) *In re Treetops Acquisition Company, LLC,* Case No. 14-22602 (Bankr. E.D. Mi. 2015) – Executory contract is one where both parties have obligations . Agreement by which individuals were granted right to unlimited golf, skiing and hunting at Debtor's property was executory as individuals were allowed to exercise right to use facility while facility was required to allow that use, such that each side still needs to perform its side of the agreement. As executory contract, right to use facilities was subject to rejection, with individuals having opportunity to file claim for economic value of lost rights of use.

(4720) *In re Manalapan Mining Company, Inc.,* 2015 WL 3827022 (Bankr. E.D. Ky. 2015) – Although captioned "lease", agreement conveying rights to mine minerals on land operates to convey to "lessee" title to the minerals as a matter of state law. Thus, "lease" was not lease subject to assumption under Section 365 but was ownership interest in land that could be transferred pursuant to Section 363 over objection of "lessor".

(4721) *In re Denman,* 2014 WL 3687246 (Bankr. W.D. Tn. 2014) – An executory contract is one with material obligations left to be performed by both parties. Unperformed obligations must be such that failure to complete performance would be material breach. Agreement must be a contract and not some other type of legal instrument. Limited Liability Company operating agreement is not a contract within the scope of Section 365. Operating agreement is closer to corporate bylaws, establishing existence and structure of the entity. Breach by any member does not excuse performance by all other members and LLC agreements are unilateral agreements between the member and the LLC itself.

9.103 Debtor's Authority to Assume or Reject

(4722) *In re Ambro,* Case No. 17-46787 (Bankr. E.D. Mi 2018) – Section 524 regarding reaffirmation agreements does not apply to lease assumptions. Leases are assumed under Section 365, not reaffirmed under Section 524. Where Chapter 7 Trustee does not assume or reject unexpired lease, Debtor has right to assume lease under Section 365(p)(2)(A) by notifying lessor in writing that Debtor desires to assume lease. Lessor may, at its option, notify Debtor that is willing to have lease assumed by Debtor. Upon acceptance by lessor, lease assumption is self effectuating without Court intervention.

(4723) *Williams v. Ford Motor Credit Company,* 2016 WL 2731191, 2016 U.S. Dist. LEXIS 62402 (E.D. Mi. 2016) – Debtor is permitted to assume lease during 60 day window within which Trustee can assume lease. Trustee's right to assume is not exclusive of Debtor's right under Section 365(p).

(4724) *In re English*, Case No. 07-55986 (Bankr. E.D. Mi. 2008) – Assumption of leases by Debtor in Chapter 7 controlled by 11 USC Sections 365(p)(1) and (p)(2). Debtor is permitted to assume lease of personal property in Chapter 7 only if the lease is rejected or not timely assumed by the Chapter 7 trustee, at which point the leased property ceases to be property of the estate. If Debtor then assumes the lease, then the liability is assumed by the Debtor and not by the estate. Debtor's assumption of a lease of personal property does not require Court approval as it neither affects property of the estate nor creates any obligation of or claim against estate.

(4725) *In re Houvener,* Case No. 09-42209 (Bankr. E.D. Mi. 2009) - Debtor's "Lease Assumption Agreement" is invalid and unenforceable where the Agreement was executed by Debtor and Lessor before the Chapter 7 Trustee rejected the lease or the lease was deemed rejected. Debtor is not authorized to assume a lease as long as the lease is property of the estate, and Debtor and Lessor did not enter into new assumption agreement after Lease deemed rejected.

9.104 Trustee's Authority to Assume or Reject

(4726) *Ulrich v. Walker,* 2016 WL 3213665 (9th Cir. BAP 2016) – Prepetition agreement under which Debtor paid counsel a pre-paid retainer that was deemed earned when paid in exchange for counsel's agreement to represent Debtor in post-petition adversary proceedings to except debt form discharge was executory contract that could be assume or rejected post-petition. Whether contract is executory depends on whether material performance is due on both sides, such that failure to perform by either party would be material breach excusing other party from further performance. Attorney's part of contact was clearly executory as of moment of petition as contract contemplated solely for post-petition services. Client's obligations were also executory as client was responsible for payment of all out of pocket expenses including service of process fees, filing fees, witness fees, computer research fees, travel, expenses of depositions, investigative costs, copying and other incidental expenses, and client's failure to pay would consistent material breach allowing firm to terminate further representation. Trustee would post-petition reject executory contract and recover that portion of pre-petition retainer that did not represent payment to attorney for services performed as of date of rejection.

(4727) *Vashino v. Lykins Enterprises, Inc.,* 2011 WL 166241 (Bankr. E.D. Ky. 2011) – Section 365(a) provides a trustee or Debtor in possession may assume or reject an executory contract or unexpired lease subject to court approval.

(4728) *In re Lykins Enterprises, Inc.,* 2011 WL 61174 (Bankr. E.D. Ky. 2011) – Section 365 gives Debtor-in- Possession right to assume or reject executory contracts or unexpired leases.

9.105 Agreements Subject to Assumption or Rejection

(4729) *Transamerica Life Insurance Company v. Shubert,* Case No. 16-4505 (E.D. Pa. 2016) – Contract is executory for purposes of Section 365 if the obligations of both the Debtor and the other party are unperformed so that failure of either to complete performance would be material breach. Typically, the determination of whether contract is executory is made as of petition date. Life insurance contract was executory where, as of petition date, Debtor had obligation to make payments and insurance company had obligation to pay benefits. Although Debtor had missed premium payment, as of petition date the policy was in "grace period" for payment of premium and reinstatement of policy and contract had not yet expired by its terms.

(4730) *Forest Creek Townhomes, LLC v. Carroll Property Management, LLC,* 2016 WL 2344230 (W.D. Tn. 2016) – Code allows assumption and assignment of executory contract unless contract contains provision prohibiting assignment that is enforceable under applicable state law. Georgia law prohibits assignment of personal services contract, defined as one in which the offeree is vested with discretion in accomplishing the assigned tasks because his skills, knowledge, experience and expertise are unique to the area and could not be duplicated by others not similarly qualified. Contract for property management services was "personal services contract" as to manager where the Management Agreement explicitly noted that "Manager is experienced in the business of managing multifamily apartment complexes such as the Premises"; required manager manage, operate and maintain the Premises and carry out any rehabilitation activities in a commercially reasonable manner"; and gave property manager significant discretion in how to manage the Property including contracting for repairs and capital improvements; executing leases and collecting rents; hiring, discharging, and supervising employees; and performing other management activities within the budget proposed by the property manager and approved by the property owner. Manager also had discretion to exercise "other general authority and power as may be necessary or advisable to manage the property, and managing an apartment complex requires skill and experience and, while there may be other property management companies that can provide similar services, such services could not be duplicated by others not similarly qualified. Management contract, as executory contract, not subject to assumption and assignment.

(4731) *Chesapeake Appalachia, LLC v. Powell,* Case No. 13-0035 (M.D. Pa. 2015) – Oil and Gas lease is interest in real property pursuant to state law and cannot be assumed or rejected under Section 365 as interest is neither executory nor a lease of property.

(4732) *In re Priva Technologies, Inc.,* Case no. 11-12574 (Bankr. W.D. Mi. 2014) – Section 365 does not apply to post-petition agreements. License agreement entered into between Chapter 11 Debtor and third party not subject to assumption by Chapter 7 trustee following conversion of case.

(4733) *Lewis Brothers Bakeries, Inc. v. Interstate Brands Corp.,* Case No. 11-8150 (8th Cir. 2012) – License agreement by which Interstate granted to Lewis a perpetual, royalty-fee, assignable, transferable, exclusive license to use brands and trademarks in specific areas was executory contract. Although license had been granted 8 years prior to Interstate's bankruptcy, and Lewis had paid all of the consideration for acquisition of the license at the time of the grant, Court held that there were sufficient mutual obligations, the breach of any by one party would excuse compliance by the other. Under the License, Lewis, as licensee, had to refrain from sublicensing the marks, was limited to using marks in specific areas, was prohibited from registering the marks, was required to execute documents to preserve the marks, could use the marks only as prescribed, must maintain the character and quality of the goods sold under the marks, inform Interstate of any threatened infringement, and assist in any infringement litigation. Interstate was required to defend the trademarks, control quality of goods, notify Lewis of any threatened infringement, maintain full control over infringement actions, refrain from settling any infringement action in a manner adverse to Lewis, refrain from suing Lewis for infringement or using the marks in the appropriate areas and indemnify Lewis from any claim arising out of any willful act or omission by Interstate.

(4734) *In re Kazi Foods of Michigan, Inc.,* 473 B.R. 887 (Bankr. E.D. Mi. 2011) – Debtor cannot assume contract if applicable non-bankruptcy law prevents assignment of contract to third party, even if Debtor proposes to assume but not to assign the contract. Federal Trademark law prevents Debtor-franchisee from assigning non-exclusive license to use franchisor's trademarks and qualifies as "applicable non-bankruptcy law" within meaning of bankruptcy code.

(4735) *Super Nova 330 LLC v. Gazes,* Case No. 11-1773 (2d Cir. 2012) – Lease is unexpired for purposes of section 365(d)(3) where a landlord obtained warrant of eviction but did not execute on that warrant prior to the tenant's filing of a bankruptcy petition. The tenant retained a

residual interest in the lease as the State Court could vacate the warrant of eviction for good cause and reinstate the lease until the execution of the warrant even though the lease was previously terminated "nominally" when the eviction warrant was issued.

(4736) *Vashino v. Lykins Enterprises, Inc.,* 2011 WL 166241 (Bankr. E.D. Ky. 2011) – In order to ascertain the available rights and remedies following assumption or rejection under 365(a), the determination must first be made whether the agreement is an executory contract or an unexpired lease. Whether agreement is "unexpired lease" is matter of federal law as impacted by state law principals. To create the relationship of landlord and tenant it should appear from the agreement that one party intends to dispossess himself of the premises and the other party intends to enter and occupy the premises in a manner that the first party had the right to do. language chosen by the parties, including identifying themselves as "landlord" and "tenant," is given great weight, although not solely determinative. The written agreement of the parties is a lease designed to provide the Plaintiff possession of the real property on which the convenience store is located to the exclusion of the Debtor.

(4737) *In re Lykins Enterprises, Inc.,* 2011 WL 61174 (Bankr. E.D. Ky. 2011) – Whether agreement is lease versus purchase is determined by Federal law. Debtor entered into long term lease with Defendant by which Defendant took control of the property and operated a gas station and convenience store is determined by federal law, informed by general state law principals. Agreement was lease subject to assumption or rejection where documents retained to Debtor a right to take possession if Defendant breached the lease; Defendant was responsible for all utilities and maintenance; and Defendant had to maintain insurance as directed by Debtor.

9.106 Deadline to Assume or Reject

(4738) *Transamerica Life Insurance Company v. Shubert,* Case No. 16-4505 (E.D. Pa. 2016) – Whether contract is executory is usually determined as of petition date. However, when contract expires post-petition, court will look to the date of the motion to assume or reject rather than the petition date. Where contract is in "grace period" for payment as of petition date, Section 108 extends grace period to longer of contract period or 60 days after the petition date. As long as Debtor takes steps to assume in that time, the fact that the contract may "expire" on its own terms does not defeat assumability. Debtors took timely affirmative act to assume by stating in Chapter 13 plan that Debtors would assume the contract. Although Debtors failed to confirm the plan and the case was later converted to Chapter 7, Debtors' timely filing of plan within Section 108 grace period constituted affirmative act to assume which extended time for determining assumability to date of hearing on Motion to Assume filed by Chapter 7 Trustee. Trustee allowed to assume and assign contract where Motion provided for timely cure of defaults including payment of premiums and any damages suffered by insurance company as result of default and reinstatement.

(4739) *Cousins Properties, Inc. v. Treasure Isles HC, Inc.,* Case No. 10-8075 (6th Cir. BAP 2011) – Deadline to assume lease of non-residential real property under Section 365 is satisfied upon Debtor filing a motion to assume the lease. Section 365 does not require entry of the order allowing assumption prior to expiration of deadline to assume or reject.

(4740) *In re Caster,* 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – In Chapter 7 proceeding, unexpired lease must be assumed within 60 days of the order for relief (as may be extended by Order of Court) or the lease is deemed rejected by operation of law. Conversion of case from Chapter 7 to Chapter 11 after expiration of 60 day period to assume does not permit Debtor to later assume lease.

9.107 Failure to Assume or Reject

(4741) *In re Caster,* 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from "payment in full at exercise' to payment over life of Chapter 11 Plan did not assume lease in unaltered from. Debtor's purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

9.108 Procedural Requirements for Assumption

(4742) *Bobka v. Toyota Motor Credit Corp.,* Case No. 17-2380 (S.D. Ca. 2018) – Section 524 regarding reaffirmation agreements does not apply to lease assumptions. Leases are assumed under Section 365, not reaffirmed under Section 524. Where Chapter 7 Trustee does not assume or reject unexpired lease, Debtor has right to assume lease under Section 365(p)(2)(A) by notifying lessor in writing that Debtor desires to assume lease. Lessor may, at its option, notify Debtor that is willing to have lease assumed by Debtor. Upon acceptance by lessor, lease assumption is self effectuating without Court intervention.

(4743) *In re Abdemur,* Case No. 17-16875 (Bankr. S.D. Fl. 2018) – Section 524 regarding reaffirmation agreements does not apply to lease assumptions. Leases are assumed under Section 365, not reaffirmed under Section 524. Where Chapter 7 Trustee does not assume or reject unexpired lease, Debtor has right to assume lease under Section 365(p)(2)(A) by notifying lessor in writing that Debtor desires to assume lease. Lessor may, at its option, notify Debtor that is willing to have lease assumed by Debtor. Upon acceptance by lessor, lease assumption is self effectuating without Court intervention.

(4744) *In re Ambro,* Case No. 17-46787 (Bankr. E.D. Mi 2018) – Section 524 regarding reaffirmation agreements does not apply to lease assumptions. Leases are assumed under Section 365, not reaffirmed under Section 524. Where Chapter 7 Trustee does not assume or reject unexpired lease, Debtor has right to assume lease under Section 365(p)(2)(A) by notifying lessor in writing that Debtor desires to assume lease. Lessor may, at its option, notify Debtor that is willing to have lease assumed by Debtor. Upon acceptance by lessor, lease assumption is self effectuating without Court intervention.

(4745) *Stanley Jacobs Production, Ltd. v. 9472541 Canada, Inc.,* Case No. 17-50476 (Bankr. D. Del. 2018) – Section 365 does not recognize concept of "implied assumption". Estate purported to sell assets but Motion to Assume and Assign did not list asset in question. Purchaser did not acquire any rights in asset and was not liable for pre-petition royalties, but was liable for royalties and damages from post-petition use of purchased assets.

(4746) *Angelone v. Great Atlantic & Pacific Tea Co.,* Case No. 15-8932 (S.D.N.Y. 2016) – Provision in commercial lease requiring tenant to pay landlord 50% of any profit received on assignment of lease is unenforceable under 11 USC Section 365(f)(1) as a provision that prohibits, restricts or conditions assignment of the lease. Although profit sharing provision would not preclude assignment of lease, it would decrease value of assignment which is inconsistent with prevailing public policy and long standing precedent.

(4747) *Williams v. Ford Motor Credit Company,* 2016 WL 2731191, 2016 U.S. Dist. LEXIS 62402 (E.D. Mi. 2016) – Assumption of unexpired lease is procedure separate from that of reaffirmation. While reaffirmation has various procedural requirements and must be approved by Court, Section 365(p) does not impose any procedural requirements other than declaration by Debtor of intent to assume. Assumption does not require court authorization to be valid and enforceable. To subject assumption under Section 365(p) to same requirements as reaffirmation under Section 524(c) would render Section 365(p) irrelevant, and there is no indication in Section 365 that Congress intended same procedural safeguards for reaffirmations to apply to assumptions. Only requirement is that Debtor notify lessor in writing of intent to assume lease within 30 days of notification by lessor that lessor is willing to have lease assumed. 30 day window is for protection of lessor, not Debtor, and Debtor who did not notify lessor within 30 days but did notify lessor in writing of intent to assume was binding on lessor and Debtor where lessor accepted otherwise untimely assumption.

(4748) *In re FKA, FC, LLC,* 2016 WL 690854 (Bankr. W.D. Mi. 2016) – Trustee or Debtor-in-Possession seeking to assume executory contract or unexpired lease bears burden to prove that the agreement is one that is subject to assumption and that all requirements for assumption are satisfied. Requirements include curing any existing defaults, providing compensation to other party for loss or damage resulting from defaults, and providing adequate assurance of prompt cure. Landlord/creditor not entitled to recover attorney fees incurred in bankruptcy proceeding as part of assumption of lease where landlord admitted that Debtor never defaulted under the lease and so there was neither default to cure nor damages resulting from "such default". Bankruptcy filing alone is not event of default under Section 365(b)(2), and Debtor at all times both before and after petition timely and completely paid all rent, CAM, taxes and other charges as required. Lease did not create right to recover attorney fees independent of breach of the lease itself and nothing under applicable State law allowed landlord to recover attorney fees absent a default and subsequent recovery of damages.

(4749) *In re Oreck Corp.,* 2014 WL 929614 (Bankr. M.D. Tn. 2014) – Claim for unpaid "stub rent", representing the time between the first day of the bankruptcy filing and the date on which the first post-petition rent payment is due, is not entitled to administrative priority. Lease required payment of rent on first day of month. Debtor filed for bankruptcy on the 6th day of the month, without having paid the rent for that month. Court adopted "billing date" method to determine whether rent for month in which case is filed is considered pre-petition or post-petition rent. Obligation to pay rent for that month was pre-petition based on billing date. As rent for that month had completely accrued pre-petition, that rent cannot constitute post-petition administrative claim even for balance of month during which Debtor continued to occupy premises, and Debtor is not required under Section 365(d)(3) to pay that "stub rent" as condition of remaining in possession of property during period in which Debtor can either assume or reject lease; and if lease is rejected, "stub rent" is part of pre-petition claim and not post-petition administrative expense.

(4750) *In re AppleIllinois, LLC,* 2014 WL 297327 (Bankr. E.D. Ky. 2014) – Assumption of executory contract requires that Debtor (A) cure all defaults or provides adequate assurance that it will promptly cure such defaults, (B) compensate or provides adequate assurance that it will promptly compensate the other party for any pecuniary loss resulting from any default, and (C) provide adequate assurance of future performance under the contract. Section 365 does not create independent right to attorney fees. Actual pecuniary loss is determined by amount that would be recovered under state law outside bankruptcy. Contract that allowed Franchisor to recover attorney fees in actions to construe or enforce franchise agreement did not encompass fees for assumption and assignment, as assumption and assignment did not raise issues of construction or enforcement of franchise agreement.

(4751) *Thompson v. Credit Union Financial Group,* 2011 WL 2604823 (W.D. Mi. 2011) – Section 363(p) allows Debtor to assume lease if Trustee does not do so. However, assumption of lease is not automatic or implied. Lease is assumed only upon entry of an Order of the Court permitting the assumption. Debtor's retention of the leased property and continued payment on the lease does not constitute "implied assumption" of lease. Where Debtor, post-discharge, stops paying on the unassumed lease, Creditor may not pursue *in personam* recovery against Debtor. Remedy is limited to repossession and disposition of the collateral. Debtor's personal liability on the unassumed lease was discharged.

9.109 Effect of Rejection

(4752) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) - Rejection of executory contract does not terminate the agreement but leaves other party with rights of non-breaching party. If contract creates non-dischargeable obligation, rejection of contract is not a race obligation. "Deemed rejection" under Section 365(d)(1) abandons bankruptcy estates rights under contract back to Debtor and gives creditor right to file claim in bankruptcy case for breach of contract deemed to have occurred as if claim arose before date of filing petition. Assuming that Antenuptial Agreement was executory contract, Agreement was deemed rejected giving creditor right to file proof of claim for breach. However because bankruptcy estate was "no-asset case" there would be no reason for Court to determine value of creditor's "rejection claim".

(4753) *Cybertron International Inc. v. Capps,* Case No. 17-5099 (D. Kan. 2018) – Rejection of executory contract constitutes breach of contract by Debtor, relieving Trustee of any obligation to perform but does not release Debtor from any ongoing obligations. Even if contract was "executory" and automatically rejected, covenant not to compete contained in contract survives rejection and subsequent Chapter 7 discharge.

(4754) *Mission Products Holdings, Inc. v. Tempnology LLC,* 879 F.3d 389 (1st Cir. 2018) – Rejection of license of patent and trademark does not terminate lessee's right to use patents but does terminate right to use intellectual property such as trademarks, adopting *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985), *cert petition filed* ___US ___ (2018).

(4755) *In re SIMA International, Inc.,* Case No. 17-21761 (Bankr. D. Conn. 2018) – Debtor, as licensor, rejection of license agreement does not

abrogate licensee's right to use trademarks or other intellectual property.

(4756) *In re Roberson,* 2017 WL 6060598 (Bankr. N.D. Ohio 2017) – Creditor cannot setoff debt owed to debtor that arose post-petition against pre-petition, discharged debt. Creditor, debtor's landlord, violated stay resulting in award of damages. Landlord purported to setoff damage award against rent owed post-petition. However, Debtor rejected the lease without assumption, rendering any rent claim an unsecured pre-petition debt that was discharged, as Debtor had no enforceable liability to Creditor, Creditor's actions in setting off was violate of automatic stay. Creditor ordered to pay sanctions to Debtor for initial stay violation without reduction or setoff. Fact that debtor remained in premises post-petition did not operate as assumption of lease and holdover tenant is not liable under lease merely because they wait for landlord to take steps to recover possession.

(4757) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Creditor violated discharge injunction by filing eviction action against Debtor post-discharge seeking not only possession of property but also award of unpaid rent accruing after entry of discharge. Section 502(g) treats a claim for post-petition damages for breach of an unexpired prepetition lease as prepetition, discharged claim. Any debt owed to landlord on lease deemed rejected under Section 365 including post-petition rent arrearage is deemed prepetition debt. Abandonment of property under Section 554 does not render Debtor liable for post-petition rental payments. Property had not yet been abandoned by Chapter 7 estate as Chapter 7 case remained pending and Court had not entered Order deeming property to be abandoned. There was no indication that Debtor entered into new post-petition lease agreement where Debtor did not make any payments nor offer to make any payments. Holdover tenants are not liable for post-petition rent simply because they wait for landlord to take steps to complete eviction action.

(4758) *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC,* 686 F.3d 372 (7th Cir. 2012) – Rejection of lease of intellectual property case is breach but does not terminate licensee's right to use intellectual property subject to lease, rejecting *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985).

(4759) *In re Prentice,* 2012 WL 1801711 (Bankr. E.D. Mi. 2012) – Rejection (whether express or by failure to assume) operates a breach of the agreement. Rejection does not terminate the agreement and the other party to the agreement can seek allowance of damage claims. Rejection does not relieve Debtor of any future obligations. Specifically, rejection does not relieve Debtor of obligations under non-compete agreement. Creditor entitled to relief from stay to enforce non-compete action through action in State Court for injunction.

9.110 Subleases and Assignments

(4760) *Osprey-Troy Officentre, LLC v. World Alliance Financial Corp.,* 822 F. Supp. 2d 700 (E.D. Mi. 2012), *aff'd* 2012 WL 4857030 (6th Cir. 2012) – Debtor's rejection of lease operates as breach of lease but does not terminate lease. Rejection of lease does not relieve sub-tenant of Debtor from complying with terms of sub-lease. Sub-lease expressly incorporated certain terms of main lease, making landlord third-party beneficiary of obligations stated in sub-lease. Landlord could enforce sub-lease as third party beneficiary notwithstanding rejection of main lease in Debtor's bankruptcy proceeding. However, Sublease Termination Agreement between Debtor and sub-tenant was effective to terminate sub-lessee's obligations under the sublease even though the termination agreement was signed without the landlord's knowledge or consent. Michigan law does not require subtenant and sub-landlord to notify or obtain consent of main landlord to terminate sublease.

9.111 Sale of Property Subject to Lease Under Section 363

(4761) *Pinnacle Restaurant at Big Sky, LLC v. CH SP Acquisitions, LLC,* Case No 15-35572 (9th Cir. 2017) – Trustee can sell property subject to lease free and clear of interests of tenants pursuant to Section 363. Section 363 allows Trustee to sell property free and clear of any interest. Sale does not implicate Section 365 or require Trustee to either assume or reject lease. Instead, sale is treated as equivalent of foreclosure sale which would foreclosure out rights of lessees who are junior to mortgage. Because lease is not rejected by sale, protections of Section 365(h) does not apply.

M. Statement of Intentions – Section 521(a)(6)

9.112 When Required

(4762) *In re Richardson,* Case No. 11-31806 (Bankr. E.D. Mi. 2011) – Section 521(a)(6) does not trump Section 362(h). Section 521(a)(6) requires that Debtor who desires to retain possession of personal property where a creditor asserts a purchase money security interest must within 45 days of the first meeting of creditors either redeem or reaffirm. Section 521(a)(6) applies only where the creditor has an allowed claim "for the purchase price". Creditor filed a proof of claim for $15,000 balance owed on car with purchase price of $31,000.00. As claim was for substantially less than "the purchase price" Debtor could not use Section 521(a)(6) to maintain possession.

(4763) *Maple Forest Condominium Association v. Spencer,* 2010 WL 3909985 (Bankr. E.D. Mi. 2010) – Section 521(a)(2), which requires Debtor to file statement of intention with respect to property that secures a claim, and Section 521(a)(6), which requires Debtor to perform the stated intentions within specified time, apply only in Chapter 7 proceeding. Sections 521(a)(2) and (a)(6) cannot from the basis of an action against a Debtor in Chapter 13 as a matter of law.

9.113 Effect of Filing

(4764) *In re Reed,* 2011 WL 6328677 (Bankr. E.D. Mi. 2011) – Section 521 provides Debtor must file statement of intentions indicting intention to surrender, redeem or reaffirm for property secured by purchase money security interest and Debtor must thereafter execute reaffirmation agreement or redeem, failing which the property must be returned to the creditor. Section 521 not implicated where Debtor failed to file the statement of intention but did sign and file a reaffirmation agreement even if reaffirmation agreement rejected by Court.

9.114 Failure to File

(4765) *In re Vantrump,* Case No. 11-55021 (Bankr. E.D. Mi. 2011) – Failure to enter into a reaffirmation agreement or to surrender vehicle within

45 days after 341 meeting lifts stay and specifically allows creditor to enforce *ipso facto* clause. Debtor's Motion for Entry of Order prohibiting Enforcement of *Ipso Facto* Clause denied as relief is prohibited by Section 521(d).

(4766) *In re Richardson,* Case No. 11-31806 (Bankr. E.D. Mi. 2011) – Section 521(a)(6) does not trump Section 362(h). Section 521(a)(6) does not impose or extend stay that would otherwise expire under Section 362(h). Section 521(a)(6) requires that Debtor who desires to retain possession of personal property where a creditor asserts a purchase money security interest must within 45 days of the first meeting of creditors either redeem or reaffirm. Debtor neither reaffirmed nor redeemed within 45 days, resulting in Debtor's loss of any right to possess the collateral. Further, Section 521(a)(6) applies only where the creditor has an allowed claim "for the purchase price". Creditor filed a proof of claim for $15,000 balance owed on car with purchase price of $31,000.00. As claim was for substantially less than "the purchase price" Debtor could not use Section 521(a)(6) to maintain possession.

(4767) *In re Reed,* 2011 WL 6328677 (Bankr. E.D. Mi. 2011) – Creditor would not be allowed to repossess vehicle based on Debtor's failure to reaffirm debt where loan documents did not define filing of bankruptcy as event of default. Where loan agreement defined default solely as failure to make payments, Debtor would be entitled to retain vehicle as long as Debtor maintained payments, consistent with terms of the loan agreement.

N. Reaffirmation Agreements

9.115 Time for Execution and Filing

(4768) *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.

(4769) *In re Maiers,* Case No. 17-70869 (Bankr. C.D. Ill. 2017) – Debtor and Creditor who miss deadline for reaffirming debt cannot circumvent requirements of Section 524(c) by stipulating to except debt from discharge. Section 524(c) demands that reaffirmation agreements be made before discharge is granted and must contain specified disclosures. Stipulation to except debt from discharge did not contain required disclosures and was not signed by the debtor, only the debtor's attorney. Order excepting discharge of a debt can only be entered if there was a timely filed adversary proceeding. Stipulation did not constitute Complaint in Adversary Proceeding depriving court of authority to make a determination of dischargeability. Debtor could not use Section 727(a)(10) to waive discharge as to one specific debt, as Section 727(a)(10) only allows waiver of a general discharge. If Section 727(a)(10) could be used to waive discharge of specific debt, then requirements for reaffirmation agreements under Section 524(c) would be meaningless.

(4770) *In re Vozza,* 2017 WL 2992481 (Bankr. E.D. Mi. 2017) – Court will not reopen case and set aside discharge to allow Debtor to execute reaffirmation agreement where reaffirmation agreement was not executed by parties before entry of discharge. Setting aside discharge would not cure defect as discharge has already been entered, cutting off time for executing reaffirmation agreement. Further, Rule 4008 requires reaffirmation agreement to be filed with Court within 60 days of First Meeting of Creditors. Deadline long ago expired and no party sought, before expiration, to extend time to execute reaffirmation.

(4771) *SMS Financial JDC, LP v. Cope,* Case No. 16-6063 (10th Cir. 2017) – A lack of valid reaffirmation agreement renders underlying obligation void, not merely voidable. Improperly reaffirmed debt is not subject to ratification as Bankruptcy Court approval is required before entry of discharge. FDIC could not use *Doench Duhme* doctrine to avoid effect of in valid reaffirmation agreement. *Doench* applies where there is an otherwise enforceable agreement and borrower is relying on agreements allegedly reached between bank and borrower that are not in banks books and records and were not made according to proper bank procedure. Although Debtor attempted to reaffirm debt by signing note allegedly reaffirming obligation, reaffirmation was never presented to Bankruptcy Court and was never approved by Court. *D'Oench* cannot be used to breathe life into void agreements notwithstanding that lender held signed note "reaffirming" debt and there was no indication in bank records that reaffirmation had not taken place.

(4772) *In re Jackson,* Case No. 15-50309 (Bankr. E.D. Mi. 2015) – Reaffirmation agreement must be filed with the court prior to entry of discharge and must be signed within 60 days of the date first set for the meeting of creditors. Approval of reaffirmation agreement denied where agreement was not dated and it was not clear that agreement that agreement had been signed by all parties before entry of discharge and was not filed with the court until more than 60 days after the date first set for the meeting of creditors.

(4773) *Venture Bank v. Lapides,* Case No. 14-3085 (8th Cir. 2015) – To be enforceable, reaffirmation agreement must contain all essential elements of a contract under state law and must be executed prior to entry of discharge. "Change in Terms" agreement the extended maturity date of loan 6 months and contained unqualified promise of Debtor to pay was invalid where agreement was entered after discharge and without court approval. Creditor could have elected to allow Debtor to continue to make voluntary payments without execution of agreement. But once agreement was signed, subsequent payments were not voluntary and violated discharge injunction, even where lender fully complied with terms of Agreement and extended (multiple times) the maturity date of the loan. That Debtor received consideration for terms of Agreement what would have been sufficient to support agreement, failure to execute or file agreement within time permitted under Section 524 rendered agreement unenforceable by lender.

(4774) *In re Didio,* Case No. 15-40930 (Bankr. E.D. Mi. 2015) – Section 524 requires that reaffirmation agreement be made before entry of discharge. Reaffirmation agreement signed by lender three days after entry of discharge order is not enforceable. Motion to approve reaffirmation denied.

(4775) *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.

(4776) *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 no later than 60 days after date first set for 341 meeting. Where deadline passed without Debtor or creditor filing reaffirmation agreement, court lacked authority to approve reaffirmation even if case reopened. Rule 4004 allows court to extend deadline but only on motion to extend filed before expiration of initial deadline and in any event requires reaffirmation agreements to be "made" before entry of the discharge. Reaffirmation agreement is made when agreement is signed by both Debtor and creditor. Parties did not sign reaffirmation agreement before discharge precluding entry of an order approving the reaffirmation. Court also would not vacate discharge to permit making and filing of untimely reaffirmation notwithstanding equities of situation and potential hardship faced by Debtor as there is no basis in the Code to vacate a discharge on request of the Debtor or for purposes of executing a reaffirmation agreement.

(4777) *In re Glenn,* Case No. 14-55663 (Bankr. E.D. Mi. 2015) – 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 signed reaffirmation agreement after discharge such that there is no enforceable agreement that can be approved by court. 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.

(4778) *In re Wills,* 2015 WL 1321488 (Bankr. N.D. Ohio 2015) – Reaffirmation agreements must be signed by parties and file with court prior to entry of discharge. Court lacks statutory authority to set aside discharge on request of Debtor. Although Debtor and creditor intended to sign and file reaffirmation agreement, they did not do so prior to discharge as required by Section 524 and Rule 4008. Court can extend time for filing with court but cannot extend time for execution of reaffirmation in first instance; and cannot extend deadline after deadline has already expired. Court would not set aside discharge to allow belated execution and filing of reaffirmation agreement. Motion failed to allege any basis for relief under either Rule 59 or Rule 60 and there was no basis to revoke the discharge under Section 727.

(4779) *In re McNeal,* 2013 WL 5494322 (Bankr. N.D. Ohio 2013) – There is no basis to set aside discharge to allow Debtor to execute otherwise untimely reaffirmation agreement. Rule 4008 requires reaffirmations to be filed prior to discharge. Although Rule 4008 allows for extensions of deadlines, nothing in Rule 4008 allows court to extend time to file reaffirmation to a date after entry of the discharge.

(4780) *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.

(4781) *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.

(4782) *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.

(4783) *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. Court can extend deadlines to execute and file reaffirmations only if motion to extend is filed before discharge is entered. 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.

(4784) *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.

(4785) *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 indicted 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.

(4786) *In re Stanco,* Case No. 12-49854 (Bankr. E.D. Mi. 2012) – Section 524 requires reaffirmation agreement must be made before granting of discharge. Creditor did not sign reaffirmation agreement until 11 days after discharge entered. Court denied request to approve

reaffirmation agreement as agreement was not enforceable.

(4787) *In re Smith,* 2012 WL 441322 (Bankr. N.D. Ohio 2012) – Rule 4008(a) requires reaffirmation agreements to be filed not later than 60 days after the first date set for the first meeting of creditors. Rule 4004 provides a vehicle for delaying entry of discharge at the request of the Debtor. Debtor's Motion to Vacate Discharge for purposes of allowing belated reaffirmation agreement denied. Section 524 makes clear that reaffirmation agreements are not enforceable if not made before entry of reaffirmation.

(4788) *In re Smith,* 467 BR 122 (Bankr. W.D. Mi. 2012) – Section 524 imposes strict deadlines for execution and filing of reaffirmation agreement to insulate Debtors from post-discharge pressure to bargain away their fresh-start. Setting aside discharge for purposes of allowing belated reaffirmation agreement would undermine this congressional policy. Although court can extend time for execution and filing of reaffirmation agreement before deadlines expire, court would not set aside the discharge for purposes of allowing a late reaffirmation.

(4789) *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.

(4790) *In re Golden,* Case No. 11-60732 (Bankr. E.D. Mi. 2011) – Deadline to execute reaffirmation agreement is date of entry of discharge. Deadline to file reaffirmation agreement under Rule 4008(a) is 60 days after date first set for first meeting of creditors. Court can extend deadline to file but only if discharge has not yet been entered. Reaffirmation agreement not filed until more than 100 days after 341 meeting and 2 days after entry of discharge would not be approved by Court.

(4791) *In re Crawford,* Case No. 11-59787 (Bankr. E.D. Mi. 2011) – Motion to Reopen Case to allow filing of reaffirmation agreement denied. Section 524 requires reaffirmation agreement to be made and filed prior to entry of discharge.

(4792) *In re Russell,* Case No. 11-61160 (Bankr. E.D. Mi. 2011) – Motion to Vacate Discharge for purposes of allowing late filing of reaffirmation agreement denied. Motion failed to allege that reaffirmation agreement had been executed prior to entry of discharge, which prevents enforceable agreement. Court cannot "cure" the failure to execute the discharge agreement by vacating the discharge. Further, deadline to file reaffirmation agreement is 60 days after first meeting of creditors unless an extension of time is obtained before discharge is entered. Court cannot extend deadline after discharge and cannot vacate discharge and create new deadlines.

(4793) *In re Ocheltree,* 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Court would not revoke discharge merely to allow parties to avoid time requirements of Rule 4008 which requires approval of reaffirmation agreement prior to entry of discharge.

(4794) *In re Reed,* Case No. 10-66892 (Bankr. E.D. Mi. 2010) – Section 524(c) requires that reaffirmation agreement be made before discharge is entered. Rule 4008 requires reaffirmation agreement to be filed with Court no later than 60 days after date first set for the meeting of creditors. Rule 4008 allows time to be extended, but only on Motion filed before time originally expires. Reaffirmation agreement admittedly not signed by creditor until after discharge entered was not enforceable. Further, reaffirmation agreement not filed with court before expiration of deadline nor was timely motion for extension filed. Even had reaffirmation agreement been executed before discharge, agreement would have been unenforceable based on failure to timely file with court.

(4795) *In re Tabche,* Case No. 10-49603 (Bankr. E.D. Mi. 2010) - Approval of Reaffirmation Agreement denied where reaffirmation agreement not signed or filed prior to entry of discharge as required by Section 727 and no Motion to Extend Time filed before entry of discharge.

(4796) *In re McGhee,* Case No. 09-72091 (Bankr. E.D. Mi. 2010) – Approval of Reaffirmation Agreement denied where reaffirmation agreement not signed prior to entry of discharge as required by Section 727; and Reaffirmation Agreement not filed with Court within 60 days of First Meeting of Creditors as required by Rule 4008.

(4797) *In re Wonfor,* Case No. 09-63612 (Bankr. E.D. Mi. 2010) – Reaffirmation agreement is not enforceable unless made before the granting of the discharge under Section 727. Motion to Reopen Case to allow filing of Reaffirmation Agreement stated date on which Debtor executed agreement but did not state date on which creditor executed the agreement. Debtor permitted to supplement record to show date on which creditor signed to permit Court to determine whether reaffirmation agreement could be approved and therefore whether re-opening case would produce any benefit to Debtor or creditor.

(4798) *In re Schulte,* Case No. 09-71367 (Bankr. E.D. Mi. 2010) – Section 542(c)(1) prohibits enforcement of a reaffirmation agreement unless the agreement is made before the entry of the discharge. Reaffirmation agreement signed by creditor six days after entry of discharge is not enforceable. Motion to extend deadline can be granted only if discharge has not already been entered. Motion for Extension of Time filed after entry of discharge is untimely and must be denied.

(4799) *In re Gabbard,* Case No. 05-40949 (Bankr. E.D. Mi. 2010) – Rule 4004 allows extension of time to file reaffirmation agreement only if motion is filed before a discharge has been granted. Even if court could extend time to file reaffirmation agreement, reaffirmation agreement cannot be approved where the reaffirmation agreement itself was not signed until after entry of the discharge.

(4800) *Pickerel v. Household Realty Corp.,* 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Reaffirmation agreement signed prior to entry of discharge but not filed with Court until after discharge is binding and enforceable reaffirmation agreement. Section 524(c)(3) does not impose time limit for filing, and only requires that agreement be "timely" filed and without regard to whether a discharge has been entered. As long as the reaffirmation agreement is executed prior to entry of discharge, Code does not impose time limit to file and there is no prohibition against filing timely executed reaffirmation agreement after entry of discharge. Filing with Court is condition of enforcement of agreement, but not of validity of agreement.

(4801) *In re Pohorecki,* 2010 WL 2926199 (Bankr. N.D. Ohio 2010) - Rule 4008 requires reaffirmation agreement to be filed within 60 days of

meeting of creditors. Rule 4008 also allows court to enlarge time to file reaffirmation agreement where reaffirmation agreement was signed 7 days after Rule 4008 deadline but was fully executed and filed with the court before entry of the discharge.

(4802) *In re Taylor,* 09-61344 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed prior to entry of the discharge. Any alleged reaffirmation agreement signed after entry of discharge is unenforceable as a matter of law. Reaffirmation Agreement must be filed with the Court not later than 60 days after the date first set for the Meeting of Creditors. Court can extend time to file Reaffirmation Agreement on Motion filed before the discharge is entered. Court would not approve reaffirmation agreement where Debtor signed one day after entry of discharge and creditor signed 13 days after entry of discharge; and neither Reaffirmation Agreement nor Motion to Extend Time for Filing were filed until after entry of discharge.

(4803) *In re Owens,* Case No. 09-35753 (Bankr. E.D. Tn. 2010) – Motion to Set Aside Discharge and Extend Time to File Reaffirmation Agreements denied. Section 524(c)(1) requires reaffirmation agreements to be made prior to discharge. Reaffirmation agreements entered into after the entry of a discharge are unenforceable and of no legal significance. Bankruptcy Code does not permit "setting aside" of a discharge other than by revoking discharge, and only the US Trustee, Bankruptcy Trustee or a creditor can request revocation and only where the Debtor obtained the discharge by fraud or knowingly failed to report or turnover property of the estate, refused to comply with a valid Court Order, or failed to run over documents to the US Trustee. Court does not have equitable power to vacate a discharge for purpose of entering reaffirmation agreement. Rule 4008 requires reaffirmation agreements to be filed within 60 days of the First Meeting of Creditors and allows an extension of that deadline only on motion filed before the entry of a discharge.

(4804) *In re Piontek,* Case No. 09-70632 (Bankr. E.D. Mi. 2010) – Motion to Extend Time for Filing Reaffirmation Agreement denied where reaffirmation agreement was not returned to creditor until after entry of the discharge. Deadline for filing reaffirmation agreement is 60 days after completion of 341 Meeting pursuant to Rule 4008. Court can extend time to file reaffirmation agreement only if the discharge has not been granted. Once discharge granted, court lacks authority to extend time to file reaffirmation agreement. Further, reaffirmation agreement is not enforceable where agreement was not signed until after discharge granted pursuant to Section 524. As there could be no enforceable reaffirmation agreement, no purpose would be served by extending the time to file the agreement even if the court had authority to do so.

(4805) *In re Richards,* Case No. 05-85572 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed and filed with the Court prior to entry of the discharge. Any alleged reaffirmation agreement signed after entry of discharge is unenforceable as a matter of law.

(4806) *In re Bennett,* Case No. 07-60111 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to approve reaffirmation agreement denied where motion failed to demonstrate that reaffirmation agreement was signed prior to the entry of a discharge. No purpose would be served in reopening case where there can be no enforceable reaffirmation agreement.

(4807) *In re Hall,* Case No. 08-54354 (Bankr. E.D. Mi. 2009) - Case would not be reopened to permit Debtor to seek Court approval of reaffirmation agreement. Court had previously entered discharge and closed case. Motion to Reopen indicated that reaffirmation agreement was signed after entry of the discharge. Section 524 requires approval of a reaffirmation agreement prior to entry of discharge. There could be no enforceable reaffirmation agreement and, therefore, no purpose would be served by reopening case.

(4808) *In re East,* Case No. 09-51865 (Bankr. E.D. Mi. 2009) - Motion to Approve Reaffirmation Agreement filed 5 days after entry of discharge denied. Reaffirmation Agreement must be signed prior to entry of Discharge. While Reaffirmation Agreement indicated that Debtor signed 5 days prior to discharge, Creditor's signature is undated and fax header on document indicates that creditor did not sign until same day as Motion to Approve filed. Reaffirmation Agreement not signed by all parties until after Discharge entered is unenforceable.

9.116 Failure or Refusal to Execute

(4809) *In re McCray,* 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must "not retain possession". Debtor who proposed to "pay and stay" did not propose to reaffirm or redeem. Debtor's attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

9.117 Form of Reaffirmation Agreement

(4810) *SMS Financial JDC, LP v. Cope,* Case No. 16-6063 (10th Cir. 2017) – A lack of valid reaffirmation agreement renders underlying obligation void, not merely voidable. Improperly reaffirmed debt is not subject to ratification as Bankruptcy Court approval is required before entry of discharge. FDIC could not use *Doench Duhme* doctrine to avoid effect of in valid reaffirmation agreement. *Doench* applies where there is an otherwise enforceable agreement and borrower is relying on agreements allegedly reached between bank and borrower that are not in banks books and records and were not made according to proper bank procedure. Although Debtor attempted to reaffirm debt by signing note allegedly reaffirming obligation, reaffirmation was never presented to Bankruptcy Court and was never approved by Court. *D'Oench* cannot be used to breathe life into void agreements notwithstanding that lender held signed note "reaffirming" debt and there was no indication in bank records that reaffirmation had not taken place.

(4811) *Albright v. Maumee Valley Credit Union,* 2016 WL 4204082 (Bankr. N.D. Ohio 2016) – Reaffirmation agreement is not unenforceable merely because parties used obsolete, but only slightly different, form of reaffirmation agreement where form used, while different than Director's Form, contained all requirements to comply with statute. Director's Form is not official form use is not mandatory, and use of alternative forms is acceptable as long as forms used are consistent with Code and Rules. Primary difference between form used and Director's Form was a change in Form Number rather than any substantive difference.

(4812) *In re Hopkins,* 2014 WL 1329163 (Bankr. S.D. Iowa 2014) – Debtor's voluntary payments after discharge and Debtor's statements that Debtor intended to repay debt notwithstanding discharge did not except debt from discharge or constitute reaffirmation agreement. Creditor's

acceptance of voluntary payments was not violation of discharge injunction, but creditor's actions to collect after voluntary payments stopped constituted violations of discharge injunction. Creditor was aware of bankruptcy discharge and willfully violated injunction warranting award of actual damages, attorney fees and punitive damages.

(4813) *In re Williams,* Case No. 10-45234 (Bankr. E.D. Mi. 2010) – Reaffirmation Agreement that indicated that account was in default would not be approved absent a waiver of default by the creditor or submission of a new reaffirmation agreement with a new payment schedule that indicates Debtors are not in default for failing to make payments.

(4814) *In re Hayes,* Case No. 10-57345 (Bankr. E.D. Mi. 2010) – Reaffirmation Agreement stricken where both sections of Part IV were signed by attorney. One part states that a presumption of undue hardship exists, while second part states that no presumption of undue hardship exists, creating internal inconsistency.

(4815) *In re Strathres,* Case No. 10-55413 (Bankr. E.D. MI. 2010) - Court denied approval of reaffirmation agreement there Agreement did not contain adequate description of repayment schedule. Reaffirmation agreement failed to provide the term over which the payments would be made and indicated that payments would be $275.33 per month for 0 months.

(4816) *In re Blackstock,* Case No. 09-68632 (Bankr. E.D. Mi. 2010) – Court denied approval of reaffirmation agreement there Agreement did not contain adequate description of repayment schedule. Although Reaffirmation Agreement indicated that payment could vary from month to month, Agreement must disclose at least an approximate current monthly payment amount and the next monthly payment due date.

(4817) *In re Bennett,* Case No. 07-60111 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed by both parties before the entry of a discharge to be enforceable.

(4818) *In re East,* Case No. 09-51865 (Bankr. E.D. Mi. 2009) - Motion to Approve Reaffirmation Agreement signed by creditor 5 days after entry of discharge denied. Reaffirmation Agreement must be signed prior to entry of Discharge. While Reaffirmation Agreement indicated that Debtor signed 5 days prior to discharge, Creditor's signature is undated and fax header on document indicates that creditor did not sign until same day as Motion to Approve filed. Reaffirmation Agreement not signed by all parties until after Discharge entered is unenforceable.

9.118 Terms of Reaffirmed Loan

(4819) *Tanner v. Tanner,* 2014 WL 5488495 (Bankr. N.D. Ohio 2014) – Debtor's sister violated discharge injunction by attempting to collect pre-petition unsecured debt post-discharge. Sister's parents borrowed money secured by their home and loaned money to Debtor. Thereafter, Debtor filed bankruptcy and obtained a discharge. Sister, who had inherited property, refinanced mortgage and then attempted for require Debtor to pay refinanced debt. Sister's actions were attempt to collect pre-petition obligation which was not altered by post-petition refinance of mortgage. There was no evidence that Debtor agreed to waive discharge or reaffirm debt as part of sister's refinance, and Debtor did not receive any consideration independent of the discharged loan in exchange for any alleged reaffirmation. Sanctions awarded for attorney fees, costs, lost wages and mileage incurred by Debtor from and after date on which Sister received notice of the discharge.

(4820) *In re Gavitt,* 2014 WL 4058956 (Bankr. S.D. Ohio 2014) – Reaffirmation agreement that lowered interest rate but otherwise was silent as to any other changes plainly intended to restore terms of original mortgage. Reaffirmation agreement is new contract between Debtor and creditor and parties are free to negotiate any terms they choose. Code does not require that terms of reaffirmation agreement mirror terms of original loan.

9.119 Motion for Approval – Represented Debtor

(4821) *In re Martin,* 2013 WL 10818345 (Bankr. S.D. Ohio 2011) – Attorney represented Debtor in negotiations of reaffirmations but "fulfilled professional duty" in electing not to certify absence of undue hardship, requiring court hearing to consider approval.

(4822) *In re Beckett,* Case No. 10-72900 (Bankr. E.D. Mi. 2011) – Motion to approve "corrected" reaffirmation agreement denied as unnecessary where creditor is Credit Union rendering Section 524(m)(1) inapplicable and Debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.

(4823) *In re Parker,* Case No. 10-66294 (Bankr. E.D. Mi. 2010) – Court approval not required for Reaffirmation Agreement where creditor is Credit Union rendering Section 524(m)(1) inapplicable and Debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.

(4824) *In re Fox,* Case No. 08-45081 (Bankr. E.D. Mi. 2009) – Court denied motion for approval of reaffirmation agreement as unnecessary where Debtor's attorney signed the reaffirmation agreement certifying that it did not impose an undue hardship despite presumption of undue hardship because the Debtor's monthly expenses were $431 greater than their monthly income. Section 524(m)(1) does not require affirmative approval of a reaffirmation by the Court where Debtor's counsel certifies no undue hardship, even where a presumption of undue hardship arises. Section 524(m)(1) requires only that the Court review the reaffirmation agreement where there is a presumption of undue hardship. Section 524(m)(1) allows the Court to set a hearing to consider approval of the reaffirmation agreement but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

(4825) *Ford Motor Credit Co. v. Morton,* 410 BR 556 (6th Cir. BAP 2009) – Bankruptcy Court may not disapprove an attorney certified reaffirmation agreement solely because the Court believes reaffirmation is not in the best interest of the Debtor. The "best interest" requirement is limited to cases involving a Debtor who is not represented by an attorney. Court may review reaffirmation agreements signed by represented Debtor only where a presumption of undue hardship exists, as determined by comparison of Debtor's monthly income and monthly expenses. If there is no presumption of undue hardship, Court lacks authority to deny reaffirmation agreement for represented Debtor.

9.120 Motion for Approval – Unrepresented Debtor

(4826) *In re Johnson,* Case No. 08-49859 (Bankr. E.D. Mi. 2009) – Court denied unrepresented Debtor's Motion for Approval of reaffirmation agreement based on the amount of the debt, the range of potential value of the collateral securing the debt, the nature and amount of Debtor's income and expenses, the understanding of the Debtor as to the meaning and effect of a reaffirmation, the risks attendant to the reaffirmation and finding that approving the reaffirmation would impose an undue hardship. Court further ordered that although the reaffirmation agreement is denied, Debtor may remain in possession of the real property that is the subject of the reaffirmation agreement and continue periodic payments under the loan and applicable agreements, and mortgagee is prohibited from exercising its rights and remedies including foreclosure unless Debtor defaults in the future.

(4827) *In re Weinstein,* Case No. 08-55319 (Bankr. E.D. Mi. 2008) - Court denied unrepresented Debtor's motion for approval of reaffirmation agreement based on the amount of the debt, the range of potential value of the collateral securing the debt, the nature and amount of Debtors income and expenses, the understandings of the Debtor is to the meaning and effect of a reaffirmation, the risks attendant to the reaffirmation and finding that approving the reaffirmation would impose an undue hardship.

(4828) *In re Hitchcock,* Case No. 09-50130 (Bankr. E.D. Mi. 2009) - Court denied approval of Reaffirmation Agreement where Debtor appeared to be in default at time approval sought and Debtor unable to obtain from creditor a waiver of the default or a new Reaffirmation Agreement that indicated Debtor was not in default and provided new payment schedule.

9.121 Court Review – Scope

(4829) *Ford Motor Credit Company v. Hall,* 2017 WL 3084373 (E.D. Mi. 2017) – Section 524(c)(6) allows the Court to disallow reaffirmation agreement if the Court finds that reaffirmation would impose an undue hardship on Debtor or is not in best interest of Debtor. Section 524(m) creates presumption of abuse if Debtor's monthly income is less than Debtor's expenses as shown on Debtor's completed and signed statement in support of the reaffirmation agreement. Court erred in finding presumption of abuse where Debtor's statement in support of reaffirmation agreement showed that Debtor had monthly income in excess of expenses including payment on reaffirmed car. Court lacked evidentiary basis for finding of undue hardship independent of statutory presumption where financial information provided by Debtor at hearing indicated that Debtor had income in excess of expenses but Court disregarded Debtor's unrebutted testimony. Court abused discretion in refusing to approve reaffirmation agreement where record did not support finding of undue hardship. Court also abused discretion by ruling that Debtor could nonetheless retain vehicle as long as Debtor made the payments and enjoined Creditor from repossessing vehicle absent financial default, as attempt to create "ride through" option specifically rejected by Congress in BAPCPA.

(4830) *In re Covington,* 2014 WL 1331156 (Bankr. E.D. Wash. 2014) – Court rejected reaffirmation agreement for tires on vehicle, where Debtor's expenses (not including debt to be reaffirmed) exceeded income. Collateral such as used tires have limited value and it may be possible to replace the tires at a cost less than amount to be reaffirmed. Cost of repossession likely would exceed value of collateral, making repossession highly unlikely. Reaffirmation would be undue hardship because Debtor lacked enough income to make payments on reaffirmed debt and still pay living expenses.

(4831) *In re Brady,* 2014 WL 1330020 (Bankr. E.D. Wash. 2014) – Court must consider whether existence of senior lien would make it impossible for junior creditor to repossess collateral. Court would not approve reaffirmation agreement for tires for Debtor's automobile where automobile was subject to senior lien which precludes junior lienholder from repossession tires under Section 9-335 of Article 9 of the UCC.

(4832) *In re Martin,* 2013 WL 10818345 (Bankr. S.D. Ohio 2011) – To approve reaffirmation agreement, court must find that agreement is in best interest of Debtor and does not impose an undue hardship on Debtor or dependents. "Best interest" standard depends on whether the reaffirmation is financially or economically beneficial to the Debtor, considering whether the Debtor was fully informed, whether debt is secured or unsecured, whether and to what extent Debtor has equity in collateral, likelihood of repossession in the debt is not reaffirmed extent to which collateral is necessity, Debtor's payment history, and whether Debtor has alternatives other than reaffirmation. Undue hardship is mathematical question, comparing Debtor's income to expenses to determine if Debtor has sufficient funds to make payments. Court approved reaffirmations of mortgages on 8 parcels of non-residential real property that Debtors rented out. Debtors were fully informed of alternatives, properties generated positive cash flow, and Debtors remained current on all mortgage payments both pre- and post-petition. If reaffirmations are not approved, Debtors are likely to lose properties in foreclosures and would impair Debtors' ability to enjoy fresh start.

(4833) *In re Fox,* Case No. 08-45081 (Bankr. E.D. Mi. 2009) –Section 524(m)(1) requires only that the Court review the reaffirmation agreement where there is a presumption of undue hardship. Section 524(m)(1) allows the Court to set a hearing to consider approval of the reaffirmation agreement but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

(4834) *Ford Motor Credit Co. v. Morton,* 410 BR 556 (6th Cir. BAP 2009) – Bankruptcy Court may not disapprove an attorney certified reaffirmation agreement solely because the Court believes reaffirmation is not in the best interest of the Debtor. The "best interest" requirement is limited to cases involving a Debtor who is not represented by an attorney. Court may review reaffirmation agreements signed by represented Debtor only where a presumption of undue hardship exists, as determined by comparison of Debtor's monthly income and monthly expenses. If there is no presumption of undue hardship, Court lacks authority to deny of reaffirmation agreement for represented Debtor.

9.122 Hearing Required

(4835) *In re Parker,* Case No. 10-66294 (Bankr. E.D. Mi. 2010) – Court approval not required for Reaffirmation Agreement where creditor is Credit Union rendering Section 524(m)(1) inapplicable and Debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.

(4836) *In re Fox,* Case No. 08-45081 (Bankr. E.D. Mi. 2009) –Section 524(m)(1) allows the Court to set a hearing to consider approval of the reaffirmation agreement where presumption of undue hardship exists, but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

9.123 Effect of Denial

(4837) *Ford Motor Credit Company v. Hall,* 2017 WL 3084373 (E.D. Mi. 2017) – Section 524(c)(6) allows the Court to disallow reaffirmation agreement if the Court finds that reaffirmation would impose and undue hardship on Debtor or is not in best interest of Debtor. Section 524(m) creates presumption of abuse if Debtor's monthly income is less than Debtor's expenses as shown on Debtor's completed and signed statement in support of the reaffirmation agreement. Court erred in finding presumption of abuse where Debtor's statement in support of reaffirmation agreement showed that Debtor had monthly income in excess of expenses including payment on reaffirmed car. Court lacked evidentiary basis for finding of undue hardship independent of statutory presumption where financial information provided by Debtor at hearing indicated that Debtor had income in excess of expenses but Court disregarded Debtor's unrebutted testimony. Court abused discretion in refusing to approve reaffirmation agreement where record did not support finding of undue hardship. Court also abused discretion by ruling that Debtor could nonetheless retain vehicle as long as Debtor made the payments and enjoined Creditor from repossessing vehicle absent financial default, as attempt to create "ride through" option specifically rejected by Congress in BAPCPA.

(4838) *Venture Bank v. Lapides,* Case No. 14-3085 (8th Cir. 2015) – To be enforceable, reaffirmation agreement must contain all essential elements of a contract under state law and must be executed prior to entry of discharge. "Change in Terms" agreement the extended maturity date of loan 6 months and contained unqualified promise of Debtor to pay was invalid where agreement was entered after discharge and without court approval. Creditor could have elected to allow Debtor to continue to make voluntary payments without execution of agreement. But once agreement was signed, subsequent payments were not voluntary and violated discharge injunction, even where lender fully complied with terms of Agreement and extended (multiple times) the maturity date of the loan. That Debtor received consideration for terms of Agreement what would have been sufficient to support agreement, failure to execute or file agreement within time permitted under Section 524 rendered agreement unenforceable by lender.

(4839) *In re Cockrell,* 2013 WL 4047184 (Bankr. W.D. Ark. 2013) – When court denies approval of reaffirmation agreement as not in Debtor's interest, Debtor can retain property as long as Debtor maintains payments, such that denial of approval of reaffirmation does not penalize Debtor. Debtor indicated intent to reaffirm and signed reaffirmation agreement, such that stay was not lifted nor could creditor rely on lack of reaffirmation to declare default. Under the circumstances, there was no reason for court to approve reaffirmation as doing so would not benefit Debtor (Debtor could retain property either way as long as payments were made) but approval would subject Debtor to deficiency claim if Debtor later defaulted.

(4840) *In re Johnson,* Case No. 08-49859 (Bankr. E.D. Mi. 2009) – Court denied unrepresented Debtor's Motion for Approval of reaffirmation agreement. Court further ordered that Debtor may remain in possession of the real property that was the subject of the reaffirmation agreement and continue periodic payments under the loan and applicable agreements, and mortgagee is prohibited from exercising its rights and remedies including foreclosure unless Debtor defaults in the future.

9.124 Effect of Approval

(4841) *Pickerel v. Household Realty Corp.,* 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

9.125 Rescission of Reaffirmation Agreement – By Debtor

(4842) *In re O'Connor,* 2015 WL 5692037 (Bankr. E.D.N.Y. 2015) – Debtor may rescind reaffirmation agreement not later than entry of discharge or 60 days after agreement is filed with court. Once deadline has expired, Court has no authority to grant Debtor relief from reaffirmation.

(4843) *In re Jones,* 2015 WL 237240 (Bankr. N.D. Ohio 2015) – Section 524 allows Debtor to revoke reaffirmation agreement by the later of discharge or 60 days after the agreement is filed with the court. Rescission requires only timely notice to the creditor and does not require order of court or other action by court. "Rescission of Reaffirmation Agreement" filed with Court before expiration of deadline operated to rescind agreement without further order of court.

(4844) *In re Larson,* 2012 WL 3782547 (Bankr. W.D. Pa. 2012) – Creditor's conduct post-discharge in attempting to collect debt, which included denying existence of reaffirmation agreement and then refusing to comply with it, provided equitable grounds for court to reopen and rescind reaffirmation agreement. Debtor reaffirmed obligation secured by Debtor's vehicle. Debtor's request to reaffirm the debt indicated that debt was current. Court conducted three separate hearings on issue of reaffirmation but creditor failed to appear for any of the hearings. Court ultimately approved reaffirmation agreement on understanding that Debtor was current in payments. Two weeks after entry of discharge, creditor contacted Debtor and stated that Debtor was three payment behind and demanded immediate payment, and denying existence of reaffirmation agreement. Before Debtor had an opportunity to make payments, creditor repossessed the car. Debtor attempted to pay the amount past due and retake possession of the car, but creditor refused to accept payment and refused to return vehicle. Creditor then sold vehicle at auction and stated that Debtor would be liable for deficiency. Rescission is normally governed by Section 524(c) which requires rescission prior to discharge or within 60 days of making reaffirmation, whichever occurs later. Debtor's discharge date was the later of the two and Debtor had not rescinded by that date. However, creditor's conduct, first in making agreement, then denying its existence, and then refusing to comply provided ample support to rescind reaffirmation agreement under Section 105.

(4845) *Salyersville National Bank v. Bailey,* 2011 WL 6141644 (6th Cir. BAP 2011) – Reaffirmation agreement would be rescinded where reaffirmation was based on mutual mistake of creditor and Debtor. Reaffirmation agreement is valid and enforceable only to extent it would be enforceable under applicable nonbankruptcy law. However, court will not rescind agreement merely because later events make

reaffirmation an imprudent decision. Reaffirmation was predicated on creditor holding a valid mortgage on Debtor's residence. Chapter 7 trustee thereafter brought action to avoid mortgage as never properly recorded and trustee and creditor agreed that the property would be sold with the proceeds being retained by the estate, with the bank filing an unsecured claim for the amount of the debt. Effect of claim and settlement of litigation was to leave bank as unsecured creditor. Erroneous assumption that bank held validly perfected secured claim was mistake of material fact that went to the very root of the reaffirmation agreement.

(4846) *Pickerel v. Household Realty Corp.,* 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Debtors' execution of second reaffirmation agreement that made minimal changes to first reaffirmation agreement did not constitute rescission of first agreement. Rescission requires Debtor to give notice of rescission to creditor. Although no particular from of notice is required, notice should adequately convey to creditor the Debtor's intent to no longer be bound. Debtors' execution of a second reaffirmation agreement does not indicate intent to no longer be bound by reaffirmation agreement. Code does not prohibit modification or properly executed reaffirmation agreement and modification does not operate as rescission or revocation. Substance of reaffirmation agreements was virtually identical and second reaffirmation agreement made only one minor change to one term of the first agreement. Debtor's argument that second reaffirmation agreement was not enforceable as the agreement was filed 4 days after the deadline under Rule 4008. However, Section 524(c)(3) does not impose time limit for filing, and only requires that agreement be "timely" filed and without regard to whether a discharge has been entered. As long as the reaffirmation agreement is executed prior to entry of discharge, Code does not impose time limit to file and there is no prohibition against filing timely executed reaffirmation agreement after entry of discharge.

9.126 Rescission of Reaffirmation Agreement – By Creditor

(4847) *In re Jenkins,* 2017 WL 7069076 (Bankr. S.D. Ohio 2017) – Section 524(c)(4) provides Debtor with statutory right of redemption. Creditor's insertion in Reaffirmation Agreement of provision that purportedly allowed Creditor to rescind was enforceable where provisions were buried in section headed "Disclosure Statement and Instructions to Debtor(s)" and inserted paragraph in specific provision captioned "Can you cancel the agreement?" Added provision was not conspicuous, not in bold type face or capital letters, but instead blended in with balance of type on form. Section 524(k)(2) requires any disclosures of terms clear and conspicuous. Although Form Reaffirmation Agreement is "Director's Form" that is not mandatory, parties should not vary terms unless alterations are negotiated and enforceable under non-bankruptcy law and alterations do not obfuscate, impede or defeat streamlining of bankruptcy process. Party to reaffirmation agreement cannot bootstrap contract terms into reaffirmation agreement through inconspicuous additions to statutory disclosures on form represented to be Director's Form. Allowing Code required disclosures to be compromised with contractual terms or other language confuses and defeats specific purpose of disclosures – to provide debtor with important information debtor needs to know concerning consequences of entering into reaffirmation agreement.

(4848) *In re Jenkins,* 2017 WL 7058140 (Bankr. S.D. Ohio 2017) – Rejecting creditor's alterations to Reaffirmation Agreement and incorporating ruling in *In re Jenkins,* 2017 WL 7069076 (Bankr. S.D. Ohio 2017).

9.127 Reinstatement of Rescinded Agreement

(4849) *In re Slack,* Case No. 09-42599 (Bankr. E.D. Mi. 2009) – Stipulation to Reinstate Reaffirmation Agreement would not be approved by Court. While Code permits a Debtor to rescind a reaffirmation agreement, nothing in the Code permits a Debtor to later "withdraw" that rescission and reinstate the reaffirmation agreement. Denial was without prejudice to parties to prepare and submit a new reaffirmation agreement as long as that could be done prior to entry of discharge.

9.128 Jurisdiction to Enforce

(4850) *In re Gavitt,* 2014 WL 4058956 (Bankr. S.D. Ohio 2014) – Upon approval of reaffirmation agreement, agreement becomes new, post-petition contract between Debtor and creditor. State Court and not bankruptcy court has jurisdiction over actions based on alleged breaches of reaffirmed debt.

9.129 Relationship to Assumed Leases

(4851) *In re Ambro,* Case No. 17-46787 (Bankr. E.D. Mi 2018) – Section 524 regarding reaffirmation agreements does not apply to lease assumptions. Leases are assumed under Section 365, not reaffirmed under Section 524. Where Chapter 7 Trustee does not assume or reject unexpired lease, Debtor has right to assume lease under Section 365(p)(2)(A) by notifying lessor in writing that Debtor desires to assume lease. Lessor may, at its option, notify Debtor that is willing to have lease assumed by Debtor. Upon acceptance by lessor, lease assumption is self effectuating without Court intervention.

(4852) *Williams v. Ford Motor Credit Company,* 2016 WL 2731191, 2016 U.S. Dist. LEXIS 62402 (E.D. Mi. 2016) – Assumption of unexpired lease is procedure separate from that of reaffirmation. While reaffirmation has various procedural requirements and must be approved by Court, Section 365(p) does not impose any procedural requirements other than declaration by Debtor of intent to assume. Assumption does not require court authorization to be valid and enforceable. To subject assumption under Section 365(p) to same requirements as reaffirmation under Section 524(c) would render Section 365(p) irrelevant, and there is no indication in Section 365 that Congress intended same procedural safeguards for reaffirmations to apply to assumptions. Only requirement is that Debtor notify lessor in writing of intent to assume lease within 30 days of notification by lessor that lessor is willing to have lease assumed. 30 day window is for protection of lessor, not Debtor, and Debtor who did not notify lessor within 30 days but did notify lessor in writing of intent to assume was binding on lessor and Debtor where lessor accepted otherwise untimely assumption.

(4853) *In re Thompson,* 2010 WL 4259959 (Bankr. W.D. Mi. 2010) – Section 524(c) does not apply to post-discharge lease assumption agreements. Section 365(p)(2)(C) allows parties to enter into lease assumption agreements post-discharge, with the resulting agreement being treated as post-petition obligation as to which neither automatic stay nor discharge injunction applies. Lease assumption is not subject to procedural requirements for reaffirmation agreements under Section 524(c).

(4854) *In re Jackson*, Case No. 06-44335 (Bankr. E.D. Mich.) The requirements of § 524(c) do not apply to leases assumed in Chapter 7 cases pursuant to §365(p). The bankruptcy court found that a lease assumed under §365(p) does not require a reaffirmation agreement. The court noted that §365(p) does not specifically mention any of the rights and disclosures required under §524. The court noted that §362(h)(1)(A) differentiates reaffirmation agreements and lease assumptions.

(4855) *In re Gundy*, Case No. 07-57777, (Bankr. E.D. Mich. 2008) - 11 USC §365(p) creates a specific type of agreement, similar to but not actually a reaffirmation agreement, which allows a Debtor to assume a lease of personal property. To assume the lease, the court determined the parties need only comply with 11 USC 365(p).

(4856) *In re Murray*, Case No. 08-67847 (Bankr. E.D. Mich. 2009).

O. Redemption

9.130 Generally

(4857) *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) - 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 sheriffs deed and preserving second mortgage holder's interest.

(4858) *In re Madison Heights Group, Inc.,* 2013 WL 8059810 (Bankr. E.D. Mi. 2013), *reh'g denied,* 2014 WL 1075809 (Bankr. E.D. Mi. 2014) – Redemption requires payment of the obligation in full. Plan that proposes to "cure" default over time does not constitute redemption unless amount paid equals full debt within redemption period, and redemption is effective only on final payment.

(4859) *In re Perales,* 2012 WL 902790 (6th Cir. BAP 2012) - Debtor may redeem consumer good from a lien securing a dischargeable consumer debt if the property is exempt or has been abandoned. Debtor must pay lien holder in full, at the time of redemption, the amount of the "allowed secured claim" that is secured by the collateral. Court may determine value of secured claim on motion with notice to the secured creditor. However, court is not required to hold an evidentiary hearing to consider the valuation of the collateral. Debtors Motion to Redeem attached Edmonds.com printout for the value of the vehicle. Creditor appeared at the hearing but did not present any evidence regarding the value of the vehicle other than to insist that the redemption amount should be the same as the balance outstanding on the loan. Court properly accepted Debtor's proposed valuation were that valuation was the only evidence presented to the court.

(4860) *In re Pearsall,* 2010 WL 3607421 (Bankr. N.D. Ohio 2010) – Section 722 permits redemption only when the underlying debt is otherwise dischargeable. Court could not decide Debtor's Motion to Redeem while creditor's adversary proceeding to have debt excepted from discharge was pending.

(4861) *In re Leflore,* Case No. 04-64226 (Bankr. E.D. MI. 2010) - Motion to Redeem Automobile denied without prejudice where Motion failed to state a definite and specific amount to be paid. Statement that the amount would be "the amount owing pursuant to the Chapter 13 Trustee's records" was too uncertain to permit court to approve redemption.

9.131 Deadline to Redeem

(4862) *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) - 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 sheriffs deed and preserving second mortgage holder's interest.

(4863) *In re Thompson,* 2015 WL 5604396 (Bankr. E.D. Tn. 2015) – Section 521(a)(2)(A) requires Debtor to file statement of intention to redeem within 30 days of petition date, and must perform that intention within 30 days after the date first set for the meeting of creditors. The Court can extend either or both deadlines if timely requested. Right to redeem exists irrespective of whether the automatic stay is in place, such that Trustee's Notice of No Assets, which lifts stay, did not terminate Debtor's right to redeem. Debtor timely filed statement of intention to redeem by filing, simultaneously with the petition, a statement of intention that listed collateral and indicated an intent to redeem. However, Debtor did not timely perform intention where Debtor offered $2500 as alleged value of car while actual value was $5,225.00. Redemption requires payment of the full amount of the secured debt based on the current retail value of the collateral.

(4864) *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.

9.132 Value of Property Being Redeemed

(4865) *In re Thompson,* 2015 WL 5604396 (Bankr. E.D. Tn. 2015 – Section 521(a)(2)(A) requires Debtor to file statement of intention to redeem within 30 days of petition date, and must perform that intention within 30 days after the date first set for the meeting of creditors. The Court can extend either or both deadlines if timely requested. Debtor did not timely perform intention where Debtor offered $2500 as alleged value of car while actual value was $5,225.00. Redemption requires payment of the full amount of the secured debt based on the current retail value of the collateral.

(4866) *In re Beckum,* 2014 WL 1873299 (Bankr. C.D. Ill. 2014) – Valuation for purposes of redemption is determined under Section 506(a)(2) which requires replacement or retail value, regardless of proposed disposition of collateral. Debtor presented only evidence of liquidation value which does not meet evidentiary standard. Creditor testified as to anticipated wholesale cost plus cost of preparation for sale plus unspecified amount for "dealer markup". Neither party presented evidence of actual retail value of car, precluding court for determining proper redemption amount.

(4867) *In re Perales,* 2012 WL 902790 (6th Cir. BAP 2012) - Debtor may redeem consumer good from a lien securing a discharge will consumer debt if the property is exempt or has been abandoned. Debtor must pay lien holder in full, at the time of redemption, the amount of the "allowed secured claim" that is secured by the collateral. Court may determine value of secured claim on motion with notice to the secured creditor. However, court is not required to hold an evidentiary hearing to consider the valuation of the collateral. Debtors Motion to Redeem attached Edmonds.com printout for the value of the vehicle. Creditor appeared at the hearing but did not present any evidence regarding the value of the vehicle other than to insist that the redemption amount should be the same as the balance outstanding on the loan. Court properly accepted Debtor's proposed valuation were that valuation was the only evidence presented to the court.

(4868) *In re Gehrig,* 2011 WL 2619552 (Bankr. N.D. Ohio 2011) – Standard from "Condition Report" is "particularly unhelpful" in valuing the vehicle to be redeemed. From does not indicate particular "trim level" which can significantly impact valuation. From has "check boxes" for features, some, many or all of which may be standard features depending on the trim level and would be already included in the valuation rather than "add ons". From indicates that the person noting the condition of the vehicle may or may not have actually viewed the vehicle and if not, fails to identify the person who provided the information. Proper redemption value in this case will be the value that most closely approximates the selling price a retailer dealer would charge for a similar vehicle using retail price of a like vehicle to be the starting point. Helpful and necessary information is: (1) year, (2) model, (3) trim, (4) options, (5) mileage, (6) condition, and (7) the basis, e.g. inspection or third party report, upon which the person makes the evaluation. Lender's appraisal was more accurate as person actually viewed the vehicle and attached photographs; and appraisal more accurately reflected both Edmunds and NADA values, adjusted for repairs needed to the vehicle.

(4869) *In re Provost,* Case No. 10-61226 (Bankr. E.D. Mi. 2010) – Valuation for purposes of redemption is based on replacement value of the property as of the date of the petition without deduction for costs of sale or marketing, and based on price retail merchant would charge for property consideration age and condition of the property at the time of valuation. Debtor's Appraiser who actually drove the vehicle in a road test was more thorough than Creditor's appraiser who asked dealers for "asking price" and adjusted for mileage and condition of vehicle. Debtor's Appraiser's figure held to be the redemption price.

(4870) *In re Pearsall,* 2010 WL 3607421 (Bankr. N.D. Ohio 2010) – An individual Debtor may redeem consumer goods from a lien securing a dischargeable consumer debt, if the property is exempt under § 522 or has been abandoned under § 554, by paying the lienholder in full at the time of redemption the amount of the "allowed secured claim" that is secured by the collateral. The value of the collateral (and the amount of the secured claim) shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use on a plan affecting such creditor's interest. Where Debtor proposes to redeem and retain, value is the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined. Debtor's purchase price of the vehicle was relevant where Debtor purchased the car only one month prior to filing bankruptcy, leading to conclusion that property is worth closer to purchase price than significantly deflated opinion offered by Debtor. Purchase price would be discounted by expenses for recondition and prospective repair costs as those would not been needed to put the car in its current condition and those items were all performed when Debtor purchased the car and court would further reduce value slightly in light of additional mileage since Debtor purchased the vehicle.

(4871) *In re Pharr,* Case No. 10-47531 (Bankr. E.D. Mi. 2010) – Valuation for purposes of redemption is date of Order for Relief. Creditor is not permitted to challenge the value based on Debtor's alleged failure to maintain or repair the vehicle pre-petition. Even if Debtor had contractual obligation to maintain vehicle and breached that obligation, operative issue is condition of property on date of petition regardless of how or why it came to be in that condition. For redemption of vehicle, starting point is either NADA Official Used Car Guide or Kelley Blue Book or some combination of the two. Either party is then free to present additional expert evidence. "Private Party Value" is not proper standard as Section 721 requires "the price a retail merchant would charge". Kelley Blue Book retail value assumes "excellent" condition. For vehicle in less than excellent condition, court would start with "Retail" value and subtract estimated costs of repair and allowances for overall condition of vehicle.

9.133 Enforcement of Order for Redemption

(4872) *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".

9.134 Failure to Redeem

(4873) *In re McCray,* 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must "not retain possession". Debtor who proposed to "pay and stay" did not propose to reaffirm or redeem. Debtor's attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

P. "Ride Through"

9.135 Prohibited

(4874) *In re McCray,* 2017 WL 5956639 (Bankr. E.D. Mi. 2017) – Code requires Chapter 7 Debtor to either reaffirm, redeem or surrender collateral. Debtor cannot retain collateral without approved reaffirmation agreement or redemption and must "not retain possession". Debtor who proposed to "pay and stay" did not propose to reaffirm or redeem. Debtor's attempt to have collateral ride through left case subject to dismissal under Section 707 and 727.

Q. Lien Strips

9.136 Permitted

(4875) *Bank of America v. Brown,* 2014 WL 5437356 (11th Cir. 2014) – Wholly unsecured second mortgage can be stripped by Debtor from property, following *McNeal.*

(4876) *Bank of America v. Glaspie,* 2014 WL 5462421 (11th Cir. 2014) – Wholly unsecured second mortgage can be stripped by Debtor from property, following *McNeal.*

(4877) *Bank of America v. Caulkett,* ____ S.Ct. ____(2015) – Debtor cannot strip wholly unsecured second mortgage in Chapter 7 case. Court adhered to definition of "allowed secured claim" announced in *Dewsnup* that claim, unless validly objected to, is "allowed" and claim is "secured" if there is collateral for the claim. Nothing in *Dewsnup* conditioned "allowed secured claim" on equity. Court tangentially mentioned, but did not discuss, impact of decision in Chapter 13 cases.

(4878) *Bank of America v. Nemcik,* ____ S.Ct. ____(2015) – Debtor cannot strip wholly unsecured second mortgage in Chapter 7 case. Court adhered to definition of "allowed secured claim" announced in *Dewsnup* that claim, unless validly objected to, is "allowed" and claim is "secured" if there is collateral for the claim. Nothing in *Dewsnup* conditioned "allowed secured claim" on equity. Court tangentially mentioned, but did not discuss, impact of decision in Chapter 13 cases.

(4879) *In re Bonds,* 2014 WL 1796691 (Bankr. E.D. La. 2014) – Debtor can bifurcate partially secured lien and avoid wholly unsecured lien where lien in question is non-consensual lien. *Dewsnup* applies only to consensual liens and does not prevent bifurcation or stripping of judgment liens that are partially or wholly unsecured.

(4880) *Malone v. Citibank, NA,* 2013 WL 1342942 (Bankr. N.D. Ga. 2013) – Wholly undersecured claim would be voided and extinguished upon entry of Chapter 7 discharge.

(4881) *In re Almeida,* 2013 BR 1163777 (Bankr. M.D. Fl. 2013) – Condominium Association lien is not within sphere of protection from valuation under Section 506. Where condo lien is second lien and amount owed on first lien exceeds value of property, Debtor in Chapter 7 can strip condo lien from the property using Section 506.

(4882) *McNeal v. GMAC Mortgage, LLC,* 2012 WL 1649853 (11th Cir. 2012) – Debtor can strip a wholly unsecured second mortgage in Chapter 7. Court distinguished *Dewsnup* as *Dewsnup* involved partially secured mortgage while instant case involved property that was worth less than first mortgage balance leaving second mortgage entirely unsecured.

(4883) *In re Lavelle*, Case No. 09-72389 (Bankr. E.D.N.Y. 2009) – Debtor can strip wholly unsecured second mortgage in Chapter 7. Court did extensive review of case law and concluded that *Dewsnup* was distinguishable.

9.137 Not Permitted

(4884) *Ryan v. United States,* 725 F.3d 623 (7th Cir. 2013) – Chapter 13 Debtor cannot strip lien federal tax lien where line is partially secured. Tax lien encumbered Debtor's personal property although lien was for taxes totaling over $130,000 but Debtor's personal property had value of only $1,625.00. *Dewsnup* precludes any attempt to strip or bifurcate lien where lien is secured by even one dollar of value.

(4885) *In re Saric,* 2013 WL 6536752 (Bankr. N.D.N.Y. 2013) – Debtor cannot strip wholly unsecured lien in Chapter 7 proceeding.

(4886) *Palomar v. First American Bank,* 2012 WL 4739407 (N.D. Ill. 2012), *aff'd,* Case no. 12-3492 (7th Cir. 2013) – Rejecting *McNeal,* court held that Debtor cannot strip lien in Chapter 7. *Dewsnup's* determination that stripping down the primary lien on the Debtor's residence is impermissible under Chapter 7 applies "with equal force and logic" to the stripping off of a secondary lien.

(4887) *Wachovia Mortgage v. Smoot* 2012 WL 4344599 (E.D.N.Y. 2012) – Rejecting *McNeal* and adopting *In re Talbert,* 344 F.3d 555 (6th Cir. 2003), Debtor cannot strip off wholly unsecured lien in Chapter 7.

(4888) *Christo v. Wells Fargo Bank,* 2012 WL 3839238 (Bankr. N.D. Ohio 2012) – Debtor in Chapter 7 cannot rely on Section 1322(b)(2) as basis for lien strip. Section 1322 does not apply in Chapter 7 proceeding. Under Chapter 7, there is no basis for a Debtor to avoid an otherwise valid mortgage or consensual lien. Although *Dewsnup* involved partially secured lien, rational of that case applies equally to wholly undersecured liens, precluding lien strip in Chapter 7.

(4889) *In re Richins,* 469 BR 375 (Bankr. D. Utah 2012) – Cannot strip wholly unsecured lien in Chapter 7.

(4890) *Dhillon v. JP Morgan Chase Bank,* 2011 WL 2134051 (Bankr. S.D. Ill. 2011) – Under the rationale set forth in *Dewsnup* and subsequent cases, the Court need only determine whether the defendant's claim in the instant case is "allowed" under § 502 and is "secured" by a valid lien. Fact that lien is second mortgage that is entirely unsecured because property is worth less than amount owed on superior lien does not render second mortgage subject to lien strip.

(4891) *Cushion v. Pines Investment Co.,* Case No. 10-6604 (Bankr. E.D. Mi. 2011) – Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 Debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

(4892) *Stewart v. CitiFinancial, Inc.,* Case No. 10-6713 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 Debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

(4893) *Champney v. Comerica Bank,* Case No. 10-6841 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 Debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

(4894) *Hares v. Sage Financial Ltd.,* 2010 WL 2834150 (Bankr. S.D. Ohio 2010) - Debtors cannot strip lien in Chapter 7 proceeding. Section 506 is limited to property in which the estate has an interest. Debtors claimed as exempt any equity in the property and no party objected to the exemption. Further, Chapter 7 trustee had filed Report of No Assets resulting in abandonment of the property by the estate. Even if property was still property of estate, Supreme Court decision in *Dewsnup* prohibits lien strip in Chapter 7 proceeding. Creditor's failure to file a proof of claim does not affect the property interest created by a lien. Attempt to strip lien did not distinguish case from *Dewsnup* merely because the Debtors in *Dewsnup* were attempting to decrease the value of the secured claim of the mortgage holder, while Debtors in this case were attempting to completely avoid Defendant's lien. Following *Dewsnup,* Sixth Circuit in *Talbert* prohibited Chapter 7 Debtor's attempt to wholly unsecured lien.

9.138 Value of Property

(4895) *In re Fox,* 2012 WL 3834832 (Bankr. E.D. Tn. 2012) – Bank's appraisal more accurately estimated value of home. Neither Bank's appraiser nor Debtor's appraiser were able to locate good comparable sales. Bank's comparable were closer in location and more accurately reflected actual purchase price when Debtor acquired property, adjusted for later downturn in housing market. Bank established that property was worth at least amount owed on first mortgage precluding stripping of Bank's second mortgage.

R. Trustee

9.139 Election of Trustee

(4896) *In re Hardge,* Case No. 15-48255 (Bankr. E.D. Mi. 2015) – Motion to Confirm Election of Trustee must be served on entire matrix with 14 days' notice to respond. Motion stricken by court where certificate of service indicated that only ECF participants were served but lacked service on all non-ECF parties.

9.140 Removal of Trustee

(4897) *In re Wring,* Case no. 14-8049 (6th Cir. BAP 2015) – Court will remove Chapter 11 Trustee only on showing of incompetence, misconduct in office, conflict of interest, unwillingness to perform duties, or violations of fiduciary duties owed to estate and creditors. Trustee had been managing properties for 3 years and Debtor did not allege any undisclosed conflicts, incompetence or wrongdoing on part of trustee. Debtor's disagreements with trustee over how to best manage estate did not rise to level of removal of trustee where actions of trustee fell within business judgment of trustee. Bankruptcy court will not be involved in day to day operations of trustee and will afford trustee wide latitude and discretion in operation of estate.

(4898) *In re Alexander,* 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor's Motion to Appoint New Trustee denied where, even if basis for removing current trustee was shown, appointing new Trustee would be futile act. Trustee abandoned cause of action against Debtor's prior counsel. Debtor failed to take any action to prosecute that cause of action until after statute of limitations expired. Debtor then filed Motion to Appoint New Trustee to prosecute action. Upon abandonment, claim ceased to be property of estate. Therefore, even if new trustee was appointed, that trustee would lack ability to prosecute claim or to otherwise exercise control over property that is not property of estate.

(4899) *Shapiro v. French,* Case No. 09-14179 (E.D. Mi. 2010) – Chapter 7 Trustee properly removed in light of conflict of interest in investigating and determining whether to pursue possible claims against himself and his law firm. Trustee failed to investigate whether Trustee was negligent in handling accounting malpractice adversary case and in failing to investigate potentially avoidable insider transfers. Allegations would have warranted investigation by neutral and disinterested party. Section 324 authorizes Court to remove trustee for "cause", such

as (but not limited to) incompetence, misconduct in office, conflict of interest or other violations of fiduciary duties. Trustee's conflict of interest in investigating and pursuing claims against himself and his firm warrant removal.

9.141 Suspension of Trustee

(4900) *Pereira v. U.S. Department of Justice*, Case No. 16-2599 (S.D. N.Y. 2016) – Office of United States Trustee has authority to suspend trustee who is abusive or overly aggressive and biased. Trustee not entitled to formal hearing before suspension and UST is not required to meet with the Trustee during the process, although UST has discretion to do so. Action of UST will not be overturned unless it was unreasonable and without cause based on administrative record. Decision to suspend Trustee was amply supported in 574-page record that was both comprehensive and voluminous and the decision of UST was detailed and exhaustive. Trustee's conduct violated UST requirement that Trustee be courteous and accessible to all parties with reasonable inquiries or comments and must be free pf prejudice against any individual.

9.142 Duty to Preserve or Protect Assets

(4901) *New Products Corporation v. Tibble,* 2016 WL 245908 (Bankr. W.D. Mi. 2016), *aff'd,* 2017 WL 4216081 (W.D. Mi. 2017), *affd*, 2018 WL 1916216 (6th Cir. 2018) – Trustee has duty to protect assets consistent with ordinarily prudent person in conduct of private affairs under similar circumstances and with a similar object in view. Trustee should not spend money that would otherwise go to unsecured creditors to prop up collateral of particular creditor. Trustee does not have duty to protect asset where liens on asset far exceed value, as any money expended would solely benefit secured creditor while depleting the few assets of estate. Trustee not liable to secured creditor for diminution in value of building where, after Chapter 7 filed, Trustee did not secure building, allowing "scrappers" to remove wires, steel beams, piping, light fixtures, plumbing fixtures, furnaces and support columns. As of petition date, building value was less than half of what was owed on secured claim. Although "scrapping" undoubtedly adversely affected value of property, trustee not liable for failure to secure where only secured creditor would have benefitted at expense of unsecured creditors and secured creditor had other remedies available to it including stay relief and motion to compel abandonment for creditor to protect its rights.

(4902) *In re Carvalho,* Case No. 14-45654 (Bankr. E.D. Mi. 2015) – Court would not approve Trustee's request to spend $11,500 to fence property while asbestos remediation took place, where trustee did not also propose security to protect property and it was highly likely that if fence was installed it would be removed by scrappers well before remediation work would be completed.

9.143 Sale or Disposition of Assets – Section 363

(4903) *In re Gardens Regional Hospital,* Case No. 16-17463 (Bankr. D.C. Ca. 2017) - Section 363 and Section 541 allow sale of assets of nonprofit institution only in accordance with nonbankruptcy law. Although State law required Attorney General approval whenever non-profit corporation which operates or controls a health facility attempts to sell its assets, State not required to approve sale of hospital where hospital had shut down completely and discharged all patients. Closed, non-operating hospital does not qualify as "health facility" meaning that Debtor is not required to obtain Attorney General consent.

(4904) *In re Kennedy,* 2016 WL 3226244 (Bankr. E.D. Tn. 2016) – Trustee could sell annuity owned by Debtor. Annuity represented contract right to future stream of payments. Trustee would not be required to pay Debtor lump sum value of exempt portion of annuity on sale. Instead, Debtor would retain first right to future payments until exempt amount received, following which the purchaser would receive all future payments. Proposed sale would generate $6100 for estate while allowing Debtor to retain future distributions until exempt amount paid in full, with balance paid to annuity purchaser. Proposed sale of the Annuity meets the two standards for non-ordinary course sales under § 363(b): (1) business justification and (2) good faith.

(4905) *In re Talbut,* 2015 WL 5145598 (Bankr. N.D. Ohio 2015) – Trustee can sell Debtor's LLC membership interest but sale is subject to requirements of LLC Operating Agreement. Trustee can sell property of estate free and clear of any interest in the property of an entity other than the estate if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Interests of other members of LLC are not liens and are not in bona fide dispute, and neither party argued that the other members or the LLC could be compelled to accept money satisfaction. Operating agreement provision that precluded any member from taking action that would make it impossible to carry on LLC's business did not apply as sale of Debtor's 25% membership interest had no effect on LLC's ability to operate. However, Operating Agreement's right of first refusal is operative and Trustee must comply with that provision under state law. Accordingly, applicable non-bankruptcy law does not permit sale of property free and clear of Operating Agreement or rights of other members. As no provision of Section 363 allows sale of the interests of the estate without complying with Operating Agreement, Trustee's proposed sale of the property could not be approved.

(4906) *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.

(4907) *In re Priva Technologies, Inc.,* Case no. 11-12574 (Bankr. W.D. Mi. 2014) – Proposed transfer of intellectual property rights amount to sale under Section 363 and not "license" of technology where estate would not retain any interest in transferred rights and would retain only right to future payment stream such that sale was subject to rights of secured creditor. Proposed sale of property would not generate sufficient proceeds to pay secured creditor in full, such that sale can occur free and clear of liens only if secured creditor consents as the estate itself has nothing to gain from proposed transaction. Proposed sale, at most, if everything materialized over the proposed future payment stream (based on uncertain licensing fees) would produce little more than a hope that the estate may receive some contingent payments, which is not sufficient to overcome secured creditor's rights in the collateral. While proposed sales are normally within business judgment of trustee, court will not defer to trustee where property to be sold is fully encumbered, as trustee should not be permitted to gamble with property of

secured creditor.

(4908) *In re Ripberger,* 2014 WL 5474057 (Bankr. E.D. Ky. 2014) While Section 363 applies to jointly owned property, Section 363 does not give standing to non-Debtor co-owner to request sale.

(4909) *Gentile v. DiGiacomo,* Case no. 12-071 (1st Cir. BAP 2013) – Debtor lacks standing to oppose sale of property under Section 363 where Debtors could not demonstrate that denial of motion would produce funds in excess of that necessary to pay creditors in full and produce additional funds for payment to Debtors. Where estate is not sufficient to pay claims in full whether or not the sale is approved, Debtors lack pecuniary interest in outcome of sale motion. Dissenting opinion asserted that where liens exceeded value of property to be sold, there was no conceivable benefit to the estate and trustee lacked any sound business reason for proposed sale, such that Debtors should be allowed to argue that property should be abandoned rather than sold.

(4910) *In re Fodale,* 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee's proposed sale of Debtor's membership interests in various LLCs governed by Section 363(b)(1) which allows trustee to sell assets other than in ordinary course of Debtor's business. Trustee must have some articulated reason for selling property out of the ordinary course of business and court must expressly find based on evidence presented that there is a good business reason for the sale. Court approved sale of interests to insider where trustee's investigation determined that, on a combined basis, there was a negative book value on the seven limited liability companies totaling approximately $4,300,000. Current property tax statements, assessed values, information received from real estate agent regarding values, and current leases and vacancies supported trustee's conclusion that fair market values of the properties were significantly less than the secured claim and properties were further encumbered Federal Tax Liens. There was extremely limited chance of selling the Membership Interests to a non-member given transfer restrictions included in the operating agreements. Creditor's allegation that trustee should have tried to sell interests to non-insiders was nose sufficient to overcome trustee's conclusion that sale was in best interest of estate where sale would generate $60,000 for estate; amount of administrative costs and priority claims rendered it unlikely that objecting creditor would ever receive any distribution even if settlement was not approved. Trustee properly rejected creditor's offer which stated a higher amount but included contingencies that placed transaction at risk and could cause other sale to also fall apart.

9.144 Sale or Disposition of Assets Free and Clear of Liens or Interests – Section 363(f)

(4911) *In re Knight*, 2017 WL 5151676 (Bankr. D.S.C. 2017) – Trustee cannot sell property free and clear of liens unless (1) applicable nonbankruptcy law permits sale of property free and clear of lien; (2) lienholder consents; (3) price at which property is to be sold exceeds aggregate value of all liens on property; (4) lien is in bona fide dispute; or (5) lienholder could be compelled, in legal or equitable proceeding, to accept money satisfaction of such interest. Trustee could not sell property free and clear of judgment lien holder's interest where proposed sale of property was for price far less than total of all liens on property and lienholder objected to sale. Fact that Trustee recovered property by avoiding transfer by debtor to third party did not make lien avoidable where creditor was not involved in fraudulent transfer and there was no evidence of fraud or collusion between debtor and creditor. Judgment lien was not subject to any bona fide dispute. Trustee could not rely on "Diligent Creditor Doctrine" as there was no indication that judgment lienholder "slept on rights" merely because creditor did not take role in avoiding transfer, as creditor already held valid lien and had no duty to do anything more to protect its interest and creditor did not conceal lien from Trustee to induce Trustee to act.

(4912) *In re Strieter,* 2015 WL 2215418 (Bankr. E.D. Mi. 2015) – Property encumbered by easement that precluded subdivision of property subject to sale of part of property subject to easement that precluded development. Easement, as a whole, did not preclude subdivision of ownership but only subdivision of use, such that buyer could acquire part of property but could not use property in manner inconsistent with easement. Section 363 allows sale free and clear of liens but does not allow sale free and clear of easement interests.

(4913) *Thaw v. Moser,* 2014 WL 5064797 (5th Cir. 2014) – Trustee's sale of property jointly owned by Debtor and non-filing spouse under section 363 did not constitute unconstitutional taking of non-filing spouse's interest in property. Debtor and spouse first acquired property after effective date of BAPCPA and trustee was relying on authorization contained in BAPCPA to sell otherwise exempt property where property was acquired with intent to hinder, delay or defraud creditors.

(4914) *Kim v. Dome Entertainment Center, Inc.,* 2014 WL 1385109 (5th Cir. 2014) – Chapter 7 Trustee can sell home owned by Debtor and wife, notwithstanding that wife was not in bankruptcy. Section 363 allows sale of property free and clear of interests of third parties. Although spouse's homestead rights under Texas law amounted to right of life tenant for so long as the property retains its homestead character, that is not basis to preclude sale of entire property. Spouse entitled to be compensated from sale for value of spouse's interest in the property.

(4915) *In re Mendez,* 2014 WL 2434622 (Bankr. W.D. Mi. 2014) – Trustee's Motion to approve sale of entireties property granted. Trustee marketed property (a blueberry farm) for 17 months with help of court appointed realtor, and negotiated proposed sale at arm's length and presented proposed sale as best offer received. Motion raised exigency as harvest season was approaching and if the property was not sold prior to harvest, value would drop and would likely need another year to sell property, as marketability was highest before harvest, such that rejecting proposed sale likely would not generate additional funds but would delay administration of estate. Trustee could sell interest of Debtor's spouse and must account to spouse for her share of the property sale. Property owned by husband and wife as tenants in entireties is not exempt to extent of joint debt. Court entered order determining that joint debt aggregated $33,897.35 and directed that entireties property is not exempt to that extent. Fact that one or more joint creditors may not file claims or may later withdraw the claims does not warrant re-examining prior order or setting aside prior order, where determination was correct when made and no party appealed. Fact that actual joint debt to be administered in case was less than $33,897.35 did not warrant reducing amount of non-exempt value. Trustee entitled to sell property and to use $33,897.35 to pay unsecured creditors, with joint creditors receiving full payment and any remaining funds being available for costs of administration and payment to remaining unsecured claims.

(4916) *Higgason v. Brown,* 2014 WL 24040 (Bankr. E.D. Ky. 2014) – Section 363 allows sale of property owned jointly by Debtor and co-owner only if partition is impracticable; sale of undivided interest would produce substantially lower proceeds for estate; benefit to estate of sale of

entire property outweighs prejudice to co-owner; and property is not used for specific purposes. Trustee did not present any evidence that partition is impracticable. Property was 125 acres of vacant land that was already bisected by road used for removing timber from property. Trustee's only evidence was testimony of appraiser that property was worth $500 per acre if sold as whole but "substantially less" if partitioned, but appraiser did not walk land, had no knowledge of topography, and viewed property only by a brief view from a neighbor's home and review of an aerial map. Appraiser's conclusory statement that property cannot be divided was not sufficient where appraiser did not explain why and did not give any opinion as to amount of decrease in value, leaving it impossible to determine if decrease would be significant. Co-owner of property testified that the property had been in family for many years and was already effectively split into two halve by the existing logging road. Trustee also failed to present any evidence that sale of undivided interest would produce substantially lower proceeds for estate. Trustee did not present any evidence that property which was vacant and mostly located on a rocky hillside had any alternative uses or how partition and sale would actually impact proceeds to estate. Appraisal submitted by Trustee valued property as a whole at between $62,500 and $75,000, meaning estate's one-half interest would be valued $31,250 to $37,750 for a sale of a one-half interest, or a difference in value of, at most, $6,100, which is not such a significant difference to constitute a "substantial loss" to the estate.

(4917) *Miller v. Boss,* 2013 WL 1389759 (Bankr. E.D. Mi. 2013) – Section 363 allows trustee to sell free and clear of interest of any undivided interest of a co-owner as tenant in common, joint tenant or tenant by the entirety, unless partition is impracticable; sale of undivided interest would produce significantly lower price; benefit to estate of sale free and clear would outweigh detriment to co-owner; and property is not used in the energy field. Asset owned by Debtor and third party as "joint tenancy with rights of survivorship" is owned as joint tenancy. Court rejected argument that "rights of survivorship" created different status of ownership than "plain joint tenancy".

(4918) *Miller v. Boss,* 2013 WL 1389759 (Bankr. E.D. Mi. 2013) – Section 363 authorizes sale of property free and clear of interest of other parties who own property jointly with rights of survivorship. Section 363(h) reference to "joint tenant" includes joint tenant with rights of survivorship as defined in Michigan law. Joint tenancy with right of survivorship is "type of" joint tenancy. Property was single family residence that could not reasonably be partitioned. Sale of undivided interest would produce far less for estate than sale of whole with distribution of proceeds to parties in accordance with their interests, as sale of undivided ownership in single family home would likely produce no offers, and co-owners previously rejected opportunities to purchase Debtor's interest even a discounted price. Sale would benefit estate by allowing payment of approximately 75% of claims. Other owner's argument that property prices were depressed and that they would receive less than the actual value of their interests if the property is sold now did not overcome benefit to estate and owners did not present any evidence that a delay in the sale would result in any material increase in the value of the property.

(4919) *In re Jaussi,* 2013 WL 1124411 (Bankr. D. Colo. 2013) – Section 363 allows sale of assets free and clear of liens if applicable nonbankruptcy law permits sale of such property free and clear of such interest; or the entity holding the interest consents; or the interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; or the interest is in bona fide dispute; or the entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. State law allowing foreclosure sale does not constitute applicable non-bankruptcy law that permits sale of property free of junior lienholder. This subsection of Section 363 is limited to those instances where the owner can sell the property free and clear. Proposed sale was not for amount greater than aggregate value of liens. Although amount owed on first mortgage exceeded value of property, leaving junior lienholders completely undersecured for purposes of Section 506, proposed sale of property for amount owed on first mortgage was not sale for more than all liens. "All liens" requires consideration of all liens, whether or not liens exceed value of property. Trustee could not sell property over objection of junior judgment lienholders where proposed sale would not generate sufficient proceeds to pay lienholders in full.

9.145 Sale or Disposition of Assets – Section 363 and Avoidance Action

(4920) *In re Parirokh,* Case No. 11-05409 (Bankr. W.D. Mi. 2013) – Avoidance actions under Section 363 are not property of the estate but are powers afforded to the trustee through Section 544. As such, Trustee cannot sell avoidance actions under Section 363. Avoidance actions, even if based on pre-petition fraudulent transfers, are not property of estate s there was, as of the date of the petition, no action that the Debtor could bring to recover property allegedly fraudulently transferred by the Debtor.

9.146 Sale or Disposition of Assets – Section 363 – Standing of Debtor to Request

(4921) *Andrade v. Essenfeld,* Case No. 17-3009 (Bankr. W.D. Mass. 2017) – Debtor lacks standing under Section 363(h) to request sale of property free and clear of interests of co-owners. Chapter 13 Section 1303 gives Debtor authority to exercise rights of Trustee under Sections 363(b), 363(d), 363(f) and 363(l). Section 363(h) is "notably absent" from list.

9.147 Sale or Disposition of Assets – Section 363 – Standing to Object

(4922) *In re Underwood,* 583 BR 438 (Bankr E.D. Mi. 2018) – Standing requires pecuniary interest in disposal of assets. Debtor lacks standing object to sale where sale will not produce sufficient funds to pay claims in full and produce surplus. Even if property sold for price that Debtor alleged was fair market value, rather than lower price proposed by Trustee, sale would not produce sufficient funds to pay all claims in full or produce surplus.

(4923) *In re Family Christian, LLC,* 2015 WL 3824980 (Bankr. W.D. Mi. 2015) – Unsuccessful bidder had standing to object to proposed sale of assets to insider that had been deemed to be high bidder.

9.148 Sale or Disposition of Assets – Section 363 – Notice

(4924) *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 were 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.

(4925) *In re Moore,* 2015 WL 1569848 (Bankr. W.D. Mi. 2015) – Request to sell assets in confirmed Chapter 13 case must be brought by Motion under Section 363. Court rejected stipulation signed by Debtor, Secured Creditor and Chapter 13 Trustee requesting order allowing sale of vehicle, without prejudice to motion under Section 363 for sale of vehicle.

9.149 Sale or Disposition of Assets – Section 363 – Court Approval

(4926) *Schepis v. Burtch,* Case No. 16-3953 (3d Cir. 2017) – Appeal from Order approving sale to good faith purchaser is not automatically moot if no stay is entered and sale proceeds. Court must examine case to determine if court can modify or reverse without affecting validity of sale itself. Appellate rights are preserved only in limited circumstances involving collateral issues not implicating central or integral element of sale. Court joined Sixth and Tenth Circuits in rejecting "automatically moot" interpretation of Section 363.

(4927) *In re Junk,* 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Section 363(b)(1) authorizes Trustee, after notice and hearing, to use, sell or lease property of estate. Court may approve sale of substantially all of Debtor's assets under Section 363(b)(1) where a sound business purpose dictates that result. Court will consider whether terms of proposed sale reflect highest and best offer for assets; whether negotiations were conducted at arm's length; and whether sale was in best interest of estate and creditors. Court can order sale free and clear of liens, claims and encumbrances if the entity holding lien, claim or encumbrance consents. Only party who objected to sale of property was Debtor who no longer had interest in property as property became property of this estate upon commencement of bankruptcy case.

(4928) *In re Junk,* 2017 WL 1406452 (Bankr. S.D. Ohio 2017) – Section 363(m) allows Court to make finding that sale was in good faith, thereby protecting validity of sale in the event of a later reversal or modification on appeal. "Good Faith Purchaser" is one who purchases assets for value and in good faith. Mortgage lender who propose to purchase claims held by Chapter 7 estate against mortgage lender was providing value to bankruptcy estate in form of cash payment and subordination of claims, and mortgage companies conduct in courses sale of proceedings was consistent with duty of good faith where there was no evidence that mortgage company engaged in any misconduct in negotiating settlement and sale. Record did not demonstrate any evidence of fraud or collusion or any attempt by mortgage company to take grossly unfair advantage of Debtors. Federal Rule of Bankruptcy Procedure 6004(h) provides that an order authorizing use, sale or lease of property is stayed until 14 days after entry of the order unless the Court orders otherwise. Party opposing sale indicated intent to appeal order approving sale and Trustee did not demonstrate need for waiver of 14 day stay where Trustee's only argument was attempt to prevent sale from being tied up on appeal. Although Trustee and purchaser expressed desire that closing occur immediately, parties did not present any sufficient evidentiary basis for granting relief from 14 day stay

(4929) *In re Fryar,* 2017 WL 1489822 (Bankr. E.D. Tn. 2017) – Court has duty to ensure that sale of assets is done for sound business purposes. Where settlement would result in disposition of property to creditors in manner which constitutes a reordering of distribution priorities under code, Court should not approve the settlement absent evidence that the proposed a distribution scheme will promote a significant code related objective. Debtor's proposed settlement would transfer funds to single unsecured creditor, bypassing lien held by Internal Revenue Service and priority claims, all of which are entitled to distributions ahead of unsecured claims. Following *Jevic*, settlement which amounts to either preamble to conversion or structured dismissal will not be approved where case had been pending for 8 months and was not "first-day" order necessary to the survival of Debtor, Debtor had not filed a proposed Plan of reorganization, Debtor had very little income, and settlement would result in junior creditors receiving payments while senior creditors received little or nothing in distributions. Proposed settlement would circumvent Code's procedural safeguards and could not be approved.

(4930) *Brown v. Ellmann* , 2017 WL _____ (6th Cir. 2017) – Section 363(m) prevents court from reviewing sale of property to good faith purchaser only where appeal goes to validity of sale itself or granting relief would require setting aside sale. Appeal not moot where issue was not sale but distribution of proceeds following sale and Debtor's ability to exempt portion of sale proceeds.

(4931) *Rich Dad Operating Company, LLC v. Zubrod,* 2016 WL 3397685 (10th Cir. 2016) – Appeal is moot and no longer presents "case or controversy" where issues presented are no longer live or parties lack legally cognizable interest in outcome. Appeal is constitutionally moot if court can fashion no meaningful relief. If court can fashion some sort of meaningful relief, even if relief only partially addresses grievances of appealing party, appeal is not moot. Appeal of settlement not moot where appeal cannot unwind settlement or avoid transfers of property that resulted, but would restore to Debtor ability to challenge claims of appellee in bankruptcy case. In light of possible relief, action was not constitutionally moot. Section 363(m) did not apply where bankruptcy court did not make finding under Section 363(m) that purchaser was "good faith" purchase as required. Sale of assets under Section 363 can be approved by Court using same standards as settlement of claims, and appellate court will leave to bankruptcy court the sale procedures based on dynamics of particular situation. Court not required to apply Section 363 procedures to sale of Trustee's interest in litigation between Debtor and largest creditor, with creditor purchasing estate's interest for $100,000, trustee to dismiss appeal filed by Debtor, and credit to dismiss cross-appeal. Court no required to use formal procedures under Section 363 where claims being sold were defensive claims only, no other person appeared who indicated interest in submitting higher bid, and parties were unable to proceed with prior auction as procedures could not be agreed upon. Court adequately reviewed litigation involved on appeal and supporting documents submitted by parties. Court was not required to actually decide issues presented on appeal or conduct detailed analysis of underlying law or do risk-adjustment for continued litigation and Bankruptcy Court did not ignore either non-bankruptcy court's assessment of litigation or creditor's offer of indemnity for any legal expenses incurred in settlement procedures.

(4932) *In re Family Christian, LLC,* 2015 WL 3824980 (Bankr. W.D. Mi. 2015) – Approval of proposed sale is based on business justification rule. Approval turns on unique facts and circumstances. Bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; but must consider all salient factors pertaining to the proceeding and act to further the diverse interests of the Debtor, creditors, and equity holders, alike. Relevant factors include proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. Party seeking to sell assets outside ordinary course has fiduciary duty to obtain highest and best price for assets. Determination is not based on price alone, and seller can take into account other factors such as contingencies, timing, and other uncertainties that may make higher bid less desirable. If court perceives any degree of fraud, unfairness or mistake with the sale or any flaw in the auction process, court must assess impact of all factors on the sale when comparing the offer to the perceived value of the assets sold, and where the sale is to an insider, the sale is subject to greater scrutiny. Seller is not required to provide line by line breakdown of successful, albeit lower, bid to justify business decision to sell to lower bidder. However, auction sale could not be approved where part of the sale included insider releases and seller did not account for value of those releases in determining value of assets being sold. Debtor demonstrated that assets were decreasing in value and substantial time had elapsed since filing, and Debtor had explored options and engaged in vigorous marketing campaign producing robust bidding. Debtor has support of all major stakeholders and were not acting in furtherance of special interests of one group. However, Debtor failed to present evidence of value of assets being sold in relation to sale price and failed to demonstrate that purchaser, an insider, acted in good faith in negotiating terms of the auction so as to not unfairly tilt playing field in favor of insider.

9.150 Sale or Disposition of Assets – Break Up Fee

(4933) *In re JW Resources, Inc.,* 2015 WL 5091067 (Bankr. E.D. Ky. 2015) – The purpose of a break-up fee is to induce the stalking horse bidder to enter into and pursue a transaction through an auction and closing. Stalking horse bidder spends substantial time and money performing due diligence and negotiating an agreement while subsequent bidders can forego due diligence because they gain the required comfort from the willingness of the stalking horse bidder to enter into the proposed agreement. This puts the first bidder at a significant disadvantage because other bidders will not incur the costs and risks of entering into the stalking horse agreement with the Debtor. A break-up fee is not warranted if a signed asset purchase agreement will not benefit a proposed auction of a Debtor's assets. Debtor established that proposed Asset Purchase Agreements will force other bidders to commit to a sale and force lessors to negotiate necessary. Proposed fee was reasonable where break-up fees were primarily based on the lost opportunity costs of the stalking horse bidder and Debtor made good faith effort to reduce fees to lowest possible amount that would be acceptable to stalking horse. There were very few possible bidders for the Debtors' assets such that the stalking horse bidder is only one of two active purchasers in this market with the financial ability to close the transaction, indicating that the stalking horse bidder has other opportunities that are larger, and therefore more attractive, than this transaction and likely would switch to those potentially more lucrative options if it is not adequately protected through the break-up fees. Court can also consider actual costs to stalking horse for negotiating transaction, but in this case stalking horse used in-house attorneys and staff which resulted in out of pocket costs that were not significant and so did not represent unreasonable breakup fee. While breakup fees are not favored because of possibility that fee will chill bidding, amount of fee was not so large compared to entire transaction that it would scare away serious bidders.

9.151 Final Report

(4934) *In re Fontenot,* Case No. 08-60654 (Bankr. E.D. Mi. 2009) - Trustee's Final Report could not be approved where Final Report was not accompanied by correct 20 Day Notice. Notice of Final Report stated that parties had 20 days from August 12 to object, but Final Report and Notice were not filed with the Court until August 23. Notice failed to provide 20 days' notice from date of filing Final Report as required.

9.152 Amended Final Report

(4935) *In re East,* 2016 WL 6952471 (Bankr. E.D. Tn. 2016) – Trustee had authority to amend final report to reserve an asset for future distribution. Amendment was filed only 2 weeks after filing of initial final report, well within the 30 days allowed for objections. Supplemental report filed to correct statement that all property had been fully administered where there was one parcel of property that was not administered and which trustee did not intend to abandon. Section 554 allows trustee in final report to designate property that is not abandoned, which then remains property of estate even after final report is filed and approved.

9.153 Final Report – Objections

(4936) *Carl F. Schier PLLC v. Nathan,* 2018 WL 4492240 (E.D. Mi. 2018) – Pre-bankruptcy counsel for Debtor lacked standing to object to final report where counsel had withdrawn Proof of Claim, thereby abdicating any direct pecuniary interest in outcome, well before filing of final report. Standing requires that parties be directly and adversely affected pecuniarily by order. Interests that are remote and consequential are insufficient to confer standing. Debtor's alleged interest and potential outcome of appeal from state Court judgment in which counsel represented Debtor did not give counsel direct or immediate interest in bankruptcy proceeding. At best, counsel held contingent, remote and consequential interest in State Court litigation which is insufficient to support standing.

(4937) *In re Woods,* 2018 WL 2021254 (Bankr. N.D. Ohio 2018) – Rule 5009 allows parties 30 days after filing final report to object to report. If no objections are filed, Rule creates presumption that estate is fully administered. Rule 5009 is evidentiary rule. 30-day window to object to Final Report does not extend any other deadlines to file documents or take actions. Court correctly closed case without discharge when Debtor did not file Domestic Support Certification within 28 days of Trustee's Notice of Final Cure as required by Local Rule. Debtors not entitled to set aside order closing case merely because order was entered less than 30 days after final report filed.

(4938) *In re Bransford,* Case No. 14-30468 (Bankr. E.D. Mi. 2016) – Debtor does not ordinarily have standing to object to Trustees Final Report.

However, if Objection to final report would result in surplus in excess of estate liabilities, affected Debtor has standing as Debtor has direct pecuniary interest in outcome of dispute.

(4939) *In re East,* 2016 WL 6952471 (Bankr. E.D. Tn. 2016) – Any party in interest has standing to file objection to final report. Party in interest is one with a sufficient stake in the outcome as to directly affect party's pecuniary interest; anyone who has interest in property to be administered and distributed; anyone who has practical stake in outcome of case or who will be impacted in any significant way in the case; and anyone who has legally protected interest that could be affected by a bankruptcy proceeding. Co-owner of property that is subject to possible sale under Section 363 free and clear of co-owner's interest has standing to object to final report or to any attempt trustee to amend or supplement final report.

(4940) *In re Fisher,* 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – Creditor's Motion to Vacate Order Approving Trustee's Final Report denied. Creditor received proper notice of filing of final report yet failed to file objection by deadline stated. Creditor failed to allege any basis under Rule 60 to set aside order.

9.154 Liability of Trustee – Standing to Sue

(4941) *Carroll v. Prosser,* 2016 WL 4821261 (D. V. I. 2016) – Chapter 7 Trustee enjoys immunity from suit for actions (1) taken within scope of authority; (2) Debtor had notice of proposed acts; (3) trustee candidly disclosed proposed acts to court and (4) bankruptcy court approved trustee's proposed acts. Trustee owed fiduciary obligations to estate which can result in personal liability even where trustee is otherwise afforded immunity. In seeking court approval to sell assets, trustee must disclose to court all material information. Concerns about provenance of art work did not rise to level of materiality requiring disclosure to court as long as disclosure was made to potential buyers. Fiduciary duty includes duty to maximize value of estate but requires more than mere negligence or actions taken within sound business judgment. Trustee's conduct in disposing of art assets did not violate fiduciary duty. Although sale of art work through auctioneer may not have produced greatest price that could have been achieved in private sale, use of auctioneer was not breach of fiduciary duty particularly where trustee had previously sought assistance of Christie's to market paintings but Christie's would not do so because of concerns about provenance. Decision to then sell by auction was reasonable exercise of business judgment. Debtor's contention that sale price was less than reasonable equivalent value also failed because the art was sold through properly marketed auction and produced final sale price within range of pre-auction estimates. Even if Trustee breached duty, Debtor could not prove any damages as Debtor failed to produce any evidence that art could have been sold at higher price through private channels.

(4942) *New Products Corp. v. Tibble,* 2015 WL 4498023 (Bankr. W.D. Mi. 2015), *rehearing denied*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015), *aff'd,* 2017 WL 4216081 (W.D. Mi. 2017), *aff'd*, 2018 WL 1916216 (6th Cir. 2018) – Assignee of loan documents lacks standing to bring action against Chapter 7 Trustee for breach of fiduciary duty where alleged breaches occurred before assignee obtained assignment where assignment documents indicated that assignee had obtained only contractual rights against Debtor. Michigan law recognizes distinction between duties sounding in tort and those sounding in contract. Assignment did not purport to assign any tort claims to assignee and so assignee did not acquire any tort causes of action.

9.155 Liability of Trustee – Surety Bond

(4943) *Martinec v. Smith,* Case No. 17-3042 (Bankr. S.D. Tx. 2017) – Section 322 requires Trustee to post bond payable if Trustee does not faithfully perform duties or does not accurately account for money and property of estate. Section 322(d) requires action to be brought against bond within 2 years of date on which Trustee is discharged. Statute of limitations did not run where Trustee was removed and replaced but not discharged. Successor Trustee could maintain action against prior Trustee's bond although more than two years had passed since Successor Trustee replaced initial Trustee. "Discharge" of Trustee is not synonymous with "removal" for purposes of limitations period.

9.156 Retention of Attorney for Trustee

(4944) *Cox v. Sitel Operating Corporation,* 2018 WL 4102838 (E.D. Tn. 2018) – Chapter 7 Trustee had authority, with Bankruptcy Court approval to retain counsel to prosecute non-bankruptcy cause of action. At time Debtor filed Chapter 7 case, Debtor was plaintiff in FLSA action. Action became property of bankruptcy estate upon filing of Chapter 7 petition and Bankruptcy Trustee became proper party in interest. Bankruptcy Court approved Trustee's request to retain Debtor's pre-bankruptcy counsel to continue representation. Trustee's proposed retention of Debtor's counsel was within Trustee's discretion and allowed case to continue seamlessly, avoiding potential attorney liens being placed on settlement and additional attorney fees which would result from retention of new counsel at midpoint of non-bankruptcy litigation.

(4945) *Furlough v. Cage,* Case No. 17-20603 (5th Cir. 2018) - Party must have pecuniary interest in outcome to have standing. Debtor lacks standing to oppose Trustee's request to retain counsel where there was no indication that Debtor had any pecuniary interest in outcome of matter. Debtor could not acquire standing during pendency of case by purchasing creditor's claim. Standing is determined at commencement of action and Debtor was not creditor at time creditor opposed Trustee's request to employ counsel to pursue recovery against Debtor's owner.

9.157 Compensation for Trustee

(4946) *In re Turner Grain Merchandising, Inc.,* Case No. 14-15687 (Bankr. E.D. Ark. 2017) – In Chapter 7 case where there is a subsequent Trustee appointed, Court is not required to award Trustee commissions to initial Trustee first with successor Trustee to follow. Initial Chapter 7 Trustee collected over $600,000 and distributed $845,000 before being replaced, first Trustee sought compensation of $45,000 using statutory formula starting at 25% and declining to 3%. After appointment of successor Trustee, successor Trustee objected because to the extent successor Trustee was able to recover and distribute assets, successor Trustee may be limited to remaining 3% commission which could overcompensate First Trustee and under-compensate Second Trustee particularly where Second Trustee might end up serving substantially longer time and bear greater administrative burden. Although statutory formula is presumptively correct way to distribute commissions, Court can depart from statutory formula where there are extraordinary circumstances such as appointment of successor Trustee.

Court must then determine and apportion compensation between Trustee's taking into account rational relationship between fee side by each Trustee and services rendered by each Trustee. Further, Court would delay distributions to either Trustee until end of case in order to allow Court to make overall determination and apportionment of Trustee compensation.

(4947) *Fear v. US Trustee,* Case No. 15-1133 (9th Cir. BAP 2015) – Statutory commission for Chapter 7 Trustee is presumptively reasonable except in extraordinary circumstances. Fact that Chapter 7 Trustee would receive amount in excess of funds that would be available for unsecured creditors is not "extraordinary circumstance" to reduce trustee fees.

(4948) *In re McCarty,* 2015 WL 4747185 (Bankr. S.D. Ohio 2015) – Chapter 7 Trustee is not entitled to statutory commission for sale of fully encumbered asset. Section 326 excludes from calculation of commission funds paid to or turned over for secured claims. Trustee did not obtain secured creditor's consent to proposed "carve out" for unsecured creditors and trustee knew that property was fully encumbered and that sale would not produce any benefit to unsecured creditors.

(4949) *Holley v. Corcoran,* 2016 WL 6211975 (6th Cir. 2016) – Trustee not permitted to charge exempt property for payment of administrative expenses. Debtor claimed home exempt as tenants by entireties. Trustee, with Debtors' consent, sold house to third party and used proceeds to pay joint creditors of Husband and Wife. Trustee then sought to recover trustee fee from remaining proceeds. Section 522 prohibits exempt property from being charged for payment of any administrative expense. Entireties exemption applies to all proceeds of sale of property other than proceeds used to pay joint creditors, leaving no non-exempt funds available for administrative expenses.

(4950) *Gold v Robbins*, 750 F.3d 392 (4th Cir. 2014) - Chapter 7 trustee entitled to statutory Sec. 326 fee absent extraordinary circumstances.

(4951) *In re Scoggins*, 2014 WL 4425905 (Bankr. E.D. Cal. 2014) - Distribution to unsecured and priority claims if less than the trustee fees may be "extraordinary circumstances".

9.158 Banking Relationships

(4952) *McGarry & McGarry, LLC v. Rabobank,* Case No. 16-3164 (7th Cir. 2017) - Bankruptcy Trustee's contract with bank that requires Trustee to use bank as exclusive depository for estate funds in any case where Trustee uses bank's services did not violate Bank Holding Company Act which prohibits a bank from providing services to customer on condition that customer deal with no other bank. Relationship between bank and Trustee did not preclude Trustee from using any other bank in future cases, but only required Trustee to deal with bank on exclusive basis when Trustee elected to use that bank in any particular estate.

9.159 Closing Case

(4953) *In re Jackson,* 2017 WL 383346 (Bankr. W.D. Mi. 2017) – Bankruptcy Court will normally keep the case is open during pendency of any appeals but neither statute nor rules require Court do so. Court would close Chapter 7 case notwithstanding appeal by Debtor regarding Debtor's adversary proceeding against Wells Fargo where appeal was frivolous, over two years had passed since Chapter 7 Trustee filed "no asset report" and requested to be discharged as Trustee, and the Chapter 7 estate had been fully administered. There was no reason not to discharge Trustee based on status of case as case was long overdue to be closed.

S. Property Subject to Lease

9.160 Sale Free and Clear of Leasehold

(4954) *Pinnacle Restaurant at Big Sky, LLC v. CH SP Acquisitions, LLC,* Case No 15-35572 (9th Cir. 2017) – Trustee can sell property subject to lease free and clear of interests of tenants pursuant to Section 363. Section 363 allows Trustee to sell property free and clear of any interest. Sale does not implicate Section 365 or require Trustee to either assume or reject lease. Instead, sale is treated as equivalent of foreclosure sale which would foreclosure out rights of lessees who are junior to mortgage. Because lease is not rejected by sale, protections of Section 365(h) does not apply.

T. Property Owned by Co-Tenants

9.161 Sale Pursuant to Section 363

(4955) *Radlax Gateway Hotel, LLC v. Amalgamated Bank,* ____ US ____ (2012) – Chapter 11 plan that proposed to cram down value of collateral and then sell collateral free and clear of liens could not be confirmed where plan purported to deprive secured creditor of right to credit bid at the bankruptcy sale. Sale of property pursuant to Section 1129(b) allows sale free and clear as part of confirmed plan as long as sale complies with Section 363(k) which expressly authorizes credit bid. Debtor cannot use Section 1129(b)(2)(A)(iii) "indubitable equivalent" provision to circumvent Section 363 requirement for credit bid if property is to be sold.

(4956) *Waldschmidt v. Johnson,* 2011 WL 6140852 (Bankr. M.D. Tn. 2011) – Section 363 permits Trustee to sell property owned by Debtor and non-Debtors as co-tenants.

9.162 Distribution of Proceeds of Sale

(4957) *Waldschmidt v. Johnson,* 2011 WL 6140852 (Bankr. M.D. Tn. 2011) – Where during ownership of property, one co-tenant bore disproportionate burden for mortgage payments, construction expenditures, and taxes and insurance, at sale of property Trustee can surcharge proceeds of other co-tenants to even up the overall burden of ownership. Record indicated that Debtor bore 100% of mortgage, taxes and insurance during co-ownership of property. Trustee entitled to surcharge interests of remaining co-tenants before benefit of estate before distributing balance of proceeds to co-tenants.

X. Chapter 11

A. Generally

10.1 Debtor-in-Possession – "Mere Continuation"

(4958) *Indian Harbor Insurance Company v. Zucker,* 2017 WL 2641085 (6th Cir. 2017) - Chapter 11 Debtor-in-possession is "mere continuation" of prepetition Debtor. Debtor-in-possession and pre-bankruptcy company are not distinct legal entities. Where prepetition Debtor could not bring cause of action against insurer, Debtor-in-possession also cannot bring action against insurer as Debtor-in-possession is subject to same restrictions as would have existed prior to commencement of bankruptcy case. Liquidating Trustee appointed consensually as part of confirmation of Chapter 11 Plan also steps into shoes of Debtor-in-possession and is not a distinct legal entity. Accordingly, voluntarily appointed Trustee also cannot bring action against insurance company where prepetition Debtor would not have been permitted to do so. Voluntarily appointed Trustee, even though appointed as part of confirmation process, is different than Court appointed Trustee who would receive right to sue on estate's behalf.

10.2 Appointment of Trustee – Standing

(4959) *Walker v. Family Trust Services, LLC,* 2018 WL 646411 (M.D. Tn. 2018) – Creditor holding contingent and unliquidated claim has standing to seek appointment of Trustee. Section 1109 permits any creditor to raise and appear on any issue in case. Creditor is defined as entity holding claim that rose at or before time of order for relief. Claim is any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

10.3 Appointment of Trustee – Grounds

(4960) *Walker v. Family Trust Services, LLC,* 2018 WL 646411 (M.D. Tn. 2018) – Section 1104 allows for appointment of trustee for cause including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management. While Bankruptcy Court did not expressly find fraud, Court had ample evidence of mismanagement where evidence indicated that someone within Debtor's employment had forged documents including alleged deeds. While it was unclear how forgeries took place or extent of Debtor's involvement in orchestrating forgeries, it was fairly undisputed that there was fraudulent activity connected to and done Debtor's benefit. Debtor did not rebut any of this evidence or offer an explanation that Debtor was unaware of dishonest acts perpetrated on his behalf. Further, Debtor affirmatively lied on his petition by stating that he lived in Humboldt, Tennessee relying on forged documents regarding residence. Evidence supported finding that either Debtor had acted dishonestly or with inattention to detail or incompetence or mismanagement, sufficient to appoint trustee.

(4961) *In re ProFlo Industries, LLC,* 2018 WL 615122 (Bankr. N.D. Ohio 2018) – Appointment of trustee is exception in Chapter 11 case, and there is strong presumption that debtor should remain in possession as very often creditors benefit by continuation of debtor in possession because expense of trustee is avoided, and debtor is familiar with and better able to operate business . Court is reluctant to appoint trustee unless debtor has had reasonable opportunity to confirm plan. Court can appoint Trustee under Section 1104 for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case; or in the interests of creditors, any equity security holders, and other interests of the estate. Movant must present clear and convincing evidence that produces firm belief or conviction as to truth of allegations as to enable Court to reach clear conviction of truth of matters asserted. State Court default judgment against Debtor for fraud did not establish cause. Allegations against Debtor in pre-petition state court action do not constitute admissions of Debtor in post-petition effort to appoint trustee. Moving party did not demonstrate cause for appointment of Trustee. Alleged bad faith in filing petition on eve of adverse state court judgment may constitute grounds for dismissal or conversion but is not basis to appoint trustee. Debtor's request to appoint counsel who allegedly had conflict because counsel also represented principal and principal's father individually did not constitute grounds where there was no indication requested counsel possessed improper or privileged information that was not available to Debtor or that Debtor was unable to operate in its owned best interests independent of interests of sole shareholder. Omissions and errors in Schedules were not attempt to mislead creditors or provide inaccurate information to creditors, but resulted from certain documents not being filed when schedules were uploaded to court. Allegation that creditor was not disclosed as secured creditor was not material where creditor was scheduled as unsecured so creditor had notice, and within 5 days of petition Debtor filed Motion to Approve Cash Collateral which recognized creditor's secured status. Moving party did not establish that appointment of trustee was in best interests of parties where largest secured creditor opposed appointment because appointment would increase administrative costs and further impact creditor's cash collateral, and parties entered into cash collateral order with budget acceptable to impacted creditor. Evidence indicated that debtor was effectively managing business where Debtor had experienced net profits since filing in excess of $600,00.00.

(4962) *United Surety & Indemnity Co. v. Lopez-Munoz,* Case No. 16-9007 (1st Cir. 2017) – Debtor's potentially fraudulent transfers of assets pre-petition was not grounds to appoint Chapter 11 Trustee to pursue recovery where there was no evidence that transfers were actually avoidable. Prior to commencement case, Debtor transferred two gas stations, one to a family trust and the second to his children, for no consideration. Debtor admitted that he did so to keep assets from hands of one particularly aggressive creditor. Court could not determine whether transfers were actually fraudulent for purposes of Section 1104 where it appeared that value of assets transferred was less than liens and encumbrances on the assets such that assets had no value as of date of transfer. Court may consider under 11 USC Section 1104 not only whether transfer was fraudulent but also whether transfer had any effect on estate's value. Motivation to protect assets form one creditor for the benefit of all other creditors does not automatically make transfer fraudulent for purposes of Section 1104.

10.4 Appointment of Examiner

(4963) *In re ProFlo Industries, LLC,* 2018 WL 615122 (Bankr. N.D. Ohio 2018) – Court can appoint examiner under Section 1104 if Court does not appoint trustee where appointment is in best interests of creditors. Appointment is in discretion of Court based on whether creditors and

security holders would be served and whether costs of examiner would be disproportionately high. Creditor alleged that Debtor transferred $360,000 pre-petition to related entities and made other payments to insiders in unknown amounts. Creditors would be served by appointment of examiner for limited purpose of investigating transfers and determining whether there are grounds to pursue recovery. Costs would not be high for limited undertaking and there was no unsecured creditor committee in case.

10.5 Standing to Appear

(4964) *In re RnD Engineering, LLC,* 2016 WL 4361220 (Bankr. E.D. Mi. 2016) – Only "party in interest" has right to appear and be heard in bankruptcy case. Section 1109 provides that party in interest may appear; Section 1128 provides that parity in interest may object to confirmation; and Section 1104 provides that party in interest may move for appointment of trustee. Code does not defined party in interest and includes persons whose pecuniary interests are directly affected by bankruptcy proceedings; anyone who has interest in property to be administered and distributed; anyone who has practical stake in the outcome; and anyone who has legally protected interest that could be affected by bankruptcy proceedings. Creditors are considered parties in interest as long as the creditor holds a right to payment. Where court authorized full payment to creditor prior confirmation of plan pursuant to a judgment entered in adversary proceeding, party is no longer a creditor once the Debtor tenders payment and creditor lacks any further interest in case. At that point, party ceases to be creditor and loses standing to participate. Party's only remaining relationship to case would be as competitor of Debtor in particular industry which does not qualify as party in interest. Party's assertions that Debtor is "bad actor" and that Debtor would bring some sort of disrepute to industry and party's assertion that it is somehow a "self-appointed guardian" of the public interest are insufficient to convey standing.

10.6 Classification of Claims

(4965) *In re New Bride Missionary Baptist Church,* 509 BR 85 (Bankr. E.D. Mi. 2014) – Debtor could not separately classify large deficiency claim from other unsecured claims for purposes of obtaining consenting class. Administrative convenience class is limited to claims that are so large in number and small in dollar amount that dealing with them is burdensome. In this case, there were only seven creditors other than the holder of the deficiency claim and included claims up to $9,500.00. Claims were not so numerous or so small in dollar amount to warrant separate classification and treatment. Classification solely or primarily for purposes of obtaining votes necessary to confirm plan is not permissible under Code.

(4966) *In re Salapack,* 2012 WL 4486103 (Bankr. N.D. Ohio 2012) – Section 1122 allows classification of claims as long as claims in any class are substantially similar to other claims in same class. Classification cannot artificially attempt to designate classification based on alleged dischargeability or non-dischargeability of debts. Classification is controlled by relationship of claim to estate and Debtor, and not relationship between claims and other persons such as guarantors. Debtor's individual Chapter 13 plan proposed two separate classes of unsecured creditors, one being creditors who filed claims before specific date which preceded conversion of case from Chapter 7 to Chapter 11; and the second being creditors who filed claims after that date, albeit before the claims bar date. Plan improperly separately classified claims. All of the claims were general, non-priority, unsecured claims held against same Debtor. Classification scheme attempted to distinguish based on relationship between claims, being those filed before the specified date and those filed after. However, fact that claims are similar does not necessarily mandate that claims be placed in same class as long as separate classification is in connection with some legitimate purpose beyond obtaining confirmation of plan.

(4967) *In re Christian Love Fellowship Ministries, International,* 2011 WL 5546926 (Bankr. E.D. Mi. 2011) – General rule is that dissimilar claims cannot be classified together; and similar claims may be separately classified only for legitimate reasons. Proponent must demonstrate justification and that classification is not motivated by the purpose of gerrymandering an affirmative vote of an impaired class. Separate classification of unsecured deficiency claim from all other unsecured claims violated classification rules. Presence of trade creditors, standing alone, is not sufficient basis as trade creditors exist in most, if not all, Chapter 11 cases, leading to an exception that swallows the rule. Small number and identity and type of the unsecured creditors and the amounts of their claims indicate that the proposed classification in this case is primarily for the purpose of obtaining a consenting class which approves the proposed plan. There was little difference between the deficiency claim and other unsecured claims to differentiate them other than by their source or how they arose, and there are not the kind of "unique" differences. Debtor's rationale based on a continuing relationship with the other unsecured creditors over the life of the plan did not evidence difference where Debtor's plan proposed a continuing relationship with the secured creditor that will continue for the life of the plan. Any alleged differences between the deficiency claim and all other unsecured claims were of insufficient substance and materiality to justify separate classification and disparate treatment.

10.7 Payment of Claims Before Confirmation

(4968) *In re RnD Engineering, LLC,* 2016 WL 4361220 (Bankr. E.D. Mi. 2016) – Court can authorize Debtor to pay claims of creditors in full prior to confirmation of Plan. Section 363 allows court to authorize trustee or DIP in Chapter 11 to use property of estate other than in ordinary course of business. Rules 6003 and 6004 which govern procedure for use of property outside ordinary course limit Debtor's ability to use property to pay pre-petition claims only during first 321 days of case. After 21 day period expires, court can authorize Debtor to pay claims in full prior to confirmation of plan. Court can also order creditor to accept full payment of claim in satisfaction of claim. Creditor cannot refuse payments solely for purpose of retaining standing to object to confirmation of plan or to push for appointment trustee.

10.8 Key Employee Retention Plans

(4969) *In re FirstEnerge Solutions Corp.,* 2018 WL 4501132 (Bankr. N.D. Ohio 2018) – 11 USC Sections 363(b) and 503(c)(3) allows Court to authorize non-ordinary-course transactions using property of estate when sound business purpose dictates. Court must expressly find good business reason to grant request other than appeasement of major creditors. Section 503 establishes very strict and specific test governing retention and severance payments for "insiders". For non-insiders, Section 503 covers bonus payments to employees that are outside ordinary course and which are permitted only if justified by facts and circumstances. Request to establish Key Employee Retention Plan under Section 503 requires greater scrutiny than business judgment rule in effort to prevent creditor distributions from being unfairly diluted. Court will

consider whether there is reasonable relationship between Plan proposed and results obtained (will key employees to stay for as long as necessary to reorganize Debtor or, for performance incentive, will Plan achieve performance); is cost reasonable in context of assets, liabilities and earning potential; is Plan fair and reasonable; does Plan apply to all employees; does Plan discriminate unfairly; is Plan consistent with industry standards; what efforts did Debtor undertake to determine need for Plan; does Plan appropriately identify employees needing to be incentivized; are resources available to Debtor and general applicability in particular industry; and did Debtor receive independent counsel. Plan rejected where goal was to facilitate shutdown of portion of Debtor's operations, not reorganization of Debtor itself; Plan did not bear reasonable relationship to Debtor's purpose in proposing Plan where cost could exceed $99 million, clearly outside ordinary course of business and without any showing that amount was necessary to maintain operating units until units could be shut down; Plan excluded employees that Debtor conceded were critical while being imprecise about which employees were included; evidence highlighted significant inadequacies in Plan including failure to adequately determine flight risk of employees; number of employees covered far exceeded actual requirements for maintaining operational safety; although bonuses for job functions and actual need was reasonable, certain job functions would be less important, level of criticality would differ from plant to plant, some job functions were overstaffed, and although attrition is inevitable, attrition can be planned for; Plan would unfairly discriminate among employees by including non-union employees while excluding union employees; Plan included far more employees and far larger budget than is typical for employee retention Plan by similar Chapter 11 Debtors. Although cost was not in itself excessive and Debtor established appropriate due diligence and use of independent counsel, that was not sufficient to overcome shortfalls in Plan. Motion to approve Plan denied with leave to Debtor to submit proposed replacement Plan after having sought input from Committees, Unions, United States Trustee, and other parties-in-interest.

10.9 Modification of Mortgage on Principal Residence

(4970) *In re Berlland,* Case No. 17-10821(Bankr. D. Mass. 2018) - Section 1123(b)(5), which is identical to Section 1322(b)(2), prohibits modification of mortgage secured only by real property that is Debtor's principal residence. Whether property constitutes "principal residence" is determined on petition date, as statute indicates that property "is" Debtor's principal residence. Neither fax that existed at time mortgage was obtained nor representations and mortgage documents themselves have bearing on status of property as of petition date. Further, focuses on status of property, not nature of mortgage. Debtor's home initially consisted of single-family dwelling. Debtor later constructed second, 1600 square-foot residence with intention that mother-in-law and father-in-law would usually it rent-free. At some later date, Debtor's brother-in-law began residing in unit, paying $300 per month which was far below market value rent. As of petition date, property was not used exclusively as Debtor's principal residence even though amount of rent being charged was nominal.

(4971) *Birmingham v. PNC Bank, NA,* Case No. 15-1800 (4th Cir. 2017) – Section 1322(b) prevents modification where sole collateral is principal residence. Section 101(13A)(A) defines "principal residence" to include "incidental property". Section 101(27B) defines "incidental property" as property commonly conveyed with principal residence in area where property is located. Mortgage that referenced escrow funds, insurance proceeds, and miscellaneous proceeds was not subject to modification as these items are "incidental" property that are part of the principal residence. Standard FNMA mortgage form requires escrow for taxes, insurance premiums, and mortgage premiums, and assigns to lender proceeds of any insurance and proceeds forfeiture or condemnation but does not define these items as "additional collateral". Items are incidental to and inextricably bound to the property itself and does not give lender rights beyond property. Court distinguished cases that hold that escrow payments can remove property from protection of Section 1322 where mortgage specifically defined escrow account as "additional security"; appliances, machinery and equipment and furniture may cause mortgage to be modifiable where mortgage itself described items as "additional collateral"; or collateral otherwise involved personal property unrelated to real property such as a mobile home located on leased land.

(4972) *In re Sierra,* Case No. 15-70603 (Bankr. S.D. Tx. 2016) – Section 1322(b)(2) prevents modification of mortgage on Debtor's principal residence. Section 1322(c)(2) permits modification of mortgage on primary residence where mortgage "is due before the date on which the final payment under the plan is due". Debtor cannot accelerate payments under plan to convert non-modifiable mortgage into one that will be paid off during plan. The last contractual payment on Debtor's mortgage would some due one year after expiration of Debtor's 60 month plan. Debtor's plan proposed to pay the mortgage in full over 5 year plan term at reduced interest rate. Although loan allowed pre-payment without penalty, such that Debtor could propose to shorten term to 5 years and pre-pay without violating "anti-modification" provision, that did not allow modification of interest rate as the mortgage by its own terms matured outside the life of the plan, rendering subsection (c)(2) inapplicable.

(4973) *Utzman v. SunTrust Mortgage, Inc.,* 2016 U.S. Dist. LEXIS 26341 (N.D. Ca. 2016) – Anti-modification provision of Section 1123(b)(5) applies where (1) the security interest is in real property; (2) the real property is the only security for the debt; and (3) the real property is Debtor's principal residence. If real property is Debtor's residence, it is not removed from Section 1123(b)(5) (which is identical to Section 1322(b)(5)) because some portion of the property is used for a different purpose. Section 1123 does not require that property be used only or exclusively as principal residence, only that it be used to some extent for that purpose. Fact that Debtor rented out portion of property to third party did not change fact that other part of property was Debtor's residence. However, collateral was not exclusively real property where construction loan agreement encumbered personal property that, as of petition date, had not yet been incorporated into real estate including air conditioning and heating equipment, carpet, appliances, cabinets, and sprinkler systems. Loan was not secured exclusively by real property and so was subject to modification.

(4974) *White v. McDermott,* 2015 WL 4612349 (E.D. Mi. 2015) – Section 1123(b)(5) prohibits modification of mortgage secured only by Debtor's residence. Residence includes the residential structure and incidental property, defined as property commonly conveyed with principal residence in area where property is located. House and attached 40 acres of farmland were "residence" where Debtor treated the property as a contiguous unit, placed single mortgage encumbering entire property, and location of property was such that conveyance of acreage was common and incidental to sales of residences themselves. Debtor's initial plan was fatally defective as it sought to modify the rights of the holder of the mortgage on Debtor's residence. Debtors then amended the plan but continued to propose to modify the non-modifiable mortgage, leaving Debtor's amended plan with same fatal defect.

(4975) *In re Harriman,* 2014 WL 1312103 (Bankr. N.D. Ca. 2014) – Debtor in Chapter 11 cannot modify mortgage secured only by Debtor's residence. Debtor cannot use Section 506 to bifurcate principal mortgage as doing so would violate Section 1125.

(4976) *In re Graham,* 2014 WL 988608 (Bankr. W.D. Mi. 2014) – Section 1125(b)(5) prohibits Debtor from modifying a mortgage secured only by Debtor's residence. Debtor guaranteed repayment of loans from lender to wholly-owned corporation and pledged mortgage on home as collateral for guarantee. Although obligation was non-purchase money corporate obligation and not personal debt or purchase money obligation, Section 1125(b)(5) focuses on nature of collateral, not nature of debt. Where collateral consists of only a security interest in the principal mortgage, obligation is not modifiable. Fact that loan itself is collateralized by assets of corporation does not preclude finding that guarantee is secured solely by personal residence, where residence was sole collateral for the guarantee, which constituted independent obligation of guarantor separate from liability of borrower on note and no corporate assets were pledged for the guarantee itself.

10.10 Insider Defined

(4977) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – Section 1129(a)(10) provides that votes of insider creditors do not count for purposes of determining whether class of claims has voted to accept Plan. "Insider" is not defined. Section 101 (31) contains nonexclusive list of entities that code deems to be insiders, referred to as "statutory insiders". However, party who is not statutory insider can still be considered insider based on specific relationship between Debtor and creditor such that creditor is in position to influence or control, at least in part, Debtor's conduct. Fact that creditor's principal is "distant relative" of Debtor's principal is not sufficient to render creditor "statutory insider". Evidence did not support finding that creditor was non-statutory insider. Although creditor's principal had long time friendly relationship with family of Debtor's principal, and creditor perform services for Debtor in geographic region beyond the area where creditor typically works and agreed that work would not be paid for when completed in departure from creditors ordinary business terms and instead agreed to take security interest in assets, there was no evidence that creditor had more knowledge of Debtor's financial affairs than Debtors other creditors or that creditor was allowed to gain influence or control over Debtor or advantage of other creditors. There was no evidence that creditor ever exerted or attempted to exert control over Debtor; extending credit to Debtor on eve of filing bankruptcy did not allow creditor to step ahead of other creditors but instead exposed creditor to risk of nonpayment; and there was no evidence that creditor manipulated Debtor.

(4978) *US Bank, NA v. CWCapital Asset Management, LLC,* 138 S.Ct. 960, 200 L.Ed.2d 218 (2018) - Determination whether creditor is statutory insider as defined in Section 101(31) is a mixed question of law or fact. Conclusions of law are reviewed on *de novo* basis while findings of fact including what, when, where, how and why are reviewable for clear error. Where mixed questions of law and fact involve Court in case specific factual issues, appellate courts should review decision with deference. Bankruptcy Court conclusion that creditor was not non-statutory insider dependent on resolution of questions concerning creditors relationship with party from whom debt was acquired; Creditors motivations; and Creditor's ability to control Debtor, all of which are particularly factually oriented. Court adopted basic definition of non-statutory insider and then had to do fact intensive job of exploring whether fax meant required definition. Court of Appeals applied appropriate standard of review in Bankruptcy Courts determination where Court of Appeals applied "clear error" standard.

(4979) *US Bank v. Villages at Lakeridge, LLC,* Case No. 13-60038 (9th Cir. 2016) – Creditor is not "insider" merely because creditor obtained claim by assignment from insider. Creditor itself did not have any relationship with Debtor other than as creditor and transaction was arms-length. Insider status cannot be assigned and whether particular creditor is insider is factual question determined on case-by-case basis.

10.11 "Governmental Unit"

(4980) *Kentucky Employees Retirement System v. Seven Counties Services, Inc.,* 2016 WL 1274595 (W.D. Ky. 2016), *aff'd*, 2018 WL 4042666 (6th Cir. 2018), *certification to Kentucky Green Court,* 2018 WL 407825 (6th Cir. 2018) – Entity is not eligible for Chapter 11 protection if entity is "governmental unit" defined as department, agency or instrumentality. Whether entity is governmental unit depends on whether entity enjoys powers typically enjoyed by sovereign such as eminent domain, taxing authority and sovereign immunity; whether entity has public purpose; degree to which state exercises day-to-day control over entity's operations; and the description given to the entity by the state and the relationship between the entity and the state. Entity that contracted with state to provide community mental health services on behalf of state was not governmental unit. Entity did not have traditional state attributes. Although entity had right to ask for state to levy special ad valorem tax to fund community mental health operations, that did not give entity power to tax where taxes themselves could be levied only by State Cabinet. Fact that entity was 95% funded by state also did not give entity any power of sovereign as funding was always at control of State Board. While entity provided services that served public function of mental health treatment that alone was not sufficient to make entity state agency where state lacked any control over day-to-day operations. If public purpose alone was sufficient, many entities including Red Cross would be "state agencies" even though state lacks any control over entity. Further, "control" by state must be more than regulatory oversight and must involve control to protect government finances or public fisc. Entity was private corporation. State had no role in appointing Board of Directors, Officers, Executives, or Employees. State did not vet candidates for managerial positions and employees are not employees of state and have no recourse to public sector rights. State liaison observes operations and reports but has no decision making ability and is excluded from "executive sessions". State could de-designate entity which would preclude entity from receiving further state contracts but would not shut the entity down or require dissolution. Funds provided to entity by State are pursuant to contract between entity and state to provide services, not from direct appropriation of funds or grants, and state review of budgets is only to ensure that funds are used correctly, not to consider or reject any portion of the budget process. State treated entity as private entity, requiring licensing and franchises just as any private entity, requiring entity to observe corporate formalities including filing Annual Reports or face dissolution, entity is not subject to State open meetings act, and entity has separate contracts with sate to provide services.

10.12 Best Interests of Creditors

(4981) *In re Allied Consolidated Industries, Inc.,* 2017 WL 2928779 (Bankr. N.D. Ohio 2017) - Section 1129 (a) (7) allows confirmation of a Plan

over the objection of a creditor only if the creditor will receive value, as of the effective date of the Plan, it is not less than the amount that the holder would receive if the Debtor were liquidated under Chapter 7. Plan proposed to pay all creditors, including objecting creditor, in full plus interest at rate of 6% per annum. Plan met requirements of Section 1129 (a) (7) where creditor did not argue either that creditors would not be paid in full or that 6% interest was not adequate to fully compensate for time value of money. Plan also provided for Creditor Trust to liquidate certain property within 24 months which generate sufficient proceeds to pay creditors, where 24 month period was reasonable time to market and sell real estate and was not "extraordinary" length of time or disadvantage creditors.

(4982) *Colfin Bulls Funding A, LLC v. Paloian,* Case NO. 15-6074 (N.D. Il. 2016) – Unsecured creditor in solvent Chapter 11 estate entitled to interest at contract rate rather than lower, Federal Judgment rate. Court expressly disagreed with 9th Circuit holding that interest is limited to Federal Judgment rate.

(4983) *In re Hockenberry,* 2011 WL 4441582 (Bankr. S.D. Ohio 2011) – Best Interests of Creditors test under Section 1129(a)(7) requires Court to discount future stream of payments to creditors to determine whether present value exceeds anticipated liquidation value of Debtor's estate under Chapter 7.

10.13 Interest/Discount Rate

(4984) *In re Ivens Properties, Inc.,* 2014 WL 1873963 (Bankr. E.D. Tn. 2014) – To be fair and equitable with respect to secured creditor, plan must provide for creditor to retain lien until paid in full, and creditor must receive deferred cash payment totaling at least the allowed amount of the claim with a value as of the effective date of at least the value of the claim in property of the estate. Plan met first requirement by expressly stating that creditor would retain lien. Second requirement depends on value of collateral, determined in light of purpose of valuation and Debtor's proposed disposition or use of the collateral. Code does not mandate date as of which valuation is to be determined, leaving it to Court to determine most appropriate date. Property was worth in excess of debt regardless of what date was used for valuation. Second part of test depends on appropriate interest rate. *Till* formula starts with prime rate which is admittedly a low estimate of the correct rate, and then requires creditor to present evidence for higher rate, with creditor bearing burden of proof on matters such as risk of default, rate of depreciation, liquidity of collateral, and administrative expenses of enforcement. While there is no fixed guideline for adjustments, adjustment typically range from 1% to 3%. Debtor's proposed rate of 2% over prime was reasonable where collateral was worth more than debt and there were no unusual factors as to the collateral.

(4985) *In re Hockenberry,* 2011 WL 4441582 (Bankr. S.D. Ohio 2011) – Court rejected Federal Judgment Rate as appropriate discount rate in determining whether Plan met Best Interests of Creditors standard. Current Judgment rare was so low that it would not compensate creditors even for the current rate of inflation. Proper discount rate for insolvent Chapter 11 Debtor must also take into account risks inherent in waiting to receive payment. Plan that proposed to use Judgment Rate did not comply with Section 1129(a)(7) and could not be confirmed.

(4986) *In re Mace,* 2011 WL 284435 (Bankr. M.D. Tn. 2011) – *Till* requires Court to begin by looking at national prime rate and then to adjust according to the greater risk sometimes posed by a bankrupt Debtor. Court found that no adjustment was necessary where creditor was fully secured, Debtor had never missed a payment, and the plan was feasible. Creditor's risk of spreading payments over 20 year amortization rather than shorter term was fairly compensated by interest at prime rate without adjustment.

10.14 Post-Petition Financing – Section 364

(4987) *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.

(4988) *In re Packard Square, LLC,* 2017 WL 4573736, *rehearing denied,* 2017 WL 6539509 (Bankr. E.D. Mi. 2017) – Granting post-petition financing on priming basis is extraordinary and allowed only as last resort. Debtor seeking to borrow money secured by "priming" lien must prove that there is adequate protection of liens to be primed. Adequate protection can be through cash payments by estate to extent of decrease in value of primed creditor's interest; by proving additional or replacement liens; or by providing other relief that will provide indubitable equivalent of creditor's pre-financing interest. Indubitable equivalent requires relief that will result in realization of value by secured creditor and must both compensate for present value of creditor's interest and insure safety of creditor's interest. Adequate protection is generally not found where it is based on increase under highly speculative circumstances, where time values are tight, or where debtor faces other hurdles. Existing liens totaled more than $59 million and were accruing interest at the rate of $640,000 per month. Debtor's appraised value was predicated on value of completed project where project was far from completion. Even assuming Debtor's appraiser's "as is" value is correct, total of existing liens plus proposed priming lien would exceed value of property which clearly does ton provide adequate protection for creditor who is otherwise fully secured. Using Debtor's appraiser's projected completion value yields very slim equity cushion when liens include continued accrual for interest, too small to constitute equity cushion sufficient to protect creditors. Creditor's appraiser testified that Debtor's appraiser assumed unrealistic lease-up time to stabilization; used unsupportable cap rate; did not provide support for apartment rent estimates; overstated size of retail space by 33,000 square feet; and assumed future rent spikes at rates that far exceed historical rent increases.

10.15 Valuation

(4989) *Midstate Finance Company v. Peoples,* 2018 WL 1586138 (E.D. Tn. 2018) – Section 1325(a)(4) provides that Plan cannot be confirmed unless creditors receive no less than amount they would have received under hypothetical Chapter 7 liquidation. Value is generally taken to mean fair market value defined as price arrived at in an arm's length transaction in competitive and open market under all conditions requisite to a fair sale, buyer and seller, each acting prudently, knowledgeably, and assuming price is not affected by undue stimulus. Court will consider variety of information inducing appraisals, witness testimony, offers made for property, and comparable arm's length sales, with no

single factor being dispositive. In assessing appraisals, Court will consider appraiser's education, training, experience, familiarity with property, manner of conducting appraisal, testimony, and overall ability to substantiate basis for valuation, with emphasis on appraiser's familiarity or lack of familiarity with property at issue and use of comparables. Court must filter and evaluate evidence offered and is not required to accept an appraiser's calculations but may form own opinion considering appraisals and expert testimony. Courts can also consider offers to purchase but are not required accept offer as measure of valuation. Creditor's offer to purchase property did not control valuation where circumstances surrounding offer was not "arm's-length transaction" under "ordinary selling conditions." Creditor and Debtors were only parties in contention for the Property; Debtors were bidding in an attempt to keep own home; and Creditor held 80% of unsecured debt and would receive 80% of proceeds as dividend on claim, leaving Creditor to actually pay only 20% of price it was offering. Bankruptcy Court considered a wide range of evidence including Debtors' approximation of Property in Schedule A; appraisal of Property; Trustee's testimony Debtors' valuation reflected reasonable price; the bidding history; Creditor's $66,000 offer and Real Estate Assessment Data submitted by Creditor. Bankruptcy Court also took account of Creditor's testimony that Creditor was initially concerned with structural soundness of Property's improvements, while later testifying Creditor was concerned only with land; and Debtor's appraiser and Trustee actually examined Property, while Creditor never inspected it.

(4990) *In re Webster,* 2017 WL 5989170 (Bankr. E.D. Mi. 2017) – Chapter 13 Plan cannot be confirmed unless it pays to unsecured creditors at least the amount creditors would receive in hypothetical Chapter 7. Correct valuation of Debtor's business is as going concern where plan proposes that Debtor retain and operate business. Debtor's proposed liquidation value based on "break up" value of non-operating business did not correctly represent value of ongoing business. However, full fair market value of business overstates value as Chapter 7 Trustee may receive permission to operate business for short time but would not have sufficient time to achieve full fair market value. Correct value is "forced sale" going concern value.

(4991) *National Bank v. Sunnyslope Housing Ltd.,* Case No. 12-17241 (9th Cir. 2017) – Valuation of collateral is determined in light of purpose of valuation and proposed disposition or use of property. Replacement value was appropriate standard even though foreclosure value exceeded replacement value where Chapter 11 Plan proposed for Debtor to retain the property used as low income housing. Although highest and best use of property would be for housing absent low income restrictions, absent foreclosure the property cannot be used other than for affordable housing. Accordingly, valuation of property as low income housing was appropriate standard.

(4992) *In re Neace,* 2017 WL 75747 (Bankr. E.D. Ky. 2017) - Valuation of manufactured must be determined in light of purpose of evaluation which is to determine secure portion of lien to be paid over life of Debtor's plan. "Replacement value" is standard used, defined as price a retail merchant would charge for property of that kind concerning age and condition of property at time of valuation. Costs to set up and deliver a new manufactured home are not included in the "replacement value" of manufactured home, particularly where Debtor intends to retain manufactured home and, therefore, would not include either set up or delivery charge. Neither costs of removal nor costs of setup and delivery are considered in determining replacement value and cannot be used to increase the value of property.

(4993) *First Southern National Bank v. Sunnyslope Housing, LP,* Case No. 12-17241 (9th Cir. 2016), *en banc review pending*, _____ WL _____ (9th Cir. 2016) – Valuation of collateral for purposes of Cramdown under Section 1129 is determined from perspective of creditor even where Debtor proposes to retain collateral and its contemplated use. Ninth Circuit has set case for rehearing *en banc*.

(4994) *Deutsche Bank National Trust v. Jackson,* Case No. 19-81506 (S.D. Fl. 2016) – Two-year delay between valuation hearing and proposed confirmation of plan required new valuation hearing. Substantial delay converted what would appear to be final valuation order into interlocutory order and lender would not be barred from introducing evidence of post-petition appreciation in value. While this does not convert all valuation orders into interlocutory ones or provide that parties are always at liberty to reargue valuation, confirmation two years later warranted reconsideration under Sections 506 and 1129 as valuation is to be contemporaneous with purposes of valuation in first instance.

(4995) *In re Avalanche, LLC.,* Case No. 09-34010 (Bankr. E.D. Mi. 2010) - Section 506 requires value to be determined in light of the purpose of the value and the proposed disposition or use of the property. Debtor's proposed continued use of the property as an ice rink and related facility precluded use of comparables for light industrial property. Although valuation as an ice rink may be problematic given the lack of comparables, appraiser could use the income or replacement cost methods to provide estimate; or given the limited nature of the market, could use comparable sales even from distant locations.

10.16 "Deemed Recourse" Rights – Section 1111

(4996) *Mastan v. Salamon,* Case No. 15-60031 (9th Cir. 2017) – Section 1111(b) "deemed recourse rights" do not survive post-petition foreclosure concluded after mortgage company obtained relief from stay. Although junior lender had right of recourse as a petition date, plain language of Section 1111 mandates that it does not apply if lien does not exist. Once a junior lender was foreclosed, junior lienor no longer had a lien and was left with exactly the rights party had it not bankruptcy context including inability to pursue deficiency against property owner. Where lien is lost for any reason prior to confirmation of Plan, creditor can no longer transform non-recourse claim into recourse claim.

10.17 Voting – Section 1111(b)

(4997) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – Secured Creditor who elects under Section 1111(b)(1)(A) to have entire claim treated as secured debt under 11 USC Section 1111(b)(2) does not hold an unsecured claim and cannot vote to accept or reject Plan in class dealing with unsecured claims. However, party may not elect treatment under Section 1111(b)(2) where property that secures claim is of inconsequential value. Second mortgage holder could not elect treatment under Section 1111(b)(2) where value of property was less the amount owed on first mortgage rendering 2nd mortgage claim entirely unsecured. Creditor's attempt to elect treatment under Section 1111(b)(1)(A) was invalid requiring treatment of claim for balloting purposes in class of general unsecured creditors.

10.18 Feasibility

(4998) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – Section 1129(a)(11) allows Court to confirm Plan only if confirmation is not likely to be followed by liquidation or need for further reorganization. Feasibility is fundamentally fact question which must be firmly rooted in predictions based on object of facts showing that Plan offers reasonable assurance of success. Plan must provide realistic and workable framework rather than visionary promises. Plan did not appear feasible where budget projected monthly sales of more than double the volume ever actually achieved by Debtor and greater than could be reasonably projected based on actual market conditions. Further, Debtor's own projections indicated that it would not have sufficiently high sale suit to sustain agreement with primary supplier and would likely be in default under supply agreement with very first month after confirmation. Debtor's "hope" that supplier would be willing to adjust relationship lacked any evidentiary support. Budget also projected over 60 months that there would be no changes in income or expenses and contained unreasonable projections regarding payroll costs. Projections also extended over only 60 months when treatment of class to creditor would run for 20 years it budget apparently contemplated no increase in income or expenses (even cost-of-living) for entire 20 year duration. While Debtor's principles were well-intentioned and enthusiastic, management track record was poor. Well feasibility does not demand Debtor guarantee that every payment will be made, there must be some evidence of object of fact to show that all Plan payments are likely to be made. Debtors conclusory assumptions that all income and expense line items for first 5 years will remain constant for next 15 years insufficient to show that more likely than not Debtor would be able to maintain make payments over 20 year term.

(4999) *In re Johnson,* 583 BR 682 (6th Cir. BAP 2018) – Plan is not infeasible merely because it does not provide for full payment of potentially non-dischargeable claim. Assuming claim is not dischargeable, there is no requirement that plan provide for full payment of claim. Creditor can enforce claim by receiving pro-rated distribution under plan and enforcing remaining balance against property that is not property of bankruptcy estate. Plan specifically preserved all property of estate as property of estate rather than revesting in Debtor, allowing Debtor to receive salary on a going forward basis to extent of agreed budget with balance being distributed to creditors. Once Plan concludes, creditor can enforce any remaining obligations to full extent of non-dischargeable amount.

(5000) *In re St. James Nursing and Physical Rehabilitation Center, Inc.,* 2016 WL 6407360 (Bankr. E.D. Mi. 2016) – Proponent of Plan has burden of proving that proposed Plan is feasible under Section 1129(a)(11). Feasibility requirement of is satisfied if Debtor demonstrates a reasonable probability that Debtor will be able to make all payments to creditors according to the terms provided in plan**.** Proponent need not show that success is guaranteed or that possibility of failure is shown. Factors include: (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan; (7) past financial performance of the Debtor; and (8) term of the plan. Debtors' Projections showed that Debtors would be able to meet their expenses and make all the payments required by Plan. Debtor's Revised Projections were reliable, conservative, well-grounded and adequately based on the Debtors' historical financial performance and demonstrate reasonable probability that Debtor will be able make all of the payments provided in the Plan.

(5001) *In re Oakland Physicians Medical Center, LLC,* 2016 WL 424810 (Bankr. E.D. Mi. 2016) – Feasibility requirement of § 1129(a)(11) protects creditors against unrealistic plans that have little or no chance of success. Creditors should not be expected to be bound by the terms of plans entailing visionary schemes which promise creditors more than the Debtor can possibly deliver. Proponent of plan need not show that success is guaranteed but must demonstrate a reasonable assurance of commercial viability and reasonable probability that Debtor will be able to make payments to creditors according to terms of plan. Plan did not appear feasible where only $3.75 million of needed $10 million in exit financing had been committed, with remainder being non-binding letters of intent or expressions of interest, and if plan is confirmed it would be seriously undercapitalized from day one.

(5002) *In re Shefa, LLC,* 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Debtor must demonstrate that plan is feasible as condition of confirmation. Feasibility depends on reasonable probability of payment, and depends on factors including adequacy of capital structure, earning power of business, economic conditions, ability of management, probability of continuation of existing management, and any other related matter that impacts prospects of a sufficiently successful operation to allow performance of provisions of plan. Debtor's plan that involved redevelopment of empty former hotel was not feasible where Debtor lacked any capital or income from business operations and lacked any commitment from any funding sources. Debtor had no ability to make monthly payments on secured claims or on County's $1.8 million water and sewer claims that were entitled to treatment as unsecured claims.

10.19 Good Faith

(5003) *In re Oakland Physicians Medical Center, LLC,* 2016 WL 424810 (Bankr. E.D. Mi. 2016) – Good faith requires a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code and that plan be proposed with honesty and good intentions, and with a basis for expecting that a reorganization can be effected, and that plan proponent deal with creditors in a manner that is fundamentally fair. Court's focus must be on the plan itself. Pre-petition behavior is largely irrelevant but court must consider totality of circumstances using common sense and judgment.

(5004) *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.

10.20 Good Faith – Voting

(5005) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – Section 1126(e) allows Court to disallow vote of creditor who acts in bad faith. Good faith is designed to prevent obstructive tactics that give creditor unfair advantage such as creditor casts vote for purpose of coercing payment of more than creditor might reasonably perceive as his fair share of estate. Designation of creditors vote is drastic remedy and party seeking to have ballots allowed bears heavy burden of proof. Evidence did not support finding that creditors vote was in bad faith. Debtor retained creditor to perform work on Debtor's premises and except security interest in lieu of immediate payment.

Creditor's principal testified that he signed ballot accepting Plan so that he could get paid and "help [Debtor] out". While creditor might have been "friendly" to Debtor, creditor freely acknowledged desire to help Debtor and relationship between Debtor and creditor was not sufficient to designate creditors acceptance as lacking good faith.

10.21 Impairment Generally

(5006) *Liggett v. Schwartz,* 2015 WL 4478033 (6th Cir. 2015) – Creditor's claim is impaired where plan proposes to pay contractually based unsecured claim over time without interest. Plan does not pay amount equal to present value of claim and deprives creditor of interest to which creditor would be entitled as a matter of state law.

10.22 Artificial Impairment

(5007) *Federal National Mortgage Association v. Village Green I, GP,* 2014 WL 288974 (W.D. Tn. 2014), *aff'd,* 2016 WL 325163 (6th Cir. 2016) – Good faith requires that Debtor demonstrate some economic justification for delaying payment to *de minimus* creditors to show that claims are actually, rather than artificially, impaired. Debtor failed to demonstrate economic justification to defer payments to accountant and attorney aggregating $2,400.00, by proposing to pay those claims $1,200 30 days after confirmation and another $1,200 60 days after confirmation. Debtor's budget showed that Debtor anticipated gross revenue in excess of $2 million and operating net income in excess of $63,000.00. Further, at confirmation, Debtor was to receive immediate payment of $74,000 from reserves held by FNMA. Debtor had ample cash available to pay accountant and attorney without impairing those creditors.

10.23 Unfair Discrimination – Generally

(5008) *Hargreaves v. Nuverra Environmental Solutions, Inc.,* Case No. 17-1024 (D. Del. 2017) – *Jevic* does not prevent confirmation of "gift plans" where senior creditor voluntarily "gifts" portion of senior creditor's distribution to lower class of creditor, jumping intervening creditor class or produces unequal distribution between similarly situated class. Plan proposed that secured creditors made "gift" to unsecured creditors that would produce 1% recovery to general unsecured creditors other than trade creditors, and 6% to trade creditors. Although disparate treatment raised presumption of unfair discrimination, treatment was not unfair as unsecured creditors, but for "gift" would have received nothing and disparate treatment fostered reorganization.

(5009) *In re Marotta,* 479 BR 681 (Bankr. M.D.N.C. 2012) – Filing fees advanced by counsel for Debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.

(5010) *In re Fornes,* 2012 WL 4904581 (Bankr. M.D.N.C. 2012) – Adopting holding in *Marotta,* filing fees advanced by counsel for Debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.

(5011) *In re Hollingsworth,* 2012 WL 4832328 (Bankr. M.D. N.C. 2012) - Adopting holding in *Marotta,* filing fees advanced by counsel for Debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.

(5012) *In re Salapack,* 2012 WL 4486103 (Bankr. N.D. Ohio 2012) – Debtor's individual Chapter 13 plan proposed two separate classes of unsecured creditors, one being creditors who filed claims before specific date which preceded conversion of case from Chapter 7 to Chapter 11; and the second being creditors who filed claims after that date, albeit before the claims bar date. Plan cannot unfairly discriminate against Plan proposed to pay first group 100% while paying second group 0%. Plan must provide for same treatment for each claim in particular class. Plan did not violate this provision as each creditor within a specific class received the same treatment. However, Court concluded that separate classification violated Section 1122(a).

(5013) *In re BWP Transport, Inc*., Case No. 10-67778 (Bankr. E.D. Mi. 2011) – Presumption of unfair discrimination arises where there is (1) dissenting class; (2) another class of same priority; (3) and a difference in the plan's treatment that produces either a materially lower percentage recovery or allocates materially greater risk of default on dissenting creditor. Plan proponent can overcome presumption by showing that allocation of risk was consistent with the risk assumed by parties before bankruptcy. Although secured creditors have different collateral, all secured creditors have same priority. Plan proposed to pay dissenting secured creditor over 6 years while paying balance of secured claims over 5 years but also proposed to pay dissenting creditor materially higher rate of interest than remaining secured claims and plan proposed higher rate of interest on deficiency balance that on any other unsecured claims.

(5014) *In re Mace,* 2011 WL 284435 (Bankr. M.D. Tn. 2011) – To determine if discriminatory treatment is "unfair", courts consider (1) whether the discrimination is supported by a reasonable basis; (2) whether the Debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) how the class that is being discriminated against is treated. Creditor who held "bundled investment property loan" secured by multiple parcels of investment properties was not "similarly situated" with creditor who held mortgage on single piece of rental real estate. Further, even if the creditors were similarly situated, the discrimination would not be unfair. Discrimination has reasonable basis given significant differences in the nature of the collateral; discriminatory treatment was proposed in good faith and not for purposes of punishing creditor or for purposes of manipulating voting; and creditor was being offered same treatment as other creditors holding similar "bundled investment" loans.

10.24 Unfair Discrimination – Horizontal Gifting

(5015) *Hargreaves v. Nuverra Environmental Solutions Inc.,* Case No. 17-1024 (D. Del 2018) - "Horizontal Gifting" where one class of creditors voluntarily "gifts" portion of recovery to separate class of equal dignity does not cause Plan to unfairly discriminate. Unfair discrimination results when one similar class receives materially lower percentage recovery. However, class of creditors that voluntarily gives up portion of distribution to which it would otherwise be entitled is not being unfairly discriminated against; and gifting did not adversely affect appealing creditor as gifting was necessary to confirm Plan and all unsecured creditors did significantly better than they would have outside of Chapter 11 or under Plan of liquidation.

10.25 Fair and Equitable – Secured Claims

(5016) *Ahuja v. Lightsquared, Inc.,* Case No. 15-2480 (2d Cir. 2016) – To be confirmed over dissenting class of equity security holders requires that plan be fair and equitable. Plan is fair and equitable if it provides that each holder of an interest receives or retains an interest in property having a value as of the effective date of plan equal to allowed amount of any fixed liquidation preference or any fixed redemption price to which the holder is entitled; or any interest junior to the class will not receive or retain anything under the plan. Plan did not propose distributions to subordinate classes as there were no classes subordinate to common equity, and there was no evidence that senior classes were paid more than the claims were worth. Plan also provided equal treatment to all shareholders as all shareholder interest were extinguished. That shareholder who was also creditor received payment on its secured claim did not render treatment on equity interest unequal.

(5017) *In re Ivens Properties, Inc.,* 2014 WL 1873963 (Bankr. E.D. Tn. 2014) – To be fair and equitable with respect to secured creditor, plan must provide for creditor to retain lien until paid in full, and creditor must receive deferred cash payment totaling at least the allowed amount of the claim with a value as of the effective date of at least the value of the claim in property of the estate. Plan met first requirement by expressly stating that creditor would retain lien. Second requirement depends on value of collateral, determine din light of purpose of valuation and Debtor's proposed disposition or use of the collateral. Code does not mandate date as of which valuation is to be determined, leaving it to Court to determine most appropriate date. Property was worth in excess of debt regardless of what date was used for valuation. Second part of test depends on appropriate interest rate. *Till* formula starts with prime rate which is admittedly a low estimate of the correct rate, and then requires creditor to present evidence for higher rate, with creditor bearing burden of proof on matters such as risk of default, rate of depreciation, liquidity of collateral, and administrative expenses of enforcement. While there is no fixed guideline for adjustments, adjustment typically range from 1% to 3%. Debtor's proposed rate of 2% over prime was reasonable where collateral was worth more than debt and there were no unusual factors as to the collateral.

10.26 Preservation of Liens

(5018) *JPMorgan Chase Bank NA v. Wheeler Financial Inc.,* Case No. 16-4924 (N.D. Ill. 2017) - Chapter 11 plan that did not explicitly provide for preservation of lien leaves previously secured creditor unsecured, with only contractual right to payment of sums specified under plan. Plan proposed to pay $40,000 in real estate tax arrears to the tax certificate holder. Tax certificate holder and Debtor negotiated amendment that required Debtor to sell property and pay entire balance owed within six months. Creditor's failure to provide for specific preservation of lien resulted in "trade-off" of secured claim for contractual right to payment. Creditor not entitled to relief from automatic stay following Debtor's failure to make payment as required by plan as holder of tax certificate gave up its prepetition lien in return for promise under plan to be paid in six months. Tax lien on property was replaced by new contractual right defined by terms of plan.

10.27 Release of Debtor Claims

(5019) *In re Grove Instruments, Inc.,* Case No. 15-40733 (Bankr. C.D. Mass. 2017) – Court raised, but did not decide, whether Court has subject-matter jurisdiction to enter "bar order" in connection with proposed settlement of Chapter 7 Trustee's adversary proceeding to recovery preferential payments to creditors where Section 524(e) specifically provides that discharge of Debtor does not discharge liability of any third party. Whether Court would approve Settlement of litigation between Chapter 7 Trustee and Debtor corporation that included "bar order" against third parties raising independent claims depends on factors including relatedness of claims sought to be enjoined and identity of interests between Debtor and parties who would benefit from bar order; whether bar order would be fair and equitable to non-Debtor parties including whether barred parties would be paid all or substantial amount of claims; benefit to estate; whether parties to be barred support settlement; consideration being paid by or on behalf of non-Debtor party that benefits from bar order; and whether effect of bar order would be consistent with distribution scheme under Code. Bar order in settlement would not be approved where claims to be barred, while complicated, involved limited number of investors, officers and directors and would not involve global settlement that serves "common good". Insurance company that would benefit from bar order had up to $7 million in exposure under D&O policy but was proposing to settle for only $500,000.00, which would produce relatively small dividend to barred creditors and produces uncertain, and possibly modest, recovery in relation to potential recovery if allowed to pursue recovery against D&O policy. Claims to be barred were independent claims by investors against Directors and Officers for breach of fiduciary duties arising from Securities violations in connection with issuance of convertible notes. While settlement would provide benefit to Chapter 7 estate, settlement rejected given relative benefits and burdens of requested bar order, lack of relatedness of claims to be enjoined with claims asserted by Trustee, lack of support by any party who would be barred, and lack of fairness of proposed settlement on barred claimants

(5020) *Opt-Out Lenders v. Millennium Lab Holdings II, LLC,* Case No. 16-110 (D. Del. 2017) – Bankruptcy Court lacks jurisdiction to approve third-party releases as part of confirmation of Chapter 11 plan. Third-party releases are not "core" matters where creditors who would have claims released held claims for common-law fraud and RICO which are not closely intertwined with Federal regulatory program and are entitled to Article 3 adjudication. Plan's release would permanently extinguish claims amounting to resolution of claims on merits against lender. If Bankruptcy Court lacks adjudicatory authority, Bankruptcy Court must submit proposed findings of fact and conclusions of law to District Court for de novo review.

(5021) *Quad/Graphics, Inc. v. One2One Communications, LLC,* Case No. 13-1675 (D.N.J. 2016) – Where plan calls for release of claims by Debtor

against third parties, court cannot confirm unless court determines whether beneficiaries of releases have made substantial contribution to plan of reorganization. Judgment creditor offered to purchase claims of Debtor against third parties for $20,000.00. Debtor declined to sell and instead released claims as part of plan confirmation. Each non-Debtor must be separately valuated for adequacy of consideration for release. Fact that CEO and wife agreed to waive claims against Debtor was not automatically sufficient where CEO and wife were hired by reorganized Debtor in same roles and capacity at combined salary of $300,000 per year. Claims that suits against management of reorganized Debtor would impair ability to dedicate full time to management of business and that releases were "necessary for reorganization" did not demonstrate, on a person by person basis, that person being released had provided adequate value in exchange for release.

10.28 Competing Plans

(5022) *In re Oakland Physicians Medical Center, LLC,* 2016 WL 424810 (Bankr. E.D. Mi. 2016) – When faced with two competing plans that are both confirmable, court will consider which plan is in the best interest of creditors, based on (a) the support of a greater number of creditors; (b) the support of a greater dollar amount of creditor claims; (c) has the support of creditors that will continue to have long-term business relationships with the Reorganized Debtor; (d) the support of the Official Committee of Unsecured Creditors; (e) as of the confirmation hearing was a better plan in terms of ultimate creditor recovery; and (f) which plan appears more feasible.

10.29 Effect of Confirmation Order

(5023) *Porter v. GMAC Mortgage, LLC,* 2018 WL 3056692 (W.D. Tn. 2018) - Order confirming Chapter 13 Plan is res judicata on all issues that were or could have been raised during confirmation proceedings. Whether claim could have been raised in Bankruptcy Court focuses on whether claim is related to bankruptcy proceeding. Claim is "related to" if claim would have effect on bankruptcy estate or impact Debtor's rights. Plaintiff's complaint alleging predatory lending was related to bankruptcy proceeding as claim would have impact on bankruptcy estate and on GMAC's liabilities. Creditor should have raised claims in bankruptcy proceeding. Creditor's attempt to raise claims in independent litigation barred by res judicata.

(5024) *Nestle Waters North America, Inc. v. Mountain Glacier LLC,* 877 F.3d 246 (6th Cir 2017) – Code permits Debtor in Plan to reserve right to restart prosecution of nay claim or interest, and Plan must only note that claim is being reserved. Although general reservation of rights not sufficient, Plan does not need to detail each potential defendant or state factual basis for claims. Plan must only provide sufficient information to identify claims or potential claims at issue and evaluate whether those claims may provide additional assets for distribution. Plan sufficiently reserved claim where plan identified Debtor's claim against Nestle Waters and indicated the forum. Creditors knew there was ongoing claim and potential recovery. If creditors wanted more information they should have objected to the reservation and asked Court to require more through description.

(5025) *In re Shefa, LLC,* 2017 WL 6550492 (Bankr. E.D. Mi. 2017) – Creditor's Motion to Enforce Chapter 13 Plan denied where Motion sought relief that was not provided for in confirmed plan and sought to impose additional deadlines for performance by Debtor. Although styled as Motion to Enforce, Motion actually sought to add or vary terms of confirmed plan. Under Chapter 11, on Debtor may propose modification of confirmed plan.

(5026) *SFX React-Operating, LLC, v. Eagle Theater Entertainment, LLC,* 2017 WL 3616562 (E.D. Mi. 2017) – Under Section 1141, confirmation of a Plan operates as a discharge of any debt that arose before the date of confirmation and includes any right to payment whether or not reduced to judgment, liquidated, unliquidated, contingent, fixed, matured or unmatured. Creditor's claims discharged where all actions that gave rise to claim occurred before commencement of case. Creditor cannot evade effect of discharge by alleging continuing or new claims allegedly arising post-confirmation where all operative acts occurred pre-confirmation, even if damages did not manifest themselves until post-confirmation.

(5027) *In re Allied Consolidated Industries, Inc.,* 2017 WL 2928779 (Bankr. N.D. Ohio 2017) - Section 1141(d)(3) provides that confirmation of a Plan does not discharge a Debtor if (a) the Plan provides for liquidation of all or substantially all property of estate; (b) Debtor does not engage in business after consummation a Plan; and (c) Debtor would be denied discharge under Section 727(a). Joint Plan provided for liquidation of substantially all of Debtor's property and Debtor's, as corporations, would not be entitled to discharge under Chapter 7. However, Joint Plan provided for Debtors to engage in business after confirmation of Plan during the period when the Creditor Trust is liquidating assets and Plan contemplated Debtor contributing certain income from ongoing operations to Creditor Trust in addition to using proceeds to fund Plan. Plan also provided that upon termination of Creditor Trust, any remaining assets would be returned to Reorganize Debtor including operating assets of one of Debtor businesses.

(5028) *Mountain Glacier, LLC v. Nestlé Waters North America, Inc.*, 2017 WL 149943 (Bankr. M.D. Tn. 2017) - Confirmation of plan by Bankruptcy Court is given same effect as judgment by District Court and Res Judicata principles bar relitigation of any issue raised or that could have been raised in confirmation proceedings. Confirmed Plan may provide for retention and enforcement by Debtor of any claim or interest, thereby circumventing res judicata effect of confirmation, but only if there is a specific articulation of reservation as to specifically described claims.

(5029) *In re Birdstone, Inc.,* 2016 WL 5794721 (Bankr. N.D. Ohio 2016) – Upon confirmation of plan, any prior adequate protection orders for use of cash collateral terminate and provisions of plan control. Confirmation revests property in Debtor and once property is removed from estate, automatic stay terminates, with property being "emancipated" subject only to plan terms. However, where plan provided for effective date 30 days after conformation, property remained property of estate for those 30 days. Any prior adequate protection order must, therefore, be honored during that 30 day window as property remains in the bankruptcy estate and is not yet property of Debtor.

(5030) *In re Kramer,* 2016 WL 3632810 (Bankr. E.D. Mi. 2016) – Section 727(a)(8) denies discharge to Debtor who received discharge in prior Chapter 7 or Chapter 11 filed within 8 years of the filing of the current case. Under Section 1141, confirmation of Chapter 11 plan constitutes discharge as of date of confirmation of plan, and terms of plan itself clearly specified that Debtor would receive a discharge

upon confirmation. Fact that Debtor post-confirmation failed to make all payments required by plan did not revoke or alter fact that discharge had been entered.

(5031) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.,* 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized Debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized Debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be "related to" the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.

(5032) *State of Florida v. Davis,* Case No. 11-15040 (11th Cir. 2012) – State is not barred by discharge injunction from collecting past-due child support even where State has filed claim in Bankruptcy Court and claim had been disallowed. After confirmation of Debtor's Chapter 11 plan, and well past the claims bar date, the State filed a claim for outstanding child support. Bankruptcy Court disallowed the claim as late filed. Denial of claim in by Bankruptcy Court does not preclude later attempt to collect debt. Discharge injunction precludes only efforts to collect discharged obligations. Domestic Support Obligations are non-dischargeable as a matter of law and, therefore, is beyond the terms of the discharge injunction. To the extent that the Bankruptcy Court disallowed the claim, that ruling precluded payment through the confirmed plan but did not prohibit State from seeking payment other than through plan or from property of bankruptcy estate.

(5033) *In re Clymer,* 2012 WL 1252978 (Bankr. N.D. Ohio 2012) – Following BAPCPA, in individual Chapter 11 case, Order Confirming Plan does not operate as discharge. Discharge in individual Chapter 11 is entered after completion of payments. Debtor's Motion for Final Decree and Entry of Discharge denied as premature where, based on terms of Plan, it was "unlikely" that Debtor had completed payments under the plan.

(5034) *Electric Reliability Council of Texas, Inc. v. May,* Case No. 08-40890 (5th Cir. 2010) – Confirmation of Plan replaces pre-petition obligations with restructured debt arrived at in the plan. Discharge does not eliminate pre-petition debts, but it effects an injunction against enforcement of pre-petition rights, and each claimant is given a new enforceable obligation based on treatment in plan. Pre-confirmation injunction against Creditor drawing on letter of credit for payment of pre-petition invoices did not enjoin Creditor from drawing on letter of credit for post-confirmation defaults under confirmed plan.

(5035) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.,* - 422 BR 93 (6th Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior to confirmation.

(5036) *Maxus Capital Group, LLC. v. Uhrich,* Case No. 09-8047 (6th Cir. BAP 2010) – Confirmation Order that that is not appealed is binding on all parties. Collateral attack by party who did not take direct appeal of Confirmation Order is prohibited by laches, finality and binding provisions of confirmed plan. Confirmation of plan has effect of a judgment and res judicata bars re-litigation of any issue that was or could have been raised in confirmation proceedings. Party who was aware of alleged fraudulent statements leading up to confirmation of plan who failed to raise those issues during confirmation and failed to take direct appeal precluded from collateral attack to revoke confirmation.

10.30 Revocation of Confirmation Order

(5037) *Metropolitan Estates, Inc. v. Emmons-Sheepshead Bay Development, LLC,* Case No. 15-3844 (2d Cir. 2016) - Court can revoke confirmation order under 11 USC section 1144 if confirmation was procured by fraud. Amended complaint failed to sufficiently alleged that confirmation order was procured by fraud as complaint contained only conclusory allegations that Debtor fraudulently and intentionally misled Bankruptcy Court by underreporting value of property, obscuring ownership history of property, and manufacturing "false sense of urgency" in bankruptcy proceedings. Complaint indicated that bankruptcy court confirmed chapter 11 plan over plaintiff's objections based on alleged undervaluing of property and lack of good faith. Even accepting all factual allegations as true, complaint failed to contain sufficient facts to state claim that was plausible on its face.

(5038) *Maxus Capital Group, LLC. v. Uhrich,* Case No. 09-8047 (6th Cir. BAP 2010) –Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.

10.31 Interpretation of Confirmed Plan

(5039) *Mountain Glacier, LLC v. Nestlé Waters North America, Inc.*, 2017 WL 149943 (Bankr. M.D. Tn. 2017) - Interpretation of confirmed Chapter 11 Plan is core proceeding allowing bankruptcy Court to conduct appropriate proceedings and enter final order. Interpretation of confirmed plan is within scope of courts "related to" jurisdiction as a Court has authority to interpret and enforce its own orders.

(5040) *Dow Corning Corp. v. Claimants' Advisory Committee,* 2010 WL 5128712 (6th Cir. 2010) – Bankruptcy Court's interpretation of confirmed plan is reviewed on abuse of discretion standard. District Court interpretation of confirmed plan as matter of first impression

and not in the capacity of an appellate court is afforded lesser degree of deference and then only when the Court conducts hearing on issues presented. District Court should have held evidentiary hearing and considered extrinsic evidence on provisions of Chapter 11 plan that were ambiguous. However, where provisions of plan are capable of interpretation based solely on the language of the plan itself, no extrinsic evidence is necessary and District Court can construe language as a matter of law.

10.32 Modification of Confirmed Plan

(5041) *In re Shefa, LLC,* 2017 WL 6550492 (Bankr. E.D. Mi. 2017) – Creditor's Motion to Enforce Chapter 13 Plan denied where Motion sought relief that was not provided for in confirmed plan and sought to impose additional deadlines for performance by Debtor. Although styled as Motion to Enforce, Motion actually sought to add or vary terms of confirmed plan. Under Chapter 11, on Debtor may propose modification of confirmed plan.

(5042) *Trendi Sportswear, Inc. v. Bank of Baroda,* 2014 WL 5066197 (2d Cir. 2014) – Debtor's confirmed plan cannot be modified after plan has been substantially consummated.

10.33 Absolute Priority Rule

(5043) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – Absolute Priority rule prohibits confirmation over dissenting impaired class where Plan provides that holder of claim or interest is junior to dissenting class will receive or retain property on account of claim or interest. Although Plan did not propose full repayment to unsecured creditors, Plan contemplated that subordinate class consisting of equity interest would retain ownership interest in violation of absolute priority rule.

(5044) *Zachary v. California Bank & Trust,* Case No. 13-16402 (9th Cir. 2016) – Absolute priority rule applies in individual Chapter 11 case. Debtor cannot confirm plan over objection of unsecured creditor unless plan either pays claim in full or Debtor does not retain any pre-petition assets. Amendment to absolute priority rule in BAPCPA allows Debtor to retain post-petition assets and earnings but does not exclude pre-petition assets that are property of estate under section 541. Court rejected "broad view" adopted by minority of courts that BAPCPA amendment allows Debtor to retain pre- and post-petition assets and earnings.

(5045) *Ahuja v. Lightsquared, Inc.,* Case No. 15-2480 (2d Cir. 2016) – To be confirmed over dissenting class of equity security holders requires that plan be fair and equitable. Plan is fair and equitable if it provides that each holder of an interest receives or retains an interest in property having a value as of the effective date of plan equal to allowed amount of any fixed liquidation preference or any fixed redemption price to which the holder is entitled; or any interest junior to the class will not receive or retain anything under the plan. Plan did not propose distributions to subordinate classes as there were no classes subordinate to common equity, and there was no evidence that senior classes were paid more than the claims were worth. Plan also provided equal treatment to all shareholders as all shareholder interest were extinguished. That shareholder who was also creditor received payment on its secured claim did not render treatment on equity interest unequal.

(5046) *Ice House America, LLC v. Cardin,* 2014 WL 1887583 (6th Cir. 2014) – BAPCPA did not abrogate absolute priority rule in individual Chapter 11 cases. Plan could not be confirmed over objection of unsecured creditor where plan proposed less than full payment while Debtor would retain substantial equity in pre-petition assets. Section 1115 expanded definition of property of estate to include property acquired after commencement of case and earnings from services performed after commencement of case. Language of Section 1129 excludes from absolute priority rule only property acquired by Debtor that is defined in Section 1115, which is limited to property acquired post-petition. Debtor is not permitted to retain any interest in property of estate that Debtor owned as of the petition date over objecting, impaired unsecured creditor.

(5047) *Dill Oil Co. v. Stephens,* 2013 WL 151193 (10th Cir. 2013) – Absolute priority rule remains in effect in individual Chapter 11 cases. Nothing in BAPCPA expressly overruled or vacated absolute priority rule and court would not lightly imply repeal. Section 1115 did not clearly express intent to overrule or abolish absolute priority rule.

(5048) *Western Real Estate Equities, LLC v. Village at Camp Bowie I, LLP,* Case No. 12-10271 (5th Cir. 2013) – Code does not distinguish between discretionary or artificial impairment versus economically driven impairment. Plan that proposed to artificially impair unsecured class by paying them in full over three months satisfied Section 1129 as presenting an accepting impaired class. Artificial impairment did not render plan *per se* in bad faith. Plan confirmed where plan was proposed with legitimate and honest purpose to reorganize.

(5049) *In re Ralph Roberts Realty, LLC,* Case No. 12-53023 (Bankr. E.D. Mi. 2012) – Plan that violates absolute priority rule cannot be confirmed over objection of unsecured creditors. Claim violates rule any time a lower class of claims or interests receives something on account if their claim or interest when superior impaired class opposes confirmation. Plan proposed that current interest holder would be given opportunity to retain ownership interest by waiving large pre-petition claim against Debtor. Plan gave only the interest holder the opportunity to give new value and acquire ownership or reorganized Debtor and did not allow anyone else to compete for this opportunity. To extent "new value" collar exists, it remains only to extent that parties other than the Debtor or its principals is allowed to bid for the acquisition of the reorganized Debtor. Exclusive right to contribute new value is, itself, an interest that is retained "on account of" prior interest and is not made available to others, granting prior owners superior and exclusive right to contribute new value. Although it may be unlikely that any third party would offer "new value" to obtain interest, that does not allow Debtor to ignore "new value" rule and to create exclusive right in favor of principal.

(5050) *In re Maharaj,* Case No. 11-1747 (4th Cir. 2012) – Congress did not abrogate absolute priority rule in individual Chapter 11 cases. Plan could not be confirmed over objection of class of unsecured creditors where plan also proposed that Debtors would continue to own and operate auto body business and other personal assets. Debtor's argument that without ability to retain business, Debtors would lack any source of income from which to pay creditors was not sufficient basis to ignore Chapter 11 requirement.

(5051) *Radlax Gateway Hotel, LLC v. Amalgamated Bank,* ____ US ____ (2012) – Chapter 11 plan that proposed to cram down value of collateral and then sell collateral free and clear of liens could not be confirmed where plan purported to deprive secured creditor of right to credit bid at the bankruptcy sale. Sale of property pursuant to Section 1129(b) allows sale free and clear as part of confirmed plan as long as sale complies with Section 363(k) which expressly authorizes credit bid. Debtor cannot use Section 1129(b)(2)(A)(iii) "indubitable equivalent" provision to circumvent Section 363 requirement for credit bid if property is to be sold.

(5052) *In re Lindsey,* 2011 WL 344465 (Bankr. E.D. Tn. 2011), *aff'd* 2012 WL 4854718 (E.D. Tn. 2012), *appeal dismissed,* 726 F.3d 857 (6th Cir. 2013), *vacated after further appeal,* 2013 WL 5436968 (E.D. Tn. 2013) – Court vacated prior holding regarding absolute priority rule. Court had previously held that Majority of courts hold that individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires Debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows Debtor to retain property acquired post- petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by Debtor pre-petition. Plan that provided for Debtor to retain pre-petition assets while paying dissenting classes less than the full amount of claims was not fair and equitable and could not be confirmed. On further appeal, Sixth Circuit determined that appellate court lacked jurisdiction as Order being appealed was order denying confirmation of plan which is non-final, non-appealable order.

(5053) *In re Maharaj,* 2011 WL 1753795 (Bankr. E.D. Va. 2011) – Individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires Debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows Debtor to retain property acquired post-petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by Debtor pre- petition. Court could not confirm plan that proposed to retain Debtor's pre-petition homestead where unsecured creditors did not accept plan, as retention would violate absolute priority rule by permitting Debtor to retain property while impairing dissenting class of unsecured creditors.

10.34 Absolute Priority – New Value Exception

(5054) *In re Cheerview Enterprises, Inc.,* 2018 WL 3493034 (Bankr. E.D. Mi. 2018) – New Value exception to absolute priority rule requires that new value be made in money or money's worth; and amount reasonably equivalent to value of property received; and necessary for successful reorganization of Debtor. Opportunity to contribute new value cannot be given exclusively to prepetition equity holders without consideration of other alternatives. Plan did not meet new value exception where Plan did not indicate how much Debtor's principal would invest or when principal would make investment. There was no evidence to demonstrate that proceeds of investment (whether from Debtor's principal or from subsequent auction of equity interest) would be necessary or essential to successful reorganization and no evidence that auction proceeds would be reasonably equivalent to value of ownership interest in reorganize Debtor. Structure of auction strongly suggested that only bitter at auction would be current principal, making auction functional equivalent of exclusive opportunity for Debtor's principal and amounted to contrivance to circumvent absolute priority rule.

(5055) *In re Andrews,* 2015 WL 4608091 (Bankr. M.D. Tn. 2015) – Absolute priority rule applies in all chapter 11 cases including chapter 11 case filed by individual. Plan violated absolute priority rule as plan proposed less than full payment to creditors while allowing Debtor to retain pre-petition property. New value corollary requires contribution of new value that is necessary or essential to success of Debtor; new value must be money or money's worth; and new value must be reasonably equivalent to value of assets retained. Debtor's proposal to contribute future income is not "new value" as individual Chapter 11 Debtor is already required to contribute Debtor's projected disposable income. Compliance with code requirement that Debtor contribute future income cannot constitute "new value" as it does not add anything that that creditors are not already entitled to receive. New value was also not reasonably equivalent where actual cash to be contributed was $104,000 but Debtor would retain pre-petition asset valued at $1.25 million.

(5056) *In re Klosterman Development, Inc.,* 2013 WL 4605451 (Bankr. N.D. Ohio 2013) – New Value exception (or collar) to absolute priority rule allows holders of pre-petition interests to retain interest over dissenting impaired class only if the new value is money or money's worth and provides capital to Debtor that is necessary for implementation of plan. Principal's proposal to have Debtor borrow money with Debtor co-signing the loan is not "new value" as principal is not providing any money or other items of value. Debtor would be the primary borrower and Debtor's assets would be pledged as collateral. Principal was not actually contributing anything other than a signature on a loan that Debtor would be responsible to repay.

10.35 "Carve Outs"

(5057) *Hargreaves v. Nuverra Environmental Solutions, Inc.,* Case No. 17-1024 (D. Del. 2017) – *Jevic* does not prevent confirmation of "gift plans" where senior creditor voluntarily "gifts" portion of senior creditor's distribution to lower class of creditor, jumping intervening creditor class or produces unequal distribution between similarly situated class. Plan proposed that secured creditors made "gift" to unsecured creditors that would produce 1% recovery to general unsecured creditors other than trade creditors, and 6% to trade creditors. Although disparate treatment raised presumption of unfair discrimination, treatment was not unfair as unsecured creditors, but for "gift" would have received nothing and disparate treatment fostered reorganization.

(5058) *In re Fryar,* 2017 WL 1489822 (Bankr. E.D. Tn. 2017) – Court has duty to ensure that sale of assets is done for sound business purposes. Where settlement would result in disposition of property to creditors in manner which constitutes a reordering of distribution priorities under code, Court should not approve the settlement absent evidence that the proposed a distribution scheme will promote a significant code related objective. Debtor's proposed settlement would transfer funds to single unsecured creditor, bypassing lien held by Internal Revenue Service and priority claims, all of which are entitled to distributions ahead of unsecured claims. Following *Jevic*, settlement which amounts to either preamble to conversion or structured dismissal will not be approved where case had been pending for 8 months and was not "first-day" order necessary to the survival of Debtor, Debtor had not filed a proposed Plan of reorganization, Debtor had very little income, and settlement would result in junior creditors receiving payments while senior creditors received little or nothing in distributions. Proposed settlement

would circumvent Code's procedural safeguards and could not be approved.

(5059) *In re Fuel4Less, LLC,* Case No. 7-11-15240 (Bankr. D. N. Mex. 2016) - Order that provided that proceeds from settlement of adversary proceeding would be used to pay "general unsecured creditors" did not result in "carve out" of proceeds for payment of nonpriority unsecured claims ahead of payments to priority unsecured creditors. Code does not define "general unsecured creditors". Code divides claims into secured claims and unsecured claims. Within category "unsecured claims" there are priority unsecured claims and nonpriority unsecured claims. Without deciding whether "carve out" would be permissible, any attempt to "carve out" payment for nonpriority unsecured claims must be clear and explicit. Absent explicit explanation in order that remaining proceeds would be distributed among nonpriority unsecured claims, bypassing priority claims, Distribution Scheme Set Forth in Order is consistent with priorities set forth in bankruptcy code, requiring distribution first on priority unsecured claims.

(5060) *Czyzewski v. Jevic Holding Corp.,* _____ US _____, 2017 WL 1066259 (2017) – Bankruptcy Court cannot approve "structured dismissal" of Chapter 11 case where distributions would not follow ordinary priority rules without assent of impacted creditors. Section 349 is intended to allow Judges flexibility to protect "reliance interests" acquired in bankruptcy, not to make general end of case distributions that would be flatly impermissibly Chapter 11 Plan or Chapter 7 liquidation. Courts have allowed interim distributions that violate ordinary priority rules such as "first-day" wage orders that allow payment of prepetition wages, "critical vendor" orders that allow payment of essential suppliers, and "roll up" that allow lenders who continue financing the Debtor to be paid on prepetition claims. These distributions make a successful reorganization more likely and make even disfavored creditors better off. Those policy concerns do not apply in structured dismissal context where dismissal does not propose to preserve Debtor as going concern, does not make disfavored creditors better off, does not propose possibility of confirmable plan, does not restore status quo, and does not protect reliance interest.

10.36 Means Prohibited by Law – Marijuana Assets

(5061) *Geiger v. Cook Investments NW, SPNWY, LLC,* Case No. 17-5516 (W.D. Wa. 2017) – Debtor who owned commercial facility that was leased to third party who operated facility as state-licensed grower of marijuana. Debtor's Plan rejected lease with third party and presented plan based entirely on non-marijuana related income. When Court is presented with an undisputed, known criminal violation, Court cannot ignore violation and fail to consider whether Court is confirming plan premised on illegal behavior, but Court is not required to dismiss case where Plan did not contemplate continued illegal behavior or any income derived from illegal behavior.

10.37 Final Decree

(5062) *Hamadani v. Murphey,* 2012 WL 1969908 (M.D. Tn. 2012) – Alleged party in interest lacked standing to object to entry of final decree where party had sold his ownership interest in Debtor prior to commencement of Chapter 11 case. Standing requires that the party must have a personal stake in the outcome of the matter. Party had no ownership interest in Debtor-corporation and was not owed money by Debtor-corporation and had no other direct personal stake in the corporation or the outcome of the Chapter 11 case.

(5063) *In re Haines,* 2012 WL 1790219 (Bankr. N.D. Ohio 2012) – Motion for Entry of final Decree denied as Chapter 11 case had not been completed and Debtor had not received a discharge. Final Decree and case closing in individual chapter 11 case requires more than just confirmation and payment of initial disbursements. Final Decree must wait until case is fully administered. Debtors have not received a discharge and the plan is not substantially consummated. Plan and latest post-confirmation operating report showed nearly $166,000 remained owed to priority creditors; and large payment to secured creditors had not been made. Entry of a final decree would be premature. Debtor's statement that entering Final Decree would allow cessation of Chapter 11 Quarterly Fees was not sufficient reason to issue final decree before completion of case administration.

(5064) *In re Clymer,* 2012 WL 1252978 (Bankr. N.D. Ohio 2012) – Following BAPCPA, in individual Chapter 11 case, Order Confirming Plan does not operate as discharge. Discharge in individual Chapter 11 is entered after completion of payments. Debtor's Motion for Final Decree and Entry of Discharge denied as premature where, based on terms of Plan, it was "unlikely" that Debtor had completed payments under the plan.

10.38 Equitable Mootness – Appeal of Confirmation

(5065) *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 form 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.

(5066) *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 relay 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 dis proportionately 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.

(5067) *In re Tribune Media Co.,* Case No. 14-3332 (3d Cir. 2015) – Equitable mootness allows court to dismiss appeal of confirmed plan where reversal would inequitably alter treatment of innocent parties and plan has been substantially consummated rendering it difficult to unwind. However, appeal is not equitably moot as to limited issue of whether funds were improperly distributed to once class of creditors as it would not be unfair to require creditors to return funds should it be determined that plan misapplied agreement between creditors for distribution of funds. Creditors would merely be required to return funds they should not have received in first instance, and reversal would not otherwise affect or upset confirmed plan or constitute reversal of material and integral part of plan.

(5068) *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.

B. Assumption or Rejection of Executory Contracts

10.39 Definition of "Executory"

(5069) *Kentucky Employees Retirement System v. Seven Counties Services, Inc.,* 2016 WL 1274595 (W.D. Ky. 2016), *aff'd*, 2018 WL 4042666 (6th Cir. 2018), *certification to Kentucky Green Court,* 2018 WL 407825 (6th Cir. 2018) – Court must first determine whether contract exists between parties and, if so, whether contract is executory. Key is to proceed backward, to determine whether rejection would produce benefits anticipated. If rejection would not accomplish objectives or if objectives have already been realized, contract is not executory. Contract must have obligations that extent into future, or right to assume or reject would be of no effect. Contract was executory where Debtor had ongoing duty to contribute to State Retirement System under contract between entity and state, and state had obligation to manage pension contributions for benefit of employees. Further, rejection would serve purpose of Section 365 where, absent rejection, entity would no longer be able to meet obligations and would be forced out of business, leaving rejection to serve specific purpose intended. Upon rejection, Debtor no longer had to contribute to state pension fund. Although 28 USC Section 959 generally required Debtor to comply with all State laws, the state laws generally encompass health, safety and welfare, but do not include laws requiring contribution to pension system where Code specifically allows rejection of that contractual obligation. Entity was not political subdivision and employees were not state employees. While state law and Bankruptcy Code may overlap, that overlap was not of a type that affected public health, safety or welfare and so state law must yield to Code.

(5070) *In re Evans Coal Corp.,* 485 BR 162 (Bankr. E.D. Tn. 2013) – Debtor cannot assume contract that terminated pre-petition. Lease provided that lease would terminate automatically when lessee could no longer mine coal at reasonable profit. Lessee last mined coal at profit more than three years previously. Debtor's "opinion" that coal can be mined at profit again at some point in the future does not alter fact that lease already terminated on its own terms. Lease also required Lessee to mine coal in accordance with all environmental laws and regulations, and Lessee was in substantial violation of applicable laws and regulations.

(5071) *In re KY USA Energy, Inc.,* 2010 WL 4923644 (Bankr. W.D. Ky. 2010) - Generally accepted definition of an executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other. The trial court should work backward from an examination of the purposes to be accomplished by rejection and, if they have been accomplished, then the contract cannot be said to be executory. It does not include a contract fully performed by one of the parties. Party judicially admitted in its Complaint against Debtor

that party fully completed its obligations compelling holding that agreement was not executory.

10.40 Agreements Subject to Assumption or Rejection

(5072) *In re Trinity Coal Corp.,* 2014 WL 3784244 (Bankr. E.D. Ky. 2014) – Where multiple contracts or agreements are intended to comprise one agreement or transaction, Debtor cannot sever them for purposes of assumption or rejection. Multiple documents constituting integrated agreement must be either assumed or rejected in full. Whether several documents from one indivisible contract is a matter of contract interpretation governed by state law. Court will examine written agreement for evidence of the parties' intent as evidenced by the purpose at the time of contract execution. Equitable considerations prevail over a mechanistic approach as to whether the contract is divisible or indivisible and thus enforceable taking into account objects to be attained and common sense of the situation. If the parties' intent cannot be derived from the face of the documents, the Court must engage in a fact intensive inquiry considering a variety of factors. Documents evidenced intent that Agreements from one indivisible contract. Agreements were executed contemporaneously by the same parties, they all relate to the same subject matter, one Agreement specifically provided that the transaction would be canceled if the remaining Agreements were not executed, documents defined "entire agreement" to include the remaining Agreements and the multiple Agreements referenced each other , and sole consideration for the Agreements were the various property rights that the parties exchanged as part of the single transaction.

10.41 Time for Assuming or Rejecting

(5073) *In re Caster,* 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from "payment in full at exercise' to payment over life of Chapter 11 Plan did not assume lease in unaltered from. Debtor's purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

(5074) *Tencup Property, LLC v. Riley,* Case No. 09-065 (1st Cir. BAP 2010) - Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease of non-residential real property within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled "motion to reject." Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and Debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.

(5075) *In re Greektown Holdings, LLC,* Case No. 08-53104 (Bankr. E.D. Mi. 2008) – Creditor's Motion to Compel assumption of construction contract denied. Section 365(d)(2) permits Debtor to assume or reject executory contract up to date of confirmation of plan. Court has discretion to accelerate deadline to assume or reject. Court must balance interests of contracting party against interests of Debtor and the estate. Burden is on creditor to justify shortening of time. Creditor's concerns about Debtor's ability to pay for future construction as payments come due is not sufficient reason to accelerate deadline, where Debtor has made each post-petition payment in a timely manner and has already cured all pre-petition payment defaults. Contract scheduled to be fully complete in near future, at which time assumption or rejection becomes unnecessary, as opposed to typical executor contract that extends well beyond normal plan confirmation. Creditor will have administrative expense status for any post-petition construction payments, eliminating the need for accelerated assumption and creditor retains its full lien rights pending assumption. Benefit to creditor of early assumption outweighed by potential harm to Debtor.

10.42 Right to Assume

(5076) *In re Cumberland Corral, LLC,* 2014 WL 948473 (Bankr. M.D. Tn. 2014) – Debtor cannot assume contract if applicable law excuses other party to the contract from accepting performance from or rendering performance to an entity other than the Debtor and the other party does not consent. However, enforceable prohibition on assignment does not preclude assumption where Debtor, after assuming, does not propose to assign but wants to retain contract. Franchise agreements prohibited assignment without consent of franchisor. However, Debtor had no intention of assigning and sought to assume and continue to operate.

(5077) *Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.,* 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Debtor may assume Executory Contract even if Contract is not assignable pursuant to applicable non-bankruptcy law. Assumption by the Debtor maintains the parties' relationship under the Agreement and does not require the other party to the contract to accept performance from an unknown third party when it contracted for those services from Debtor. Purported pre-petition termination of agreement does not preclude assumption where contract allowed termination only for "material defaults". Court concluded that alleged pre-petition defaults either did not exist in fact or were not material to permit termination of agreement. Further, certain defaults such as a failure to maintain sufficient inventory were disputed and, in any event, could be easily rectified. Although non-Debtor party alleged that there were sums due and owing pre-petition, party failed to produce evidence of the amount allegedly owed, preventing Court from finding either that default was material or that Debtor lacked ability to either cure or provide assurance of prompt cure.

10.43 Right to Assign

(5078) *In re Appalachian Oil Co, Inc.,* 2009 WL 2843371 (Bankr. E.D. Tn. 2009) – Non-residential Lease that is terminated pre-petition leaves Debtor with no possessory or leasehold interest to become property of the estate and Debtor is not permitted to assume or assign that lease. Whether a lease has been terminated pre- petition is determined by applicable state law where the property is located. Where Landlord had failed pre-petition to clearly and unequivocally terminate the Lease, the Lease remained property of estate subject to assumption and assignment.

10.44 Curing Defaults and Future Performance

(5079) *In re Cumberland Corral, LLC,* 2014 WL 948473 (Bankr. M.D. Tn. 2014) – Non-monetary, non-curable default does not preclude assumption of executory contract unless default is material or caused substantial economic detriment. Debtor failed two inspections within 12 month period but had addressed issues and passed all post-petition inspections, and there were no allegations that health or safety was compromised or that Franchisor suffered any actual monetary damages. As Debtor is now in compliance, non-curable non-monetary defaults would not preclude assumption. Further, while franchise agreements had cross-default provisions, and Debtor admittedly was in default under one franchise agreement, cross-default would not preclude assumption where cross-defaulted agreements are not substantially connected, such that a failure to enforce the cross-defaults would deprive other party of essential part of its bargain. Franchise agreements were independent, executed at different times, for different locations, and there was no evidence that consideration for one franchise agreement supported other franchise agreement or that franchises were in any way economically interdependent.

(5080) *In re Oreck Corp.,* 2014 WL 929614 (Bankr. M.D. Tn. 2014) – Claim for unpaid "stub rent", representing the time between the first day of the bankruptcy filing and the date on which the first post-petition rent payment is due, is not entitled to administrative priority. Lease required payment of rent on first day of month. Debtor filed for bankruptcy on the 6th day of the month, without having paid the rent for that month. Court adopted "billing date" method to determine whether rent for month in which case is filed is considered pre-petition or post-petition rent. Obligation to pay rent for that month was pre-petition based on billing date. As rent for that month had completely accrued pre-petition, that rent cannot constitute post-petition administrative claim even for balance of month during which Debtor continued to occupy premises. Only those lease payments that first became due after the commencement of the case constitute post-petition rent that can be afforded administrative priority.

(5081) *In re AppleIllinois, LLC,* 2014 WL 297327 (Bankr. E.D. Ky. 2014) – Assumption of executory contract requires that Debtor (A) cure all defaults or provides adequate assurance that it will promptly cure such defaults, (B) compensate or provides adequate assurance that it will promptly compensate the other party for any pecuniary loss resulting from any default, and (C) provide adequate assurance of future performance under the contract. Section 365 does not create independent right to attorney fees. Actual pecuniary loss is determined by amount that would be recovered under state law outside bankruptcy. Contract that allowed Franchisor to recover attorney fees in actions to construe or enforce franchise agreement did not encompass fees for assumption and assignment, as assumption and assignment did not raise issues of construction or enforcement of franchise agreement.

(5082) *In re Evans Coal Corp.,* 485 BR 162 (Bankr. E.D. Tn. 2013) – Debtor cannot assume lease that required Lessee to mine coal in accordance with all environmental laws and regulations, where Lessee was in substantial violation of applicable laws and regulations and had no reasonable likelihood of complying with requirements. Property would be so burdensome given cost of remediation and compliance where Lessee had not been able to use property profitably for at least three years even without these additional costs.

(5083) *Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.,* 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Section 365 prohibits assumption of executor contract unless party seeking to assume cures all defaults, or provide adequate assurance of a prompt cure; (2) compensates, or provide adequate assurance of such compensation will be made, to a party who has suffered an "actual pecuniary loss;" and (3) provide adequate assurance of future performance.

10.45 Non-Competition Agreements

(5084) *In re Spooner,* 2012 WL 909515 (Bankr. N.D. Ohio 2012) - Non-compete agreement is not "executory contract" that can be rejected under section 365. Chapter 13 plan that proposed to reject noncompetition agreement could not be confirmed as the plan violated section 1325(a)(1).

(5085) *In re Houston,* Case No. 09-10769 (Bankr. W.D. Ky. 2009) – Section 365 permits a Debtor to assume or reject an executory contract. An executory contract he is one under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the other party's performance. Whether a party's nonperformance of the remaining obligations under a contract would constitute a material breach is a factual question resolved through application of state law. Executory contract must be accepted or rejected as a whole. Debtor's request to reject only the portion of the agreement that includes the executory contract is not permitted.

10.46 Effect of Assumption

(5086) *File v. Boersen Farms, Inc.,* 2014 WL 1017041 (Bankr. W.D. Mi. 2014) – Purchaser at bulk sale under Section 365 assumed leases that were identified in Purchase Agreement which included leases with Plaintiff. Purchaser did not exercise right to exclude leases from those being assumed within time permitted, and assumption became final at that point. Documents referred to Debtor's assumption and assignment, and purchaser did not have separate right or authority to determine whether lease would be assumed or assigned under Section 365 as power rests solely in Debtor-in-possession.

(5087) *In re Caster,* 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from "payment in full at exercise' to payment over life of Chapter 11 Plan did not assume lease in unaltered from. Debtor's purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

10.47 Grounds for Rejection

(5088) *In re Bing Construction Company,* Case No. 11-57853 (Bankr. E.D. Mi. 2011) – Motion to Reject Executory Contract granted where evidence presented indicated that the cost of Debtor's performance would substantially exceed amount of remaining payments due to Debtor on contract. Assumption of contract would be substantial detriment to Debtor and would harm both estate and creditor body as a

whole, such that rejection would be in the best interests of the estate.

10.48 Effect of Rejection

(5089) *Mission Products Holdings, Inc. v. Tempnology LLC,* 879 F.3d 389 (1st Cir. 2018) – Rejection of license of patent and trademark does not terminate lessee's right to use patents but does terminate right to use intellectual property such as trademarks, adopting *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985).

(5090) *In re SIMA International, Inc.,* Case No. 17-21761 (Bankr. D. Conn. 2018) – Debtor, as licensor, rejection of license agreement does not abrogate licensee's right to use trademarks or other intellectual property.

(5091) *In re Roberson,* 2017 WL 6060598 (Bankr. N.D. Ohio 2017) – Creditor cannot setoff debt owed to debtor that arose post-petition against pre-petition, discharged debt. Creditor, debtor's landlord, violated stay resulting in award of damages. Landlord purported to setoff damage award against rent owed post-petition. However, Debtor rejected the lease without assumption, rendering any rent claim an unsecured pre-petition debt that was discharged, as Debtor had no enforceable liability to Creditor, Creditor's actions in setting off was violate of automatic stay. Creditor ordered to pay sanctions to Debtor for initial stay violation without reduction or setoff. Fact that debtor remained in premises post-petition did not operate as assumption of lease and holdover tenant is not liable under lease merely because they wait for landlord to take steps to recover possession.

(5092) *In re Humbert,* 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Creditor violated discharge injunction by filing eviction action against Debtor post-discharge seeking not only possession of property but also award of unpaid rent accruing after entry of discharge. Section 502(g) treats a claim for post-petition damages for breach of an unexpired prepetition lease as prepetition, discharged claim. Any debt owed to landlord on lease deemed rejected under Section 365 including post-petition rent arrearage is deemed prepetition debt. Abandonment of property under Section 554 does not render Debtor liable for post-petition rental payments. Property had not yet been abandoned by Chapter 7 estate as Chapter 7 case remained pending and Court had not entered Order deeming property to be abandoned. There was no indication that Debtor entered into new post-petition lease agreement where Debtor did not make any payments nor offer to make any payments. Holdover tenants are not liable for post-petition rent simply because they wait for landlord to take steps to complete eviction action.

(5093) *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC,* 686 F.3d 372 (7th Cir. 2012) – Rejection of lease of intellectual property case is breach but does not terminate licensee's right to use intellectual property subject to lease, rejecting *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985).

(5094) *In re Prentice,* 2012 WL 1801711 (Bankr. E.D. Mi. 2012) – Rejection (whether express or by failure to assume) operates a breach of the agreement. Rejection does not terminate the agreement and the other party to the agreement can seek allowance of damage claims. Rejection does not relieve Debtor of any future obligations. Specifically, rejection does not relieve Debtor of obligations under non-compete agreement. Creditor entitled to relief from stay to enforce non-compete action through action in State Court for injunction.

(5095) *Kupfer v. Salma,* Case No. 14-16697 (9th Cir. 2016) – Damage cap for rejection of unexpired leases under Section 502(b)(6) does not include pre-rejection missed lease payments. Landlord's attorney fees incurred after date of tenant's lease rejection were subject to cap but attorney fees incurred before rejection were not subject to cap as pre-rejection fees could not be result of termination of the lease.

(5096) *Burival v. Roehrich,* 2010 WL 2882222 (8th Cir. 2010) – Debtor who rejects unexpired lease of non-residential real property must perform all obligations arising after the date of petition. Rent obligations that accrue between Petition and rejection of executory contract must be performed when they arise. Post- petition pre-rejection obligation is not limited to value of the estate up through the date of rejection.

10.49 Failure to Timely Assume or Reject

10.50 Collective Bargaining Agreements

(5097) *Unite Here Local 54 v. Trump Entertainment Resorts, Inc.,* 810 F.3d 161 (3d Cir. 2016), *cert denied,* Case No. 15-1286 (2016) – Chapter 11 Debtor-Employer can reject or modify employee benefits established in collective bargaining agreement ever after agreement has expired.

C. Conversion to Chapter 7

10.51 On Request of Debtor

(5098) *In re Superior Towing & Transport, LLC,* 2016 WL 5342383 (Bankr. N.D. Ohio 2016) – Court has discretion in determining whether to dismiss Chapter 11 Case or to instead convert case to Chapter 7, depending on best interests of creditors. Court converted case where Debtor's estate includes substantial unencumbered assets that would have value and be readily saleable by Chapter 7 Trustee. There was no operating value in entity and Debtor intended to cease operations entirely, such that dismissal of the case would not produce greater recoveries for unsecured creditors by dismissing and letting Debtor return to business outside bankruptcy protection and would create risk of assets being removed or transferred rather than used to pay creditors. Debtor had sufficient debt (at a minimum $100,000) and sufficient assets to warrant administration of estate.

(5099) *In re Valentin Company, LLC,* Case No. 08-58645 (Bankr. E.D. Mi. 2008) – Debtor's *Ex Parte* Motion to Convert Case denied. 11 USC Section 1112 and Federal Rule of Bankruptcy Procedure 1017 require 20 days' notice of a Motion to Convert to all creditors and parties in interest.

10.52 On Request of Creditor

(5100) *In re Vanilla Woodward, LLC,* Case No. 12-44862 (Bankr. E.D. Mi. 2012) – Case converted to Chapter 7 on Motion of US Trustee and Creditor. Court previously denied approval of disclosure statement and afforded Debtor opportunity to amend. Debtor failed to amend as

allowed. Debtor also evidenced overall failure to timely prosecute case, including multiple failures to appear for 341 meetings; striking lack of knowledge of representative who did finally appear for the 341 meeting; Debtor's admitted failure to make timely required adequate protection payments; failure to make required disclosures in Statement of Financial Affairs and failure to amend when deficiencies were brought to Debtor's attention; and knowing failure to amend SOFA to correct specific error brought to Debtor's and counsel's attention at the 341 meeting.

(5101) *In re Westgate Properties, Ltd.,* 2010 WL 2802511 (Bankr. N.D. Ohio 2010) – Section 1112(b)(1) permits court to dismiss or convert a case for cause based on best interests of creditors and the estate. Cause includes both a (1) continuing loss to or diminution of estate assets after the entry of the order for relief and (2) an absence of a reasonable likelihood of rehabilitation evidencing an inability to put back the Debtor in good condition or re-establish on a firm, sound basis. Cause also exists where Debtor fails to timely to provide information reasonably requested by the United States trustee. Movant bears burden of proving by preponderance of evidence that cause exists. Cause existed where Debtor had filed three separate Chapter 11 cases in three years, each of which was filed solely to forestall foreclosure proceedings. Over the course of its three bankruptcy cases, the Debtor lost its primary tenant; there was no indication that the Debtor will soon have the former tenant's rental space filled, leaving Debtor unable to generate sufficient cash flow to service its debt to the Creditor. Secured Creditor expressed no desire to work with the Debtor leaving Debtor with no option except to cram down the Creditor's interest, which did not appear feasible as Debtor had not made any significant payments to the Creditor. Debtor continued to accrue unpaid real estate taxes and ongoing deferral of required maintenance resulted in continuing loss to and diminution of estate assets. Availability of financing necessary for reorganization was very speculative considering that the value of the underlying property has diminished and any further effort to reorganize appears futile. Debtor had only one significant asset; (2) the Debtor had few unsecured creditors whose claims were small in relation to the claims of the secured creditors; (3) the Debtor had few, if any, employees; (4) the principal asset of the Debtor was the subject of a foreclosure action at the time of the bankruptcy filing; and (5) the timing of the Debtor's bankruptcy filing, occurring just hours before foreclosure, evidences an intent to delay or frustrate legitimate efforts of the Debtor's secured creditors. Debtor also failed to provide information to the United States Trustee until the eve of the Hearings held on Dismissal or Conversion, and even then the information was not complete; and Debtor did not file filed its schedules and statement of financial affairs until the day of the hearing held to Dismiss or Convert.

10.53 On Request of United States Trustee

(5102) *White v. McDermott,* 2015 WL 4612349 (E.D. Mi. 2015), *rehearing denied*, 2016 WL 865722 (E.D. Mi. 2016), *appeal pending*, Case No. 16-1425 (6th Cir. 2016) – Cause exists for conversion of case from Chapter 11 to Chapter 7 where the estate is suffering continuing or substantial loss to or diminution of assets and the absence of a reasonable likelihood of rehabilitation. Loss or diminution needs to be either continuing or substantial, not both. Estate was suffering continuing loss where monthly reports reflected expenses in excess of income on a recurring basis, and the deficit was compounded as Debtors were not paying the mortgage or the automobile payment which would have increased deficit. "Likelihood of rehabilitation" requires that the Debtor or some other party step in and stem losses and place Debtor's enterprise back on solid financial footing in a reasonable time. Debtors lacked any reasonable likelihood of rehabilitation where Debtor's plan and Debtor's amended plan were both rejected by the Court. Debtor's initial plan was fatally defective as it sought to modify the rights of the holder of the mortgage on Debtor's residence. Debtors then amended the plan but continued to propose to modify the non-modifiable mortgage, leaving Debtor's amended plan with same fatal defect.

(5103) *McDermott v. Junk,* 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – 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.

(5104) *In re Wilderness Crossings, LLC,* Case No. 09-14547 (Bankr. W.D. Mi. 2010) – Section 1112(b)(1) allows the court to convert or dismiss a case in the best interests of creditors and the estate upon cause shown, unless the Court also finds unusual circumstances that make conversion or dismissal not in the best interests of creditors or the estate. Once "cause" is found, conversion or dismissal is mandatory unless Court specifically identifies "unusual circumstances".

(5105) *In re Westgate Properties, Ltd.,* 2010 WL 2802511 (Bankr. N.D. Ohio 2010) – Section 1112(b)(1) permits court to dismiss or convert a case for cause based on best interests of creditors and the estate. Debtor's failure to provide information to the United States Trustee until the eve of the Hearings held on Dismissal or Conversion, and even then the information was not complete; and Debtor's failure to file schedules and statement of financial affairs until the day of the hearing held to Dismiss or Convert; constituted cause.

(5106) *In re Oakland Hills Land Development, LLC,* Case No. 10-56463 (Bankr. E.D. Mi. 2010) - Debtor's ongoing mis-management warranted conversion of case to Chapter 7. Debtor's representative failed to appear for the First Meeting of Creditors without any reasonable explanation or grounds, particularly where Court had repeatedly warned Debtor's counsel of the date and time for the First Meeting and where companion case was also dismissed for failure of the representative to appear for the First Meeting of Creditors in that case. Court concluded that conversion, rather than dismissal, was in the best interests of creditors.

(5107) *LaBankoff v. United States Trustee,* Case No. 09-1300 (9th Cir. BAP 2010) - Section 1112(b)(1) requires conversion or dismissal if cause is established absent unusual circumstances specifically identified by the court that establish that the requested conversion is not in the best interests of creditors and the estate; or if (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification or excuse for a Debtor's act or omission and the act or omission will be cured in a reasonable time. Debtor's failure to confirm a plan within time set by Court at prior status conference permits conversion pursuant to Section 1112(b)(4) for failure to file or confirm a plan within the time fixed by Order of Court. Court had warned Debtor at prior status conference that reorganization would not be possible if funded solely by speculative recoveries from unfiled lawsuits or the "illusory" possibility of sale of patent rights, yet Debtor filed proposed plan primarily based on these sources of income. Court correctly

concluded that Debtor could not realistically effectuate a plan as the funding sources were "not available or were illusory". Debtor made no showing that there were unusual circumstances presented in his case that should justify not converting the case. In addition, the bankruptcy court determined that there was no reasonable possibility that Debtor could confirm a plan in a reasonable time.

10.54 By Court

(5108) *LaBankoff v. United States Trustee,* Case No. 09-1300 (9th Cir. BAP 2010) – Court has authority to *sua sponte* convert case under Section 105(a).

(5109) *Mitan v. Duval,* 2009 WL 2059737 (6th Cir. 2009) - Bankruptcy Court has authority to *nunc pro tunc* convert case from Chapter 11 to Chapter 7 to prevent fraud or abuse of the bankruptcy system. Retroactive conversion does not violate Rule 2002(a)(4) which requires 20 days' notice of the hearing, - retroactive relief dating back prior to the commencement of the 20 day notice period is appropriate as long as 20 days' notice of the hearing itself is provided. Section 105 empowers Court to retroactively convert a case under "very absurd facts" where failure to do so would reward fraud and non-cooperation by Debtor. Case "full of extraordinary circumstances warranting equitable relief", warranted conversion *nunc pro tunc*. Apparent lack of assets or possible insolvent estate, standing alone, does not prohibit conversion rather than dismissal.

10.55 Burden of Proof

(5110) *In re Wilderness Crossings, LLC,* Case No. 09-14547 (Bankr. W.D. Mi. 2010) – United States Trustee established "cause" for conversion where Debtor had history of negative monthly income for each month after the petition date; Debtor's failure to make Court Ordered adequate protection payments; and Debtor's post-petition employment tax delinquencies. Debtor bears burden to demonstrate "unusual circumstances" to avoid conversion or dismissal once cause is found. "Unusual circumstances" include events not common in Chapter 11 that indicate that parties would be better served by leaving case in Chapter 11. Debtor demonstrated "unusual circumstances" where Debtor was on verge of new financing where lender had already wire-transferred over $2 million to Debtor's attorney's trust account to be used to purchase virtually all secured claims against Debtor and then doing long term debt restructuring that would allow Debtor to survive. Debtor provided evidence of deal in place between new lender and existing secured lenders that would permit new lender to acquire secured debt at substantial discounts and to also pay outstanding IRS obligations. Proposed transaction would reduce debt load by more than $1 million, or approximately one-third of total debt which will provide substantial assistance to Debtor.

(5111) *LaBankoff v. United States Trustee,* Case No. 09-1300 (9th Cir. BAP 2010) – Party requesting dismissal or conversion of Chapter 11 case bears burden of establishing by preponderance of the evidence that cause exists to convert the case from chapter 11 to chapter 7, or to dismiss the case, whichever is in the best interest of creditors and the estate. When the bankruptcy court acts without a movant, it may rely on the record before it in determining cause. Once cause has been established, the Court must convert or dismiss, unless the Court specifically identifies unusual circumstances that establish that such relief is not in the best interest of creditors and the estate; or if (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification or excuse for a Debtor's act or omission and the act or omission will be cured in a reasonable time.

10.56 Property in Hands of Debtor at Conversion

(5112) *In re Lincoln,* Case No. 16-12650 (Bankr. E.D. La. 2017) – When case converts from Chapter 11 to Chapter 7, property acquired by Debtor post-petition becomes property of Chapter 7 estate. Section 1115 includes in Chapter 11 estate all property acquired by Debtor after commencement of the case. Section 348 which provides that property of estate in converted case is determined as of the petition date is applicable only in Chapter 13. Congress limited Section 348(f)(1)(A) to Chapter 13 and chose not to add similar provision for individual Chapter 11 cases. Section 348(f) does not limit or condition the scope of Section 1115 following conversion to Chapter 7

10.57 Funds on Hand at Conversion

(5113) *In re Yuska,* Case No. 14-1504 (Bankr. N.D. Iowa 2017) – Trustee not required to return to Debtor funds received by Chapter 13 Trustee prior to pre-confirmation conversion to Chapter 7 where funds were rent owed to Debtor by various tenants. Funds are not wages and resulted from account receivable that existed prior to Chapter 13 filing. Account receivable, and subsequent recollections, would have come into Chapter 7 estate if Debtor had initially filed under Chapter 7 rather than Chapter 13.

(5114) *In re Nicodemus,* 2016 WL 6915521 (Bankr. S.D. Ohio 2016) – Court cannot confirm plan that provides that if case is converted post-confirmation, any funds on hand with the trustee will be assigned to and used to pay attorney fees. Provision conflicts with Section 348 and the Court's decision in *Harris v. Viegelahn.* Authority of Trustee to administer funds terminates immediately upon conversion of case and funds are not property of Chapter 7 estate.

(5115) *United States Trustee v. Ste-Bri Enterprises, Inc.,* 2017 WL 4226873 (N.D. Ohio. 2017) – Final Report in Chapter 7 case that was previously converted from Chapter 11 listed outstanding UST quarterly fees, pre-conversion professional fees, and fees owed to Chapter 7 Trustee, totaling about double the actual funds available to pay. Section 726(b) requires payment of claims be paid in full before paying lower priority, and if there are insufficient funds to pay all claims entitled to certain level, claims in that priority level are paid pro-rata. Section 507(a)(1) affords equal priority to fees and charges assessed against estate under 28 USC Section 123. UST Quarterly Fes are not "administrative expenses" but are cost of bankruptcy case that to be paid ahead of Chapter 11 administrative expense and concurrently and prorata with Chapter 7 administrative expenses. UST fees are afforded equal priority with Chapter 7 professional fees and paid concurrent and pro-rata.

(5116) *Meier v. Katz,* 2016 WL 930656 (N.D. Il. 2016) – Funds in Individual Debtor's Chapter 11 DIP account on conversion of case to Chapter 7 become property of Chapter 7 estate. Section 348(f) provides exception for funds received post-petition in Chapter 13 but is expressly limited to Chapter 13 and has no application in Chapter 11 either expressly or by implication.

(5117) *In re Gorniak,* 2016 WL 1411494 (Bankr. W.D. Wi. 2016) - Funds in Individual Debtor's Chapter 11 DIP account on conversion of case to Chapter 7 become property of Chapter 7 estate. Section 348(f) provides exception for funds received post-petition in Chapter 13 but is expressly limited to Chapter 13 and has no application in Chapter 11 either expressly or by implication.

D. Dismissal and Abstention

10.58 Defects in Petition

(5118) *In re Detroit Hamtramck Auto Sales, Inc.,* Case No. 08-64124 (Bankr. E.D. Mi. 2008) – Chapter 11 case dismissed where Voluntary Petition filed by individual who is not an attorney. A corporation may not file bankruptcy petition except through an attorney.

10.59 Procedure for Dismissal

(5119) *In re Four Wells Limited,* Case No. 15-8020 (6th Cir. BAP 2016) – Court can dismiss Chapter 11 case for cause even where there is pending Plan and Disclosure Statement. Code requirement that Court conduct hearing on Disclosure Statement and on Confirmation does not supplant Court's ability to dismiss case, even after plan filed, prior to hearing on either Disclosure Statement or Confirmation. Dismissal for bad faith is in discretion of Court and will not be overturned absent abuse of that discretion. Court abuses discretion when court makes factual findings without evidentiary support. Court can consider record in case and take judicial notice of matters in Court file, but statements and arguments of counsel are not evidence on which court can base factual findings. Court abused discretion in dismissing case where (i) factual finding that Debtor was "single asset" case unsupported by record that indicated that consolidated Debtors had multiple business operations; (ii) finding that Debtor had no ongoing business activities was unsupported where record prior pleadings and activities in case confirmed that at least one of the consolidated Debtors operated as commercial landlord, had continuing lease agreements, was collecting rents, had a bank account and maintained property. Fact that Debtors had no employees was not dispositive of fact that Debtors nonetheless had ongoing business; (iii) Court's factual conclusion that case was essentially tow party dispute was unsupported where record indicated while one creditor had been more active in case, there were other creditors in case including ones that filed responses in support of Motion to Dismiss - while primary issue may have involved dispute between Debtor and major creditor, that does not convert case into "two party dispute; (iv) Court's finding of no likelihood of confirmation of plan was unsupported where Court questioned counsel at length but incorrectly shifted burden to Debtor to prove that plan was feasible, and even if plan was not feasible there was no evidence that a feasible plan could not be proposed; (v) Court's finding that Debtor had not communicated with creditors lacked any evidentiary support where conclusions were inconsistent with statements of creditor at hearing and finding was based entirely on contradictory statements of counsel which are not evidence. While evidence indicated that established that Debtor had no employees, few unsecured creditors, petitions were filed to stop State Court foreclosures, and there was no pressure from other creditors, there was no evidence in record to support finding that Debtor actually abused bankruptcy process. While case had been pending for one year, that factor alone was not enough to warrant dismissal where record indicated that much of that time had been spent in litigation with secured creditor which necessarily had to be resolved before plan could be proposed.

10.60 Cause for Dismissal or Conversion

(5120) *In re BCC Sandusky Permanent LLC,* 2017 WL 2470864 (Bankr. N.D. Ohio 2017) – Section 1112 allows Court to dismiss case for "cause". Section 1112(b)(4) allows Court to dismiss where there is substantial or continuing loss to or diminution of the estate and the absence of reasonable likelihood of rehabilitation. Factors are in the conjunctive requiring proof of both substantial or continuing loss *and* absence a reasonable likelihood of rehabilitation. Further, any "loss" must have occurred during the Chapter 11 proceeding itself. Moving party did not demonstrate basis to dismiss where there was no evidence that Debtor's assets had declined in value since commencement of the bankruptcy case and Debtor's financial reports showed year-to-date positive cash flow and year-to-date net income. Possibility that Debtor may suffer loss in future does not constitute a "substantial loss" which requires the loss to have already occurred; or a "continuing loss" which requires a loss that has occurred and is continuing.

(5121) *In re Johnson,* 2016 WL 2638036 (Bankr. M.D. Tn. 2016) – Dismissal is factually driven decision and is vested in court's broad discretion taking into account case specific factual inquiry. Section 1112 provides nonexhaustive list of factors to be considered in dismissing case for cause, including substantial or continuing loss or diminution of estate and lack of reasonable likelihood of rehabilitation; gross mismanagement of estate; failure to timely pay taxes coming due post-petition. Substantial or continuing loss or diminution of estate requires (1) substantial loss or diminution of assets such as loss of asset values or negative cash flow post-petition; and(2) absence of reasonable likelihood of rehabilitation. Rehabilitation is not synonymous with reorganization but is higher standard requiring proof that someone will be able to stem losses and place enterprise back on substantial financial footing within reasonable time. Creditor demonstrated continuing loss or diminution where Debtor's primary asset, an apartment complex, had substantially deteriorated after Debtor removed appliances, fixtures and HVAC equipment, leaving apartments open and exposed to elements demonstrating an inability to reserve the estate. Debtor failed to demonstrate any likelihood of rehabilitation where Debtor's plan was not feasible as Debtor could not generate the income proposed and would continue to suffer large monthly negative cash flow even after reorganization. Debtor had been in Bankruptcy for 9 months with no forward progress on confirmable plan and presented no likelihood of presenting plan in near future. Debtor also breached fiduciary duty to estate and creditors by failing to preserve property. Debtor failed to maintain the property post-petition and failed to notify secured creditor of serious problems with its collateral; and actively damaged and removed appliances and fixtures from the property during the pendency of this case and after secured creditor obtained relief from the automatic stay. Debtor also failed to pay post-petition property taxes by the deadline required. Totality of circumstances existed cause for dismissal of Chapter 11 case.

(5122) *In re Four Wells Limited,* Case No. 15-8020 (6th Cir. BAP 2016) – Whether Chapter 11 case should be dismissed for bad faith depends on totality of circumstances and its generally limited to egregious cases involving concealment or misrepresentation of assets and sources of income, lavish lifestyles, and intentions to avoid large single debt based on conduct akin to fraud, misconduct or gross negligence. Factors to consider include (1) Debtor has one asset; (2) improper pre-petition conduct of Debtor; (3) few if any unsecured creditors; (4) Debtor's

lack of success in defending foreclosure actions; (5) Debtor and creditor have fought to standstill in State Court and Debtor has been required to post a bond that Debtor cannot afford; (6) filing of petition allows Debtor to evade Court Orders; (7) Debtor has no ongoing business or employees; (8) lack of possibility of reorganization; ((8) whether Debtor has filed prior bankruptcy petitions; (10) whether Debtor is generating cash or income; (11) whether there was pressure from non-moving creditors; (12) whether case is essentially two-party dispute which can be resolved in non-bankruptcy forum; and (13) whether Debtor was formed on eve of filing bankruptcy petition. Dismissal for bad faith is in discretion of Court and will not be overturned absent abuse of that discretion. Court abuses discretion when court makes factual findings without evidentiary support. Court can consider record in case and take judicial notice of matters in Court file, but statements and arguments of counsel are not evidence on which court can base factual findings. Court abused discretion in dismissing case where (i) factual finding that Debtor was "single asset" case unsupported by record that indicated that consolidated Debtors had multiple business operations; (ii) finding that Debtor had no ongoing business activities was unsupported where record prior pleadings and activities in case confirmed that at least one of the consolidated Debtors operated as commercial landlord, had continuing lease agreements, was collecting rents, had a bank account and maintained property. Fact that Debtors had no employees was not dispositive of fact that Debtors nonetheless had ongoing business; (iii) Court's factual conclusion that case was essentially tow party dispute was unsupported where record indicated while one creditor had been more active in case, there were other creditors in case including ones that filed responses in support of Motion to Dismiss - while primary issue may have involved dispute between Debtor and major creditor, that does not convert case into "two party dispute; (iv) Court's finding of no likelihood of confirmation of plan was unsupported where Court questioned counsel at length but incorrectly shifted burden to Debtor to prove that plan was feasible, and even if plan was not feasible there was no evidence that a feasible plan could not be proposed; (v) Court's finding that Debtor had not communicated with creditors lacked any evidentiary support where conclusions were inconsistent with statements of creditor at hearing and finding was based entirely on contradictory statements of counsel which are not evidence. While evidence indicated that established that Debtor had no employees, few unsecured creditors, petitions were filed to stop State Court foreclosures, and there was no pressure from other creditors, there was no evidence in record to support finding that Debtor actually abused bankruptcy process. While case had been pending for one year, that factor alone was not enough to warrant dismissal where record indicated that much of that time had been spent in litigation with secured creditor which necessarily had to be resolved before plan could be proposed.

(5123) *Northbrook Loans, LLC v. BlackAMG,* Case No. 15-5222 (N.D. Ill. 2015) – Whether to convert or dismiss case is based on best interests of creditors. Court dismissed Chapter 11 after Debtor's sole asset, a parcel of real estate was over encumbered and there was no chance of reorganization. Only creditor that would benefit by conversion was secured creditor who was going to recover property regardless of conversion or dismissal, and conversion would merely add administrative expenses to already insolvent estate.

(5124) *In re Premier Pest Management, Inc.,* Case No. 15-52811 (Bankr. E.D. Mi. 2015) – Case dismissed where Debtor failed to appear at status conference and counsel failed to serve Order setting status conference on matrix as required. Case beset by problems including five different documents filed by Debtor being stricken and failure to timely comply with order of court to file list of equity security holders by date specified, although list was ultimately filed after deadline.

(5125) *In re Al-Hafiz, LLC,* Case No. 15-41324 (Bankr. E.D. Mi. 2015) – Debtor's failure to meet deadline in scheduling order to file combined plan and disclosure statement and failure to request extension of that deadline warranted dismissal of Chapter 11 case.

(5126) *In re Al Huda Properties, LLC,* Case No. 15-41323 (Bankr. E.D. Mi. 2015) – Debtor's failure to meet deadline in scheduling order to file combined plan and disclosure statement and failure to request extension of that deadline warranted dismissal of Chapter 11 case.

(5127) *The Village at Knapp's Crossing, LLC,* 2014 WL 2574033 (Bankr. W.D. Mi. 2014) – Court can dismiss case for "cause" where Debtor has no reasonable prospects of proposing a confirmable plan in a reasonable time. Debtor lacked ability to confirm plan where only asset was largely vacant land and only prospect of reorganizing depended on construction and leasing of major shopping center. Property currently housed only one building housing a single tenant. Debtor had no source of funding for the transformation of raw land into a shopping center capable of generating sufficient revenue. Debtor's own financials showed substantial deficiency in income to cover construction costs or operating expenses. Debtor did not have firm commitment for any financing for the construction or development of site. Even if proposed financing materialized, amount of financing was not sufficient, after paying existing liens, to provide working capital or funds for development. Court would convert case to proceeding under Chapter 7 at request of creditors.

(5128) *In re New Bride Missionary Baptist Church,* 2014 WL 1364975 (Bankr. E.D. Mi. 2014) – Court declined to approve disclosure statement where plan was facially unconfirmable. Plan appeared to gerrymander unsecured claims to isolate one larger unsecured claim in order to produce accepting impaired class. Court did not dismiss case but entered Order to Show Cause why case should not be dismissed to provide Debtor with opportunity to promulgate confirmable plan.

(5129) *In re Madison Heights Group, LLC,* 2013 WL 8060359 (Bankr. E.D. Mi. 2013) – Cause to dismiss case exists where there appears no viable way to reorganize Debtor. Case would be dismissed where Debtor's sole income was rent that had been absolutely and unconditionally assigned to creditor prior to commencement of case, as Debtor had no funds with which to pay debt or to reorganize affairs.

(5130) *In re Creekside Sr. Apartments, LP,* 2013 WL 1188061 (6th Cir. BAP 2013) – Bankruptcy Court Order dismissing case under Section 1112 is reviewed for abuse of discretion. Dismissal under section 1112(b)(4)(A) requires party seeking dismissal to prove both a substantial or continuing loss or diminution of estate and an absence of any reasonably likelihood of rehabilitation. Court properly dismissed case where Debtor, after protracted proceedings, had filed four disclosure statements and plans, none of which were confirmed because Debtor failed to properly value tax credits that were appurtenant to Debtor's primary assets. Plan also proposed separate classification of bank's deficiency claim from other unsecured claims, although plan proposed identical treatment for both classes. Debtor's cash flow projections indicated negative cash flow through at least 2020, and relied on large balloon payments although Debtor had no indication as to amount those payments were anticipated to be or how Debtor would make the payments. Case presented no evidence of any ability to reorganize within reasonable time. Ongoing negative cash flow constituted substantial or continuing loss, and financials indicated no reasonable likelihood of

reorganization. Debtor failed to demonstrate any unusual circumstances that would establish that conversion or dismissal is not in the best interest of creditors.

(5131) *Estate of Gray v. McDermott,* 2011 WL 946729 (E.D. Mi. 2011) – Court properly dismissed case *nunc pro tunc* at request of creditor where Debtor was not eligible for relief under Chapter 11 in the first instance.

10.61 Dismissal – Failure to Provide Information – Section 1112(b)(4)

(5132) *In re Four Wells Limited,* Case No. 15-8020 (6th Cir. BAP 2016) – Debtor's failure to timely file UST required Operating Reports is cause for dismissal. Although there was insufficient evidentiary basis to dismiss case for bad faith, evidentiary records indicated that Debtors were consistently late in filing operating reports and Debtors offered no explanation. While Section 1112(b)(4)(F) limits dismissal to unexcused failure to file reports, Debtors carry burden to show cause why reports were not filed timely. However, Debtors failed to present any evidence to court on this issue. Further, while Section 1112(b)(4)(F) limits dismissal to "unexcused" failure to file, Subsection (H) does not require failure to be "unexcused", and mere failure, regardless of reason, is sufficient to dismiss case for cause.

10.62 Dismissal – Bad Faith

(5133) *In re BCC Sandusky Permanent LLC,* 2017 WL 2470864 (Bankr. N.D. Ohio 2017) – Section 1112 allows Court to dismiss the case for "cause" including bad faith. In determining bad faith, Court will consider (one) whether Debtor has only one asset; (2) whether Debtor engaged in improper prepetition conduct; (3) whether there only a few unsecured creditors; (4) whether property was posted for foreclosure and Debtor has been unsuccessful in defending against foreclosure in state Court; (5) Debtor and one creditor have proceeded to stand still in state Court litigation and Debtor has lost or been required to post a bond which it cannot afford; (6) filing a petition effectively allows Debtor to evade Court orders; (7) Debtor has no ongoing business or employees; and (8) lack of possibility of reorganization). Although Debtor's case was a "single asset real estate case", Debtor had been in existence for a number of years and there were no characteristics of "new Debtor syndrome". Bankruptcy code specifically contemplates single asset real estate case is being filed. Although Debtor, the owner of a shopping center, had no employees, it had an ongoing business and leasing and managing the property and the property produces cash flow that is more than sufficient to cover expenses. Although Debtor had only to unsecured creditors, creditors held significant claims aggregating approximately $100,000. Further, unsecured creditors were not seeking dismissal of Case. Debtor filed bankruptcy on Eva foreclosure sale, but timing was not arbitrary, occurring only after Debtor's efforts to resolve that were terminated by lender just a few days before scheduled foreclosure sale and did not appear to be effort to evade state Court foreclosure order. Whether Debtor has possibility of reorganization is based on facts and circumstances that existed at time of filing a bankruptcy petition. Debtor presented evidence that it would be able to sell or refinance the underlying property for an amount sufficient to pay the mortgage where the mortgage debt was approximate $22 million, the property appraised as of the petition date at least $25 million, and Debtor had received offers in excess of $28 million, although those offers had not closed. Improper prepetition conduct focuses on conduct of Debtor, not conduct of managers where managers were not in control of property as of commencement of case and property was being operated by court-appointed receiver who was controlling property during bankruptcy process. Court also found that State Court Receivers notice regarding the scheduled foreclosure sale fell short of notice and procedures designed to affect the sale that maximizes the value of property and protects rights of parties other than lender, where there was no appraised value listed in the notice of sale, indicated that a minimum bid of two thirds of the appraised value is required, and proposed required deposit of 20% while federal statutory procedure required a deposit of only 10%. Debtor's expert testified that buyer who would most likely be interested in property would be institutional real estate investment trust or large private trust where listing a local newspaper would be unlikely to reach those buyers while an experience, nationwide commercial property broker would be able to obtain a significantly greater price.

10.63 Dismissal With Prejudice to Re-filing

(5134) *In re Packard Square, LLC,* 2017 WL 4570699 (Bankr. E.D. Mi. 2017), *affd,* 2018 WL 2159791 (E.D. Mi. 2018) – Section 305 allows Bankruptcy Court to suspend all proceedings in Case if interests of creditors and debtors would be better served by suspension. Pendency of state court liquidation proceedings is relevant to abstention where debtor has been receivership for so long that bankruptcy case is duplicative and wasteful. Factors to consider include economy and efficiency of administration; whether there is another forum available to protect interests of both parties and whether there is pending proceeding in state court; whether federal proceedings are necessary to just and equitable solution; whether there is alternative means of equitably distributing assets; whether debtor and creditors are able to work out less expensive out of court arrangement; whether non-federal insolvency proceeding has proceeded to point where it would be costly and time consuming to start afresh; and purpose for which bankruptcy jurisdiction is invoked. If State Court has previously appointed receiver, Court will also consider length of time receiver has acted, what receiver has done, and impact of these considerations on other relevant factors. Dismissal is preferred only where dismissal would better serve interest of both debtor and creditors. Court would dismiss case where there was state court receiver in possession for more than 10 months pre-petition, best interests of creditors is to complete construction project, and Debtor lacks funding to do so as Court has denied Motion for DIP Financing. Debtor lacks any resources to complete project leaving State Court receivership as most viable option. Leaving receiver in place also avoids delays in turning control over to Debtor. Issues regarding actions of Receiver can be best adjudicated in State Court that appointed receiver and State Court has extensive supervisory authority over receiver. To ensure that Debtor does not attempt to circumvent Court ruling, dismissal would be with prejudice to Debtor seeking further relief for two years, to give state court receivership time to conclude.

(5135) *In re Lee,* 467 BR 906 (6th Cir. BAP 2012) – Bankruptcy Court properly dismissed individual Chapter 11 Case with prejudice to Debtor filing another petition for relief for 180 days. Alleged mortgage creditor had standing to request dismissal. Creditor either held valid assignment of note and mortgage or, if not, creditor had at least an equitable interest in note and mortgage sufficient to support standing as "creditor". Although "bad faith" is not expressly enumerated in Section 1112 as a basis for dismissal, "cause" is flexible concept that incorporates bad faith as one possible basis. Bad faith is fact-specific determination based on totality of circumstances. Petition was Debtor's third Chapter 11 filing. Each of the prior two filings were dismissed because Debtor failed to file required documents; failed to

produce financial records at the prior Section 341 meetings; and failed to pay filing fees in at least one prior case. Debtor's primary reason for filing was to stop foreclosure but Debtor had no meaningful ability to reorganize in an honest or forthright fashion. Court can dismiss case with bar to refiling under Sections 109 and 349 for up to 180 days for cause. Serial filings designed to delay creditors, coupled with failure to file schedules, failure to pay filing fees, and failure to produce documents evidenced intent to frustrate the bankruptcy process rather than reorganize affairs.

(5136) *In re Morris,* 2010 WL 3910222 (Bankr. N.D. Ohio 2010) – Court can dismiss case with prejudice to re- filing pursuant to Section 109(g) for 180 days. Court has authority under Section 105 and Section 349 to dismiss with prejudice for a period longer than 180 days to prevent an abuse of process. Dismissal with prejudice for two years warranted where Debtor has repeatedly filed such that Debtor has been under the protection of the Bankruptcy Code for all but a little over six months of the preceding 6 years. Morris filed his first chapter 13 case in 2004 which was subsequently dismissed in 2009 for failure to pay. Less than three months later, Debtor filed his second chapter 13 case which was dismissed for failure to appear at the confirmation hearing. A little over three months after that dismissal, Debtor filed his third chapter 13 case that was for failure to pay, failure to obtain credit counseling, failure to assert consistent exemptions and failure to comply with 11 U.S.C. Section 1325(a)(4). Seventeen days later, Debtor filed the instant case. Debtor has not made any meaningful payments to his creditors since dismissal of his first Chapter 13 case and has not made a mortgage payment in over a year or a payment on his car note in 2010. Debtor included the monthly payment on a disputed mortgage on his schedule J in this and did not take any steps in this case to have the Court rule on the validity of the mortgage. Debtor was less than cooperative in this case with complying with his statutory duties as a Debtor. Debtor failed to attend the initial Debtor's conference with the U.S. Trustee; Debtor has not paid any portion of the case filing fee; Debtor did not pay any quarterly fees to the U.S. Trustee's office nor has he filed any monthly operating reports; Debtor did not file the credit counseling as mandated by 11 U.S.C. Section 521; and Debtor has asserted exemptions which are not allowed by law. Debtor's behavior at various hearings evidenced bad faith. The Court took large amounts of time to try and explain the statutory requirements to Debtor only to have him appear at the next hearing and feign ignorance. Debtor accused various judges and clerk's office staff of attempting to thwart his efforts to obtain bankruptcy relief when the only thing they have done is required him to comply with the Bankruptcy Code.

10.64 Sanctions for Filing

(5137) *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.

(5138) *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.

10.65 Abstention

(5139) *In re Packard Square, LLC,* 2017 WL 4570699 (Bankr. E.D. Mi. 2017), *affd,* 2018 WL 2159791 (E.D. Mi. 2018) – Section 305 allows Bankruptcy Court to suspend all proceedings in Case if interests of creditors and debtors would be better served by suspension. Pendency of state court liquidation proceedings is relevant to abstention where debtor has been receivership for so long that bankruptcy case is duplicative and wasteful. Factors to consider include economy and efficiency of administration; whether there is another forum available to protect interests of both parties and whether there is pending proceeding in state court; whether federal proceedings are necessary to just and equitable solution; whether there is alternative means of equitably distributing assets; whether debtor and creditors are able to work out less expensive out of court arrangement; whether non-federal insolvency proceeding has proceeded to point where it would be costly and time consuming to start afresh; and purpose for which bankruptcy jurisdiction is invoked. If State Court has previously appointed receiver, Court will also consider length of time receiver has acted, what receiver has done, and impact of these considerations on other relevant factors. Dismissal is preferred only where dismissal would better serve interest of both debtor and creditors. Court would dismiss case where there was state court receiver in possession for more than 10 months pre-petition, best interests of creditors is to complete construction project, and Debtor lacks funding to do so as Court has denied Motion for DIP Financing. Debtor lacks any resources to complete project leaving State Court receivership as most viable option. Leaving receiver in place also avoids delays in turning control over to Debtor. Issues regarding actions of Receiver can be best adjudicated in State Court that appointed receiver and State Court has extensive supervisory authority over receiver.

E. Retention and Compensation of Counsel

10.66 Requirements for Retention

(5140) *In re YMCA of Marquette County,* 2017 WL 3017097 (Bankr. W.D. Mi. 2017) – Approval of retention of attorney for Debtor requires attorney to satisfy requirements of Section 327, including proof that attorney does not hold or represent an interest adverse to the estate and is disinterested. Requirements are in the conjunctive, so professional must demonstrate both a lack of any interest adverse to estate and disinterestedness. Disinterestedness is defined as (a) not a creditor, equity security holder or insider; (b) is not and was not within 2 years before the date of the filing a director, officer or employee of Debtor; and (c) does not have any interest materially adverse to interests of estate or class of creditors or equity holders by reason of any relationship to or connection with or interest in Debtor or any other reason. Attorney who is member of firm but who, within 2 years pre-petition served on board of directors of Debtor, is not disinterested. However, disqualification of attorney does not automatically disqualify entire firm. However, relationship between Debtor and attorney, including attorney's potential exposure as former of board during time when CEO was apparently mismanaging Debtor's financial affairs and potential other mismanagement disqualify firm. Individuals who served on board, including attorney, may have to answer for failure to detect, deter or otherwise address former CEO's mismanagement, such that Debtor would have good reason to investigate potential claims for breach of fiduciary duty against board members. Evidence indicated that possible claims against board were more than theoretical or speculative and there is good reason to believe that investigation is warranted.

(5141) *In re Ortega,* 2011 WL 3810287 (Bankr. W.D. Ky. 2011) – Court lacked authority to approve retention *nunc pro tunc*. Although case had been heavily litigated and Counsel had performed extensive services, Counsel failed to demonstrate any extraordinary circumstances that would warrant late filing of Application for retention. Although Court would certainly have approved retention had application been timely filed, Court cannot grant the Application and make it effective as to the date of the filing of the Petition absent extraordinary circumstances. Application for Retention would be approved effective with date of filing of Application only.

(5142) *In re Sausa,* Case No. 10-55640 (Bankr. E.D. Mi. 2011) – Sections 327 and 330 and Federal Rule 2014 require Counsel for Debtor in Chapter 11 to have retention approved by the Court. Where approval is not obtained, court can grant approval on a *nunc pro tunc* basis under "exceptional circumstances". Counsel failed to obtain approval over long period of time notwithstanding several "milestones" which should have alerted Counsel to need to seek approval for retention. *Nunc pro tunc* application for retention and Counsel's fee application both denied in their entirety.

10.67 Lack of Authorization to Retain Counsel

(5143) *In re Machinery Maintenance Specialists, Inc.,* 2010 WL 7346416 (Bankr. E.D. Mi. 2010) – Section 327 requires court approval for Debtor's retention of Counsel in Chapter 11 case. Section 330 authorizes compensation to be paid only to Counsel whose retention is approved by the Court. Counsel who never filed Application for Retention and whose retention was never approved by the Court not entitled to compensation for services in Chapter 11 Case. Counsel never filed the application, there was no time pressure that would have prevented filing at commencement of case, Counsel delayed more than one year after filing the case to seek approval for retention and then did so only after the United States Trustee filed a Motion for Turnover of the pre-petition retainer, and allowing Counsel to keep the unapproved retainer would adversely affect other parties. Counsel required to disgorge to the United States Trustee the retainer received prior to commencement of the case

10.68 Denial of Application to Retain Counsel – Effect

(5144) *In re Moohaven Dairy, LLC,* Case No. 10-24239 (Bankr. E.D. Mi. 2011) – 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.

10.69 Compensation

(5145) *In re Stetler Cross Ministries, Inc.* 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff'd sub nom Stetler Cross Ministries, Inc. v. McDermott*, 2011 WL 1434615 (W.D. Ky. 2011) - Section 330(a)(2) and Court's broad and inherent authority permit Bankruptcy Court to Order disgorgement of previously paid attorney fees where attorney does not satisfy requirements of Code and Rules. Debtor's Counsel received $2000 fee although Counsel never filed application to be retained as Counsel and never filed application for approval of compensation as required by Sections 327, 330 and 331. Debtor's Counsel in Chapter 11 proceeding cannot be paid without obtaining prior Court approval. There are few omissions more serious in Chapter 11 case than failure of Debtor's attorney to obtain Court approval prior to securing payment for services rendered from Debtor's estate. Bankruptcy Code and Rules strictly regulate compensation of professionals for purposes of preventing over-reaching. Failure to follow Rules, regardless of how *de minimus* the fee, cannot be overlooked by Court. Further, Counsel did not place unawarded fees in trust account a drew upon and spent funds without Court approval. Although failure may have been inadvertent or negligent failure to disclose, failure to seek Court approval by Debtor's Counsel prior to accepting fee and having employment approved by Court requires disgorgement.

(5146) *In re Stetler Cross Ministries, Inc.,* 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff'd sub nom Stetler Cross Ministries, Inc. v. McDermott,* 2011 WL 1434615 (W.D. Ky. 2011) – Section 330(a)(2) and Court's broad and inherent authority permits bankruptcy court to order disgorgement of previously paid attorney fees where an attorney fails to satisfy the requirements of the Code and Rules. Debtor's Counsel received a $2000 fee although counsel never filed an application to have himself or his firm retained as counsel and never filed an application for approval of compensation as required by sections 327, 330 and 331. Debtor's counsel in a Chapter 11 proceeding cannot be paid without seeking and obtaining prior court approval. There are few omissions more serious in a Chapter 11 case than the failure of a Debtor's attorney to obtain court approval prior to securing payment for services rendered from a Debtor's estate. Bankruptcy Code Rules strictly regulate the compensation of professionals for the purpose of preventing over-reaching. Failure to follow these rules, regardless of how *de minimus* the fee, cannot be overlooked by the Court. Further, Counsel did not place the unawarded fees in his trust account, but rather drew upon the funds, and spent them, all without Court approval. Although failure may have been inadvertent or negligent failure to disclose, the failure to seek Court approval by Debtor's counsel prior to accepting the fee and having his employment approved by the Court

requires disgorgement.

F. Retention of Other Professionals

10.70 Standards for Retention

(5147) *In re Affordable Med Scrubs, LLC,* 2016 WL 1244771 (Bankr. N.D. Ohio 2016) – Debtor can retain professionals that do not hold adverse interest to estate and who are disinterested, and where terms of retention are in best interests of estate. Progress and status of case indicated that Debtor's proposed retention of financial advisor would benefit estate where Debtor had continue to use cash collateral, there was uncertainty as to status, employment and compensation of upper level management and counsel, and circumstances have not promoted longer term focus on reorganization of business.

10.71 Compensation

(5148) *In re Affordable Med Scrubs, LLC,* 2016 WL 1244771 (Bankr. N.D. Ohio 2016) – Compensation to professional must be reasonable an in best interest of estate. Proposed terms of retention were reasonable to extend that retention allowed professional to receive payment of 75% of fees and 100% of expenses on monthly basis, subject to final approval by court. Professional was aware of budgeted amounts and agreed to proceed with services. Proposed compensation provided protection against excessive and unreasonable expenses. However, to extent that Debtor would indemnify professional from any actions arising out of retention was not reasonable. Indemnification was not normal provision of retention of financial advisors. Cost of indemnification claim would sink Debtor given very thin margins and restrictions on use of cash collateral. Further, there were only two active creditors and no creditor committee, substantially limiting risk of action.

G. Incurring Debt

10.72 Generally – Section 364

(5149) *In re VPH Pharmacy, Inc.,* 2018 WL 329906 (E.D. Mi. 2018) – Section 364 creates a framework for debtor to incur debt and obtain credit. Trustee or debtor who is authorized to operate debtor's business can incur unsecured debt and obtain unsecured credit in ordinary course of business without first obtaining court order and credit or loan is afforded priority status under Section 503(b)(1). Section 364(b) permits court to authorize debtor to incur unsecured debt other than in the ordinary course of business with creditor holding administrative expense claim under Section 503(b)(1), after notice and hearing. Section 364(c)(1) allows Creditor to acquire super-priority administrative status, superior to other priority claims. Section 364(d) allows court to allow borrowing on secured basis including lien that is senior or equal to existing liens. Order that approved financing secured by lien on assets did not constitute either super-priority administrative claim or priming lien. While Court orally indicated that court intended to approve super-priority status, actual Order did not do so and parties did not seek clarification or amendment of Order from Bankruptcy Court.

H. Jurisdiction to Enforce Confirmed Plan

10.73 Generally

(5150) *Jackson Masonry LLC v. Ritzen Group. Inc.,* 2018 WL 1636085 (Bankr. M.D. Tn. 2018) - 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 is without protection of Bankruptcy Court and may not come to bankruptcy judge every time something unpleasant happens. 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.

XI. **Chapter 13**

A. Eligibility

11.1 Generally

(5151) *In re Woods,* Case no. 11-72329 (Bankr. E.D. Mi. 2012) – Debtor's Chapter 13 petition that included reference to limited liability company as "all other names used by Debtor" improperly attempted to join LLC as Debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.

(5152) *In re Scarlett,* Case No. 09-50320 (Bankr. E.D. Mi. 2012) – Debtor's Chapter 13 petition that included reference to limited liability company as "all other names used by Debtor" improperly attempted to join LLC as Debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.

(5153) *In re Executive Business Corporation,* Case No. 08-46714 (Bankr. E.D. Mi. 2008) - Corporation is not eligible for relief under Chapter 13.

11.2 Section 109 – Regular Income

(5154) *In re Gomery,* 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Incarcerated Debtor who had no income at all and had no reasonable prospect of having income in the future was not eligible. Chapter 13 requires Debtor to have regular income.

(5155) *In re Lovell,* 444 BR 367 (Bankr. E.D. Mi. 2011) – Debtor did not have "regular income" where Debtor was unemployed and relied entirely on spouse for funds to make plan payments, where Debtor's spouse was also Debtor in separate Chapter 13 case. While support from non-filing spouse constitutes regular income as long as history of regularity and stability is provided, Debtor's spouse in Chapter 13 is required to commit 100% of disposable income to funding spouse's own plan. Therefore, spouse did not have any income that could be given to Debtor to fund her chapter 13 plan and Debtor lacked "regular income" for purposes of Chapter 13 eligibility.

11.3 Section 109 – Debt Limits

(5156) *In re Bosserman,* 2018 WL 2186974 (Bankr. N.D. Ohio 2018) – Section 109(e) limits eligibility for relief under Chapter 13 to individuals with noncontingent, liquidated unsecured debts of less than $394,725; and noncontingent, liquidated secured debts of less than $1,184,200. Eligibility is based in first instance on Debtor's schedules if schedules were made in good faith. Evidence raised substantial questions concerning the Debtor's good faith where evidence indicated that Debtor understated and mis-described claims, scheduling debts at far less than amounts claimed by creditor and supported by documentation. Debt was not contingent or unliquidated because claim related to sum certain evidenced by guarantees of payment connected to promissory notes on which Debtor had previously defaulted. Debtor's commercial guarantees were independent of creditors attempts to realize on collateral. Debtor's unsecured debts exceeded limits set forth in Section 109 at time of filing.

(5157) *In re Asch,* 2015 WL 4973196 (Bankr. E.D. Ky. 2015) – Court will rely primarily on Debtor' s schedules, checking only to see that schedules were made in good faith, as eligibility is determined by debts that existed on date of petition and not after a hearing. However, court is not bound by information in schedules where it appears to legal certainty that amount owed exceeds amount shown by Debtor. If court has notice of possible manipulation, court can review other parts of record to determine whether amount and nature of Debtors was reasonable or whether facts existed as of the petition date to demonstrate that schedules were manipulated. Schedules indicated effort by Debtor to manipulate debts. Debtor failed to include pre-petition interest on secured debts; failed to schedule secured claim of IRS and stated that IRS debt was uncollectable; Debtor listed mortgage debts as contingent and unliquidated although principal and interest amounts were easily calculated based on note and mortgage, and Debtor was primary borrower and there were no events required to give rise to liability. Based on claims scheduled and proofs of claim filed, Debtor's secured debt exceeded debt limits. Debtor given opportunity to convert case or case would be dismissed.

(5158) *In re Shenas,* 2011 WL 3236182 (Bankr. N.D. Ca. 2011) – Unsecured portion of undersecured debt is normally considered as unsecured debt for purposes of eligibility. However, where Debtor's personal liability on note had been discharged in prior Chapter 7 case, any alleged deficiency balance is unenforceable and therefore is not included in calculation of unsecured debts in Chapter 13.

(5159) *In re Hannon,* 455 BR 814 (Bankr. S.D. Fla. 2011) – Joint Chapter 13 Debtors with combined debts exceeding statutory limits are eligible for relief under Chapter 13 if each individual's debts are within limits. Cased dismissed where each Debtor, standing alone, had Debtors that exceeded Section 109 limits.

(5160) *In re Bowley,* 2011 WL 4458928 (Bankr. D. Hawaii 2011) – Debtor not eligible for relief under Chapter 13 where schedules indicated claim secured by Debtor's mortgage exceeded $6 million.

(5161) *In re Hurtt,* 2011 WL 1576085 (Bankr. E.D. Ky. 2011) – Court should first examine Debtor's schedules to determine eligibility. Review is not limited to Schedule D, and court can consider all schedules as well as summary of schedules. Where schedules showed deficiency balances on secured claims that exceed unsecured debt limits, Debtor is not eligible, and case must be dismissed. Obligation is not "secured" for purposes of eligibility if the collateral belongs to third party and not to Debtor.

(5162) *In re Schumacher,* Case No. 10-57196 (Bankr E.D. Mi. 2010) – Undersecured portions of secured claims and wholly undersecured claims are treated as unsecured claims for purposes of Section 109 eligibility. Although lien strip will not be final and effective until plan completion, Section 506 limits value of secured portion of claim to value of property. Any excess obligation is unsecured in determining eligibility.

(5163) *In re Bowes,* 2009 WL 2983036 (Bankr. N.D. Ohio 2009) - Eligibility depends on noncontingent, unliquidated unsecured debts "on the date of the filing of the petition." Chapter 13 eligibility should normally be determined by the Debtor's schedules, checking only to see if the schedules were made in good faith. The schedules (1) are the starting point of the eligibility inquiry, but may also be the ending point under certain circumstances; (2) the word "normally" used with respect to reliance on schedules implies exceptions for the proper application of a court's discretion so long as the determination focuses on determining debts "on the date of filing," and (3) eligibility determination should not depend on the claims allowance process or turn into separate satellite litigation that dominates and delays the Chapter 13 proceedings. Undersecured portion of secured claims are treated as unsecured debts for eligibility purposes. Court can consider Debtor's Amended Schedule F where original Schedule F listed debts that were obligations of a failed corporation which were not guaranteed by Debtor and any potential liability would depend on piercing the corporate veil or some other theory. The Amended Schedules do not change any debts for which the Debtors were personally liable, but only deleted those debts for which Debtors were not personally liable and, therefore, represent a more accurate statement of the Debtors' debts and obligations. Debts which are the subject of a valid pre-petition State Court judgment must be included as those debts are not contingent or unliquidated.

11.4 Debt Limits – Unliquidated or Contingent Debts

(5164) *In re Bosserman,* 2018 WL 2186974 (Bankr. N.D. Ohio 2018) – Debt is "contingent" if liability depends on something that might or might not happen in future. Debt is liquidated if it can be determined by mathematical computation or is otherwise readily ascertainable. Although schedules listed secured creditor's claim as contingent and unliquidated, documentary and testimonial evidence contradicted Debtor's description where Debtor, in restructuring agreement, expressly acknowledged being in default on obligations owed to secured creditor. Debtor personally guaranteed payment of promissory notes to secured creditor. Claims were unsecured because only collateral for claims or assets owned by third party and not by any property owned by Debtor personally. Further, unsecured deficiency balance as disclosed on Schedule D is treated as unsecured claim for purposes of eligibility. Evidence also raised substantial questions concerning the Debtor's good faith where evidence indicated that Debtor understated and mis-described claims, scheduling debts at far less than amounts claimed by creditor and supported by documentation. Debt was not contingent or unliquidated because claim related to sum certain evidenced by guarantees of payment connected to promissory notes on which Debtor had previously defaulted. Debtor's commercial guarantees were independent of creditors attempts to realize on collateral. Debtor's unsecured debts exceeded limits set forth in Section 109 at time of filing.

(5165) *In re Fishel,* 2018 WL 1870368 (Bankr. W.D. Wis. 2018) – Section 109(e) is not jurisdictional but sets in motion series of events that allows court to dismiss case at later date. Section 1307 is discretionary and provides that court may dismiss or may convert but does not require dismissal or conversion. While lack of eligibility may constitute cause for dismissal Court is not required to dismiss where dismissal would be absurd or would produce result beyond scope of abuse which Congress was attempting to address. Debtor could make payments proposed in plan and while Debtor has significant student loan debt, that debt would survive discharge. Allowing case to proceed is consistent with Congressional intention that debtors who can pay portion of debt in Chapter 13 should be required to do so. Best interests of Debtor, estate, and creditors best served if Debtor permitted to pursue confirmation of her Chapter 13 Plan. Literal interpretation of statute would lead to absurd result where debtor had no option. Debtor was above-median income with disposable income available to pay creditors and would not be able to rebut presumption of abuse leading to dismissal; but Chapter 13 attempt to repay some amounts raises argument that debtor is ineligible for Chapter 13 relief. Only remaining option would be Chapter 11 which is inordinately expensive and cumbersome for consumer debtor; would likely result in significant portions of funds that would otherwise be available to creditors being paid in administrative expenses and U.S. Trustee quarterly fees; additional formalities of Chapter 11, including disclosure statement and balloting, and attorney's fees, would eat up substantial amounts that would otherwise be available to creditors; which is neither in best interests of Debtor nor creditors.

(5166) *In re Gamble,* Case No. 16-36498 (Bankr. S.D. Tex. 2017) - Cap on lease rejection damages under Section 502(b)(6) does not apply in determining whether debts exceed Section 109 debt limits. Debt limits for eligibility are determined as of petition date and possibility statutory limit under Section 502(b)(6) may eventually cap landlord's claim does not alter analysis. Landlord's claim liquidated by pre-petition State Court judgment allowed in full amount leaving Debtors ineligible for Chapter 13 relief.

(5167) *In re Perkins,* 2016 WL 8078319 (Bankr. W.D. Ky. 2016), *affd,* 2018 WL 1279252 (6th Cir. BAP 2018) - Debtor met Chapter 12 debt limit requirement where scheduled that aggregated $3,500,000 and proofs of claim filed by bar date totaled $4,012,000, either of which is less than Chapter 12 limit. In determining amount of outstanding debt, schedules will be afforded prima facie validity which can be overcome by evidence controverting schedules. Creditor did not present any evidence to rebut presumption of accuracy of debt represented on schedules. Although proofs of claim were filed by creditors who were not scheduled, that does not demonstrate a lack of good faith in Debtor's preparation of schedules in first instance. Court would not combine proofs of claim with scheduled debt for which no claim was filed by claims bar date to determine total debt.

(5168) *In re Yuen,* 2013 WL 5567266 (Bankr. S.D. Tx. 2013) – Appeal of final judgment does not render debt unliquidated or contingent.

(5169) *In re Perkins,* 2009 WL 2983034 (Bankr. N.D. Ohio 2009) – Eligibility depends on noncontingent, unliquidated unsecured debts "on the date of the filing of the petition." Chapter 13 eligibility should normally be determined by the Debtor's schedules, checking only to see if the schedules were made in good faith. The schedules (1) are the starting point of the eligibility inquiry, but may also be the ending point under certain circumstances; (2) the word "normally" used with respect to reliance on schedules implies exceptions for the proper application of a court's discretion so long as the determination focuses on determining debts "on the date of filing," and (3) eligibility determination should not depend on the claims allowance process or turn into separate satellite litigation that dominates and delays the Chapter 13 proceedings. The Court must make an independent determination apart from Debtor's schedules whether debts are contingent and unliquidated, particularly where Debtor's schedules list every debt as contingent and unliquidated. Secured debt is treated as unsecured to the extent the claims exceed the collateral value. Claims based on mortgages and consensual secured lending arrangements are not contingent or unliquidated. Debtor's personal liability for corporate debts will be contingent if there is no personal guarantee and no pre-filing determination of personal liability. However, personal liability premised on a personal guarantee is not contingent. Personal credit card debt is not contingent or unliquidated just because items were purchased for Debtor's business. Debtor's unsecured debt exceeded limits of Section 109 requiring dismissal of Debtor's Chapter 13 Petition.

(5170) *In re Frederick,* 2011 WL 5908957 (Bankr. E.D. Mi. 2011) – Debt is "liquidated" if the amount can be ascertained. Dispute over underlying liability does not render debt unliquidated where amount of claim can be calculated. Consent judgment entered prior to commencement of case liquidated claim at $950,000. Debtor's opinion or "belief" that creditor would ultimately agree to accept far less in satisfaction of claim did not render debt unliquidated. Whether debt is liquidated is determined as of date petition is filed without regard to whether the amount of the claim may be later reduced or even eliminated.

(5171) *In re Croney,* 2011 WL 1656371 (Bankr. W.D. Wa. 2011) – For purposes of eligibility, Debtor's unconditional personal liability of corporate obligation is liquidated unsecured debt. Unconditional guarantee did not require lender to pursue recovery of collateral or take other collection actions against corporate borrower before pursuing guarantor rendering guarantor labile for full balance of loan. Collateral pledged by corporate borrower did not convert claim into secured claim as to Debtor where there was no property of the Debtor pledged as collateral.

(5172) *Free v. Malaier,* 2015 WL 9252592 (9th Cir. BAP 2015) – Where Debtor previously received discharge in Chapter 7, unsecured portion of secured claim in chapter 13 is not included in calculation of unsecured debts for purposes of Section 109.

(5173) *In re Kwiatkowski,* 486 BR 409 (Bankr. E.D. Mi. 2013) – Eligibility is generally determined by face of Debtor's schedules, as long as schedules are completed in good faith. Debtor's schedules lacked good faith when Debtor scheduled unsecured deficiency claims on foreclosed mortgages with amounts as "unknown". Property had been foreclosed in 2009 and by date of bankruptcy filing, Debtor knew that deficiency claim was, at a minimum, $250,000.00. Debtor knew the balance of the mortgage as of the foreclosure date was at least $575,000 and that property sold for less than $302,000, as evidenced by Debtor's own tax returns and the sheriff's deed. Debtor's assertion that the deficiency balance was "unknown" lacked good faith where Debtor knew that the actual balance was at least $250,000.00. As result, Debtor had total unsecured debt in excess of statutory limit for relief under Chapter 13. Under Michigan law, foreclosure satisfies the debt only to extent of foreclosure sale price. If the foreclosure bid is not sufficient to pay the debt in full, the remaining balance is an unsecured deficiency claim for purposes of Chapter 13 eligibility.

(5174) *In re Shenas,* 2011 WL 3236182 (Bankr. N.D. Ca. 2011) – Unsecured portion of undersecured debt is normally considered as unsecured debt for purposes of eligibility. However, where Debtor's personal liability on note had been discharged in prior Chapter 7 case, any alleged

deficiency balance is unenforceable and therefore is not included in calculation of unsecured debts in Chapter 13.

(5175) *In re Hannon,* 455 BR 814 (Bankr. S.D. Fla. 2011) – Joint Chapter 13 Debtors with combined debts exceeding statutory limits are eligible for relief under Chapter 13 if each individual's debts are within limits. Cased dismissed where each Debtor, standing alone, had Debtors that exceeded Section 109 limits.

(5176) *In re Bowley,* 2011 WL 4458928 (Bankr. D. Hawaii 2011) – Debtor not eligible for relief under Chapter 13 where schedules indicated claim secured by Debtor's mortgage exceeded $6 million.

(5177) *Liggett v. Schwartz,* 2012 WL 1020011 (E.D. Mi. 2012) – Wholly unsecured debt is included in calculation of unsecured debts for purposes of eligibility, notwithstanding Debtor's classification of the obligation as a secured claim. Unsecured portion of under secured debt is counted as unsecured for eligibility purposes. Debtors schedules valued property at $225,000, subject to first mortgage in excess of $250,000 and a second mortgage of $137,000. Adding entire unsecured balance of second mortgage to Debtor's scheduled unsecured debt would Debtor far beyond section 109 debt limit. Absent a good faith dispute as to the value of the property or the secured status of the debt, Debtor would be deemed ineligible for chapter 13 relief.

(5178) *In re Winters,* 2012 WL 1067696 (Bankr. E.D. Tn. 2012), *affirmed in further proceeding, Winters v. IRS,* 485 BR 375 (Bankr. E.D. Tn. 2013) – Debtor's liability on personal guarantee may be "contingent debt" to the extent that the underlying obligation is not yet in default. However, once a default in the underlying obligation arises, liability on personal guarantee is no longer contingent as Debtors liability is no longer conditioned upon the occurrence or happening of any extrinsic event. Value of collateral securing loan was substantially less than the amount owed on the obligation, leaving a noncontingent unsecured balance owing substantially in excess of the debt limits under section 109, requiring dismissal of Chapter 13 case.

(5179) *In re Frederick,* 2011 WL 5908957 (Bankr. E.D. Mi. 2011) – Debt is "liquidated" if the amount can be ascertained. Dispute over underlying liability does not render debt unliquidated where amount of claim can be calculated. Consent judgment entered prior to commencement of case liquidated claim at $950,000. Debtor's opinion or "belief" that creditor would ultimately agree to accept far less in satisfaction of claim did not render debt unliquidated. Whether debt is liquidated is determined as of date petition is filed without regard to whether the amount of the claim may be later reduced or even eliminated.

11.5 Debt Limits – Student Loans

(5180) *In re Pratola,* 578 B.R. 414 (Bankr. N.D. Ill. 2017), *reversed,* 2018 WL 4181498 (N.D. Ill. 2018) – Section 109(e) contains eligibility standards and mandates dismissal or conversion if debts exceed limits. Court does not have equitable power or discretion to allow case to continue where Debtor is not eligible. Student loan debt is included in calculation of unsecured debt and resulted in Debtor having debt in excess of Section 109 limits.

(5181) *In re Fishel,* 2018 WL 1870368 (Bankr. W.D. Wis. 2018) – Section 109(e) is not jurisdictional but sets in motion series of events that allows court to dismiss case at later date. Section 1307 is discretionary and provides that court may dismiss or may convert but does not require dismissal or conversion. While lack of eligibility may constitute cause for dismissal Court is not required to dismiss where dismissal would be absurd or would produce result beyond scope of abuse which Congress was attempting to address. Debtor could make payments proposed in plan and while Debtor has significant student loan debt, that debt would survive discharge. Allowing case to proceed is consistent with Congressional intention that debtors who can pay portion of debt in Chapter 13 should be required to do so. Best interests of Debtor, estate, and creditors best served if Debtor permitted to pursue confirmation of her Chapter 13 Plan. Literal interpretation of statute would lead to absurd result where debtor had no option. Debtor was above-median income with disposable income available to pay creditors and would not be able to rebut presumption of abuse leading to dismissal; but Chapter 13 attempt to repay some amounts raises argument that debtor is ineligible for Chapter 13 relief. Only remaining option would be Chapter 11 which is inordinately expensive and cumbersome for consumer debtor; would likely result in significant portions of funds that would otherwise be available to creditors being paid in administrative expenses and U.S. Trustee quarterly fees; additional formalities of Chapter 11, including disclosure statement and balloting, and attorney's fees, would eat up substantial amounts that would otherwise be available to creditors; which is neither in best interests of Debtor nor creditors.

(5182) *In re Petty,* Case No. 18-40258 (Bankr. E.D. Tx. 2018) – Section 109(e) limit eligibility under Chapter 13 to debtors with non-contingent, liquidated unsecured debts of less than $394,725.00. Although Section 109 is not jurisdictional and may be waived, Court lacked authority ignore provisions when timely raised. Student loan debt is non-contingent and liquidated unsecured debt and cannot be ignored in determining eligibility.

(5183) *In re Bailey-Pfeiffer,* 2018 WL 1896307 (Bankr. W.D. Wis. 2018) – Student loan debt is non-contingent and liquidated unsecured debt and cannot be ignored in determining eligibility.

(5184) *In re Mendenhall,* 2017 WL 4684999 (Bankr. D. Idaho 2017) - Student loan debt is non-contingent and liquidated unsecured debt and cannot be ignored in determining eligibility.

(5185) 578 B.R. 414 (Bankr. N.D. Ill. 2017), *reversed,* 2018 WL 4181498 (N.D. Ill. 2018) – Debtor who has debts above eligibility limits for Chapter 13 cannot proceed over objection. Case must either be dismissed or converted to Chapter 7 or 11.

11.6 Eligibility – Stockbroker

(5186) *In re Melcher,* 2017 WL 3981110 (Bankr. E.D. Ky. 2017) – Section 109(e) provides that "stockbroker" is not eligible for relief under Chapter 13. "Stockbroker" is defined as person who has customers and Debtor engages in business of trading securities. "Customer" is entity with whom a Debtor deals as principal or agent and that has a claim against Debtor on account of a security received, acquired, or held by Debtor in the ordinary course of such Debtor's business as a stockbroker (i) for safekeeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase;(v) as collateral under a security agreement; or(vi) for the purpose of effecting registration of transfer; and

(B) entity that has a claim against a person arising out of (i) sale or conversion of security received, acquired, or held; or (ii) deposit of cash, security, or other property for the purpose of purchasing or selling security. Employee who effects transactions while acting on behalf of principal-employer is not stockbroker because person does not have "customers". Debtor, an employee of Fidelity brokerage, was not stockbroker because Debtor did not have customers. While Debtor advised clients regarding investment options including stock transactions she did so as Fidelity employee. Debtor is paid by Fidelity, not by any particular client. Fidelity provides Debtor an office, owns her client list, and does not permit Debtor to provide professional services outside of employment. Clients entrust funds to Fidelity, not Debtor. Debtor holds no client funds in her personal bank account. Debtor may have access to clients' accounts for purpose of initiating investment actions as they direct, but she is not entity holding the clients' deposited funds.

B. Confirmation of Plan

11.7 Form of Plan

(5187) *In re Lundy,* 2016 WL 6108524 (Bankr. N.D. Ohio 2016) – Courts strongly disfavor including provisions in a Chapter 13 plan provisions that merely restate Code and Rules. Even if additional provisions do nothing more than restate parties' rights, they thwart goal of providing streamlined method of reorganizing debts.

(5188) *In re Crawford,* 2016 WL 408924 (Bankr. W.D. Tx. 2016) – Although Section 1325 allows above median Debtor to pay all claims in 60 months even where Debtor has ability to pay claims in full in far shorter time, court can condition confirmation of plan to preclude Debtor's discharge in event plan is later modified to reduce dividend below 100%. Section 105 allows court to impose additional conditions on confirmation of plan to ensure that Debtors receive what Debtors agreed to at confirmation – discharge on payment of 100% dividend – while requiring dividend to remain at 100%.

(5189) *In re Rose,* 2015 WL 151221 (Bankr. W.D. Mi. 2015) – Court has authority to mandate use of standard from plan. To extent that plan permits changes, any changes must be applicable to the case at hand. Additional provisions that do nothing more than restate parties' rights under the law thwart goal of providing streamlined method for reorganization and are not "alterations as may be appropriate to suit the circumstances". Provision purporting to define effective date of the plan is unnecessary where plan is effective upon date order is entered by court on the docket absent some peculiar circumstance in the case. Blanket provision allowing Debtors to pursue all Chapter 5 causes of action is unnecessary, duplicative and arguably conflicts with applicable law particularly where Debtor could not identify any particular cause of action that Debtor may want to pursue. Court would not prohibit provision requiring application of payments notwithstanding that plan already provided for allocation of payments where including additional provision was warranted precaution given history and circumstances of case.

(5190) *In re Ott,* 2014 WL 14300013259A0959 (Bankr. S.D. Tx. 2014) – Bankruptcy court can mandate use of standard from plan that allows deviation only "for good cause shown". Court would not approve deviation absent exceptional circumstances peculiar to Debtor's case.

(5191) *In re Visintainer,* 435 BR 727 (Bankr. M.D. Fl. 2010) – Court has authority to promulgate mandatory from Chapter 13 plan. From plan facilitates Court's independent duty to ensure that plan complies with Code, and facilitates uniformity and efficient review of plans throughout district. Court's adoption of mandatory model plan does not conflict with Code requirement that only the Debtor is permitted to file a plan. Mandatory from plan allowed Debtor to supplement plan with case specific provisions.

(5192) *Diaz v. Zeman,* 462 BR 804 (Bankr. D. Colo. 2011) – Debtor cannot avoid local rule that requires use of local from plan. Required from of plan is within scope of rulemaking authority of court and does not violate provisions of Chapter 13.

(5193) *In re Butcher,* Case No. 11-10545 (Bankr. D. Co. 2011) – Bankruptcy Court has authority to mandate from of Chapter 13 plan. Adoption of mandatory from plan does not exceed Court's rule making powers as from plan does not violate either Section 1325 or Section 1329. Bankruptcy courts have "daunting challenge" to ensure that plans are in full compliance with Section 1325. Adoption of standard from plan reduces chances that court will confirm plan that does not comply.

11.8 100% Plans

(5194) *In re Molina,* 2015 WL 8494012 ((W.D. Tx. 2015) – Court has power to add conditions to confirmation order to ensure compliance with Code. Debtors did not have to contribute 100%^ of disposable income if Plan proposes to pay 100% of claims. Court approved insertion of condition that provided that Debtor would not receive discharge unless Plan actually produced 100% to creditors.

(5195) *In re Gillen*, Case No. 16-81595 (Bankr. C.D. Il. 2017) - Section 1325(b)(1) requires that a Debtor's Plan either distribute property having a value as of the effective date of the Plan that is not less than the amount of the claim; or the Plan must provide for all of the Debtor's projected disposable income be applied to make payments to unsecured creditors. Where Debtor's Plan proposes to pay all unsecured creditors in full but without interest, Debtor is not required to commit 100% of Debtors disposable income. Section 1325(b)(1) does not require Debtor to pay interest on allowed unsecured claims merely because Debtor's proposed Plan payment is less than Debtor's full disposable income unless interest is otherwise required by Section 1325(a) and (4).

(5196) *In re McCarthy,* 554 BR 388 (Bankr. W.D. Tx. 2016) – Where Debtor has excess disposable income bug provides for 100% dividend to unsecured creditors, Court cannot force Debtor to increase payments to shorten plan payment term. But can impose condition at confirmation that Debtor will not receive a discharge unless creditors receive 100% and that Debtor is not permitted to modify plan during plan term to reduce dividend below 100%.

(5197) *In re Crawford,* 2016 WL 408924 (Bankr. W.D. Tx. 2016) – Although Section 1325 allows above median Debtor to pay all claims in 60 months even where Debtor has ability to pay claims in full in far shorter time, court can condition confirmation of plan to preclude Debtor's discharge in event plan is later modified to reduce dividend below 100%. Section 105 allows court to impose additional conditions on confirmation of plan to ensure that Debtors receive what Debtors agreed to at confirmation – discharge on payment of 100% dividend –

while requiring dividend to remain at 100%.

(5198) *In re Bailey,* 2013 WL 6145819 (Bankr. E.D. Ky. 2013) – Debtor who proposes full repayment to unsecured creditors not required to commit 100% of disposable income. Debtor could not be required to increase payments at end of 401-k loans just because increase would allow plan to complete at 100% dividend at earlier date.

(5199) *In re McGehan,* 2013 WL 4069524 (Bankr. D. Colo. 2013) – Debtor who proposes 100% dividend cannot be compelled to pay larger payment and to shorten plan term. Although Debtor had disposable income of more than $4,000 per month, plan proposed payments of $1,000 per month and full repayment of allowed claims. Plan complied with requirements of code, and Debtor has no good faith obligation to pay more merely to shorten plan term. Above median Debtor had 60 month applicable commitment period and was entitled to use entire plan term to pay 100% dividend even if Debtor is not committing all disposable income.

(5200) *In re Braswell,* 2013 WL 3270752 (Bankr. D. Ore. 2013) – Where a creditor objects, the Debtor must either contribute 100% of disposable income or must pay interest to unsecured creditors. Debtor can pay 100% dividend to unsecured creditors over stretched out plan length and pay less than full disposable income each month, but must compensate unsecured creditors for the delay.

(5201) *In re Hight-Goodspeed,* 486 BR 462 (Bankr. N.D. Ind. 2013) – While Debtor who proposes to pay 100% to unsecured creditors is permitted to stretch out plan term and to pay less than full monthly disposable income, Debtor must then pay interest to unsecured creditors. Chapter 13 requires Debtor to either pay 100% of monthly disposable income or to pay interest to unsecured creditors to compensate for the delay in payment.

(5202) *In re Richall,* 470 BR 245 (Bankr. D. N.H. 2012) – Above median Debtor cannot be forced to pay surplus disposable income to pay creditors in full in less than 60 months. Above median Debtor has right to pay less than all disposable income as long as plan proposes to pay creditors in full, even if Debtor has sufficient income to pay creditors in full in less time. However, blow median Debtor can be required to pay excess disposable income. Code allows for below median Debtor to exceed 36 month plan term only for "cause". Where Debtor can pay all claims in less than 36 months, there is no "cause" to extend plan beyond 36 months.

(5203) *In re Winn,* 469 BR 628 (Bankr. W.D. N.C. 2012) – When Debtor proposes plan that pays 100% to unsecured creditors, Debtor is not required to commit 100% of disposable income. Debtor cannot be required to shorten plan term and pay 100% in less than 60 months. Although Debtor's budget contained "exorbitant" expenses for leasing home and retaining property with no equity, Section 1325 requires only that Debtor either pay 100% or commit 100% of disposable income.

(5204) *In re Richall,* 470 BR 245 (Bankr. D.N.H. 2012) – Section 1325 requires Debtor to commit 100% of disposable income only when paying unsecured creditors less than a 100% dividend. Plan confirmed at 100% dividend even though plan payment was only one-half of Debtor's disposable income.

11.9 Requirements for Confirmation Generally

(5205) *In re Weese,* Case No. 09-9268 (Bankr. W.D. Mi. 2010) – Court cannot confirm plan that does not comply, in all respects, with requirements of Code and Rules. Supreme Court in *Espinsoa* mandated that Court has independent duty not confirm to plan that is inconsistent with requirements of Code, even absent an objection to confirmation by any creditor or the Chapter 13 Trustee. Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts.

(5206) *In re Peckens-Schmidt,* 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court cannot confirm plan that does not comply, in all respects, with requirements of Code and Rules. Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

11.10 Modification of Plan Pre-Confirmation

(5207) *In re Welsh,* 540 BR 672 (Bankr. E.D. Ark. 2015) - Rule 2002(a)(5) and 2002(b)(2) noticing requirements apply to pre-confirmation modifications of a plan, and the notice is required to all creditors. The Debtors argued that the clerk's notice of the 341 meeting gave sufficient notice of the deadline to object to confirmation of the original plan, and those creditors failing to timely object were not required to receive notice of subsequent pre-confirmation modification, but the court held that any modification resets the time for objections.

11.11 Section 1325(a)(1) – Compliance with Law

(5208) *In re Jordan,* 2016 WL 4570414 (Bankr. S.D. Ohio 2016) – When debt is excepted from discharge, creditor is entitled to recover interest and costs of collection to extent provided for by contract or statute accruing on claim post-petition, even where claim is otherwise paid in full during life of Chapter 13 case. Plan that proposed to permanently enjoin the Debtors' student loan creditors from charging certain late fees, collection fees and other penalties; unilaterally declare that the creditors have waived the default status on the Debtors' student loans upon confirmation of the Plan and require the creditors to (i) remove the default status on the loan accounts as of the date of confirmation of the Plan and (ii) cease reporting the default status to the national credit bureaus; and prohibit the creditors from accruing interest at the default rate from the Petition Date to the date the Debtors receive a discharge was fatally defective as Plan cannot cut off rights of creditor holding

non-dischargeable claim to enforce claim immediately following completion of chapter 13 case and cannot require creditor to waive default or to forgo default interest. Once the automatic stay no longer applies, the nondischargeable nature of the debt permits creditors to recover amounts from the Debtors personally to the extent the creditors are otherwise entitled to recover the amounts under applicable law. It is improper for the Debtors, absent a showing of undue hardship, to attempt to permanently enjoin student loan creditors from recovering those amounts from the Debtors. Creditor holding non-dischargeable judgement is entitled to remain in same position as creditor would have been had bankruptcy case never been filed in first instance.

11.12 "Means Forbidden by Law" – Section 1325(a)(2)

(5209) *Olson v. Van Meter,* Case No. 17-1168 (9th Cir. BAP 2018) – Bankruptcy Court erred in *sua sponte* dismissal of Debtor's Chapter 13 case merely because tenant operated marijuana dispensary in commercial property owned by Debtor. Debtor's proposed Chapter 13 Plan filed to stop foreclosure of commercial real property did not violate Section 1325(a)(2) merely because one tenant in commercial property operated marijuana dispensary. Evidence indicated that Debtor, a 92-year-old woman, was not involved in day-to-day operations of property. Debtor's son acted as manager of property and executed lease with tenant to operate dispensary. Debtor's Plan provided for sale of property within six months of confirmation with funds to be used to pay all claims in full; and Debtor filed Motion to Sell property under Section 363 and to reject lease with dispensary. Bankruptcy Court did not articulate legal basis for dismissal or make factual findings to support dismissal. Chapter 13 Trustee would not be administering proceeds of any illegal business as Plan did not propose to use rents and income from property for Chapter 13 Plan payments but instead paid all rents and income to mortgage holder for payment of adequate protection under valid assignment of rents. Bankruptcy Court made no findings that Debtor's conduct violated Control Substances Act and there was no evidence that Debtor knowingly and intentionally allowed property to be used for purpose of distributing drugs. Fact that marijuana had some incidental connection to Chapter 13 case did not mandate dismissal under Section 1307.

(5210) *Geiger v. Cook Investments NW, SPNWY, LLC,* Case No. 17-5516 (W.D. Wa. 2017) – Debtor who owned commercial facility that was leased to third party who operated facility as state-licensed grower of marijuana. Debtor's Plan rejected lease with third party and presented plan based entirely on non-marijuana related income. When Court is presented with an undisputed, known criminal violation, Court cannot ignore violation and fail to consider whether Court is confirming plan premised on illegal behavior, but Court is not required to dismiss case where Plan did not contemplate continued illegal behavior or any income derived from illegal behavior.

(5211) *In re Johnson,* 2015 WL 3764728 (Bankr. W.D. Mi. 2015) – Debtor is not permitted to be in Chapter 13 where portion of income is derived from growing and sale of medical marijuana. Although Debtor's conduct is lawful under Michigan law, it remains illegal under Federal law. Bankruptcy Judge, as Federal Judge, must uphold federal law. Debtor cannot "segregate" marijuana income from other income and only use "other" income for plan payments as marijuana income necessarily impacts Debtor's expenses and impacts Debtor's ability to make plan payments even if marijuana income is not direct source of payments. Debtor can remain in Chapter 13 only if Debtor closes business and destroys inventory and equipment.

(5212) *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo. 2014), *aff'd,* Case No. 14-046 (10th Cir. BAP 2015) – Debtor engaged in medical marijuana business, although legal as a matter of State law, violates Federal Law requiring dismissal of case. Court can deny request to convert where Debtor would not be eligible for relief under Chapter 13 or where conversion would constitute lack of good faith. Reorganization efforts would be funded from profits of ongoing criminal activity under federal law and would necessarily require Chapter 13 Trustee to administer and distribute funds derived by Debtors from operation of business in violation of federal law failed to comply with Section 1325(a)(3) which requires the plan to be proposed in good faith and not by any means forbidden by law. Monthly income from other sources was not sufficient to fund a plan and Debtors' ages and health issues indicated that there was on likely ability to increase income and Trustee's acts in administering case would themselves constitute federal crimes.

11.13 Projected Disposable Income – Future Income

(5213) *In re Grabarczyk,* 2012 WL 5409373 (Bankr. N.D. Ohio 2012) – Annual bonuses reasonably certain to be received although not known in amount are included in projected disposable income and must be paid to the trustee when received.

11.14 Projected Disposable Income – Litigation Recovery

(5214) *In re Russell,* Case No. 13-30160 (Bankr. M.D. Al. 2016) – Post-petition cause of action that arose within 3 year Applicable Commitment Period but not recovered until after expiration of ACP not required to be committed in below-median Debtor's 60 month chapter 13 plan. While Debtor would have been required to turnover proceeds had they been received within ACP, Section 13425 does not require Debtor to commit additional income received after expiration of ACP. Section 1329(c) allows court to extend ACP for up to 60 months for cause, but increasing dividend to unsecured creditors is not "cause" for purposes of Section 1329. "Cause" to extend ACP beyond 36 months is Debtor-centric, such that ACP can be extended if necessary to benefit Debtor, but is not creditor-centric and does not apply where only benefit of extension would run solely to unsecured creditors.

(5215) *In re Daniels,* 2013 WL 365107 (Bankr. E.D.N.C. 2013) – Proceeds of post-petition personal injury action are not disposable income in Chapter 13. After confirmation of plan, Debtor suffered personal injury. Debtor amended Schedules to disclose and exempt claim and no party objected to the exemption. Court rejected majority holding that exempt income could still be disposable income. Court adopted minority position that exempt assets are excluded from disposable income. Congress did not intend disposable income to include recoveries on post-petition personal injury actions. If Congress had intended to include post-petition personal injury recoveries as disposable income, congress could have clearly stated such in Section 1306 and Section 1325.

(5216) *Connor v. Carroll,* 2013 WL 150150 (6th Cir. 2013) – Proceeds of post-petition settlement of pre-petition personal injury litigation were not disposable income where amount of settlement was neither known nor virtually certain at the time of confirmation of the plan.

(5217) *In re Mobley,* 2011 WL 6812551 (Bankr. E.D. Mi. 2011) – Proceeds of litigation that were received pre-petition and fully exempted did not

constitute "disposable income". Chapter 13 requires Debtor to commit future earnings and future income to funding of plan. Post-petition income does not include pre-petition property or its proceeds.

11.15 Projected Disposable Income – Non-Filing Spouse

(5218) *In re Haroldson,* 2016 WL 3034794 (Bankr. D. Colo. 2016) – Rejecting Court's holding in *Blackshear,* Debtor must provide information regarding a non-filing spouse's income and expenses on Schedules I and J and Form B122C–1 as disclosure is necessary, not only to show the Debtor is committing all of [his] disposable income to Plan payments, but also to show feasibility and good faith. Debtor required to disclose spouse's income and expenses, even though such information does not appear to affect the Debtor's own disposable income.

(5219) *In re Blackshear,* 2015 WL 2405848 (E.D. Mi. 2015) – Debtor's Schedule I needs to disclose only the income of the non-filing spouse to the extent routinely contributed to household expenses. Debtor did not violate Section 521 by failing to disclose all income of the non-filing spouse and failure to disclose did not result in failure to prove either that Debtor was contributing best efforts or that plan was feasible.

(5220) *In re Hicks,* Case no. 12-64774 (Bankr. E.D. Mi. 2013) – Debtor's non-filing spouse not required to commit spouse's income for funding of Debtor's plan where claims being administered in Chapter 13 consists of debts that Debtor had prior to commencement of the case. Issue is fact question based on "whose debt is it", and court will not require new spouse to contribute to payments of debts incurred prior to Debtor's marriage where spouse is already contributing substantial portion of income to the plan on a voluntary basis. Spouse was not saving every dime of income and was already contributing large portion of income to household expenses, spouse permitted to retain balance of income for spouse's discretionary use including savings.

(5221) *In re Stampley,* 437 BR 825 (Bankr. E.D. Mi. 2010) – Where married Debtor files individually, court calculates disposable income on Debtor' family budget including income and expenses of non-Debtor spouse. Failure to do so would leave Debtor's unsecured creditors to subsidize spouse's expenses. Household expenses should be allocated between Debtor and spouse based on proportionate income. Debtor who earned 66% of the household income would be allocated 66% of household expenses plus any sole expenses such as car payment and car insurance for Debtor's car. Those expenses are then deducted from Debtor's income to determine plan payment. Although Debtor's Schedule J indicated total disposable income of only $165, allocation of expenses produced excess income of Debtor of $802 which would produce 100% dividend to unsecured creditors. Permitting Debtor to allocate more than her proportionate share of income to the household expenses would unfairly prejudice Debtor's creditors and would amount to a "gift" by Debtor to her non-filing spouse.

11.16 Projected Disposable Income – Social Security Income

(5222) *In re Drake,* Case No. 16-12280 (Bankr. N.D. Ga. 2017) - Social Security income does not need to be paid into a Chapter 13 Plan because Social Security benefits are excluded from "current monthly income". Debtor's Plan proposed to allow Debtor to save $900 each month from her Social Security benefits for "unforeseen circumstances" resulting in Debtors saving more than $30,000 over life of Plan while paying unsecured creditors only $8000. Section 101 shows clear intent to protect Social Security income from bankruptcy process and Debtor need not disclose disposition of Social Security income he does not intend to use toward Plan. While optics of the situation are not pleasant and raise a specter of unfairness, retaining Social Security income is not sufficient to show lack of good faith because Debtor's withholding of Social Security income is consistent with plain language of Bankruptcy Code.

(5223) *Charnetsky v. Buenviaje,* Case No. 16-15191 (9th Cir. BAP 2017) - 42 USC Section 407(a) operates as complete bar to forced inclusion of past and future Social Security proceeds in bankruptcy estate. Section 407 creates exception to the general rule of Section 541 that all of Debtor's interest in property becomes property of estate. Debtor is not required to assert exemption in Social Security proceeds already received and in the bank as proceeds never became property of estate in first instance. Debtor is required to list account in Schedule A/B. Funds do not lose status upon deposit into bank if Debtor segregates proceeds and maintains funds in account that contains only Social Security proceeds. Fact that statute limits exemption to "right to receive" proceeds does not alter conclusion as Debtor is not required to exempt property that is not property of estate in first instance.

(5224) *In re Fuqua*, Case No. 15-52398, 2015 Bankr. LEXIS 3244 (Bankr. E.D. Mi. 2016) – Social Security Income received by Debtor is excluded in calculating disposable income. However, exclusion of income raises questions of good faith unless Debtor can explain how the excess income is to be used. If funds are to be used to provide substantial or extravagant lifestyle, failure to commit proceeds can constitute bad faith.

(5225) *In re Hall,* Case No. 15-30749 (Bankr . E.D. Mi. 2015) – Social Security income is excluded from calculation of Current Monthly Income in Section 101(10A). Section 1325(b) defines disposable income as Current Monthly Income less certain deductions. As Social Security is not included in CMI, Debtor is not required to include Social Security in calculating disposable income or plan payment. However, exclusion of income is not *per se* good faith under Section 1325(a)(3), which is separate obligation from Section 1325(b). If retained Social Security benefits enable Debtor to lead extravagant lifestyle or to acquire luxury goods, failing to commit that income to plan is lack of good faith. Court could not reach conclusion where there was no evidence in record as to the uses for Debtor's Social Security income that is not committed to the Plan.

(5226) *In re Mihal,* 2015 WL 2265790 (Bankr. E.D. Mi. 2015) – Social Security income received by Debtor is excluded in calculation of Current Monthly Income. Debtor's Chapter 13 Plan did not lack good faith where plan payment excluded Debtor's social security income.

(5227) *In re Worthington,* 2014 WL 1173316 (Bankr. S.D. Ind. 2014) – Social Security income received by Debtor is excluded from calculation of Current Monthly Income. Debtor's Chapter 13 plan did not lack good faith where plan did not include substantial portion of social security income.

(5228) *Mort Ranta v. Gorman,* 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating

projected disposable income or plan payment, regardless of whether Debtor is above or below median income. Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur.

(5229) *In re Berry,* 2013 WL 249862 (Bankr. E.D. Wash. 2013) – Debtors with below median income not required to include income received from social security in determining projected disposable income. Calculation of disposable income, whether Debtors are above median or below, starts with calculation of CMI, which expressly excludes social security. While Debtors can voluntarily agree to commit all or some portion of Social Security, Debtors cannot be compelled to do so.

(5230) *Drummond v. Welsh,* 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether Debtor has misrepresented facts or manipulated code or acted in inequitable manner; Debtor's history of bankruptcy filings; whether Debtor filed solely to frustrate collection of State Court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require Debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Court will not substitute its judgment for that of Congress in determining how much of what type of income is to be included in calculating plan payment. Court cannot, under guise of "good faith" ignore requirements and limitations that Congress chose to enact. Where a Chapter 13 Debtor calculates repayment plan and excludes social security income as Code allows, exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because Debtors do what Code allows. That Debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income.

(5231) *Anderson v. Cranmer,* 2012 WL 5235365 (10th Cir. 2012) – Social Security of Debtor and non-filing spouse are excluded from calculation of projected disposable income and do not need to be included in calculating plan payment. Exclusion of SSI from calculation of PDI was not lack of good faith that prevents confirmation of the plan.

(5232) *Beaulieu v. Ragos,* Case no. 11-31046 (5th Cir. 2012) – Social Security benefits are not included in calculation of projected disposable income. Although Code does not define "projected disposable income" the definition of "disposable income" specifically excludes Social Security income; and definition of "current monthly income" similarly excludes Social Security income. In light of Congressional intent to exclude Social Security from CMI and disposable income, "it makes little sense to circumvent that prohibition by allowing social security income to be included in *projected* disposable income." Conclusion is further bolstered by Social Security Act, 42 USC Section 407(a), enacted in 1935, that prohibits Social Security income from being subject to "any bankruptcy or insolvency law." Debtors' refusal to commit 90% of their Social Security income is not "bad faith" that would preclude confirmation where Debtors, as a matter of law, are not required to include SSI in calculating plan payment.

(5233) *Baud v. Carroll,* 2011 WL 338001 (6th Cir. 2011) - Social Security income does not have any role in calculating "disposable income" or "projected disposable income" in Chapter 13. However, Court did not determine whether Social Security income had some other role in Chapter 13, such as in calculating Schedule I or in determining "monthly disposable income" on Schedule J.

(5234) *In re Tobias,* Case No. 11-40453 (Bankr. E.D. Mi. 2011) – Debtor's social security income is excluded in determining disposable income and projected disposable income pursuant to Section 101(10A). Debtor not required including Social Security Income on B22C. Debtor should list Social Security Income on Schedule I but is allowed to then deduct that income on Schedule J. Court did not address issue of whether deduction of Social Security Benefits constituted lack of good faith.

(5235) *In re VanDyne,* 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Non-filing spouse unemployment income is included in determining disposable income in Chapter 13. Unemployment is not a benefit received under Social Security Act. Further, calculation of projected disposable income is not limited to mechanical approach in calculating CMI (from which Social Security would be excluded) but looks prospectively to determine ability to pay.

(5236) *In re Mains,* 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

(5237) *In re Herrmann,* 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income Debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the Debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a Debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

(5238) *In re Vandenbosch,* 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

(5239) *In re Miller,* 2011 WL 95335 (Bankr. D.S.C. 2011) – Section 101(10A) excludes all social security benefits, regardless of recipient and regardless of whether contributed to Debtor's household expenses. Debtor's non-filing husband received Social Security which he contributed in full each month for payment of household expenses. Debtor also received Social Security. Debtor not required to include either her social security or that of her non-filing spouse in calculating Current Monthly Income or disposable income in Chapter 13.

(5240) *In re Bartelini,* 434 BR 285 (Bankr. N.D.N.Y. 2010) – Social security is excluded from CMI under 101(10A). CMI is starting point to calculate projected disposable income. Therefore, Debtor cannot be compelled to list Social Security in PDI calculation for purposes of plan payment.

(5241) *In re Westing,* 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income Debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only $165 and would produce dividend of 1.9% while Debtor had disposable income of more than $2,300 if the Social Security was included.

(5242) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a Debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow Debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

(5243) *In re Welsh,* 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a Debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify §407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a Debtor to include Social Security income on Schedule I.

(5244) *In re Thompson,* 2010 WL 3583400 (8th Cir. BAP 2010) - Trustee's objection based on good faith overruled. Debtor received, but did not schedule, Social Security income. Forcing a Debtor to include Social Security income would permit Section 1325(a)(3)'s general concept of "good faith" to control and "render meaningless" Section 1325(b)'s calculation of "ability to pay".

(5245) *In re Olguin,* 429 BR 346 (Bankr. D. Colo. 2010) – Section 101(10A) excludes social security benefits received by Debtor from calculation of CMI, but does not exclude social security benefits received by non-Debtor and regularly contributed to household expenses. Debtor's grandparents resided with Debtor. Grandparents received social security and gave that to the Debtor to cover household expenses. Debtor must include the social security received by grandparents and contributed to household expenses in determining CMI.

11.17 Projected Disposable Income – Railroad Retirement Act

(5246) *In re Scholz,* 447 BR 887 (9th Cir. BAP 2011) – Railroad Retirement Act benefits, while in the nature of Social Security, are not excluded from calculation of CMI. However, anti-alienation provision of RRA, 45 USC Section 231m(a) preempts any requirement to include RRA benefits in calculation of "projected disposable income". Debtor cannot be required to contribute RRA benefits in calculating PDI or determining plan payment.

11.18 Projected Disposable Income – Firefighters Retirement

(5247) *In re Charron,* Case No. 2016 WL 3003144 (Bankr. E.D. Mi. 2016) – Although Firefighter's Pension is similar to and in lieu of Social Security, benefits are not "under" Social Security Act and cannot be excluded in calculating disposable income.

11.19 Projected Disposable Income – Civil Service Retirement System

(5248) *In re Moose,* 2012 Bankr. LEXIS 1175 (M.D.N.C. 2012) – Benefits paid under Civil Service Retirement, although in nature of Social Security, are not Social Security and so are not excluded in calculating disposable income.

11.20 Projected Disposable Income – Expiration of Secured Debt Payments

(5249) *In re Grabarczyk,* 2012 WL 5409373 (Bankr. N.D. Ohio 2012) – Change in future expenses resulting from pay off of secured debt is known or reasonably certain at time of confirmation. Plan must propose to increase plan payments when car loan is paid off prior to completion of payments under plan.

11.21 Projected Disposable Income – Long Term Care Insurance

(5250) *In re Melander,* 506 BR 855 (Bankr. D. Mn. 2014) – Long Term Care Insurance could not be deducted from calculation of disposable income absent evidence that the expense is necessary and reasonable. Although Debtors purchased policy many years before filing bankruptcy, Debtors did not present any evidence as to the reason for purchasing that policy or any other details that would allow court to permit deduction of $440 per month in calculating disposable income.

11.22 Projected Disposable Income – Child Support

(5251) *In re Brooks,* Case No. 14-2856 (7th Cir. 2015) – Child support received by Debtor must be included in calculation of Current Monthly Income. However, above median Debtor can then deduct child support income from Current Monthly Income to determine Disposable

Income in Chapter 13 Case. Fact that Debtor and her child were counted as household of 2 people for determining whether Debtor was above or below median, and for determining appropriate national and local standard deductions in calculating Disposable income, did not preclude Debtor for also deducting child support from CMI. Court would not permit deduction only if amount of support is grossly excessive in relation to essential expenses so as to amount to abuse of bankruptcy process.

11.23 Housing Expense

(5252) *In re Konowicz,* 470 BR 725 (Bankr. D.N.J. 2012) – Plan not proposed in good faith and did not contribute all disposable income where Debtor sought to retain home with excessive mortgage payment while paying dividend of only 10%.

11.24 Projected Disposable Income – "In Kind" Income

(5253) *In re Perez,* 2016 WL 3230662 (Bankr. E.D. Wis. 2016) – "In kind" income received by Debtor is not "income" for purposes of calculating Disposable Income even where value of income is included in taxable income. Debtor worked for a car dealership. Employer provided Debtor, at no cost, with a car for personal use. Dealer included value of car usage in taxable income at end of year. However, Debtor did not receive any cash or other spendable income from the car. Court compared definition of "income" in dictionary, IRS Code, and Census Bureau standards and concluded that while definitions are not co-extensive, Census Bureau definition which excludes "in kind" income from calculation of household income made most sense, as Debtor could not use the value of the automobile to pay creditors and forcing Debtor to include value of automobile in calculation of disposable income would artificially increase her "income" available for creditors leaving Debtor unable to make payments out of actual income.

11.25 Self-Employed Debtor

(5254) *In re Kuwik,* 511 BR 696 (Bankr. N.D. Ga. 2014) – Self-employed debtor must use gross business income in calculating whether Dbtor has CMI in excess of applicable median income.

(5255) *In re Hoffman,* 2014 WL 2118435 (Bankr. D. Mn. 2014) – Self-employed Debtor must calculate CMI using gross income. Although From B22 refers to gross income less expenses, Code does not allow deduction of expenses in determining CMI.

(5256) *In re Harkins,* 2013 WL 1830838 (Bankr. S.D. Ohio 2013) – Self-employed Debtor must use gross income in calculating current monthly income.

(5257) *In re Romero,* 2013 WL 241742 (Bankr. S.D. Fla. 2013) – Self-employed Debtor is entitled to deduct business expenses in determining whether Debtor is above or below median income. Precluding Debtor from deducting expenses produces artificial calculation of income that does not actually exist. Debtor was below median and had 36 month applicable commitment period even though, without deducting expenses, Debtor would have been above median.

11.26 "Reasonably Necessary" Expenses Generally

(5258) *DeHart v. Knorr,* 2013 WL 5550209 (Bankr. M.D. Pa. 2013) – Child care expenses caused by Debtor-husband's volunteer work was not reasonably necessary expense. While Debtor-husband's work with Boy Scouts was admirable, it was not reasonable to deduct child care expenses that resulted from those activities in calculating the plan payment.

11.27 Projected Disposable Income – Actual and "Reasonably Necessary" Expenses

(5259) *In re Scott,* 2013 WL 5567319 (Bankr. N.D. Ohio 2013) – Continuing the dichotomy between Schedules I and J and means test. Court concluded that plan did not contribute 100% of projected disposable income where amount to be paid to unsecured creditors was less than 60 times the "disposable income" calculated on From 22C. Debtors' Schedule I and J showed disposable income (after adjusting for housing expense that plan proposed to pay through trustee) of $327.50, while Means Test shows disposable income under Section 1325(b)(2) of $575.45. Debtors were "above median". "Projected disposable income" uses disposable income calculated on from 22C times 60, thereby "projecting" disposable income (a defined term) over the life of the plan. Although court has discretion to take into account changes in income or expenses that are known or virtually certain, court lacks discretion to deviate from means test calculated disposable income by disregarding definition of disposable income. Fact that Debtors' disposable income on Schedule J was less than shown on means test did not allow court to disregard means test. Debtors did not show changes to expenses within scope of *Lanning,* but rather showed Debtors inclination to spend over and above allowed deductions.

(5260) *Drummond v. Welsh,* 711 F.3d 1120 (9th Cir. 2013) For "above median income" Debtors, payments on secured loans are considered in calculating disposable income. Under BAPCPA, Congress determined that Debtors may deduct secured debt payments, even on assets such as ATVs that would otherwise be considered "luxury goods". Section 1325 mandates that disposable income "shall be determined" in accordance with Section 707(b)(2) which uses Current Monthly Income less specified deductions, one of which is secured debt payments. Section 707 does not limit secured debt payments to "necessary" secured debts or exclude payments on "luxury" goods. BAPCPA adopted mechanical approach to calculating disposable income and court would not alter or engraft other exceptions onto that definition.

(5261) *In re VanDyne,* 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Although IRS Standards are not dispositive, they do provide evidence of reasonableness. Debtor failed to produce evidence that expenditures for items such as food ($700); clothing ($100); "husband's bills" ($562); recreation ($150); and cigarettes ($300); which produced a total expense for these items that exceeded IRS standards, was reasonable and would be disallowed to the extent beyond IRS standard. Utility expense disallowed to extent in excess of IRS standard where Debtor did not provide any evidence of reasonableness of higher amount. Transportation expense of $650 reasonable where Debtor and non-filing spouse had daily commutes that totaled over 300 miles per day.

(5262) *Dow Chemical Employees Credit Union v. Collins,* 2011 WL 2746210 (E.D. Mi. 2011) –Chapter 13 Debtor does not have unbridled

discretion to carve out for himself and his family whatever lifestyle he may choose, but must instead undergo a degree of belt-tightening. An unreasonably large amount devoted to discretionary expenses is not allowed under the Bankruptcy Code in determining "disposable income." Bankruptcy courts are regularly confronted with deciding whether or not a Debtor's expenses are excessive or unreasonable and generally bankruptcy courts are not to substitute their values for those of the Debtor. A court should question a Debtor's judgment when: (1) the Debtor proposes to use income for luxury goods or services; (2) the Debtor proposes to commit a clearly excessive amount to non-luxury goods or services; (3) the Debtor proposes to retain a clearly excessive amount of income for discretionary purposes; (4) the Debtor proposes expenditures that would not be made but for a desire to avoid payments to unsecured creditors; and (5) the Debtor's proposed expenditures as a whole appear to be deliberately inflated and unreasonable. Married Debtor with non-filing spouse and three children that included $300 per month for recreation and $300 per month for non-filing spouse's cigarettes where budget overall was not extravagant or luxurious.

(5263) *In re Joest,* 2011 WL 1043559 (Bankr. N.D.N.Y. 2011) – For above median Debtor, reasonably necessary expenses are controlled solely by Section 707(b)(2) without regard to separate inquiry as to the reasonable necessity of a specific expense under Section 1325(b)(2). Debtor, a single woman, sought to deduct the ownership expense for Debtor's two financed automobiles. Trustee argued that it was not "reasonably necessary" for a single Debtor to retain two financed automobiles. Court stated that Section 707(b) deduction for automobile ownership expense was not tied to household size, but was limited only to two automobiles on which Debtor was making payments. "Plain meaning" of 1325(b) and 707(b) allows for two ownership expense deductions as long as Debtor has actual payments on two vehicles, without regard to whether it was reasonably necessary for Debtor to retain both vehicles.

(5264) *In re Cash,* Case No. 10-58607 (Bankr. E.D. Mi. 2011) – Debtor's Plan failed to commit 100% of Debtor's disposable income where Debtor proposed to retain and pay $450 per month vehicle payment for car driven by 19 year old grandson while plan proposed 60 month term yielding no dividend to unsecured creditors. Disposable income is income received by the Debtor which is not reasonably necessary for maintenance of Debtor or a dependent of Debtor. Unsecured creditors are not required to bear burden of Debtor's moral obligation to provide college education for children or grandchildren. Further, evidence did not indicate that grandson was actually a dependent of Debtor, and at most grandson was only "partially" dependent on Debtor. Confirmation denied.

(5265) *In re Lofty,* 437 BR 578 (Bankr. S.D. Ohio 2010) – Section 1325 permits Debtor to deduct expenses reasonably necessary for support of Debtor or a dependent of Debtor. Payment of mortgage, insurance and expenses for home owned by Debtors but occupied by Debtor's adult son and grandson are not reasonably necessary expenses where property does not produce any income. Debtors' efforts to assist son are "noble" but neither son nor grandson are dependents of Debtors. "Dependent" requires more than a moral obligation for support. Party will be "dependent" only where there is some legal obligation for support. Debtors did not schedule son and grandson on Schedule I as dependents and Debtors did not claim son and grandson on Tax Returns as dependents.

11.28 Support for Adult Children

(5266) *In re Stackhouse,* 2018 WL 1634119 (Bankr. S.D. Ohio 2018) – Disposable income is income received by debtor which is not reasonably necessary for maintenance or support of debtor or dependent of the debtor. Debtor's support for Daughter and Granddaughter in form of $265 monthly car payments and $900 monthly general financial assistance payments were purely discretionary and not reasonably necessary where daughter and granddaughter are not dependents. Debtors did not list them as dependents on schedules and there is no evidence that Debtors have legal obligation to support them or that daughter suffers from debilitating disability that impairs her ability to support herself or her child; and Debtors did not claim them as dependents for tax purposes. Student loan payments for Daughter's student loans are discretionary payments where there was no evidence that Debtors themselves were liable on loans.

11.29 Private School or College Tuition

(5267) *In re Stackhouse,* 2018 WL 1634119 (Bankr. S.D. Ohio 2018) – Student loan payments for Daughter's student loans are discretionary payments where there was no evidence that Debtors themselves were liable on loans.

(5268) *In re Crim*, 2011 WL 863452 (Bankr. M.D. Tenn. 2011) - $500 tuition cost was reasonable and necessary for chronically ill child for whom no public-school option was available.

11.30 Recreation Expense

(5269) *In re Golematis,* 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Expenses for children's' sports, figure skating, baseball and soccer were not excessive where Debtors' total family recreational budget was $200 including these activities.

11.31 Home Maintenance

(5270) *In re Golematis,* 2012 WL 3583154 (Bankr. E.D. Mi. 2012) –Home maintenance expenses of $266 were not unreasonable where $120 was payment on a balance owed for roof repairs and $146 was for general maintenance. Without the roof repair, house would have been uninhabitable; and balance of $146 was "far less" than what other courts have concluded is excessive.

11.32 Modification of Mortgage on Principal Residence – Section 1322(b)(2)

(5271) *In re Berlland,* Case No. 17-10821(Bankr. D. Mass. 2018) - Section 1123(b)(5), which is identical to Section 1322(b)(2), prohibits modification of mortgage secured only by real property that is Debtor's principal residence. Whether property constitutes "principal residence" is determined on petition date, as statute indicates that property "is" Debtor's principal residence. Neither facts that existed at time mortgage was obtained nor representations and mortgage documents themselves have bearing on status of property as of petition date. Further, focuses on status of property, not nature of mortgage. Debtor's home initially consisted of single-family dwelling. Debtor later constructed second, 1600 square-foot residence with intention that mother-in-law and father-in-law would usually it rent-free. At some later

date, Debtor's brother-in-law began residing in unit, paying $300 per month which was far below market value rent. As of petition date, property was not used exclusively as Debtor's principal residence even though amount of rent being charged was nominal.

(5272) *In re Shank,* Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Plan that proposes to satisfy mortgage by paying specific principal amount plus interest does not require filing of adversary proceeding. Adversary proceeding is required to challenge the validity, priority or extent of lien. Chapter 13 Plan did not contest the validity of mortgage or contest that mortgage was valid lien on collateral and, in fact, specifically provided for payment of mortgage to full extent of amount allegedly owed. Code allows valuation of collateral to be determined in contested matter such as through confirmation process. Creditor who did not object to confirmation of Plan and did not file proof of claim asserting any amount due inconsistent with amounts set forth in Plan agreed to treatment of mortgage as specified in Plan. Upon completion of Plan, Debtor entitled to entry of order deeming mortgage satisfied.

(5273) *In re Adams,* Case No. 15-75191 (Bankr. E.D.N.Y. 2017) – Lien on mixed use property that includes Debtor's residence cannot be modified under Section 1322(b)(2). Section 1322(b) preludes modifying lien secured only by property that is principal residence. Principal residence is defined as "structure… used as the principal residence by the Debtor, including incidental property" such as rents and profits. Duplex in which Debtor resided in one side while renting out the other side was "structure" used by Debtor as "principal residence" and mortgage was protected from modification. Fact that some portion of the property may be used for purposes other than as Debtor's residence did not exclude property from scope of Section 1322(b).

(5274) *Birmingham v. PNC Bank, NA,* Case No. 15-1800 (4th Cir. 2017) – Section 1322(b) prevents modification where sole collateral is principal residence. Section 101(13A)(A) defines "principal residence" to include "incidental property". Section 101(27B) defines "incidental property" as property commonly conveyed with principal residence in area where property is located. Mortgage that referenced escrow funds, insurance proceeds, and miscellaneous proceeds was not subject to modification as these items are "incidental" property that are part of the principal residence. Standard FNMA mortgage form requires escrow for taxes, insurance premiums, and mortgage premiums, and assigns to lender proceeds of any insurance and proceeds forfeiture or condemnation but does not define these items as "additional collateral". Items are incidental to and inextricably bound to the property itself and does not give lender rights beyond property. Court distinguished cases that hold that escrow payments can remove property from protection of Section 1322 where mortgage specifically defined escrow account as "additional security"; appliances, machinery and equipment and furniture may cause mortgage to be modifiable where mortgage itself described items as "additional collateral"; or collateral otherwise involved personal property unrelated to real property such as a mobile home located on leased land.

(5275) *In re Sierra,* Case No. 15-70603 (Bankr. S.D. Tx. 2016) – Section 1322(b)(2) prevents modification of mortgage on Debtor's principal residence. Section 1322(c)(2) permits modification of mortgage on primary residence where mortgage "is due before the date on which the final payment under the plan is due". Debtor cannot accelerate payments under plan to convert non-modifiable mortgage into one that will be paid off during plan. The last contractual payment on Debtor's mortgage would some due one year after expiration of Debtor's 60 month plan. Debtor's plan proposed to pay the mortgage in full over 5 year plan term at reduced interest rate. Although loan allowed pre-payment without penalty, such that Debtor could propose to shorten term to 5 years and pre-pay without violating "anti-modification" provision, that did not allow modification of interest rate as the mortgage by its own terms matured outside the life of the plan, rendering subsection (c)(2) inapplicable.

(5276) *Utzman v. SunTrust Mortgage, Inc.,* 2016 U.S. Dist. LEXIS 26341 (N.D. Ca. 2016) – Anti-modification provision of Section 1123(b)(5) (which is identical to Section 1322(b)(2)) applies where (1) the security interest is in real property; (2) the real property is the only security for the debt; and (3) the real property is Debtor's principal residence. If real property is Debtor's residence, it is not removed from Section 1123(b)(5) (which is identical to Section 1322(b)(5)) because some portion of the property is used for a different purpose. Section 1123 does not require that property be used only or exclusively as principal residence, only that it be used to some extent for that purpose. Fact that Debtor rented out portion of property to third party did not change fact that other part of property was Debtor's residence. However, collateral was not exclusively real property where construction loan agreement encumbered personal property that, as of petition date, had not yet been incorporated into real estate including air conditioning and heating equipment, carpet, appliances, cabinets, and sprinkler systems. Loan was not secured exclusively by real property and so was subject to modification.

(5277) *In re Snowden,* 2016 WL 578969 (Bankr. E.D. Ky. 2016) – Whether mortgage is protected from modification depends on whether the only collateral is the real estate used as Debtor's principal residence. Whether parcel is within scope of anti-modification provision is fact intensive inquiry. Debtor owned 6 contiguous lots, which he had acquired from two different sellers. Debtor placed his mobile home one of the lots and installed a septic system. Debtor then filed the Affidavit of Conversion which included all 6 of the lots as a single, contiguous unit. The only improvement on the other 5 lots was an abandoned and now-burned out manufactured home formerly used by a relative of defendant. Lender held lien on 5 of the 6 lots, but did not hold the lien on the lot on which Debtor's manufactured home was located. Lots were not single, large parcel where Debtor acquired lots in multiple transactions, legal descriptions were such that Debtor could sell any of the lots without any other action to partition. Lender specifically did not include lot on which home was located in description of collateral. Presence of now-abandoned manufactured home on one of the lots indicated not only that the lots could be used separately but had in fact been used separately. Lender offered no evidence regarding use of the adjourning lots or extent to which lots Debtor used lots as part of their residence. Separate lots indicate more than one parcel of real property secures underlying loan, allowing modification of loan.

(5278) *In re Darlene M.,* 2015 WL 9283872 (Bankr. N.D. Ohio 2015) – Anti-modification provision of Section 1322(b)(2) applies where sole security for debt is real property used by Debtor as residence. Mortgage that was secured by property and by escrow funds that are part of mortgage payment is secured solely by real property. Escrow funds are incidental property as defined in section 101(27B) similar to fire insurance and assignments of rents and proceeds. To conclude otherwise would take most mortgages outside of anti-modification protections and would eviscerate the protective exception for residential mortgages contrary to congressional intent.

(5279) *In re Colcord,* 2015 WL 5461543 (Bankr. E.D. Mi. 2015) – Anti-modification provision of Section 1322(b)(2) applies when only security

for debt is real property; the only security for the loan is the real property; and the real property is Debtor's principal residence. Assignment of rents provision in mortgage does not convert mortgage into one secured by collateral other than real property. While enforceable assignment of rents would create separate security interest and remove property from protection of Section 1322(b)(2), Michigan Law invalidates any assignment of rents in apartment building with fewer than 6 units. Debtor's occupancy of one half of duplex while renting out other half was less than 6 units rendering assignment unenforceable, and leaving real property as sole collateral. However, duplex was not Debtor's "principal residence" where Debtor lived in half and rented out half, and Debtor had never resided in property as a whole. "Principal Residence" is defined in Section 101(13A) as property used as the principal residence of Debtor. Debtor never resided in one half of property such that collateral for loan included property that was not Debtor's residence (although it was attached to Debtor's residence). Loan not within anti-modification protections of Section 1322(b)(2).

(5280) *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.

(5281) *White v. McDermott,* 2015 WL 4612349 (E.D. Mi. 2015) – Section 1123(b)(5) prohibits modification of mortgage secured only by Debtor's residence. Residence includes the residential structure and incidental property, defined as property commonly conveyed with principal residence in area where property is located. House and attached 40 acres of farmland were "residence" where Debtor treated the property as a contiguous unit, placed single mortgage encumbering entire property, and location of property was such that conveyance of acreage was common and incidental to sales of residences themselves. Debtor's initial plan was fatally defective as it sought to modify the rights of the holder of the mortgage on Debtor's residence. Debtors then amended the plan but continued to propose to modify the non-modifiable mortgage, leaving Debtor's amended plan with same fatal defect.

(5282) *In re Johnson,* 2015 WL 4053584 (Bankr. E.D. Tn. 2015) – Anti-modification provision of Section 1322(b)(2) applies only when security for loan is only real property that is the Debtor's principal residence". Whether mobile home is within Section 1322(b)(2) depends on whether mobile home is affixed to property so as to become part of the realty; and whether Debtor owns the underlying real estate. Debtor's mobile home straddled the properly line between Debtor and his neighbor, such that one third of the home was on neighbor's property and two-thirds on Debtor's property, the deck affixed to the mobile home was on Debtor's property but the driveway used for access was entirely on neighbor's property. Significant portion of mobile home located on Debtor's property was sufficient to invoke protections of Section 1322(b)(2), even though a portion of the home was located on the neighbor's property.

(5283) *In re Wollman,* 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) applies only when the sole collateral is real estate that is used as Debtor's principal residence. Debtor could modify lien secured by both a mortgage on real property and a security interest in the manufactured house located on the land but which had not become affixed. Manufactured home was personal property such that lien was not secured exclusively by real property, even if Debtor resided in manufactured home as residence.

(5284) *In re Espanol,* 2014 WL 1612393 (Bankr. D. Conn. 2014) – Anti-modification provision of Section 1322(b)(2) prohibited Debtor from de-accelerating pre-petition mortgage based on pre-petition violation of due on sale clause.

(5285) *In re Brinkley,* 2013 WL 5935157 (Bankr. E.D. Mi. 2013) – Debtor's residence for purposes of Section 1322, is location where Debtor resided on date petition was filed. Debtor's stated intention to vacate that premises at some point in the future does not alter conclusion that Debtor cannot modify mortgage on residence as of petition date, even if Debtor in fact vacates that premises at some point post-petition.

(5286) *Wallingford v. Green Tree Servicing, LLC,* 2013 WL 1777121 (6th Cir. 2013) – Section 1322(b)(2) prevents modification of mortgage on real property that is Debtor's principal residence. Whether mobile home is part of real property and encompassed within Section 1322(b)(2) depends on state law definition of mobile home and real property. Under Ohio law, mobile home becomes part of realty only if mobile home is permanently affixed *and* owner surrenders certificate of title. Mobile home was not part of real property where home was permanently affixed but Debtor never surrendered certificate of title. Debtor could modify security interest in the mobile home.

(5287) *In re Kelly,* 2013 WL 603138 (Bankr. E.D. Mi. 2013) – Court must determine whether property constitutes Debtor's principal residence in considering possible modification of loan. Court would use "hybrid" approach, rejecting approach that looked at principal residence as of mortgage date or as of petition date. Debtor resided in one house on petition date. Plan proposed to surrender that house and for Debtor to move into "rental" property and to modify the mortgage on the "rental" by bifurcating the mortgage into secured and unsecured claims. "Nuanced view" requires more than a blind look at Debtor's residence as of the petition date. More important consideration is what property Debtor intends to use as residence over life of Chapter 13 plan. Court would consider (1) where did the Debtor reside on the date of filing of bankruptcy? (2) did the Debtor move out of their principal residence either shortly before or after the filing of the bankruptcy? (3) did the Debtor move into a property Debtor had previously used as a rental property? (4) where does the Debtor intend to reside for the duration of the bankruptcy? and (5) does the Debtor retain title to the property even though Debtor is not residing in the property at the time of filing for bankruptcy? (6) did the Debtor start renting his/her principle residence to tenants around the time Debtor filed for bankruptcy? Debtor's plan indicated that Debtor intended to surrender prior principal residence and use former rental as principal residence during chapter 13 case. As such, mortgage on prior rental was protected from modification under Section 1322(b)(2).

(5288) *In re Smith,* 2012 WL 1122975 (Bankr. N.D. Ohio 2012) – Debtor's post-confirmation Motion to Disallow Arrearage Claim and Deem Mortgage Current denied. Plan provided for treatment of mortgage arrearage but creditor did not file proof of claim. Court concluded that attempt to disallow pre-petition arrearage where creditor did not file proof of claim would constitute impermissible modification of mortgage which specifically allowed lender to collect delinquencies and arrearages.

(5289) *Flickinger v. Americhoice Fed. Credit Union,* 2010 WL 4923933 (Bankr. M.D. Pa. 2010) - Existence of co-obligors did not forfeit protection from modification in § 1322(b)(2). Co-obligors did not grant security interest in collateral. Debtors failed to demonstrate that U.C.C.-1 filings executed prior to security interest in residence were related to mortgage note. Questions of fact about U.C.C. filings prevented judgment as matter of law.

(5290) *In re Lopez*, 2010 WL 4875884 (Bankr. N.D. Cal. 2010) Security interest that included all easements, appurtenances, and fixtures, now or hereafter part of the property did not forfeit protection from modification in § 1322(b)(2). Additional collateral was of little or no independent value.

(5291) *Shirk v. JPMorgan Chase Bank, N.A.,* ____(Bankr. S.D. Ohio 2010) – Antimodification provision of Chapter 13, which prevents Debtor from modifying rights of creditor whose claim is secured solely by interest in real property that is Debtor's principal residence, is applicable to mortgage loans secured by interest in Debtor's principal residence irrespective of whether holder of that secured claim when Chapter 13 petition is filed originated the loan or acquired it through assignment; key to applicability of provision is whether claimant holds a security interest in Debtor's principal residence, and nature of transaction by which claimant acquired this security interest is irrelevant. 11 U.S.C.A. § 1322(b)(2).

(5292) *In re Ramsey,* 2009 WL 3245303 (Bankr. M.D. Tn. 2009) – Creditor objected to Plan claiming that terms of Plan constituted improper modification of mortgage creditor's rights in violation of Section 1322(b)(2). Plan terms required Creditor to (1) apply the payments received from the trustee on pre-confirmation arrearages (defined as all sums included in the allowed proof of claim plus any post-petition pre- confirmation payments due) only to such arrearages; (2) deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges; (3) provide at least 60 days written notice to the trustee, the Debtors and the attorney for the Debtors of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages or any change in the property taxes and/or the property insurance premiums and the effective date of any such adjustment; and (4) notify the trustee, the Debtors and attorney for the Debtors, in writing, of any protective advances or other charges incurred by the claimholder, pursuant to the mortgage agreement, within 60 days of making such protective advance or other charges. The Plan further required the Trustee to (1) make monthly ongoing mortgage payments commencing with the later of the month of confirmation or the month in which a proof of claim itemizing the arrears is filed by such claimholder; (2) file a motion and notice consistent with LBR 9013-1 no later than 60 days prior to the anticipated last payment under the plan, requesting the court find that the trustee has complied with the plan to maintain mortgage payments and to cure the pre-confirmation default and providing that if the claimholder asserts that the mortgage obligation is not contractually current at the time of the trustee's motion, then the claimholder shall, within 30 days of receipt of the motion, file a Statement of Outstanding Obligations, clearly itemizing all outstanding obligations it contends have not been satisfied as of the date of the Statement failing which the trustee shall submit an order declaring the mortgage current and all arrearages cured as of the date of the trustee's motion: and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325.

11.33 Modification of Mortgage on Principal Residence – Post-petition Mortgage Payments

(5293) *In re Adamczyk,* Case No. 16-21773 (Bankr. E.D. Mi. 2016) – Where timing is such that as of date of confirmation, trustee would have sufficient funds to pay all post-petition mortgage payments through date of confirmation, plan improperly attempted to modify loan by providing that lender would receive only one of two post-petition mortgage payments with balance on hand being used to pay attorney fees. Default that is created by normal passage of time, given that Debtors are not required to start making chapter 13 plan payments for 30 days, may be code created default that can be cured without violating Section 1322. However, funds on hand with Trustee must be used to pay post-petition mortgage payments where funds are available to do so.

11.34 Modification of Mortgage on Principal Residence – Attorney Fees

(5294) *Maike v. United Financial Credit Union,* 2017 WL 3485717 (E.D. Mi. 2017) – Administrative expenses including attorney fees do not have absolute priority under Section 1326, and may be paid first or concurrently. Attorney fees may not be paid in full at the expense of the homestead mortgagee. First funds distributed by Trustee must be applied to post-petition mortgage payments that have come due. Attorney who received payment ahead of mortgagee's receipt of full payment of post-petition mortgage payments required to disgorge portion of fees received to Trustee for Trustee to re-disburse to mortgagee for payment of post-petition payments. Attorney retained portion of fees after disgorgement fulfilling requirement that attorney receive *some* distribution concurrent with the mortgage company.

(5295) *In re Johnson,* Case No. 14-31791 (Bankr. E.D. Mi. 2016) – Award of attorney fees cannot interrupt payment of non-modifiable mortgage on Debtor's residence over lender's objection. Court awarded fees but ordered that fees be paid only after ongoing monthly payments to mortgage holder.

(5296) *In re Maike,* 2016 WL 1391855, 179 F. Supp. 3d 750 (E.D. Mi. 2016) - Attorney fees cannot be paid ahead of mortgage if doing so delays ongoing payments to mortgage holder. Section 1322(b)(5) allows curing of default over reasonable period but does not allow the plan to create the default by diverting plan payments to attorney rather than to mortgagee for ongoing mortgage payments. Accrual of post-petition mortgage payments is a default that can be cured without violation anti-modification provision of Section 1322(b)(2) where default is result of circumstances independent of plan itself, rather than default that is created by the plan. If mortgagee objects, Trustee must first use funds on hand to make ongoing post-petition mortgage payments, with attorney fees being paid only after post-petition mortgage payments are current.

(5297) *In re Hammon,* 2015 WL 4462179, 2015 Bankr. LEXIS 2446 (Bankr. W.D. Mi. 2015) – Attorney fee cannot be paid ahead of mortgage if doing so delays ongoing payments to mortgage holder. Funds on hand at confirmation would not be sufficient to pay the ongoing monthly obligation if counsel is paid in full from first disbursement, constituting improper modification of mortgage. Section 1326(b)(1) which requires payment of administrative expenses does not trump anti-modification provision of Section 1322(b)(5).

(5298) *In re Beall,* Case no. 13-09232 (Bankr. W.D. Mi. 2014) – Attorney fees cannot be paid ahead of ongoing monthly mortgage payment without constituting improper modification of mortgage. Section 1322(b)(2) precludes modification of mortgage without consent of lender, which includes delays in payment of post-petition mortgage payments for payment of fees. Section 1326's generally requirement that administrative expenses be paid before or concurrently with payments to creditors does not trump Section 1322's express prohibition against modification of mortgage on principal residence. Plan which struck standard provision that attorney fees would be paid with funds remaining after payment of ongoing mortgage payments could not be confirmed over creditor's objection where Trustee would not have sufficient funds on hand at confirmation to pay attorney fees in full and also pay ongoing mortgage payment.

(5299) *In re Rogers,* 500 BR 537 (Bankr. W.D. Mi. 2013) – Attorney fees cannot be paid ahead of ongoing monthly mortgage payment without constituting improper modification of mortgage. Section 1322(b)(2) precludes modification of mortgage without consent of lender, which includes delays in payment of post-petition mortgage payments for payment of fees. Section 1326's generally requirement that administrative expenses be paid before or concurrently with payments to creditors does not trump Section 1322's express prohibition against modification of mortgage on principal residence.

11.35 Modification of Mortgage on Principal Residence – Section 1322(b)(5)

(5300) *In re Moore,* 2014 WL 4855011 (Bankr. W.D. Mi. 2014) – Where mortgage ballooned and became fully due and payable prior to commencement of case, loan fits within definition of Section 1322(c)(2) which allows Debtor to "cure" defaults within reasonable time. Plan could not be confirmed where plan failed to provide for full payment of the loan within plan term but sought to maintain pre-balloon contractual payment while Debtor attempted to refinance. "Default" that must be cured would be payment of balloon balance on loan within plan term.

11.36 Modification of Mortgage on Principal Residence – Voluntary Acceleration

(5301) *In re Sierra,* Case No. 15-70603 (Bankr. S.D. Tx. 2016) – Section 1322(b)(2) prevents modification of mortgage on Debtor's principal residence. Section 1322(c)(2) permits modification of mortgage on primary residence where mortgage "is due before the date on which the final payment under the plan is due". Debtor cannot accelerate payments under plan to convert non-modifiable mortgage into one that will be paid off during plan. The last contractual payment on Debtor's mortgage would some due one year after expiration of Debtor's 60 month plan. Debtor's plan proposed to pay the mortgage in full over 5 year plan term at reduced interest rate. Although loan allowed pre-payment without penalty, such that Debtor could propose to shorten term to 5 years and pre-pay without violating "anti-modification" provision, that did not allow modification of interest rate as the mortgage by its own terms matured outside the life of the plan, rendering subsection (c)(2) inapplicable.

11.37 Modification of Mortgage on Principal Residence – Fully Matured Mortgage

(5302) *Hurlburt v. Black,* 2017 WL 2483724 (Bankr. E.D.N.C. 2017) – Section 1322(c)(2) does not allow Debtor to modify under-secured creditor's rights by bifurcating loan into secured and unsecured components. Section 1322(c)(2) allows debtor to modify payment of claim and could stretch claim out over full term of Chapter 13 plan but must pay the claim in full.

11.38 Default Interest

(5303) *In re Perkins,* 2017 WL 439319 (Bankr. W.D. Ky. 2017) - Section 506(b) allows fully secured creditor to recover interest on the claim plus any reasonable fees, costs or charges provided for under the agreement or state statute. Over-secured Creditor is entitled to default rate of interest to compensate creditor for loss resulting from nonpayment as long as default interest rate is intended to compensate lender for administrative expenses and inconvenience. Award of fees, costs or charges is dictated by terms of loan agreement. However, whether Creditors entitled to default rate of interest depends on facts and equities of each particular case, with presumption that contractual rate of interest is appropriate subject to being rebutted by evidence that default rate is significantly higher than pre-default rate without any justification; and whether secured creditor runs realistic risk of nonpayment, whether Plan proposes relatively quick orderly liquidation, and whether contract rate of interest was prevailing market rate at time of default. Debtor rebutted presumption in favor of default rate of interest of additional 5% where default rate would double contractual interest rate on note; pre-default rate of 5% was prevailing market rate at time of default; and creditor did not present any evidence to establish that additional 5% rate was either justified or in line with prevailing market rates. Creditor did not present any evidence as to why doubling of interest rate would be anything other than windfall to creditor, creditor had already received substantial payments from liquidation of collateral; and creditor's risk of nonpayment was low given its substantial over-secured status. Application of default rate would materially decrease payments, if not completely eviscerate payments, to unsecured creditors. Court would not apply default rate of interest and would limit recovery to over=secured creditor to contractual pre-default rate.

(5304) *Pacifica L 51 LLC v. New Investments, Inc.,* Case No. 13-36194 (9th Cir. 2016) – Interpreting the "cure and maintain" provision in Sections 1123(a)(5) and 1123(d), curing default does not nullify obligation to pay post-default interest at default rate. Amount necessary to cure is determined in accordance with non-bankruptcy law and underlying agreement. Debtor's plan that proposed to sell collateral and pay lender in full at pre-default rate did not comply with Section 1123(d) where, prior to commencement of case, Debtor had defaulted and lender accelerated and demanded payment in full at default interest rate. Cure is intended to afford parties the benefit of bargain, not to give Debtor advantage. Once cure is effected, including payment of any default interest, costs, attorney fees and other authorized charges, party can return to pre-default conditions for remainder of loan term.

(5305) *Anderson v. Hancock,* Case No. 15-1505 (4th Cir. 2016) – Debtor's proposal to cure prepetition default does not allow plan to reduce interest rate to pre-default rate of interest. Debtors defaulted on mortgage and interest rate increased to "default rate" for balance of mortgage term.

While "cure" allows Debtors to deaccelerate mortgage and allow Debtors to avoid foreclosure, it does not permit court to alter contractually stipulated rate of interest.

11.39 Modification of Other Liens on Personal Residence

(5306) *In re Brown,* 2018 WL 739414 (Bankr. N.D. Ohio 2018) – Statutory liens are not security interests for purposes of anti-modification provision of Section 1322(b)(2). Mechanic's lien secured solely by debtor's principal residence can be modified and bifurcated under Section 506. Section 1322(b)(2) prevents only modification of security interest on primary residence. Mechanic's lien is not consensual lien but arises solely from statute and is not created by agreement of parties.

(5307) *In re Slade-Lanier,* 2014 WL 2565919 (Bankr. N.D. Ohio 2014) – Tax certificate holder bound by terms of plan that proposed to pay a portion of the property tax claim with the unpaid portion to be treated as unsecured claim. Tax certificate holder had notice of the plan and the treatment of the claim but failed to object to proposed treatment. Court was not determining amount of tax claim, which would violate Section 505(a)(2)(C), but was only determining the treatment of the claim consistent with the terms of the confirmed plan.

(5308) *In re Ange,* 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Section 1322(b)(2) prevents modification of security interest that is secured solely by Debtor's principal residence. Security interest is a "lien created by an agreement". Lien arising by statute as a result of unpaid property taxes results in creditor holding secured claim but lien is not "security interest". Debtor can modify method of application of payments on property tax claim without violating Section 1322(b)(2).

11.40 Modification of Mortgage on Property Other Than Principal Residence

(5309) *In re Wollman,* 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) applies only when the sole collateral is real estate that is used as Debtor's principal residence. Debtor could modify lien secured by both a mortgage on real property and a security interest in the manufactured house located on the land but which had not become affixed. Manufactured home was personal property such that lien was not secured exclusively by real property, even if Debtor resided in manufactured home as residence.

(5310) *Bullard v. Hyde Park Savings Bank,* 2013 Bankr. LEXIS 2187 (1st Cir. BAP 2013) – Chapter 13 plan cannot propose to both modify secured claim and "cure and maintain" claims modified over term longer than Chapter 13 plan. Modification requires that Debtor pay full value of modified claim by termination date of plan.

(5311) *Colbourne v. Ocwen,* Case No. 12-14722 (11th Cir. 2013) – Debtor who is not eligible for discharge cannot cram down mortgage on non-residential property. Section 1325(a)(5) requires the secured creditor hold lien until either payment of underlying claim in full according to applicable non-bankruptcy law; or entry of discharge. Debtor's plan did not propose full payment of secured claim and Debtor would not receive discharge, precluding any attempt to force creditor to release lien upon payment of bifurcated secured claim.

(5312) *In re Proctor,* 2013 WL 3787424 (Bankr. E.D.N.C. 2013) – Debtor in Chapter 11 (which has same anti-modification provision as Section 1322) could modify mortgage on principal residence where, at time mortgage was obtained, property was not Debtor's residence. Whether property constitutes principal residence depends on function of property at time mortgage was obtained. At that point, the property was a second home purchases as an investment. Fact that Debtor later sold residence and moved into second home and used that as residence did not bring property within anti-modification provisions for principal residence.

(5313) *Ryan v. U.S.,* Case No. 12-3398 (7th Cir. 2013) – Chapter 13 Debtor cannot use Section 506 to bifurcate federal tax lien. Although lien was for amount far in excess of value of Debtor's equity in assets, under *Dewsnup,* U.S. held valid secured claim that cannot be bifurcated.

(5314) *Congrove v. Northern Hancock Bank & Trust, Co.,* 485 BR 841 (Bankr. N.D. Ohio 2013) – Property is protected from modification only if property is real property that is used by Debtor as principal residence. Mobile home that was not permanently affixed to realty remains personal property that is not protected from bifurcation in Chapter 13.

(5315) *Wallingford v. Green Tree Servicing, LLC,* 2012 WL 3779954 (S.D. Ohio 2012) – Mobile home was not considered part of realty for purposes of anti-modification provision of Section 1322(b)(2). Under Ohio law, mobile home becomes part of realty only if permanently affixed to realty *and* the certificate of title is surrendered to clerk of the court of common pleas. Although mobile home had been permanently affixed, certificate of title had not been surrendered. Mobile home did not constitute part of real property. Claim secured by lien on real property and on mobile home located on property not protected from modification as lien was secured by property other than "real property that is the Debtor's principal residence".

(5316) *Pawtucket Credit Union v. Picchi,* 448 BR 870 (1st Cir. BAP 2011) – Anti-modification provision of Section 1322(b)(2) does not prevent modification of mortgage on duplex even where Debtor occupied one side of the property. Anti-modification provision applies only when the collateral is exclusively Debtor's principal residence, not when the property merely includes the Debtor's principal residence.

(5317) *In re Starks,* 2011 WL 248521 (Bankr. E.D. Ky. 2011) – Mobile home that had active certificate of motor vehicle title and had not been affixed to real estate constituted personal property on which the secured claim would be modified.

(5318) *In re Colbourne,* Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

11.41 "Cure and Maintain"

(5319) *In re Campbell,* 2018 WL 2339334 (Bankr. N.D. Ohio 2018) - Amount necessary to cure default or arrearage through Chapter 13 Plan is determined in accordance with underlying agreement and applicable non-bankruptcy law. Amount necessary to cure must be consistent with

agreement of parties and must not include charges forbidden by applicable non-bankruptcy law. Mortgage expressly required Debtor to escrow for taxes and insurance as well as projected escrow shortage consistent with RESPA escrow limitations. Evidence indicated that escrow calculation was in error because Debtor's insurance premiums had increased, but Debtor paid increased premium directly to creditor and inclusion of increased premium resulted in over statement of escrow shortage. Although mortgage permitted creditor to recover all costs and expenses of collection including reasonable attorney fees as part of contractual reinstatement, applicable non-bankruptcy law disallowed creditor's right to recover attorney fees where loan is not being contractually reinstated, fees were incurred as part of foreclosure proceeding and not exercise of contractual right of reinstatement, and mortgage is being paid through bankruptcy right to "cure and maintain" rather than contractual right of reinstatement. Fees attributable to separate loan not covered by Note or secured by Mortgage could not be included in calculation of amount due under Mortgage or amount necessary to "cure and maintain" although amount would be allowed as general unsecured claim.

(5320) *In re Cipriani,* 2017 WL 6754284 (Bankr. N.D. Ohio 2017) – Debtor cannot "cure and maintain" mortgage where debtor previously field and received discharge under Chapter 7. Debtor's only recourse is to pay off mortgage in full over life of plan under Section 1322(c).

(5321) *In re Parker,* 2017 WL 75745 (Bankr. E.D. Ky. 2017) - Section 1322 cuts off Debtor's right to cure defaults on a mortgage on Debtor's principal residence once the property is sold at foreclosure sale conducted in accordance with applicable nonbankruptcy law. "Foreclosure sale" is single, discrete event consisting of an auction in which highest bidder purchases property. Chapter 13 filed after foreclosure sale but within redemption prevents Debtor from curing and reinstating mortgage in bankruptcy. Debtor's sole right to cure all mortgage default under section 1322 after foreclosure sale is full redemption under applicable state law.

(5322) *Anderson v. Hancock,* Case No. 15-1505 (4th Cir. 2016) – Debtor's proposal to cure prepetition default does not allow plan to reduce interest rate to pre-default rate of interest. Debtors defaulted on mortgage and interest rate increased to "default rate" for balance of mortgage term. While "cure" allows Debtors to deaccelerate mortgage and allow Debtors to avoid foreclosure, it does not permit court to alter contractually stipulated rate of interest.

(5323) *In re Joslin,* 2016 WL 556125 (Bankr. S.D. Ohio 2016) – Provision in mortgage allowing borrower to reinstate after default and acceleration did not apply where Debtor sought to cure and maintain under Section 1322. Reinstatement is contractual remedy and while cure and maintain is provided for by Code. Provision in mortgage that permitted lender to recover attorney fees a part of reinstatement of mortgage did not apply where plan proposed to cure and maintain. Debtor not required to pay attorney fees to lender as part of cure as there was neither statutory nor contractual basis to award fees.

(5324) *In re Wollman,* 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) does not prohibit Debtor from either curing defaults and maintaining payments; or curing or waiving defaults and completing contract payments during life of plan. Neither cure and maintain nor payment over life of plan constitutes impermissible modification of mortgage. Plan must propose prompt cure. Debtor could cure mortgage over 60 month life of plan – time to cure was not unreasonable on facts of case.

(5325) *Bullard v. Hyde Park Savings Bank,* 2013 Bankr. LEXIS 2187 (1st Cir. BAP 2013) – Chapter 13 plan cannot propose to both modify secured claim and "cure and maintain" claims modified over term longer than Chapter 13 plan. Modification requires that Debtor pay full value of modified claim by termination date of plan.

(5326) *Deutsche Bank v. Tucker,* 621 F.3d 460 (6th Cir. 2010) - Section 1322(e) allows Debtor to cure defaults determined in accordance with the underlying agreement and applicable non-bankruptcy law. "Default" includes all fees and costs allowed under the parties' agreement even when the claim is otherwise undersecured.

11.42 Curing Mortgage Default After Foreclosure

(5327) *In re Parker,* 2017 WL 75745 (Bankr. E.D. Ky. 2017) - Section 1322 cuts off Debtor's right to cure defaults on a mortgage on Debtor's principal residence once the property is sold at foreclosure sale conducted in accordance with applicable nonbankruptcy law. "Foreclosure sale" is single, discrete event consisting of an auction in which highest bidder purchases property. Chapter 13 filed after foreclosure sale but within redemption prevents Debtor from curing and reinstating mortgage in bankruptcy. Debtor's sole right to cure all mortgage default under section 1322 after foreclosure sale is full redemption under applicable state law.

(5328) *TD Bank v. LaPointe,* 505 BR 595 (1st Cir. BAP 2014) – Section 1322(c)(1) creates uniform federal rule regarding date on which foreclosure sale is conducted. Sale is complete when the gavel falls at the sale. The sale occurs at the foreclosure sale when the sale is completed and the bidding processed is closed. Fact that title may not actually transfer until later date does not allow Debtor to cure and reinstate as right terminated when sale gaveled down pre-petition.

(5329) *Hopkins v. Federal Home Loan Corporation,* Case no. 13-14757 (E.D. Mi. 2014) – Chapter 13 Debtor is not permitted to cure default pursuant to Section 1322 after foreclosure sale occurs. Post-sale remedy is limited to paying redemption costs before redemption expires. Filing Chapter 13 does not expand or extend redemption.

11.43 Cure and Maintain – Reverse Mortgage

(5330) *In re Carter,* Case No. 14-48000 (Bankr. E.D. Mi. 2014) – Reverse Mortgage matures when mortgagor passes away. In Chapter 13, where mortgagor is alive at date of filing and plan proposes to cure and reinstate default, maturity date is presumed to be after plan term as Debtor anticipates surviving for full plan term. Debtor could cure default in reverse mortgage that resulted from non-payment of taxes by paying taxes (or by paying mortgagee if mortgagee paid taxes) over life of plan. However, plan cannot "cram down" mortgage on Debtor's residence as doing so would violate Section 1322(b)(5). Section 1322(b)(5) allows cram down only if original mortgage term expires within term of plan which was inconsistent with Debtor's assertion that Debtor intended to reside in property for entire plan term.

11.44 Secured Claims Generally

(5331) *First American Title Lending of Georgia, LLC v. Holt,* Case No. 16-12150 (Bankr. N.D. Ga. 2017) – Debtor in Chapter 13 cannot stretch our redemption time for pawn loan. Section 108(b) extends redemption period that has not expired prepetition to 60 days from the petition date. After extended redemption period, pawned property is no longer property of estate and cannot be redeemed by treating pawnbroker as secured creditor in Chapter 13. Rejecting *Title Max v. Northington.*

(5332) *Title Max v. Northington,* Case No. 16-172 (Bankr. M.D. Ga. 2016), *reversed,* Case No. 16-17467 (11th Cir. 2017) – Debtor cannot redeem pawn transaction over life of Chapter 13 case even where petition is filed before expiration of the statutory period of redemption. Under State law, any pledged collateral that is not redeemed is automatically forfeited to the pawn broker. Section 108 allows Debtor to extend redemption for 60 days post-petition but at end of redemption Debtor loses all interest in asset and asset becomes property of pawn broker and is no longer property of bankruptcy estate as Debtor is automatically divested of any interest in asset.

(5333) *In re Hurst,* Case No. 15-40962 (Bankr. M.D. Ga. 2016) – Debtor can redeem pawn transaction over life of Chapter 13 Plan as long as time for redemption of Pawn had not expired prior to commencement of case.

(5334) *In re Cashman,* 2011 WL 1565189 (Bankr. D. Hawaii 2011) – Claim against automobiles in which Debtors had interest jointly with parents is secured claim even though Debtors are not personally obligated on the notes. Auto loans are secured by Debtor's interest in the automobiles and that interest becomes property of the estate. Chapter 13 Plan can treat secured debts even where Debtors have no personal liability on the claim.

(5335) *In re Mullins,* 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding. Debtor's Plan failed to comply with Section 1325(a)(5) where plan purported to treat judicial lien creditor as unsecured claim.

(5336) *Bank of the Prairie v. Picht,* 428 B.R. 885 (10th Cir. BAP 2010) – Debtors with no personal liability on mortgage as a result of prior Chapter 7 could not discharge mortgage by paying only value of property as of the date of the petition, where that value was far less than the balance owed. Lack of personal liability does not alter amount of claim, and Section 1325(a)(5) requires payment of the full amount determined under applicable non-bankruptcy law. Debtors could not bifurcate claim into "secured" portion and unsecured portion pursuant to Section 506 and pay only the secured portion, as Section 1325 refers to amounts due under applicable non-bankruptcy law preventing use of Section 506 to bifurcate and reduce amount of secured claim.

11.45 Secured Claim – Inherited Property

(5337) *In re Sims,* 2017 WL 104751 (Bankr. N.D. Il. 2017) – Debtor had sufficient interest in property to allow Debtor to redeem property through Chapter 13, where property had been owned solely by debtor's spouse who had passed away prior to bankruptcy filing. Spouse's death created inchoate interest in property in Debtor as intestate heir of Spouse sufficient to support Chapter 13 filing and redemption of property sold at property tax sale through Chapter 13 where Bankruptcy filed before expiration of redemption period.

11.46 Purchase Money Security Interest Defined

(5338) *In re Jett,* 2017 WL 112525 (Bankr. S.D. Miss. 2017) – Purchase money security interest requires acquisition of goods using loan proceeds. Subsequent refinancing of prior purchase money loan is not done to acquire goods and so is not purchase money security interest protected from bifurcation of secured claim under hanging paragraph of Section 1325.

(5339) *In re Allen,* Case No. 09-13560 (Bankr. M.D. Tn. 2010) – New loan obtained by Debtor to "roll up" three pre-existing automobile loans into a single loan transaction destroyed loan's status as "purchase money security interest" removing loan from scope of "hanging paragraph". Consolidation loan did not make it possible to obtain a vehicle or other personal property as the Debtor already owned those assets. The fact that the loans that were re-financed and "rolled up" were themselves purchase money security interests did not convert refinance transaction into purchase money loan.

11.47 Secured Claims - Preservation of Lien

(5340) *JPMorgan Chase Bank NA v. Wheeler Financial Inc.,* Case No. 16-4924 (N.D. Ill. 2017) - Chapter 11 plan that did not explicitly provide for preservation of lien leaves previously secured creditor unsecured, with only contractual right to payment of sums specified under plan. Plan proposed to pay $40,000 in real estate tax arrears to the tax certificate holder. Tax certificate holder and Debtor negotiated amendment that required Debtor to sell property and pay entire balance owed within six months. Creditor's failure to provide for specific preservation of lien resulted in "trade-off" of secured claim for contractual right to payment. Creditor not entitled to relief from automatic stay following Debtor's failure to make payment as required by plan as holder of tax certificate gave up its prepetition lien in return for promise under plan to be paid in six months. Tax lien on property was replaced by new contractual right defined by terms of plan.

11.48 Secured Claim – Lien Invalidation in Plan

(5341) *In re Shank,* Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Plan can invalidate mortgage in its entirety if Plan provides for no payments on mortgage; Plan is confirmed; property that is subject to Lien is dealt with by Plan; lien holder participates in the reorganization; and the Plan specifically does not preserve the lien. Chapter 13 Plan that sought to pay mortgage in full did not invalidate lien. Accordingly, there is no participation requirement by creditor as long as creditor received notice of proposed treatment consistent with the requirements of due process.

11.49 Secured Claims – Modification Versus "Cure and Maintain"

(5342) *Bullard v. Hyde Park Savings Bank,* 2013 Bankr. LEXIS 2187 (1st Cir. BAP 2013) – Chapter 13 plan cannot propose to both modify secured claim and "cure and maintain" claims modified over term longer than Chapter 13 plan. Modification requires that Debtor pay full value of modified claim by termination date of plan

11.50 Secured Claims - Interest Rate

(5343) *In re Perkins,* 2018 WL 1279252 (6th Cir. BAP 2018) – Chapter 12, like Chapter 13, requires payment to secured creditor of value, as of effective date of plan, that is not less than allowed amount of claim. Stream of payments must total at least amount of claim at appropriate rate of interest. Interest rate is determined by *Till* formula, using national prime rate plus risk adjustment between 1% and 3%. Starting at lower amount places burden on creditor to produce evidence regarding risk and appropriate upward adjustment. 1% increase reasonable given Debtor's long history of successful farming, richness of land, and creditor was over-secured on appreciating assets and plan proposed steady reduction on principal over life of plan. Interest rates specified in notes between Debtor and Creditor are one piece of evidence but do not control the ultimate determination of interest rate for confirmed plan.

(5344) *In re Elkhorn Crossing, LLC,* 2016 WL 6875893 (Bankr. D. Neb. 2016) – Plan must propose to pay secured creditors in full by payments having a present value equal to not less than amount of claim. Plan must propose appropriate interest rate to ensure that present value is at least value of claim. Factors to consider in setting interest rate include circumstances of the case, nature of the collateral, and duration and feasibility of the plan. In considering length of plan. Court can consider length of underlying note and customer repayment period for similar loans. Plan that proposed to pay Land Loan over 15 years was reasonable where terms of original loan was 16 years, such that imposing 15-year term was not unreasonable as long as interest rate provided for periodic adjustments. Proposal to fix rate for entire 15-year term could not be approved. Term of 15 years for two other loans was unreasonable where original loans were short term, where term would be far in excess of original term, and collateral consisted of personal property and a junior lien on real estate, and Debtor did not present any evidence that 15-year term was appropriate, and loans were of type that are normally repaid over 5 year plan term. Further, plan proposed fixed interest rate which was not reasonable given length of proposed term.

(5345) *In re Jones,* 2015 WL 4624481 (Bankr. E.D. Ky. 2015) – *Till* rate of interest is appropriate for paying secured claim in Chapter 13. Although Supreme Court decision in *Till* is plurality and non-binding as to methodology, Sixth Circuit has recognized *Till* as appropriate method of determining interest rate, rejecting pre-*Till* "coerced loan" method. Plan that provided for 5.25% on mobile home loan met *Till* standards for prime (3.25%) plus 2% "adjustment".

(5346) *In re Johnson,* Case No. 15-20959 (Bankr. E.D. Mi. 2015) – Court would adjust proposed interest rate to secured creditor in Chapter 13. Plan initially proposed rate of 5.25% on automobile and motorcycle loans, later increased to 6.25% after creditor objected, and Trustee objected to higher rate. Court concluded that initial rate calculated at prime plus 2% was insufficient where Debtor purchased one of the vehicles less than one year pre-petition and purchased the other vehicle only 6 months pre-petition, and Debtors had significant secured debt overall and little, if any, equity in vehicles to provide equity cushion. *Till* warranted slight adjustment to initial rate, to 5.75%.

(5347) *In re Thomas,* 2014 WL 1761954 (Bankr. W.D. Mo. 2014) – Chapter 13 plan that proposed to retain car and pay contractual interest rate of 19.95 percent did not lack good faith. Debtor bought car during prior bankruptcy proceeding pursuant to Court Order that allowed Debtor to incur debt at 19.95 percent. Debtor's first case dismissed and Debtor filed second case, and proposed to reduce interest rate to Till rate. Creditor objected based on prior Court Order in first case that determined interest rate and Debtors amended plan to increase rate. Paying loan at higher rate, standing alone, was not lack of good faith particularly where prior Court Order at least implicitly determined that contract rate was appropriate rate. Further, even at lower rate, Debtors' plan proposed no dividend for unsecure creditors, so paying higher rate was not transferring money from unsecured creditors to secured creditor.

(5348) *In re Gift,* 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where Debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.

(5349) *United Security Bank v. Garner,* 10-795 (11th Cir. 2011) – Where plan proposes to modify interest rate under Section 1325(a), oversecured creditor is entitled to interest at contract rate during period from petition to confirmation but post-confirmation is entitled only to *Till* rate. Creditor entitled to contract interest rate of 10.5% through confirmation but then at *Till* rate of 4.25%. Allowing oversecured creditor to continue to receive contract rate post-confirmation would provide windfall to creditor at expense of other creditors.

(5350) *In re Dimery,* 2011 WL 2470057 (Bankr. N.D. Ohio 2011) – "Formula approach" adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate "risk" factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court used prime of 3.25% plus 2% "risk" adjustment.

(5351) *First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.,* 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.

(5352) *In re Blanton,* 2010 WL 4503188 (Bankr. N.D. Ohio 2010) – Section 1325(a)(5) requires secured creditors to receive interest to account for the time value of money. "Formula approach" adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate "risk" factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court rejected both the contract rate approach and the "prime with no risk adjustment" approach. Interest rate must be based on prime rate plus adjustment for risk, which normally will be 1% - 3%. Interest rate fixed at 5.25% representing prime of 3.5% plus 1.75% for risk, which falls near middle of risk range. Creditor produced no evidence that circumstances of case were exceptional or that deviation from formula was appropriate.

11.51 Secured Claims – Adequate Protection

(5353) *Partap Investments, LLC v. Kittusamy,* Case No. 16-1242 (9th Cir. BAP 2017) - Party to "Lease" that is actually disguised as security interest not entitled to administrative claim for post-petition, pre-rejection "rent". Prepetition "lease" was disguised security agreement convey title to property to Debtor. Accordingly, "lessor" is not entitled to administrative claim under Section 503(b)(1)(A) for unpaid post-petition lease payments. Secured lender is entitled to administrative claim only to the extent that secured lender can prove that asset diminished in value as a result of bankruptcy filing. Creditors are not entitled to administrative claim where creditor did not present evidence to establish diminution in value as alleged diminution was based on purchase price of assets in first instance less value at time secured creditor recovered possession, neither of which accurately measures actual diminution as a result of bankruptcy case. Creditor did not present evidence of actual value of property at commencement of case or actual value of property at time creditor re-obtained possession.

(5354) *In re Parsons,* 2012 WL 3763384 (Bankr. W.D. Ky. 2012) – Secured creditor in chapter 13 entitled to payments that provide adequate protection of security interest. Adequate protection payment of $75 per month would be reasonable considering collateral is 2002 Dodge Ram that is rapidly depreciating. Confirmed Plan modified to provide for monthly payments to creditor of $75 per month.

11.52 Secured Claims – Acceptance by Creditor

(5355) *Bronitski v. Bea,* 2015 WL 3441169 (9th Cir. BAP 2015) – Secured creditor's failure to object to proposed plan constitutes "acceptance' within scope of Section 1325(a)(5).

(5356) *In re Maddox,* 2013 WL 3553395 (Bankr. ED. Tn. 2013) – Section 1325(a)(5) provides three alternative methods by which a Chapter 13 Debtor may deal with the holder of each allowed secured claim provided for by the plan—acceptance of the plan by the secured creditor (§ 1325(a)(5)(A)); compliance with the Chapter 13 cramdown provisions (§ 1325(a)(5)(B)); or surrender of the collateral to the secured creditor (§ 1325(a)(5)(C). Acceptance of a chapter 13 plan by the holder of an allowed secured claim provided for by the plan satisfies the confirmation standard of section 1325(a)(5) with respect to such secured claim. Where creditor, with full notice of proposed treatment, accepts plan, Chapter 13 Trustee lacks standing to object to that proposed treatment. While Trustee is entitled to appear and be heard and has standing to raise any issue relevant to confirmation, Trustee does not have standing to object to proposed cram down of secured claim where treatment is acceptable to the affected creditor.

11.53 Secured Claims – Property Taxes

(5357) *Encore Assets, LLC v. Woodley,* Case No. 17-53630 (Bankr. N.D. Ga. 2017) – Debtor can propose to redeem property after sale for unpaid property taxes if Chapter 13 filed before end of statutory redemption period. Tax deed does not vest absolute title in purchaser until after redemption expires, and Debtor retains full right of possession, use, profits and exclusions of others during redemption period. Tax Deed is non-recourse secure claim. Lien could be modified as property was not Debtor's principal residence and so was not protected under Section 1322(b)(2), and Court did not reach issue as to whether lien would have been modifiable under Section 1322(c).

(5358) *In re Sims,* 2017 WL 104751 (Bankr. N.D. Il. 2017) – Debtor had sufficient interest in property to allow Debtor to redeem property through Chapter 13, where property had been owned solely by debtor's spouse who had passed away prior to bankruptcy filing. Spouse's death created inchoate interest in property in Debtor as intestate heir of Spouse sufficient to support Chapter 13 filing and redemption of property sold at property tax sale through Chapter 13 where Bankruptcy filed before expiration of redemption period.

(5359) *State of Tennessee v. Hildebrand,* 2017 WL 710473 (6th Cir. 2017) – Interest rate for unpaid property taxes is determined by "applicable non-bankruptcy law" pursuant to Section 511. "Applicable non-bankruptcy law" is any statute that is not aimed solely at bankruptcy proceedings. "Bankruptcy law" includes both Federal provisions in Code itself and any state law that is targeted to bankruptcy proceedings and does not constitute "applicable non-bankruptcy law". State law provided for interest rate of 12% plus 6% penalty rate provided for interest at 12%. Statute that purported to "convert" penalty into interest solely in bankruptcy cases qualified as "bankruptcy law" as it applied only in bankruptcy cases, and so was not "applicable state law and did not apply under Section 511. Plan needed to provide for interest at rate of 12% as that was rate specified by non-bankruptcy law.

(5360) *JPMorgan Chase Bank NA v. Wheeler Financial Inc.,* Case No. 16-4924 (N.D. Ill. 2017) - Chapter 11 plan that did not explicitly provide for preservation of lien leaves previously secured creditor unsecured, with only contractual right to payment of sums specified under plan. Plan proposed to pay $40,000 in real estate tax arrears to the tax certificate holder. Tax certificate holder and Debtor negotiated amendment that required Debtor to sell property and pay entire balance owed within six months. Creditor's failure to provide for specific preservation of lien resulted in "trade-off" of secured claim for contractual right to payment. Creditor not entitled to relief from automatic stay following Debtor's failure to make payment as required by plan as holder of tax certificate gave up its prepetition lien in return for promise under plan to be paid in six months. Tax lien on property was replaced by new contractual right defined by terms of plan.

(5361) *In re Rice,* 2016 WL 4574301 (Bankr. E.D. Mi. 2016) – County Property Tax collector who acquires statutory assignment of unpaid taxes from municipality after confirmation of Plan cannot add 4% statutory administrative fee to case. Plan proposed to pay taxes in full. At time case filed and at time of confirmation, taxes were owed to municipality and were not transferred to County until after confirmation of plan. County as transferee takes claim in status that transferor had as of transfer date. County is bound by terms of confirmed plan which did not contemplate later assessment of administrative fee. Section 511 requires rate of interest to be fixed as of month of confirmation of plan and does not allow for any additional interest or fees to be added to outstanding amount. When plan confirmed in December, 2013, applicable interest rate was 12% and there was no administrative fee charged or chargeable.

(5362) *In re Gonzalez,* 2016 WL 2944281 (Bankr. E.D. Pa. 2016) – Debtor can propose to cure unpaid property taxes after sale over life of plan where Debtor filed after the sale but within redemption. Plan that proposed to cure default over 36 month plan term was consistent with Section 1322(b)(2).

(5363) *In re Pittman,* Case No. 14-17665 (Bankr. E.D. Pa. 2016) – Debtor can propose to cure unpaid property taxes after sale over life of plan where Debtor filed after the sale but within redemption. Plan that proposed to cure default over 36 month plan term was consistent with Section 1322(b)(2).

(5364) *Plymouth Park Tax Services, LLC v. Bowers,* 2014 WL 3558096 (6th Cir. 2014) – Purchaser of tax certificates holds a "tax claim" under Section 511 and is entitled to be paid principal amount shown on certificate plus interest at rate shown on certificate. Creditor who purchased certificate with successful bid of 0.25% entitled to be repaid in Chapter 13 plan for principal amount of certificate plus 0.25%. Creditor not entitled to statutory interest rate of 198% that would have accrued on taxes had certificate not been issued where Debtor, under state law, had right to redeem by paying principal amount of certificate plus certificate rate of interest.

(5365) *In re Ange,* 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Purchasers of property tax certificates step into shoes of taxing authority. Where plan proposed to pay County Tax Collector balance owed plus interest at 18%, and plan was confirmed on those terms, certificate holder became entitled to same treatment. Debtor could attempt to reduce interest rate by filing objection to proof of claim of certificate holder. Claim objections are designed to determine amount owed to creditor as of petition date. Applicable interest rate as of petition date was 18%, so balance owed as of petition date would be calculated using 18%. Plan did not propose to alter or modify interest rate for property taxes, so certificate holder remained entitled to interest at 18% post-petition, consistent with the terms of the confirmed plan. While Debtor's plan could have proposed to modify tax claim, it did not do so and Debtor could not modify claim through the vehicle of an objection to proof of claim.

(5366) *In re Bowers,* Case No 13-8014 (6th Cir. BAP 2013) – State law controls rate of interest paid on unpaid property tax claims pursuant to Section 511(a). Purchaser of tax certificates who bid .25% to acquire certificates entitled to interest at rate of .25%, not statutory rate on unpaid taxes that are owed to taxing authority. Chapter 13 plan properly treated tax certificate claims by proposing to pay principal plus interest at .25% over life of Chapter 13 plan. Under Ohio law, interest continues to accrue at certificate rate during any bankruptcy proceeding. Although state law provided that certificate holders are entitled, outside of bankruptcy, to receive principal plus interest at 18%, statute expressly limited interest during bankruptcy case to lower, certificate rate.

(5367) *In re Martin,* 2013 WL 4094413 (Bankr. S.D.N.Y. 2013) – Debtor can redeem property from pre-petition tax foreclosure sale over life of chapter 13 plan. Debtor filed Chapter 13 after the sale occurred but before redemption expired. Debtor permitted to pay the redemption amount through chapter 13 plan as tax claim is secured claim that is subject to modification, including modification of any requirement to redeem in shorter time period.

11.54 Secured Claims – Equal Monthly Installments Generally

(5368) *In re White,* 2017 WL 2111166 (Bankr. W.D. La. 2017) – Plan that proposed monthly payments of specific amount and provided for annual lump sum payments of $1500 did not provide equal monthly payments to secured creditor. Plan payments were insufficient to pay EMI and annual lump sums would be necessary to "catch up" the payment to secured creditor. Plan could not be confirmed over objection of secured creditor.

11.55 Secured Claims – Balloon Payments

(5369) *In re Cochran,* 555 BR 892 (Bankr. M.D. Ga. 2016) – Plan that proposes to pay secured creditor monthly payment for first 12 months with balloon at end of 12th month period did not violate Section 1325(a)(5)(B)(iii)(I) requirement of equal monthly payments. Section 1325 requires only that periodic payments be in equal amounts as balloon payment is not intended as "periodic" as plan contemplates only one balloon payment and not "periodic" or repeated payments. Balloon payment at end of term is consistent with Congressional intent to allow Chapter 13 plans to be as flexible as possible while providing certainty to secured creditors that they will receive at least some defined payment each month. Court acknowledged that allowing balloon payments was minority rule but concluded that balloon payments were consistent with both Congressional intent and plain language. Plan was feasible where Debtor testified that he had been assured by local bank that refinance at end of 12 months was easily done although Debtor did not produce term sheet, commitment or any other documents from bank to confirm that tender would, or may be, willing to refinance loan. Debtor proposed to include provision for relief form stay at end of 12 months if balloon not paid, and plan proposed monthly payment at least sufficient to cover accruing interest and value of collateral far exceeded amount owed on loan, leaving creditor adequately protected.

(5370) *In re Guerrero,* 2015 WL 5162272 (Bankr. E.D. Wis. 2015) – Debtor can propose plan to cure balloon payment and pay lien in full over life of plan where loan matured and became fully due and payable prior to commencement of case.

(5371) *In re Ramirez,* 2014 WL 1466212 (Bankr. S.D. Fl. 2014) – Plan that proposed balloon payment to retire first mortgage on investment property is feasible where Debtor has significant equity in other property and earning capacity of Debtor produces strong incentive to complete plan that crams unprotected mortgage. Permitting Debtor to structure plan to provide affordable payments for 60 months and opportunity to refinance in month 60 using equity in home is consistent with congressional policies of allowing Debtors flexibility in structuring plan.

(5372) *In re Spark,* 2014 WL 1759553 (Bankr. M.D. Fl. 2014) – Plan that proposed monthly payments to secured creditor for 59 months and a single, lump sum payment in month 60 violated Section 1325 requirement for equal monthly payments. Balloon payment is, by definition, not equal monthly installment.

11.56 "Catch All" Provision in Hanging Paragraph

(5373) *In re Tanguay*, 427 B.R. 663 (Bankr. E.D. Tenn. 2010) - Hanging paragraph's one year catch-all provision includes motor vehicles purchased for non-personal use.

11.57 910 Car Claims – Defined

(5374) *In re McGinness,* 2018 WL 1162876 (Bankr. E.D. Tn. 2018) – Whether vehicle is within anti-modification provision of Section 1325(a) depends on whether vehicle was purchased within 910 days and was acquired for personal use of the debtor. Person use is construed as "non-business use". Whether vehicle was acquired for personal use is determined by debtor's intent at time vehicle purchased, although debtor's actual use can be persuasive evidence. Court adopted "predominant use" test as most reasonable and practical as test does not focus on whether vehicle is used exclusively for personal use (which could exclude even a debtor who drives the vehicle to work) or exclusively business (which would exclude debtor who occasionally drives for personal purposes). Predominate use allows for some personal use that will naturally occur even in driving business vehicle. Debtor did not acquire vehicle of personal use notwithstanding provision in contract that indicated that debtor intended to use vehicle for personal, family or household purposes where Debtor was never asked by Dealership or lender how debtor intended to use vehicle and provision in contract was pre-printed form; debtor was required to have vehicle in course of employment picking up and transporting patients for events and medical appointments; debtor received reimbursement from employer for mileage; and while debtor also used vehicle for personal use, debtor's business use of vehicle predominated over personal use.

(5375) *In re Douay,* Case Number 17-750 (Bankr. N.D. W.Va. 2018) – Debtor cannot bifurcate secured claim if creditor holds purchase money security interest, debt was incurred within 910 days, and collateral for debt is motor vehicle acquired for personal use of debtor. Whether persona is acquired for personal use depends on whether debtor's personal use is significant and material. Vehicle was not acquired for personal use of debtor where debtor purchased vehicle exclusively for use by non-filing spouse and spouse was sole user of vehicle both before and after bankruptcy petition. Fact that spouse resided in same house as Debtor did not make Debtor's use of the vehicle anything more than incidental and far less than significant and material.

(5376) *In re Dungey,* Case No. 16-21600 (Bankr. E.D. Mi. 2017) – Car loan protected from valuation where car was purchased within 910 days and loan was used to acquire vehicle. However, second claim that was cross collateralized against car not protected where second claim arose out of credit card charges and personal loans unrelated to acquisition of vehicle.

(5377) *In re Howard,* 597 F.3d 852 (7th Cir. 2010) - Car finance company had purchase money security interest in full amount of claim, including negative equity from trade in.

(5378) *In re Dale,* 528 F.3d 568 (5th Cir. 2009) – Financing of negative equity does not defeat status of security interest as "purchase money". Purchase money includes the price paid and all value given to enable the Debtor to acquire the vehicle. Negative equity, gap insurance and extended warranties are properly considered expenses incurred by the creditor in connection with the purchaser's acquisition of an interest in the vehicle.

(5379) *AmeriCredit Financial Services v. Penrod,* 636 F.3d 1175 (9th Cir. 2010), *cert denied.* – Negative equity included in car loan is not part of the purchase money financing for purposes of the hanging paragraph. The payment of Debtor's remaining debt on her 1999 Ford Explorer is the payment of an antecedent debt, not an expense incurred in buying the new vehicle. Negative equity on Debtor's Ford Explorer was not sufficiently connected to the purchase of the Ford Taurus to establish a purchase-money security interest. A seller or lender can obtain a purchase money security interest only for new value, and closely related costs. Old value simply does not fit within that rubric. Negative equity charges related to Penrod's 1999 Ford Explorer would not qualify as new value under 11 U.S.C. § 547(a)(2). Broad language is employed to encompass third party financing, not to expand the scope of purchase money security interests.

(5380) *In re Allen,* Case No. 09-13560 (Bankr. M.D. Tn. 2010) – New loan obtained by Debtor to "roll up" three pre-existing automobile loans into a single loan transaction destroyed loan's status as "purchase money security interest" removing loan from scope of "hanging paragraph". Consolidation loan did not make it possible to obtain a vehicle or other personal property as the Debtor already owned those assets. The fact that the loans that were re-financed and "rolled up" were themselves purchase money security interests did not convert refinance transaction into purchase money loan.

(5381) *Nuvelle Credit Corp. v. Westfall,* 599 F.3d 498 (6th Cir. 2010) – Negative equity rolled into financing does not destroy "purchase money security interest" for purposes of the "hanging paragraph". Uniform Commercial Code defines "purchase money security interest" as all consideration paid for the acquisition of the car and is not limited to new or additional value. Financing will be "purchase money" if the underlying obligation (1) was all or part of the price of the collateral; and (2) value given to enable the Debtor to acquire rights in or the use of the collateral.

(5382) *Shaw v. Aurgroup Financial Credit Union,* 552 F.3d 447 (6th Cir. 2009) – Chapter 13 plan improperly attempted to bifurcate purchase money claim of creditor that had provided financing within 910 days prior to commencement of Chapter 13 case to allow Debtor to purchase a motor vehicle. So-called "hanging paragraph" requires that purchase money security interest secured by a motor vehicle purchased within 910 days of the filing of the case must be treated as entirely secured and either paid in full with interest or Debtor must surrender the property, unless the creditor accepts contrary treatment, either expressly or by a failure to object.

(5383) *In re Thompson,* 2009 WL 1758757 (Bankr. N.D. Ohio 2009) – "Hanging paragraph" applies only to purchase money security interests whether collateral consists of automobile or "other thing of value". Motor vehicle cannot be "other thing of value" for purposes of avoiding restriction that vehicle has been purchased for personal use of Debtor. Debtor's plan that "crammed down" car secured by non-purchase money security interest confirmed.

(5384) *In re Tyson*, Case No. 09-01179 (Bankr. W.D. Mi. 2009). Financing of the negative equity did not destroy the purchase money security interest and that as a result, the claim could not be bifurcated into secured and unsecured portions. The hanging paragraph requires, "a purchase money security interest securing the debt that is the subject matter of the claim." While most courts focus on the definition of purchase money security interest, this Court focused on the term "debt". The "debt" is the right to receive payment on account of the contract, which includes the negative equity, and this "debt" is secured by a purchase money security interest in the vehicle. Accordingly, the claim could not be bifurcated.

(5385) *In re Hingiss,* 2010 WL 4941622 (Bankr. E.D. We. 2010) – Court can use equitable tolling to prevent circumvention of 910 Claim based on prior bankruptcy filing. Debtor filed a Chapter 13 case within 910 days of acquiring the vehicle. Debtor confirmed a plan that treated the claim as fully secured and provided for full payment of the claim. Court dismissed the case 9 days after confirmation on a Trustee Affidavit of Default. Three months later, Debtor filed another Chapter 13. This second case was filed beyond 910 days and the Debtor sought to cram down the car. The Court found that the Debtor had not acted in bad faith in the dismissal – the Debtor lost his job right after confirmation and it took a couple months to find a new one. Equitable tolling extends the statute of limitations period where it is equitable to do so on a case-by- case basis. Equitable tolling does not assume any blameworthy conduct by the defendant. The 910 day lookback would be extended by the number of days that passed in the prior Chapter 13 case, resulting in the claim being non-modifiable under the infamous "hanging paragraph".

11.58 910 Car Claims – Modification of Interest Rate

(5386) *In re Kemmery,* 516 BR 485 (N.D. Ohio 2014) – While lender's lien on automobile purchased less than 910 days pre-petition cannot be stripped down, interest rate on claim can be modified pursuant to *Till.* Appropriate interest rate is prime of 3.25% plus 2% risk factor, for total rate of 5.25%.

(5387) *In re Kelley,* 2012 WL 5457331 (Bankr. E.D. Ky. 2012) – Status of secured claim as 910-car claim does not preclude modification of claim to reduce interest rate pursuant to Till. Chapter 13 Debtors eligible for discharge do not have to pay contract interest rates and other contract charges to accomplish release of liens through the confirmed plan, but lien release must await discharge when Section 1325(a)(5)(B)(i) applies. Creditor bound by confirmed plan that reduced interest rate from 20% to 4.25% even where claim was not subject to cram down under "hanging paragraph".

11.59 Surrender Generally

(5388) *Jodway v. Fifth Third Bank,* 2017 WL 2350062 (E.D. Mi. 2017), *aff'd,* 2018 WL 300438 (6th Cir. 2018) – Debtor cannot modify plan to excuse performance of one obligation where Debtor is refusing to comply with other provision of Plan as confirmed. Debtor's Plan proposed to surrender real property. After confirmation, Debtor instead vigorously contested Creditor's efforts to foreclose. Debtor's later plan modification to excuse payments and reduce ongoing plan payments denied based on Debtor's refusal to complete surrender of property.

(5389) *In re Kurzban,* Case No. 09-30656 (Bankr. S.D. Fla. 2017) – "Surrender prevents Debtor from contesting foreclosure in action pending or ripe for filing when bankruptcy case in which property is surrendered is filed. However, decision to surrender does not last in perpetuity no matter what might occur after Debtor "surrenders" property. Debtor not prevented from contesting foreclosure where, after Debtor surrendered property, Lender voluntarily dismissed foreclosure action and engaged in loan modification efforts. Over 7 years after Debtor obtained discharge and more than 5 years after dismissal of prior action, lender instituted new action to foreclose mortgage based on new, post-bankruptcy defaults. Debtor's prior surrender of property was not binding in subsequent foreclosure action relating to defaults that did not exist as of date on which Debtor made decision to surrender.

(5390) *Failla v. Citibank, NA,* Case No. 15-15626 (11th Cir. 2016) – "Surrender" requires that Debtor relinquish rights in collateral and take no action inconsistent with that designation. Surrender survives abandonment of property by trustee and duty to surrender collateral continues. Debtors filed Chapter 7 and indicated in statement of intentions that they would surrender their home. There was no dispute that mortgage was valid, that Debtors had defaulted on payments, or that value of property was less than balance owed. After trustee abandoned the home, Citibank continued foreclosure and Debtors then contested foreclosure action. Creditor sought order from bankruptcy Court Ordering Debtor to stop contesting foreclosure action. Bankruptcy Court entered Order directing Debtors to stop contesting foreclosure or risk losing discharge. District Court affirmed and 11th Circuit affirmed.

(5391) *In re Tosi,* 2016 WL 859034, 546 BR 487 (Bankr. D. Ma. 2016) – To surrender collateral as to real estate means to make collateral available to secured creditor to pursue state law rights. Surrender must leave creditor's State Court rights in the collateral unmodified. Plan that proposed to allow Debtor 90 days post-confirmation to sell property, failing which property would be surrendered, altered creditor's rights by delaying right to foreclose, in violation of Section 1325(a)(5).

(5392) *In re Ware,* 2015 WL 4389688 (Bankr. N.D. Il. 2015) – Surrender of collateral requires physical delivery to creditor and, in case of vehicles, surrender of certificate of title and keys. However, if Debtor is unable to deliver physical possession through no fault of Debtor, property can be surrendered for purposes of Section 1325 without physical delivery. Record must demonstrate that lack of possession is not the result of Debtor's own actions or lack of good faith. Automobile stolen a year before case filed, properly reported to both police and insurance at time of theft, could not be returned as Debtor was not in possession and lack of possession was not due to Debtor's own culpable behavior. If Debtor reacquires possession after confirmation, Debtor must physically deliver vehicle to lender. If vehicle had been seized due to fault of Debtor, for example unpaid parking tickets that caused vehicle to be impounded, surrender without possession would not fulfill Debtor's good faith obligations.

(5393) *Bank of New York v. Watt,* 2015 WL 1879680 , 2015 U.S. Dist. LEXIS 54041(D. Ore. 2015) – Surrender of collateral in Chapter 13 means that Debtor will not oppose creditor's ability to realize on collateral. Surrender does not divest Debtor of ownership or obligations attendant to ownership. Vesting, on other hand, would transfer title to the grantee. Section 1325 allows treatment of secured claim by surrender but nothing in Section 1325 allows Debtor to "vest" property in creditor effectively forcing creditor to accept title to property without voluntary acceptance of conveyance. Plan that proposed to vest property in secured creditor could not be confirmed over creditor's objection.

(5394) *In re Eyerman,* 517 BR 800 (Bankr. S.D. Ohio 2014) – Creditor was not "secured" creditor in Chapter 13 case where property covered by security agreement consisted solely of property belonging to LLC and one parcel of land owned by Debtors but did not include any personal property of Debtors. Plan that proposed to treat creditor by surrendering interest in land and deeming deficiency balance to be unsecured for purposes of Debtors' Chapter 13 plan confirmed as creditor had no security interest in Debtors' personal property and surrender of real

estate complied with Section 1325(a)(5).

(5395) *In re Prior,* 2014 WL 585284 (Bankr. S.D. Ga. 2014) – Debtor cannot surrender collateral if Debtor is not able to deliver possession or control of collateral. Surrender requires an affirmative act beyond merely abandoning of interest.

(5396) *Santander Consumer USA, Inc. v. Brown,* 746 F.3d 1236 (11th Cir. 2014) – Replacement value of collateral applies when collateral is surrendered. Where replacement value of collateral exceeds debt, debt is satisfied on confirmation of the plan.

(5397) *In re Plummer,* 2014 WL 1248039 (Bankr. M.D. Fl. 2014) – Surrender of collateral requires only that Debtors make collateral available for secured creditor to exercise state law rights. Surrender does not obligate Debtors to "deliver' property or to otherwise take any affirmative action. Debtor "surrenders" collateral when he allows the secured creditor to obtain possession by available legal means. Debtor is not required to convey title. Debtor did not violate Code or act inconsistent with stated intent to "surrender" when Debtor refused to sign deed in lieu of foreclosure. Debtor took no steps to impede foreclosure process or to otherwise hinder creditor's exercise of state law rights. Debtor's continued occupancy of property, and rental of property after bankruptcy filing but before foreclosure, did not interfere with secured creditor's ability to seek possession by legal means, as mortgagee had no right to possession until after transfer of title following foreclosure sale.

(5398) *In re Brown,* 2014 WL 1245266 (11th Cir. 2014) – When collateral is surrendered in Chapter 13 Plan, debt is extinguished to extent of value of collateral. Value of Collateral is determined by replacement value of collateral. Prior decision in *Rash* using foreclosure value abrogated by BAPCPA provision of Section 1325(a)(5). Where replacement value of vehicle exceeded debt, debt was deemed satisfied in full upon surrender of collateral.

(5399) *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.

(5400) *In re Waltower,* 2012 WL 4758043 (Bankr. S.D. Ga. 2012) – Surrender of property in confirmed chapter 13 plan terminates automatic stay as to property. However, surrender does not convey title. Lender to whom property was surrendered had not foreclosed or taken title and, therefore, had no duty to maintain the property. Debtor's failure to maintain property post-confirmation resulted in Debtor being liable for damages to adjoining property owners for nuisance resulting from neglect and decay of property.

(5401) *In re Paquette,* 2011 WL 5856265 (Bankr. E.D. Mi. 2011) – Plan provision that required creditor to file deficiency claim within 180 days after confirmation of plan that provided for surrender of property did not violate Code. Although creditor may not be able to complete foreclosure process within 180 days, but creditor had other options to quantify deficiency claim including motion to value collateral, motion to estimate deficiency, and amendment to secured proof of claim. Plan did not require creditor to actually foreclose to establish deficiency claim.

11.60 Surrender in Full Satisfaction

(5402) *Santander Consumer USA, Inc. v. Brown,* 746 F.3d 1236 (11th Cir. 2014) – Replacement value of collateral applies when collateral is surrendered. Where replacement value of collateral exceeds debt, debt is satisfied on confirmation of the plan for debt that is not a "910-vehicle".

(5403) *In re Menden,* 2011 WL 4433621 (Bankr. N.D. Ohio 2011) – Creditor received constitutionally sufficient notice of Debtor's Amended Chapter 13 Plan that provided for surrender of automobile in full satisfaction of debt. Service on Creditor at one of two notice addresses and electronic service on Creditor's attorney who had filed a Notice of Appearance was sufficient to comply with Rule 2002. Even if service had not complied with Rule 2002, service on Creditor's attorney was reasonably calculated, under all the circumstances, to apprise Creditor that its rights may be altered and to advise Creditor of opportunity to object. Confirmation of Plan was *res judicata* on surrender in full satisfaction. Creditor's unsecured deficiency claim would be disallowed. However, Creditor would not be required to refund payments received from the Chapter 13 Trustee prior to the date on which the Proof of Claim was disallowed where Debtor waited almost three years after Trustee began distributions to file objection to claim.

(5404) *Americredit Financial Services, Inc. v. Tompkins*, 604 F.3d 753 (2d Cir. 2010). Creditor could maintain unsecured claim for deficiency not satisfied by surrender and sale of "910 vehicle".

(5405) *In re Long,* 519 F.3d 88 (6th Cir. 2009) – "Hanging paragraph" added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.

11.61 Secured Claims – Vesting Title in Creditor Permitted

11.62 Secured Claims – Vesting Title in Creditor Not Permitted

(5406) *Wells Fargo Bank, NA v. Sagendorph,* Case No. 15-40117 (D. Mass. 2017) – Reversing decision of Bankruptcy Court, District Court concluded that plan that would vest title in secured creditor cannot be confirmed over objection of creditor. Section 1322(b)(9) permits vesting and Section 1325(a) allows surrender, but terms are not synonymous and Section 1325(a)(5) does not provide for vesting as permissible treatment of secured claim. Surrender is act of making property available to lender, while vesting confers ownership. Creditor is not required to accept title to property forced on it over its objections.

(5407) *In re Williams*, 2015 WL 7776552 (Bankr. D. Kan. 2015) - "Surrender" and "vesting" are not synonymous terms. Although Section 1322(b)(9) allows vesting the title to property in a secured creditor, Section 1325(b)(5) does not permit confirmation of a plan vesting title

to collateral to a secured creditor over that creditor's objection. Section 1322(b)(9) includes vesting as a discretionary term of a plan, but it does not assure confirmation of a plan providing for vesting. To permit vesting over the creditor's objection would transform creditor's right into obligations, rewriting both the Bankruptcy Code and the underlying loan documents, while at the same time ignoring the secured creditor's state law rights.

(5408) *In re Weller,* 2016 WL 164645 (Bankr. D. Mass. 2016) – Secured creditor cannot be compelled under either State Law or Code to accept title to property that it did not want. Court rejected decision of another judge in same district in *Sagendorph* (see above) and concluded that vesting provision in Section 1322(b)(9) and Section 1325(a)(5) allow surrender of property which allows creditor to pursue recovery, but neither Section 1322 nor Section 1325 compels creditor to accept property. Plan that proposes to vest property in secured creditor cannot be confirmed over creditor's objection.

(5409) *In re Zair,* 2016 U.S. Dist. LEXIS 49032 (E.D.N.Y. 2016), *appeal pending,* Case No. 16-1648 (2d. Cir. 2016) – Section 1325 does not permit confirmation of plan over objection of secured creditor where plan proposes to vest title to property in creditor. Section 1325 allows confirmation only if creditor accepts plan or plan either provides for payments to creditor with creditor to retain lien or Debtor surrenders property.

(5410) *In re Tosi,* 2016 WL 859034, 546 BR 487 (Bankr. D. Ma. 2016) – Vesting under Section 1322(b)(9) is not same a surrender. Surrender allows, but does not require, creditor to enforce state law rights. Vesting under Section 1322 operates as transfer of title to another person or entity. Plan that proposes to vest property in secured creditor fails to comply with Section 1325(a)(5) as surrender must leave creditor's rights in collateral unaltered, while vesting title in creditor substantially alters creditor rights. Vesting does not meet any of the three categories of treatment of secured claims under Section 1325. Vesting provision of Section 1322(b)(9) does not override Section 1325(a)(5) limitation on treatment of secured claims.

(5411) *Bank of New York v. Watt,* 2015 WL 1879680, 2015 U.S. Dist. LEXIS 54041 (D. Ore. 2015) – Section 1325 does not permit confirmation of plan over objection of secured creditor where plan proposes to vest title to property in creditor. Section 1325 allows confirmation only if creditor accepts plan or plan either provides for payments to creditor with creditor to retain lien or Debtor surrenders property. Surrender means relinquishment of Debtor's rights but does not impose on creditor a duty to accept title. Section 1322 lists permissible terms for plan but confirmation is governed by Section 1325. Section 1322 cannot create fourth option for dealing with secured claims by vesting title in creditor.

(5412) *In re Davis,* Case No. 14-60616 (Bankr. S.D. Ga. 2015) – Plan that proposed to vest property in secured lender did not comply with Section 1325. Vesting involves immediate and non-consensual transfer of title, which is not the equivalent of surrender for purposes of Section 1325(a)(5).

(5413) *In re Malave,* Case No. 13-13348 (Bankr. S.D. N.Y. 2014) – Debtor cannot use Section 1322(b)(9) to vest title in creditor, essentially forcing creditor to accept transfer involuntarily.

(5414) *In re Smith,* Case No. 14-60627 (Bankr. S.D. Ga. 2014) - Plan cannot propose vesting of collateral in secured creditor. Code requires only that property be surrendered, which does not equate to transfer of title. Section of Code dealing with vesting does not require creditor to accept title to property and does not authorize court to enter order to compel creditor to either commence foreclosure or to accept quitclaim deed to property.

(5415) *In re Rose,* 512 BR 790 (Bankr. W.D.N.C. 2014) – Plan cannot propose vesting of collateral in secured creditor. Code requires only that property be surrendered, which does not equate to transfer of title. Section of Code dealing with vesting does not require creditor to accept title to property and does not authorize court to enter order to compel creditor to either commence foreclosure or to accept quitclaim deed to property.

(5416) *In re Coonfield,* 517 BR 239 (Bankr. E.D. Wa. 2014) – Creditor cannot be forced to accept title over objection. Plan that proposed to transfer property to secured creditor did not comply with Section 1325,

(5417) *In re Rosa,* 495 BR 522 (Bankr. D. Hawaii 2013) - Provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded did not constitute "surrender" of property and could not be confirmed over objection of secured creditor. However, plan that included vesting provision would be confirmed where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that the plan may provide for the vesting of property of the estate, on confirmation of the plan, in the Debtor or any other entity. Secured creditor's failure to object constitutes "acceptance" of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.

11.63 Deficiency Claims – Limiting Provisions

(5418) *In re Paquette,* 2011 WL 5856265 (Bankr. E.D. Mi. 2011) – Provision that required holders of secured claims on property being surrendered to file claims for deficiency balances did not violate Section 1325. Provision promoted plan feasibility and timely, orderly and fair administration of claims. Provision would not prohibit creditors from reaching agreement with Debtor and the Chapter 13 Trustee as to the amount of the deficiency within the 180 day period; creditor could file a deficiency claim and allow the parties to object, with the court then determining the value of the collateral and liquidating the deficiency claim; asking court to value the property under procedures in Section 506 and Rule 3012; asking the court to estimate the amount of the deficiency claim under Section 502; or by filing a claim timely and then amending the claim at a later date to state the secured and unsecured portions of the claim once the value of the property is determined, either by a foreclosure sale or a valuation hearing.

11.64 Applicable Commitment Period

(5419) *In re Kuwik,* 511 BR 696 (Bankr. N.D. Ga. 2014) – Self-employed debtor must use gross business income in calculating whether Dbtor has CMI in excess of applicable median income.

(5420) *Plilar v. Stearns,* 2014 WL 1259569 (4th Cir. 2014) – Applicable Commitment Period is temporal. Debtors with above median income must propose 60 month chapter 13 plan even where disposable income on From B22 is negative unless plan proposes 100% dividend in shorter time.

(5421) *In re Skiles,* 2014 WL 92477 (Bankr. N.D. Ohio 2014) – Applicable Commitment Period depends on whether Debtor's income is above or below median income for Debtor's household size. In determining household size, court would not limit analysis to IRS definition of dependent, nor would court use "heads on beds" theory. Court would include only those individuals who acted as single economic unit with Debtor, defined as those who Debtor financially supports and those who financially support the Debtor. Individuals listed in Debtor's tax return are rebuttably presumed to be members of Debtor's household. Individuals not listed in most recent tax returns as dependents are rebuttably presumed not to be members of Debtor's household. The party desiring a different conclusion has the initial burden of providing evidence showing the individual satisfies the "economic unit" definition. In determining whether person is part of "economic unit", court will consider degree of financial support provided to the individual by the Debtor; degree of financial support provided to the Debtor by the individual; extent to which individual and Debtor share income and expenses; extent to which there is joint ownership or properly; extent to which there are joint liabilities; extent to which assets owned by Debtor or the individual are shared, regardless of title; and any other type of financial intermingling or interdependency between Debtor and individual. "Economic unit" will be construed expansively to include unmarried couple that shares living expenses in shared home and shared a significant amount of income and expenses; Debtor, girlfriend, their child and her children from prior relationship, where Debtor was primary source of support for girlfriend and her children; and adult daughter and her children where daughter and children were dependent on Debtor for support. If Information that may bear on includes a domestic relations order, such as a separation agreement or child custody order, but court may not accept domestic agreement that attempts to "even things out" and may not represent the economic realities of the parties. Official documents completed before the Debtor's contemplation of bankruptcy such as an application for a residential loan or governmental assistance, which includes the Debtor's household size may be relevant. Other information, such as receipts, bank statements, or credit card statements which either show or do not show costs consistent with caring for another may also be beneficial. Debtor's bald statement that an individual either is or is not part of the Debtor's "household," without more, is insufficient when a good faith challenge is asserted. An adult capable of supporting himself, but who is not working without reasonable cause and lives off the generosity of the Debtor, usually should be excluded from the Debtor's "household," even if the adult would otherwise satisfy the requirements of the "economic unit" definition. A contrary rule would result in a Debtor's creditors subsidizing the adult's decision not to work. Debtor failed to establish larger household size where tax return listed only one child, where Debtor had shared custody of three children from prior marriage and had part-time custody. Fact that children spend a few days per month with Debtor did not establish that Debtor provided economic support or that children were part of "economic unit" of Debtor rather than of ex-wife who had primary custody. Even if children were considered part of household they would be considered only as "part time" members with proper accounting for time spent with each parent and counted on fractional basis. Debtor's two children each lived with him approximately half of the time, and counted for a combined "one" person for means test purposes.

(5422) *In re Gaut,* 2014 WL 293556 (Bankr. N.D. Ohio 2014) – Applicable commitment period is determined by whether Debtor is above or below median income for a household of Debtor's size. Court would use "economic unit" method of determining household size, rather than "heads on beds" analysis. On date of filing, Debtor resided in house with non-filing spouse, 19 year old son, and 20 year old daughter, her husband and her child. Only income in house was Debtor's disability. Debtor and spouse tax returns listed only the 19 year old son as dependent. Tax returns created rebuttable presumption of dependents, giving rise to presumption that Debtor's household size was three. Court scheduled additional hearing to take further evidence on "economic unit" status of Debtor's household.

(5423) *Danielson v. Flores,* 2013 WL 4566428 (9th Cir. 2013) – Above-Median Debtor with negative disposable income has applicable commitment period of 5 years. ACP is temporal requirement and above median Debtor must propose plan length of 60 months even where disposable income calculated pursuant to Section 1325 and Section 707 is negative number. Court reversed prior 9th Circuit decision in *Kagenveama*, 541 F.3d 868 (9th Cir. 2008), as in conflict with Supreme Court decision in *Lanning,* 130 S.Ct. 2464 (2010), and aligning itself with the Sixth. Eighth and Eleventh Circuits.

(5424) *Baud v. Carroll,* 2011 WL 338001 (6th Cir. 2011) – Section 1325(b) ties "applicable commitment period" to Current Monthly Income and not calculation of "disposable income". Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated "disposable income" is positive, zero or negative.

(5425) *In re Tennyson,* 611 F.3d 873 (11th Cir. 2010) - Applicable commitment period is temporal, establishing the minimum length of the plan, and not merely a multiplier. Above median Debtor must propose 60-month plan unless paying 100% dividend. Linking "applicable commitment period" to "disposable income" would leave "applicable commitment period" an indeterminate term in light of *Lanning* approach that "projected disposable income" can vary based on multitude of factors. In order for "applicable commitment period" to have any definite meaning, its definition must be that of a temporal term derived from Section 1325(b)(4) and independent of Section 1325(b)(1).

(5426) *Yoshikawa v. Carroll,* Case No. 10-11701 (E.D. Mi. 2011) – Citing Sixth Circuit Decision in Baud, Debtor with above median CMI has 60 month Applicable Commitment Period regardless of positive or negative disposable income.

(5427) *In re Wolkens,* Case No. 10-40184 (Bankr. E.D. Mi. 2010) – Above Median Income Debtor with no disposable income does not have an applicable commitment period and so can confirm plan that runs less than 60 months without paying all claims in full, relying on District Court opinion in *In re Baud,* 415 BR 291 (Bankr. E.D. Mi. 2010).

(5428) *Whaley v. Tennyson,* 2010 WL 2793941 (11th Cir. 2010) – Above median income Debtor must be in plan for minimum of five years. "Plain language" of statute indicates that Applicable Commitment modifies "period" which is a measure or duration of time. Applicable Commitment Period as measure of time does not render Section 1322(d) limit useless as 1325(b) sets a minimum period at 5 years unless

all unsecured claims are paid in full in a shorter time, while Section 1322(d) sets only a maximum length. To read applicable commitment period as temporal only would render 1325(b)(4)(B) superfluous. Although *Lanning* does not directly address issue, *Lanning* does state that Section 1325 formula does not exist in a vacuum. Applicable Commitment Period must have an existence independent of 1325(b) calculation of disposable income; otherwise, applicable commitment period would not have a fixed or definable meaning. Congressional intent also indicates that Applicable Commitment Period is temporal, as Congress intended to require Debtors to repay creditors the maximum amount they can afford.

(5429) *In re Compann,* 2010 WL 4008311 (Bankr. N.D. Ga. 2010) – Applicable Commitment Period is determined by Current Monthly Income as defined in Section 101(10A). Debtor who has CMI above the applicable median has a 60 month ACP regardless of amount of "disposable income' as calculated on Means Test from. Self-employed Debtor must calculate CMI using gross income, which will then determine ACP and plan length. Debtor is permitted to deduct business expenses only after CMI is determined to calculate Disposable Income.

(5430) *In re Weigand,* 386 BR 238 (9th Cir. 2008) – Chapter 13 Debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI. Business expenses are to be subtracted from CMI when calculating "disposable income." Debtor with Current Monthly Income above median has 60 month Applicable Commitment Period.

(5431) *In re Carpenter,* 2009 WL 1636246 (Bankr. E.D. Tn. 2009) - For above-median Debtor, "applicable commitment period" is temporal and not monetary or mathematical. Above median Debtor must be in plan for full 60 months unless plan proposes 100% dividend to creditors in shorter time. "Applicable Commitment Period" is not just part of mathematical equation. Fact that Debtor could pay to unsecured creditors an amount equal to 60 times calculated "disposable income" does not excuse requirement that Debtor commit all projected disposable income over 60 month plan term. Phrase "applicable commitment period" is composed of terminology that is not defined in the Code. Dictionary definitions of "Applicable" (defined as "fit or suitable for its purpose; appropriate)"; "commitment" (defined as "the committing of oneself to a particular course of conduct"); and "period" (defined as "a length of time") lead to conclusion that "applicable commitment period," is the length of Debtor's Chapter 13 Plan.

(5432) *Baud v. Carroll,* 2009 WL 2876899 (E.D. Mi. 2009) *reversed Baud v. Carroll,* 2011 WL 338001 (6th Cir. 2011) – Section 1325(b) ties "applicable commitment period" to Current Monthly Income and not calculation of "disposable income". Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated "disposable income" is positive, zero or negative.

(5433) *Hildebrand v. Petro,* 2008 Fed. App. 0015P (6th Cir. BAP 2008) – "Projected Disposable Income" is not based on a mechanical application of the provisions of Sections 1325(b)(1) and (2). Section 1325(b)(2) defines "disposable income" as "current monthly income less specific expenses enumerated in Section 707(b)(2)(a) and (B). "Disposable income" is a backward looking determination based on the six months preceding the commencement of the bankruptcy case. "Projected" disposable income requires an examination of future events and factors likely to be in operation through the projection period. Section 1325(b)(1) requires an analysis of projected disposable income "as of the effective date of the plan". Therefore, the inquiry must focus on the reality of the Debtor's income and expenses at confirmation as disclosed on Debtor's Schedules I and J. Although Debtors "disposable income" calculation resulted in negative income, Schedules I and J indicated that Debtors had total monthly net income of $1386.33. Section 1325(b)(1) would require Debtor to make monthly payments in the amount of $1386.33 in order to pay 100% of Debtor's "projected disposable income".

(5434) *In re Dotson,* 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – " Applicable commitment period" is a measure of time and not a multiplier or element in mathematical formula. Applicable Commitment Period for Debtor with Current Monthly Income above the applicable median income Debtor is 60 months. Therefore, Plan must either provide a term of 60 months or must pay not less than 100% to all creditors in a shorter time. Plan which proposed 36 month term with no dividend to unsecured creditor failed to comply with Section 1325 and could not be confirmed.

(5435) *Coop v. Frederickson,* 545 F.3d 652 (8th Cir. 2008) - " Applicable commitment period" is a measure of time and not a multiplier or element in mathematical formula. Applicable Commitment Period for Debtor with Current Monthly Income above the applicable median income Debtor is 60 months. Therefore, Plan must either provide a term of 60 months or must pay not less than 100% to all creditors in a shorter time. Plan which proposed 36 month term with no dividend to unsecured creditor failed to comply with Section 1325 and could not be confirmed.

11.65 Attorney Fee Provisions

(5436) *In re Nicodemus,* 2016 WL 6915521 (Bankr. S.D. Ohio 2016) – Court cannot confirm plan that provides that if case is converted post-confirmation, any funds on hand with the trustee will be assigned to and used to pay attorney fees. Provision conflicts with Section 348 and the Court's decision in *Harris v. Viegelahn.* Authority of Trustee to administer funds terminates immediately upon conversion of case and funds are not property of Chapter 7 estate.

11.66 Disposable Income Distinguished From Projected Disposable Income

(5437) *Plilar v. Stearns,* 2014 WL 1259569 (4th Cir. 2014) – "Disposable Income" and "Projected Disposable Income" are two different concepts. Disposable income is based entirely historical information, while projected disposable income is forward looking and takes into account known or virtually certain changes to income and expenses. Bankruptcy court can consider Schedules I and J to capture changes to disposable income.

(5438) *Mort Ranta v. Gorman,* 2013 WL 3286252 (4th Cir. 2013) – Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur.

(5439) *In re Aldridge,* 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Projected Disposable Income is calculated based on Means Test and From B22C. Where Debtors could not dispute math in calculations and could not point to any "known or virtually certain" changes sufficient to overcome statutory presumption of disposable income, Debtors required to pay Disposable Income as calculated in B22C to unsecured creditors. Where Debtors indicated that the "simply cannot pay" that amount into the plan, confirmation denied and case dismissed as any attempt to amend the plan would be futile.

(5440) *Baud v. Carroll,* Case No. 09-10673 (E.D. Mi. 2009) – Debtors with above median income but who have no "disposable income" as calculated pursuant to section 1325 are not required to be in a 60 month Chapter 13 plan. Because the Debtors have no "projected disposable income" as calculated on the From B22C, the "applicable commitment period" requirement "does not come into play". "Projected disposable income" is determined using a "formulaic approach" for above median Debtors. Projected disposable income is based on "current monthly income" as defined in section 101(10A) less "amounts reasonably necessary to be expended" as determined in accordance with section 707(b)(2)(A) and (B), to create "presumptive" projected disposable income. Thus, Debtors whose calculation of Monthly Disposable Income using the from B22C produced a negative number presumptively did not have "projected disposable income" merely because Schedule I exceeded Schedule J by $400 per month. Burden is then upon objecting party to rebut presumption that Debtor's "disposable income" as shown on from B22C does not reflect Debtor's true "projected disposable income". Positive net income shown on Schedules I and J is not sufficient to rebut presumption of Form B22C's accuracy, absent additional evidence demonstrating that Debtor's pre- bankruptcy average income and expenses have improved recently in any material aspect. The fact that Debtor's Schedules I and J indicate that Debtor has ability to pay more of their unsecured debts does not overcome the fixed formulas for identifying Debtors who can afford to repay their debts as "very clearly" established by Congress. As presumption of negative disposable income was not rebutted, Debtors were not subject to minimum "applicable commitment" and could confirm a plan which proposed only a 36 month plan term notwithstanding status of Debtors as "above median income" Debtors.

(5441) *Hildebrand v. Thomas,* 395 BR 914 (6th Cir. BAP 2008) – The calculation of "disposable income" under Section 707 does not control the calculation of "projected disposable income" for purposes of section 1325(b)(1)(B). "Projected disposable income" is forward-looking and must be based on anticipated income over the life of the plan. "Projected disposable income" under Section 1325(b)(1)(B) will match "disposable income" under Section 1325(b)(2) if the Debtor's income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor's income or expenses have changed, the amount available for unsecured creditors from "projected disposable income" may be more or less than that reflected as "Monthly Disposable Income" on the from B22C. Thus, Debtor's intention to surrender collateral in a Chapter 13 will not affect the calculation of "disposable income" but will affect the calculation of "projected disposable income" as that will no longer include a deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor's "projected disposable income".

(5442) *In re Petro,* 395 BR 369 (6th Cir. BAP 2008) - The calculation of "disposable income" under Section 707 does not control the calculation of "projected disposable income" for purposes of section 1325(b)(1)(B). "Projected disposable income" is forward-looking and must be based on anticipated income over the life of the plan. "Projected disposable income" under Section 1325(b)(1)(B) will match "disposable income" under Section 1325(b)(2) if the Debtor's income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor's income or expenses have changed, the amount available for unsecured creditors from "projected disposable income" may be more or less than that reflected as "Monthly Disposable Income" on the from B22C. Thus, Debtor's intention to surrender collateral in a Chapter 13 will not affect the calculation of "disposable income" but will affect the calculation of "projected disposable income" as that will no longer include a deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor's "projected disposable income".

(5443) *In re Dotson,* 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – "Projected disposable income" is not synonymous with "disposable income". "Projected disposable income" is based on Debtor's Schedule I and Schedule J. Although Debtor's Means Test indicated that Debtor had negative disposable income, Debtor's Schedules I and J indicated that Debtor had "monthly net income" of $350.00. Debtor's Chapter 13 Plan failed to commit 100% of Debtor's "projected disposable income" could not be confirmed over objection of the Chapter 13 Trustee or unsecured creditors.

11.67 Tax Refunds as Disposable Income

(5444) *In re Blake,* 565 BR 871 (Bankr. N.D. Ill. 2017) – Debtor may either deduct full tax withholding in calculating disposable income and turn over tax refund to trustee; or prorate tax refunds on Schedule I and subtract from resulting calculation of income reasonable expenses to determine disposable income and then withhold from tax refund prorated amount before turning over to Trustee any unaccounted for balance. Plan is not infeasible because Debtor prorates tax refund over 12 months although tax refund is received only once per year, as Debtor is also to prorate expenses occurring once per year over 12 months on Schedule J.

(5445) *In re Gibson,* Case No. 16-25231 (Bankr. N.D. Ill. 2016) - Debtor in Chapter 13 is permitted to prorate anticipated future tax returns on Schedule I and to then use prorated tax refunds to pay reasonably necessary expenses, thereby reducing amounts to be paid to Chapter 13 Trustee. Any requirement that Debtor pay over 100% of tax refunds would deprive Debtor of ability to use tax refunds to cover reasonable expenses. Fact that Debtor receives tax refunds once per year does not deprive Debtor of ability to deduct expenses worst incurred on a monthly basis and does not result in Debtor's Plan lacking feasibility as Debtor's Schedule I overstates Debtor's actual monthly income by including income that Debtor does not receive on a monthly basis. Bankruptcy Code requires that income received other than on a monthly basis be prorated and calculated in determining income on Schedule I. Debtor's actual tax refund for 2016 was best estimate of future tax refunds for use in calculating income on Schedule I.

(5446) *In re Kehl,* Case No. 10-65068 (Bankr. E.D. Mi. 2011) – Tax refunds constitute "disposable income" in Chapter 13. Debtors who

historically received tax refunds of $4,000 per year would be required to contribute those to Chapter 13 plan absent evidence that refunds are necessary for support or maintenance of Debtors.

(5447) *In re Barbutes,* 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Debtor's future tax refunds are generally considered "disposable income" that must be contributed to the plan funding. Debtor's testimony that Debtors "tried not to owe" at tax time and lack of any proof that future refunds were needed for the "maintenance or support" of the Debtors rendered tax refunds disposable income. Plan that failed to commit 100% of future tax refunds could not be confirmed.

11.68 Exempt Assets as Disposable Income

(5448) *In re Peredo,* Case No. 17-50814 (Bankr. W.D. Tx. 2017) – Exempt income is disposable income for purposes of Chapter 13. Although Debtor's right to recover funds for Workers Compensation was exempt asset that did not have to be included in liquidation analysis, proceeds were disposable income that must be contributed to Chapter 13 Plan to meet "disposable income" test under Section 1325(b).

(5449) *In re Kirby,* 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action are disposable income. Although Debtor properly amended schedule B to disclose, and Schedule C to exempt, post-petition personal injury action as exempt, "majority view" holds that exempt property can be disposable income in a Chapter 13 case. Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 "income" and Section 1325(b)(2) expressly defines "disposable income" to mean income not needed for Debtor's support. Trustee' plan modification granted to extent of additional funds necessary to pay creditors in full.

11.69 Ambiguous Provisions

(5450) *In re Robbins*, 426 B.R. 265 (Bankr. W.D. Mich. 2010) - Proposed Chapter 13 Plan was neither clear nor feasible, warranting denial of confirmation without prejudice to amendment. On one hand, the Plan provided that all unsecured creditors will receive a 100% dividend, but on the other hand, it also provided that Sallie Mae will receive a *pro rata* distribution with other unsecured creditors *and* payments after the Plan's repayment period ends. The notion that Sallie Mae's payment rights will continue is inconsistent with the proposition that all unsecured creditors (of whom Sallie Mae is the largest) will receive a 100% dividend. If the Plan's dividend were truly *pro rata,* Sallie Mae would receive about 96 percent of each month's plan payment, and the other unsecured creditors would receive roughly 4 percent, which results in other unsecured creditors receiving far less than the 100% dividend the Debtor's Plan promises.

(5451) *In re Woods,* 406 BR 293 (Bankr. N.D. Ohio 2009) – Provision in Chapter 13 Plan that real property would be surrendered in full satisfaction did not prevent secured creditor from filing unsecured deficiency claim. Creditor filed Proof of Claim before plan was confirmed, providing notice to Debtor that creditor contested treatment in plan and that creditor would expect that any objection to the deficiency claim would be resolved through the claim resolution process.

11.70 Retirement Contributions

(5452) *Miner v. Jones,* Case No. 17-879 (W.D. La. 2018) – Debtors permitted to voluntarily contribute to 401(k) up to maximum allowable amount under IRS regulations. Courts have taken 3 approaches to voluntary contributions: some courts allow Debtors to shelter contributions not exceeding IRS limits; some courts do not allow deductions at all; and some courts permit contributions not larger that Debtor was making before filing. Court concluded that allowing contributions up to IRS limit was consistent with congressional intent that retirement contributions be excluded from disposable income. Further, contribution up to IRS limit is not standing alone bad faith as Debtor is doing nothing more than what law permits.

(5453) *In re Stackhouse,* 2018 WL 1634119 (Bankr. S.D. Ohio 2018) – Voluntary 401(k) contributions are not reasonable and necessary expenses where there is no evidence that Debtors were planning on retiring any time soon, that their employment is unstable, or that Debtors are going to become disabled and have to rely on disability benefits; and even if Debtors lost job, there is no evidence that Debtors cannot be retrained for different employment.

(5454) *Gorman v. Cantu,* Case No. 17-1034 (4th Cir. 2017) – Debtor permitted to continue pre-petition retirement contributions where only issue presented was Debtor's good faith. Recognizing three divergent lines of authority – that contributions are allowed subject to showing of good faith; contributions are allowed as long as contributions are consistent with pre-petition practice; and voluntary contributions are disallowed entirely, citing *Seafort v. Burden* – Fourth Circuit concluded that Trustee had appealed only issue of good faith, and Circuit Court did not have to choose between three alternative approaches. Contributions were in good faith where debtor as contributing $3200 per year while tax law would have permitted contributions up to $18,000, and Debtor resumed those contributions only after paying off pre-existing retirement loan. Dissent argued that Court should consider underlying issue of whether contributions are ever permitted and without expressing preference for outcome, noted that only the Sixth Circuit had definitively ruled on the issue, holding that contributions are not permitted.

(5455) *Resfl Five, LLC v. Ulysse,* Case No. 16-62900 (S.D. Fl. 2017) – Debtor is permitted to contribute statutory maximum to retirement account and to deduct contributions in determining disposable income. Debtors is not required to show history of contributions and is not prevented from increasing amount of contributions on eve of bankruptcy filing as long as contributions do not exceed statutory cap. Section 541(b)(7) specifies that amounts contributed to retirement account "shall not constitute disposable income". Section 541 is not limited to pre-petition contributions or to withholdings taken by debtor's employer but not invested as of petition date. However, plan must still be in good faith including consideration of amount of contributions, considering debtor's age in relationship to anticipated retirement to determine whether it would be unreasonable to reduce contributions during life of plan and whether contributions are good faith financial planning. Plan did not lack good faith where debtor had history of significant contributions and ongoing contributions were mere continuation of retirement planning, and Debtor was near retirement age such that larger contributions were both normal and permitted, and contributions evidenced intention to save for retirement while balancing costs of everyday life.

(5456) *In re Miner,* 2017 WL 1011419 (Bankr. W.D. La. 2017) – Debtor with outstanding 401-k loan permitted to continue repayments while in Chapter 13 but must increase plan payments when loan is paid off. Debtor permitted to continue 401-k contributions but at reduced rate, not to exceed 3% of gross income. Debtor could not continue to contribute at higher amount and "offset" contributions against Wife's Social Security income as Wife has on legal right to contribute to Husband's 401-k account.

(5457) *In re Curran,* Case No. 12-44197 (Bankr. E.D. Mi. 2015) – Borrower who proposed to modify plan could not deduct voluntary retirement contributions in calculating projected disposable income, even where Debtor previously deducted those contributions in determining plan payment at the outset of the case. Modification reopens all issues under Section 1325 including validity of future contributions.

(5458) *In re Reyes,* Case no. 15-45618 (Bankr. E.D. Mi. 2015) – Debtor is not permitted to deduct voluntary retirement contributions in calculating disposable income over objection of creditor or Trustee.

(5459) *In re Pittman,* 2014 WL 946570 (Bankr. S.D. Ohio 2014) – Debtor not permitted to deduct voluntary 401-k contributions in calculating disposable income. Debtor must also increase disposable income upon final payment of 401-k loans. Terminating contributions and increasing payment when loan ends would provide dividend of at least 24% to unsecured creditors, rendering Debtor's case abusive under Section 707(b)(3). Debtor's alleged anticipated tax liabilities and medical expenses and potential lost income from shoulder complications did not alter conclusion that case was abusive where Debtor failed to present any corroborating testimony or documentation from any health care providers regarding injuries or potential medical expenses.

(5460) *In re Scott,* 2013 WL 5567319 (Bankr. N.D. Ohio 2013) – Income made available after payment of 401-k loans must be included in calculating disposable income. Changes in expenses is known or virtually certain as of date of confirmation.

(5461) *In re Manlove,* 2013 WL 1385747 (Bankr. E.D. Wa. 2013) – Debtor's voluntary contributions were not reasonably necessary where Debtor was participant in employer funded pension plan and Debtor would not be retiring for at least 20 years. Debtors had sufficient income to fund a plan of reorganization, resulting in Debtor's Chapter 7 being abusive under Section 707(b)(3).

(5462) *In re Bruce,* 484 BR 387 (Bankr. W.D. Wa. 2012) – Below median Debtor permitted to continue to contribute to retirement account where amount was relatively nominal and Debtor had reduced contributions prior to commencement of case in effort to pay creditors. Amount of contribution was amount necessary for Debtor to obtain employer matching of contributions and Debtor did not have large amount already set aside for retirement.

(5463) *In re Rodriguez,* 487 BR 275 (Bankr. D. N.Mex. 2013) – Debtor's plan lacked good faith where Debtor proposed to contribute $733 per month to Debtor's retirement fund for duration of plan. Although contribution was consistent with historical contributions, Debtor's proposed contributions lacked good faith as primary creditor was ex-wife who held claim based on Debtor's pre-petition misappropriation of funds from spouse's retirement account.

(5464) *In re Rogers,* Case No. 12-32558 (Bankr. E.D. Mi. 2012) – Debtors cannot exclude post-petition voluntary retirement contributions in calculating disposable income.

(5465) *In re Golematis,* 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Debtor-wife's 401-k contributions were not unreasonable where Debtor-wife was 45 years old and had only $14,000 in total retirement savings.

(5466) *Parks v. Drummond,* 475 BR 703 (9th Cir. BAP 2012) – Debtors cannot deduct voluntary post-petition retirement contributions in calculating disposable income. Section 541(b)(7)(A) excludes retirement contributions as of the commencement of the case from property of the estate. Section 1306 expressly incorporates Section 541. Read together, "most reasonable" interpretation is that Section 541 excludes only contributions made pre-petition from calculation of disposable income. BAPCPA excludes from disposable income any post-petition payments on retirement loans but does not exclude post-petition contributions.

(5467) *Seafort v. Burden,* 669 F.3d 662 (6th Cir. 2012) – Debtor cannot deduct voluntary retirement contributions in calculating disposable income, even if Debtor has been making those contributions prior to commencement of case and dos not propose to increase or alter amount contributed. Voluntary contributions are not reasonably necessary deductions in calculating disposable income under Section 1325.

(5468) *In re Farkas,* 2012 WL 3257855 (Bankr. E.D. Mi. 2012) – Retirement account contributions are not per se allowed or disallowed but must be evaluated on case by case basis looking at totality of circumstances including amount of existing savings, Debtor's age, and years left until retirement. Debtor's 401-k loan payments were not reasonably necessary where Debtor, age 39, already had $127,000 in retirement savings plus separate pension plan through employer. Debtor was relatively young and had many years remaining before retirement.

(5469) *In re Beckerman,* 381 BR 841 (Bankr. E.D. Mi. 2008) – Retirement contributions are not per se included or excluded in calculating disposable income for purposes of Section 707(b)(3). Retirement contributions must be reasonably necessary for maintenance or support of Debtor or a dependent of the Debtor. Debtors' contribution of $469 per month was reasonably necessary where Debtors were 55 years old, had no savings for retirement and had no significant personal or real property. Although both Debtors enjoyed stable employment and neither planned on retiring for a number of years, combination of age and lack of any meaningful retirement savings demonstrated that Debtors would not be able to sustain retirement without continuing contributions. Amounts contributed were reasonably necessary and would be deducted in determining disposable income for purposes of Section 707(b)(3).

(5470) *In re Egan,* 2011 WL 3902817 (Bankr. E.D. Pa. 2011) - Chapter 13 Debtors are not prohibited from increasing amount of post-petition contributions to 401(k) plan subject to review for good faith. Plan proposed to complete repayment of 401 (k) loans into thin increase amount of 401 (K) contributions by the amount of the loan payments. Congress did not include any qualifying language in section 541 which excludes "any amount" of retirement contributions from calculation of Current Monthly Income. Repayment of 401 (k) loans constitute changes that are known or virtually certain at the time of confirmation. Further, allowing increased contributions is consistent with congressional policy favoring personal retirement savings.

(5471) *In re Parks,* 2011 WL 2493071 (Bankr. D. Montana 2011) - Section 541 excludes from calculation of Disposable Income any amounts withheld by an employer as of the petition date but does not insulate further retirement contributions from disposable income analysis.

(5472) *In re McCullers,* 451 BR 498 (Bankr. N.D. Cal. 2011) - Section 541 excludes from project disposable income only prepetition voluntary retirement contributions. Chapter 13 Debtors was Current Monthly Income greater than the applicable median family income cannot make any voluntary post-petition contributions to a retirement plan if they creditor or the trustee objects under section 1325. There are circumstances in which a chapter 13 Debtor can make post-petition contributions to a qualified benefit plan absent and objection by the trustee or unsecured creditors. If the trustee or unsecured creditors object, court must determine reasonableness of voluntary contributions.

(5473) *In re Kehl,* Case No. 10-65068 (Bankr. E.D. Mi. 2011) –Voluntary retirement contributions are not per se unreasonable and must be evaluated on case by case basis, looking to factors such as amount of existing retirement savings, Debtor's age and expected time until retirement, annual income and overall budget, amount of monthly retirement contributions, and needs of any dependents. Contributions were not reasonable where Debtors were in their early 30s and had $22,000 in retirement savings. Debtors had annual income in excess of $97,000 and proposed contribution was $423 per month. If the Debtors stopped contributing only during Chapter 13 plan and then resumed contributions, Debtors would have more than $230,000 in retirement savings by age 60.

(5474) *In re Meyers,* Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; Debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where Debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and Debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit Debtor to adequately fund her retirement.

(5475) *In re Divazio,* Case no. 10-74441 (Bankr. E.D. Mi. 2011) – Retirement contributions are not *per se* necessary, and depend on amount of existing retirement savings, Debtor's age and time left to retirement, annual income and overall budget, amount of monthly contributions, and needs of dependents.

(5476) *In re Duncan,* Case No. 10-72730 (Bankr. E.D. Mi. 2011) –Voluntary contributions to retirement plans are not per se unreasonable and must be examined on case-by-case basis looking to amount of existing retirement savings; Debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Debtor was 42 years old and would likely retire in 20 years. Even reducing Debtor's 401-k contributions by half would allow Debtor to accumulate significant retirement savings while still paying 50% of unsecured debt.

(5477) *In re Hoke,* 447 BR 835 (Bankr. N.D. Ohio 2011) –Court would add back Debtors' voluntary 401-k contributions totaling over $600 per month where Debtors are young and in good health and there was no evidence of any exigency such as health or impending retirement.

(5478) *In re Smith,* 2010 WL 2400065 (Bankr. N.D. Ohio 2010) – In determining disposable income for purposes of Chapter 13, Debtor's contributions to voluntary retirement plan are excluded. Prior to the enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA"), most courts took a dim view of 401(k) contributions. Courts reasoned that such contributions compromised the tradeoff of temporary maximum repayment for permanent debt relief on which chapter 13 is premised. BAPCPA added section 541(b)(7), which excludes from property of the estate any amount withheld by an employer from the wages of employees for payment as contributions to an employee benefit plan that is subject to title I of the Employee Income Security Act of 1974 except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2). Debtors' contributions to 401(k) plans are excluded from the Debtors' disposable income. However, Debtor's "eve of bankruptcy" decision to commence or increase the amount of the contribution can still be considered in determining Debtor's good faith or lack of good faith. Good-faith serves as a backstop against Debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the Debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the Debtor's 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors' plan is proposed in bad faith where Debtor increased his 401(k) contribution by five times on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and Debtors presented no financial-planning justification for the increase. Debtors' 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

11.71 Retirement Loans

(5479) *In re Miner,* 2017 WL 1011419 (Bankr. W.D. La. 2017) – Debtor with outstanding 401-k loan permitted to continue repayments while in Chapter 13 but must increase plan payments when loan is paid off. Debtor permitted to continue 401-k contributions but at reduced rate, not to exceed 3% of gross income. Debtor could not continue to contribute at higher amount and "offset" contributions against Wife's Social Security income as Wife has on legal right to contribute to Husband's 401-k account.

(5480) *Seafort v. Burden,* 669 F.3d 662 (6th Cir. 2012) – Debtor with outstanding 401-k loan permitted to continue repayments while in Chapter 13 but must increase plan payments when loan is paid off.

11.72 Cramdown Generally

(5481) *In re Wollman,* 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Debtor can bifurcate lien that is secured by Debtor's interest in real estate and also in manufactured home in which Debtor resided but which was not affixed to the real estate. Section 1322(b)(2) does not prevent modification or bifurcation of lien that is secured, in whole or in part, by personal property. Court valued collateral at amount listed in Debtor's schedules where Debtor did not indicate that the debt was contingent, disputed or unliquidated and did not indicate any disagreement

with the valuation asserted by creditor in Debtor's prior bankruptcy case. Lien would be bifurcated into secured and unsecured portion, with secured portion to be paid as "cure and maintain" where Debtor would maintain contractual payments and cure arrearage over life of plan; and unsecured portion to be paid as general unsecured claim pro rata with all other unsecured claims. To extent treatment may be inconsistent with normal cure and maintain provisions, treatment proper because creditor's proof of claim itself bifurcated lien amount consistent with amounts determined by court; and creditor did not object to bifurcation and "cure and maintain" where creditor's only objection was to whether proposed "maintain" payment was proper amount under loan documents. Court recognized authority that normally Section 1322(b)(2) anti-modification and Section 1322(b)(5) are mutually inconsistent such that Debtor can either cure and maintain debt in full or can modify or bifurcate and pay secured portion in full over life of plan.

(5482) *Magee v. Weller,* 2013 WL 5366092 (S.D. Ohio 2013) – Code provisions that permit Debtor to bifurcate liens on non-residential real property to extent lien exceeds value of collateral is not unconstitutional taking under Fifth Amendment. While bifurcation may alter secured creditor's property rights, it does not completely destroy those rights and does not implicate the takings clause of the Fifth Amendment.

(5483) *In re Thorpe,* 2011 WL 671935 (Bankr. E.D. Ky. 2011) – Debtor's interest in mobile home that Debtor was leasing on lease-purchase was property of estate. Debtor cannot cram down secured obligation on which Debtor is not liable. Debtor leased a mobile home with option to purchase. At the time, Debtor's seller was indebted to creditor and creditor held properly perfected security interest in the mobile home. Debtor could not cram down secured claim absent privity with the creditor. Debtor could not cram down the lease- purchase because Section 365 requires leases to be assumed or rejected in toto, and does not allow modification or alteration as part of assumption process.

(5484) *Reinhardt v. Vanderbilt Mortgage and Finance, Inc.,* 563 F.3d 558 (6th Cir. 2009) – Anti-modification provision of Section 1322(b)(2) does not prohibit cramdown of lien which is secured by both real estate and the unattached mobile home located on that real estate. Section 1322(b)(2) prohibits only cram down of a security interest in real property that is the Debtor's principal residence. Section 1322 contains two requirements: the property be real property; and the real property be the Debtor's principal residence. If the claim does not pertain to "real property" it does not matter whether the claim is on the "Debtor's principal residence". Although the mobile home was located on the real property, the mobile home which constituted the Debtor's principal residence was unattached personal property. As the creditor's lien was secured by property other than in real property constituting the Debtor's principal residence, section 1322(b)(2) did not prohibit the modification or cram down of that security interest

11.73 Cramdown – Valuation

(5485) *21st Mortgage Corp. v. Glenn,* Case No. 17-60533 (5th Cir. 2018) – Valuation of personal property is based on purpose of valuation and proposed disposition of property. Personal property is to be valued using replacement value without deduction of costs for sale or marketing. Value of Debtor's manufactured home which Debtor's Chapter 13 Plan proposed to retain would not include costs of set up or delivery of new manufactured home as Debtor's proposed use of manufactured home did not include delivery or installation of new unit. Cost of delivery and installation analogous to items Debtor does not receive when he retains vehicle such as warranties, inventory, storage and reconditioning.

(5486) *In re Drobney,* 2018 WL 1508556 (Bankr. W.D. Mi. 2018) – Rule 3012 effective December 1, 2017, allows Debtor to value collateral under Section 506 as part of Chapter 13 Plan. Rule requires service of the Plan in same manner as required for summons and complaint in adversary proceeding. In most cases, service can be accomplished by ordinary First Class United States Mail. Rule 7004(h) requires ervice on "Federally Insured Depository Institution" by certified mail addressed to named officer of Institution; or attorney for Institution where attorney has already appeared in case on behalf of Creditor. The term 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. 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 and did not specify corporate officer; and second attempt was by ordinary mail to attorney in Southfield who may not have been officer of creditor and who had not appeared on behalf of Creditor in action. Court would adjust Debtor-attorney's compensation to account for costs that were unnecessarily increased as result of defective service.

(5487) *National Bank v. Sunnyslope Housing Ltd.,* Case No. 12-17241 (9th Cir. 2017) – Valuation of collateral is determined in light of purpose of valuation and proposed disposition or use of property. Replacement value was appropriate standard even though foreclosure value exceeded replacement value where Chapter 11 Plan proposed for Debtor to retain the property used as low income housing. Although highest and best use of property would be for housing absent low income restrictions, absent foreclosure the property cannot be used other than for affordable housing. Accordingly, valuation of property as low income housing was appropriate standard.

(5488) *In re Neace,* 2017 WL 75747 (Bankr. E.D. Ky. 2017) - Valuation of manufactured home must be determined in light of purpose of evaluation which is to determine secure portion of lien to be paid over life of Debtor's plan. "Replacement value" is standard used, defined as price a retail merchant would charge for property of that kind concerning age and condition of property at time of valuation. Costs to set up and deliver a new manufactured home are not included in the "replacement value" of manufactured home, particularly where Debtor intends to retain manufactured home and, therefore, would not include either set up or delivery charge. Neither costs of removal nor costs of setup and delivery are considered in determining replacement value and cannot be used to increase the value of property.

(5489) *In re Jude,* 2016 WL 3582133 (Bankr. E.D. Ky. 2016) – Valuation for "cramdown" purposes is replacement value, defined as price willing buyer would pay to obtain property from willing seller. Expert witness may rely on otherwise inadmissible facts or data in support of opinion if other experts in field would reasonably rely on those kinds of facts or data in forming opinion. Appraiser of mobile home contacted mobile home manufacturer to confirm the manufacturer and model of the home which is essential to any appraisal and is required to provide accurate NADA Book value. Appraiser then relied on calls to mobile home sellers in the area to confirm sales of comparable homes and worked with an internet marketplace for mobile home sales, which are data sources on which appraisers routinely rely. Opinion not inadmissible merely because opinion based on otherwise inadmissible hearsay. Cost approach used by lender's appraiser was more reliance where sales identified as "comparable" were materially different than the subject calling into question the accuracy of the opinion. Each of the three comparables

were larger and older than the subject property, were manufactured by different companies, and failed in some cases to identify the model or determine that the comparable had features similar to Debtor's. Debtor's opinion of value entitled to no weight where Debtor was not an expert and his opinion was based entirely form an internet purchased report from NADA guides with no personal involvement in determining value. Debtor purchased home 4 years earlier and while property had minimal issues, those issues did not support Debtor's estimate of a 50% drop in value.

(5490) *In re Wollman,* 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Debtor can bifurcate lien that is secured by Debtor's interest in real estate and also in manufactured home in which Debtor resided but which was not affixed to the real estate. Section 1322(b)(2) does not prevent modification or bifurcation of lien that is secured, in whole or in part, by personal property. Court valued collateral at amount listed in Debtor's schedules where Debtor did not indicate that the debt was contingent, disputed or unliquidated and did not indicate any disagreement with the valuation asserted by creditor in Debtor's prior bankruptcy case. Lien would be bifurcated into secured and unsecured portion, with secured portion to be paid as "cure and maintain" where Debtor would maintain contractual payments and cure arrearage over life of plan; and unsecured portion to be paid as general unsecured claim pro rata with all other unsecured claims. To extent treatment may be inconsistent with normal cure and maintain provisions, treatment proper because creditor's proof of claim itself bifurcated lien amount consistent with amounts determined by court; and creditor did not object to bifurcation and "cure and maintain" where creditor's only objection was to whether proposed "maintain" payment was proper amount under loan documents. Court recognized authority that normally Section 1322(b)(2) anti-modification and Section 1322(b)(5) are mutually inconsistent such that Debtor can either cure and maintain debt in full or can modify or bifurcate and pay secured portion in full over life of plan.

(5491) *Magee v. Weller,* 2013 WL 5366092 (S.D. Ohio 2013) – Code provisions that permit Debtor to bifurcate liens on non-residential real property to extent lien exceeds value of collateral is not unconstitutional taking under Fifth Amendment. While bifurcation may alter secured creditor's property rights, it does not completely destroy those rights and does not implicate the takings clause of the Fifth Amendment.

(5492) *In re Thorpe,* 2011 WL 671935 (Bankr. E.D. Ky. 2011) – Debtor's interest in mobile home that Debtor was leasing on lease-purchase was property of estate. Debtor cannot cram down secured obligation on which Debtor is not liable. Debtor leased a mobile home with option to purchase. At the time, Debtor's seller was indebted to creditor and creditor held properly perfected security interest in the mobile home. Debtor could not cram down secured claim absent privity with the creditor. Debtor could not cram down the lease- purchase because Section 365 requires leases to be assumed or rejected in toto, and does not allow modification or alteration as part of assumption process.

(5493) *Reinhardt v. Vanderbilt Mortgage and Finance, Inc.,* 563 F.3d 558 (6th Cir. 2009) – Anti-modification provision of Section 1322(b)(2) does not prohibit cramdown of lien which is secured by both real estate and the unattached mobile home located on that real estate. Section 1322(b)(2) prohibits only cram down of a security interest in real property that is the Debtor's principal residence. Section 1322 contains two requirements: the property be real property; and the real property be the Debtor's principal residence. If the claim does not pertain to "real property" it does not matter whether the claim is on the "Debtor's principal residence". Although the mobile home was located on the real property, the mobile home which constituted the Debtor's principal residence was unattached personal property. As the creditor's lien was secured by property other than in real property constituting the Debtor's principal residence, section 1322(b)(2) did not prohibit the modification or cram down of that security interest.

11.74 Unfair Discrimination Generally

(5494) *Hargreaves v. Nuverra Environmental Solutions, Inc.,* Case No. 17-1024 (D. Del. 2017) – *Jevic* does not prevent confirmation of "gift plans" where senior creditor voluntarily "gifts" portion of senior creditor's distribution to lower class of creditor, jumping intervening creditor class or produces unequal distribution between similarly situated class. Plan proposed that secured creditors made "gift" to unsecured creditors that would produce 1% recovery to general unsecured creditors other than trade creditors, and 6% to trade creditors. Although disparate treatment raised presumption of unfair discrimination, treatment was not unfair as unsecured creditors, but for "gift" would have received nothing and disparate treatment fostered reorganization.

(5495) *In re Engen,* Case No. 15-20184 (Bankr. D. Ks. 2016) - In determining whether separate classification of student loans unfairly discriminates, court will consider principles of equality of distribution; nonpriority status of student loans; mandatory versus optional contributions; and the Debtors fresh start. Code does not prohibit all discrimination. Separate Classification of Student Loan Creditors to be paid before other general unsecured creditors does not unfairly discriminate in violation of 11 USC Section 1322(b)(1)even where student loan creditor would receive majority of claim without interest, all remaining general unsecured creditors will receive no distribution. Prior to commencement of Chapter 13, Debtors participated in a voluntary debt reduction program which resulted in 86% paydown on non-student loan unsecured debts without any corresponding payments to student loan creditors as proposed discrimination will substantially equalize distribution between student loan creditors in chapter 13 and Debtors prepetition payments on unsecured debts. Congresses treatment of student loans as nonpriority, but nondischargeable, evidence is congressional policy that student loans received favored treatment in bankruptcy, and allowing separate classification furthers congressional intention to protect governments and student loan programs fiscal health. Allowing Debtor to separately classify is more consistent with "fresh start" as Debtor who is not able to separately classify may be faced with higher debt burden after bankruptcy than Debtor had prior to bankruptcy. Given number of Debtors in bankruptcy who have student loans, separate classification of student loans for preferred treatment is proper, reasonable, and fair discrimination, benefiting Debtors, student loan creditors, taxpayers and other third parties.

(5496) *Copeland v. Fink,* 742 F.3d 811 (8th Cir. 2014) – Unfair discrimination prohibition prevents confirmation of plan that pays nondischargeable, non-priority claims in full while making no payments to general unsecured claims. Nondischargeability alone is not a basis for separate classification and preferential treatment.

11.75 Unfair Discrimination – Co-signed Debt

(5497) *In re Russell,* 2013 WL 6858133 (Bankr. S.D. Ohio 2013) – Section 1322(b)(1) allows plan to discriminate where claim is one for consumer debt where Debtor is jointly liable with another person. Exclusion of co-signed consumer claims does not allow co-signed creditor to receive more than the creditor would have received outside bankruptcy, such as by accelerating payments to cosigned creditors or allowing cosigned creditors to receive more than the amount they are owed. Section 1322(b)(1) also does not allow Debtor to prefer co-signed debt where doing so would improperly allow Debtor to shelter income and assets that are effectively Debtor's. thus, Debtor could not propose full payment of joint obligation with Debtor's spouse to retain luxury automobile. Court approved plan that proposed higher payment to student loan creditors on obligations that were incurred by and for benefit of Debtor and on which Debtor's mother co-signed. Case presented quintessential facts that motivated congress to add the co-signed consumer debt clause.

(5498) *Carrion v. Rivera,* Case No. 12-067 (1st Cir. BAP 2013) – Section 1322(b)(1) allows plan to discriminate where favored creditor is co-signed consumer debt. Debtor's obligation to co-operative association was co-signed by mother-in-law. Loan was secured by Debtor's co-op shares, but value of shares was far less than total debt. Debtor proposed to surrender shares and to pay remaining unsecured deficiency in full while paying balance of claims at approximately 9%. Section 1325(b) requirement that projected disposable income be applied to make payments to unsecured creditors did not mandate pro-rata distributions to all unsecured creditors or preclude discrimination in favor of one or more as long as discrimination is not unreasonable. To determine if proposed discrimination is "unfair", court must consider whether claim is truly consumer co-Debtor claim; whether the co-Debtor undertook the underlying liability for Debtor's benefit or vice versa; and whether plan otherwise satisfies requirements for confirmation including good faith. Co-signed debt for co-op was consumer debt where co-op was Debtor's residence. Cosigned debt was for Debtor's benefit for the same reason. In all other respects, Debtor's plan complied with Section 1325.

(5499) *Meyer v. Renteria,* 470 WL 838 (9th Cir. BAP 2012) – Section 1322(b)(1) allows a Debtor to separately classify and preferentially treat consumer debt where that debt is guaranteed by a non-Debtor. Plan that proposed to pay one creditor in full while paying other unsecured creditors little or nothing did not unfairly discriminate in violation of Section 1322(b)(1). Debt to be paid in full was guaranteed by Debtor's mother; and Debtor explained that purpose of discriminatory treatment was to prevent creditor from attempting to collect from mother. Court expressly left unanswered question as to whether discriminatory treatment where there is a co-obligor could ever be "unfair" in violation of Section 1322(b)(1).

11.76 Student Loans – Cure and Maintain Payments

(5500) *In re Quinn,* 2018 WL 3012900 (Bankr. E.D. Mi. 2018) – Allowing separate classification of student loans coupled with favorable treatment helps Debtors and is also consistent with congressional intent to protect fiscal health of student loan programs. However, favorable treatment of student loans, even as long-term debt under Section 1322(b)(5) cannot unfairly discriminate. Whether treatment unfairly discriminates is based on totality of circumstances. One consideration that supports favorable treatment is to not force Debtor into default during term of Plan. Debtors' Plan would result in continuing default student loan creditor would be paid as long-term debt and would receive between $850 per month and $1112 per month, but would remain in default on student loans because contractual obligation was $1894 per month. If Debtors' Plan is approved, student loan creditors would receive all available funds with general unsecured creditors receiving no distribution. Over the term of Debtor's Chapter 13 Plan, Debtors would reduce the principal balance on the student loan by only $215. If student loans are not separately classified, Debtors would owe $6006 more than the petition date. Slight benefit to Debtors does not offset discriminatory impact on unsecured creditors, particularly where Debtor would remain in default of student loans yet remaining unsecured creditors would receive nothing. Chapter 13 Plan that diverted 100% of Plan funding to student loan creditors with no meaningful payment to remaining unsecured creditors unfairly discriminated. **Note: After Court issued opinion, Debtor modified Plan to pay minimum dividend to unsecured creditors of 10% of allowed claims (for a total distribution of approximately $3000) following which Court confirmed Chapter 13 Plan.**

(5501) *In re Kindle,* 2017 WL 5035080 (Bankr. D.S.C. 2017) – Whether separate classification of student loans that called for Debtors to "cure and maintain" long term student loans under Section 1322(b)(5) unfairly discriminates, Court will consider totality of circumstances considering factors such as need to balance Fresh Start, legislative intent favoring student loan repayments, Debtor's good faith, and degree of discrimination in relation to basis for discriminatory treatment. Objective is equitable distributions of assets not necessarily equal distributions. Plan did not unfairly discriminate where proposed treatment would produce 33% recovery to general unsecured creditors while student loans will receive 44%; and if student loans are not separately classified, all unsecured creditors including student loans would receive 36%. Discrimination had reasonable basis where interest on student loans was $200 per month and if debtors were not permitted to cure and maintain, interest would continue to accrue at that rate for the first 30 months of the Plan during which the unsecured creditors would not be receiving any distributions; and once payments began they would not be sufficient to cover interest and default charges, leaving debtor owing more at end of case than they did at beginning. Non-dischargeability of student loans would leave Debtors worse off at the end of the Chapter 13 than at the beginning which is inconsistent with goal of fresh start. While characterization of student loans as non-dischargeable is not enough standing alone to support discriminatory treatment, combined with other factors proposed treatment while discriminatory was not unfair.

(5502) *Jordahl v. Burrell,* Case no. 15-6009 (8th Cir. BAP 2015) – Section 1322(b) requires that proposed Plan comply with all provisions of Section 1322(b). Where plan complies with one subsection but violates second subsection, plan cannot be confirmed. Subsections of Section 1322(b) are not in the alternative – it is not sufficient to comply with most of the requirements to confirm a plan, the plan must comply with all requirements. Debtor's plan proposed to treat one student loan as "cure and maintain" direct payments while treating other student loans as general unsecured claims with far lower dividend. Debtor's proposal met the requirements of Section 1322(b)(5) which allows cure and maintenance of payments but unfairly discriminated in violation of Section 1322(b)(1) by proposing to pay one unsecured claim in full via cure and maintain while paying all other unsecured claims including other student loans at a far lower rate. Fact that student loan debt was not dischargeable was not basis for separate classification. Further, direct payments would result in one student loan creditor receiving payments of principal and interest while other unsecured creditors received less than full payment in violation of Section 1322(b)(10)

11.77 Unfair Discrimination – Student Loans

(5503) *In re Quinn,* 2018 WL 3012900 (Bankr. E.D. Mi. 2018) – Allowing separate classification of student loans coupled with favorable treatment helps Debtors and is also consistent with congressional intent to protect fiscal health of student loan programs. However, favorable treatment of student loans, even as long-term debt under Section 1322(b)(5) cannot unfairly discriminate. Whether treatment unfairly discriminates is based on totality of circumstances. One consideration that supports favorable treatment is to not force Debtor into default during term of Plan. Debtor's Plan would result in continuing default student loan creditor would be paid as long-term debt and would receive between $850 per month and $1112 per month, but would remain in default on student loans because contractual obligation was $1894 per month. If Debtor's Plan is approved, student loan creditors would receive all available funds with general unsecured creditors receiving no distribution whatsoever. If Debtor's Plan is approved, Debtors over the term of Debtor's Chapter 13 Plan, Debtors will reduce the principal balance on the student loan by only $215. If student loans are not separately classified, Debtors would oh $6006 more than the petition date. Slight benefit to Debtor's does not offset discriminatory impact on unsecured creditors, particularly where Debtor would remain in default of student loans yet remaining unsecured creditors would receive nothing. Chapter 13 Plan that diverted 100% of Plan funding to student loan creditors with no meaningful payment to remaining unsecured creditors unfairly discriminated. **Note: After Court issued opinion, Debtor modified Plan to pay minimum dividend to unsecured creditors of 10% of allowed claims (for a total distribution of approximately $3000) following which Court confirmed Chapter 13 Plan.**

(5504) *In re Kindle,* 2017 WL 5035080 (Bankr. D.S.C. 2017) – Whether separate classification of student loans that called for Debtors to "cure and maintain" long term student loans under Section 1322(b)(5) unfairly discriminates, Court will consider totality of circumstances considering factors such as need to balance Fresh Start, legislative intent favoring student loan repayments, Debtor's good faith, and degree of discrimination in relation to basis for discriminatory treatment. Objective is equitable distributions of assets not necessarily equal distributions. Plan did not unfairly discriminate where proposed treatment would produce 33% recovery to general unsecured creditors while student loans will receive 44%; and if student loans are not separately classified, all unsecured creditors including student loans would receive 36%. Discrimination had reasonable basis where interest on student loans was $200 per month and if debtors were not permitted to cure and maintain, interest would continue to accrue at that rate for the first 30 months of the Plan during which the unsecured creditors would not be receiving any distributions; and once payments began they would not be sufficient to cover interest and default charges, leaving debtor owing more at end of case than they did at beginning. Non-dischargeability of student loans would leave Debtors worse off at the end of the Chapter 13 than at the beginning which is inconsistent with goal of fresh start. While characterization of student loans as non-dischargeable is not enough standing alone to support discriminatory treatment, combined with other factors proposed treatment while discriminatory was not unfair.

(5505) *In re Engen,* Case No. 15-20184 (Bankr. D. Ks. 2016) - In determining whether separate classification of student loans unfairly discriminates, court will consider principles of equality of distribution; nonpriority status of student loans; mandatory versus optional contributions; and the Debtors fresh start. Code does not prohibit all discrimination. Separate Classification of Student Loan Creditors to be paid before other general unsecured creditors does not unfairly discriminate in violation of 11 USC Section 1322(b)(1)even where student loan creditor would receive majority of claim without interest, all remaining general unsecured creditors will receive no distribution. Prior to commencement of Chapter 13, Debtors participated in a voluntary debt reduction program which resulted in 86% paydown on non-student loan unsecured debts without any corresponding payments to student loan creditors as proposed discrimination will substantially equalize distribution between student loan creditors in chapter 13 and Debtors prepetition payments on unsecured debts. Congresses treatment of student loans as nonpriority, but nondischargeable, evidence is congressional policy that student loans received favored treatment in bankruptcy, and allowing separate classification furthers congressional intention to protect governments and student loan programs fiscal health. Allowing Debtor to separately classify is more consistent with "fresh start" as Debtor who is not able to separately classify may be faced with higher debt burden after bankruptcy than Debtor had prior to bankruptcy. Given number of Debtors in bankruptcy who have student loans, separate classification of student loans for preferred treatment is proper, reasonable, and fair discrimination, benefiting Debtors, student loan creditors, taxpayers and other third parties.

(5506) *Jordahl v. Burrell,* Case no. 15-6009 (8th Cir. BAP 2015) – Section 1322(b) requires that proposed Plan comply with all provisions of Section 1322(b). Where plan complies with one subsection but violates second subsection, plan cannot be confirmed. Subsections of Section 1322(b) are not in the alternative – it is not sufficient to comply with most of the requirements to confirm a plan, the plan must comply with all requirements. Debtor's plan proposed to treat one student loan as "cure and maintain" direct payments while treating other student loans as general unsecured claims with far lower dividend. Debtor's proposal met the requirements of Section 1322(b)(5) which allows cure and maintenance of payments but unfairly discriminated in violation of Section 1322(b)(1) by proposing to pay one unsecured claim in full via cure and maintain while paying all other unsecured claims including other student loans at a far lower rate. Fact that student loan debt was not dischargeable was not basis for separate classification. Further, direct payments would result in one student loan creditor receiving payments of principal and interest while other unsecured creditors received less than full payment in violation of Section 1322(b)(10).

(5507) *In re Curry,* 2015 WL 1020641 (Bankr. C.D. Ill. 2015) – Court would not confirm plan that treated Income Contingent Repayment Plan for student loans as separately classified unsecured claim.

(5508) *In re Kubeczko,* Case No. 12-13766 (Bankr. D. Colo. 2014) – Proposed payment of student loans as separate classification to be paid as long term debt directly by Debtor unfairly discriminated against other unsecured creditors. Separate classification allows student loan creditors to receive 50% dividend over life of plan while unsecured creditor would receive only 0.26%. However, if student loans are treated as general unsecured claims, unsecured creditor pool would receive more than 8%. Section 1322(b)(1) allows unsecured creditors to be placed in separate classes but requires that all such classes be treated fairly and without unfair discrimination. To determine whether discrimination is unfair, court considers whether discrimination has reasonable basis; whether Debtor can carry out plan without discrimination; whether discrimination is proposed in good faith; and whether degree of discrimination is directly related to basis or rationale for discrimination. Discrimination is not necessary to confirmation and implementation of plan where Debtor would not make

direct payments to secured creditors but would pay same amount into chapter 13 case, such that Debtor did not suffer any hardship in making plan payments. Degree of discrimination was too great, as plan if confirmed with discriminatory treatment would substantially benefit student loan creditor at expense of other unsecured creditors. While Section 1322(b)(5) allows treatment of long term debts, that section does not afford Debtor opportunity to discriminate or otherwise remove the protections under Section 1322(b)(1). Further, Section 1322(b)(1) precludes payment of interest on non-dischargeable debt unless all unsecured debts are paid in full. Allowing long term debt treatment of student loans would allow Debtor to continue to pay interest on student loans while paying other unsecured creditors a dividend of less than 1%.

(5509) *In re Jordahl,* 2014 WL 4250504 (Bankr. D. Mn. 2014) – Plan that proposed to separately classify and pay student loans as long term debt paid directly by Debtor unfairly discriminated against other unsecured creditors. Plan would pay student loans in full plus interest, while remaining unsecured creditors would receive less than 10% of their allowed claims. Section 1322(b)(1) precludes unfair discrimination. Section 1322(b)(5) that allows curing and maintenance of payments on long term debt "notwithstanding Section 1322(b)" does not render Section 1322(b)(1) inapplicable. Treatment of long term debt must not unfairly discriminate against similarly situated creditors. Discrimination between unsecured debts is permitted only where (1) discrimination has reasonable basis; (2) Debtor cannot carry out a plan without the discrimination; (3) discrimination is proposed in good faith; and (4) degree of discrimination is directly related to basis or rationale for discrimination. Non-dischargeability of student loans, standing alone, is not basis for discrimination Potential for accrued interest on student loans over life of plan is not significant economic harm that would warrant potential discriminatory treatment. Alleged impairment of fresh start if Debtor is not able to discriminate in favor of non-dischargeable loan is not sufficient to warrant discriminatory treatment. Discrimination was not necessary where Debtor could promulgate confirmable and feasible plan without the discrimination. Degree of discrimination was also excessive where student loan creditors would receive 52% of debt over plan term while remaining unsecured creditors would receive between 6% and 10%. Plan also violated Section 1322(b)(10) as it proposed interest to student loans without paying all other allowed claims in full.

(5510) *In re Brown,* 500 BR 255 (Bankr. S.D. Ga. 2013) – Debtor can separately classify student loan and treat as long term debt to be cured and maintained, and pay with interest, even if other creditors are not being paid in full. Section 1325(b)(10) restriction on payment of interest applies only to debts that are not subject to "cure and maintain". Student loan obligation that is treated as "cure and maintain" is non-dischargeable under Section 1328.

(5511) *In re Precise,* 501 BR 67 (Bankr. E.D. Pa. 2013) – Plan cannot pay 86% of student loans while paying only 8% of other unsecured claims. Payment of student loans would include continuing interest accruals in violation of Section 1322(b)(10).

(5512) *In re Russell,* 503 BR 788 (Bankr. W.D. Ohio 2013) – Chapter 13 Plan did not unfairly discriminate by proposing greater dividend to Debtor's student loans that were co-signed by Debtor's mother than would be paid to other unsecured creditors.

(5513) *In re Mason,* 2011 WL 2198345 (Bankr. N.D. W. Va. 2011) – Nature of student loan debts is different than other unsecured debts as student loan debts are generally excepted from any future discharge. Allowing separate classification and treatment is more consistent with Congressional policy as (1) a Debtor will not be afforded a fresh start in bankruptcy if the Debtor is defaulting on student loan payments over the term of a 3–5 year plan; (2) strong public policy supports the repayment of educational loans; (3) Congress prefers Chapter 13 over Chapter 7, and Debtors in Chapter 7 fare better with making post-bankruptcy payments on student loan debts because a Chapter 7 Debtor will not have been in forced default of student loan obligations for 3–5 years; and (4) other unsecured creditors in Chapter 13 are not harmed by the preferential treatment for student loan debt because unsecured creditors must receive a return in Chapter 13 that is equivalent to what they would receive in Chapter 7 pursuant to 11 U.S.C. § 1325(a)(4). To support separate classification, Debtor must be able to articulate a reason why the discriminatory treatment is being proposed, and be able to demonstrate that a lesser discriminatory means of treatment is not advisable. Court would not confirm Debtor's plan that paid 72% of student loan debts, while making an 8% distribution to other unsecured creditors where Debtor did not show why a 62% or 52% payment to the student loan creditors and higher payment to unsecured creditors would not be appropriate.

(5514) *In re Slone,* 2010 WL 3767317 (Bankr. N.D. Ohio 2010) – Debtor is not permitted to expense student-loan payment as doing so would permit Debtor to prefer one creditor over another, similarly situated, creditor. Nondischargeability of a student loan is not, without more, a basis to permit a Debtor to treat the student loan creditor more favorably than other unsecured creditors.

(5515) *In re Rooney,* 2010 WL 2630245 (Bankr. N.D. Ohio 2010) – Nondischargeability of a student loan is not, without more, a basis to permit a Debtor to treat the student loan creditor more favorably than other unsecured creditors. Congress specified the types of unsecured claims that should be treated more favorably than others in Section 507. Non-dischargeable student loan debts are not among those specified in § 507. To treat certain unsecured creditors more favorably simply because they hold a nondischargeable claim would elevate such claims to a priority status that was not intended by Congress.

(5516) *In re Parrott,* 2009 WL5216043 (Bankr. E.D. Tn. 2009) – Debtor's Chapter 13 Plan that sought to cure defaults on student loans and to pay the loans in full as long term debt unfairly discriminated against remaining unsecured creditors. The authority to treat an unsecured debt as a long-term debt is neither expressly nor logically an exception from the statutory rule that classifying unsecured claims cannot unfairly discriminate against any of the classes. Treating the student loan debts more favorably does not aid the Debtors' performance of the plan or otherwise provide a possible benefit for the other unsecured creditors. The classification is intended to reduce the balances due on the student loan debts after the Debtors complete the plan. This will benefit the Debtors because the unpaid balances can be discharged only if the Debtors can prove that paying the debts would be an undue hardship. Attempting to pay more on the student loan debts is good planning for the Debtors' benefit with no benefit for the other unsecured creditors.

11.78 Good Faith – Generally

(5517) *In re Pfetzer,* 2018 WL 1448742 (Bankr. E.D. Ky. 2018) – Section 1307 allows Court to dismiss Chapter 13 case if Debtor filed petition in

bad faith. Determination of good faith based on totality of circumstances applying multi-factor test with non-exclusive set of factors. Creditor did not object to confirmation but filed Motion to Dismiss alleging Debtor concealed and misrepresented assets and income and submitted inaccurate Statements and Schedules with intent to hinder, delay and fraud creditors. However, creditor did not file Objection to Confirmation within deadline permitted by Rules and Motion to Dismiss was not substitute for Objection where Motion is filed after expiration of deadline to object. Creditor who does not timely object to confirmation of Plan under Section 1325(a)(7) cannot later bring Motion to Dismiss for lack of good faith. Although Plan had not yet been confirmed, expiration of deadline to object to confirmation sufficient to bar later filing of Motion to Dismiss.

(5518) *Miner v. Jones,* Case No. 17-879 (W.D. La. 2018) – Debtors permitted to voluntarily contribute to 401(k) up to maximum allowable amount under IRS regulations. Courts have taken 3 approaches to voluntary contributions: some courts allow Debtors to shelter contributions not exceeding IRS limits; some courts do not allow deductions at all; and some courts permit contributions not larger that Debtor was making before filing. Court concluded that allowing contributions up to IRS limit was consistent with congressional intent that retirement contributions be excluded from disposable income. Further, contribution up to IRS limit is not standing alone bad faith as Debtor is doing nothing more than what law permits.

(5519) *In re Hager,* 2017 WL 5513627 (Bankr. W.D. Mi. 2017) – Debtor's amended plan addressed Court's concerns regarding good faith in connection with confirmation of Debtor's initial plan where Debtor increased income by $300 per month by renting part of residence to ex-husband that helped offset otherwise high housing costs; increased plan length form 36 months to 60 months; and increased dividend to unsecured creditors from $2,000 to $30,000. Plan addressed previous "paltry" dividend. Evidence indicated that Plan was feasible given Debtor had strong desire to retain home; Debtor had good post-petition payment history; and Debtor agreed to default provisions in Order allowing for Dismissal of case if Debtor missed Plan payments.

(5520) *In re Hager,* 2017 WL 3889895 (Bankr. W.D. Mi. 2017) – Good faith is foundation undergirding Code policy of giving relief to "honest but unfortunate debtors". Decision is inherently fact driven and includes consideration of amount of payments and surplus; debtor's employment history and ability to earn; probable duration of Plan; accuracy of Plan's statements of debts, expenses and percentage of repayment including whether any inaccuracies are attempt to mislead court; extent of preferential treatment between classes; extent of modification of secured claims; type of debt to be discharged including debt that is not dischargeable in Chapter 7; existence of special circumstances such as inordinate medial expense; frequency of prior bankruptcy filings; motivation and sincerity of debtor in seeking Chapter 13 relief; burden of plan administration on Trustee; and whether Debtor is attempting to abuse spirit of Code. Debtor's purchase of used car to replace older high mileage vehicle shortly before filing was not evidence of lack of good faith where Debtor replaced older, high mileage vehicle, purchased vehicle was used and was reasonable transportation for Debtor, vehicle was reasonably priced, and payment was not excessive. However, Plan lacked good faith where Debtor proposed to retain Condominium in luxury resort development where property was valued at $300,000 but had no equity because the first mortgage balance exceeded the value; payments on condo including Mortgage, Taxes, Insurance and Condo Fees totaled just under $2,000 per month, and proposed housing expense almost doubled IRS allowance for housing in the community. Condo also significantly increased Debtor's transportation expenses as Condo was located more than 50 miles from her work, and Debtor did not even consider seeking less expensive, more convenient housing. Debtor's "stubborn refusal" to consider lower housing cost was evidence of lack of good faith. Debtor also had engaged in significant (and unsuccessful) gambling activities, spending her hard-won child support, wages, and unemployment income plus proceeds for other investments, at time when debtor was obligated on non-dischargeable debt that survived prior Chapter 7 discharge and included new debts and credit cards including attorney fees of attorney in family court matter. Rather than pay bills, Debtor chose to patronize local casinos, losing between $22,477 and $49,923 at one casino alone, plus additional losses at second casino. Debtor even continued to gamble after Chapter 13 Filing. Debtor's naked allegation that she suffered "Post Traumatic Stress Disorder/ Litigation Abuse Syndrome" was not convincing where debtor did not present any evidence other than self-serving statements about supposed diagnosis or symptoms or an specific steps taken to address issues.

(5521) *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.

(5522) *In re McDonald,* 2015 WL 1524096 (Bankr. W.D. La. 2015) – Even where plan commits 100% of disposable income, court can deny confirmation for lack of good faith where Debtor proposes to retain luxury good encumbered by security interest. Debtor's plan proposed to retain 4-wheeler that was encumbered by lien in the amount of $4500 while plan proposed total payments to unsecured creditors of $1,000.00. Four wheeler was not reasonably necessary but was a luxury item. Debtor's job is not affected by not having four wheeler and while deer hunting may be more difficult, it is not dependent on ownership of four wheeler. Good faith has economic component that beyond disposable income test. Expense was not reasonably necessary but was luxury good, and while Debtor may be inconvenienced that does not amount to necessity. Chapter 13 necessarily involves a sacrifice quotient. Payment for luxury item with little or no payment to unsecured creditors violates good faith test of Section 1325(a)(3).

(5523) *In re Rolince,* 2015 WL 1321510 (Bankr. N.D. Ohio 2015) – Plan lacked good faith where Debtor was not eligible for discharge because of prior Chapter 7 discharge; plan proposed to pay only unsecured claims with Debtor's mortgage paid directly by Debtor; and plan would

produce, at most, $134 for unsecured creditors after payment of trustee fee and attorney fee. Plan essentially sought to buy a 5 year stay of collection activities by creditors under circumstances where it was unlikely that creditors would ever receive anything more than a nominal payment and in all likelihood no payment as Debtor would dismiss case once period passed for Debtor to obtain discharge in subsequent Chapter 7 proceeding. Good faith requires a sincerely intended repayment of pre-petition debt consistent with Debtor's available resources, not merely "parking" case while time runs to file a new Chapter 7.

(5524) *In re Gomery,* 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Confirmation of plan requires that Debtor filed petition in good faith and proposes plan in good faith, with the Debtor bearing the burden of proof on both issues. Good faith is amorphous concept that is flexible and fact specific based on sincerity of Debtor in seeking relief; Debtor's potential future earnings; circumstances under which debts were incurred; amount of proposed repayment to creditors; whether debt would be non-dischargeable in chapter 7; timing of petition; and whether Debtor has been forthcoming with the court and creditors. Debtor lacked good faith were schedules omitted 50% ownership of corporation that owned valuable commercial real estate. Debtor's statements that he thought wife was sole shareholder was not credible where Debtor was attorney with 25 years' experience and all corporate documents including tax returns listed Debtor as 50% owner. Debtor offered to have corporation sell property and remit 50% of proceeds (representing Debtor's interest) only after omission of corporate interest had been discovered and objected to by trustee and unsecured creditor. It also appeared that Debtor may have omitted interest in bank account into which his salary and draws from law firm were deposited. Debtor also caused law firm to make large transfers to third parties that were not properly disclosed in law firm's Chapter 7 case. Debtor's schedules failed to disclose any sporting goods and when asked under oath about a rifle that had been seen in Debtor's home, Debtor refused to answer citing the Fifth Amendment. Debtor filed Chapter 13 only after losing State Court litigation and he was unable to obtain appellate bond to stay action pending appeal. Large portion of creditor's claim resulted from Debtor's misconduct in State Court litigation resulting in over $300,000 in sanctions. Court would convert case to allow Chapter 7 Trustee to more fully investigate Debtor's assets and financial affairs.

(5525) *In re Asplund,* 2014 WL 5017833 (Bankr. E.D. Mi. 2014) – Good faith of Debtor in Chapter 13 is fact driven. Debtor's Chapter 13 case lacked good faith where case was Debtor's third case, and second chapter 13 within 3 years such that Debtor had been continuously under the protection of the bankruptcy code for almost three years; Debtor's was not entitled to a discharge; Debtor had very few creditors other than obligations under marital settlement agreement that was more than three times the total amount owed to all other creditors; Debtor had made minimal, if any, payments on obligations under marital settlement agreement and was attempting to recover other money that was being held pending further order of the domestic support court when case was filed; Debtor filed this case immediately after an unfavorable ruling by the domestic relations court; and Debtor's overall conduct that indicated that Debtor was not making efforts to comply with settlement agreement but was in fact making great efforts to avoid paying Debtor did not need relief from any other creditor and could just as easily have addressed financial issues arising out of domestic Court Orders outside bankruptcy, and plan was little more than an attempt to further delay the ex-spouse for three years without any meaningful payments on those debts.

(5526) *Copeland v. Fink,* 742 F.3d 811 (8th Cir. 2014) – Good faith prevents confirmation of plan that pays nondischargeable, non-priority claims in full making no payments to general unsecured claims. Debtors' proposal to pay as much as possible on non-dischargeable claims while leaving nothing for remaining creditors proposes to protect creditors least in need of protection at expense of most vulnerable creditors.

(5527) *In re Thomas,* 2014 WL 1761954 (Bankr. W.D. Mo. 2014) – Chapter 13 plan that proposed to retain car and pay contractual interest rate of 19.95 percent did not lack good faith. Debtor bought car during prior bankruptcy proceeding pursuant to Court Order that allowed Debtor to incur debt at 19.95 percent. Debtor's first case dismissed and Debtor filed second case, and proposed to reduce interest rate to Till rate. Creditor objected based on prior Court Order in first case that determined interest rate and Debtors amended plan to increase rate. Paying loan at higher rate, standing alone, was not lack of good faith particularly where prior Court Order at least implicitly determined that contract rate was appropriate rate. Further, even at lower rate, Debtors' plan proposed no dividend for unsecure creditors, so paying higher rate was not transferring money from unsecured creditors to secured creditor.

(5528) *In re Brinkley,* 2013 WL 5935157 (Bankr. E.D. Mi. 2013) – Debtor's plan lacked good faith where plan proposed to retain rental property in Florida where rental income is less than monthly expenses. Retention of property would drain assets that would otherwise be available for payment to unsecured creditors.

(5529) *In re Rodriguez,* 487 BR 275 (Bankr. D. N.Mex. 2013) – Debtor's plan lacked good faith where Debtor proposed to contribute $733 per month to Debtor's retirement fund for duration of plan. Although contribution was consistent with historical contributions, Debtor's proposed contributions lacked good faith as primary creditor was ex-wife who held claim based on Debtor's pre-petition misappropriation of funds from spouse's retirement account.

(5530) *In re Kwiatkowski,* 486 BR 409 (Bankr. E.D. Mi. 2013) – Debtor's schedules lacked good faith where Debtor intentionally understates debts in order to qualify for relief under Chapter 13. Debtor scheduled unsecured deficiency claims on foreclosed mortgages with amounts as "unknown" although Debtor knew that the actual balance was at least $250,000.00, leaving Debtor ineligible for relief under Chapter 13. Debtor was not unsophisticated, with Finance Degree from University of Michigan and prior ownership and operation of a mortgage company and employment as mortgage broker.

(5531) *Drummond v. Welsh,* 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether Debtor has misrepresented facts or manipulated code or acted in inequitable manner; Debtor's history of bankruptcy filings; whether Debtor filed solely to frustrate collection of State Court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require Debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Court will not substitute its judgment for that of Congress in determining how much of what type of income is to be included in calculating plan payment. Court cannot, under guise of "good faith" ignore requirements and limitations that Congress chose to enact. Where a Chapter 13 Debtor calculates repayment plan and excludes social security income as Code allows,

exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because Debtors do what Code allows. That Debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income. Further, Debtor's proposed secured debt payments on retained "luxury goods" did not evidence lack of good faith. For "above median income" Debtors, payments on secured loans are not considered in calculating disposable income. Under BAPCPA, Congress determined that Debtors may deduct secured debt payments, even on assets such as ATVs that would otherwise be considered "luxury goods". Section 1325 mandates that disposable income "shall be determined" in accordance with Section 707(b)(2) which uses Current Monthly Income less specified deductions, one of which is secured debt payments. Section 707 does not limit secured debt payments to "necessary" secured debts or exclude payments on "luxury" goods. BAPCPA adopted mechanical approach to calculating disposable income and court would not alter or engraft good faith exception onto that definition.

(5532) *In re Hamade,* 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Debtor has burden to prove that plan was filed in good faith and not by any unlawful means. Good faith is largely factual question, that demands that Debtor be honest, forthcoming, truthful and frank, both to the Court and creditors. Court must determine whether Debtor's plan satisfies purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the Debtor's available resources. Court should take into account the totality of the circumstances confronting a Debtor, not simply his or her pre-plan conduct, when deciding whether or not to confirm a Chapter 13 plan. Non-exhaustive list of factors includes the amount of the proposed payments and the amount of the Debtor's surplus; the Debtor's employment history, ability to earn and likelihood of future increase in income; the probable or expected duration of the plan; the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; the extent of preferential treatment between classes of creditors; the extent to which secured claims are modified; the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7; the existence of special circumstances such as inordinate medical expenses; the frequency with which the Debtor has sought relief under the Bankruptcy Reform Act; the motivation and sincerity of the Debtor in seeking Chapter 13 relief; the burden which the plan's administration would place upon the trustee; and, whether the Debtor is attempting to abuse the spirit of the Bankruptcy Code. Plan that proposed 3% dividend not *de facto* in bad faith, as code does not require any minimum payment to creditors. Debtor had stable employment at modest salary that was not likely to change during the pendency of the case. Plan proposed 5 year term which did not weigh against good faith. Debtor's failure to produce documents related to an alleged loan by Debtor's nephew to Debtor did not evidence bad faith as transaction was informal in nature between family members and it did not appear that any documents actually existed relative to the transaction. However, Debtor did fail to disclose sale of land or other source of funds to renovate Debtor's business premises, which is negative in good faith inquiry. Although creditor held debt that might be non-dischargeable in Chapter 7, schedules indicated that this was not disguised Chapter 7 case filed to circumvent Section 523, but included numerous other debts owed to other creditors, rendering this factor neither positive nor negative on issue of good faith. Debtor did not have any recent bankruptcy filings and Debtor indicated a genuine desire for a fresh start coupled with intent to pay creditors as far as Debtor was capable. Creditor's objection to confirmation for bad faith overruled.

(5533) *Meyer v. Lepe,* 470 BR 851 (9th Cir. BAP 2012) – In determining good faith, court must consider whether Debtor acted equitably in presenting plan; whether Debtor misrepresented facts in the plan or unfairly manipulated the code; or otherwise proposed plan in inequitable manner. Decision is "case by case" basis depending on totality of circumstances in particular case. Case filed solely to strip second mortgage was not "bad faith" that would prevent confirmation of plan. Other than second mortgage, Debtor had total unsecured debt of only $549 and Debtor had monthly income that was more than sufficient to pay all monthly expenses and debts. Amount of proposed payments were not insignificant; any errors in schedules were the fault of lawyer and did not evidence lack of good faith; low amount of unsecured debt cannot render Debtor ineligible for relief; case properly reorganized debts and dealt with unsecured classes; and creditor whose lien was being stripped did not oppose confirmation.

(5534) *In re St. Vincent,* 2012 WL 879286 (Bankr. W.D. Mi. 2012) - Chapter 13 Plan was not filed in good faith where plan and schedules indicated existence of only a single creditor, a bankruptcy trustee overseeing the chapter 7 estate of a co-owner of Debtor's home. The Chapter 7 Trustee had commenced adversary proceeding to sell the co-owner's interest in the property together with the interest of her co-tenants, including the Debtor, pursuant to section 363(h). There was no dispute that the chapter 7 trustee did not hold a claim against the Debtor and was not a creditor of the Debtor - the chapter 7 trustee did not have any right to payment from the Debtor or any other interest in property of the Debtor. Debtor's only purpose in filing the chapter 13 case was to frustrate the chapter 7 trustee's right to sell the real property. Debtors chapter 13 plan did not propose to pay any "claim" of the chapter 7 trustee but effectively sought to force the chapter 7 trustee to "sell" the property to the Debtor. Debtor's plan did not qualify as a sincerely intended repayment of prepetition debt because neither the schedules nor the plan involved any prepetition debt whatsoever.

(5535) *In re Lofty,* 437 BR 578 (Bankr. S.D. Ohio 2010) – In determining good faith, court will look at both pre-petition conduct and circumstances surrounding Chapter 13 filing based on totality of circumstances. Debtors' plan lacked good faith where Debtors owned two parcels of real property that were occupied by their adult children while Debtors themselves occupied an expensive and depreciating motor home. Debtors could sell motor home and move into one of residences, thereby using payments to build equity and reduce living expenses. Further, Debtors' plan proposed to retain property in which adult son and grandson resided but with Debtors making mortgage payments plus paying taxes, insurance and maintenance totaling $3,000 per month. By paying the costs related to the housing of their son and grandson from their projected disposable income, the Debtors are choosing to support family members at the expense of the nonpriority unsecured creditors. That support impacts the amount of the Debtors' payments to unsecured creditors and is inconsistent with the requirement that a plan be proposed in objective good faith. Even if Debtors' son was a dependent, Debtors failed to demonstrate why suitable housing could not be obtained for less than $3,000 per month to free up money for payment to unsecured creditors. Debtors proposed to retain two parcels of real estate and a Motor Home for themselves and their immediate family, plus a separate vehicle, while only paying a 7% dividend to nonpriority unsecured creditors. Debtors sought to retain the Motor Home, continue spending the winter months in a warmer climate

and support their immediate family without considering other viable options.

(5536) *In re McDonald,* 437 BR 278 (Bankr. S.D. Ohio 2010) – Good faith is defined by factual inquiry. Court must ultimately determine whether the Debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the Debtor's available resources. Sixth Circuit uses twelve-part test to determine whether a Debtor's Chapter 13 plan was proposed in good faith: (1) the amount of the proposed payments and the amount of the Debtor's surplus; (2) the Debtor's employment history, ability to earn and likelihood of future increase in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment within classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is non- dischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the Debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the Debtor in seeking Chapter 13 relief; (11) the burden which the plan's administration would place upon the trustee; and, (12) whether the Debtor is attempting to abuse the spirit of the Bankruptcy Code. Debtors' plan not proposed in good faith even where plan committed 100% of Debtors' disposable income, where plan proposed to retain a $365,000 house with about $358,000 in secured debt attached to it having mortgage payments of $2,750 per month; two vehicles with secured debt totaling $53-54,000 with monthly payments totaling $1,182 (with the payment on one vehicle, acquired shortly before filing, of $835 per month); a Harley Davidson motorcycle free and clear of liens that has not been sold; Debtors had combined monthly gross income of approximately $19,000, and are proposing to pay either a 0% dividend or a minimal dividend to non-priority unsecured creditors. Plan would reaffirm the secured debt on the Debtors' high-end home and cars and the tax liability for which Husband is personally obligated, at the expense of the Debtors' non-priority unsecured creditors who receive nothing.

(5537) *In re Predragovic,* 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Good faith requires a review of the totality of the circumstances, including: (1) the Debtor's income; (2) the Debtor's living expenses; (3) the Debtor's attorney's fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the Debtor has petitioned for relief under Chapter 13; (6) the Debtor's potential for future earning; (7) any special circumstances, such as unusually high medical expenses; (8) the frequency with which the Debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by Debtor as indicative of the Debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the Debtor. Allowance or disallowance of expenses on the means test is not determinative of good faith. Complying with the means test does not mean that any combination of expenses that leads to an equal or better financial number being paid to creditors is acceptable. Debtor's actual expenses for vehicle ownership and operating expenses were significantly less than the allowances shown on the means test, yet Debtor attempted to use IRS allowances, rather than actual expenses, to calculate a plan payment. Debtor used actual expenses for food and other expenses that far exceeded amount of IRS allowances for those items, thus using IRS standards when those exceeded actual but used actual when those were higher than IRS standards.

(5538) *In re Smith*, 2010 WL 2400065 (Bankr. N.D. Ohio 2010) - The Debtor bears the burden of demonstrating good faith. Bankruptcy court must ultimately determine whether the Debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the Debtor's available resources. Debtor's "eve of bankruptcy" decision to commence or increase the amount of the contribution can still be considered in determining Debtor's good faith or lack of good faith. Good-faith serves as a backstop against Debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the Debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the Debtor's 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors' plan is proposed in bad faith where Debtor increased his 401(k) contribution by *five times* on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and Debtors presented no financial-planning justification for the increase. Debtors' 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

11.79 Good Faith – Failure to Strip Lien

(5539) *In re Gilmore,* 2010 WL 2342441 (Bankr. N.D. Ohio 2010) – Debtor's Plan lacks good faith where plan does not strip wholly unsecured mortgage.

11.80 Voluntary Mortgage Acceleration

(5540) *In re Pewitt,* Case No. 16-46596 (Bankr. E.D. Mi. 2016) – Debtor's plan lacks good faith where Debtor proposes to voluntarily increase payments to mortgage company and pay off mortgage loan in 60 months while essentially paying unsecured creditors no dividend. If mortgage is paid according to its terms, unsecured creditors would receive more than $13,000 over life of plan. Debtor's plan improperly uses Debtors surplus fund to pay secured creditor who is not entitled to payments; improperly prefers secured creditor over all other unsecured creditors; and abuses spirit of bankruptcy code which requires orderly pro rata payment of unsecured creditors from Debtor's disposable income. Debtor's argument that unsecured creditors would receive no dividend if Debtor liquidated under chapter 7 had no bearing on requirement under Section 1325 that all of Debtor's projected disposable income be used to make payments to unsecured creditors. Debtor's voluntary request to increase payments to mortgage company at expense of unsecured creditors renders plan on confirmable under 11 USC Section 1325(a)(3).

11.81 Good Faith – Social Security Income

(5541) *In re Green,* 2018 WL 1581635, 2018 BL 105577 (Bankr. S.D. Ga. 2018). Exclusion of SSI is expressly allowed by the Bankruptcy Code

and its omission from the plan cannot alone constitute bad faith. Debtor had pension income of $2,072.00 per month plus SSI of $975 per month. He lived with his daughter and did not pay rent but did contribute an unspecified amount toward household utilities. Debtor had a total monthly budget of $1,877.00, leaving Debtor with monthly "disposable income" of $209 per month (if SSI is excluded) or $1,184 per month (if SSI is included). Debtor who proposes Plan that strictly complies with calculations mandated by Sections 101(10A) and 1325(b) cannot lack good faith. Congress created "exception" when it enacted BAPCPA, and it cannot be "bad faith" to do what Code specifically allows. Contrary holding would render meaningless Section 101(10A) that excludes SSI. General "good faith" requirement under Section 1325 cannot override more specific provisions of the Code. Debtor can voluntarily contribute SSI Debtor cannot be forced to do anything more. Excluding SSI and allowing Debtor to amass such funds while paying a 0% dividend to unsecured creditors raises specter of unfairness, that does not translate into bad faith.

(5542) *In re Drake,* Case No. 16-12280 (Bankr. N.D. Ga. 2017) - Social Security income does not need to be paid into a Chapter 13 Plan because Social Security benefits are excluded from "current monthly income". Debtor's Plan proposed to allow Debtor to save $900 each month from her Social Security benefits for "unforeseen circumstances" quote resulting in Debtors saving more than $30,000 over life of Plan while paying unsecured creditors only $8000. Section 101 shows clear intent to protect Social Security income from bankruptcy process and Debtor need not disclose disposition of Social Security income he does not intend to use toward Plan. While optics of the situation are not pleasant and raise a specter of unfairness, retaining Social Security income is not sufficient to show lack of good faith because Debtor's withholding of Social Security income is consistent with plain language of Bankruptcy Code.

(5543) *In re Fuqua*, Case No. 15-52398, 2015 Bankr. LEXIS 3244 (Bankr. E.D. Mi. 2016) – Social Security Income received by Debtor is excluded in calculating disposable income. However, exclusion of income raises questions of good faith unless Debtor can explain how the excess income is to be used. If funds are to be used to provide substantial or extravagant lifestyle, failure to commit proceeds can constitute bad faith.

(5544) *In re Hall,* Case No. 15-30749 (Bankr . E.D. Mi. 2015) – Social Security income is excluded from calculation of Current Monthly Income in Section 101(10A). Section 1325(b) defines disposable income as Current Monthly Income less certain deductions. As Social Security is not included in CMI, Debtor is not required to include Social Security in calculating disposable income or plan payment. However, exclusion of income is not *per se* good faith under Section 1325(a)(3), which is separate obligation from Section 1325(b). If retained Social Security benefits enable Debtor to lead extravagant lifestyle or to acquire luxury goods, failing to commit that income to plan is lack of good faith. Court could not reach conclusion where there was no evidence in record as to the uses for Debtor's Social Security income that is not committed to the Plan.

(5545) *In re Mihal,* 2015 WL 2265790 (Bankr. E.D. Mi. 2015) – Social Security income received by Debtor is excluded in calculation of Current Monthly Income. Debtor's Chapter 13 Plan did not lack good faith where plan payment excluded Debtor's social security income.

(5546) *In re Worthington,* 2014 WL 1173316 (Bankr. S.D. Ind. 2014) – Social Security income received by Debtor is excluded from calculation of Current Monthly Income. Debtor's Chapter 13 plan did not lack good faith where plan did not include substantial portion of social security income.

(5547) *Mort Ranta v. Gorman,* 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating projected disposable income or plan payment, regardless of whether Debtor is above or below median income. Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur. Court noted that allowing Debtor to exclude SSI in calculating projected disposable income is limited by other requirements of Section 1325 including liquidation and good faith.

(5548) *In re Holls*, Case no. 13-46765 (Bankr. E.D. Mi. 2013) –Debtor's failure to include SSI in calculating the plan payment was a lack of good faith. Citing the court's decision in *In re Mains,* Court concluded that Debtors must list SSI in Schedule I and can use that income, as reasonably necessary, for living expenses, but anything left must be used for the plan payment, same as all other income.

(5549) *In re Wise,* Case no. 13-44673 (Bankr. E.D. Mi. 2013) – Debtor's failure to commit social security for funding of plan constituted lack of good faith. Debtor proposed to retain more than $43,000 in social security benefits over term of Debtor's plan while paying unsecured creditors a nominal dividend.

(5550) *Drummond v. Welsh,* 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether Debtor has misrepresented facts or manipulated code or acted in inequitable manner; Debtor's history of bankruptcy filings; whether Debtor filed solely to frustrate collection of State Court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require Debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Where a Chapter 13 Debtor calculates repayment plan and excludes social security income as Code allows, exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because Debtors do what Code allows. That Debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income.

(5551) *Anderson v. Cranmer,* 2012 WL 5235365 (10th Cir. 2012) – Social Security of Debtor and non-filing spouse are excluded from calculation of projected disposable income and do not need to be included in calculating plan payment. Exclusion of SSI from calculation of PDI was not lack of good faith that prevents confirmation of the plan.

(5552) *Beaulieu v. Ragos,* Case no. 11-31046 (5th Cir. 2012) – Social Security benefits are not included in calculation of projected disposable

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

(5553) *Mains v. Foley,* 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

(5554) *In re Vandenbosch,* 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

(5555) *In re Westing,* 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income Debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only $165 and would produce dividend of 1.9% while Debtor had disposable income of more than $2,300 if the Social Security was included.

(5556) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a Debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow Debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

(5557) *In re Welsh,* 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a Debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify § 407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a Debtor to include Social Security income on Schedule I.

(5558) *In re Miller,* 2011 WL 95335 (Bankr. D.S.C. 2011) – Section 101(10A) excludes all social security benefits, regardless of recipient and regardless of whether contributed to Debtor's household expenses. Debtor's non-filing husband received Social Security which he contributed in full each month for payment of household expenses. Debtor also received Social Security. Debtor not required to include either her social security or that of her non-filing spouse in calculating Current Monthly Income or disposable income in Chapter 13.

(5559) *In re Bartelini,* 434 BR 285 (Bankr. N.D.N.Y. 2010) – Social security is excluded from CMI under 101(10A). CMI is starting point to calculate projected disposable income. Therefore, Debtor cannot be compelled to list Social Security in PDI calculation for purposes of plan payment.

(5560) *In re Herrmann,* 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income Debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the Debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a Debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

11.82 Good Faith - Plan Length

(5561) *In re Sampson-Pack,* 2014 WL 1320371 (Bankr. D. Md. 2014) – Debtor who proposes to pay 100% dividend but commits less than 100% of disposable income must also pay interest. Section 1325(b) requires either that Debtor pay 100% of disposable income or pay creditors with interest. Debtor can either commit all disposable income and pay creditors in full in shorter time, or pay creditors over longer time with interest.

(5562) *DeHart v. Humes,* 2013 WL 6536947 (Bankr. M.D. Pa. 2013) – Plan proposed for 60 months lacked any justification to for term longer than 36 months. Debtor apparently proposed to stretch out payments at lower amount than disposable income. Debtor's desire to lower plan payments but pay same total amount over 60 months as Debtor would have paid over 36 months lacks any justification for longer plan term.

(5563) *In re McGehan,* 2013 WL 4069524 (Bankr. D. Colo. 2013) – Debtor who proposes 100% dividend cannot be compelled to pay larger

payment and to shorten plan term. Although Debtor had disposable income of more than $4,000 per month, plan proposed payments of $1,000 per month and full repayment of allowed claims. Plan complied with requirements of code, and Debtor has no good faith obligation to pay more merely to shorten plan term. Above median Debtor had 60 month applicable commitment period and was entitled to use entire plan term to pay 100% dividend even if Debtor is not committing all disposable income.

(5564) *In re Cobb,* 2013 WL 266517 (Bankr. D.R.I. 2013) – Debtor's plan that proposed 100% dividend over 60 months did not lack good faith merely because Debtor could pay off plan in shorter duration. Debtor's plan proposed to pay less than 100% of Debtor's disposable income over life of plan. Had Debtor committed all disposable income, plan would have completed in substantially shorter time. Absent evidence of misconduct or abuse, mere fact that Debtor has ability to pay creditors over shorter period of time is not bad faith. Plan confirmed.

11.83 Good Faith – "Attorney Fee Only" Plans

(5565) *In re Dugan,* Case No. 15-21258 (Bankr. D. Kn. 2016) – Code does not prohibit plan that pays only attorney fees. Plan that is filed in good faith under totality of circumstances is not rendered unconfirmable merely because plan pays only attorney fees, and Debtor is not required to show "special circumstances". Code does not prohibit filing by Debtor who could benefit from Chapter 7 but who cannot generate sufficient cash up front to pay attorney fees.

(5566) *Brown v. Gore,* 2014 WL 563601 (11th Cir. 2014) – Debtor lacked good faith in filing a petition and plan where purpose of Chapter 13 rather than Chapter 7 was to pay attorney fees in installments, where Debtor had no non-exempt assets or income that would be seized in Chapter 7; Debtor's income was barely enough to cover Debtor's expenses and was fixed as sole source was social security, and Debtor did not have ability to earn more income; Chapter 13 trustee would have burden of collecting funds primarily for benefit of Debtor's attorney; and Debtor was likely to default in Chapter 13 and end up without a discharge. Record contained no evidence that it was in Debtor's best interest to file a chapter 13. Although plan proposed 100% dividend to unsecured creditors over 36 months, Debtor's budget was only $1214 per month, leaving room for $150 plan payment, and leaving no margin for error or room for unforeseen expenses. Likelihood was that case would fail before any money would be paid to unsecured creditors. "If [Debtor] could not save $150 for five months to pay his attorney up front for a Chapter 7 petition, a Chapter 13 plan requiring him to pay $150 monthly for three years seemed doomed to failure. The bankruptcy court emphasized the "abysmal failure rate of chapter 13 cases," pointing out that in the Eastern Division of the Northern District of Alabama "approximately 65% of all chapter 13 cases fail before Debtors complete their plans and become eligible for a discharge.

(5567) *Sikes v. Crager,* 2012 WL 3518473 (5th Cir. 2012) – There is no *per se* rule against "attorney fee only" plans. Based on "totality of circumstances" test, plan did not lack good faith in light of Debtor's overall financial condition, mounting medical costs, increasing debts, and fact that based on Debtor's minimal income, even if Debtor stopped paying on all credit card debt immediately, it would take a year for Debtor to amass sufficient funds to file Chapter 7. Debtor's decision to file Chapter 13 was not attempt to abuse Chapter 13 but was responsible decision given Debtor's particular circumstances.

(5568) *Berliner v. Pappalardo,* 2012 WL 954860 (1st Cir. 2012) - Chapter 13 plan that pays only attorney's fees is not bad faith per se. Debtor chose chapter 13 over chapter 7 because Debtor lacked immediately available funds to pay Chapter 7 fees. Good faith is based on totality of circumstances that ultimately derives from concepts of equity. Fee-only plans, by definition, leave the vast majority of debts unsatisfied and may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of Debtors; and such plans, by their very nature, create that appearance. However, this does not convert "fee only" plans into per se bad faith. There may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified. Alleged inability to immediately pay attorney fees for Chapter 7 did not demonstrate lack of good faith absent evidence that Debtor had a pressing need for the appellant's services, that he could not secure adequate representation that he could afford without resorting to a fee-only plan, or that it was infeasible to proceed pro se. Debtor acknowledged that he could have retained the appellant for representation in Chapter 7 if he had waited three months longer; and the record contains no compelling reason why a three-month wait would have been intolerable. Case remanded to Bankruptcy Court for further findings.

(5569) *In re Jackson,* 2012 WL 909782 (Bankr. N.D. Al. 2012) –Chapter 13 dismissed for bad faith. From 22 disclosed no presumption of abuse had Debtors sought Chapter 7 relief. Although Chapter 13 plan proposed 18% dividend, parties conceded that primary motivation in filing Chapter 13 was to finance attorney fees over time. Term "fee only case" includes cases that provide some small distribution to unsecured creditors, where the "main purpose" for choosing chapter 13 as opposed to chapter 7 was to finance attorney fees. Chapter 13 in the Bankruptcy Code was not intended as a payment collection and enhancement device for attorneys. Majority of courts to consider the issue find chapter 13 cases filed in lieu of otherwise-available chapter 7 relief to finance attorney fees, which the Debtor cannot afford to prepay, are not filed in good faith under section 1325. Chapter 7 case would enable Debtors to receive discharge in short order during which Debtors would be protected by the automatic stay. In Chapter 7 Debtors would not be burdened with plan payments for three years, which may be insurmountable tasks;. Chapter 7 discharge eliminates risk of default and dismissal of their cases followed by repeat performances. If allowed, these misguided Debtors impermissibly burden chapter 13 trustees and bankruptcy courts with the administration of their cases which are subsidized by Debtors in "legitimate" chapter 13 cases.

11.84 Plan Length and Disposable Income

(5570) *In re Sampson-Pack,* 2014 WL 1320371 (Bankr. D. Md. 2014) – Plan that pays unsecured creditors in full in 60 months but does not contribute 100% of Debtor's disposable income must pay interest on unsecured claims. Plan must either commit 100% of disposable income or pay creditors a total with a present value of at least 100% of claims.

(5571) *In re Braswell,* 2013 WL 3270752 (Bankr. D. Ore. 2013) – Where a creditor objects, the Debtor must either contribute 100% of disposable income or must pay interest to unsecured creditors. Debtor can pay 100% dividend to unsecured creditors over stretched out plan length and pay less than full disposable income each month, but must compensate unsecured creditors for the delay.

11.85 Domestic Support Obligations

(5572) *In re Swonger,* Case No. 14-50807 (Bankr. E.D. Mi. 2014) – State Court judgment of divorce that required Debtor to pay off HELOC did not create domestic support obligation such that Debtor's failure to refinance HELOC would not impede confirmation of plan. Obligation was within section labeled "Property Division" and judgment itself otherwise barred spousal support other than as sanction for failure to refinance HELOC and State Court had not yet entered or considered any request for award of support based on Debtor's failure to refinance. Judgment distributed property and ordered payment of HELOC without regard to respective financial positions of the parties and instead intended simple, equal distribution of marital assets. However, provision of State Court judgment that allowed Court to convert obligation to pay off HELOC into prospective award of domestic support if Debtor did not timely pay HELOC warranted stay relief to send matter back to State Court to determine proper enforcement of judgment including potential imposition of prospective domestic support obligation.

(5573) *In re Resendiz,* 2013 WL 6152921 (Bankr. S.D. Tx. 2013) – Chapter 13 plan must pay DSO with interest even where other unsecured creditors will receive less than full payment. DSO under state law includes not only principal amount of obligation but also all interest that accrues on any arrearage.

(5574) *In re Thomas,* Case No. 13-8048 (6th Cir. BAP 2014) – Priority claims such as Section 101 (14A) domestic support obligations are priority claims that must be paid in full during Chapter 13 plan.

(5575) *In re Ashby,* 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Domestic Support Obligation is priority claim that must be paid in full over life of plan unless holder agrees to other treatment, pursuant to Section 1322(a)(2). Further, plan cannot be confirmed under Section 1325(a)(8) unless Debtor is current in all DSO payments coming due after commencement of the case. Debtor's plan could not be confirmed over DSO claimant's objection where plan did not propose full payment of the arrearage within plan term, and Debtor was months behind in post-petition DSO claims.

(5576) *In re Phile,* 490 BR 250 (Bankr. S.D. Ohio 2011) – Chapter 13 plan that provided that Debtor's obligation to former spouse would be deemed to not constitute a domestic support obligation and would be discharged at end of plan could not be confirmed. Dischargeability of obligation could not be established through plan confirmation process, but required adversary proceeding.

11.86 Transfer of Property

(5577) *In re Elkins,* 2016 WL 6892728 (Bankr. E.D. Ky. 2016) – "Cause" for relief form stay is dependent on all facts and circumstances of case. Creditor demonstrated cause where case was Debtor's second case, both filed on eve of foreclosure sale; Chapter 13 plan vaguely referred to a sale of the property but Debtor took no action to follow through, has not retained a broker, or undertaken to market property; plan did not provide express timetable for sale to occur; Debtor did not provide proof that co-owner consented to sale and Debtor had not commenced adversary proceeding under Section 363(h) to sell free and clear of co-owner's interest; property was not Debtor's residence; property was diminishing in value; and Debtor had ample time to find private buyer as foreclosure process had been pending for 7 years plus the many months since filing is first bankruptcy case.

(5578) *In re Dahlgren,* Case No. 11-2794 (3d Cir. 2012) – Plan that proposed "forced sale" of co-owner's interest in property could not be confirmed. Plan proposed that would effectively divest co-owner of ownership of property and instead treat co-owner as creditor. Chapter 13 did not provide any mechanism to strip ownership of property from co-owner.

11.87 Income Tax Returns

(5579) *Romeo v. Maney,* 2018 WL 1463850 (9th Cir. BAP 2018) – Section 521 requires Debtor to file Federal Tax Returns with Court on annual basis. There is no authority to require Debtor to file State Tax Returns. Trustee cannot access filed tax returns absent motion and showing of need to access returns. Trustee established need to access returns by arguing that access was necessary to determine whether modification of plan may be appropriate.

11.88 Income Tax Claims

(5580) *In re Mazzarella,* 2013 WL 6051036 (Bankr. N.D. Ohio 2013) – Section 507(a)(8) defines priority tax claims as those measured by income and for which a return was last due, with extensions, less than three years prior to commencement of the case. Three year period is extended for any time period during which applicable non-bankruptcy law prevents actions to collect tax. While statute tolls running of three years for any time during which a prior bankruptcy case was pending, the time is not tolled based on pre-petition tolling agreement between taxpayer and governmental unit. Fines imposed on unpaid taxes are not compensatory in nature and are not entitled to priority status.

(5581) *In re Paradis,* 2012 WL 3938644 (Bankr. D. Me. 2012) – Section 1322 requires full payment of priority claims. Section 507(a)(8) determines whether taxes are priority or non-priority. Tax will be priority if the tax is measured by income and if the last date on which the return was due is more than three years prior to commencement of the case, unless Section 507(a)(8)(A)(i) extends the time. Time will be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the Debtor for a hearing and an appeal of any collection action taken or proposed against the Debtor, plus 90 days. Debtor filed for bankruptcy in June, 2011. Debtor had not obtained extension for filing 2007 return, meaning last date on which return could be filed was April 15, 2008. Thus, three year "lookback" presumably expired on April 15, 2011. Debtor's request for Offer in Compromise did not constitute "request by the Debtor for a hearing" sufficient to suspend time. OIC process entails no hearing and is an administrative proposal designed to foster evaluation and negotiation. OIC stands apart from more formal proceedings that include a request for hearing and operate to suspend time. Taxes were not assessed within 240 days where taxes were assessed, at the latest, 291 days pre-petition and there was no action that would have tolled running of 240 day period. As no part of IRS unsecured claim was entitled to priority, Court would confirm plan that treated claim consistent with treatment of all other unsecured claims. Further, as non-priority taxes, obligation would be discharged in Chapter 13 plan pursuant to Section 1328.

(5582) *In re Shelly,* 458 BR 740 (Bankr. N.D. Ohio 2011) – Debtor's plan could not be confirmed where plan failed to demonstrate that full secured claim of IRS would be paid during Chapter 13 plan. Plan provision that called for Debtors to commit additional amounts that were contingent on successful prosecution of pending legal malpractice action did not demonstrate that plan was sufficiently funded, where Debtors did not demonstrate likelihood of success on merits or any other information concerning validity or amount of likely recovery. Section 1325(a)(5) requires that plan pay secured claim in full. Plan payments were not sufficient to pay the IRS secured claim, preventing confirmation.

(5583) *In re Senczyszyn,* Case No. 09-49868 (Bankr. E.D. Mi.), *aff'd*, 2011 WL 500060 (E.D. Mi. 2010) – Debtor can file a proof of claim on behalf of a governmental agency for pre-petition taxes where the governmental agency fails to file a claim within the time permitted under Rule 3002. Debtor's Proof of Claim for 2008 taxes in case filed in March, 2009, properly stated claim for "pre-petition" taxes and Chapter 13 Plan properly provided for full payment of those taxes. Debtors had filed their tax returns prior to the fling of the case, resulting in an indisputable pre-petition relationship between the Debtors and the State; and the obligation arose out of pre-petition events, even if the liability was not "payable" until after the petition date. At best, claim may have been "unmatured" but the definition of Claim expressly includes unmatured obligations.

(5584) *In re Wilson*, Case No. 10-45791 (Bankr. E.D. Mi. 2010) – Chapter 13 case filed prior to April 15, 2010, could not fix 2009 tax liability or deem the governmental agency to have filed a proof of claim where no proof of claim has been filed. Plan that purports to fix amount of 2009 tax liability cannot be confirmed where no proof of claim has been filed. However, if either the governmental agency files a claim within the time permitted or the Debtor files a claim on behalf of the governmental agency as permitted under Rule 3004, then the claim must be paid in full as a priority claim pursuant to Section 1325.

11.89 Other Tax Claims

(5585) *In re Gift,* 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where Debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.

(5586) *In re Pierrotti,* 645 F.3d 277 (5th Cir. 2011) – Chapter 13 Plan can treat IRS secured claim over life of plan, but Section 1325(b)(5) does not allow Debtor to reclassify IRS lien as "long term debt" on which the last payment would be due after expiration of the plan. IRS secured claim must be paid in full over term of plan unless IRS agrees to contrary treatment.

(5587) *In re McDonald,* 437 BR 278 (Bankr. S.D. Ohio 2010) - Section 1322(a)(2) requires the payment of all priority tax claims within the Plan over the life of the Plan in deferred installments unless the holder of such claim agrees otherwise. Plan that provided for payment of the sales taxes "outside" the Plan contravenes §1322(a)(2) and the Plan cannot be confirmed over objection of the Taxing Authority.

11.90 Joint Cases – Substantive Consolidation for Plan Administration

(5588) *In re Newman,* 2017 WL 2589318 (Bankr. E.D. Tn. 2017) – Creditor of only one joint Debtor is entitled to payment only form assets of that joint Debtor and has no claim against assets of other joint Debtor. Joint filing does not substantively consolidate cases or make assets of one Debtor liable to creditors of other Debtor. Estates will not be substantively consolidated where creditors of one estate will benefit at expense of other estate and when affairs and assets are not so intertwined as to prevent efficient administration of estates.

(5589) *In re Bransford,* Case No. 14-30468 (Bankr. E.D. Mi. 2016) – Petition filed under Section 302 commences joint case of individual and spouse. However, joint petition does not constitute consolidation of Debtors' Estates. Rule 1015 allows joint administration where the Debtors are a husband and wife. Joint administration does not consolidate estates. Absent substantive consolidation, assets of one Debtor, owned separately, stay within that estate and cannot be used to pay creditors of the Codebtor. Substantive consolidation is drastic remedy that requires unusual circumstances such as a substantial co-mingling of assets, liabilities and handling of financial affairs of the separate Debtors. Substantive consolidation not appropriate where asset in question could be clearly ascribed to Debtor-husband and liabilities were easily separated between those of Debtor-husband and Debtor-wife. Debtor-husband's creditors would suffer minimal harm if estates are consolidated – although personal injury lawsuit of Debtor-husband was personal to Debtor-husband and constituted his property and not property of Debtor-wife' Debtor-husband's creditors would receive 100% absent substantive consolidation but 98% of cases are consolidated. However, Debtor-husband would suffer substantial prejudice where husband would receive zero dollars if cases are substantively consolidated versus $34,000 if husband's assets are used only to pay husband's debts. Absent substantive consolidation of Debtors' estates, there was no authority for Trustee to use proceeds of husband's personal injury litigation to pay wife's individual creditors.

(5590) *In re Stampley,* 437 BR 825 (Bankr. E.D. Mi. 2010) – Section 302 provides that spouses may file joint case. Joint petition creates two separate estates, not one single estate. Court can determine under Section 302 the extent to which the estates should be consolidated, if at all. If estates are not consolidated, the estates remain separate. Where spouses had significantly different incomes, court should not consolidate estates so as to avoid using income from higher income spouse to subsidize payments to creditors of other spouse at expense of creditors of higher income spouse.

11.91 Best Interests of Creditors – Liquidation Analysis

(5591) *In re Roberts,* 2018 WL 2392147 (Bankr. N.D. Ohio 2018) – In calculating Liquidation Value of estate, it is appropriate to deduct Chapter 7 administrative fees and expenses. Debtor can also deduct hypothetical Chapter 7 Trustee's attorneys fees where it appears likely that Chapter 7 Trustee would appoint attorney to assist in sale of property. Debtor owned undivided fractional interest in property. Sale of property as a whole would require either cooperation of other co-owners or adversary complaint against co-owners, either of which would require retention of attorney. Debtor's estimate of $2500 was reasonable and would be deducted in calculating Chapter 7 liquidation value.

(5592) *Midstate Finance Company v. Peoples,* 2018 WL 1586138 (E.D. Tn. 2018) – Section 1325(a)(4) provides that Plan cannot be confirmed unless creditors receive no less than amount they would have received under hypothetical Chapter 7 liquidation. Value is generally taken to mean fair market value defined as price arrived at in an arm's length transaction in competitive and open market under all conditions requisite to a fair sale, buyer and seller, each acting prudently, knowledgeably, and assuming price is not affected by undue stimulus. Court will consider variety of information inducing appraisals, witness testimony, offers made for property, and comparable arm's length sales, with no single factor being dispositive. In assessing appraisals, Court will consider appraiser's education, training, experience, familiarity with property, manner of conducting appraisal, testimony, and overall ability to substantiate basis for valuation, with emphasis on appraiser's familiarity or lack of familiarity with property at issue and use of comparables. Court must filter and evaluate evidence offered and is not required to accept an appraiser's calculations but may form own opinion considering appraisals and expert testimony. Courts can also consider offers to purchase but are not required accept offer as measure of valuation. Creditor's offer to purchase property did not control valuation where circumstances surrounding offer was not "arm's-length transaction" under "ordinary selling conditions." Creditor and Debtors were only parties in contention for the Property; Debtors were bidding in an attempt to keep own home; and Creditor held 80% of unsecured debt and would receive 80% of proceeds as dividend on claim, leaving Creditor to actually pay only 20% of price it was offering. Bankruptcy Court considered a wide range of evidence including Debtors' approximation of Property in Schedule A; appraisal of Property; Trustee's testimony Debtors' valuation reflected reasonable price; the bidding history; Creditor's $66,000 offer and Real Estate Assessment Data submitted by Creditor. Bankruptcy Court also took account of Creditor's testimony that Creditor was initially concerned with structural soundness of Property's improvements, while later testifying Creditor was concerned only with land; and Debtor's appraiser and Trustee actually examined Property, while Creditor never inspected it.

(5593) *In re Perkins,* 2018 WL 1279252 (6th Cir. BAP 2018) – Best interests of creditors test in Section 1225, which mirrors Section 1325, requires value, as of effective date of plan, of property to be distributed is not less than amount creditor would be paid if estate was liquidated under Chapter 7. Plan can only be confirmed if it provides more money to unsecured creditors than liquidation under Chapter 7. Debtor provided liquidation analysis which projected proceeds that would be received from liquidating all bankruptcy estate's assets that showed after all secured, priority, and administrative claims and sales costs were paid, there would be no funds left to pay non-priority unsecured creditors.

(5594) *In re Webster,* 2017 WL 5989170 (Bankr. E.D. Mi. 2017) – Chapter 13 Plan cannot be confirmed unless it pays to unsecured creditors at least the amount creditors would receive in hypothetical Chapter 7. Correct valuation of Debtor's business is as going concern where plan proposes that Debtor retain and operate business. Debtor's proposed liquidation value based on "break up" value of non-operating business did not correctly represent value of ongoing business. However, full fair market value of business overstates value as Chapter 7 Trustee may receive permission to operate business for short time but would not have sufficient time to achieve full fair market value. Correct value is "forced sale" going concern value.

(5595) *In re Engle,* 2013 WL 4038625 (Bankr. S.D. Ohio 2013) – To determine whether plan meets "best interests of creditors" test, court must determine value, as of the effective date of the proposed Chapter 13 plan, of the property to be distributed to each unsecured creditor in Chapter 13, taking into account the Chapter 13 administrative expenses, and compare that to what creditors would receive in a liquidation under Chapter 7. Where avoidance actions would be successful in a Chapter 7, Plan must account for value of avoidance actions. Plan that proposed that Chapter 13 Trustee would pursue avoidance action and retain any proceeds did not meet liquidation analysis as Chapter 13 Trustee has no obligation to pursue recovery and Debtor cannot, through plan, attempt to force trustee to pursue preference action. Debtor can propose plan that calls for Debtor to pursue recovery and pay proceeds to trustee, but cannot seek to impose obligation on trustee to pursue recovery.

(5596) *In re Hilliard,* 2012 WL 1067691 (Bankr. E.D. Tn. 2012) - Debtor in divorce proceeding was awarded entire interest in marital home, provided that when, or if, the home was sold, Debtor and her ex-husband would each receive one half of the proceeds. Ex-husband executed quitclaim deed to Debtor which was properly recorded. As of the date of Debtors bankruptcy petition, the property had not been sold. Although Domestic Relations Court apparently intended for ex-husband to retain equitable interest of property, that equitable interest was not disclosed in the public records and, therefore, a chapter 7 trustee would take title to the property free and clear of ex-husbands interest. Further, ex-husbands unrecorded interest in the proceeds of the sale would be unavoidable transfer, the value of which would be brought back into the estate for valuation purposes. Therefore, entire value of property must be considered in determining whether chapter 13 plan meets liquidation requirement for confirmation.

(5597) *In re Sharp,* 394 BR 207 (Bankr. C.D. Ill. 2008) – Court must perform a hypothetical analysis to determine what, if anything, a Chapter 7 trustee would be able to distribute to unsecured creditors if a Debtor's estate were liquidated. To accomplish that analysis, the value of a Debtor's non-exempt property must first be determined. That value is then reduced by (i) the administrative expenses of a Chapter 7 case, including the costs of sale of the non-exempt property, (ii) the amount of all lien claims that would be enforceable against the non-exempt property in the Chapter 7 case, and (iii) the amount of priority claims allowable under Chapter 7 which would be paid with sale proceeds before a distribution to unsecured creditors. What remains is the minimum amount that must be paid to unsecured creditors through the Chapter 13 plan to meet the requirement of Section 1325(a)(4). Trustee's reliance on old depreciation schedules to suggest that the price paid years ago for items is determinative of their value today is misplaced. Although more than $12,000 was spent since 2002 for business equipment, it is doubtful that items such as a cellular telephone purchased in 2005 for $61 or a shop vacuum purchased in 2006 for $52 would retain much value. Court must also deduct expense of liquidating these items or the other administrative costs of a Chapter 7 case. Trustee failed to present any evidence that Chapter 7 trustee would pursue the Debtor's assets because the value of the assets would have to be four to five times greater than what the Debtor estimates in order for a Chapter 7 trustee to liquidate the assets, pay the Debtor his exemption, pay the costs of sale and other Chapter 7 expenses, and still have something meaningful to distribute to unsecured creditors.

(5598) *In re Gillen*, Case No. 16-81595 (Bankr. C.D. Il. 2017) - Section 1325(b)(1) requires that a Debtor's Plan either distribute property having a value as of the effective date of the Plan that is not less than the amount of the claim; or the Plan must provide for all of Debtor's projected disposable income be applied to make payments to unsecured creditors. Where Debtor's Plan proposes to pay all unsecured creditors in full

but without interest, Debtor is not required to commit 100% of Debtors disposable income. Section 1325(b)(1) does not require Debtor to pay interest on allowed unsecured claims merely because Debtor's proposed Plan payment is less than Debtor's full disposable income unless interest is otherwise required by Section 1325(a) and (4).

(5599) *In re Grabarczyk,* 2012 WL 909511 (Bankr. N.D. Ohio 2012) – To the extent that Debtor's plan proposes to pay priority claims and chapter 13 administrative expenses through the chapter 13 plan, any deductions taken by Debtors on line 49 and line 50 of the from B22C must be added back into the disposable income calculated online 59 in order to ensure that the total proceeds available to unsecured creditors is not less than the presumptively disposable income shown on line 59 times 60. Priority creditors are not "unsecured creditors" were paid from projected disposable income. Instead, those payments are deducted before determining projected disposable income which is then allocated to payment of general unsecured creditors.

(5600) *Meredith v. Weigl,* 2011 WL 2321884 (Bankr. S.D. Ga. 2011) – Section 1325(a)(4) requires that plan provided dividend to unsecured creditors in amount not less than what would be paid in Chapter 7. Plan must include value of avoidable pre-petition transfers in determining "best interests". Plan could not be confirmed where plan failed to account for value of property transferred within one year prior to filing for no consideration.

11.92 Net Present Value - Liquidation Discount Rate

(5601) *Midstate Finance Company v. Peoples,* 2018 WL 1586138 (E.D. Tn. 2018) – Bankruptcy courts must discount payments to be made under a Chapter 13 plan to net present value when applying the best interest of the creditors test. Debtor's Plan proposed payments to unsecured creditors over 60 months that totaled same amount that creditors would receive in hypothetical liquidation under Chapter 7. Bankruptcy Court erred in failing to discount payments under Plan to present value when comparing amount creditors would receive under plan with amount creditors would have received in hypothetical Chapter 7 liquidation.

(5602) *In re Engle,* 2013 WL 4038625 (Bankr. W.D. Ohio 2013) – Liquidation requires that proceeds to be paid under Chapter 13 plan be reduced to present value to determine whether plan meets liquidation. *Till* rate is correct rate to use as discount factor. Debtor's proposed discount rate of less than 1% did not provide adequate discount. Trustee's proposed rate of 5.25% based on national prime rate of 3.25% plus 2% risk factor was reasonable rate.

(5603) *McDonald v. Credit Acceptance Corp.,* 2011 WL 6643074 (E.D. Mi. 2011) – Interest rate that exceeds 3% risk factor not prohibited by *Till. Till* did not impose ceiling over prime as risk factor. Plan that provided for interest to secured creditor at 15% approved when contract rate was 24% and car was purchased only one week prior to filing.

(5604) *First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.,* 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.

(5605) *In re Villegas*, 09-41394 (Bankr. E.D. Mi. 2009) – The interest rate to be used to for purposes of Section 1325(a)(4) is determined according to *Till v. SCS Credit Corp.,* 541 U.S. 465 (2004). Plan that proposed interest to unsecured creditors at Federal Judgment rate of 0.43% could not be confirmed over objection of creditor or Chapter 13 Trustee (citing *In re Hoskins,* 2009 WL 1139407 (Bankr. N.D. W. Va. 2009).

11.93 Duty to Insure – Section 1326(a)(4)

(5606) *In re Sims,* 2017 WL 104751 (Bankr. N.D. Il. 2017) – Section 1326(a)(4) requires Debtor who proposes to retain property that is either leased or is subject to security interest "in whole or in party attributable to the purchase price of such property" to provide lender or lessor with reasonable proof of insurance and Debtor must continue to insure property throughout Bankruptcy case.

11.94 Feasibility

(5607) *In re Perkins,* 2018 WL 1279252 (6th Cir. BAP 2018) – Section 1225 allows Chapter 12 plan to be confirmed only if debtor will be able to make all payments under plan and comply with plan. Feasibility is factual question based on determination of reasonable probability of payment. Plan does not need to guarantee success, but must present reasonable assurance of success through realistic and workable framework for reorganization. Debtor's projections based on average yields and obtainable prices for crops plus additional possible crop income provided reasonable assurance of success. Possible loss of future income may put pressure on plan, but plan did not need to guarantee success, only provide a reasonable assurance of success.

(5608) *In re Cipriani,* 2017 WL 6754284 (Bankr. N.D. Ohio 2017) – Debtor cannot "cure and maintain" mortgage where debtor previously field and received discharge under Chapter 7. Debtor's only recourse is to pay off mortgage in full over life of plan under Section 1322(c). Plan not feasible where debtor did not have sufficient income to retire mortgage in full over 60 month maximum plan term.

(5609) *In re Blake,* 565 BR 871 (Bankr. N.D. Ill. 2017) – Debtor may either deduct full tax withholding in calculating disposable income and turn over tax refund to trustee; or prorate tax refunds on Schedule I and subtract from resulting calculation of income reasonable expenses to determine disposable income and then withhold from tax refund prorated amount before turning over to Trustee any unaccounted for balance. Plan is not infeasible because Debtor prorates tax refund over 12 months although tax refund is received only once per year, as Debtor is also to prorate expenses occurring once per year over 12 months on Schedule J.

(5610) *In re Gibson,* Case No. 16-25231 (Bankr. N.D. Ill. 2016) - Debtor in Chapter 13 is permitted to prorate anticipated future tax returns on Schedule I and to then use prorated tax refunds to pay reasonably necessary expenses, thereby reducing amounts to be paid to Chapter 13 Trustee. Any requirement that Debtor pay over 100% of tax refunds would deprive Debtor of ability to use tax refunds to cover reasonable expenses. Fact that Debtor receives tax refunds once per year does not deprive Debtor of ability to deduct expenses worst incurred on a

monthly basis and does not result in Debtor's Plan lacking feasibility as Debtor's Schedule I overstates Debtor's actual monthly income by including income that Debtor does not receive on a monthly basis. Bankruptcy Code requires that income received other than on a monthly basis be prorated and calculated in determining income on Schedule I. Debtor's actual tax refund for 2016 was best estimate of future tax refunds for use in calculating income on Schedule I.

(5611) *In re Shefa, LLC,* 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Debtor must demonstrate that plan is feasible as condition of confirmation. Feasibility depends on reasonable probability of payment, and depends on factors including adequacy of capital structure, earning power of business, economic conditions, ability of management, probability of continuation of existing management, and any other related matter that impacts prospects of a sufficiently successful operation to allow performance of provisions of plan. Debtor's plan that involved redevelopment of empty former hotel was not feasible where Debtor lacked any capital or income from business operations and lacked any commitment from any funding sources. Debtor had no ability to make monthly payments on secured claims or on County's $1.8 million water and sewer claims that were entitled to treatment as unsecured claims.

(5612) *In re Gomery,* 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Debtor could not demonstrate ability to make payments as required by the plan. Debtor was currently incarcerated for solicitation of murder and had no income at all, yet plan proposed payments of $100 per month. While plan payment was minimal, Debtor failed to present evidence of any ability to make even this small payment.

(5613) *Williams v. Wayne County Treasurer,* Case No. 14-11844 (E.D. Mi. 2014) – Feasibility requires proof that Debtor has necessary resources to make all payments under plan. Debtor's plan lacked feasibility where required payments on secured debts exceeded Debtor's income and Debtor failed in effort to reduce value of property to level where Debtor could sustain debt service.

(5614) *In re Ramirez,* 2014 WL 1466212 (Bankr. S.D. Fl. 2014) – Plan that proposed balloon payment to retire first mortgage on investment property is feasible where Debtor has significant equity in other property and earning capacity of Debtor produces strong incentive to complete plan that crams unprotected mortgage. Permitting Debtor to structure plan to provide affordable payments for 60 months and opportunity to refinance in month 60 using equity in home is consistent with congressional policies of allowing Debtors flexibility in structuring plan.

(5615) *In re Gundrum,* 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Cause exists to grant secured creditor relief from stay where Debtor's chapter 13 plan was facially not feasible. Plan was hopelessly speculative where Debtor repeatedly amended plan to reduce plan payments reflecting insufficient of income, and reliance on large lump sum payment at end of plan where there was no evidence that any lump sum would actually materialize.

(5616) *Mort Ranta v. Gorman,* 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating projected disposable income or plan payment, regardless of whether Debtor is above or below median income. However, Court can take into account SSI to extent offered by Debtor for purposes of determining whether plan is feasible. Section 1325(a)(6) requires only that the Debtor be able to make the payments, without limitation that payments can be made only from disposable income. Debtor is not prohibited from using available money that is excluded from definition of CMI in making plan payments.

(5617) *In re Bodkin*, 2011 WL 6792775 (Bankr. N.D. Ohio 2011) - Failure of Debtors to make direct payments on secured claims was evidence that plan lacked feasibility. Plan was not feasible when Debtors had not made direct payments on secured claims, including mortgage, and house payment was 46% of budget. Debtors had made poor economic decisions prior to filing and proposed to retain all assets, while paying priority debt and little to unsecured creditors. Debtors demonstrated they could not live within budget by falling behind on scheduled debt payments.

(5618) *In re Shelly,* 458 BR 740 (Bankr. N.D. Ohio 2011) – Debtor's plan could not be confirmed where plan was entirely contingent on successful prosecution of pending legal malpractice action. Debtor did not demonstrate likelihood of success on merits or any other information concerning validity or amount of likely recovery.

11.95 Feasibility – Plan Dependent on Sale of Property

(5619) *In re Elkins,* 2016 WL 6892728 (Bankr. E.D. Ky. 2016) – "Cause" for relief form stay is dependent on all facts and circumstances of case. Creditor demonstrated cause where case was Debtor's second case, both filed on eve of foreclosure sale; Chapter 13 plan vaguely referred to a sale of the property but Debtor took no action to follow through, has not retained a broker, or undertaken to market property; plan did not provide express timetable for sale to occur; Debtor did not provide proof that co-owner consented to sale and Debtor had not commenced adversary proceeding under Section 363(h) to sell free and clear of co-owner's interest; property was not Debtor's residence; property was diminishing in value; and Debtor had ample time to find private buyer as foreclosure process had been pending for 7 years plus the many months since filing is first bankruptcy case.

(5620) *In re Milburn,* 2012 WL 5457424 (Bankr. E.D. Ky. 2012) – Plan that proposed to fund payments to creditors by selling property could not be confirmed where plan proposed 48 month period within which to sell property. Only evidence presented to court as to reasonable marketing time was bank's real estate appraiser who testified that the property could most probably sell in 90 to 180 days. Confirmation denied without prejudice to Debtor filing amended plan that provided for 180 days within which to market and sell property.

(5621) *In re Weltlich,* 2012 WL 3782553 (Bankr. N.D. Ohio 2012) – Plan that proposed funding solely from sale of property confirmable where plan contained conditions to ensure sale of property; Debtor had listed the property and was actively showing it; Debtor had reduced the asking price materially to spur sale; and order required that property remained listed at all times. Court's prior conditional stay order would remain in place, which had material financial projections that Debtor so far had met, demonstrating ability to perform the plan. Plan was sincere effort to address financial difficulties, repay debts, and maximize financial resources. Debtor has significant incentive to complete plan as claims bar date passed and many creditors had not filed claims.

(5622) *In re Milano,* 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Feasibility of plan that depends on sale of property requires evidence of amounts

of claims that are secured by property to be sold; state of the market for the property; current sale prospects; existence and maintenance of equity cushion; terms of listing including asking price and marketing plans; and whether the plan contains a default or "drop dead" provision. Debtor's generalized statements of what they believe property could be sold for was not sufficient to meet burden of showing feasibility. Further, profit and loss statement for business indicated that business was operating at a loss even before paying mortgage or salary to Debtors. Business financials showed no significant change over the prior two years and no improvement in business that would allow Debtors to afford significantly higher payment that would be required by plan modification.

11.96 Feasibility – Funding Dependent on Non-Debtor

(5623) *In re Hager,* 2017 WL 5513627 (Bankr. W.D. Mi. 2017) – Debtor's amended plan addressed Court's concerns regarding good faith in connection with confirmation of Debtor's initial plan where Debtor increased income by $300 per month by renting part of residence to ex-husband that helped offset otherwise high housing costs; increased plan length form 36 months to 60 months; and increased dividend to unsecured creditors from $2,000 to $30,000. Plan addressed previous "paltry" dividend. Evidence indicated that Plan was feasible given Debtor had strong desire to retain home; Debtor had good post-petition payment history; and Debtor agreed to default provisions in Order allowing for Dismissal of case if Debtor missed Plan payments. Debtor's ex-husband filed affidavit confirming husband's desire and intent to contribute to Debtor's Plan.

(5624) *In re Hager,* 2017 WL 3889895 (Bankr. W.D. Mi. 2017) – Section 1325(a)(6) requires plan to be feasible, meaning that debtor has ability to make payments under and comply with plan. Prediction is somewhat data-driven and application of common sense, and does not require a guarantee of success, only that preponderance of evidence indicates that debtor will perform as proposed. Debtor's Plan not feasible where Debtor's ability to make plan payments was entirely dependent on Debtor's ex-husband contributing $750 per month. Debtor's divorce from ex-husband was particularly acrimonious and caused Debtor to file Chapter 7 some years earlier and resulted in litigation that extended far beyond Chapter 7 case. Debtor relied on same person who she claimed ruined her financially and who has been convicted of felonies for failure to pay child support. Debtor did not present evidence that ex-husband would continue to provide support t, where Debtor did not present evidence of the duration of ex-husband's support, his reliability in making payments, and Debtor did not call ex-husband as witness to testify that previously "dead beat dad" could not be counted on to save Debtor's financial fortunes. Debtor did not present evidence of current relationship with ex-spouse, such as whether they had reconciled or whether arrangement was temporary convenience and there was no evidence of any legal obligation of ex-husband to make contributions.

(5625) *In re Deutsch,* 2015 WL 1804006 (Bankr. C.D. Cal. 2015) – Debtor's plan could not be converted where ability to make plan payments was entirely dependent on contributions by non-Debtors. Debtor's income, after deduction of expenses, was not sufficient to make plan payments required. Debtor included on Schedule I a contribution from her boyfriend of $700 per month which Debtor would use to make plan payment, and Debtor filed affidavit of boyfriend stating that he would contribute and affidavit of Debtor's mother stating that if boyfriend could not contribute, she would. Affidavit from boyfriend was not convincing as relationship with boyfriend was relatively new and there was no evidence that it would last for entire term of case and there was no history of him providing support. Evidence also indicates that mother lacked financial resources to contribute to Debtor. Plans that are dependent on third parties are not the "fresh start" envisioned by code and instead spread the Debtor's financial burdens onto third parties, the very antithesis of the fresh start.

11.97 Feasibility – Balloon Payments

(5626) *In re Cochran,* 555 BR 892 (Bankr. M.D. Ga. 2016) – Balloon payment at end of term is consistent with Congressional intent to allow Chapter 13 pans to be as flexible as possible while providing certainty to secured creditors that they will receive at least some defined payment each month. Court acknowledged that allowing balloon payments was minority rule but concluded that balloon payments were consistent with both Congressional intent and plain language. Plan was feasible where Debtor testified that he had been assured by local bank that refinance at end of 12 months was easily done although Debtor did not produce term sheet, commitment or any other documents from bank to confirm that tender would, or may be, willing to refinance loan. Debtor proposed to include provision for relief form stay at end of 12 months if balloon not paid, and plan proposed monthly payment at least sufficient to cover accruing interest and value of collateral far exceeded amount owed on loan, leaving creditor adequately protected.

11.98 60 Month Plan Length

(5627) *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 Trustee although Plan had already run more than 60 months and had expired over one year prior to execution of proposed modification.

(5628) *Shovlin v. Klauss,* 2017 WL 2367976 (3d Cir. 2017) – Although Bankruptcy Code prevents confirmation of Plan which proposes to run beyond 5 years, Court has discretion to allow Chapter 13 Debtor to complete Plan payments and received discharge even if final payment is made after conclusion of 60 month period. Section 1328 Requires Court to issue discharge when all Plan payments have been made without any express requirement that payments be made within 5 years of confirmation. Limit on length of Plan is intended as shield for Debtors, not sword for creditors and preventing Debtor from making payment would produce absurd result where Debtor acted in good faith by making final payment promptly and substantially complied with Plan. In determining whether to allow Debtor additional time to complete Plan payments, Court should consider whether Debtor substantially complied with Plan, feasibility and time required to complete Plan payments, whether any creditor would be prejudiced, whether Debtor's conduct is excusable or culpable, and the availability and relative equities of other remedies.

(5629) *In re Lundy,* 2016 WL 6108524 (Bankr. N.D. Ohio 2016) – Strong majority of courts and bankruptcy treatises hold that the 60 month period runs from the date the first payment is due under Section 1326(a)(1). Unless the Court Orders otherwise, Section 1326(a)(1) requires Chapter 13 Debtors to make their first payment, "not later than 30 days after the date of filing of the plan or the order for relief, whichever is earlier,

..." The "earlier" of the order for relief and the filing of a plan will be the order of relief, which takes effect upon the filing of the petition. Measured from the date thirty days after filing, when the first payment was due under Section 1326(a)(1), Debtors' proposed Chapter 13 Plan which set the effective date as the date of confirmation would run more than 70 months, contrary to Section 1322(d)(1) statutory prohibition that the plan may not provide for payments over a period that is longer than 5 years.

(5630) *In re McCarthy,* 554 BR 388 (Bankr. W.D. Tx. 2016) – Where Debtor has excess disposable income but provides for 100% dividend to unsecured creditors, Court cannot force Debtor to increase payments to shorten plan payment term. But can impose condition at confirmation that Debtor will not receive a discharge unless creditors receive 100% and that Debtor is not permitted to modify plan during plan term to reduce dividend below 100%.

(5631) *In re Crawford,* 2016 WL 408924 (Bankr. W.D. Tx. 2016) – Although Section 1325 allows above median Debtor to pay all claims in 60 months even where Debtor has ability to pay claims in full in far shorter time, court can condition confirmation of plan to preclude Debtor's discharge in event plan is later modified to reduce dividend below 100%. Section 105 allows court to impose additional conditions on confirmation of plan to ensure that Debtors receive what Debtors agreed to at confirmation – discharge on payment of 100% dividend – while requiring dividend to remain at 100%.

(5632) *In re Molina,* 2015 WL 8494012 ((W.D. Tx. 2015) – Court has power to add conditions to confirmation order to ensure compliance with Code. Debtors did not have to contribute 100%^ of disposable income if Plan proposes to pay 100% of claims. Court approved insertion of condition that provided that Debtor would not receive discharge unless Plan actually produced 100% to creditors.

(5633) *In re Carr,* Case No. 06-51257 (Bankr. E.D. Mi. 2012) – Motion to Allow Trustee to Disburse Funds Received Post-Expiration denied where funds to be administered were received more than 60 months after plan confirmed. Motion constitutes a *de facto* plan modification that would impermissibly exceed five-year limit in Section 1329(c).

11.99 Expiration or Non-Accrual of Automatic Stay

(5634) *In re Dyer,* Case No. 12-08030 (6th Cir. BAP 2013) – Presence of automatic stay is not condition of confirmation of plan. Chapter 13 plan that otherwise complies with Section 1325 is confirmable even where Debtor failed to move to extend automatic stay in second filed case under Section 362(c)(3). None of the provisions of Section 1325(a) require the presence of the automatic stay as a condition of confirmation.

11.100 Disbursing Agent

(5635) *In re Ayodele,* Case No. 17-5693 (Bankr. E.D.N.C. 2018) – Local Rule requiring mortgage payments to be made through the Chapter 13 Trustee is a valid exercise of courts rule-making power and Trustees commission is entirely reasonable in light of services rendered by Trustee for benefit of Debtor. Although commissions impose added expense on Debtor, Debtor receives several benefits including monitoring of mortgage account status and ability to determine outstanding balance at conclusion of Plan. Trustee system is funded entirely by commissions. Excusing Debtor from compliance with Local Rule would be inappropriate.

(5636) *In re Milner*, Case No. 16-42926 (Bankr. E.D. Mi. 2016) - Presumption is that Trustee will be disbursing agent on claims. Where Debtor is current on payments to secured creditor when case is filed, Debtor will be permitted to retain direct payment arrangement. Debtor's Plan listed secured creditor as paid direct and current. Creditor did not file a claim or an objection to confirmation, but called the Trustee's office to advise that Debtor was three months behind. Court confirmed the plan holding that the creditor's phone call was not sufficient to preserve the issue of any arrearages. Creditor had not filed anything with the court to dispute Debtor's classification of the claim as current. Phone call to the Trustee is not sufficient to protect creditor's position.

(5637) *In re Moore,* Case No. 15-90015 (Bankr. W.D. Mi. 2015) – Court would not confirm plan that proposed for Trustee to pay mortgage arrearage while Debtor pays ongoing mortgage directly. Section 1326(c) creates rebuttable presumption that all disbursements under confirmed plan should be made by Chapter 13 Trustee where Trustee believes that Trustee can more effectively fulfill supervisory duty by having payments made through the Trustee, and absent some convincing reason, either business or otherwise, Trustee is entitled to require payments to be made directly to Trustee. Factors to be considered include (1) the degree of responsibility of the Debtor, as evidenced by his past dealings with creditors; (2) the reasons contributing to the Debtor's need for filing a Chapter 13 petition and plan; (3) any delays that the trustee might make in remitting the monthly payment to the targeted creditor; (4) whether the proposed plan modifies the debt; (5) the sophistication of the target creditor; (6) the ability and incentive of the target creditor to monitor payments; (7) whether the debt is a commercial or consumer debt; (8) the ability of the Debtor to reorganize absent direct payments; (9) whether the payment can be delayed; (10) the number of payments proposed to pay the targeted claim; (11) whether a direct payment under the proposed plan will impair the trustee's ability to perform his standing trustee duties; (12) unique or special circumstances of a particular case; (13) the business acumen of the Debtor; (14) the Debtor's post-filing compliance with statutory and court-imposed duties; (15) the good faith of the Debtor; (16) the plan treatment of each creditor to which a direct payment is proposed to be made; (17) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (18) the ability of the trustee and the court to monitor future direct payments; (19) the potential burden on the trustee; (20) the possible effect upon the trustee's salary or funding of the U.S. Trustee system; and (21) the potential for abuse of the bankruptcy system. Court would require payments through Trustee for mortgage rather than allowing Debtor to pay mortgage direct where Debtor had fallen behind in mortgage payments at least twice prior to commencement of case; Debtor's sole purpose in filing was to bring mortgage current which is the very debt that Debtor wants to pay directly; Debtor did not evidence ability to reorganize through direct payments where Debtor had already defaulted on mortgage twice and if he defaults again or cannot substantiate direct payment history, case would fail; direct payments interfere with Trustee's duty to assist Debtor and to monitor payments and intercede in any payment disputes between Debtor and mortgage company; Debtor's post-petition conduct did not evidence ability to consistently make direct payments where Debtor had missed 2 of 5 payments coming due under the plan as proposed; direct payments would deprive trustee of ability to monitor mortgage payments or to aid in resolving any disputes between Debtor and creditor; and direct payments adversely affect funding of the Chapter 13 system, allowing Debtor to obtain substantial benefits from system without bearing any of the costs of administration. Lender's stated preference for direct

payments is entitled to deference, but standing alone is not sufficient to overcome presumption. Trustee can administer mortgage payments and any alleged delay in making the monthly payments (as the Trustee disburses on the first business day of the month when the mortgage payment is otherwise due on the first of the month) only slightly favors Debtor as Trustee payments will still be received in a timely manner.

C. Objections to Confirmation

11.101 Procedural Requirements

(5638) *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.

(5639) *In re Mickles,* Case No. 09-63670 (Bankr. E.D. Mi. 2010) - Creditor's Objection to confirmation overruled without prejudice where Creditor's Statement of Corporate Ownership was internally inconsistent and Creditor failed to file corrected Statement within time permitted by Court. In one place, the Statement indicated that there are two entities that directly or indirectly own 10% or more of the equity, but also placed an "X" in the box stating that there are no such entities.

(5640) *In re Page,* Case No. 10-53720 (Bankr. E.D. Mi. 2010) - Creditor's Objection to confirmation overruled without prejudice where Creditor's Statement of Corporate Ownership was internally inconsistent and Creditor failed to file corrected Statement within time permitted by Court. In one place, the Statement indicated that there are two entities that directly or indirectly own 10% or more of the equity, but also placed an "X" in the box stating that there are no such entities.

11.102 Standing to Object

(5641) *Belser v. Nationstar Mortgage, LLC,* Case No. 14-065 (1st Cir. BAP 2015) – Any party in interest may object to confirmation of plan. Party in interest is generally defined as one whose pecuniary interests are directly affected by bankruptcy proceedings. A creditor is generally considered a party in interest as an entity that holds a claim against the Debtor, defined as a right to payment. In general, where creditor fails to timely file proof of claim, creditor lacks standing to object to confirmation. However, where creditor filed objection before expiration of claims bar date and before disallowance of any potential claim, creditor had standing to object to confirmation. Court did not have to reach issue of whether creditor could lose right to object to confirmation based on disallowance of claim where, at time objection filed, creditor was indisputably a creditor.

(5642) *Findling v. Rapoport,* Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Party in interest for purposes of standing to object is one with actual pecuniary interest in outcome of case. Where creditor's proof of claim had been disallowed for failure to produce evidence to support valid claim, creditor no longer had actual pecuniary interest in outcome of case.

(5643) *State Bank of Florence v. Miller,* 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Bank lacked standing to object to confirmation where Bank purchased property at foreclosure sale by credit bid for the entire amount of bid. Bank's debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to Debtor.

11.103 Deadline for Filing

(5644) *In re DuPuis,* Case No. 07-64523 (Bankr. E.D. Mi. 2008) - Objection to confirmation denied as untimely where Objection not filed until 7 months after confirmation of plan.

(5645) *In re Ramsey,* 2009 WL 3245303 (Bankr. M.D. Tn. 2009) – Creditor objected to Plan claiming that terms of Plan constituted improper modification of mortgage creditor's rights in violation of Section 1322(b)(2). Plan terms required Creditor to (1) apply the payments received from the trustee on pre-confirmation arrearages (defined as all sums included in the allowed proof of claim plus any post-petition pre- confirmation payments due) only to such arrearages; (2) deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges; (3) provide at least 60 days written notice to the trustee, the Debtors and the attorney for the Debtors of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages or any change in the property taxes and/or the property insurance premiums and the effective date of any such adjustment; and (4) notify the trustee, the Debtors and attorney for the Debtors, in writing, of any protective advances or other charges incurred by the claimholder, pursuant to the mortgage agreement, within 60 days of making such protective advance or other charges. The Plan further required the Trustee to (1) make monthly ongoing mortgage payments commencing with the later of the month of confirmation or the month in which a proof of claim itemizing the arrears is filed by such claimholder; (2) file a motion and notice consistent with LBR 9013-1 no later than 60 days prior to the anticipated last payment under the plan, requesting the court find that the trustee has complied with the plan to maintain mortgage payments and to cure the pre-confirmation default and providing that if the claimholder asserts that the mortgage obligation is not contractually current at the time of the trustee's motion, then the claimholder shall, within 30 days of receipt of the motion, file a Statement of Outstanding Obligations, clearly itemizing all outstanding obligations it contends have not been satisfied as of the date of the Statement failing which the trustee shall submit an order declaring the mortgage current and all arrearages cured as of the date of the trustee's motion: and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325.

11.104 Failure to Raise Objection

(5646) *In re Pfetzer,* 2018 WL 1448742 (Bankr. E.D. Ky. 2018) – Section 1307 allows Court to dismiss Chapter 13 case if Debtor filed petition in bad faith. Creditor who does not timely object to confirmation of Plan under Section 1325(a)(7) cannot later bring Motion to Dismiss for lack of good faith. Creditor who believes that Debtor lacks good faith must object to confirmation of Plan. Although Plan had not yet been confirmed, expiration of deadline to object to confirmation sufficient to bar later filing of Motion to Dismiss.

(5647) *In re Milner*, Case No. 16-42926 (Bankr. E.D. Mi. 2016) - Presumption is that Trustee will be disbursing agent on claims. Where Debtor is current on payments to secured creditor when case is filed, Debtor will be permitted to retain direct payment arrangement. Debtor's Plan listed secured creditor as paid direct and current. Creditor did not file a claim or an objection to confirmation, but called the Trustee's office to advise that Debtor was three months behind. Court confirmed the plan holding that the creditor's phone call was not sufficient to preserve the issue of any arrearages. Creditor had not filed anything with the court to dispute Debtor's classification of the claim as current. Phone call to the Trustee is not sufficient to protect creditor's position.

(5648) *In re Rosa,* 2013 WL 3380166 (Bankr. D. Hawaii 2013) – Surrender does not transfer ownership of the surrendered property. Rather, "surrender" means only that the Debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral. Surrender alone does not cut off the Debtor's liability for association fees. However, provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded was valid provision where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that the plan may provide for the vesting of property of the estate, on confirmation of the plan, in the Debtor or any other entity. Secured creditor's failure to object constitutes "acceptance" of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.

(5649) *In re McDonald,* 437 BR 278 (Bankr. S.D. Ohio 2010) – Trustee's failure to object to confirmation under Section 1325(a)(9) and Section 1308 based on Debtors' failure to file tax returns due for prior 4 years coupled with Trustee's failure to produce evidence of non-compliance left Court with no basis to deny confirmation on that issue. Trustee failed to meet initial burden of proof of non-compliance.

11.105 Failure to Prosecute

(5650) *Scotiabank de Puerto Rico v. Lorenzo,* Case no. 15-9010 (1st Cir. BAP 2016) – Creditor who files objections but fails to appear at the confirmation hearing waives objections to confirmation.

11.106 Burden of Proof

(5651) *In re McDonald,* 437 BR 278 (Bankr. S.D. Ohio 2010) – The objecting party has the initial burden to produce evidence in support of an objection. The Debtors have the ultimate burden of proof to show the requirements of 11 U.S.C. Section 1325 have been met.

(5652) *In re Predragovic,* 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Debtor bears burden of Proof on objection to confirmation.

D. Effect of Confirmation

11.107 Generally

(5653) *Owens v. Coffey*, 2018 WL 1162535 (Bankr. W.D. Ky. 2018) – Res judicata, also known as claim preclusion, bars party from relitigating previously adjudicated cause of action. Collateral estoppel, also known as issue preclusion, bars parties from relitigating any issue actually litigated and finally decided in prior action. Confirmation of Chapter 13 Plan is not res judicata or collateral estoppel as to discharge ability of claim. Plan's treatment of claim as general unsecured dischargeable claim did not specifically identify discharge ability of claim as issue to be determined as part of confirmation of Plan and creditor was not put on notice that Plan would terminate right to pursue nondischargeability action. Creditor timely filed objection to discharge ability of debt through proper mechanism and properly presented issue for determination. Had Plan included provision calling for nondischargeable debt to be discharged, Plan should have raised objection and Plan could not have been confirmed.

(5654) *Shoemake v. SN Servicing Corp.,* 2018 WL 3387361 (M.D. Tn. 2018) – Creditor does not violate terms of confirmed Plan by attempting to collect long-term debt more than one year after completion of Chapter 13 case where Debtors defaulted on loan post discharge. Long-term debt is excepted from discharge and creditor's actions were not inconsistent with terms of confirmed Plan.

(5655) *In re Lane,* 2018 WL 718403 (Bankr. W.D. Ky. 2018) – Confirmed plan is binding on all parties and is res judicata on all issues raised or that could have been raised in objection to confirmation, including good faith, feasibility, asset valuation and interest rate. Creditor's subsequent Motion to Dismiss that raised same issues as were raised or could have been raised pre-confirmation denied.

(5656) *Title Max v. Northington,* Case No. 16-172 (Bankr. M.D. Ga. 2016), *reversed,* 876 F.3d 1302 (11th Cir. 2017), *rehearing en banc denied* (February 14, 2018) – Confirmation of Plan is generally binding on all parties including creditors who do not take action to oppose confirmation. Creditor (a pawn broker) not precluded from seeking relief form stay even where confirmed Plan provided for payment of the pawn transaction in full over life of case where Creditor did not "sleep on its rights" and allow Plan to be confirmed. Instead, Creditor prior to confirmation of Plan filed Motion for Relief From Stay and when that Motion was denied, timely appealed to the District Court and then to Circuit Court of Appeals. Creditor at all times maintained the pawned transaction was not subject to redemption over life of case and that property vested in Creditor absolutely at end of redemption under Section 198. Although Creditor did not file "Objection to Confirmation", issues raised and argued in connection with Stay Relief were same issues and based on same facts as "Objection to Confirmation" would have been. There was no evidence that Creditor did not timely and diligently pursue remedies pre-confirmation or that Creditor waived rights or objections by either consenting to confirmation or by passively letting confirmation occur.

(5657) *Dempsey v. Florida Department of Revenue*, 2017 WL 2656154 (E.D. Tn. 2017) – State precluded from attempting to recover via wage garnishment pre-petition child support arrearage where confirmed Chapter 13 Plan provided for payment of arrearages through Plan. However, although Plan specified that the confirmation order "require[d] the Department to discontinue all collection activity outside the plan once the plan is confirmed, ... the plan was not sufficiently clear and definite in this requirement to provide a basis for a finding of contempt" where the law at the time of the DOR action was unclear and undeveloped, and Eleventh Circuit had not issue ruling in *Gonzales* until two months after bankruptcy court denied motion for contempt. The bankruptcy court did, however, order the Department to: (1) terminate its income withholding order; (2) refund to Debtor any amounts received and not yet disbursed; and (3) amend its proof of claim to reduce its amount by all sums received from Debtor's employer after confirmation and not refunded.

(5658) *Mountain Glacier, LLC v. Nestlé Waters North America, Inc.*, 2017 WL 149943 (Bankr. M.D. Tn. 2017) - Confirmation of plan by Bankruptcy Court is given same effect as judgment by District Court and res judicata principles bar relitigation of any issue raised or that could have been raised in confirmation proceedings. Confirmed Plan may provide for retention and enforcement by Debtor of any claim or interest, thereby circumventing res judicata effect of confirmation, but only if there is a specific articulation of reservation as to specifically described claims.

(5659) *State of Florida Department of Revenue v. Gonzalez,* Case No. 15-14804 (11th Cir. 2016) - Exception to automatic stay under section 362(b)(2)(C) for withholding for payment of a domestic support obligation does not trump binding effect of confirmed chapter 13 plan per section 1327(a). Chapter 13 plan proposed to pay arrearage in full through Trustee with ongoing payments made directly by Debtor. DOR filed claim for $2400 in arrearages and plan was confirmed. Accordingly, creditor was prohibited from intercepting Debtor's post-confirmation expense reimbursement payment for application to domestic support obligation. Creditor's post-confirmation collection activity constituted contempt of court for violation of confirmed plan warranting imposition of sanctions including attorney fees.

(5660) *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.

(5661) *In re Jackson,* Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Chapter 13 Plan binds all parties including Debtors. Provision of Plan dealing with claims at variance with plan provided that claim would be allowed as filed. Although Chapter 13 plan proposed to cram IRS claim and to pay any remaining balance as unsecured, IRS filed Proof of Claim with secured, priority and unsecured components and claim must be allowed and treated accordingly. IRS failure to object to proposed cram down did not alter IRS right to rely on provision that claims are treated as filed even if at variance with plan.

(5662) *In re Best,* 2014 WL 3700698 (Bankr. N.D. Ohio 2014) – Creditor precluded from seeking stay relief where plan has been confirmed treating creditor's claim and creditor did not object to confirmation. Prior to petition, creditor foreclosed on mortgage and property was sold at sheriff sale. Debtor then filed Chapter 13 and filed plan that proposed to cure defaults and reinstate mortgage over 60 month term of plan. Plan was confirmed by the Court without objection. Creditor, post-confirmation, sought stay relief for cause based on pre-petition foreclosure sale. Court denied motion. Creditor is bound by confirmed plan including provision to cure and maintain ongoing mortgage payments. While creditor may have had valid objections to confirmation of plan based on pre-petition foreclosure sale as Debtor is not permitted to cure a default after the sale has occurred, creditor is bound by confirmed plan where creditor failed to object.

(5663) *In re Green,* 2014 WL 1089843 (Bankr. N.D. Ohio 2014) – 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.

(5664) *Hope v. Acorn Financial, Inc.,* 2013 WL 5366291 (11th Cir. 2013) – Chapter 13 Trustee who was aware of defect in recorded lien but recommended confirmation of plan that paid lien as secured claim was precluded from later seeking to contest validity of lien.

(5665) *U.S. v. Monahan,* Case No. 12-084 (1st Cir. BAP 2013) – Chapter 13 Plan that provided for payment of IRS priority non-dischargeable claim but did not propose to pay interest did not discharge interest portion of tax debt. Chapter 13 plan can treat only allowed claims and per Section 502 post-petition interest is not allowed claim on unsecured debt. *Espinosa* did not compel different result where plan was silent on interest, such that IRS did not have notice that plan would discharge unpaid interest at completion of case.

(5666) *McIntosh v. LaBarge,* Case No. 12-6070 (8th Cir. BAP 2013) – Court must either confirm or deny confirmation of plan as a whole. Court cannot pick and choose those provisions that will be confirmed and excise other provisions from effect of confirmation order.

(5667) *In re Hall,* 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Confirmed plan is binding on Debtor and creditors. Plan proposed to bifurcate car claim, and to pay secured portion in full with interest. Plan also proposed to pay portion of any allowed claim that exceeds the value indicated will be treated as an unsecured claim at 100%. Debtor could not later attempt to satisfy car claim at less than full payment. First, plan as confirmed required 100% dividend to unsecured portion of secured claim. Second, Section 1325(a)(5) allows lien to be stripped only if (a) creditor received full payment of contract balance, or (b) Debtor receives discharge. In "Chapter 20" Debtor as not entitled to discharge. Therefore, Debtor could not require creditor to release lien unless creditor received full contract payment.

(5668) *In re Tirone,* 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor's objection to proof of claim based on alleged conflict with confirmed

plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by Debtor's automobile into a secured claim in amount of $6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that he collateral value was $10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, Debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.

(5669) *In re Wright,* 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer's failure to provide notice of payment changes to trustee, Debtor and Debtor's attorney, and failure to respond to Debtor's request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.

(5670) *Ginn v. CitiMortgage, Inc.,* 365 BR 84 (Bankr. D.S.C. 2012) – Preclusive effect of confirmation of Chapter 13 Plan precluded Debtor from contesting assignee's status as holder of mortgage. Chapter 13 plan expressly provided that purported mortgage assignee would be paid in the Chapter 13 case, affirmed continued applicability of pre-petition mortgage agreement, addressed acknowledged default, and provided for continued payment of contractual mortgage payments.

(5671) *In re Smith,* 2012 WL 1122975 (Bankr. N.D. Ohio 2012) – Debtor's Motion to Disallow Pre-Petition Mortgage Arrearage and Deem Mortgage Current denied. Debtor's Motion alleged that lender failed to file proof of claim and, therefore, arrearage claim should be disallowed and mortgage deemed current. Confirmed Plan estimated arrearage at $4,000 and contained provision that a proof of claim filed at variance would control the amount of the obligation. Implication of plan is that, in absence of claim, upon confirmation of plan the amount of the arrearage stated in the plan would control.

(5672) *FNB Bank v. Carlton,* 2011 WL 3799885 (Bankr. N.D. Al. 2011) - Confirmed plan trumps expiration of automatic stay under section 362(c)(3)(B). Although automatic stay expired by operation of law 30 days after commencement of case, mortgage was properly treated in chapter 13 plan, mortgage company allowed plan to be confirmed without objection, and mortgage company received payments pursuant to confirmed chapter 13 plan. Pursuant to section 1327, confirmation of plan was binding on bank and bank was limited to remedies set forth in confirmed plan. The termination of the automatic stay, coupled with bank's conduct in accepting plan payments and filing claims, and the express language of section 1327, precluded the bank from taking actions inconsistent with the terms of Debtors chapter 13 plan. Lender's pursuit of foreclosure action post-confirmation was in direct contravention of confirmed plan. Bank was guilty of contempt for willful violation of section 1327 entitling Debtor to compensation for harm suffered as consequence of banks willful failure to abide by confirmation order.

(5673) *Haney v. Educational Credit Management corp.,* 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have an provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding.

(5674) *In re Smoak,* 2011 WL 4502596 (Bankr. S.D. Ohio 2011) – Terms of confirmed plan are binding on all creditors provided in the plan. If creditor believes that plan terms are ambiguous or otherwise objectionable, creditor must raise issue before confirmation. Creditor failed to object to Plan that proposed to reduce principal balance on residential mortgage, reduce interest rate, and provide for 10 year amortization with 5 year balloon, could not later object to validity of terms.

(5675) *Wahrman v. Bajas,* 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot raise "bad faith" in obtaining confirmation of plan where alleged "bad faith" is based on pre-confirmation conduct.

(5676) *In re Carouthers*, 2011 WL 2181383 (Bankr. W.D. Mi. 2011) – Plan that confirmed claim of Credit Union as unsecured was binding on creditor, notwithstanding that creditor held a security interest in Debtors' vehicle. Although Debtors' plan did not specifically name Credit Union as unsecured creditor, creditor was listed in Schedule F and plan specifically identified all creditors treated as secured, leaving Credit Union treated as unsecured creditor by implication. Credit Union failed to object to plan and plan was confirmed. Credit Union could not obtain relief from stay to assert security interest post-confirmation.

(5677) *United Student Aid Fund v. Espinosa,* 130 S. Ct. 1367 (2010) – Order Confirming Chapter 13 Plan is binding on all creditors and parties with notice. Order is not void for purposes of Rule 60 merely because Plan as confirmed contained provisions that are otherwise prohibited by Bankruptcy Code or other applicable law. Due process requires 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." Fact that actual notice was provided through service of plan rather than service of adversary proceeding was procedural defect that did not alter validity of notice itself. Given the Code's clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error. But the order remains enforceable and binding where the creditor had notice of the error and failed to object or timely appeal. Bankruptcy Court has independent duty, even absent an objection by a party in interest, to insure that the plan complies with the requirements of Section 1325 before confirming the plan. However, Court's confirmation of a plan that does not comply with Section 1325 does not prevent the plan as confirmed from being binding on all parties with notice, even where plan itself clearly violates some statutory provision.

(5678) *U.S. v. De Kellis,* 2010 WL 3521916 (E.D. Ca. 2010) – *Espinosa* has no effect on dischargeability of student loan debt in Chapter 7. Although Debtor filed Chapter 7 at a time when private student loans were dischargeable and scheduled those loans with proper notice, entry of Chapter 7 discharge did not operate as finding of dischargeable nature of student loans. Unlike *Espinosa*, which involved a plan, a confirmation hearing, and a confirmation order, Debtor's Chapter 7 discharge did not preclude collection of non- dischargeable

student loans.

(5679) *In re Armstrong,* 434 BR 120 (Bankr. S.D.N.Y. 2010) – Mortgage creditor's unsecured proof of claim for entire mortgage balance not affected by confirmation of Plan. Prior to commencement of case, lender foreclosed mortgage, but there were no bids at the scheduled foreclosure sale. Debtor's Plan stated that Debtor intended to surrender the property but did not object to proof of claim. After creditor had been paid in full and case discharged, Debtor brought action to recover payments from creditor to the extent of the value of the property "surrendered". Court concluded that Debtor failed to object to proof of claim or to take any action until after case had been concluded, and that plan's statement that Debtor "intended to surrender" the property was insufficient notice to the mortgage company that the property was actually surrendered and neither divested Debtor of title to the property nor cut off the mortgage company's right to a deficiency judgment. "*Espinosa* is distinguishable because that case did not address the questions of a vague and ambiguous plan, or dueling characterizations of a debt as secured or unsecured. Further, Rule 60(b) is not at issue in this case. Indeed, the Court follows *Espinosa* because it holds the Debtors to their plan--the plan provides for payment of allowed unsecured claims, Trustco had an allowed unsecured claim because the Debtors did not object to the proof of claim, and the surrender provision is vague and was never consummated."

(5680) *In re Wright,* 2010 WL 3522231 (Bankr. S.D. In. 2010) – Debtor's plan proposed student loan discharge by declaration. Creditor did not object to confirmation and Trustee objected on different grounds but did not assert this issue. After confirmation, Supreme Court issued *Espinosa*, and Trustee filed Motion to Set Aside Confirmation Order as result of "mistake". Court denied Motion as Trustee and creditors had full and proper notice of the offending provision and failed to object. Failure to object when the grounds are known or readily discernible is not a "mistake" for purposes of setting aside confirmation order.

(5681) *In re Westerfield,* 403 BR 545 (Bankr. E.D. Tn. 2009) – Debtor's Chapter 13 plan, upon confirmation, becomes binding on all creditors and parties named or treated in the plan. Debtor's Chapter 13 plan would not alter status of ex-wife's Domestic Support Obligation claim from priority to unsecured where plan did not expressly state that confirmation would work such a change in status. Dissolution of Marriage decree required Debtor to hold ex-wife harmless from the secured claims on the marital homestead. Debtor could not avoid that obligation by proposing a plan to surrender the home. Although plan clearly contemplated that Debtor would not make further payments on the house, that did not constitute "clear notice" that Debtor was attempting to avoid domestic support obligation and was not sufficient to alter status of DSO claim.

(5682) *In re McLemore*, 426 B.R. 728 (Bankr. S.D. Ohio 2010) - Creditor, a tax certificate purchaser entitled to 18% interest by statute, was bound by res judicata effect of Debtor's confirmed Chapter 13 Plan which called for Till interest in its claims. Chapter 13 Debtor's confirmed plan was binding on tax claims purchaser, notwithstanding that this treatment allegedly conflicted with provision of the Bankruptcy Code dealing with tax claims. Tax claims purchaser, to extent that it believed it was protected from modification of interest rate, should have objected to plan at confirmation hearing.

(5683) *Blevins v. National City Bank,* Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon Debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, Debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured.

(5684) *In re Woods,* 406 BR 293 (Bankr. N.D. Ohio 2009) – Provision in Chapter 13 Plan that real property would be surrendered in full satisfaction did not prevent secured creditor from filing unsecured deficiency claim. Creditor filed Proof of Claim before plan was confirmed, providing notice to Debtor that creditor contested treatment in plan and that creditor would expect that any objection to the deficiency claim would be resolved through the claim resolution process.

11.108 Effective Date of Plan

(5685) *In re Humes,* Case No. 11-39684 (Bankr. D. Colo. 2018) – Plan duration commences with first payment due pursuant to Section 1326. To defer start of plan term to confirmations violates Section 1325(b) and results in plans running longer than statutory maximum 60 months.

(5686) *In re Dorsett,* Case No. 16-40837 (Bankr. E.D. Mi. 2017) – *Lanning* and other provisions of Code require effective date of plan to be date of confirmation. Plan that proposed to set effective date as date on which first payment came due could not be confirmed.

(5687) *In re Lundy,* 2016 WL 6108524 (Bankr. N.D. Ohio 2016) – Strong majority of courts and bankruptcy treatises hold that the 60 month period runs from the date the first payment is due under Section 1326(a)(1). Unless the Court Orders otherwise, Section 1326(a)(1) requires Chapter 13 Debtors to make their first payment, "not later than 30 days after the date of filing of the plan or the order for relief, whichever is earlier, ..." The "earlier" of the order for relief and the filing of a plan will be the order of relief, which takes effect upon the filing of the petition. Measured from the date thirty days after filing, when the first payment was due under Section 1326(a)(1), Debtors' proposed Chapter 13 Plan which set the effective date as the date of confirmation would run more than 70 months, contrary to Section 1322(d)(1) statutory prohibition that the plan may not provide for payments over a period that is longer than 5 years.

11.109 Parties Bound

(5688) *In re Shank,* Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Res Judicata prevents creditor from relitigating confirmation of Chapter 13 Plan. Res judicata applies when creditor has had adequate notice and was afforded the opportunity to litigate confidence of Plan or order; issue in second action is identical to issues adjudicated as part of confirmation process; confirmation order was entered by Court of competent jurisdiction; and confirmation order is final adjudication on merits of proposed Plan. Once a Plan is confirmed, even a Plan improperly modifies mortgage in violation of Section 1322 (b) (2) or otherwise contradicts code, provisions of confirmed Plan buying Debtor and creditor. Debtors Chapter 13 Plan provided for full satisfaction of mortgage by paying specified amount with fixed interest rate. Creditor neither filed an objection to confirmation or filed a Proof of Claim. At completion of Plan, Debtor entitled to order deeming mortgage satisfied even if principal balance of mortgage stated in Plan and interest rate stated in Plan very from actual amounts due under mortgage.

(5689) *Markley v. Department of Treasury, Internal Revenue Service,* 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Rule 5003(e) requires service on governmental agency at specified address. Notice mailed to IRS at address other than address required in Rule 5003(e) is ineffective to constitute "notice" of proceeding.

(5690) *In re Rice,* 2016 WL 4574301 (Bankr. E.D. Mi. 2016) – County Property Tax collector who acquires statutory assignment of unpaid taxes from municipality after confirmation of Plan cannot add 4% statutory administrative fee to case. Plan proposed to pay taxes in full. At time case filed and at time of confirmation, taxes were owed to municipality and were not transferred to County until after confirmation of plan. County as transferee takes claim in status that transferor had as of transfer date. County is bound by terms of confirmed plan which did not contemplate later assessment of administrative fee. Section 511 requires rate of interest to be fixed as of month of confirmation of plan and does not allow for any additional interest or fees to be added to outstanding amount. When plan confirmed in December, 2013, applicable interest rate was 12% and there was no administrative fee charged or chargeable.

(5691) *In re Chapter 13 Plan Administration,* 2016 WL _____, 2016 Bankr. LEXIS 1938a (Bankr. S.D. Tx. 2016) – Confirmed Plan binds Debtor, creditors and the Trustee. Trustee has no authority to disregard provisions of confirmed plan. Plan required that Trustee either increase or decrease plan payment based on post-petition changes in Debtor's mortgage payment. Trustee believed that increasing payment called into question feasibility of plan while decreasing payment left Debtor remitting less than all disposable income. Court held that Trustee improperly ignored directives of Plan. Court Ordered UST to conduct complete review of Chapter 13 Trustee's case administration and competency.

(5692) *Fadel v. DCB United, LLC,* Case no. 12-1061 (9th Cir. BAP 2013) – Confirmation Order is binding on creditors of Debtor, defined as any entity that has a claim against the Debtor that arose at the time of or before the order for relief. Post-petition purchaser of property at foreclosure sale was not creditor as purchaser did not have any claim against Debtor as of commencement of case. Purchaser of property first acquired interest after commencement of case. Purchaser's objection to confirmation does not convert purchaser into pre-petition creditor for purposes of Section 1327.

11.110 Distribution of Payments

(5693) *In re Jackson,* Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Chapter 13 Plan binds all parties including Debtors. Provision of Plan dealing with claims at variance with plan provided that claim would be allowed as filed. Although Chapter 13 plan proposed to cram IRS claim and to pay any remaining balance as unsecured, IRS filed Proof of Claim with secured, priority and unsecured components and claim must be allowed and treated accordingly. IRS failure to object to proposed cram down did not alter IRS right to rely on provision that claims are treated as filed even if at variance with plan.

(5694) *In re Pajian,* 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Distributions under confirmed plans may be made only on "allowed" claims. Allowed claim under Section 502 is one for which a proof of claim has been filed. Creditor who does not file claim not entitled to payment under plan.

(5695) *In re Marcola,* Case No. 07-23438 (Bankr. E.D. Mi. 2011) – Generally speaking, upon dismissal of Chapter 13 case, funds held by Chapter 13 Trustee are returned to the Debtor. If administrative claims exist, such as fees for Debtor's counsel, those expenses are paid and any remaining funds are paid to the Debtors. However, where obligation exists to Internal Revenue Service based on Debtor's intentional diversion of funds, exceptional circumstances exist to support exception to rule. Funds on hand ordered to be paid to IRS without prejudice to Debtor's counsel seeking to collect fees directly from Debtors after dismissal.

11.111 Vesting of Property of Estate

(5696) *In re Haddad,* 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Section 1306 sweeps into Chapter 13 estate all assets that Debtor acquires post-petition. Claim that first arose when Debtor had automobile accident post-petition became property of estate by reason of the accident itself. Revesting provision of Section 1327 does not remove assets from property of estate where Debtor did not disclose or schedule claim when obtaining confirmation of plan. Chapter 13 Debtor cannot fail to disclose assets prior to confirmation and then be rewarded by having undisclosed property "vest" in Debtor free of Estate.

(5697) *In re Watt,* 2014 WL 5304703 (Bankr. D. Or. 2014) – Section 1322(b)(9) allows plan to vest title in property in third party upon confirmation. Plan that proposed to vest title to condominium in secured lender confirmable under Section 1322(b)(9) over objection of creditor. Creditor is not required to accept the proposed treatment as long as that treatment complies with Code, and Section 1322 expressly allows vesting in Debtor or any third party. Plan also specifically stated that vesting did not alter validity, priority or extent of liens allowing creditor to foreclose post-confirmation.

(5698) *In re Hargis,* 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Property that revests in Debtor at confirmation is property that existed as of date of petition. Property that Debtor acquires post-petition such as life insurance proceeds and proceeds of inherited 401-k are property of estate that do not revest and remain property of estate.

(5699) *In re Robinson,* Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Upon confirmation of plan, property of the estate re-vests in the Debtor unless the plan provides otherwise. Automatic stay under section 362(c)(3), if not extended, terminates as to the Debtor and as to property of the Debtor, but not as to property of the estate. Therefore, confirmed plan where stay expired did not protect automobile from repossession after plan confirmed and automobile re-vested in Debtor.

11.112 Surrender of Collateral Upon Confirmation

(5700) *In re Pyburn,* 23014 WL ___ (Bankr. N.D.W. Va. 2014) – Creditor did not violate stay by bringing in rem action to reform mortgage signed by Debtor husband but not Debtor wife, where creditor had obtained relief from stay as to property in question, trustee had abandoned any

interest in property, Debtors surrendered any interest in property as part of confirmed Chapter 13 Plan, and creditor affirmatively stated that creditor did not seek payment from Debtor husband or Debtor wife and sought only to foreclose mortgage.

(5701) *Williams v. Federal National Mortgage Ass'n,* 2013 WL 5445883 (E.D. MI. 2013) – Debtor's Plan as modified provided for surrender of property. Debtor could not maintain post-confirmation action against lender based on alleged breach of agreement for loan modification. Surrender obligated Debtor to surrender title to lender and could not thereafter allege that Debtor retained any interest in the property.

(5702) *In re Rosa,* 2013 WL 3380166 (Bankr. D. Hawaii 2013) – Surrender does not transfer ownership of the surrendered property. Rather, "surrender" means only that the Debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral. Surrender alone does not cut off the Debtor's liability for association fees. However, provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded was valid provision where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that the plan may provide for the vesting of property of the estate, on confirmation of the plan, in the Debtor or any other entity. Secured creditor's failure to object constitutes "acceptance" of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.

(5703) *In re Waltower,* 2012 WL 4758043 (Bankr. S.D. Ga. 2012) – Surrender of property in confirmed chapter 13 plan terminates automatic stay as to property. However, surrender does not convey title. Lender to whom property was surrendered had not foreclosed or taken title and, therefore, had no duty to maintain the property. Debtor's failure to maintain property post-confirmation resulted in Debtor being liable for damages to adjoining property owners for nuisance resulting from neglect and decay of property.

(5704) *Arsenault v. JP Morgan Chase Bank*, 456 BR 627 (Bankr. S.D. Ga. 2011) – Lender did not violate Automatic Stay or Section 1327 by failing to take action to recover possession of property that plan surrendered. Lender has no obligation to accept surrender, foreclosure or transfer of title. While Code allows Debtor to surrender, it does not impose on lender a reciprocal duty to assume ownership or take possession of the property and does not relieve Debtor of ongoing burdens of ownership.

(5705) *Maple Forest Condominium Association v. Spencer,* 2010 WL 3909985 (Bankr. E.D. Mi. 2010), *reversed in part,* Case No. 1014413 (E.D. Mi. 2011) – Section 1325(a)(5) permits Debtor to treat secured debt by "surrender" of collateral. "Surrender" entitles the secured creditor to enforce all rights in collateral including a right of possession. Surrender, without more, does not operate as transfer of title and does not vest title in secured creditor and does not extinguish the claims of the secured creditor relating to the collateral.

11.113 Application of Payments – Section 524(i)

(5706) *Pompa v. Wells Fargo Home Mortgage, Inc.,* 2012 WL 2571156 (Bankr. S.D. Tx. 2012) – Under Section 524(i), creditor is required to credit payments as directed in the plan. Failure to properly credit payments constitutes violation of discharge injunction and creates remedy as to debts that are long term obligations that are not discharged under Section 1328. Deeming misapplication of plan payments a violation of discharge injunction does not impermissibly modify home mortgage lender's rights in violation of Section 1322, but merely enforces plan provisions and ensures that completion of plan actually results in fresh start.

11.114 Modification of Secured Claims

(5707) *In re Lee,* 2018 WL 2138774 (Bankr. N.D. Ohio 2018) - Neither Code nor Rules address whether creditor can amend claim filed on its behalf by Debtor. Courts have discretion to allow creditor to amend claim filed by Debtor on creditors by half to give creditor who originally opted to remain outside bankruptcy process flexibility to mitigate unfairness of binding creditor to claim filed by Debtor. In determining whether to allow creditor to file claim, Court will consider timeliness or lack of timeliness of amended claim. Creditor's amended claim disallowed where creditor waited 14 months after Plan confirmation. The fact that confirmed Plan coupled with Debtor's proof of claim would substantially reduce actual prepetition arrearage amount owed to creditor and arguably modify creditors rights did not permit creditor to file amended claim. Creditor had full notice of commencement of case and was served with Chapter 13 Plan and provided opportunity to object to Plan but did not do so. Confirmed Chapter 13 Plan is binding and enforceable on any party that notice of terms of Plan. Creditor not permitted to "trump" terms of confirmed Plan by filing untimely proof of claim after confirmation of Plan.

(5708) *In re Shank,* Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Res Judicata prevents creditor from relitigating confirmation of Chapter 13 Plan. Res judicata applies when creditor has had adequate notice and was afforded the opportunity to litigate confidence of Plan or order; issue in second action is identical to issues adjudicated as part of confirmation process; confirmation order was entered by Court of competent jurisdiction; and confirmation order is final adjudication on merits of proposed Plan. Once a Plan is confirmed, even a Plan improperly modifies mortgage in violation of Section 1322 (b) (2) or otherwise contradicts code, provisions of confirmed Plan buying Debtor and creditor. Debtors Chapter 13 Plan provided for full satisfaction of mortgage by paying specified amount with fixed interest rate. Creditor neither filed an objection to confirmation or filed a Proof of Claim. At completion of Plan, Debtor entitled to order deeming mortgage satisfied even if principal balance of mortgage stated in Plan and interest rate stated in Plan very from actual amounts due under mortgage.

(5709) *In re Strzelecki,* 509 BR 671 (Bankr. W.D. Ark. 2014) – Secured creditor whose lien is crammed down in confirmed plan entitled to insurance proceeds up to full amount of debt when car destroyed post-confirmation. Section 1325(a)(5)(B) provides that secured claims retain liens until earlier of full payment under applicable non-bankruptcy law or the entry of a discharge. Creditor entitled to payment of proceeds to full extent of debt even if amount exceeds "crammed down" balance owed under plan.

(5710) *In re Slade-Lanier,* 2014 WL 2565919 (Bankr. N.D. Ohio 2014) – Tax certificate holder bound by terms of plan that proposed to pay a portion of the property tax claim with the unpaid portion to be treated as unsecured claim. Tax certificate holder had notice of the plan and the treatment of the claim but failed to object to proposed treatment. Court was not determining amount of tax claim, which would violate Section 505(a)(2)(C), but was only determining the treatment of the claim consistent with the terms of the confirmed plan.

(5711) *In re Ange,* 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Section 1322(b)(2) prevents modification of security interest that is secured solely by Debtor's principal residence. Security interest is a "lien created by an agreement". Lien arising by statute as a result of unpaid property taxes results in creditor holding secured claim but lien is not "security interest". Debtor can modify method of application of payments on property tax claim without violating Section 1322(b)(2).

11.115 Discharge or Release of Secured Claims

(5712) *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.

(5713) *In re James,* 2014 WL 1614466 (Bankr. W.D. Ark. 2014) – Secured creditor entitled to payment of insurance proceeds up to full amount of debt where plan "crammed" secured claim and plan was confirmed before vehicle was damaged. While plan valued vehicle at amount lower than total debt and amount of insurance proceeds exceeded the "unpaid" balance on the secured portion of the claim, lender nonetheless entitled to proceeds as Section 1325 requires that lender retain lien until earlier of discharge or payment under applicable non-bankruptcy law. Debtor had not received discharge and lender had not been paid in full under applicable non-bankruptcy law, so lien on vehicle extended to insurance proceeds up to remaining balance owed on debt.

(5714) *In re McKee,* Case no. 10-58266 (Bankr. E.D. Mi. 2013) – Creditor holding secured claim is not entitled to be paid more on secured claim than that proposed in confirmed plan. Plan proposed to modify claim secured by automobile to reduce principal and interest, with undersecured portion being treated as unsecured. Post-confirmation, automobile was totaled in an accident. Creditor sought to recover insurance to extent of full balance remaining on contract. Recovery from insurance limited to lower balance owed on secured claim as modified, based on amount of secured claim stated in plan less payments made by Chapter 13 trustee. Fact that car was totaled and to be paid by insurance did not authorize creditor to receive more on secured claim than amount proposed in confirmed plan.

(5715) *In re Bolden,* Case No. 07-30132 (Bankr. E.D. Mi. 2012), *aff'd*, 2013 WL 3897048 (E.D. Mi. 2013) – Creditor holding lien on Debtor's vehicle bound by terms of confirmed plan that modified contract to reduce interest rate and reduced principal and provided for full payment within plan term. "Only logical interpretation" of plan was that finance contract would be paid in full after Debtor made the required number of payments. Creditor did not object to confirmation of plan and did not notify trustee after specified number of payments that lender thought it was owed more money. Although Debtor was not entitled to discharge, creditor required to release lien where creditor had been paid stated market value of collateral plus stated interest rate, even if total paid was not sufficient to pay lien under applicable non-bankruptcy law. District Court held that plan did not "cram down" the debt where the plan stated that the claim was modified, even if the modification included reduction in the principal balance. Rather, the plan proposed to modify the claim under Section 1322(b)(2) by bifurcating the claim into secured and unsecured portion and then proposed payment of the secured portion in full. Even though a Debtor may not be entitled to a discharge, the Debtor can nonetheless permanently modify a secured loan in the plan.

11.116 Direct Pay Obligations

(5716) *In re Rogers,* 2013 WL 3422702 (Bankr. E.D.N.C. 2013) – Discharge under chapter 13 discharged Debtor's liability for deficiency resulting from post-discharge default and foreclosure. Section 1328 makes the discharge applicable to all debts provided for in the Chapter 13 plan. Debtor's plan provided for lender's claim by requiring Debtors to make direct payments directly to creditor. Section 1322(b)(5) discharge exception for long term debt did not apply as plan did not provide for curing of any delinquency or default. Section 1322(b)(2) did not apply as Debtor did not modify the lender's rights under the note and deed of trust. Any deficiency judgment is not excluded from the scope of the discharge.

11.117 Actions in Violation of Confirmed Plan – Remedy

(5717) *Dempsey v. Florida Department of Revenue*, 2017 WL 2656154 (E.D. Tn. 2017) – State precluded from attempting to recover vi wage garnishment pre-petition child support arrearage where confirmed Chapter 13 Plan provided for payment of arrearages through Plan. However, although Plan specified that the confirmation order "require[d] the Department to discontinue all collection activity outside the plan once the plan is confirmed, ... the plan was not sufficiently clear and definite in this requirement to provide a basis for a finding of contempt" where the law at the time of the DOR action was unclear and undeveloped, and Eleventh Circuit had not issue ruling in *Gonzales* until two months after bankruptcy court denied motion for contempt. The bankruptcy court did, however, order the Department to: (1) terminate its income withholding order; (2) refund to Debtor any amounts received and not yet disbursed; and (3) amend its proof of claim to reduce its amount by all sums received from Debtor's employer after confirmation and not refunded.

(5718) *State of Florida Department of Revenue v. Gonzalez,* Case No. 15-14804 (11th Cir. 2016) - Exception to automatic stay under section 362(b)(2)(C) for withholding for payment of a domestic support obligation does not trump binding effect of confirmed chapter 13 plan per section 1327(a). Chapter 13 plan proposed to pay arrearage in full through Trustee with ongoing payments made directly by Debtor. DOR filed claim for $2400 in arrearages and plan was confirmed. Accordingly, creditor was prohibited from intercepting Debtor's post-confirmation expense reimbursement payment for application to domestic support obligation. Creditor's post-confirmation collection activity constituted contempt of court for violation of confirmed plan warranting imposition of sanctions including attorney fees.

(5719) *Harchar v. IRS,* 2012 WL 3968162 (6th Cir. 2012) – Bankruptcy code does not provide private right of action for alleged creditor actions

that are inconsistent with confirmed plan. Even if IRS acted inconsistent with confirmed plan, Debtor's remedy was not separate adversary proceeding against IRS but action under Section 105 to enforce plan.

11.118 Post-petition Claims

(5720) *Cripps v. Foley,* 2017 WL 1190554 (W.D. Mi. 2017) – Fees and expenses of attorney in Chapter 13 case are not post-petition claims under Section 1305.

(5721) *In re Spencer,* 2014 WL 1599869 (Bankr. N.D. Ohio 2014) – Post-petition creditor cannot be required to participate in Chapter 13 case to recover debt. Section 1305 permits post-petition creditor to participate, but if creditor elects to remain outside bankruptcy case, creditor can pursue collection against Debtor and property of Debtor, even if collection imperils successful Chapter 13 proceeding. Section 1305 does not permit Debtor to file claim on behalf of post-petition creditor. Court disallowed portion of priority claim and Debtor paid allowed portion in Chapter 13 in full. After discharge, creditor sought to collect disallowed balance by garnishing Debtor's wages. Court concluded that discharge inunction did not bar collection of non-dischargeable debt even if that debt was reduced by Order of Court and the allowed claim paid in full.

E. Revocation of Order Confirming Plan

11.117 Time for Bringing

(5459) *Dean v. Lane,* 2018 WL 4043328 (Bankr. W.D. Ky. 2018) – Complaint to revoke confirmation must be filed within 180 days after entry of the Confirmation Order.

(5460) *Jodway v. Fifth Third Bank,* 2017 WL 2350062 (E.D. Mi. 2017), *aff'd,* 2018 WL 300438 (6th Cir. 2018) – Section 1330 governs revocation of confirmation of Chapter 13 Plan and requires that Motion to Revoke be brought within 180 days of entry of the Order Confirming Plan. Time period is not extended even if confirmation is procured by fraud and fraud is then concealed until after expiration of time to seek revocation.

(5461) *Wahrman v. Bajas,* 443 BR 768 (Bankr. E.D. Mi. 2011) – Adversary proceeding to revoke confirmation was premature when filed 7 days before Debtor's plan was confirmed. Correct procedure is to object to confirmation, not attempt to revoke confirmation. Action to revoke confirmation must be brought within 180 days of the date of entry of the Order Confirming Plan.

11.118 Grounds – Section 1330

(5462) *Dean v. Lane,* 2018 WL 4043328 (Bankr. W.D. Ky. 2018) - Fraud in obtaining confirmation is only basis to revoke confirmation. Confirmation of Plan is ration judicata of all issues that could or should have been litigated at confirmation hearing precluding plaintiff from raising issues that could have been raised pre-confirmation as part of post-confirmation action to revoke confirmation. Complaint to revoke confirmation for fraud must assert that Debtor made misrepresentation regarding compliance which was materially false; representation was known by Debtor to be false or made without belief in truth or made with reckless disregard for truth; representation made to induce Court to rely; Court did rely; and as consequence of reliance, Court entered confirmation order. Plaintiffs were active participants in Chapter 13 prior to confirmation of Plan and objected to confirmation on numerous grounds including alleged illegal treatment of claim and fraudulent, illegal and unconstitutional modification of judgment lien. All claims could and should have been raised by plaintiff prior to confirmation where all claims regarding alleged false information related to Debtor's Schedules and treatment and propose Plan.

(5463) *Jodway v. Fifth Third Bank,* 2017 WL 2350062 (E.D. Mi. 2017), *aff'd,* 2018 WL 300438 (6th Cir. 2018) – Confirmation can be revoked only if confirmation was procured by fraud. Fact that lender was holding payments in suspense account did not constitute fraud by lender in confirmation of the plan.

(5464) *Metropolitan Estates, Inc. v. Emmons-Sheepshead Bay Development, LLC,* Case No. 15-3844 (2d Cir. 2016) - Court can revoke confirmation order under 11 USC section 1144 if confirmation was procured by fraud. Amended complaint failed to sufficiently alleged that confirmation order was procured by fraud as complaint contained only conclusory allegations that Debtor fraudulently and intentionally misled Bankruptcy Court by underreporting value of property, obscuring ownership history of property, and manufacturing "false sense of urgency" in bankruptcy proceedings. Complaint indicated that bankruptcy court confirmed chapter 11 plan over plaintiff's objections based on alleged undervaluing of property and lack of good faith. Even accepting all factual allegations as true, complaint failed to contain sufficient facts to state claim that was plausible on its face.

(5465) *In re Rodriguez,* 2013 WL 1716110 (3d Cir. 2013) – Sole basis to set aside Confirmation Order is for fraud under Section 1330. General provisions of Rule 60 governing rehearing are not applicable to rehearing or reconsideration of Confirmation Order. Bankruptcy Court correctly rejected creditor's request to set aside the confirmation order or to hold valuation hearing where creditor did not allege any fraud as required under Section 1330.

(5466) *Wahrman v. Bajas,* 443 BR 768 (Bankr. E.D. Mi. 2011) – Court can revoke confirmation order obtained through fraud. Creditor must prove: (1) that the Debtor made a representation regarding compliance with Section 1325 which was materially false; (2) that the representation was either known by the Debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) that the court did rely upon it; and (5) that as a consequence of such reliance, the court entered confirmation.

11.119 Grounds – Rule 60

(5467) *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.

(5468) *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.

F. Modification of Order Confirming Plan

11.120 Compliance With Code Generally

(5469) *In re Deavila,* Case No. 07-3609 (Bankr. W.D. Mi. 2010) – Court has independent duty to review proposed modifications to determine whether modification complies with requirements of Code. Court cannot approve a modification that is inconsistent with the Code, even in the absence of objections by creditors or the Chapter 13 Trustee. The Supreme Court in *Espinosa* admonished bankruptcy courts to scrutinize plans for conformity with the Code even in the absence of objections and that admonition is equally applicable to plan modifications.

11.121 Grounds – Error in Order Confirming Plan

(5470) *In re Harris,* Case No. 08-63253 (Bankr. E.D. Mi. 2009) – Order Confirming Plan would be modified where terms of Order were inconsistent with Court's text order. Confirmation Order purported to award counsel fees in the sum of $3,000.00. Court's text order indicated that fees were to be awarded by Fee Application only. Written Confirmation Order amended to provide that compensation and reimbursement of expenses shall be by application only.

11.122 Altering Treatment of Secured Creditor

11.123 Surrender of Previously Retained Collateral in Full Satisfaction

(5471) *In re Deavila,* Case No. 07-3609 (Bankr. W.D. Mi. 2010) – Debtor permitted to modify plan to surrender collateral to secured creditor in full satisfaction where confirmed plan provided for payment of the claim directly by Debtor "outside the plan". Proposed modification does not adversely affect secured creditor as plan as confirmed preserved the creditor's lien and nothing in the modification is inconsistent with creditor's rights as mortgagee. Modification does not purport to reclassify deficiency from secured to unsecured and does not alter rights of unsecured creditors in any way.

G. Modification of Plan Post-Confirmation

11.124 Generally

(5472) *Germeraad v. Powers,* 826 F.3d 962 (7th Cir. 2016) – Section 1329 provides three limits on court's power to modify plan. Modification must implement one of four changes specified in Section 1329(a)(1) - (4); modification must comport with all requirements of code; and modification cannot result in requiring payments over term longer than Applicable Commitment Period. Code does not contain explicit standards for when modification that complies with requirements of Section 1329 should be approved although modification is appropriate when there has been a post-confirmation change in Debtor's financial circumstances that affects ability to make plan payments. If Debtor's income decreases, then Debtor can seek to reduce payments; conversely, if Debtor's income increases, then trustee or unsecured creditor can seek to modify plan to increase payments where increased payments are affordable. Fact that no code provision specifically allows modification based on increased income, nothing in code prevents such an increase and is consistent with Chapter 13 policy of requiring Debtors to repay creditors to extent of Debtor's ability. Issue does ton turn o Debtor's good faith, but on Debtor's ability to afford increased payment.

(5473) *In re Ragland,* 2016 WL 106803 (Bankr. S.D. Ohio 2016) – Proposed modification denied where Debtor failed to demonstrate any change in circumstances since confirmation. Debtor's initial plan designated Debtor as "above median" and proposed a 60 month plan term. More than two years later, Debtor discovered erroneous designation as Debtor was actually "below median" and Debtor sought to shorten plan from statutorily required 60 months for "above median" Debtor to 42 months. Court denied Motion as sole basis was mistake in original plan and pursuant to Section 1327, confirmed plan is equally binding Debtor. Modification requires change in circumstances and requires consideration of interests of creditors, not just Debtor.

(5474) *In re Szumanski,* Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Section 1229 is substantively identical to Section 1329 and allows modification of Chapter 12 Plan for same reasons and to modify plan to same extent as would be applicable in Chapter 13. Modifications are permitted only to increase or reduce payments on claims of particular class; extend or reduce time for payments; or alter amount of distribution to creditor to take into account payments to creditors from third parties. Proposed modification to reduce dividend from 100% to 2% of allowed claims is permissible modification under Section 1229.

(5475) *In re Nunez,* 2014 WL 4473842 (Bankr. D 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. Further, Section 521 requires Debtor to produce tax returns on request and to file annual income and expense reports, and trustee and creditors have right under Section 1329 to seek to modify plan modification if documents indicate that Debtor has ability to increase plan payments.

(5476) *James C. Warr & Assoc. v. Ruskin,* 2012 WL 4855180 (E.D. Mi. 2012) – Attorney not entitled to compensation for time spent in attending hearing on plan modification where proposed modification failed to advance any legitimate reason for modifying plan. Modification asked only that plan be modified but failed to state any reason why the plan needed to be modified or why relief was warranted. Proposed modification was so woefully lacking in any factual basis that counsel knew or should have known that modification was doomed to fail for lack of any detail, such that any services rendered in connection with the modification were clearly unnecessary. Extremely brief modification that did not explain why a modification was necessary other than to note that modification "is necessary for the Plan to calculate timely" is insufficient to justify relief sought, and contained no information that would be probative on issue of good faith which was fatal to the modification.

(5477) *In re Milano,* 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Under Sixth Circuit law, party is permitted to modify plan to change amount and timing of payments, but not total amount of claim. Modifications tend to disturb binding effect of confirmed plan and Section 1329 must be interpreted narrowly.

11.125 Timing of Modification

(5478) *In re Sledge,* 2018 WL 4090584 (Bankr. N.D. Ohio 2018) – Plan modification is timely if filed within Applicable Commitment period. Debtor's Chapter 13 Plan is confirmed called for 25% dividend on timely filed unsecured claims. Claims filed were far less than anticipated such that Debtor's Plan would produce a 100% dividend to unsecured creditors with no change in Plan funding. Trustee's proposed Plan modification to increase dividend from 25% to 100% timely even though Debtor had already paid 25% dividend to unsecured creditors. Applicable Commitment Period of 60 months was minimum temporal requirement and Plan had not been completed after only 18 months even though Plan had paid 25% dividend. Plan contemplated potential increase in dividend where Plan indicated that 25% was estimated dividend and required Debtor to remit bonus and tax refund income which would necessarily increase distribution to unsecured creditors. Confirmation Order specifically required Debtor to devote all future disposable income to Plan which would also necessarily increase dividend.

(5479) *In re Baxter,* 2017 WL 2591263 (Bankr. E.D. Mi. 2017) – Proposed Plan modification is timely if filed before Debtor completes payments under plan, even if modification is not ruled on until after Debtor makes last payment.

11.126 Good Faith

(5480) *Jodway v. Fifth Third Bank,* 2017 WL 2350062 (E.D. Mi. 2017), *aff'd,* 2018 WL 300438 (6th Cir. 2018) – Debtor cannot modify plan to excuse performance of one obligation where Debtor is refusing to comply with other provision of Plan as confirmed. Debtor's Plan proposed to surrender real property. After confirmation, Debtor instead vigorously contested Creditor's efforts to foreclose. Debtor's later plan modification to excuse payments and reduce ongoing plan payments denied based on Debtor's refusal to complete surrender of property.

(5481) *In re Portell,* Case No. 12-44058 (Bankr. W.D. Mo. 2016) – Debtor's inheritance received during life of Chapter 13 case is property of the estate. Under state law, inheritance received by one spouse is not chargeable for debts of other spouse. Husband who inherited property during Chapter 13 required to account for inheritance to extent needed to pay joint debts plus his individual debts in full but not required to account for inheritance to extent of wife's individual debts, as wife had no interest in inheritance and her creditors had no claim to inheritance. Joint filing does not create single estate or render assets of one spouse chargeable for debts of other spouse. Husband's plan modification to pay inheritance only to extent necessary to pay his creditors and joint creditors in full but not to pay wife's individual creditors did not lack good faith as husband's retention of proceeds beyond amount needed to pay his creditors in full was merely doing what state law allowed him to do. Plan needed to be modified only to require husband to pay his creditors and joint creditors in full but not to pay wife's individual creditors any amount in excess of dividend promised when plan was confirmed.

(5482) *In re Zuccarell,* 2016 WL 3965110 (Bankr. N.D. Ohio 2016) – Plan modification must be filed in good faith. Debtors' modification seeking to retain proceeds of personal injury settlement lacked good faith where Debtors testified at the 341 meeting that they had not received the proceeds of the settlement when they had received those proceeds post-petition about a month before the 341. The Order Confirming Plan specifically retained jurisdiction over the proceeds and directed that Debtors could not spend the proceeds without court approval. Debtors instead retained the proceeds, used them to pay for household expenses and to repay loan to Debtor-wife's father. Modification not in good faith where Debtors falsely testified at the 341 meeting and then depleted the proceeds without court authority, including preferential payments to Debtor-wife's father. "Debtors' proposed modification is simply an attempt to assuage any wrongdoing and does not address the harm to creditors in having to wait four more years before receiving the distribution that should have occurred months ago."

(5483) *In re Manning,* Case No. 09-72605 (Bankr. E.D. Mi. 2015) – Plan modification to excuse obligation to remit tax refunds lacked good faith where Debtors did not remit tax refunds over duration of case and filed modification after plan expiration. Debtors had ample opportunities over life of case to send in tax refunds or to excuse obligation to do so. Debtor's willful disregard of obligations indicated that last-minute plan modification was not in good faith but was mere last minute attempt to evade obligations. Debtor cannot ignore the obligation to remit tax returns and refunds, then get to the end of the case, and then, after expiration, ask for wholesale excusal of tax returns and refunds. The court will not ignore the commitments made when the plan was confirmed.

(5484) *In re Henderson,* Case No. 09-74589 (Bankr. E.D. Mi. 2015) – Plan modification to excuse obligation to remit tax refunds lacked good faith

where Debtor did not remit refunds over life of case and waited until after expiration to seek to excuse obligation in its entirety.

(5485) *In re Ramsey,* 507 BR 736 (Bankr. D. Kan. 2014) – Plan modification lacked good faith and did not comply with Section 1322. Modification sought to pay post-petition priority taxes but funding was not sufficient to pay taxes in full over remaining life of plan. Further, Debtor sought to pay taxes for which Debtor budgeted but failed to pay, continuing pre-petition pattern of failing to timely pay taxes and Debtor did not otherwise account for funds that were budgeted but not used for payment of taxes post-petition.

(5486) *In re Coats,* 509 BR 836 (Bankr. W.D. Mi. 2014) – Exception to automatic stay for domestic support obligations does not extend to obligations beyond those for support and maintenance. Debtor and ex-spouse violated stay when they returned to domestic relations court for purposes of modifying property division and altering scope of indemnification claim of non-Debtor spouse in such a way as to increase the burden on Debtor and Debtor's estate. Modification allowed non-Debtor to withhold substantial sum from alimony and support to pay joint creditor, with Debtor then seeking to modify plan to reduce plan payment to account for the additional withholding and attendant lower income. Evidence indicated lack of good faith as Debtor was attempting to cause Debtor's unsecured creditors to pay for Debtor's improper modification of property settlement.

(5487) *In re Hargis,* 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Plan modification must be in good faith, as determined by totality of circumstances. Debtor demonstrated a change of circumstances where Debtor's husband, a co-Debtor and the sole income producer, passed away during chapter 13 case, which supported finding of good faith. Debtor received a large life insurance payment and a cash payment on Husband's 401-k, but otherwise had no income as Debtor had not worked for at least 15 years. While Debtor used insurance to purchase condominium, Debtor did so to reduce her housing expense from a rental of $1500 per month to a payment for condo fees and taxes of only $438 per month. However, Debtor did receive a large insurance payout and spent one-half of that purchasing the condo and also purchasing a new vehicle, and wanted to make minimal plan payments just sufficient to pay non-dischargeable priority claims, while having a monthly budget in excess of $2500. At end of case, Debtor would receive a discharge, own a condo worth $200,000 plus two vehicles, plus $150,000 in liquid assets, producing a net worth in excess of $350,000, while paying creditors only 50% of their claims versus 80% as provided in confirmed plan. Modification lacked good faith where Debtor would substantially improve financial position while reducing dividend to unsecured creditors.

(5488) *In re Cluckey,* 2012 WL 6721052 (Bankr. N.D. Ohio 2012) – Debtors who fell behind on post-petition taxes could not modify plan to reduce dividend in order to free up cash to pay those taxes. Confirmed plan required Debtors to pay all post-petition taxes to the tax authorities. Debtors systematically under-withheld which produced excess undisclosed net cash flow each month, and failed to pay resulting tax liabilities. Debtors violated confirmation order without any meaningful explanation and amended budget reflected no belt tightening and Debtors incurred additional unapproved post-petition liabilities including automobile payments. Debtors' modification effectively asked unsecured creditors to bail Debtors out of their post-petition tax problems without cause and without taking sufficient responsibility for the under-withholding.

(5489) *In re Walpole,* 2010 WL 2696847 (Bankr. N.D. Ohio 2010) – Section 1329 requires that all modifications be proposed in good faith. Debtor's request to modify a plan to retain the proceeds of an asset which Debtor had failed to disclose in the first instance lacked good faith. At the time of commencement of Debtor's case, Debtor owned a life estate in property owned by Debtor's mother. Debtor failed to disclose that life estate or the value of that life estate in Debtors schedules and failed to include the value of that life estate in the Plan's liquidation analysis, resulting in confirmation of a plan that failed to pay creditors the actual liquidation value of the Debtor's estate. After Debtor's mother died, Debtor requested court permission to sell the property and to retain a portion of the proceeds. Had Debtor's mother not died while the case was open, court may never have discovered Debtor's omission and Debtors may have pocketed 100% of the proceeds of the property after receiving a discharge in underfunded plan. Allowing Debtors to profit from the sale of a hidden asset would be "patent bad faith". Further, expenses for which Debtors sought to use proceeds were included within the range anticipated by Debtor's budget such that Debtors failed to demonstrate any need for the proceeds to pay these expenses.

11.127 Liquidation Value

(5490) *McKinney v. Russell,* Case No. 16-522 (N.D. Ala. 2017) - Proceeds of settlement of personal injury action that arose during Chapter 13 case are property of estate even if proceeds were received after expiration of Applicable Commitment Period. Debtor was "below median" and had 36 month Applicable Commitment Period. However, Debtor proposed and confirmed a Plan with a 60 month term. Shortly after expiration of the three-year ACP, Debtor sued and recovered $12,000 from personal injury action. Trustee could modify Plan to require remittance of proceeds where Debtor would otherwise discharge $62,000 in unsecured debt for no payment, as equity would not permit Debtor to receive benefits of Chapter 13 without bearing its attendant duties. Cause existed for modification to prevent unmistakable lack of balance between benefits and burdens of Chapter 13 case.

(5491) *In re Cochran,* Case No. 06-45912 (Bankr. E.D. Mi. 2011) – Plan modification can reset value of assets to effective date of plan as modified where modification results from change in financial condition unrelated to change in asset values. Debtor's plan was confirmed at 100% plus interest as the liquidation analysis showed $17,000 in non-exempt equity and claims were scheduled at less than $1,000. When Debtor suffered loss of income such that Debtor could no longer afford plan payment, Debtor sought to modify the plan to reduce the payments and to reduce the dividend to 0%. Debtor argued that the value of Debtor's home (the only non-exempt asset) had dropped so precipitously that the mortgage balance exceeded the value of the home, resulting in a liquidation as of the date of the modification of $0, so the plan modification that proposed to pay $0 to unsecured creditors met liquidation. Section 1329 allows the liquidation analysis to be reset as long as the balance of the requirements for a plan modification are met – change in circumstances, Debtor still committing best efforts, good faith, no evidence of intentional dissipation of assets – and as long as the plan meets liquidation recalculated as of the date of the plan modification, it works. Debtor would not be allowed to modify the plan only because liquidation had dropped, but the Debtor can use that drop to meet Section 1325(a)(4) as part of an otherwise allowable plan modification.

11.128 Ambiguous Terms

(5492) *In re Love,* Case No. 06-30968 (Bankr. E.D. Mi. 2012) – Rule 3015 requires plan modification to state how modification would affect claims and creditors. Modification that stated only that Debtor proposed to modify the plan to account for tax refunds that were not remitted to the trustee, and did not indicate that Debtor intended any other changes in the plan, did not provide adequate notice that modification would somehow alter or reduce amount of secured claim. Body of modification did not state that modification changed any term of creditor's claim, but asserted only that the balance on the claim according to the trustee's records was $2,230.57 and that the amount that would be paid on the claim over the duration of the plan would be $2,088.22. Although confirmed plan modification is binding on all parties, neither modification nor Certificate of No Response provided property notice to creditor of intent to alter treatment of claim. Creditor not bound by terms of plan modification.

11.129 Feasibility

(5493) *In re Ramsey,* 507 BR 736 (Bankr. D. Kan. 2014) – Plan modification lacked good faith and did not comply with Section 1322. Modification sought to pay post-petition priority taxes but funding was not sufficient to pay taxes in full over remaining life of plan. Further, Debtor sought to pay taxes for which Debtor budgeted but failed to pay, continuing pre-petition pattern of failing to timely pay taxes and Debtor did not otherwise account for funds that were budgeted but not used for payment of taxes post-petition.

(5494) *In re Garajau,* 2014 WL 268695 (Bankr. D. Mass. 2014) – Plan modification that is not feasible cannot be approved. Plan modification proposed to increase dividend to unsecured creditors but did not increase the plan payment, such that the proposed higher dividend would not be met.

(5495) *In re Milano,* 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Debtor must prove that any proposed modification of plan is feasible. Debtor's plan called for sale of commercial property and pay-off of mortgage in first year of plan. When property did not sell, Debtors sought to modify the plan to cure and maintain mortgage, which would require significant increase in plan payments. Debtor testified that increased plan payments could be made if Debtors sold their house and also because business income had increased. Debtors failed to demonstrate feasibility as Debtors failed to present an appraisal or other competent evidence of value of Debtors' home. Feasibility of plan that depends on sale of property requires evidence of amounts of claims that are secured by property to be sold; state of the market for the property; current sale prospects; existence and maintenance of equity cushion; terms of listing including asking price and marketing plans; and whether the plan contains a default or "drop dead" provision. Debtor's generalized statements of what they believe property could be sold for was not sufficient to meet burden of showing feasibility. Further, profit and loss statement for business indicated that business was operating at a loss even before paying mortgage or salary to Debtors. Business financials showed no significant change over the prior two years and no improvement in business that would allow Debtors to afford significantly higher payment that would be required by plan modification.

11.130 Grounds - Change of Circumstances

(5496) *In re Johnson,* 2017 WL 4898175 (Bankr. N.D. Ohio 2017) – Section 1327 precludes modification confirmed plan to address issues that were or could have been decided at time plan was confirmed, limiting modification to matters that arise post-confirmation. In deciding whether to modify Plan to allow Debtor to retain tax refund to cover expenses, Court must consider whether expenses are necessary and amounts reasonable; whether expenses fall within categories already covered in Schedule J; whether expenses were foreseeable within Schedule J categories; and whether there is sufficient money in the category on Schedule J to pay the expense. Court may also consider amount of refund compared to total tax due; debtor's income and expenses; debtor's overall budget; number and nature of dependents; amount being paid into plan; dividend to unsecured creditors; and length of plan. Modification did not demonstrate basis to modify plan where debtor received refund in March, 2017, but did not seek modification until July, 2017, and Debtor did not explain failure to seek permission to keep refund before spending refund; most expenses were for repairs and maintenance of which Debtor was aware prior to confirmation and only change is that debtor now has potential source to pay for these expenses; and modified plan proposes to drop claim for past-due property taxes by $5,000 but does not increase dividend to unsecured creditors by like amount. Court afforded Debtor additional time to file itemized list of exactly what tax refund money was spent on with documentation; documentation of any unanticipated expense not included in Schedule J and incurred post-confirmation; explanation why debtor waited until July to modify plan when refund had already been spent without Court permission; explanation as to how $5,000 owed to property tax collector has been satisfied outside plan; and explanation as to why $5,000 previously directed to payment of property taxes should not be made available to unsecured creditors.

(5497) *In re Guillen,* Case No. 15-64860(Bankr. N.D. Ga. 2017) - Modification of confirmed Chapter 13 Plan does not require substantial or unanticipated change in Debtor's financial circumstances. Section 1329 requires only that Plan, as modified, comply with the requirements of Section 1325(a)(1). Congress specifically chose not to make "change in circumstances" and express requirement of Section 1329 although it did include "change in circumstances as express requirement for hardship discharge in Section 1328. Modifications under Section 1329 are limited to only for circumstances and modification must be proposed in good faith. Although change in circumstances is not required, Court may still consider whether change in circumstances occurred in determining whether modification is filed in good faith and to advance legitimate reason for modifying Plan. Confirmed a Plan required minimum dividend to unsecured creditors are approximate $20,000. Prior confirmation, Debtor successfully prosecuted action to avoid lien. After confirmation, counsel filed application for compensation as well as modification to reduce pool to unsecured creditors to account for fees awarded to Debtor's attorney. Trustee argued that attorney's fees were known prior to confirmation of Plan and, therefore, award of attorney's fees did not constitute "change in circumstances", determination of base dividend of $20,000 was res judicata. Court noted that while confirmation requires finding that amount to be paid to unsecured creditors satisfies "liquidation test", order confirming Plan did not specifically find that amount necessary to satisfy best interest test was $20,000, only that $20,000 was at least the amount sufficient to meet test. Reduced dividend has proposed in modification still met best interest of creditors test and Plan, as modified, comply with all requirements of 11 USC Section 1325 (a). Debtor was not attempting to modify Plan to have more favorable treatment as Debtor was not proposing to shorten Plan term or to reduce the amount of the monthly payment, but only

to alter the distribution of those funds. Debtor had below median income and was living on fixed income, such that Debtor did not have resources to bear additional attorney fee award.

(5498) *In re Luman,* 2017 WL 521518 (Bankr. E.D. Mi. 2017) - Section 1329 Permits Debtor to Modify Chapter 13 Plan and does not require any demonstrated "change in circumstances" as a threshold requirement for modification. To approve proposed modification, Modification must request relief available under Section 1329(a) and comply with Sections 1322 (a), 1322 (b), 1323(c) and 1325 (a). Modification is sought to shorten Plan term from 60 months to 36 months that requirements of Section 1329 without change in circumstances where Debtor is below median income and could have proposed 36 month Plan in first instance; Plan was intended to have 36 month Plan term and reference to 60 months was error; and Section 1329 permits modifications to reduce time for payments to creditors. Even if modification required cause, Court would approve modification where Debtor's poor health has continued to deteriorate and it became increasingly unlikely that Debtor would be able to continue to work for full 60 month commitment period. Creditors will receive more than they would have received in liquidation and Debtor will benefit from earlier medical retirement and retention of additional 48 biweekly payments.

(5499) *In re Ladden,* 2017 WL 485662 (Bankr. N.D. Ohio 2017) - Confirmed Chapter 13 Plan is binding on Debtor as well as creditors. Section 1327 precludes modification of confirmed Plan under Section 1329 where modification addresses issues that were or could have been decided at the time Plan was originally confirmed. Debtor did not justify proposed modification which would reduce Plan term from 60 months to 36 months where Plan provided for distribution to unsecured creditors of no less than 13%, subject to review and increase over the life of the Plan. Fact that Debtor's tax refunds were greater than amount originally anticipated, such that 13% dividend had been achieved and 36 months, was not basis to shorten Plan and length as there was no indication at time Plan was confirmed that Debtor intended to Distribution to unsecured creditors or limit Debtor's obligation to remit tax refunds which could increase distribution to unsecured creditors. Issues concerning On distribution to unsecured creditors and impact of tax refunds could and should have been raised in connection with confirmation. Further, Debtor was "above median" income which would require Plan to run full 60 month duration raising likelihood at time of confirmation that receipt of additional disposable income would increase distribution to creditors, and any attempt by Debtor to confirm a Plan lasting only 36 months and paying a 13% dividend would not have been confirmable. Debtor's attempt to shorten Plan term from 60 months to 36 months is "bait and switch" which is precluded by Section 1327.

(5500) *In re Portell,* Case No. 12-44058 (Bankr. W.D. Mo. 2016) – Debtor's inheritance received during life of Chapter 13 case is property of the estate and receipt constitutes change of circumstances warranting modification of plan. Under state law, inheritance received by one spouse is not chargeable for debts of other spouse. Husband who inherited property during Chapter 13 required to account for inheritance to extent needed to pay joint debts plus his individual debts in full but not required to account for inheritance to extent of wife's individual debts, as wife had no interest in inheritance and her creditors had no claim to inheritance. Joint filing does not create single estate or render assets of one spouse chargeable for debts of other spouse. Husband's plan modification to pay inheritance only to extent necessary to pay his creditors and joint creditors in full but not to pay wife's individual creditors did not lack good faith as husband's retention of proceeds beyond amount needed to pay his creditors in full was merely doing what state law allowed him to do. Plan needed to be modified only to require husband to pay his creditors and joint creditors in full but not to pay wife's individual creditors any amount in excess of dividend promised when plan was confirmed.

(5501) *In re Martin,* 2013 WL 6196566 (Bankr. N.D. Ohio 2013) – Section 1329 does not require substantial and unanticipated change to support modification. Trustee demonstrated basis to modify plan to increase plan payments where Debtors' income increased since confirmation of the plan.

(5502) *In re Milano,* 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Sixth Circuit has not addressed "change in circumstances" requirement for plan modification. However, Court should consider whether there has been a change in circumstances as inherent in consideration of other factors including good faith and feasibility.

(5503) *In re VanDyne,* 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Trustee's Plan Modification based on Debtor's Amended Schedules I and J filed after confirmation is exception from general res judicata effect of confirmed plan. Trustee could not have known at the time of confirmation that Debtor's post-confirmation schedules would show significant changed income and expenses.

(5504) *Storey v. Pees,* 392 BR 266 (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 at confirmation had the trustee or an unsecured creditor with an allowed claim objected.

11.131 Grounds – Increased Income

(5505) *Germeraad v. Powers,* 826 F.3d 962 (7th Cir. 2016) – Debtor's increased income over life of case warrants Trustee's proposed plan modification to increase payments.

11.132 Grounds – Error in Order Confirming Plan

(5506) *In re Szumanski,* Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Court would modify plan under Section 1229 where Order Confirming Plan erroneously referenced 100% dividend when Debtors intended dividend to be 2% and plan funding as approved by Court was consistent with 2% dividend and there was no evidence that Debtors ever intended or could ever afford 100%. Reference in Order was good faith error

based on misinterpretation of sources of plan funding.

11.133 Reclassification of Claims

(5507) *In re Scarver,* 555 BR 822 (Bankr. M.D. Al. 2016) - Debtor permitted to modify plan after confirmation to surrender "910 creditor's" collateral where Debtor's plan as confirmed called for Debtor to retain vehicle and to pay full balance owing as secured claim notwithstanding that debt exceeded value of collateral. Majority view holds that chapter 13 Debtor may surrender collateral and reclassify resulting deficiency balance if done in good faith. Section 1329 contemplates surrender of collateral as for payment and section 1322 (B) applies without qualification to modification under section 1329. Claim has been previously allowed as secured may be reconsidered under section 506 and reclassified or disallowed according to equities of case. Section 1329 incorporate section 1325 (a) (five) which requires that secured claim be treated either by creditor accepting proposed treatment; Debtor retaining collateral and pays creditor full replacement value of collateral; or surrenders the collateral. Creditors entitled to receive payment on the full value of its secured claim only if Debtor chooses to cram down claim over creditor's objections. If Debtor surrenders collateral, Debtor is not required to fully pay secured creditor. Although "910-claims" remain secured in full as long as Debtor retains the vehicle, that provision does not apply when Debtor surrenders vehicle. Accordingly, post-confirmation surrender of collateral leaves and under secured creditor with unsecured deficiency balance under section 506. Modification must be proposed in good faith to avoid risk of unfairly prejudicing creditor by maleficent Debtor who abuses collateral and then gives it back to the creditor. Factors to determine whether modification is in good faith include extent of any post-confirmation depreciation in the collateral and whether depreciation is fault of Debtor; whether Debtor failed to maintain insurance; proposed treatment of creditors deficiency claim; whether Debtor's current in plan payments; and length of time between plan confirmation and filing of modification. Debtor's plan proposes to retain vehicle and Debtor made all payments until Debtor was involved in accident that "totaled" vehicle. Insurance company paid proceeds to lender and cause existed to reconsider secured status of lenders remaining claim where vehicle had been declared total loss and there was no other collateral securing creditors claim. Unpaid balance of obligation is properly reclassified as unsecured claim.

(5508) *In re Rodgers,* Case No. 14-83452 (Bankr. N.D. Al. 2016) – Debtor can modify plan post-confirmation to surrender collateral and reclassify the deficiency as an unsecured claim. Court rejected "minority" line of cases including *In re Nolan*, 232 F.3d 528 (6th Cir. 2000). Section 1329 and Section 502(j) permit Debtor to surrender collateral and treat deficiency as long as modification otherwise complies with requirements of section 1325 including requirement of good faith. Good faith involves factors such as extent of post-confirmation depreciation in collateral and whether that depreciation is fault of Debtor; whether Debtor failed to maintain adequate insurance as required by the loan documents; proposed treatment of the deficiency; whether Debtor is current in plan payments; and length of time between confirmation and modification. Debtor's request to modify was not *per se* lack of good faith where after confirming plan, Debtor concluded that she could no longer afford to maintain the vehicle. Modification sought to surrender vehicle and reduce plan payments which would allow Debtor to successfully complete chapter 13 plan.

(5509) *In re Gibson,* 2015 WL 1343984 (Bankr. E.D. Ky. 2015) – Section 1329 does not allow post-confirmation modification to change classification of claim from secured to unsecured. Confirmed plan treated claim as secured despite possibility that lien was not properly perfected. Status of claim as secured was determined at confirmation of plan,

(5510) *Hazelwood v. Fifth Third Bank,* 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Modification is not legally available to reclassify claim confirmed as secured to treat as unsecured. 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. While modification sought relief that was not available and court would have sustained objection had one been made, creditor did not object and became bound by terms of plan as modified. Lender is bound by terms of plan as modified including provision allowing Debtor to contest validity of mortgage.

(5511) *In re Milano,* 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Debtor's confirmed plan treated mortgage on Debtor's business as fully secured. Debtor's plan proposed to sell the property and pay off the mortgage in full. After the property did not sell, Debtors sought to modify the plan to change the treatment from "pay in full during plan" to "cure and maintain" which would allow mortgage to run well beyond confirmed plan term. Modification did not seek to alter status of claim or to bifurcate claim into secured and unsecured portions. Modification still proposed full payment of the allowed secured claim and sought only to change the timing of those payments to run for the original term of the mortgage rather than being paid during the Chapter 13 plan. Creditor would retain mortgage and lien would otherwise be unaltered. Modification permitted under Section 1329.

(5512) *Charlick v. Community Choice Credit Union,* 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Debtor could not modify plan post-confirmation to change status of second mortgage from secured to general unsecured. Section 1329 lists matters that can be the subject of a post-confirmation plan modification. Classification of claims is not included, and classification is *res* judicata pursuant to Section 1327.

(5513) *Blevins v. National City Bank,* Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon Debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, Debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured. Section 1329 limits post-confirmation plan modification to four specific circumstances. Debtor's attempt to reclassify Bank's claim from secured to unsecured is an impermissible extension of the four enumerated modification rights under section 1329 and would violate *In Re Nolan* and *Storey v. Pees.*

(5514) *In re Miller,* Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Post-confirmation Proof of Claim filed by First Mortgage holder that indicated that Second Mortgage was entirely unsecured not basis to modify plan to change treatment of second mortgage from secured to unsecured. Prohibition against modifying confirmed plan to reclassify secured claim applies equally to real property and vehicle financing claims.

(5515) *In re Crisp,* 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Debtor cannot modify confirmed plan to reclassify secured claim as unsecured following post-confirmation repossession and sale of vehicle. Section 1329 limits plan modifications to (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the Debtor to purchase health insurance. Section 1329 does not allow the Debtor to alter, reduce or reclassify a previously allowed secured claim. Claim is not subject to reclassification merely because Debtor was involuntarily dispossessed of property rather than a post-confirmation voluntary surrender. Allowing Debtor to reclassify secured claim would impermissibly allow him to shift the burden of depreciation to the creditor.

(5516) *In re Enders,* Case No. 308-04229 (Bankr. M.D. Tenn., 2010) – Plan modification approved to surrender Debtor's residence, reduce plan payment, and disallow mortgage claim. Debtor's plan provided for retention of mortgage, payment of ongoing mortgage payment, and cure of pre-petition arrears. One year later, mortgage company provided notice that the ongoing mortgage payment increased from $1756.00 per month to $2275.00 per month. Debtor responded by filing modification seeking to surrender house as Debtor could no longer afford the required plan payment. Mortgage company did not object to the plan modification. Trustee objected citing *Nolan*, 232 F.3d 528 (6th Cir. 2000) that claim confirmed as secured must remain secured even after post-confirmation surrender of collateral. Court distinguished *Nolan* as involving depreciating automobile, not real estate; and that *Nolan* involved unsecured deficiency balance on secured claim. In this case, there was no indication of any deficiency and mortgage holder did not oppose modification that allowed mortgage holder to file unsecured deficiency claim.

11.134 Surrender of Property

(5517) *In re Coughlin*, 2017 WL 2602330 (Bankr. E.D.N.Y. 2017) – Debtor did not make all direct payments to mortgage holder as required by confirmed plan not entitled to discharge as Debtor did not make all payments under plan. However, Debtor could modify plan to surrender property even after expiration of 60th month of plan as Debtor had not completed payments due under plan. Surrender of property would remove unpaid mortgage payments from plan and allow discharge. Court was troubled by fact that Debtors waited 18 months after stopping mortgage payments to seek modification to surrender property, but creditor had not opposed modification or sought stay relief at earlier time and modification did not appear to be lack of good faith.

(5518) *In re Ramos,* 540 BR 580 (Bankr. N.D. Tx. 2015) – Debtor cannot modify plan in 60th month to surrender direct pay residence where Debtor had not made payments to mortgage company during pendency of case and allowing modification after expiration of plan would divest creditor of right to pursue deficiency claim. Section 1329 allows modification to accomplish only one of four alternatives, and surrender of property is not one of the alternatives permitted.

(5519) *In re Enders,* Case No. 308-04229 (Bankr. M.D. Tenn., 2010) – Plan modification approved to surrender Debtor's residence, reduce plan payment, and disallow mortgage claim. Debtor's plan provided for retention of mortgage, payment of ongoing mortgage payment, and cure of pre-petition arrears. One year later, mortgage company provided notice that the ongoing mortgage payment increased from $1756.00 per month to $2275.00 per month. Debtor responded by filing modification seeking to surrender house as Debtor could no longer afford the required plan payment. Mortgage company did not object to the plan modification. Trustee objected citing *Nolan*, 232 F.3d 528 (6th Cir. 2000) that claim confirmed as secured must remain secured even after post-confirmation surrender of collateral. Court distinguished *Nolan* as involving depreciating automobile, not real estate; and that *Nolan* involved unsecured deficiency balance on secured claim. In this case, there was no indication of any deficiency and mortgage holder did not oppose modification that allowed mortgage holder to file unsecured deficiency claim.

11.135 Tax Refunds

(5520) *In re Johnson,* 2017 WL 4898175 (Bankr. N.D. Ohio 2017) – Section 1327 precludes modification confirmed plan to address issues that were or could have been decided at time plan was confirmed, limiting modification to matters that arise post-confirmation. In deciding whether to modify Plan to allow Debtor to retain tax refund to cover expenses, Court must consider whether expenses are necessary and amounts reasonable; whether expenses fall within categories already covered in Schedule J; whether expenses were foreseeable within Schedule J categories; and whether there is sufficient money in the category on Schedule J to pay the expense. Court may also consider amount of refund compared to total tax due; debtor's income and expenses; debtor's overall budget; number and nature of dependents; amount being paid into plan; dividend to unsecured creditors; and length of plan. Modification did not demonstrate basis to modify plan where debtor received refund in March, 2017, but did not seek modification until July, 2017, and Debtor did not explain failure to seek permission to keep refund before spending refund; most expenses were for repairs and maintenance of which Debtor was aware prior to confirmation and only change is that debtor now has potential source to pay for these expenses; and modified plan proposes to drop claim for past-due property taxes by $5,000 but does not increase dividend to unsecured creditors by like amount. Court afforded Debtor additional time to file itemized list of exactly what tax refund money was spent on with documentation; documentation of any unanticipated expense not included in Schedule J and incurred post-confirmation; explanation why debtor waited until July to modify plan when refund had already been spent without Court permission; explanation as to how $5,000 owed to property tax collector has been satisfied outside plan; and explanation as to why $5,000 previously directed to payment of property taxes should not be made available to unsecured creditors.

11.136 Vesting of Property in Creditor

(5521) *In re Williams,* 2015 WL 7776552 (Bankr. D. Kan. 2015) – Plan modification that proposed to vest property in secured creditor could not be approved over the objection of the creditor. While modification can propose to surrender property, surrender and vesting are not synonymous terms. To permit vesting over the creditor's objection would transform creditor's right into an obligation, rewriting both the Bankruptcy Code and the underlying loan documents while ignoring secured creditor's state law rights.

11.137 Minimum Plan Length – Applicable Commitment Period

(5522) *In re Groner,* 2016 WL 2865060 (Bankr. M.D. Tn. 2016) – Above median income Debtor cannot modify plan to shorten term to less than 60 months unless plan also proposes 100% dividend to unsecured creditors. Although Section 1329 does not expressly incorporate Applicable Commitment Period, Section 1329 does require compliance with Section 1325(a) which necessarily sweeps in Applicable Commitment Period provision of Section 1325(b). Interpretation is also more consistent with Congressional intent underlying BAPCPA. Allowing Debtor to circumvent ACP by modifying plan to provide term of less than 60 months where Debtor was "above median" income would defeat purpose of requiring Debtor with above-median income to provide 60 month pan in first instance, as Debtor would be able to confirm plan and then turn around and modify plan to provide lesser term.

11.138 60 Month Maximum Plan Length

(5523) *In re Koos,* Case No. 12-55947 (Bankr. E.D. Mi. 2018) – Court cannot modify Plan to extend time for Debtor's to pay overdue tax refunds where Plan as modified would exceed five-year limit under Section 1329(c).

(5524) *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 aver one year prior to execution of proposed modification.

(5525) *In re Humes,* Case No. 11-39684 (Bankr. D. Colo. 2018) – Debtor cannot seek to extend time to perform under plan beyond 60 months, even if purpose of extension is to complete obligations that came due within 60 months. Although Section 1307 provides that dismissal is permissive and not mandatory, that does not give Court license to ignore other express requirements of Code including 60 month plan limitation.

(5526) *In re Klass,* 858 F.3d 820 (3d Cir. 2017) – Court has discretion to extend plan to allow debtors to complete obligations that came due during original plan term, even if extension allows debtor to perform after expiration of 60 months.

(5527) *Shovlin v. Klauss,* 2017 WL 2367976 (3d Cir. 2017) – Although Bankruptcy Code prevents confirmation of Plan which proposes to run beyond 5 years, Court has discretion to allow Chapter 13 Debtor to complete Plan payments and received discharge even if final payment is made after conclusion of 60 month period. Section 1328 requires Court to issue discharge when all Plan payments have been made without any express requirement that payments be made within 5 years of confirmation. Limit on length of Plan is intended as shield for Debtors, not sword for creditors and preventing Debtor from making payment would produce absurd result where Debtor acted in good faith by making final payment promptly and substantially complied with Plan. In determining whether to allow Debtor additional time to complete Plan payments, Court should consider whether Debtor substantially complied with Plan, feasibility and time required to complete Plan payments, whether any creditor would be prejudiced, whether Debtor's conduct is excusable or culpable, and the availability and relative equities of other remedies.

(5528) *Germeraad v. Powers,* 826 F.3d 962 (7th Cir. 2016) – Section 1325 prevents court from confirming plan with term that runs beyond 60 months. However, code does not prohibit court from modifying plan to allow Debtor additional time to cure defaults that occurred during the 60 month term. Code only prevents court from requiring more than 60 monthly payments but does not require that those payments be made within 60 months. Court could modify plan after expiration of 60 month term where plan modification was filed before expiration of 60 months. If modification to increase payments is approved, increased payments not made during pendency of appeal would be required and Debtor would have to propose method of pay in additional sums or face dismissal of case.

(5529) *In re Ramos,* 540 BR 580 (Bankr. N.D. Tx. 2015) – Debtor can modify plan even after expiration of 60 month term where Debtor did not make payments on direct pay mortgage during plan term and so has not completed payments due under plan.

(5530) *Shovlin v. Klass,* Case No. 15-0802 (W.D. Pa. 2015) – Although court cannot confirm plan that contemplates term beyond 60 months, court is not required to dismiss case merely because case reaches 60 months without completing. Debtor who substantially complied with plan and needed to make only one final payment to achieve discharge will be given additional time. Section 1307 gives court discretion to dismiss for material default, but does not mandate dismissal even for material default where dismissal would be unfair or unduly harsh.

(5531) *In re Carr,* Case No. 06-51257 (Bankr. E.D. Mi. 2012) – Motion to Allow Trustee to Disburse Funds Received Post-Expiration denied where funds to be administered were received more than 60 months after plan confirmed. Motion constitutes a *de facto* plan modification that would impermissibly exceed five-year limit in Section 1329(c).

11.139 Lien Stripping

(5532) *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.

(5533) *In re Calloway,* Case No. 11-8059 (6th Cir. BAP 2012) – Rule 60(b) Motion for Relief from Confirmation Order did not assert mistake, inadvertence or excusable neglect sufficient to warrant relief. Debtors confirmed chapter 13 plan provided for payment of first mortgage and second mortgage as secured claims. Debtor's failure to propose a lien strip of the second mortgage prior to confirmation did not constitute "excusable neglect" sufficient to set aside confirmation order and allow Debtors to belatedly prosecute lien strip action. Debtors were aware

prior to confirmation of Debtors chapter 13 plan that the value of the property may be less than the balance owed on the first mortgage. However, Debtors, relying on counsel, chose to wait until after confirmation and until after the claim bar date had passed before determining that the second mortgage was potentially subject to being stripped.

(5534) *Blevins v. National City Bank,* Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon Debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, Debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured. Section 1329 limits post-confirmation plan modification to four specific circumstances. Debtor's attempt to reclassify Bank's claim from secured to unsecured is an impermissible extension of the four enumerated modification rights under section 1329 and would violate *In Re Nolan* and *Storey v. Pees.*

(5535) *In re Miller,* Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Post-confirmation Proof of Claim filed by First Mortgage holder that indicated that Second Mortgage was entirely unsecured not basis to modify plan to change treatment of second mortgage from secured to unsecured. Prohibition against modifying confirmed plan to reclassify secured claim applies equally to real property and vehicle financing claims.

(5536) *In re Crisp,* 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Debtor cannot modify confirmed plan to reclassify secured claim as unsecured following post-confirmation repossession and sale of vehicle. Section 1329 limits plan modifications to (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the Debtor to purchase health insurance. Section 1329 does not expressly allow the Debtor to alter, reduce or reclassify a previously allowed secured claim. Claim is not subject to reclassification merely because Debtor was involuntarily dispossessed of property rather than a post-confirmation voluntary surrender. Allowing Debtor to reclassify secured claim would impermissibly allow him to shift the burden of depreciation to the creditor.

(5537) *Charlick v. Community Choice Credit Union,* 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Section 1327 precludes attempt to modify plan post-confirmation to strip a claim that was treated as secured in plan as proposed. Valuation of property and status of lien as potentially entirely unsecured are issues that are or could have been raised at confirmation, precluding later attempt to modify plan to strip allegedly wholly unsecured second mortgage.

11.140 Disposable Income

(5538) *In re Portell,* Case No. 12-44058 (Bankr. W.D. Mo. 2016) – Disposable income test of Section 1325(b) does not apply to plan modifications. Accordingly, Debtor is not required to commit 100% of disposable income in connection with post-confirmation modification of plan. Debtor's inheritance received during life of Chapter 13 case is property of the estate. Even if disposable income test applies, inheritance is not "future income" as used in Section 1322 or 1325. Inheritance fits more squarely in category of property rather than income and is specifically included in Section 541(a)(5) as property. Under state law, inheritance received by one spouse is not chargeable for debts of other spouse. Husband who inherited property during Chapter 13 required to account for inheritance to extent needed to pay joint debts plus his individual debts in full but not required to account for inheritance to extent of wife's individual debts, as wife had no interest in inheritance and her creditors had no claim to inheritance. Joint filing does not create single estate or render assets of one spouse chargeable for debts of other spouse. Husband's plan modification to pay inheritance only to extent necessary to pay his creditors and joint creditors in full but not to pay wife's individual creditors did not lack good faith as husband's retention of proceeds beyond amount needed to pay his creditors in full was merely doing what state law allowed him to do. Plan needed to be modified only to require husband to pay his creditors and joint creditors in full but not to pay wife's individual creditors any amount in excess of dividend promised when plan was confirmed.

(5539) *In re Ladieu,* 2016 WL 1411635 (Bankr. D. Vt. 2016) – Increases in non-filing spouse's income are not relevant to proposed plan modification. After confirmation, Debtor's non-filing spouse enjoyed significant increase in income, while Debtor enjoyed very modest increase. Creditor sought to modify plan to account for substantially larger household income. Court concluded that Debtor's plan payment did not need to increase based on spouse's income and increased spouse's income cannot be considered in granting or denying Debtor's request to modify a plan where the modification otherwise complies with Section 1325. To extent that spouse has income above that which spouse has been contributing to household expenses, spouse is free to use that income as she sees fit. While spouse's income is relevant in determining confirmation in the first instance, spouse's changes in income are not relevant in considering post-confirmation plan modification.

(5540) *In re Curran,* Case No. 12-44197 (Bankr. E.D. Mi. 2015) – Borrower who proposed to modify plan could not deduct voluntary retirement contributions in calculating projected disposable income, even where Debtor previously deducted those contributions in determining plan payment at the outset of the case. Modification reopens all issues under Section 1325 including validity of future contributions.

(5541) *Gerrard v. Powell,* Case No. 14-3129 (E.D. Ill. 2014) – Chapter 13 Trustee can request plan modification to increase plan payments where Debtor's income rose substantially since confirmation of Plan. Nothing in BAPCPA changed the fundamental rule of Section 1329 that modification is permissible to increase plan payments based on increase in Debtor's ability to pay using requirements of Section 1325 of good faith, best interests of creditors, and feasibility, based on Debtor's current income and expenses and actual ability to repay creditors.

(5542) *Neidich v. Lorenzo,* 2014 WL 1877408 (S.D. Fl. 2014) – Projected disposable income test does not apply to post-confirmation modification of plan.

(5543) *In re Swain,* 509 BR 22 (Bankr. E.D. Va. 2014) – Section 1325(b) disposable income test does not apply to modifications. However, modifications must comply with feasibility, best interests of creditors and good faith. Debtor's proposed modification to increase payments met requirements of Section 1325(a) where amended schedules demonstrated that higher payment was feasible, higher payments would increase dividend to unsecured creditors, and modification was otherwise in good faith. Fact that trustee calculated disposable income to be

higher than that included in modification was not basis to deny modification.

(5544) *In re Powers,* 2014 WL 1274067 (Bankr. C.D. Ill. 2014) – Section 1325(b) requirement for 100% of disposable income does not apply to plan modifications under Section 1329. Trustee's plan modification that sought to increase Debtor's plan payment based solely on Debtor's increased income rejected by court. Trustee's plan modification based entirely on principal that disposable income can and should be recalculated denied.

(5545) *In re Swain,* 2014 WL 1311439 (Bankr. E.D. Va. 2014) – Section 1325(b) does not apply to plan modifications under Section 1329. After confirmation of plan, IRS filed priority claim that caused plan payment to be insufficient. Debtors proposed to modify plan to increase plan payment for three months to provide additional funding to pay IRS claim, and then to reduce plan payment to lower amount. Trustee objected, asserting that Debtors' disposable income exceeded both the greater payment proposed for payment of priority taxes and lower amount proposed for remainder of plan term. Court concluded that Section 1325(b) does not apply to plan modifications and Debtor is not required to determine plan payment using standards in 1325(b)(2) or (3). Debtors' failure to offer what trustee calculated as actual disposable income did not prevent approval of the modification of the plan. Court noted that Trustee did not raise issue of good faith.

(5546) *In re Pasley,* 2014 WL 1199558 (Bankr. E.D. Ca. 2014) – Projected disposable income test of Section 1325(b) is not incorporated into plan modifications under Section 1329. However, good faith requirement of Section 1325(a)(3) brings into plan modifications a requirement that Debtors continue to use best efforts.

(5547) *In re Barnes,* 506 BR 777 (Bankr. E.D. Wi. 2014) – Disposable income test under Section 1325(b) is not incorporated into and does not apply to modification under Section 1329. However, good faith element of Section 1325(a)(3) is incorporated into Section 1329.

(5548) *In re Martin,* 2013 WL 6196566 (Bankr. N.D. Ohio 2013) – Under Section 1329, confirmed plan can be modified to increase or decrease amount of plan payment, and must meet good faith, feasibility, and other requirements. Good faith looks at consideration of totality of circumstances including income, living expenses, special circumstances such as unusually high medical expenses, amount of plan payment as indicia of Debtor's sincerity, and the statutorily mandated policies that bankruptcy code be liberally construed in favor of Debtor. Feasibility requires that Debtor be able to make the payments and otherwise comply with the plan as modified. Plan modification that indicates clear inability to make the payments is not feasible. Section 1325(b) does not apply, meaning that court will not determine either income or expenses as specified in the means test, but consider actual income and actual expenses. Modification that proposed to increase payments by pro-rated amount of anticipated tax refunds was not feasible as payments would depend on calculation of future refunds that are difficult to calculate, hard to predict, and may not materialize. While future tax refunds must be remitted, it is not appropriate to include those in the plan payment itself where doing so would leave Debtor unable to make ongoing plan payments. Expenses must be reasonable and actual at time of modification; and while court is not bound by IRS guidelines, court can use those guidelines in determining reasonable expenses. Utility expenses, while higher than IRS guidelines, were fully documented and supported Debtor's amended Schedule J. Cell phone expense of $215 per month was not reasonable as Debtors have right to basic phone service but not texting, mobile internet or non-essential phone calls forces unsecured creditors to subsidize luxury expenses. Transportation expenses of $645 per month were reasonable given that Debtors lived reasonably central to work and other obligations which produced long daily commutes for husband and long weekly trips for medical treatments. Debtors' high medical expenses were supported by documentation to establish actual amount of expenses and existence of medical conditions.

(5549) *In re Fleck,* 2013 WL 4462202 (Bankr. N.D. Ohio 2013) – Trustee's plan modification granted where tax returns indicated that Debtors' income increased $18,000 since commencement of case, such that Debtors had additional disposable income that could be contributed to plan. Debtors also attempted to maintain budget for four people, including Debtor's daughter and granddaughter who Debtors were initially supporting at confirmation of plan but who, based on current tax returns, were no longer claimed by Debtors as dependents and who earned income but did not contribute that income to household. Viewed as "economic unit" Debtors could not simultaneously include daughter and granddaughter for determining household size and expenses and then ignore income received by daughter and granddaughter in calculating household income.

(5550) *In re Hargis,* 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Section 1325(b) requirement for payment of disposable income is not applicable to a post-confirmation plan modification. Section 1325(b) defines disposable income using a historical basis relating to pre-petition time period. Using that definition for plan modifications makes no sense, particularly where Section 1329 incorporates the requirements of Section 1325(a) but not (b).

(5551) *In re Kirby,* 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action are disposable income. Although Debtor properly amended schedule B to disclose, and Schedule C to exempt, post-petition personal injury action as exempt, "majority view" holds that exempt property can be disposable income in a Chapter 13 case. Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 "income" and Section 1325(b)(2) expressly defines "disposable income" to mean income not needed for Debtor's support. Trustee' plan modification granted to extent of additional funds necessary to pay creditors in full.

(5552) *In re Loveday,* 2012 WL 1565479 (Bankr. N.D. Ohio 2012) – Debtor's proposed modification sought to allow Debtor to sell oil and gas rights on Debtor's real property and to allow Debtor to retain proceeds for alleged additional expenses. Debtor sought to retain $3,100 in medical expenses. Since confirmation of plan, Debtor had incurred $5,500 in medical expenses while Debtor's budget included a medical expense budget that, since confirmation, would have paid only $2,400 of those expenses, warranting excusal of $3100 to cover additional non-budgeted expenses. Debtor also permitted to use $600 to purchase appliances. Debtor's budgeted amount for home maintenance of $100 was far below National and Local Standards that excusal of $600 to purchase appliances appeared to be reasonably necessary. Debtor also supported excusal of $1,000 for car repairs where Debtor and his wife owned two older cars, one of which needed significant repairs, and Debtor's budget had only $150 budgeted for transportation which included maintenance, repairs and gasoline. Court also allowed

Debtor to retain $3300 for future expenses. Although Debtor had not yet incurred those expenses, given the expenses that Debtor had already incurred that far exceeded budgeted items, Court concluded that Debtor likely would continue to incur expenses for medical and transportation in excess of the budgeted amounts and that Debtor would need to use retained funds to pay for these expenses.

(5553) *In re Crim*, 2011 WL 863452 (Bankr. M.D. Tenn. 2011) - Disposable income test is not applicable to plan modification. A proposed modified plan should satisfy the general requirements for confirmation such as the good faith requirement, the "best interest of creditors" test, and the feasibility test. Section 1329 does not incorporate the "projected disposable income" test, as set forth in § 1325(b). Income and expenses are not calculated according to the method provided by § 1325(b) but are based Debtor's actual income and expenses at the time of the proposed modification are used to determine whether the payments should be adjusted. However, this does not provide Debtor with *carte blanche* on expenses, and Court must still determine the reasonableness and necessity of expenses in the context of sustaining the basic needs of the Debtor and dependents, and must still balance interests of Debtors and creditors. Debtor's motion to modify confirmed plan, reducing distribution to unsecured creditors from 100% to 30%, while maintaining private school tuition payments, was granted. Testimony demonstrated that $500 tuition cost was reasonable and necessary for chronically ill child for whom no public school option was available.

11.141 Changing Disbursing Agent

(5554) *In re Vela,* 2015 WL 1152720 (Bankr. W.D. Mi. 2015) – Section 1329 allows modification for limited purposes only. Debtor's confirmed plan provided for cure and maintain of mortgage with payments through the trustee. After the mortgage was brought current through Michigan's Hardest hit program, Debtor filed a plan modification to allow Debtor to make ongoing payments directly. Plan modification fell within limited scope of Section 1329 as modification would minimally shorten plan term and would reduce disbursements to at least one class of claims, that being the Trustee, and proposed to alter distributions to mortgage company on account of payments made by other parties. However, disbursing agent is determined by Section 1326(c) which creates presumption that Trustee should be disbursing agent, unless the confirmation order provides for a different disbursing agent. Modification does not produce new Order Confirming Plan as there is only one confirmation order in any Chapter 13 case. Proposal to alter disbursing agent as part of plan modification violates Section 1326(c) in violation of Section 1329 and Section 1325(a)(1). Issue of who is the disbursing agent must be determined at confirmation and determination controls over remaining term of plan.

11.142 Post-Petition Property

(5555) *In re Russell,* Case No. 13-30160 (Bankr. M.D. Al. 2016) – Post-petition cause of action that arose within 3 year Applicable Commitment Period but not recovered until after expiration of ACP not required to be committed in below-median Debtor's 60 month chapter 13 plan. While Debtor would have been required to turnover proceeds had they been received within ACP, Section 1325 does not require Debtor to commit additional income received after expiration of ACP. Section 1329(c) allows court to extend ACP for up to 60 months for cause, but increasing dividend to unsecured creditors is not "cause" for purposes of Section 1329. "Cause" to extend ACP beyond 36 months is Debtor-centric, such that ACP can be extended if necessary to benefit Debtor, but is not creditor-centric and does not apply where only benefit of extension would run solely to unsecured creditors.

(5556) *In re White,* 2014 WL 2006560 (Bankr. N.D. Ala. 2014) – Insurance proceeds received by one Debtor following death of co-Debtor in Chapter 13 must be paid into plan to extent funds are not otherwise exempt. Debtor was not owner of policy so could not exempt proceeds. Receipt of life insurance proceeds by one Debtor constituted change of circumstances that warranted plan modification.

11.143 Procedural Requirements

(5557) *In re Ramos,* 540 BR 580 (Bankr. N.D. Tx. 2015) – Debtor can modify plan even after expiration of 60 month term where Debtor did not make payments on direct pay mortgage during plan term and so has not completed payments due under plan.

(5558) *In re Keen,* Case No. 09-79637 (Bankr. E.D. Mi. 2010) - Motion to Incur Debt and to Retain 2009 Tax Refund was defective as seeking more than one type of relief in the same motion, each of which had differing requirements regarding notice, service and non-response certification. To extent Motion sought to excuse tax refunds, motion is a plan modification pursuant to Guideline 6 with 21 days' notice required, while Motion to incur debt requires only 14 days' notice.

11.144 Changing Plan Length

(5559) *In re Luman,* 2017 WL 521518 (Bankr. E.D. Mi. 2017) - Section 1329 Permits Debtor to Modify Chapter 13 Plan and does not require any demonstrated "change in circumstances" as a threshold requirement for modification. Modification must request relief available under Section 1329(a) and comply with Sections 1322 (a), 1322 (b), 1323(c) and 1325 (a). Modification sought to shorten Plan term from 60 months to 36 months that requirements of Section 1329 where Debtor is below median income and could have proposed 36 month Plan in first instance; Plan was intended to have 36 month Plan term and reference to 60 months was error; and Section 1329 permits modifications to reduce time for payments to creditors. Even if modification required cause, Court would approve modification where Debtor's poor health has continued to deteriorate and it became increasingly unlikely that Debtor would be able to continue to work for full 60 month commitment period. Creditors will receive more than they would have received in liquidation and Debtor will benefit from earlier medical retirement and retention of additional 48 biweekly payments.

(5560) *In re Ladden,* 2017 WL 485662 (Bankr. N.D. Ohio 2017) - Confirmed Chapter 13 Plan is binding on Debtor as well as creditors. Section 1327 precludes modification of confirmed Plan under Section 1329 where modification addresses issues that were or could have been decided at the time Plan was originally confirmed. Debtor failed to justify proposed modification which would reduce Plan term from 60 months to 36 months where Plan provided for distribution to unsecured creditors of no less than 13%, subject to review and increase over the life of

the Plan. Fact that Debtor's tax refunds were greater than amount originally anticipated, such that 13% dividend had been achieved in 36 months, was not basis to shorten Plan length as there was no indication at time Plan was confirmed that Debtor intended to limit distribution to unsecured creditors or limit Debtor's obligation to remit tax refunds which could increase distribution to unsecured creditors. Issues concerning distribution to unsecured creditors and impact of tax refunds could and should have been raised in connection with confirmation. Further, Debtor was "above median" income which would require Plan to run full 60 month duration raising likelihood at time of confirmation that receipt of additional disposable income would increase distribution to creditors, and any attempt by Debtor to confirm a Plan lasting only 36 months and paying a 13% dividend would not have been confirmable. Debtor's attempt to shorten Plan term from 60 months to 36 months is "bait and switch" which is precluded by Section 1327.

(5561) *In re Ragland,* 2016 WL 106803 (Bankr. S.D. Ohio 2016) – Proposed modification denied where Debtor failed to demonstrate any change in circumstances since confirmation. Debtor's initial plan designated Debtor as "above median" and proposed a 60 month plan term. More than two years later, Debtor discovered erroneous designation as Debtor was actually "below median" and Debtor sought to shorten plan from statutorily required 60 months for "above median" Debtor to 42 months. Court denied Motion as sole basis was mistake in original plan and pursuant to Section 1327, confirmed plan is equally binding Debtor. Modification requires change in circumstances and requires consideration of interests of creditors, not just Debtor.

(5562) *In re Pasley,* 2014 WL 1199558 (Bankr. E.D. Ca. 2014) – Below median Debtor who confirmed plan with 60 month term could modify plan to shorten term to 44 months where original intent of plan to reinstate mortgage accomplished in shorter time that originally contemplated. Debtors had 36 month applicable commitment period and plan as confirmed provided 0% dividend to unsecured creditors. Plan was originally proposed as 60 month term because plan estimated that it would take 60 months to cure mortgage and car. Debtors later obtained mortgage modification that brought mortgage current and allowed Debtor to pay off car in only 44 months. Shortening of plan term after achieving objectives of original filing does not evidence lack of good faith, and Section 1329 expressly allows modification to shorten plan term. There was no evidence that Debtors were attempting to manipulate code or that at time of confirmation Debtors had any reason to believe that mortgage would later be modified such that Debtors could complete the plan earlier than 60 months. While unsecured creditors may have anticipated recovery based on entire 60 month plan, statute required only that Debtor commit disposable income for applicable commitment period, which was 36 months, such that unsecured creditors had no right to expect any payments beyond 36 month ACP. While Debtor had the ability to continue to make plan payments for full duration of plan, Section 1325 and Section 1329 required only that Debtor make plan payments for duration of ACP. Debtors could shorten plan term notwithstanding ability to pay as long as shortened term still complied with minimum ACP.

(5563) *In re Barnes,* 506 BR 777 (Bankr. E.D. Wi. 2014) – Section 1329 expressly allows shortening of plan term. Debtor who was below median income but who confirmed plan with term of 60 months not barred as matter of law from modifying plan to shorten plan term. However, Debtor failed to demonstrate any change in circumstances warranting shortening of term where evidence indicated that Debtor could continue to make plan payments over remaining term of plan as confirmed. To shorten plan term, Debtor must prove some change in circumstances that inhibits ability to fund plan through remainder of original term.

(5564) *In re Berberoglu,* Case No. 10-53436 (Bankr. E.D. Mi. 2013) – Debtor cannot modify plan to shorten plan term absent change in circumstances since confirmation of plan that would warrant deviation from res judicata effect of confirmed plan. Below median Debtor confirmed plan with 42 month term producing 7% dividend. After 36 months, plan had paid 7%, Debtor sought to shorten term to 36 months. Court denied modification as Debtor did not have any change in circumstances and only basis to modify was because Debtor wanted out of the case.

(5565) *In re Buck*, 2010 WL 5463063 (Bankr. N.D. Ga. 2010) - Applicable Commitment Period is determined at the petition date based entirely on pre-petition income. Following confirmation of 60 month plan, Debtor-husband lost his job. As a result, although CMI at the commencement of the case rendered Debtors "above median", updated income dropped the Debtors into the "below median" category. Debtors sought to modify the plan to reduce the term from 60 months to 36 months, arguing that the changed circumstances should no longer obligate them to a 60 month term. The Court rejected the attempt to shorten the plan term, holding that the "applicable commitment period" is determined by Debtors' CMI which is entirely "pre- petition focused".

(5566) *In re Grutsch,* 2011 WL 2600638 (Bankr. D. Kn. 2011) – Provisions of Section 1325(b) do not apply to plan modifications. Debtor who was originally above median and had plan confirmed with 60 month term and who later retired and had reduction in income could modify plan to shorten term to 36 months as long as modification complied with good faith requirement. Disposable income and applicable commitment period provisions of Section 1325(b) do not apply to plan modifications.

(5567) *In re Heideker,* 2011 WL 2432913 (Bankr. M.D. Fl. 2011) – Applicable Commitment Period applies to plan modifications. Debtors with above median income cannot modify confirmed plan to less than 60 months unless modification also commits 100% dividend.

11.145 Curing Post-Petition Defaults on Secured Claims

(5568) *In re Gardstein,* 2013 WL 3306095 (Bankr. E.D. Mi. 2013)- Court would lift stay for cause based on Debtor's failure to make all post-petition mortgage payments after confirmation of Chapter 13 Plan. Debtor's Plan as confirmed provided for payment of the arrearage through the Trustee, but provided for direct payments of the ongoing mortgage by the Debtor. Although the parties did not agree on the amount of the post-confirmation missed payments, the evidence indicated that there was at least some delinquency. However, Court would delay effect of stay relief to provide Debtor with opportunity to cure arrearage through a plan modification.

(5569) *In re Long,* 2011 WL 2881243 (Bankr. W.D. Mi. 2011) – Debtor cannot modify plan to cure post-petition defaults on home mortgage loan under cure-and-maintain plan. Section 1322(b)(2) precludes modification of mortgage secured solely by Debtor's residence. Section 1322(b)(5) permits Debtor to cure pre-petition defaults on home mortgage. Section 1329 permits modification only to (1) increase or reduce

amount to be paid a particular class of claims provided for under the plan; (2) extend or reduce the time within which to pay a particular class of claims provided for under the plan; (3) adjust amounts to be paid a particular claimant in order to account for other payments received by the creditor outside of the plan; and (4) reduce plan payments to reflect increases in health insurance premiums. Even if Section 1322(b)(5) allows cure of post-petition defaults in mortgage payments, Section 1329 cannot modify the terms of the mortgage to allow post-petition payments to be restructured over the objection of the creditor. Court cannot use equitable power to override specific limitations found in Section 1329. Post-confirmation amendment process under Section 1329 does not permit Debtors a second chance to use Chapter 13 as a means to alter what otherwise are Cendant's rights under its agreement to foreclose on its mortgage.

11.146 Payments Received After Expiration or Closing of Case

(5570) *In re Tucker,* 2018 WL 378887 (Bankr. M.D. Tn. 2018) – Trustee not entitled to retain or disburse funds returned to Trustee after closing of case unless Trustee can link returned fund to payments made by Trustee in first instance. Several months after case closed, Trustee received refund from secured creditor. Trustee alleged that funds were result of escrow overpayment during Chapter 13 case while Debtor contented that overpayment resulted from payments made by Debtor directly to lender after case expired. Trustee did not present any evidence to support allegation that refund arises from payments made by Trustee during pendency of case. Trustee ordered to turnover refunded proceeds to Debtor.

H. Lien Stripping

11.147 Permissible

(5571) *In re Travers,* 541 BR 639 (E.D. Ky. 2015) – Wholly unsecured lien can be stripped in Chapter 13. Supreme Court decision in *Bank of America v. Caulkett* applies in Chapter 7 context and does not overrule clear precedent of Sixth Circuit in *Lane v. Western Interstate Bancorp,* 280 F.3d 663 (6th Cir. 2002).

(5572) *Fisette v. Keller*, 455 BR 177 (8th Cir. B.A.P. 2011) - Bankruptcy court ruled that 11 U.S.C. Section 1322(b)(2) prevented the Debtor from modifying the rights of the junior lienholders, precluding stripping of lien where value of property was less than amounts owed on senior liens and encumbrances. On appeal, the Eighth Circuit BAP reversed, concluding that Section 1322(b)(2) anti-modification provision did not apply to wholly undersecured junior lienholders, and their rights could properly be modified. On further appeal, Eighth Circuit concluded it lacked appellate jurisdiction as BAP reversed and remanded for further proceedings, rendering BAP order a non-final order. Order by definition contemplated further judicial activity rendering appeal at this point interlocutory.

(5573) *Woolsey v. Citibank, N.A.,* Case No. 11-4014 (10th Cir. 2012) – Debtor cannot strip wholly underwater second mortgage in Chapter 13. Section 506(d) allows court to void a lien that is not an allowed secured claim. Creditor filed proof of claim, and claim was not subject to valid objection, rendering claim "allowed". Claim cannot be disallowed under Section 502(b)(1) as the secured claim is enforceable under the mortgage documents pursuant to applicable state law. Citing *Dewsnup,* court concluded that an allowed secured claim for purposes of Section 506 is a claim that is allowed (as creditor's claim was here) and "secured" by a lien that is valid under state law, as creditor's lien is here. Value of collateral has no bearing on lien-voiding language of Section 506(d). In dicta, court indicated that Section 1322(b)(2) may provide separate way to strip lien by allowing modification of rights of holders if the limitation on modification of secured claims is interpreted to require some value to support the claim (citing, among other Circuits, *In re Lane*, 280 F.3d 663 (6th Cir. 2002)).

11.148 Discharge Required

(5574) *Victorio v. Billingslea,* 470 BR 545 (S.D. Ca. 2012) – Court properly denied confirmation of plan that proposed to strip lien in case where Debtor was not eligible for discharge. Section 1325 does not permit permanent removal of unsecured junior lien absent entry of discharge. Although confirmed plan allowed Debtor to strip off junior lien during pendency of case, lien would reattach when plan was concluded.

(5575) *In re Gerardin,* Case No. 10-16511 (Bankr. S.D. Fl. 2011) – Lien may not be stripped if Debtor is not eligible for discharge. Section 1325 requires that the lender retain its lien until either paid in full per applicable non-bankruptcy law or the Debtor receives a discharge.

(5576) *In re Colbourne,* Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

(5577) *In re Quiros-Amy,* 456 BR 140 (Bankr. S.D. Fl. 2011) – Debtor cannot strip second mortgage. Section 1325(a)(5) requires that lien remain until entry of discharge. Where there will be no discharge, no basis to remove the lien.

(5578) *In re Lindskog,* 2011 WL 1576561 (Bankr. E.D. Wis. 2011) – Debtor who is not entitled to discharge cannot strip second mortgage. Section 1325(a)(5) requires that creditor retain lien until either debt is repaid or the Debtor receives a discharge. Allowing the lien strip would circumvent *Dewsnup v. Timms* and would be contrary to Sections 348(f)(1)(C) and 349(b)(1)(C) which provide for avoided liens to "spring back" if the case is converted or dismissed.

11.149 Discharge Not Required

(5579) *Curwen v. Whiton,* Case No. 15-1824 (D. Ct. 2016) – Discharge is not required to strip lien in Chapter 13 where property is worth less than balance owed on senior lien.

(5580) *HSBC Bank v. Blendheim,* 803 F.3d 477 (9th Cir. 2015) - Debtor cannot strip off lien in Chapter 13 even though Debtor was ineligible for Chapter 13 discharge because new filing came too soon after prior Chapter 7.

(5581) *In re Cain,* 513 BR 316 (6th Cir. BAP 2014) – Debtor can strip lien in Chapter 20 where Debtor is not entitled to discharge.

(5582) *Wells Fargo Bank, NA v. Scantling,* 2014 WL 2750349 (11th Cir. 2014) – Chapter 13 Debtor can strip wholly unsecured second mortgage even where Debtor is not eligible for discharge under Section 1328(f).

(5583) *Branigan v. Davis,* 2013 WL 1926407 (4th Cir. 2013) – Chapter 13 Debtor can strip wholly unsecured mortgage even where Debtor is not eligible for discharge because of prior chapter 7 discharge. Section 506(a) results in wholly unsecured mortgage being rendered unsecured as a matter of law. Under Section 1322, plan can alter treatment of unsecured debts. Plan proposes to modify unsecured mortgage by removing it from property. Section 1325(a)(5) is not implicated as mortgage is not "secured claim" as matter of law, which is prerequisite for application of Section 1325(a)(5).

(5584) *In re Scotto-DiClemente,* 459 BR 558 (Bankr. D.N.J. 2011) – Bankruptcy code does not condition ability to strip lien on eligibility for discharge. Section 1325(a)(5) does not apply because wholly unsecured second mortgage is not "secured" claim pursuant to Section 506.

(5585) *In re Jennings,* 454 BR 252 (Bankr. N.D. Ga. 2011) – Lien strip is available in Chapter 13 notwithstanding prior discharge in Chapter 7 such that Debtor is not eligible for discharge in Chapter 13 proceeding as long as case is filed in good faith.

(5586) *David v. TD Bank, NA,* 447 BR 738 (Bankr. D. Md. 2011) – Discharge not required to strip wholly unsecured second mortgage.

(5587) *Frazier v. Real Time Resolutions,* 469 BR 889 (S.D. Ca. 2012) – Debtor can strip off wholly unsecured second lien even where Debtor is not eligible for discharge. Lien would be stripped off at completion of plan despite fact that Debtor is not entitled to discharge.

(5588) *In re Fair,* 2011 WL 1486021 (E.D. Wis. 2011) – Section 506 permits Debtor to strip entirely unsecured junior lien even if Debtor is not eligible for discharge. Section 1325(a)(5) requirement that creditor retain lien until discharge does not apply as Section 1325(a)(5) applies only to secured creditor. Where there is no value to support the claim, the claim is unsecured pursuant to Section 506 and restrictions of Section 1325(a)(5) do not apply.

(5589) *In re Davis,* 2011 WL 1460433 (Bankr. D. Md. 2011) – Wholly unsecured lien may be stripped even if Debtor is not eligible for discharge. In Chapter 13 cases, a Debtor's ability to strip off an unsecured junior mortgage lien is governed by two Bankruptcy Code provisions; Sections 506 and 1322(b). Court adopted minority position that right to strip wholly unsecured lien is arises from Section 506 and is not dependent on discharge under Section 1325 and 1328. Plan that proposes to strip second lien following Chapter 7 in which Debtor's personal liability was extinguished is not *per se* bad faith.

(5590) *In re Scantling,* Case No. 11-0369 (Bankr. M.D. Fl. 2012) - Chapter 13 Debtor ineligible for discharge can strip off wholly unsecured junior lien at completion of payments under plan. Section 1325(a)(5) does not apply because wholly unsecured liens are not allowable secured claims.

(5591) *Fisette v. Keller,* 2011 WL 3795138 (8th Cir. BAP 2011) – Debtor can strip off wholly unsecured mortgage even in cases where Debtor is not eligible for discharge. Strip is effective upon completion of obligations under plan and is not contingent on discharge.

(5592) *In re Coryell,* Case No. 09-54760 (Bankr. E.D. Mi. 2009) – Debtor can strip wholly unsecured second mortgage even where Debtor is not eligible for a discharge. There is no requirement that a discharge be received in order to strip a second mortgage. However, property cannot vest free and clear at confirmation but must remain property of the estate until plan completion.

(5593) *In re Grignon,* 2010 WL 5067440 (Bankr. D. Or. 2010) - Debtor not eligible for discharge because of § 1328(f) can strip off wholly unsecured junior mortgage when current Chapter 13 case is filed in good faith. Nothing in the Code prohibits a Debtor who is ineligible for a Chapter 13 discharge from filing a Chapter 13 case or prohibits such a Debtor from stripping off a wholly unsecured lien.

11.150 Primary Residential Collateral

(5594) *In re Hoffman,* Case No. 15-10156 (D. N.J. 2016) – Mortgage could not be modified even though residence also had small "guest cottage" that owner rented from time to time. At time Debtor obtained the mortgage, the guest house was not occupied and Debtor represented to lender that representations by the Debtor at closing that reflect that the guesthouse was and would be used as part of the Debtor's principal residence, not a separate income-producing unit. Court held that it would be inequitable to allow Debtor to represent that property will be used solely as residence to obtain mortgage and later to attempt to modify the mortgage by alleging that portion of property had been used for income producing purpose.

(5595) *In re Brooks,* Case No. 15-21393 (Bankr. W.D.N.Y. 2016) – Mortgage on multi-unit property where Debtor resides in one unit and rents two smaller units is primarily used as Debtor's principal residence. As such, mortgage cannot be modified. Court discussed three alternative constructs, two of which draw "bright lines" if any part of property is used as residence or any part is used as non-residence, and third alternative that looks to particular facts of case and inquiring whether the loan was intended to be primarily residential or primarily commercial when made.

(5596) *In re Beck,* 2014 WL 4549014 (Bankr. D. Hawaii 2014) – Debtor can strip in Chapter 13 lien held by IRS and lien held by condominium association where property value was less than amount owed on superior liens.

(5597) *Kreitzer v. Household Realty Corp.,* 489 BR 698 (Bankr. S.D. Ohio 2013) – Section 1322(b)(2) precludes modification of claim that is secured solely by mortgage on Debtor's principal residence. Including in mortgage an assignment of "miscellaneous proceeds" defined as any compensation, settlement, award of damages, or proceeds paid by any third party for damage to property, condemnation or other taking of property, conveyance in lieu of condemnation, or misrepresentation concerning value or condition of property. Courts have uniformly concluded that including standard provisions such as insurance or "rents, royalties and profits" do not constitute additional security as used

in Section 1322(b)(2). Proceeds are inextricably bound to the property itself as part of the possessory bundle of rights rather than being independent security for loan.

11.151 Non-Primary Residential Collateral

(5598) *In re Brooks,* Case No. 15-21393 (Bankr. W.D.N.Y. 2016) – Mortgage on multi-unit property where Debtor resides in one unit and rents two smaller units is primarily used as Debtor's principal residence. As such, mortgage cannot be modified. Court discussed three alternative constructs, two of which draw "bright lines" if any part of property is used as residence or any part is used as non-residence, and third alternative that looks to particular facts of case and inquiring whether the loan was intended to be primarily residential or primarily commercial when made.

(5599) *In re Lanois,* 2014 WL 4449805, 516 BR 680 (Bankr. D.R.I. 2014) – Mortgage on multiunit property can be modified even if Debtor uses one of the units as his personal residence as long as the security interest extends to other units. Debtor can modify mortgage to reduce balance to be paid to current value of collateral and pay that amount plus interest over life of plan. Debtor is not required to maintain private mortgage insurance on mortgage that is subject to modification.

(5600) *In re Hall,* 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Confirmed plan is binding on Debtor and creditors. Plan proposed to bifurcate car claim, and to pay secured portion in full with interest. Plan also proposed to pay portion of any allowed claim that exceeds the value indicated will be treated as an unsecured claim at 100%. Debtor could not later attempt to satisfy car claim at less than full payment. First, plan as confirmed required 100% dividend to unsecured portion of secured claim. Second, Section 1325(a)(5) allows lien to be stripped only if (a) creditor received full payment of contract balance, or (b) Debtor receives discharge. In "Chapter 20" Debtor as not entitled to discharge. Therefore, Debtor could not require creditor to release lien unless creditor received full contract payment.

11.152 Procedure

(5601) *Maplethorpe v. CitiMortgage, Inc.,* 2017 WL 2712596 (Bankr. E.D. Mi. 2017) – Stripping of junior lien requires proof that value of property is less than amount owed on superior liens and encumbrances. Debtor, as party proposing to strip lien, bears burden of proof. Although Debtor presented appraisal testimony to establish value of property, Debtor did not present evidence of balance owed on mortgage. Only testimony on alleged debt was that of Debtor s to which Court sustained objection based on hearsay. Debtor did not testify that he had any personal knowledge of balance owed and was merely parroting amount shown on account statement.

(5602) *Chagolla v. JPMorgan Case Bank, NA,* Case No. 08-87523 (9th Cir. BAP 2016) – Confirmed plan that proposed to avoid entirely unsecured second mortgage and called for filing of adversary proceeding to determine value provided sufficient notice to creditor to strip lien notwithstanding that Debtors did not file the adversary proceeding. Debtors could institute adversary after discharge where creditor had full notice as of the date of filing of the plan of Debtors' intention to strip lien and creditor could not demonstrate any prejudice resulting from delays.

(5603) *In re Rodriguez,* 2013 WL 1716110 (3d Cir. 2013) – Bank could not challenge confirmation order that stripped second mortgage from property in absence of fraud. Debtor's plan proposed to strip lien and bank filed objection. Bank failed to appear at confirmation hearing and court confirmed plan and stripped lien. Confirmation order is the controlling order in Chapter 13. Bank erred when it failed to appear and present its objection to confirmation. Bank had proper notice and could have appeared. Confirmation was final order under Section 1327 and Bank presented no basis to set aside order under Section 1330.

(5604) *Bennett v. Springleaf Financial Services,* 2012 WL 113363 (Bankr. S.D. Ohio 2012) – Valuation of property stated in Chapter 13 Plan that was confirmed controls value of property for purposes of lien strip. Plan provided that property would be valued at amount stated in appraisal filed with the court unless a creditor object, and that the appraisal would become binding upon confirmation. Value established in confirmed plan controlled in later adversary proceeding to strip second mortgage. Plan sufficiently advised creditors that valuation stated in filed appraisal would control unless objections were filed. Under *Espinosa*, terms of confirmed plan bind all parties where plan sufficiently advised creditors of terms and afforded creditor opportunity to object. Preamble to Plan stated, in bold face, that plan sought to value property and that confirmation of the plan would also constitute a valuation hearing. Plan provision allowed Debtor to file adversary within 30 days following confirmation. Debtor entitled to summary judgment in Adversary based on value determined in confirmed plan.

(5605) *In re Weese,* Case No. 09-9268 (Bankr. W.D. Mi. 2010) – Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

(5606) *In re Peckens-Schmidt,* 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

(5607) *In re Ruhstaller,* Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Plan that clearly stated that Bank's second mortgage would be stripped based on a lack of equity above the amount owed on the First Mortgage could be confirmed and lien stripped. Sixth Circuit does not require

adversary proceeding and that unsecured mortgage can be stripped by plan confirmation without a separate motion to value property. Lien is avoided pursuant to section 1327(c) which is effective upon plan confirmation with no other requirements. Although filing a Motion may be better practice, it is not required by the Code.

(5608) *In re Rader,* Case No. 08-67718 (Bankr. E.D. Mi. 2009) - Motion to strip lien denied without prejudice. Action to strip lien must be prosecuted by adversary proceeding unless the affected creditor stipulates to the relief requested.

11.153 Necessary Parties – Jointly Owned Property

(5609) *Alvarez v. HSBC Bank USA, NA,* 2013 WL 5737704 (4th Cir. 2013) – Debtor cannot strip off lien on property owned by Debtor and non-filing spouse as tenants in the entireties. Only the Debtor's interest in the property was property of the estate rather than the whole of the property.

(5610) *In re Pierre,* 468 BR 419 (Bankr. M.D. Fl. 2012) – Debtor cannot strip lien off property owned by Debtor and non-filing spouse as tenants by entireties. Entireties property belongs to neither spouse individually but each spouse holds the whole or the entirety. Neither spouse can sell, forfeit, lease or encumber any part of the estate without the consent of the other.

(5611) *Strausbough v. Co-Op Services Credit Union,* 426 BR 243 (Bankr. E.D. Mi. 2010), *aff'd sub. nom In re Tomasi,* Case No. 10-11609 (E.D. Mi. 2010) – An individual Debtor can avoid a junior lien on real property owned as tenants by the entireties. Under § 506(a) each secured claim is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. A bankruptcy estate's interest in entireties property is in whatever equity is available in the entireties property that can be liquidated for the benefit of the joint creditors of the Debtor and the non-filing spouse. Where there are no joint creditors or where there is no equity in the property over and above senior liens and encumbrances, the estate does not acquire any interest in the property on which a secured claim can be based. In this case, there is no dispute that the value of the property is less than the balance owed on the first mortgage, leaving no equity available to pay joint claims and leaving the estate with no interest in the entireties property. Because the bankruptcy estate has no interest in the entireties property, the second mortgage holder has no interest in the estate's interest in the property and the second mortgage holder's claim is not an allowed secured claim.

11.154 Necessity for Proof of Claim

(5612) *Burkhart v. Community Bank of Tri-County,* Case No. 14-315 (D. Md. 2016) – Lien of allegedly wholly unsecured mortgage creditor cannot be stripped where creditor has not filed a proof of claim. Section 506(d)(2) voids a secured claim that is not allowed unless the reason for disallowance is failure to file a claim. Because creditor did not file a claim, Section 506(d)(2) did not provide any basis to strip lien. Lien stripping is two-step process, one of which values the property under section 506(a), and Section 506(d) which then voids the lien. Section 506(a) allows court to value an allowed claim. Where creditor does not file claim, claim is not "allowed".

(5613) *In re Brisco,* 486 BR 422 (Bankr. N.D. Ill. 2013) – Filing of proof of claim by creditor is prerequisite to determination of secured status. Where creditor does not file claim, creditor does not have "allowed claim" within scope of Section 1322(b)(2). As such, the lien cannot be stripped.

11.155 Valuation Date

(5614) *In re Coslow,* 2017 WL 3225450 (Bankr. W.D. Ky. 2017) – To determine whether property has value for purposes of abandonment, value is determined as of petition date. Fact that property appreciated in value post-petition or that amount owed on junior mortgage was reduced post-petition does not create value for purposes of abandonment. Equity accrued through date of petition is available for estate. Equity that accrues post-petition as compensation for post-petition services belongs to Debtor, as Chapter 7 estate includes only Debtor's rights as they existed on petition date.

(5615) *In re Guerra,* Case No. 16-40121 (Bankr. D. Mass. 2017) – For purposes of stripping lien in Chapter 13, "valuation" is determined as of the filing date rather than date of hearing on Debtor's motion to strip lien. As a petition date, there was no equity of the available to support second mortgage. Appraisal obtained 9 months after filing indicated that property had appreciated post-petition sufficient to create equity for purposes of second mortgage. Absent unusual circumstances, filing date is most logical point to establish valuation. Post-petition increase in value does not preclude lien strip.

(5616) *In re Wilson,* 2016 WL 2717648 (Bankr. N.D. Ohio 2016) – Resolution of valuation issue, and thus determination as to whether second mortgage was supported by any equity or could be stripped, turned on comparison of respective appraisals. Debtor's appraiser improperly reduced value of manufactured home based on mis-reading of HUD guidelines for "skirting". Thus, reduction applied by Debtor's appraisal was not warranted. Creditor's appraisal was too high as based on comparable properties that were not in same condition as subject property. Parties agreed that subject property needed repair and was in average condition but creditor's appraisal was based entirely on property in good condition without need for repairs. Court concluded that Debtor's appraisal, increased by amount of repairs that were not required, produced best valuation. Value as adjusted exceeded balance owed on first mortgage leaving second mortgage partially secured and so not susceptible to lien strip.

(5617) *In re DiMauro,* Case No. 15-51346 (Bankr. D. Del. 2016) – Valuation date for determining whether second lien is unsecured is petition date. Using petition date reduces gamesmanship and reduces incentive to delay litigation or appeals. Using petition date means Debtor benefits in market where prices are rising as Debtor does not have to account for appreciation, and in Debtor is disadvantaged in down market.

(5618) *In re Fuqua,* 2015 WL 5678361 (Bankr. E.D. Mi. 2015) – Valuation date is presumptively the petition date but presumption is rebuttable by relevant circumstances including amount of time that has passed between petition date and confirmation date; volatility of the market and

whether there has been a substantial change in value between the petition and confirmation dates; whether the party materially benefitting from the delay is responsible for the delay or is perceived as trying to manipulate the process for that party's benefit; and likelihood that property will or will not be dispose of or become relatively useless during the life of the plan. Court used valuation date near confirmation date where case had been pending for two years due largely to Debtor's choice to file case under Chapter 7, convert case to Chapter 11, reconvert to Chapter 7 and finally convert to Chapter 13 in which Debtor sought to "cram down" two rental properties. Likelihood was that property values had increased significantly over that time period such that valuation date near confirmation was appropriate choice.

(5619) *Reconco v. Partners for Payment Relief III, LLC,* 2014 WL 1295721 (Bankr. E.D. Va. 2014) – Valuation date for determining whether lien can be stripped is petition date. Debtor and creditor rights are generally determined as of petition date; proofs of claim are determined as of petition date; property of estate is generally determined as of petition date; and using petition date is most consistent with overall scheme of bankruptcy.

(5620) *In re Gutierrez,* 2013 WL 6198220 (Bankr. C.D. Ca. 2013) – Value of collateral for purposes of determining extent of security interest is determined as of petition date. As of petition date, value of property was less than balance owed to first mortgage, allowing Debtor to avoid second and third mortgages. By the time of confirmation of the plan, the value of the property increased to exceed the balance owed on the first mortgage. Court concluded that appreciation of the property post-petition did not prevent stripping of second and third mortgages, as property did not have equity in excess of first mortgage as of petition date.

(5621) *In re Garn,* 2013 WL 5723746 (Bankr. D. Utah 2013) – Under Section 506(a)(1), court is to value property based on purpose of the valuation and how the collateral is to be used. In lien strip cases, purpose of valuation is to determine whether junior mortgage is secured creditor, which is determined as of petition date. Thus, value of property is determined as of petition date.

(5622) *In re Cahill,* 2013 WL 6705155 (Bankr. D.N.H. 2013) – Purpose of valuation is to determine whether plan can strip lien. Lien strip would be effective as of confirmation of plan. Thus, value must be determined as of a date that is reasonably proximate to confirmation date.

11.156 Valuation and Secured Status

(5623) *Mintz v. CitiBank, NA,* 2018 WL 4008362 (Bankr. N.D. Ohio 2018) - Section 1322 allows Debtor to modify rights of holders unsecured claims. Whether lien is secured or unsecured depends on whether security interest has any value as determined under Section 506. If lien on Debtor's homestead has positive value, no matter how small, claimant holds secured claim that cannot be modified. If lien has no value at all because value of property is less than amount owed on superior liens and encumbrances, lien can be avoided. Debtor's appraisal testimony entitled to greater weight where Debtor's appraisal provided cost estimates for necessary repairs and renovations and was based on appraiser's personal experience in renovating more than 100 homes per year while lender's appraisal was based solely on comparable sales with no adjustment for necessary renovations and repairs.

(5624) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Complaint states cause of action to determine validity, priority and extent of lien even where complaint concedes validity of lien and that lien is first priority. Dispute regarding amount owed on lien is dispute regarding "extent" of lien for purposes of Rule 7001.

(5625) *In re Dungey,* Case No. 16-21600 (Bankr. E.D. Mi. 2017) – Chapter 13 Trustee has standing to seek approval of retention of appraiser where Trustee disputed creditor's claimed value of motor vehicle to be retained in Chapter 13 Plan. Plan proposed to pay secured claim in full. Trustee objected, alleging that value of vehicle was less than amount owed and that claim was not protected by 910 day provision of Section 1325 as loan was not purchase money but was cross-collateralized credit card debt. Creditor did not oppose Application to retain appraiser (which was done *ex parte* with consent of the United States Trustee), Creditor opposed payment of $200 appraiser fee, contending that Creditor would have agreed to reduce its claim had Trustee requested. However, Creditor had notice that Trustee disputed value and yet did not make any attempt to amend claim to reduce secured valuation until after Trustee hired appraiser and incurred administrative expense.

(5626) *In re Shank,* Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Plan that proposes to satisfy mortgage by paying specific principal amount plus interest does not require filing of adversary proceeding. Adversary proceeding is required to challenge the validity, priority or extent of lien. Chapter 13 Plan did not contest the validity of mortgage or contest that mortgage was valid lien on collateral and, in fact, specifically provided for payment of mortgage to full extent of amount allegedly owed. Code allows valuation of collateral to be determined in contested matter such as through confirmation process. Creditor who did not object to confirmation of Plan and did not file proof of claim asserting any amount due inconsistent with amounts set forth in Plan agreed to treatment of mortgage as specified in Plan. Upon completion of Plan, Debtor entitled to entry of order deeming mortgage satisfied.

(5627) *National Bank v. Sunnyslope Housing Ltd.,* Case No. 12-17241 (9th Cir. 2017) – Valuation of collateral is determined in light of purpose of valuation and proposed disposition or use of property. Replacement value was appropriate standard even though foreclosure value exceeded replacement value where Chapter 11 Plan proposed for Debtor to retain the property used as low income housing. Although highest and best use of property would be for housing absent low income restrictions, absent foreclosure the property cannot be used other than for affordable housing. Accordingly, valuation of property as low income housing was appropriate standard.

(5628) *Maplethorpe v. CitiMortgage, Inc.,* 2017 WL 2712596 (Bankr. E.D. Mi. 2017) – Stripping of junior lien requires proof that value of property is less than amount owed on superior liens and encumbrances. Debtor, as party proposing to strip lien, bears burden of proof. Although Debtor presented appraisal testimony to establish value of property, Debtor did not present evidence of balance owed on mortgage. Only testimony on alleged debt was that of Debtor s to which Court sustained objection based on hearsay. Debtor did not testify that he had any personal knowledge of balance owed and was merely parroting amount shown on account statement.

(5629) *In re Rougier,* 2016 WL 5109803 (Bankr. D. R.I. 2016) – Creditor holding both the first and second mortgages cannot manipulate debts to create equity for second mortgage thereby thwarting Debtor's ability to strip second mortgage. Creditor filed proof of claim for first mortgage

that "forgave" about $10,000 in accrued interest, escrow charges, and foreclosure costs, attempting to reduce total claim below value of property. Court rejected creditor's "wavier", holding that amount of lender's claim is determined based on rights under loan documents as of petition date. Lender's attempt, post-petition, to waive interests, fees and charges, did not prevent stripping of second mortgage that was completely unsecured as of petition date based on loan documents in effect as of petition date.

(5630) *Ryan v. United States,* 725 F.3d 623 (7th Cir. 2013) – Chapter 13 Debtor cannot strip lien federal tax lien where line is partially secured. Tax lien encumbered Debtor's personal property although lien was for taxes totaling over $130,000 but Debtor's personal property had value of only $1,625.00. *Dewsnup* precludes any attempt to strip or bifurcate lien where lien is secured by even one dollar of value.

(5631) *In re Moore,* Case No. 14-3740 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final order in valuation issue. Court treats request for lien strip as request to value under Rule 3012 as a contested matter. Issues are central to confirmation of Chapter 13 Plan which is core proceeding. Court accepted Debtor's appraiser's opinion where Debtor's appraiser worked almost exclusively in relevant market area while creditor's appraisal focused largely on Grand Rapids, such that Debtor's appraiser had conducted 300 local properties per year for 30 years while creditor's appraiser appraised a total of 32 over the past few years total. Debtor's appraiser personally visited the property inside and out and took pictures to confirm physical condition of property including deficiencies and unfinished nature of some rooms. Creditor's appraiser relied too heavily on transactions that had not yet closed, while Debtor's appraiser used comparable sales that had actually closed.

(5632) *Williams v. Wayne County Treasurer,* Case No. 14-11844 (E.D. Mi. 2014) – Valuation of property for purposes of Section 506 is factual determination that will not be overturned on appeal unless it is clearly erroneous. Bankruptcy Court's weighing of one party's appraisal more heavily that opposing party appraisal not clearly erroneous where court explained reasons why court found one appraisal to be more persuasive, including timing of comparables, location of comparables, and use to which Debtor put the property.

(5633) *Richards v. Community Choice Credit Union,* 2013 WL 6164442 (Bankr. E.D. Mi. 2013) – In determining value, court would disregard alleged comparable sales that were too dissimilar from Debtors' property or which were sold on a date too remote from petition date to provide useful measure of value of Debtors' property as of petition date. Sales that closed between 7 months and 12 months prior to petition date were too remote to be reliable where evidence indicated that property values had risen substantially in intervening time periods but lender's appraiser presented no evidence to demonstrate amount of change or impact of increasing values on comparable sales.

(5634) *In re McKinney,* 2013 WL 6139714 (Bankr. E.D. Mi. 2013) – Absent recent, arms-length sale of property, valuation is not precise or certain endeavor. Plaintiff failed to sustain burden of proof that property was worth no more than $197,946, which was amount owed on first mortgage.

(5635) *In re Williams,* 2012 WL 4757803 (Bankr. E.D. Tn. 2012) – Where Chapter 13 plan proposes for Debtor to retain residence, value must be based on comparable arm's length sales. Foreclosure value is not appropriate as Debtor intends to stay in property. Arm's length value does not ignore reality of market that involves distressed sales, short sales, and sales of bank owned property. High volume of foreclosures or distressed sales will lower asking price, but seller of foreclosed home will still be more likely to negotiate lower price than would be the case between two arm's length parties, neither acting under compulsion. Operate valuation date is date of confirmation hearing. Debtor's appraisal, which relied almost exclusively on foreclosed properties, was not as persuasive as creditor appraisal that relied on arm's length sales. Value of house exceeded balance owed on first mortgage, although court not required to specifically determine value.

(5636) *In re Beck,* 2012 WL 1889789 (Bankr. W.D. Ky. 2012) – Strip denied where Debtor failed to produce sufficient evidence to show value of property in amount less than owed on first mortgage. Second mortgage holder produced appraisal showing significant equity beyond first mortgage. Debtors responded only with property tax assessments. Tax assessments were insufficient to overcome presumption that bank's claim is secured as alleged in proof of claim as well as the appraisal itself.

(5637) *Clay v. CSB Bank,* 2011 WL 5922428 (Bankr. E.D. Mi. 2011) – In determining whether second mortgage can be stripped, Court does not need to determine actual value of residence. Court must only determine whether the value of the residence is greater or less than the balance owed on the prior mortgage. Appropriate valuation is the replacement value, defined as the cost the Debtor would incur to obtain a like asset for the same proposed use. Plaintiff's appraisal was not as credible where appraiser relied on three comparable homes that varied significantly from Debtor's home, with two homes being substantially larger and one substantially smaller. Appraiser used at least one foreclosed property, which is entirely appropriate, but appraiser did not make any adjustments to account for distressed nature of sale. Appraiser also made unexplained reduction in value by $8,500 because he thought lower price represented a "better value". Issues prevented appraisal from being overly reliable resulting in Debtors' failing to meet their burden of proof.

(5638) *Thomas v. CitiMortgage, Inc.,* 459 BR 708 (Bankr. E.D. Mi. 2011) – Court is not bound by respective priorities of mortgages at time case filed. Creditors' post-petition subordination agreement by which second recorded mortgage was elevated over first recorded mortgage effectively adjusted priorities to reflect priorities intended by Debtor and creditors at time new first mortgage was granted. After implementation of subordination agreement, second recorded mortgage attained first priority and could no longer be stripped in Chapter 13.

(5639) *Kessler v. Bank of America,* Case No. 10-5933 (Bankr. E.D. Mi. 2011) – Bank's appraisal did not support alleged value where appraiser either did not observe or did not adjust for conditions at property that would adversely affect value including a sagging roof that needed to be replaced; a broken central air conditioning unit; a driveway in need of repaving; three broken cement window sills; and a defective sewer line that needed replacing. Bank's appraiser also limited "comparables" to non-HUD owned properties, which are known to be distressed sales of properties often in very poor condition and instead limited comps to non- distress sales with no reflection of distressed properties in the area which would further depress sales and prices. Debtor's appraiser was both a licensed appraiser and active real estate broker and had practical experience that, combined with deficiencies in Bank's appraisal, tipped the balance in favor of Debtor's appraiser, concluding that property was worth less than balance owed on first mortgage.

(5640) *Siler v. Citibank, NA,* Case No. 09-6926 (Bankr. E.D. MI. 2010) – In lien strip action, court is not required to determine actual value of property, but only to determine whether value is greater or lesser than balance owed on superior liens and mortgages. Court would discount opinion of appraiser that was based solely on distressed sales as failing to take into account factors such as home condition, location, number of comparable homes on market in neighborhood where property located. All four comparables in Debtor's appraiser's report were distress sales with no adjustments for condition while evidence was that at least two of the properties were in significantly worse condition than Debtor's home. Proper valuation must take into account all types of sales (distressed and non-distressed), and other factors. Debtor whose appraisal was based solely on distressed sales failed to meet burden of proof in adversary to strip lien.

(5641) *In re Kattouah,* Case No. 09-53287 (Bankr. E.D. Mi. 2010) – Court discounted value determined by appraiser where appraiser assumed that value of property stated in loan application was correct and discounted the value based on that application. Although evidence supported assumed decrease in value of 5% per year, Appraiser failed to independently determine correct starting value. Debtor's Appraisal was more accurate where that appraisal began with an independent valuation as of the application date, although that value was significantly lower than the value stated by borrower in the application. Court concluded that valuation for mortgage application purposes was not done for the same purpose as the appraisal for bankruptcy purposes, particularly where it has become "fairly well documented" that prior to 2007 valuations in connection with mortgage applications were routinely inflated.

(5642) *In re Ruhstaller,* Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Whether mortgage is secured is determined by Section 506. Claim is secured if value of collateral exceeds claims of senior encumbrances. Section 506 allows value to be determined in conjunction with "any hearing" on a plan affecting the creditor's interest, including confirmation of proposed Chapter 13 Plan. Debtor is not required to file separate Motion under Rule 3012 to determine value. Debtor testified that property was worth only $150,000 and Debtor's appraiser testified that the value was $159,000.00. Bank failed to present any evidence of value and first mortgage debt exceeded $167,000.00, leaving Bank entirely unsecured.

11.157 Cross-Collateralized Liens and Future Advance Clauses

(5643) *In re Dungey,* Case No. 16-21600 (Bankr. E.D. Mi. 2017) – Chapter 13 Trustee has standing to seek approval of retention of appraiser where Trustee disputed creditor's claimed value of motor vehicle to be retained in Chapter 13 Plan. Plan proposed to pay secured claim in full. Trustee objected, alleging that value of vehicle was less than amount owed and that claim was not protected by 910 day provision of Section 1325 as loan was not purchase money but was cross-collateralized credit card debt. Creditor did not oppose Application to retain appraiser (which was done *ex parte* with consent of the United States Trustee), Creditor opposed payment of $200 appraiser fee, contending that Creditor would have agreed to reduce its claim had Trustee requested. However, Creditor had notice that Trustee disputed value and yet did not make any attempt to amend claim to reduce secured valuation until after Trustee hired appraiser and incurred administrative expense.

(5644) *In re Poole,* 2017 WL 401799(Bankr. E. D. Tn. 2017) - Section 1322(b)(2) and Section 506(a)(1) operate in tandem to protect creditor holding security interest in Debtor's principal residence to the extent that there is some value in residence over and above superior liens and encumbrances. Three separate notes executed by Debtor at various times all secured by single mortgage constituted three separate loans subject to three separate security agreements. First Note was executed at same time as Mortgage. Notes Two and Three were later executed separately for additional amounts. Each Note contained acknowledgment that Note was secured by residence described in Mortgage, and Mortgage contained provision extending lien to any future indebtedness. Each time Debtors created a new obligation to lender, a new claim arose secured by a lien on the real property pursuant to the terms of the Mortgage. Each Note is secured by lien which is separate from lien securing other Notes resulting in three notes and three liens. Fact that there is only one mortgage document does not result in three separate notes being treated as single debt or single liability. Priority of liens for determining equity in property would be established in order of date of execution of notes. Balance owed on Note One exceeded value of property leaving Note Two and Note Three entirely Unsecured, allowing mortgage securing Note Two and mortgage securing Note Three to be "stripped" from property.

11.158 Partially Secured Mortgage – Generally

(5645) *Shelton v. CitiMortgage, Inc*., 477 BR 749 (8th Cir. BAP 2012) – Debtor cannot strip partially secured lien on sole basis that creditor failed to timely file proof of claim. Section 506(d) allows avoidance of lien that is void. However, failure to file proof of claim does not invalidate lien. Liens pass through bankruptcy unless avoided on their merits. Debtors did not assert that lien was avoidable on any ground other than the untimeliness of proof of claim.

11.159 Partially Secured Mortgage – Maturity Within Plan Term

(5646) *In re Tekavec,* 2012 WL 3471386 (Bankr. E.D. Wis. 2012) – Line of Credit partially secured by second mortgage on Debtor's home subject to bifurcation under Section 1322(b)(2) where Line of Credit matured annually, resulting in final payment coming due during term of plan. Although loan had automatic one-year renewals, the renewals did not alter fact that loan had an "original" maturity date that would occur prior to Debtor's completion of plan payments. Section 1322(c)(2) expressly permits modification of loan that is secured only by security interest in Debtor's principal residence where final payment on the loan is due before the due date for the final payment under the plan. Section 1322(c)(2) controls over Section 1322(b)(2) in this circumstance. Debtor's plan that proposed to bifurcate Line of Credit would be confirmed once valuation of property is resolved.

11.160 Condominium Fees

(5647) *Whispering Woods Condo Association v. Rones,* Case No. 15-4271 (D.N.J. 2016) – State law gave priority to condominium line over first mortgage to extent of 6 months of fees and assessments. Because portion of line was secured, entire lien could not be stripped or modified including portion of lien that was not included in the 6 month priority.

11.161 Mechanic's Lien

(5648) *Thigpen v. Father & Sons Home Improvement II, Inc.,* 2014 WL 1246116 (Bankr. N.D. Il. 2014) – Debtor in chapter 13 can strip off wholly unsecured liens. Under Illinois law, properly perfected mortgage lien takes priority even over previously recorded first mortgage to the extent of the value added as a result of the work. Contractor added entire second floor, which undoubtedly enhanced value of property at least somewhat, which would stand as security for lien ahead of mortgage debt. While mortgage balance may have exceeded value of property, the mechanic's lien was superior and was not "wholly" or even partially, undersecured.

11.162 Tax Liens

(5649) *Rodriguez v. Internal Revenue Service,* 2015 WL 2194584 (Bankr. D. Md. 2015) – In Chapter 11, Debtor can strip lien of IRS from non-exempt property where superior encumbrances exceed total value of property.

(5650) *In re Beck,* 2014 WL 4549014 (Bankr. D. Hawaii 2014) – Debtor can strip in Chapter 13 lien held by IRS and lien held by condominium association where property value was less than amount owed on superior liens.

(5651) *Ryan v. United States,* 725 F.3d 623 (7th Cir. 2013) – Chapter 13 Debtor cannot strip lien federal tax lien where line is partially secured. Tax lien encumbered Debtor's personal property although lien was for taxes totaling over $130,000 but Debtor's personal property had value of only $1,625.00. *Dewsnup* precludes any attempt to strip or bifurcate lien where lien is secured by even one dollar of value.

11.163 Following Chapter 7 Discharge – Deficiency Claim

(5652) *In re Washington,* Case No. 17-15102 (Bankr. C.D. Ca. 2018) – Creditor holds unsecured deficiency claim following lien strip notwithstanding prior Chapter 7 that discharged Debtor's personal liability. Supreme Court decision in *Dewsnup* prevents Debtor from stripping lien in Chapter 7 and lien survives Chapter 7 discharge. Creditor's lien in subsequent Chapter 13 is converted to unsecured claim against estate after lien avoidance.

(5653) *In re Rosa,* 2014 WL 6999380 (Bankr. N.D. Ca. 2014) – Mortgage creditor whose claim was entirely unsecured is not entitled to unsecured claim in Chapter 13 case. Debtor's personal liability was discharged in Chapter 7 and nothing in Chapter 13 would resurrect that liability for purposes of an allowed unsecured claim in Chapter 13.

(5654) *In re Collier*, Case No. 13-55371 (Bankr. E.D. Mi. 2014) – Chapter 7 discharge ends personal liability but mortgage rides through unaffected. Chapter 7 discharge does not eliminate the debt – discharge only prevents collection from Debtor personally and does not extinguish debt or eliminate creditor's right to recover against property or against sources other than Debtor. Lien and note are not discharged in prior chapter 7 even though creditor could not pursue recovery from Debtor. Entire balance of note passes through and remains enforceable as unsecured claim in Chapter 13 case.

(5655) *In re Scantling,* 465 BR 671 (Bankr. M.D. Fl. 2012) – Where unsecured liability has been discharged in prior Chapter 7 case, creditor holds neither a secured claim by virtue of Section 506 valuation nor an unsecured claim that is enforceable against Debtor. Creditor does not have any allowed claim in subsequent Chapter 13 proceeding.

(5656) *In re Sweitzer,* 2012 WL 3647130 (Bankr. D. Md. 2012) - Order discharging Debtors of any personal liability to creditor in prior Chapter 7 case, along with order allowing Debtors to "strip off" creditor's lien, as wholly unsupported by any equity in property, in their subsequent Chapter 13 case, precluded allowance of claim even as general unsecured claim.

(5657) *In re Okosisi,* 451 BR 90 (Bankr. D. Nv. 2011) – Once lien is avoided, unsecured claim that is represented by non-recourse debt is unsecured claim in Chapter 13 case.

11.164 Lien Strip – Eligibility for Discharge

(5658) *Branigan v. Davis*, 2013 WL 1926407 (4th Cir. 2013) – Lien strip is available in Chapter 13 even where Debtor is not eligible for discharge, adopting the majority rule.

(5659) *In re Wong*, 488 B.R. 537 (Bankr. E.D.N.Y. 2013) - Lien strip is available in Chapter 13 even where Debtor is not eligible for discharge, adopting the majority rule.

(5660) *In re Jennings,* 454 BR 252 (Bankr. N.D. Ga. 2011) – Lien strip is available in Chapter 13 notwithstanding prior discharge in Chapter 7 such that Debtor is not eligible for discharge in Chapter 13 proceeding as long as case is filed in good faith. However, plan could not be confirmed as plan did not treat unsecured deficiency claim.

I. Sale of Assets – Section 363

11.165 Generally

(5661) *In re Moore,* 2015 WL 1569848 (Bankr. W.D. Mi. 2015) – Request to sell assets in confirmed Chapter 13 case must be brought by Motion under Section 363. Court rejected stipulation signed by Debtor, Secured Creditor and Chapter 13 Trustee requesting order allowing sale of vehicle, without prejudice to motion under Section 363 for sale of vehicle.

11.166 Retention of Broker

(5662) *In re Roggio,* 577 BR 457 (Bankr. M.D. Pa. 2018) – Chapter 13 Debtor does not need Court approval to retain Real Estate Broker to sell property of estate. However, compensation of Broker is subject to Order of Court following notice and hearing.

J. Discharge

11.167 Domestic Support Certification

(5663) *In re Levy,* 2014 WL 1323165 (Bankr. N.D. Ohio 2014) – Court would allow joint Debtor to act on behalf of deceased Debtor to file certification of domestic support obligations. While certificate was important to allow court to determine that all domestic support obligations had been complied with, which is requirement for entry of discharge, process of filing certificate is the product of a local rule rather than a code requirement; administration of the case remains possible even if certification is not filed; and number of cases that will be impacted by holding is minimal. Court would instead require person seeking to complete case to file a notice whether there is a probate estate or whether creation of one is expected and if not, why not; the identification of the person signing the notice and the relationship to the deceased Debtor; a foundation that the statements are made on personal knowledge; and acceptable proof of death.

11.168 Requirements Generally

(5664) *In re Long,* 2016 WL 6884305 (Bankr. W.D. Mi. 2016) – Court has authority to determine reasonableness of fee application even when filed post-plan completion. Court would not determine whether fees were discharged under Section 1328 where Debtors agreed to voluntarily pay the fees as determined by the Court. Discharge does not prevent Debtors from voluntarily paying claims, even claims that were discharged in bankruptcy case.

(5665) *Schlegel v. Billingslea,* Case No. 14-1132 (9th Cir. BAP 2015) – Debtor is not eligible for discharge where Debtor makes all plan payments but does not meet the minimum percentage dividend provided in the Plan during the Applicable Commitment Period.

(5666) *In re Young,* Case No. 06-6385 (Bankr. W.D. Mi. 2012) – To be eligible for a discharge, Debtor must make all plan payments and must meet the dividend proposed in the confirmed plan. Stated dividend is minimum that plan must yield. Right to discharge is linked to completion of all payments under plan. Debtors who have failed to make all plan payments not entitled to discharge even if stated dividend has been met notwithstanding the payment delinquency.

11.169 Direct Pay Mortgages

(5667) *Simon v. Finley,* 18-4011 (Bankr. S.D. Ill. 2018) - "Direct pay" mortgages are "payments under the Plan" as required by Section 1328 as payments must be addressed in Plan. However, Court would not set aside discharge based on fraud where creditor filed notice that mortgage was not current yet no party objected to entry of the discharge. One month after entry of discharge, Chapter 13 Trustee filed motion to revoke discharge. Court denied motion as there was no evidence of fraud because Trustee knew about missed payments in advance of entry of discharge.

(5668) *In re Gibson,* 582 BR 15 (Bankr. C.D. Ill. 2018) - Adopting minority approach, Court concluded that failure to make direct payments on nondischargeable mortgage is not grounds for denying Chapter 13 discharge. Amendment to Rule 3002.1 which requires secured creditor to file response indicating whether loan is current was not intended to serve as impetus for dismissal without discharge instead designed to be Debtor friendly by providing form for resolving disputes. Section 1328 is ambiguous in the phrase "all payments under the Plan" as it is susceptible to different interpretations where statute provides for payments under Plan not "payments provided for by the Plan".

11.170 Completion of Plan Payments

(5669) *In re Gibson,* 582 BR 15 (Bankr. C.D. Ill. 2018) – Debtor entitled to discharge where debtor made all payments required to be made to Chapter 13 Trustee even if debtor did not make all direct mortgage payments. Court cited long history of permitting discharges where all payments to Trustee are made even if direct payments on secured debts are not made. Definition of "all payments under the plan" as including direct payments on secured debts is of "recent vintage" and it is not clear from language of statute whether direct payments re "payments under plan". Rule 3002.1 was not intended as impetus for dismissal without discharge but was instead intended to benefit debtors by better ensuring fresh start. Interpreting all payments under plan to mean all payments to trustee is consistent with Section 1329 which allows modification before completion of payments under the plan, which is understood to be when debtor pays to trustee full amount required by confirmed plan. Section 1322 prohibits plan from requiring payments over more than 60 months. Long term debt paid direct by debtor necessarily extends beyond 60 months and so cannot be a payment under plan. Remedy for secured creditor is not to deny discharge but to seek stay relief.

(5670) *Kessler v. Wilson* (*Matter of Kessler)*, 655 Fed. Appx. 242 (5th Cir. 2016) Discharge can be granted only if all payments required by the plan are made. Post-petition arrears on direct pay mortgage claim means debtor did not make all payments required by plan. Debtor not eligible for discharge.

(5671) *In re Coughlin,* 2017 WL 2602330 (Bankr. E.D.N.Y. 2017) – Debtor whose plan provided for direct payment of mortgage not entitled to discharge where Debtor did not make all direct payments during plan term. Payments directly to creditors are payments due under the plan that must be paid to complete Debtor's obligations.

(5672) *In re Ramos,* 540 BR 580 (Bankr. N.D. Tx. 2015) – Completion of plan payments for purposes of discharge means completion of all payments due during course of bankruptcy plan. Debtor who paid all required payments to Trustee under plan but who failed to pay the direct pay mortgage did not complete payments due under plan and was not entitled to discharge.

11.171 Converted Cases

(5673) *In re Williams,* Case No. 14-1038 (Bankr. W.D. Mi. 2014) – Court cannot grant discharge in Chapter 13 where discharge was entered in Chapter 7 prior to conversion. Section 727(a)(10) allows Debtor to waive discharge. However, waiver of discharge must be filed before entry of the discharge. After discharge entered, it is too late for Debtor to waive. No creditor or other party in interest was requesting that

discharge be vacated and there were no allegations by Debtor of any conduct that would warrant revocation of discharge under Section 727(d). Fact that Debtor realized after entry of discharge that debt to State for overpayment of unemployment benefits would be non-dischargeable in Chapter 7 did not constitute cause to revoke discharge and allow Debtor to obtain discharge under Chapter 13.

(5674) *In re Voshell,* Case No. 13-0454 (Bankr. W.D. Mi. 2013) – Section 1328(f) precludes entry of a discharge in Chapter 13 if the Debtor received a discharge in a case filed under chapter 7 during the preceding 4 years. Debtor received a discharge in the current case, precluding Debtor from receiving a subsequent discharge if Debtor's case is converted. Debtor cannot waive prior discharge as Section 727 allows a Debtor to waive a discharge only before the discharge is entered, and there is no basis for a Debtor to revoke his own discharge. Debtor did not allege that discharge was result of fraud, where only issue was continued enforcement action by ex-wife holding non-dischargeable domestic support obligation order and there was no indication that ex-wife in any way committed some bad act that led to entry of discharge. Debtor's regret at proceeding under Chapter 7, or belief that Debtor would be better off in another chapter, is not a basis to set aside a discharge. As Debtor would not receive a discharge in Chapter 13 if case is converted, it was not clear whether Debtor still wanted to convert case. Court denied motion to convert without prejudice to Debtor filing another motion within 14 days, in which case the court would grant the motion without delay.

11.172 Time Between Cases

(5675) *In re Atrkins,* Case No. 18-47386 (Bankr. E.D. Mi. 2018) – Section 1328(f) indicates that a Debtor is not eligible for discharge if Debtor received discharge in case filed under Chapter 7 during 4 year period preceding date of the Order for relief under Chapter 13; or in case filed under Chapter 13 within 2 years preceding date of order for relief in current case. Debtor filed prior case under Chapter 13 more than 2 years but less than 4 years prior to filing current case. Debtor's first case converted to Chapter 7 and Debtor received discharge under Chapter 7. Look back period governed by the Chapter under which prior case was originally filed, not Chapter under which Debtor ultimately received discharge. Debtor received discharge in prior case that was filed under Chapter 13 more than 2 years before the date on which Debtor filed current Chapter 13 rendering Debtor eligible for discharge.

(5676) *In re Walker,* 2017 WL 2414441 (Bankr. N.D. Ohio 2017) - Section 1328(f)(1) denies Debtor discharge under Chapter 13 if Debtor received a discharge in a case filed under Chapter 7 during the 4 years preceding the date of the order for relief in the Chapter 13 case. Debtors filed current Chapter 13 case in 2017. Debtor entitled to discharge where Debtor's filed Chapter 13 in 2010 and case was converted to Chapter 7 in 2014. Operative date for determining four-year "look back" is date of filing prior case as there is only one "order for relief" in a case. Debtor's subsequent conversion of case from Chapter 13 to Chapter 7 did not constitute new order for relief. Although conversion occurred within 4 years of current bankruptcy filing and Debtor received Chapter 7 discharge after conversion of prior case, filing date of initial case, not conversion date, controls.

(5677) *In re Davis,* 2015 WL 3484561 (Bankr. E.D. Mi. 2015) – Section 1328(f) precludes entry of discharge where Debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13 case. Court can enter order determining that Debtor is not entitled to discharge even in absence of motion filed by creditor. Rule 4004 which provides for motion to object to discharge within 60 days of 341 meeting does not alter provision of 1328(f) which precludes discharge without any party filing Motion.

(5678) *In re Wilkinson,* 2014 WL 1347116 (Bankr. D. Kan. 2014) – "Case filed under" as used in 1328(f) refers to petition under which prior case was filed not chapter under which prior case was discharged. Debtor filed first case under Chapter 13, later converted to Chapter 7 and discharged. Three years later, Debtor filed for relief under Chapter 13 again and Trustee objected to discharge based on Debtor's discharge under Chapter 7. Court concluded that prior case was filed under Chapter 13, such that two year lookback under 1328(f) applies. As Debtor's second case was filed more than 2 years after earlier Chapter 13 filing, Section 1328(f) did not deny discharge in second case.

(5679) *In re Gregory,* 2014 WL 1089806 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where Debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice Debtor because Debtor did not change position in reliance on lack of objection. Fact that Debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.

(5680) *In re Rumer,* 2014 WL 1089802 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where Debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice Debtor because Debtor did not change position in reliance on lack of objection. Fact that Debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.

(5681) *In re Pickett,* 2014 WL 1089804 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where Debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice Debtor because Debtor did not change position in reliance on lack of objection. Fact that Debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.

(5682) *In re Squeo,* Case No. 10-73733 (Bankr. E.D. Mi. 2010) – Debtor not eligible for discharge under Section 1328 where Debtor had filed

petition for relief in Chapter 13 less than 4 years after date of petition in prior Chapter 7 proceeding.

(5683) *Carroll v. Sanders*, 551 F.3d 397 (6th Cir. 2008) – Provision of Section 1328(f)(1) denying a discharge to a Chapter 13 Debtor who previously received a discharge within the four-year period preceding the Chapter 13 petition is measured from date of filing petition in prior case to date a petition in current Chapter 13, not from the date of entry of the discharge in the prior case. Section 1328(f)(1) does not prohibit the granting of a discharge to a Debtor whose Chapter 13 petition was filed more than four years after the date of Debtor's prior Chapter 7 case of less than four years after the bankruptcy Court issued the discharge in the prior Chapter 7 case.

11.173 Scope and Effect Generally

(5684) *In re Thal,* 2018 WL 2182304 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 "super discharge". Debtor's Plan proposed to pay IRS priority claim in full. IRS filed priority claim for balance due as of petition date and Debtor paid that claim in full during Chapter 13 case. After discharge, IRS levied against Debtor's Social Security to recover unpaid post-petition interest and Debtor sought sanctions for violation of discharge injunction. While taxes themselves would not have been dischargeable, Section 1322(a)(2) requires only that debtor pay all priority tax debt in full in deferred cash payments. Section 1322 does not require deferred cash payments to include interest or have present value as of date of confirmation equaling total amount of priority claim Chapter 13 provides unique ability to pay tax liability without penalties and interest normally associated with tax debt. IRS willfully violated discharge injunction. Court ordered IRS to return all funds taken from debtor post discharge but could not award damages or attorney fees unless debtor exhausted administrative remedies under 26 USC Sections 7430 and 7433; and Court lacks jurisdiction to award punitive damages as waiver of sovereign immunity under Section 106 specifically excludes punitive damages.

(5685) *Markley v. Department of Treasury, Internal Revenue Service,* 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Exclusive remedy for violation of discharge injunction is action for contempt. Contempt requires proof that defendant violated definite and specific order of Court requiring defendant to perform or refrain from performing particular act with knowledge of Court Order. Whether Creditors actions filing to discharge injunction depended on whether taxes at issue were discharged in first instance. Claim for unpaid taxes in Chapter 13 proceeding was not discharged because Internal Revenue Service did not have notice of bankruptcy case and time to file proof of claim. Section 523(a)(3) provides that a debt is not discharged if the creditor did not discover the bankruptcy case and time to file a proof of claim. Debtor listed IRS tax liability and schedules at address which is not IRS designated address under Rule 5003(e). IRS did not obtain actual knowledge until more than two years after expiration of the claims bar date, at a time when IRS could not timely file a proof of claim. Fact that IRS later filed and then withdrew untimely filed proof of claim does not convert that into dischargeable debt where IRS did not have opportunity to timely file claim in first instance.

(5686) *Missouri v. Spencer,* 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.

(5687) *In re Spencer,* Case No. 15-6030 (8th Cir. BAP 2016) – Order of Bankruptcy Court reducing allowed amount of non-dischargeable claim does not preclude creditor from pursuing collection of entire claim, including disallowed amount, and creditor's actions do not violate discharge injunction.

(5688) *Jennings v. Bodrick,* 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Even if proven, debt that would be excepted from discharge under Section 523(a)(6) in Chapter 7 is not excepted from discharge in Chapter 13. Adversary proceeding to except claim from discharge in Chapter 13 case failed to state cause of action.

(5689) *State of Florida v. Davis,* Case No. 11-15040 (11th Cir. 2012) – State is not barred by discharge injunction from collecting past-due child support even where State has filed claim in Bankruptcy Court and claim had been disallowed. After confirmation of Debtor's Chapter 11 plan, and well past the claims bar date, the State filed a claim for outstanding child support. Bankruptcy Court disallowed the claim as late filed. Denial of claim in by Bankruptcy Court does not preclude later attempt to collect debt. Discharge injunction precludes only efforts to collect discharged obligations. Domestic Support Obligations are non-dischargeable as a matter of law and, therefore, is beyond the terms of the discharge injunction. To the extent that the Bankruptcy Court disallowed the claim, that ruling precluded payment through the confirmed plan but did not prohibit State from seeking payment other than through plan or from property of bankruptcy estate.

(5690) *Murawski v. Campbell,* Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Discharge pursuant to section 1328 does not discharge debts within specific sections of section 523 including debts for restitution were damages awarded in a civil action against the Debtor as a result of a willful or malicious injury by the Debtor that causes personal injury to an individual.

11.174 Scope and Effect – Mortgage Claims

(5691) *Shoemake v. SN Servicing Corp.,* 2018 WL 3387361 (M.D. Tn. 2018) – Creditor does not violate terms of confirmed Plan by attempting to collect long-term debt more than one year after completion of Chapter 13 case where Debtors defaulted on loan post discharge. Long-term debt is excepted from discharge and creditor's actions were not inconsistent with terms of confirmed Plan.

(5692) *In re Luzier,* 580 BR 725 (Bankr. N.D. Ohio 2014) – Mortgagee willfully violated discharge injunction when, in second bankruptcy case filed by debtor, it filed proof of claim that included claim for amounts that had been discharged in debtor's prior Chapter 13 case and refused to amend its proof of claim to eliminate claim for any discharged debt unless debtor first assured it that she would not attempt to hold it liable for any deficiencies in amended claim; even if mortgagee had acted inadvertently in including discharged debt in proof of claim that

it filed in debtor's second case, it refused to amend claim with knowledge that it included a claim for discharged debt. Creditor could not include in Proof of Claim costs, fees and mortgage payments allegedly unpaid prior Chapter 13 case where Creditor did not file response to Rule 3002.1 Notice of Final Cure or otherwise assert in prior case that Mortgage was not current as of date of plan completion.

(5693) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of debtor. Enforcement of Discharge Injunction is within exclusive control of District Court (or Bankruptcy Court) that entered discharge in first instance. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current. Thus, Tennessee Court has jurisdiction to rule on Plaintiff's complaint that Defendant failed to properly credit payments or deem account current as ordered by Texas Court and relief is not within exclusive control of Texas Court that entered discharge in first instance.

(5694) *In re Martin,* Case No. 11-12133 (Bankr. N.D. Miss. 2017) – Debtor's liability on long-term secured debt in Chapter 13 is not discharged at completion of Chapter 13 case. Debtor's Plan proposed to "cure and maintain" mortgage on real property under Section 1322(b)(5). After Debtor completed case, received discharge and Chapter 13 case closed, Debtor defaulted on mortgage, allowing lender to foreclose, sell property and hold unsecured deficiency claim for which Debtor's remained personally liable. However, post discharge deficiency claim did not give lender standing to assert status as unsecured claim holder in reopened Chapter 13 case for purposes of attempting to obtain disbursement of funds from Chapter 13 estate. Lender is free to collect deficiency because debt is not discharged but that does not constitute "unsecured claim" in the Chapter 13 case itself.

(5695) *Matteson v. Bank of America, NA,* 2015 WL 4719556 (6th Cir. BAP 2015) – Debtor's personal liability for long term debt treated in Plan under Section 1322(b)(5) is not discharged in Chapter 13. Secured creditor is not required to file proof of claim even where Chapter 13 Plan contemplates payments to the creditor on long term debt. Failure to file proof of claim does not affect validity, priority or extent of lien. Bankruptcy Court erred when, post-discharge, court entered judgment reducing amounts owed to lender by amounts lender would have received had lender filed a proof of claim. Creditor has right to ignore bankruptcy proceedings and enforce lien for satisfaction of debt. Failure to file proof of claim only means that creditor will not receive payments from Chapter 13 Trustee, but does not alter the validity or extent of creditor's lien.

(5696) *In re Dibling,* 2014 WL 3827818 (Bankr. S.D. Ohio 2014) – Mortgage creditor violated discharge order and order deeming mortgage current by failing to adjust records to reflect that Debtor's mortgage was current through date of discharge. Debtor awarded reasonable attorney fees incurred as result of creditor's failure to adjust records including fees incurred in foreclosure suit brought by creditor following discharge based on erroneous records.

(5697) *In re Rogers,* 494 BR 664 (Bankr. E.D.N.C. 2013) – Mortgage that was current when case filed discharges any deficiency judgment. Section 1328 excepts from the discharge only mortgage claims that are treated as "cure and maintain" under Section 1322(b)(5) and does not apply to mortgages, even long term debt, that are not "cured".

11.175 Scope and Effect – Criminal Fines and Court Costs

(5698) *Craig v. Gibbons,* 2016 WL 74650 (Bankr. M.D. Tn. 2016) – Criminal fines are not dischargeable in Chapter 13, but court costs are dischargeable under Section 1328.

11.176 Scope and Effect – Attorney Fees

(5699) *Howard v. Burk,* Case No. 17-1064 (9th Cir. BAP 2018) – Attorneys fees remain subject to Bankruptcy Court approval and constitute administrative expenses as long as fees are incurred well "representing the interests of the Debtor in connection with the bankruptcy case". Counsel's fees for services rendered after Notice of Final Cure and before entry of discharge constitute administrative expenses that are discharged. Although Plan cannot be modified, Debtor retained option of making additional Payments to Trustee to be used to pay outstanding attorney fees. Further, under Local Rules, attorney could receive direct payments from Debtor if Debtor requested Court authorization for direct payments made before entry of discharge. After entry of discharge, Court could not "except" Debtor from discharge or provide any means by which attorney could legally compelled payment of outstanding fees.

11.177 Hardship Discharge

(5700) *In re Mixson,* 2016 Bankr. LEXIS 1674 (Bankr. N.D. Al. 2016) – Hardship discharge does not require "catastrophic change of circumstances" but does require that the failure of Debtor to complete the plan is not for a reason for which Debtor is justly held accountable. Debtor husband not entitled to discharge when failure to make final plan payments was due to Husband's incarceration, as circumstances leading to incarceration were not beyond Debtor-husband's control. However, Debtor-wife entitled to discharge where husband was sole earner in house and after incarceration she lacked any ability to make payments. Husband's legal troubles were not something for which wife would justly be held accountable.

(5701) *In re Conn,* 2015 WL 3777958 (Bankr. N.D. Ohio 2015) – Debtor required to prove that failure to complete plan is due to circumstances for which Debtor should not justly be held accountable; that payments to unsecured creditors meet the Chapter 7 liquidation amount; and that modification of the plan is impracticable. After death of Debtor, Rule 1016 allows the case to proceed as though death had not occurred, based on best interests of Debtor's surviving spouse and creditors. Although probate estate indicated that Debtor's property may have had equity, no creditors filed claims in probate estate, and mortgages on property made it likely that property could not be sold for sufficient sum to produce meaningful result in bankruptcy estate beyond payment of mortgages. Allowing hardship discharge to deceased Debtor would relieve spouse from claims of pre-petition creditors while not adversely affecting creditors who could have, but did not, file claims in probate case.

(5702) *Schlegel v. Billingslea,* Case No. 14-1132 (9th Cir. BAP 2015) – Debtors not entitled to hardship discharge based on failure of plan to pay required dividend where Debtors knew from the time of confirmation that plan would not produce dividend required yet failed to take any action during life of case to address issue. Debtors had more than 4 years to address issue yet waited until the 60th month of the plan and then filed Motion for Hardship Discharge.

(5703) *In re Ingram,* Case No. 11-68905 (Bankr. E.D. Mi. 2015) – Following Debtor's death, only Personal Representative duly appointed according to state law is empowered to make decisions on behalf of estate. On death of Debtor, attorney loses authority to act on behalf of estate unless attorney is later retained by PR. Motion for Hardship Discharge denied without prejudice where there was no evidence that person directing filing of Motion was duly appointed PR.

(5704) *In re Hennessy,* 2013 WL 3939886 (Bankr. N.D.N.C. 2013) – When a Debtor dies while in confirmed chapter 13 plan, case can either be dismissed or can continue as if Debtor was still alive. However, Rule 1016 does not provide for hardship discharge based on death of Debtor. Further, hardship discharge would not benefit Debtor but would only benefit Debtor's heirs at expense of unsecured creditors. Plan provided for full payment of unsecured debts, and if hardship discharge was entered, creditors would be precluded from asserting claims against probate estate.

(5705) *In re Murray,* Case No. 07-41134 (Bankr. E.D. Mi. 2011) – Motion for Hardship Discharge denied without prejudice for lack of standing. Debtor passed away and attorney filed Motion. Upon death of Debtor, attorney's authority to act for Debtor terminated automatically. Motion could be filed only by personal representative duly appointed by the probate court.

(5706) *In re Hughes,* Case No. 06-49561 (Bankr. E.D. Mi. 2010) – Hardship discharge under Section 1328(b) requires proof that Debtor's failure to complete the payments required by the plan results from circumstances for which the Debtor should not be held accountable; value was of the effective date of the plan of property actually distributed is not less than what would have been paid had case been commenced under Chapter 7; and modification of the plan is not practicable. To prove that failure to make payments is not something for which the Debtor should be held accountable, Debtor should produce evidence that economic circumstances occasioning loss of employment were not foreseeable at time of confirmation; the exact skills and abilities of the Debtor; availability or lack of availability of employment in the same or comparable area in light of skills and abilities of Debtor; efforts of Debtor to obtain employment; availability to Debtor of any other type of employment and efforts to obtain employment. Court found that unemployment alone may be sufficient grounds for hardship discharge and expressly rejected requirement of "catastrophic circumstances", but Debtor failed to present any evidence of ability or efforts to find new employment.

11.178 Early Payoff of Plan

(5707) *In re Sizemore,* 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Debtor can payoff plan prior to plan expiration only by remitting a sum sufficient to pay all allowed claims in full. Debtor who received proceeds of life insurance on deceased ex-spouse could not remit only the balance necessary to meet the confirmed 64% dividend, but must remit sum sufficient to pay 100%.

(5708) *In re Smith,* 2011 WL 2343895 (Bankr. M.D. Fl. 2011) – Debtor permitted to pay off plan prior to expiration of applicable commitment period by lump sum that is sufficient to meet dividend required by confirmed plan. Debtor's Motion stated in bold, capital letters that the relief requested may deprive creditors of a potentially higher dividend if the Debtor's income increased in the future provided sufficient notice to creditors of the effect of the early payoff. Court approved modification over objection of Chapter 13 Trustee where no creditor objected and "by their silence, essentially voted with their wallets and opted to receive immediate payment."

11.179 Objections to Discharge

(5709) *Toste v. Smedberg,* Case no. 13-1266 (9th Cir. BAP 2014) – Court lacks jurisdiction to consider action to except debt from discharge under Section 523(a)(6) during pendency of Chapter 13 case. Section 523(a)(6) is not excepted from scope of general discharge under Section 1328, such that court cannot grant effective relief in adversary proceeding. Creditor can maintain action only if Debtor seeks hardship discharge under Section 1328(b) as hardship discharge does not include debts that would otherwise be excepted from discharge under Section 523(a)(6).

(5710) *Wahrman v. Bajas,* 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot seek to deny discharge under Section 727 while case is pending in Chapter 13. Adversary dismissed without prejudice to re-file if and when case is ever converted to Chapter 7.

11.180 Waiver of Discharge

(5711) *In re McGee,* 2014 WL 5488266 (Bankr. E.D. Ky. 2014) – Bankruptcy attorney allowed to waive discharge in his own Chapter 13 case as part of resolution of sanctions proceedings conducted by bankruptcy court. Record raised substantial issues regarding dischargeability of debts owed to former clients under Section 523, and attorney fully understood ramifications of waiver of discharge; and it appeared in attorney's best interest to waive discharge in order to put disciplinary proceedings behind him in an expeditious manner.

(5712) *In re Chadwick,* Case No. 12-10118 (Bankr. W.D. Mi. 2013) – Debtor and creditor can stipulate to order waiving discharge as to specific claim. Waiver of discharge is not reaffirmation of debt and so is not bound by requirements for reaffirmation. Waiver affects only rights as between Debtor and the specific creditor, such that waiver could be accomplished by stipulation signed only by Debtor and creditor. Court would approve stipulation and enter order excepting debt from discharge.

K. Scope of "Super Discharge"

11.181 Domestic Support Obligation – Sections 523(a)(5) and (a)(15)

(5713) *Vander Roest v. Vander Roest,* 2017 WL 2627914 (Bankr. W.D. Mi. 2017) – "Anti-Bankruptcy Clause" in judgment of divorce that purports to convert property settlement into nondischargeable alimony in the event one party files for bankruptcy does not automatically render

obligations nondischargeable or deprive Bankruptcy Court of authority to determine dischargeability of obligation. Although state courts enjoy concurrent jurisdiction to determine dischargeability, there is no authority to determine dischargeability in advance of any bankruptcy filing. Whether obligation is property settlement or support is not determined by label applied by State Court, although Bankruptcy Court will consider label such as alimony, support or maintenance specified in the decree as well as whether the obligation is paid directly to the former spouse as opposed to assumption of third-party debt and whether payments are contingent upon events such as death, remarriage or eligibility for Social Security. Judgment of Divorce specify that neither party would be entitled to alimony and instead allocated debts and included "hold harmless" clause. Obligation was nonmodifiable, not extendable and nonreviewable and is measured by unpaid obligations under hold harmless clauses rather than any showing of need or capacity to pay. Obligations did not terminate upon death or remarriage of either party, evidencing intent to create property settlement. Judgment of Divorce specify that payments would not be taxable to the recipient and not deductible by the payer, further intending that payments were in the nature of property settlement, because under Internal Revenue Code, alimony payments are deductible on payer's return and taxable to payee. Judgment of Divorce reference obligation as "alimony in gross" which is termed generally used for division of property rather than support. Obligation constituted property settlement under 11 USC Section 523(a)(15) which is dischargeable in Chapter 13 if Debtor confirms a Plan and makes all required payments.

(5714) *Carter v. Carter,* 2017 WL 1327720 (Bankr. W.D. Ohio 2017) – Domestic Support Obligations are nondischargeable in Chapter 13 pursuant to 11 USC Section 523(a)(5). "Domestic Support Obligation" is debt owed to former spouse that is in nature of alimony, maintenance or support without regard to whether the debt is expressly designated. If marital debt is not expressly designated as alimony, maintenance or support, Court will consider (1) whether parties or Court intended to create support obligation; (2) whether obligation will have actual effect of providing support; (3) if first 2 conditions are satisfied, Court must determine if obligation is so excessive as to be unreasonable under traditional concepts of support; and (4) if amount is unreasonable, obligation is dischargeable to extent necessary to serve a purpose of federal bankruptcy law. In determining whether provision of State Court decree providing for one spouse to assume marital debt and hold non-Debtor spouse harmless on the post-dissolution monthly mortgage payments constituted support obligation, Court will consider (1) label such as alimony, support or maintenance in decree or agreement; (2) direct payment to former spouse as opposed to Assumption of third-party debt; (3) payments that are contingent upon death, remarriage or eligibility for Social Security; (4) nature of obligations assumed; (5) structure and language of parties agreement or courts decree; (6) whether other lump-sum or periodic payments were also provided; (7) length of marriage; (8) age, health and work skills of parties; (9) whether obligation terminates on death or remarriage of parties; (10) adequacy of support absent debt assumption; and (11) evidence of negotiations or other understandings as to intended purposes of assumption of debt. Debtor's obligation to assume mortgage debt did not provide for direct payment to non-filing spouse but instead reflect assumption of debt with obligation to pay mortgage company directly. Obligation to pay mortgage did not terminate upon death or remarriage, was not labeled alimony, maintenance or support, was located in Section of dissolution degree entitled "Division of Property and Debts," and section entitled "Spousal Maintenance" provided that non-Debtor did not ask for spousal maintenance and was not awarded spousal maintenance. Courts that have held that assumption of mortgage debt on principal residence constituted support obligation did so in context where non-Debtor remained in marital residence and Debtor's obligation to pay mortgage was means of providing shelter that spouse and children could not otherwise afford. In this case, property was retained by Debtor and non-Debtor and children did not remain in marital residence. Post-dissolution proceedings in State Court further supported conclusion where Court issued Order that to the extent non-Debtor made payments against mortgage after dissolution of marriage, then upon sale of property non-Debtor would be entitled to recover those amounts from proceeds of sale or, if sale or disposition results in deficiency, Debtor's share of deficiency would be increased to reflect the amount of payments made by non-Debtor post-dissolution. Debtor's obligation to hold non-Debtor harmless on any post-decree monthly mortgage payments is dischargeable as property settlement, not support or maintenance.

(5715) *Rismiller v. Schweitzer,* 2015 WL 5918031 (Bankr. N.D. Ohio 2015) – Property settlement awards are discharged in Chapter 13 if Debtor receives full discharge under Section 1328(a). However, property settlement awards are not discharged in Chapter 13 if Debtor receives hardship discharge under Section 1328(b). Dischargeability or non-dischargeability is self-executing depending on which type of discharge is granted. Whether obligation is support or property settlement depends on whether debt is owed to or recoverable by former spouse, is in the nature of support, and was established by separation or divorce decree. Debtor's obligation to pay joint mortgage debt is "claim" of spouse as spouse would have right under "hold harmless" provision of decree to recover from Debtor if spouse is required to pay mortgage payment, giving rise to contingent claim. Whether obligation is in nature of support where the decree does not designate it as such depends on whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; if the first two conditions are satisfied, whether the obligation is so excessive as to be unreasonable under traditional concepts of support; to the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Court will look to traditional state law indicia of support including (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits; as well as disparity in earning power of parties, need for economic support and stability, presence of minor children, marital fault, evidence of negotiations or understandings as to intended purpose of assumption of debt. Court could not determine on summary judgment whether Debtor's assumption of mortgage obligation was intended to be support obligation or whether loan assumption enabled Plaintiff to provide a home for their minor children or whether, without the loan assumption, plaintiff could not maintain the daily necessities, such as food, housing and transportation.

(5716) *In re Thomas,* Case No. 13-8048 (6th Cir. BAP 2014) – Chapter 13 distinguishes between Section 523(a)(5) domestic support obligations, which are not dischargeable; and Section 523(a)(15) post-marital obligations such as property settlements that are dischargeable.

(5717) *Faircloth v. Hapner,* 2011 WL 6941489 (Bankr. N.D. Tn. 2011) – Obligation to pay mortgage was not included in divorce judgment as alimony or support and obligation does not otherwise qualify under Section 101(14A). Obligation is with the scope of Section 523(a)(15) as obligation owed to former spouse which is dischargeable under Section 1328.

11.182 Section 1328(a)(2)

(5718) *In re McDowell,* 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Section 1328(a)(2) excludes from the Chapter 13 discharge any obligation determined to be non-dischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11.183 Section 1328(a)(4)

(5719) *Toste v. Smedberg,* Case no. 13-1266 (9th Cir. BAP 2014) – Section 1328(a)(4) excepts from discharge debts for personal injury or death. Damages based entirely on state law of nuisance, arising out of Debtor's use of real property, is harm only to property interest and does not constitute "personal injury". Court did not reach issue of whether "personal injury" would include emotional distress where underlying State Court judgment did not reflect any damages for emotional distress, mental anguish or physical harm, or any other damages other than interference with property interests which itself is not "personal injury".

(5720) *Murawski v. Campbell,* Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Complaint to deny discharge in Chapter 13 proceeding which referenced Section 523(a)(6) would be treated as action to deny discharge of debt under Section 1328(a). Although Section 1328(a) does not incorporate Section 523(a)(6) as debt which is not dischargeable in Chapter 13, the similarity of the statutory language between Section 523(a)(6) and Section 1328(a)(4) is sufficient to allow the Court to consider the dischargeability of the debt under standards set forth in Section 1328(a)(4). Section 1328(a)(4) excepts from discharge any debt for damages awarded in a civil action arising from personal injury caused by willful *or* malicious injury, which is a lower standard than Section 523(a)(6) which requires willful *and* malicious injury, but does require that the damages be "awarded". Jury verdict that determined liability and damages for assault and battery would be "award" even though bankruptcy petition prevented State Court from entering judgment based on the verdict. Section 1328(a)(4) does not require that "award" be reduced to an enforceable judgment.

(5721) *Waag v. Permann,* 418 BR 373 (8th Cir. BAP 2009) – Section 1328(a)(4) does not require existence of prepetition judgment for willful or malicious injury to be excepted from discharge. Use of word "awarded" is yet not used to denote "past tense" but rather is a limiter on "restitution" and "damages". As long as damages are, at some point, "awarded", those damages will be nondischargeable even if those damages are not awarded until after entry of the discharge in bankruptcy.

11.184 Section 523(a)(6)

(5722) *Thomas v. Alheit,* 2018 WL 3807811 (Bankr. N.D, Ohio 2018) – Section 523(a)(8) does not apply in Chapter 13 and is not exception to "super discharge" under Section 1328. Adversary proceeding dismissed.

11.185 Attorney Fees

(5723) *Howard v. Derham-Burk,* Case No. 17-1064 (9th Cir. BAP 2018) - attorney fees for services incurred during the course of Chapter 13 case that remain unpaid as of entry of discharge are discharged under Section 1328. After Debtor received discharge, attorney filed fee application primarily related to services in connection with Notice of Final Cure, and sought to recover fees directly from Debtor outside bankruptcy. Plan provided for payment of attorney's fees and costs as administrative expenses over life of Plan and included supplemental fees and expenses for services through term of Chapter 13 case. Although services did not really do ongoing performance hundred Plan, services were necessary to ensure that lender did not undermine Debtor's ability to obtain fresh start. Attorney could have modified Plan to arrange for and obtain compensation by alternate means before entry of discharge but did not do so. Although Debtor is not prevented from voluntarily paying approved fees, Counsel cannot require Debtor to make payments on discharged administrative expense claim.

11.186 Priority Claims – Post-Petition Interest

(5724) *In re Thal,* 2018 WL 2182304 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 "super discharge". Debtor's Plan proposed to pay IRS priority claim in full. IRS filed priority claim for balance due as of petition date and Debtor paid that claim in full during Chapter 13 case. After discharge, IRS levied against Debtor's Social Security to recover unpaid post-petition interest and Debtor sought sanctions for violation of discharge injunction. While taxes themselves would not have been dischargeable, Section 1322(a)(2) requires only that debtor pay all priority tax debt in full in deferred cash payments. Section 1322 does not require deferred cash payments to include interest or have present value as of date of confirmation equaling total amount of priority claim Chapter 13 provides unique ability to pay tax liability without penalties and interest normally associated with tax debt. IRS willfully violated discharge injunction. Court ordered IRS to return all funds taken from debtor post discharge but could not award damages or attorney fees unless debtor exhausted administrative remedies under 26 USC Sections 7430 and 7433; and Court lacks jurisdiction to award punitive damages as waiver of sovereign immunity under Section 106 specifically excludes punitive damages.

11.187 Penalties Owed to Governmental Agencies

(5725) *US v. Daley,* Case No. 17-10962 (E.D. Ma. 2018) – Ten percent "exaction" when person prematurely withdraws funds from qualified retirement account is not itself "ta" or "compensation for actual pecuniary loss" by government and so is not entitled to priority treatment. In determining whether item is tax or penalty that is priority, court must determine whether charge is pecuniary burden laid on individual or property for purpose of defraying expenses of government. Items I "penalty" if it intended as punishment for unlawful at. Exaction for purposes of Code is penalty where goal is to deter unlawful conduct of prematurely withdrawing funds and not to provide funds to run government, Penalty is not entitled to priority treatment as penalty is not intended as compensation for actual pecuniary loss, as primary purpose is to deter taxpayers from prematurely withdrawing funds. Exaction resulting from premature withdrawal is non-priority penalty characterized as unsecured claim and are dischargeable under Section 1328.

(5726) *Kozlowski v. Unemployment Insurance Agency,* 2016 WL 6405806 (E.D. Mi. 2016) – Penalties for fraudulently obtained unemployment benefits are part of "damages" arising from fraud and are non-dischargeable under Section 523(a)(2). While penalties may be dischargeable under (a)(7), sections are not mutually exclusive. Even if penalties under (a)(7) are dischargeable in Chapter 13, penalties that flow from

fraud are not excepted from discharge under (a)(2) and are not dischargeable in Chapter 13.

(5727) *Michigan Unemployment Insurance Agency v. Andrews,* 2016 WL 4497757(E.D. Mi. 2016) – Reversing the Bankruptcy Court's ruling, District Court held that penalties assessed incidental to overpayment of unemployment benefits are not dischargeable under Section 523(a)(2). While Section 523(a)(7) makes penalties owed to governmental units non-dischargeable, that does not supplant the provisions of Section 523(a)(2). Any debt that arises out of fraud is non-dischargeable, including penalties. Debtor's liability for penalties flowed directly from Debtor's fraud in obtaining unemployment in the first instance, rendering amount of unemployment and all penalties non-dischargeable under Section 523(a)(2).

11.188 Enforcement of Injunctive Relief

(5728) *Innerwood & Co. LLC v. Privett,* 2016 WL 4697662 (S.D. Ohio 2016) – Whether enforcement of injunction against Debtor for violation of non-compete agreement is stayed depends on whether injunction amounts to "claim". The right to equitable relief, such as the right to an injunction to enforce a non-compete agreement, constitutes a claim only if it is alternative to right to payment or if compliance with equitable order will require Debtor to pay of money. Right to equitable relief might be dischargeable "claim" if breached non-compete agreement could be reduced to money damages. Debtor's payment of legal fees to defend action to enforce an injunction is not the type of expense that constitutes a "requirement that Debtor pay money" to satisfy injunction. Bankruptcy Court must determine (1) whether Debtor is required to expend money to comply with obligations under the non-compete agreements or the preliminary injunction order and (2) whether Debtor is subject to money damages for breach of the non-compete agreements or the preliminary injunction order.

11.189 Discharge Injunction

(5729) *Forson v. Nationstar Mortgage, LLC,* 2018 WL 1635231 (Bankr. S.D. Ohio 2018) – Creditor that attempts to collect discarged 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 $8,000although 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.

(5730) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of debtor. Enforcement of Discharge Injunction is within exclusive control of District Court (or Bankruptcy Court) that entered discharge in first instance. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current. Thus, Tennessee Court has jurisdiction to rule on Plaintiff's complaint that Defendant failed to properly credit payments or deem account current as ordered by Texas Court and relief is not within exclusive control of Texas Court that entered discharge in first instance.

(5731) *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.

(5732) *Forson v. Nationstar Mortgage, LLC,* 2016 WL 2727973 (Bankr. S.D. Ohio 2016) – Sole remedy for alleged violation of discharge injunction is through contempt proceedings. Section 524 does not create independent private cause of action. Power of court is limited to effort to enforce court's own order. Complaint that sought to certify class action against lender for violation of discharge injunction that defined class as all Debtors in bankruptcy proceedings anywhere in United States did not support jurisdiction as class would include Debtors who received discharges other than in the Southern District of Ohio. Court lacked jurisdiction to enforce orders of other courts through contempt proceedings. Court did allow certification of all Debtors who received discharges in the Southern District of Ohio.

(5733) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Lender violated discharge injunction when creditor, after entry of discharge in Chapter 13 proceeding, demanded and received payment of pre-petition attorney fees, late fees and costs as part of request by Debtors for payoff as part of refinancing with new lender.

(5734) *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.

(5735) *Kowall v. GMAC Mortgage, LLC,* Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Section 524(a)(2) injunction replaces automatic stay as to actions to collect debts from Debtor personally. Section 524 does not contain a private cause of action, but Court can enforce discharge injunction through contempt. Contempt requires proof that defendant violated a specific order with knowledge of the order allegedly violated. Complaint failed to state cause of action where complaint failed to allege either that the Debtor received a discharge or that the creditor had knowledge of the discharge. Contempt appropriate where actions are intended to coerce payments and not where actions have some other, lawful purpose. Creditor's action in reporting loan to credit reporting agency is not inherently action to collect debt. Debtor failed to allege that creditor reported loan information for improper purpose or that creditor had taken any action designed to coerce payment with no lawful purpose.

L. Revocation of Discharge

11.190 Grounds

(5736) *Simon v. Finley,* 18-4011 (Bankr. S.D. Ill. 2018) – Sole basis to revoke discharge is that discharge was obtained by fraud where requesting party did not know of fraud until after discharge was granted. Motion to Revoke Discharge must be brought within one year after discharge is granted. "Direct pay" mortgages are "payments under the Plan" as required by Section 1328 as payments must be addressed in Plan. Court would not set aside discharge based on fraud where creditor filed notice that mortgage was not current yet no party objected to entry of the discharge. One month after entry of discharge, Chapter 13 Trustee filed motion to revoke discharge. Court denied motion as there was no evidence of fraud because Trustee knew about missed payments in advance of entry of discharge.

M. Rule 3002.1

11.191 Applicability – Principal Residence

(5737) *In re Beiter,* 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Rule 3002-1 applies to claims secured by security interest in principal residence and where plan provides for either trustee or debtor to make contractual payments.

(5738) *In re Hockenberger,* 2018 WL 1770172 (Bankr. N.D. Ohio 2018) – Rule 3002.1 applies in Chapter 13 case to claims (1) secured by security interest in debtor's principal residence, and (2) for which plan provides for continuing contractual installment payments including "cure and maintain" under Section 1322(b)(5).

11.192 Applicability – Non-principal Residence

(5739) *In re Gurdano,* 2012 WL 2402789 (Bankr. S.D. Fl. 2012) – Notice of Payment Change filed in case where security is not personal residence is of no effect. Debtor is not required to object to Notice.

(5740) *In re Wallett,* 2012 WL 4062657 (Bankr. D. Vt. 2012) – Creditor holding mortgage on property that is not Debtor's principal residence not bound by Rule 3002.1 and not required to file response to Trustee's Notice of Final Cure. Although Rule 3002.1 does not expressly state that it does not apply to non-principal residential loans, logical inference from language of Rule limits applicability to principal residences.

(5741) *In re Bolden,* Case No. 07-30132 (Bankr. E.D. Mi. 2012) – Creditor holding lien on Debtor's vehicle not required to file response to Trustee's Notice of Final Cure. Rule 3002.1 applies only to loan secured by principal residence and where mortgage continues beyond life of plan. Car financing did not involve car and did not involve "continuing" secured debt.

11.193 Applicability – Grant of Relief From Stay

(5742) *In re Holman,* 2013 WL 1100705 (Bankr. E.D. Ky. 2013) – Rule 3002.1 applies where plan treats security interest in Debtor's principal residence as cure and maintain under Section 1322(b)(5). Obligations under Rule 3002.1 do not end when stay relief is granted. Although debt may no longer be paid under the plan, the debt is still provided for under the confirmed plan. Trustee and Debtors have continuing need for disclosures. Stay lift does not terminate Debtor's interest in property and Debtor may desire to retain property by refinancing or to sell property prior to foreclosure. Disclosures keep Debtor informed as to interest rate changes, late fees and penalties, all of which assists the Debtor in proceeding after the stay lift, and also assist the trustee and Debtor in reviewing any post-foreclosure deficiency claim.

(5743) *In re Marquez,* Case No. 11-12659 (Bankr. W.D. Mi. 2012) – Court excused further compliance with Rule 3002.1 where, after confirmation of plan, creditor received relief from automatic stay. Stay lift terminates any opportunity for Debtor to "cure and maintain" payments under the plan.

(5744) *In re Thonga,* 2012 WL 5050669 (Bankr. E.D. Wis. 2012) – Rule 3002.1 does not apply to mortgage on principal residence where stay is later lifted. Rule applies only to creditors that have filed claims secured by a security interest in the Debtor's residence. Creditor withdrew its claim after entry of order lifting stay. Creditor no longer was a "holder of a claim" as required by the Rule.

(5745) *In re Kraska,* 2012 WL 1267993 (Bankr. N.D. Ohio 2012) – Court declined to waive compliance with Rule 3002.1 in connection with Order Granting Relief From Stay. Although Debtor's plan provided for the surrender of the property, nothing in Rule 3002.1 limits its applicability to cases where Debtor retains property. Rule applies to all claims secured by a mortgage on the principal residence, and whether Debtor intends to keep or surrender property does not change fact that as of the petition date and as of the confirmation date, the mortgage does encumber the principal residence and will continue to do so until foreclosure proceedings are complete. Mortgage company likely will be filing claim and Rule is designed to assist in evaluating and implementing claim and to account for payment changes and costs and advances that may be incurred prior to completion of foreclosure proceedings.

On Rehearing, Court reconsidered and agreed to waive compliance with Rule 3002.1 where the property is surrendered in the Plan. The United States Trustee has filed a Motion for Rehearing which remains pending as of the date of preparation of this material.

11.194 Applicability – Obligation Treated in Plan

(5746) *In re Garduno,* 2012 WL 2402789 (Bankr S.D. Fla. 2012) – Rule 3002.1 applies only where claim is provided for under Section 1325(b)(5). Plan that provided that lender would receive "$0.0" did not treat bank and effectively left bank out of plan entirely. Creditor not required to file any notices and, to extent notices are filed, notices are a nullity to which Debtor not required to object.

11.195 Applicability – Property Surrendered at Confirmation

(5747) *In re Hager,* Case No. 11-63365 (Bankr. E.D. Mi. 2011) – Rule 3002.1 does not apply where property is surrendered at confirmation. Rule 3002.1 applies only where plan as confirmed calls for "cure and maintain".

11.196 Applicability – "Direct Pay" Mortgage

(5748) *In re Merino,* 2012 WL 2891112 (Bankr. M.D. Fl. 2012) – Rule 3002.1 applies only to "cure and maintain" obligations. Debtor was current in mortgage payments as of commencement of case and paid mortgage directly to lender during pendency of chapter 13. As Debtor was current at petition, there was nothing to "cure". Mortgage was not within scope of Section 1322(b)(5) and, therefore, not within scope of Rule 3002.1.

11.197 Applicability – Stripped Liens

(5749) *In re Carey*, Case No. 13-47640 (Bankr. E.D. Mi. 2016) – Creditor not authorized to receive payment on Notice of Post-Petition Mortgage Fees, Charges and Expenses if lien has been stripped. Although strip is not effective until completion of plan, determination that lien can be stripped necessarily involves finding that lien is entirely unsecured pursuant to Section 506. As an unsecured creditor, claimant is not entitled to recover post-petition fees, charges, expenses or interest. Creditor can file notice for purposes of preserving right to payment in event Chapter 13 Plan does not complete but Trustee is not to make payments on Notice. The creditor retains its right to collect those in the event the case ends without a discharge but if the Debtor receives a discharge then the balance of the 3002.1 charges are also discharged.

11.198 Conflict with Local Rule – Preemption

(5750) *In re Lee,* 2012 Bankr. LEXIS 1465 (Bankr. N.D. Ohio 2012) – Chapter 13 Trustee's Notice and Motion of Intent to Declare Debtor Current and Reinstated on Wells Fargo Bank., N.A., c/o Chase Home Finance, LLC's Secured Claim denied. Trustee also filed a Notice of Final Cure Mortgage Payment pursuant to new Rule 3002.1. Intent of both of the Trustee's filed documents is the same: to provide of record evidence that Debtor has cured the default on the mortgage on his principal residence being paid through his confirmed Chapter 13 plan. Trustee's separate Motion was "belt and suspenders" attempt to obtain separate Order that is no longer permitted under Rule 3002.1. Rule 3002.1 is a comprehensive procedural path for reaching the result sought by the Trustee. The Motion is not provided for under and now conflicts with that procedural path and creates procedural confusion for the court and the parties and threatens the creditor's entitlement to at least 21 days for response. Because the Motion conflicts with and confuses that procedure, the creditor's objection will be sustained and the Motion will be denied, without prejudice. The Notice and the process set forth in Rule 3002.1 of the Federal Rules of Bankruptcy Procedure will control.

11.199 Notice of Payment Change – Generally

(5751) *In re Beiter,* 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Rule 3002.1 requires lender to serve and file notice of change of payment amount no later than 21 days before new payment amount is due.

11.200 Notice of Payment Change – Failure to Provide

(5752) *In re Beiter,* 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – If Creditor does not timely file and serve payment change notice, Court may prevent creditor from presenting omitted information into evidence or award other relief including reasonable expenses and attorney fees resulting from failure. Bankruptcy Court Order in settlement between creditor and United States Trustee that implemented moratorium on filing Notices did not absolutely absolve lender from complying with Rule 3002.1 as Creditor voluntarily agreed to enter into moratorium before Court entered Order and because it is not clear whether Bankruptcy Court had authority to enter moratorium in first instance. Lender's later refund of alleged overpayment that resulted from non-filing of Notice of Payment Change did not preclude recovery. While lack of monetary damages may pose a barrier to further recovery, Rule 3002.1 allows recovery of expenses and attorney fees even in absence of actual monetary harm. Complaint stated cause of action based on creditor's non-filing of notice of payment change.

(5753) *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.

(5754) *In re Wright,* 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer's failure to provide notice of payment changes to trustee, Debtor and Debtor's attorney, and failure to respond to Debtor's request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.

11.201 Notice of Payment Change - Excusal of Compliance – HELOC

(5755) *In re Pillow,* Case No. 11-11688 (Bankr. W.D. Mi. 2013) – Rule 9006 allows Court to alter deadlines set forth in Rule 3002.1 for filing notices of mortgage payment changes. Where interest rate changes frequently and produces nominal monthly payment changes, it is not reasonable to require lender to file notice at least 21 days prior to effective date. Objective of Rule 3002.1 is normal adjustments for taxes and periodic interest rate changes, not for interest rate changes that happen frequently under HELOC. Further, clerical and legal expenses of lender in filing notices are recoverable from the Debtor, resulting in an increase in the burden on Debtor for otherwise minor changes in monthly payments. Court would authorize creditor to file payment changes every 6 months, but would also require lender to file quarterly reports in the final year of the plan to allow Debtor to address impact on confirmed plan in time to take action to conclude case.

(5756) *In re Marquez,* Case No. 11-12659 (Bankr. W.D. Mi. 2012) – Court considered, but did not rule on, whether timing for filing Notices of Payment Change can be altered under Rule 9006(b).

(5757) *In re Adkins,* 2012 WL 3860593 (Bankr. N.D. Ohio 2012) – Court cannot excuse compliance with Rule 3002.1 even for second mortgage that is Home Equity Loan of Credit on which interest rate changes frequently. Rule applies to any mortgage secured by principal residence and does not permit court to create exceptions even if compliance with rules produces hardship or where compliance with rule is difficult.

11.202 Notice of Payment Change - Expenses for Filing

(5758) *In re White,* 2012 Bankr. LEXIS 1884 (Bankr. E.D.N.C. 2012) – Preparation and filing of notice of payment change is ministerial action that does not require assistance of counsel. Filing of Notice is not compensable expense.

(5759) *In re Adams,* 2012 WL 1570054 (Bankr. E.D.N.C. 2012) – Cost of preparing and filing Notice of Payment Change is not compensable expense. Mortgage companies have routinely served notices of mortgage payment change on Debtors without assistance of attorney. Rule

3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services.

(5760) *In re Baines,* 2012 LEXIS 2980 (Bankr. M.D.N.C. 2012) - Cost of preparing and filing Notice of Payment Change is not compensable expense. Rule 3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services. Preparation is normal business function that does not require assistance of attorney.

(5761) *In re Hunt,* 2012 LEXIS 2981 (Bankr. M.D.N.C. 2012) - Cost of preparing and filing Notice of Payment Change is not compensable expense. Rule 3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services. Preparation is normal business function that does not require assistance of attorney.

11.203 Notice of Post-petition Fees and Expenses – Generally

(5762) *In re Polly,* 2016 WL 3004439 (Bankr. W.D. Ky. 2016) – Creditor's claim for post-petition mortgage fees under Rule 3002.1 sought amounts that were excessive and unreasonable. Creditor failed to demonstrate basis for charge of $650 to prepare proof of claim where much of work done was administrative that can be done by para-professional. Department of Housing and Urban Development schedule of attorney fees for various tasks is persuasive but not binding on bankruptcy court. Reasonable cost for proof of claim would be $200.00. Remaining charges of $500 to object to plan and $100 for filing notice of post-petition fees were reasonable, for total sum of $800.

(5763) *In re Delise,* Case No. 12-42111 (Bankr. E.D. Mi. 2012) – Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.1.

(5764) *In re Pasko,* Case No. 12-41172 (Bankr. E.D. Mi. 2012) - Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.

(5765) *In re Rusch,* Case No. 11-67578 (Bankr. E.D. Mi. 2012) – Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.1.

(5766) *In re Sheppard,* 2012 WL 1344112 (Bankr. E.D. Va. 2012) – Creditor is not required to file notice of post-petition fees and expenses where sums have already been approved in separate Court Order. Creditor filed motion for relief from stay. In consent order resolving motion, stay remained in place and creditor was awarded attorney fees and costs incurred in prosecution of motion. Creditor later filed Rule 3002.1 notice seeking same fees and costs. Rule 3002.1 notice struck by court as sums had already been awarded by court. Although Rule 3002.1 appears absolute in requiring notice, purpose of rule is fulfilled by Court Order in lieu of notice.

11.204 Objections to Notice - Generally

(5767) *In re Tuneberg,* 2012 WL 3744719 (Bankr. S.D. Tx. 2012) – Court unable to rule on Debtor's objection to Notice of Post-petition Fees where Debtor failed to submit sufficient information from which Court could determine recoverability of charges.

11.205 Notice of Post-Petition Fees and Expenses – Expenses for Filing

(5768) *In re Polly,* 2016 WL 3004439 (Bankr. W.D. Ky. 2016) – Creditor's claim for post-petition mortgage fees under Rule 3002.1 sought amounts that were excessive and unreasonable. Creditor failed to demonstrate basis for charge of $650 to prepare proof of claim where much of work done was administrative that can be done by para-professional. Department of Housing and Urban Development schedule of attorney fees for various tasks is persuasive but not binding on bankruptcy court. Reasonable cost for proof of claim would be $200.00. Remaining charges of $500 to object to plan and $100 for filing notice of post-petition fees were reasonable, for total sum of $800.

(5769) *In re Adams,* 2012 WL 1570054 (Bankr. E.D.N.C. 2012) – Secured creditor not entitled to recover attorney fees for filing notices of mortgage payment changes. Mortgage companies routinely serve notices of mortgage payment changes without assistance of an attorney. Although Rule 3002.1 changed the method of service, and provided new forms, it does not have any effect on the underlying services.

11.206 Recoverable Charges

(5770) *In re Minor,* 2018 WL 3078177 (Bankr. W.D. Ky. 2018) – Rule 3002.1 allows recovery of attorney fees only to extent reasonable using lodestar analysis. Court must determine whether services were reasonably necessary and reasonableness of time expended. Charge of $3,001.20 reduced to $1,760 where Court determined that amount of time expended exceeded reasonable time for services provided. Many time entries were routine matters that should have taken less time than shown on time records.

(5771) *In re Formosa,* 2018 WL 494416 (Bankr. E.D. Mi. 2018) – Rule 3002.1 is a notice provision that does not provide means to determine whether particular charges or expenses are recoverable. Propriety of charges is determined by underlying contract or statutory provisions governing transaction. Mortgage allowed lender to recover reasonable attorney fees to protect its interests in property. Bank had no duty to conduct PACER search before commencing foreclosure sale. Rule impose on Debtor duty to provide notice to creditors. However, Code does not impose duty on Debtor beyond properly scheduling creditor in Matrix. Absent evidence that Debtor either failed to include creditor in Matrix or otherwise concealed notice of bankruptcy filing from creditor, Debtor had no affirmative duty to advise creditor of bankruptcy filing where Debtor had properly included credit in Matrix and Bankruptcy Court Clerk mailed notice to Creditor as required by Rule 2002, but between petition date and date on which creditor received notice from Clerk, creditor had conducted foreclosure sale. Fees incurred by

creditor to set aside foreclosure sale were not fees to protect creditor's interest in property but were instead expended to remedy Bank's violation of stay. Fees in connection with filing proof of claim, reviewing schedules, objecting to plan and otherwise representing Bank in bankruptcy case were routine legal services for lenders in bankruptcy cases and were incurred for work to protect Bank's interest in property. Fannie Mae and Freddie Mac guidelines are illustrative but not binding. Charges totaling $2500 for filling Proof of Claim, reviewing schedules, filing objections, and monitoring of Bankruptcy case was on "high side" and exceeded FNMA guidelines, but were within range of reasonableness in this case.

(5772) *In re Brumley,* 2017 WL 3129735 (Bankr. W.D. Mi. 2017) – Rule 3002.1 permits holder of claim secured by principal residence to recover fees, costs and charges incurred after filing of case. Notice of Post-Petition Mortgage Fees, Charges and Expenses must be filed within 180 days of incurring expense, sand expense must be recoverable under applicable loan documents. Loan documents permitted lender to conduct inspections of property if loan is in default or property is vacant. Loan was in default at time of inspections where loan was post-petition current but pre-petition arrearages had not yet been cured. Provision that permitted lender to conduct inspections did not provide for recovery of costs for those inspections. Separate paragraph of loan documents allowed lender to "collect fees and charges authorized by the Secretary [of Housing and Urban Development]". Lender did not provide any evidence of any agency regulation that would permit recovery of inspection fees or amount of fees recoverable. Notice of Post-Petition Mortgage Fees, Charges and Expenses disallowed.

11.207 Motion for Determination

(5773) *In re Formosa,* 2018 WL 494416 (Bankr. E.D. Mi. 2018) – Determination of proper amounts of fees, expenses or charges under Rule 3002.1 to determine whether claim fees or charges are required by underlying agreement or non-bankruptcy law to cure default or maintain payments is initiated by Motion. Determination of amount necessary to cure a default which includes any fee or expense claimed by creditor without regard to whether payment is necessary to cure default is brought by Motion under Rule 3002.1(c), which sweeps in any fee or expense incurred in connection with mortgage claim incurred after bankruptcy case is filed and claim holder asserts fees or charges are recoverable against debtor or principal residence.

11.208 Sanctions

(5774) *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.

(5775) *In re Luzier,* 580 BR 725 (Bankr. N.D. Ohio 2014) – Creditor precluded from attempting to recover fees, expenses, and charges and mortgage payment unpaid as of completion of Debtor's Chapter 13 Plan where Creditor does not file objection to Notice of Final Cure under Rule 3002.1. Creditor admittedly received Notice of Final Cure and admittedly did not file any response. Creditor's subsequent threats to foreclose based nonpaid mortgage payments and costs violated Rule 3002.1. Creditor who does not respond to Notice of Final Cure is precluded form introducing evidence of any amounts outstanding as of completion of Chapter 13 Case. Creditor violated Discharge Injunction where Debtor completed Chapter 13 case, creditor did not respond to Notice, and creditor attempted to recover unpaid mortgage payments first by starting foreclosure proceedings and then, when Debtor filed second Chapter 13 case, including mortgage payments and fees and costs from first case in Proof of Claim in second case. Court would award Debtor fees and costs incurred as result of Creditor's non-compliance with Rule 3002.1 to be determined at subsequent hearing.

(5776) *In re Gravel,* 556 BR 561 (Bankr. D. Vt. 2016) – Sanctions imposed against mortgage creditor totaling $375,000 for violations of Rule 3002.1 in three Chapter 13 cases. In each case, after conclusion of Chapter 13 case and entry of discharge, creditor attempted to recover fees allegedly incurred during Chapter 13 but not disclosed to Court as required by Rule 3002.1. Same mortgage servicer had been chastised by Court in North Carolina and sanctioned in amount of $9,000 by same Judge hearing current matters, for same issues. In each of the three

matters Court imposed sanction of $1,000 per month for 25 months over which servicer failed to comply, for total of $75,000.00. In two of the cases, the Court had previously entered orders declaring the mortgage to be pre- and post-petition current and servicer send bills for fees notwithstanding Orders. Court imposed additional $100,000 in one case and additional $200,000 in second case where court had already issued $9,000 sanction). Court noted that sanctions were not intended to coerce compliance in these cases as servicer had already waived the fees, but concluded that sanctions were warranted under Section 105 as punitive non-contempt sanctions following belated compliance.

(5777) *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.

(5778) *In re Pompa,* 2012 WL 2571156 (Bankr. S.D. Tx. 2012) – Rule 3002.1 did not preempt court's ability to issue sanctions under Section 105 based on creditor's charging of improper fees and improperly applying payments.

11.209 Trustee's Notice of Final Cure – Generally

11.210 Notice of Final Cure – Failure to Respond

(5779) *In re Montaie,* Case No. 10-75259 (Bankr. E.D. Mi. 2016) – Rule 3002.1 requires party objecting to notice of final cure to file response within 21 days. Creditor response field after deadline and after entry of discharge was nullity requiring no action by the Court.

(5780) *In re Mehilli,* Case No. 09-76137 (Bankr. E.D. Mi. 2015) – Court will not take action where Creditor response is filed after expiration of deadline to file response and after entry of discharge.

11.211 Notice of Final Cure – Creditor Response

(5781) *In re Hockenberger,* 2018 WL 1770172 (Bankr. N.D. Ohio 2018) – Rule 3002.1 requires holder of claim secured by lien on Debtor's principal residence to file response to Trustee's Notice of Final Cure stating whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5). Response is not entitled to presumption of validity and mortgage holder bears burden of proof to establish amount of any outstanding obligations. Court, after notice, is to determine whether Debtor has cured all defaults and paid all required post-petition amounts. Plan called for Trustee to pay mortgage arrearage and Debtor to pay ongoing mortgage payments directly. Creditor not paid in full even where Creditor's arrearage on Proof of Claim was paid in full by Trustee but Debtor did not make all contractually due monthly payments during life of Plan, as Debtor knew that mortgage payments did not include escrows for taxes and insurance and was aware that creditor had been advancing costs during pendency of case; and creditor had filed Notice of Mortgage Payment Change during Case but Debtor did not increase monthly payment.

(5782) *In re Love,* Case No. 06-30968 (Bankr. E.D. Mi. 2012) – Creditor responded to Trustee's Notice, alleging that creditor had balance due on account. Debtor alleged that account was paid according to the Trustee records and so no balance was due. Court reconciled amounts due under loan documents and compared that to total amount paid by Trustee, and determined balance remaining. Discrepancy between creditor records and Trustee records resulted from ambiguous plan modification that apparently attempted to reduce balance due without proper notice. Once court determined that modification did not effectively reduce balance, then payments by trustee were not sufficient to pay actual balance owed.

11.212 Notice of Final Cure – Expenses for Filing Response

(5783) *In re Wallett,* 2012 WL 4062657 (Bankr. D. Vt. 2012) – Creditor holding mortgage on property that is not Debtor's principal residence not bound by Rule 3002.1 and not required to file response to Trustee's Notice of Final Cure. As such, creditor not entitled to recover cost of filing unnecessary response.

(5784) *In re Carr,* 2012 WL 930337 (Bankr. E.D. Va. 2012) – Creditor may not charge a Debtor a fee for filing a response to the Chapter 13 trustee's Notice of Final Cure Payment, which is required under the bankruptcy rule governing notice relating to claims secured by security interest in a Debtor's principal residence; the response is not a pleading, but is simply a statement by the creditor as to the status of the loan at the conclusion of the plan, the statement can be derived simply and quickly from creditor's records and poses no significant burden on creditor, as it is a business function, akin to issuing a receipt for payments received under the plan or providing an annual escrow statement, that can be done by a claims administrator in creditor's own office, and no legal analysis is generally required. If the Chapter 13 trustee or Debtor contests the creditor's response to the Notice of Final Cure Payment, the matter becomes a contested matter and would proceed as any other contested matter, with the creditor entitled to legal representation, and, if the underlying loan documents and non-bankruptcy law permit the recovery of attorney fees, and the Bankruptcy Code does not prohibit those fees, attorney fees in successfully defending creditor's response to trustee's notice would be recoverable.

11.213 Notice of Final Cure – Debtor's Response

(5785) *In re Bodrick,* 2013 WL 5583600 (Bankr. N.D. Ohio 2013) – Rule 3002.1 does not obligate Debtor to file response if creditor files opposition to Notice of Final Cure. Creditor's notice that it disagrees with Notice of Final Cure affords Debtor and Trustee opportunity to file Motion to determine, but does not mandate such a filing. Debtor's non-filing of any Motion in response to Creditor's Response disagreeing with Notice of Final Cure does not waive or estop Debtor from later contending that loan was current as of date of Notice of Final Cure or any later date. Debtor's adversary complaint filed against lender after bankruptcy case was reopened that asserted that lender had failed to properly credit post-petition payments was not precluded by earlier Notice of Final Cure, entry of discharge, or Order closing case.

11.214 Effect of "Deem Current" Order

(5786) *In re Beiter,* 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – "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.

N. Dismissal

11.215 Voluntary Dismissal – Absolute Right to Dismiss

(5787) *In re Parker,* 2016 WL 6783268 (Bankr. E.D. Ky. 2016) – Applying provisions of Chapter 12 regarding voluntarily dismissal that mirror comparable provisions in Chapter 13, Court concluded that Debtor in Chapter 12 has absolute right to dismiss case at any time. Section 1208(b) states that on request of a Debtor if the case has not previously been converted, court *must* dismiss case, while Section 1208(d) allows, but does not require, court to convert or dismiss on motion of party in interest. Where Congress used mandatory "must" in one section and discretionary "may" in separate subsection, presumption is that Congress intended two different results, one mandatory and the other discretionary. Citing *Liberty National Bank & Trust Co. v. Burba,* 1994 WL 709314, a Chapter 13 Case in which the 6th Circuit concluded that a Debtor has an absolute right to dismiss, Court held that there was no basis to engraft any limitation on that right. Supreme Court's ruling in *Marrama v. Citizens Bank* does not compel different result as Court was concerned with Debtor's attempt to convert case from Chapter 7 to Chapter 13 where Debtor would not be eligible for relief under Chapter 13. That did not in any way limit Debtor's right to dismiss case where there is no eligibility issue presented in dismissal.

(5788) *In re Fisher,* 2015 WL 1263354 (Bankr. W.D. Va. 2015) – Debtor has absolute right to voluntarily dismiss Chapter 13 Case. Denial of request on equitable grounds would circumvent Supreme Court ruling in *Law* which precludes use of equitable principals to circumvent plan language of Code.

(5789) *In re Gorges,* Case No. 14-59311 (Bankr. E.D. Mi. 2015) – Debtor has absolute right to voluntarily dismiss Chapter 13 proceeding. However, court can condition dismissal on retention of jurisdiction to grant additional relief on motion for sanctions against Debtor and counsel that was filed before case was dismissed.

(5790) *In re Thompson,* 2015 WL 394361 (Bankr. E.D. Ky. 2015) – Section 1307 affords Debtor absolute right to dismiss case. Pending motion to convert filed by UST does not supplant that right absent proof of bad faith, citing *Marrama.* Fact that Debtor may have had substantial non-exempt equity in real property sufficient to pay claims in full not "bad faith" for purposes of Section 1307. While trustee may have been correct that conversion would be "winning proposition for all involved parties", that does not afford court discretion to disregard plain meaning of Section 1307.

(5791) *In re Meskos,* Case No. 10-72179 (Bankr. E.D. Mi. 2012) – Debtor has absolute right to dismiss Chapter 13 proceeding notwithstanding allegations by Trustee of undisclosed assets and income. Section 1307(b) is unqualified and does not include an imputed "bad faith" exception.

(5792) *Procel v. U.S. Trustee,* 467 BR 297 (Bankr. S.D.N.Y. 2012) – Recognizing substantial split of authority, Court concluded that binding Second Circuit precedent allowed Debtor absolute right to voluntarily dismiss even where Chapter 13 petition was part of scheme to hinder, delay or defraud creditors. Court questioned continued viability of pre-*Marrama* precedent but concluded that Second Circuit's prior holdings had not clearly been abrogated by *Marrama* and court was therefore bound to follow those precedents.

(5793) *In re Willliams,* 435 BR 552 (Bankr. N.D. Ill. 2010) – Chapter 13 Debtor whose case had not previously been converted from another chapter had absolute right to dismiss case, which could not be denied on ground that Debtor had acted in bad faith.

(5794) *In re Mangual,* 2010 WL 5185392 (Bankr. D.P.R. 2010) – Although raising questions after Court's decision in *Marrama* and recognizing substantial split of authority, Court concluded that Debtor had absolute right to dismiss Chapter 13 case. However, Court has authority to impose conditions on dismissal. Court properly dismissed case on Debtor's request for voluntary dismissal but imposed 1 year bar to refiling where material omissions and inaccuracies in schedules called into question whether Debtor intended to abuse process but findings did not amount to level of bad faith.

(5795) *In re Hamlin,* 2010 WL 749809 (Bankr. E.D.N.C. 2010) – Debtors have the absolute right to dismiss pursuant to Section 1307(b). However, that right is not entirely unconditional. Section 349 permits courts to impose conditions on dismissal if appropriate to prevent abuse of process.

11.216 Voluntary Dismissal – No Absolute Right to Dismiss

(5796) *In re Allman,* 2018 WL 1320152 (Bankr. M.D. Tn. 2018) – Court can deny Debtor's request to dismiss case and instead convert case to Chapter 7 where filing was in bad faith to hinder creditor's in abuse of bankruptcy system. Good faith is condition of eligibility to be Chapter 13 debtor. Debtor who has acts in bad faith is not eligible to be Chapter 13 debtor and is not entitled to protections of Chapter 13 such as absolute right to dismiss.

(5797) *In re Haddad,* 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Debtor does not have absolute right to dismiss where evidence indicates that Debtor is attempting to use dismissal as "escape hatch" to avoid consequences s of Debtor's bad faith conduct. Debtor's continuous breach of duty to disclose post-petition automobile accident in Chapter 13 and timing of Debtor's Motion to Dismiss – filed after Chapter 13 Trustee scheduled hearing on plan modification to require settlement proceeds be paid into plan for distribution to creditors – suggested that Debtor's

dismissal was "escape hatch" to prevent Court from ruling on Trustee's Plan Modification. However, these two facts alone did not constitute the level of fraud or bad faith required by *Marrama* and *Jacobsen,* where Debtor was retired schoolteacher living on social security and pension; Debtor suffered serious personal injury as result of accident; at some point, Debtor's son was killed; Debtor suffered serious personal hardships during case; and Debtor stated that she relied on bankruptcy attorney's advice throughout bankruptcy case and did not know she was required to disclose claim. Court did not need to determine whether absolute right to dismiss existed where, assuming that there was bad faith exception, evidence did not support finding of bad faith.

(5798) *In re Pustejovsky,* 2017 WL 3841743 (Bankr. W.D. Tx. 2017) – Debtor does not have absolute right to dismiss Chapter 13 Case. Debtor's schedules and amended schedules did not disclose multiple assets including jet ski, trailer and storage space. Debtor did not disclose pending litigation to recover for husband's wrongful death and stated in SOFA that she was not involved in any litigation. Debtor did not list gifts or potential causes of action against third parties including numerous friends to whom Debtor allegedly loaned money. Debtor did not disclose interest in pending probate estate and did not list probate administrator or her son as creditors. Although Debtor had pending cause of action for wrongful death, debtor never sought authorization to retain counsel although Debtor hired 4 separate law firms to represent her in action. Attorneys were aware of bankruptcy case and consulted with bankruptcy counsel but nobody sought or obtained Court approval for retention, apparently in effort to bypass bankruptcy attorney and provide advice directly to debtor regarding bankruptcy action. Debtor did not produce to the Chapter 7 Trustee bank records, deposit records, wire transfer records, copies of checks, proof of insurance, documentation regarding deceased husband's life insurance, records of vehicle transfers or sale of assets claimed by probate administrator. Debtor did not present confirmable Chapter 13 Plan after more than 10 months and Debtor was behind in Chapter 13 Plan payments. Debtor attempted to keep Chapter 13 case open long enough to reach settlement with one defendant in personal injury action and then dismiss case keeping Court unaware of negotiated settlement. Debtor not permitted to dismiss case in bad faith. Allowing dismissal without bad faith exception would create absurd result and could render Section 1307(c) meaningless. Allowing dismissal in these facts would allow Debtor an "escape hatch" for dishonest conduct or lack of good faith. Court would vacate dismissal order and convert case to proceeding under Chapter 7.

(5799) *In re Criscuolo,* 2014 WL 1910078 (Bankr. E.D. Va. 2014) – Chapter 13 Debtor does not have absolute right to dismiss chapter 13 case where Debtor's bad faith conduct evidences intent to abuse letter or spirit of code. Court can condition dismissal and impose sanctions as long as sanctions do not contravene any explicit provision of code. Court can grant Debtor's request to voluntarily dismiss but impose bar to future filings consistent with Section 1307.

(5800) *In re Cyncynatus,* 2013 WL 3864310 (Bankr. N.D. Ohio 2013) – Section 1307(b) does not afford Debtor an absolute right to dismiss where Debtors acted in bad faith in the bankruptcy case. Dismissal denied and case converted to Chapter 7 where Debtors owned a Florida timeshare that had not been disclosed; Debtors transferred real estate before they filed the case in an effort to convert a non-exempt asset to an exempt asset; Debtors did not actually live at the property they claimed as exempt homestead; Debtors failed to account for proceeds from the 2011 sale of inherited property in Florida. Totality of circumstances firmly established that the Debtors filed and proceeded with their bankruptcy case in bad faith. They did not tell the truth in their initial filing about their residence, the amount of cash they had on hand, the fact that Jerry owned a Florida timeshare, or Jerry's sale of the inherited Florida property and their continued possession of some of the sale proceeds. Debtors did not have a good faith basis for claiming a homestead exemption in the Miner Road property. The deception continued when the Debtors made undisclosed payments on the note secured by the Florida timeshare, stopping only when the trustee uncovered the payments. Additionally, Debtor lied when he testified at trial that he had not found new employment, thus deliberately underplaying his ability to fund their chapter 13 plan and suggesting that Debtors had to dismiss their case for that reason. There are no special circumstances that would counterbalance these actions and failures to act. Debtors acted in bad faith when they filed their bankruptcy case and continued in that spirit throughout.

(5801) *Taylor v. Winnecour,* 462 BR 527 (Bankr. W.D. Pa. 2011) – Debtor does not have absolute right to dismiss a Chapter 13 case that has not previously been converted from another chapter, without regard to Debtor's basis for seeking dismissal, to status of proceedings, or to consequences of dismissal on creditors. Court may consider factors such as Debtor's good faith and whether Debtor is using bankruptcy process in abusive way in deciding whether to grant dismissal motion. Debtor filed bankruptcy, took advantage of the automatic stay of matters pending against her, and caused her creditors to appear in matters before this court and to file actions against her. Effect of dismissal, which would once again force creditors back into other courts after Debtor delayed their suits in those courts and would further the abuse of process of which Debtor has already been found culpable. Debtor's effort to dismiss the case was next effort in litigious past to put her creditors to great expense while side-stepping any real effort to reconcile or satisfy their debts. If the bankruptcy were dismissed, then the District Court would once again face proceedings on the sanctions it ordered; the State Court would once again face proceedings on creditor's fraudulent conveyance action; the State Court would once again face proceedings in the effort to collect on judgment; creditors would once again be faced with litigation in multiple forums in an effort to liquidate their claims or collect on their judgments or defend abusive actions; and, the chapter 13 Trustee would have expended substantial time, effort and costs in the on-going effort to identify assets that, if an avoidance and recovery action is successful, will be more than sufficient to pay all of the creditors in full.

(5802) *In re Kotche,* 457 BR 434 (Bankr. D. Md. 2011) – Debtor does not have absolute right to voluntarily dismiss. Debtor's conduct, in omitting from her bankruptcy schedules valuable jewelry purchased for her by her ex-husband, and in moving to voluntarily dismiss case once her misconduct was brought to attention of bankruptcy court, smacked of bad faith and warranted denial of dismissal motion.

(5803) *In re Caola,* 422 BR 13 (Bankr. D.N.J. 2010) – Chapter 13 Debtor's right to voluntarily dismiss his or her case is not absolute when there has been showing of bad faith conduct; to allow Debtor to voluntarily dismiss case with impunity would render conversion provision a dead letter and open up bankruptcy courts to myriad of potential abuses. Request for dismissal denied where, prior to petition, Debtor engaged in potentially fraudulent transfer by conveying property owned by Debtor and spouse jointly into spouse's name alone.

(5804) *In re Armstrong,* 408 BR 559 (Bankr. E.D.N.Y. 2009) – Following Supreme Court decision in *Marrama v. Citizens Bank of Massachusetts,*, Debtor does not have absolute right to dismiss Chapter 13 case where Debtor's conduct evidences bad faith. Debtor entered into a post-

petition contract to sell real property for $1.5 million without seeking the permission of the Trustee or the authority of the Court and request for dismissal was apparent effort to conceal transfer and permit Debtor to retain substantial non-exempt funds that would otherwise have been available for payment to creditors.

(5805) *Jacobsen v. Moser,* 609 F.3d 647 (5th Cir. 2010) – Debtor does not have absolute right to dismiss Chapter 13 where Debtor has acted in bad faith and has abused the bankruptcy process. Debtor's schedules failed to list multiple parcels of real estate in which Debtor had an interest and Debtor was attempting to sell at least one parcel without disclosing the parcel or the transaction to the court or creditors; failed to disclose multiple transfers that occurred pre-petition including quit claiming away property to family members; the omission of six rental properties or the income received; and a business venture in Oslo, Norway operated by Debtor's cousin. Request to dismiss would denied and case converted.

(5806) *Rosson v. Fitzgerald,* 545 F.3d 764 (9th Cir. 2008) - In light of *Marrama,* Debtor does not have absolute right of voluntary dismissal under Section 1307(b), but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or "to prevent an abuse of process." Debtor wrongfully retained proceeds of arbitration that were committed to the Chapter 13 plan and used the proceeds to improve and renovate Debtor's home. Debtor never provided the bankruptcy court with an explanation of what happened to the missing funds. Debtor failed to deliver the funds as ordered and then, when taken to task for failing to do so, invoked his supposedly absolute right to withdraw from the bankruptcy process by requesting that his Chapter 13 petition be dismissed. Under these circumstances, bankruptcy court correctly concluded that Debtor sought to voluntarily dismiss his case in order to "abscond with [estate] proceeds." Denial of voluntary dismissal to prevent abuse of bankruptcy process is action specifically approved of by Court in *Marrama*.

11.217 Voluntary Dismissal – After Conversion from Chapter 7

(5807) *In re Vansickle,* 2017 WL 806647 (Bankr. N.D. Ohio 2017) - Section 1307(b) gives Debtor unfettered right to dismiss case unless case was previously converted. When dealing with case converted from Chapter 7, Section 1307(c) allows the Court to either convert case or dismiss case whichever is and best interest of creditors. Court must first determine whether cause exists to dismiss case and, if so, whether interests of creditors are setter served by conversion versus dismissal. Cause existed where Debtor had accrued substantial delinquency in Chapter 13 plan payments constituting material default under Section 1307(c)(6). Best interest of Debtor does not play role in analysis. Best interest of creditors is determined by whether some creditors received preferential payments such that equality of distribution would be better served by conversion; whether there would be loss of rights granted in case if it were dismissed; whether Debtor would simply file new case upon dismissal; ability of Chapter 7 Trustee to reach assets for benefits of creditors; whether conversion or dismissal of estate would maximize value as economic enterprise; whether any remaining issues would be better resolved outside bankruptcy; whether estate consists of a single asset; whether Debtor engaged in misconduct and whether creditors are in need of Chapter 7 Trustee to protect interest; whether plan has been confirmed and whether any property remains in estate to be administered; and whether appointment of Trustee is desirable to supervise administration of estate. Court may also compare creditors' interests in bankruptcy with those they would have under state law outside bankruptcy. Court would convert case to Chapter 7 rather than dismissing as requested by Debtor where Debtor's real estate had over $30,000 of nonexempt equity making a distribution to unsecured creditors likely if case is converted. Forcing creditors to resort to state law would result in one creditor obtaining judgment in seizing all of equity in property to detriment of all remaining creditors, while in Chapter 7 creditors would share in distribution. Other than nonexempt business property, Debtor had few assets and no source of income from which to pay other creditors. There was no evidence of any misconduct by Debtor and it was unlikely that Debtor would file a new case if the current case is dismissed. However, under circumstances, interest of creditors favored conversion rather than dismissal.

(5808) *In re Smith,* 2017 WL 512795 (E.D. Mi. 2017) – Section 1307 permits a Debtor to voluntarily dismiss Chapter 13 case as long as case has not been converted under Section 706. Debtor who converted proceeding from Chapter 7 does not have absolute right to dismiss case, but Section 1307 does not preclude dismissal on Motion with notice to all creditors. Bankruptcy Court has discretion in determining whether dismissal should be granted. Court did not abused discretion in dismissing case where Court questioned Debtor at hearing on Motion and learned that Debtor had sufficient assets to pay creditors outside bankruptcy; Debtor had been misinformed by previous counsel regarding consequences of filing bankruptcy; and there was no evidence that Debtor was trying to game system.

(5809) *In re Seidl,* 2013 WL 2109447 (Bankr. N.D. Ohio 2013) – Debtor has no right to voluntarily dismiss Chapter 13 where case was filed as Chapter 7 and converted upon a finding of presumed abuse under Section 707. Debtor's Motion to Dismiss where Debtor did not provide notice of Motion to Creditors or other parties in interest, without prejudice to Debtor re-filing the motion with proper notice to all parties.

11.218 Voluntary Dismissal – Imposition of Bar Against Re-Filing

(5810) *In re Ross,* Case No. 15-2222 (3d Cir. 2017) – Debtor's request to voluntarily dismiss Chapter 13 case does not deprive Court of authority to include filing injunction in Dismissal Order. Including injunction against future filing does not contravene any provision of the Code that is specific, explicit or express, such that Supreme Court decision in *Law v. Siegel* is not implicated. Section 1307 does not make request for voluntarily dismissal either automatic or without prejudice (unlike Federal Rule of Civil Procedure 41 that makes request for voluntary dismissal which makes dismissal automatic without a court order and specifies that the dismissal is without prejudice), such that Court retains jurisdiction after request for voluntary dismissal to condition actual dismissal order.

11.219 Notice

(5811) *Haffey v. Crocker,* 2017 WL 5710561 (6th Cir. BAP 2017) – Due process is required to prevent, to extent possible, erroneous deprivation of property. Party allegedly aggrieved by denial of procedural due process must show that prejudice resulted. Bankruptcy court did not afford Debtor due process when Court cancelled hearing on Motion to Dismiss and then expedited hearing on Motion for Sanctions that did not request dismissal, but Court dismissed case at expedited hearing date. Order setting hearing entered only four days before the scheduled sanctions hearing was not sufficient notice of issues to be presented or that Court would consider dismissal. Although Moving Party included expedited hearing date in Notice attached to Motion, Court did not enter Order shortening time for notice nor inform debtor that Court would

take up issue of dismissal at earlier hearing. Notice was not given that clearly identified issues to be addressed nor to provide reasonable opportunity to be heard. However, denial of notice was harmless where Bankruptcy Court correctly concluded that Chapter 12 should be dismissed as Debtor had not filed confirmable plan; Debtor had unreasonably delayed in the prosecution of the case by evading discovery including failing to appear for scheduled deposition and failing to cooperate in efforts to schedule or reschedule deposition at Debtor's request; and Estate was suffering and would continue to suffer losses as Debtor's operating reports indicated that Debtor had lost over $9,000 in 12 mots preceding the hearing. Even if Debtor had full notice and opportunity to be heard at dismissal hearing, evidence in record established cause for dismissal, such that lack of notice was harmless under circumstances of case.

(5812) *Young v. U.S. Dept. of Veterans Affairs,* Case No. 16-0016 (W.D. Va. 2016) – Before court dismisses *pro se* filing, court must advise Debtor of right to hearing. Order entered that required Debtor to pay filing fee by date certain or case may be dismissed did not allow court to *sua sponte* dismiss case after Debtor failed to comply with order absent provision expressly advising Debtor of right to hearing.

(5813) *Sanders v. Cohen,* Case No. 15-1284 (9th Cir. BAP 2016) – Notice setting confirmation hearing that also stated that if the plan is not confirmed, the Court will consider a Motion for Dismissal by the Chapter 13 Trustee including a possible bar to re-filing provided adequate notice for due process purposes that case may be dismissed at the confirmation hearing on an oral motion of the Chapter 13 Trustee. Section 1307 allows court to dismiss case "after notice and a hearing". Section 102 defines "after notice and a hearing" to mean such notice as is appropriate under the circumstances, which is flexible concept and is sufficient if the process notifies the Debtor of deficiencies in the petition and dismisses case when Debtor fails to address deficiencies. Notice does not require formal written pleadings or any particular form, as long as content reasonably apprises party of nature of case and opportunity to respond. Debtor had ample opportunity based on the Notice of the confirmation hearing. The Trustee's objection to confirmation, and the objections filed by two of Debtor's mortgage lenders and the United States all of which detailed grounds for denying confirmation and dismissing case. Debtor also failed to demonstrate how any alleged lack of notice prejudiced Debtor where Debtor did not contest factual basis for dismissal and did not present any evidence of any persuasive arguments that Debtor could have made had he been given additional time to respond.

11.220 Failure to File Documents

(5814) *In re Coppenvolle,* Case No. 11-65164 (Bankr. E.D. Mi. 2011) – Motion for Extension of Time denied for failure to comply with local rules. Motion failed to indicate whether attorney attempted to obtain concurrence of Trustee in the relief requested; and failed to indicate that objections must be filed within three days. Further, Debtor did not file required documents even after filing motion and before motion date requested in motion for extension.

(5815) *In re Souders,* Case No. 10-68760 (Bankr. E.D. Mi. 2010) - Letter requesting additional time to file documents denied for failure to demonstrate good cause.

(5816) *In re Tudgay,* Case No. 10-43763 (Bankr. E.D. Mi. 2010) – Debtor's failure to file schedules, means test from, Statement of Financial Affairs and a Chapter 13 Plan by deadline established by court required dismissal.

(5817) *In re Chavis,* Case No. 06-59328 (Bankr. E.D. Mi. 2009) - Debtor's failure to file amendments by the time ordered by Court resulted in dismissal of case where Order provided that if Debtor failed to file the required amendments "the Court may dismiss this case without further notice or hearing."

(5818) *In re Richards,* Case No. 03-47950 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.

(5819) *In re Noell,* Case No. 06-49184 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.

(5820) *In re Rice,* Case No. 08-71658 (Bankr. E.D. Mi. 2009) - Debtor's failure to file Adversary Proceeding to strip second mortgage within the deadline prescribed by the Court resulted in dismissal of case.

(5821) *In re Mitanoski,* 08-49612 (Bankr. E.D. Mi. 2009) – Debtor's failure to file and serve proposed plan modification and Amended Schedules within time prescribed by Court Order resulted in dismissal of case.

11.221 Failure to File Amended Plan

(5822) *In re Henry,* 2015 WL 4605352(6th Cir. BAP 2015) – Bankruptcy Court did not abuse discretion in dismissing pro se Debtor's case after denying confirmation and affording Debtor two weeks to file amended plan, but Debtor failed to file amended plan as required. Debtor knew of deadline to submit amended plan and trustee was "extremely thorough" in explaining to Debtor what needed to be done, yet Debtor failed to comply.

11.222 Death of Debtor – Pre-Confirmation

(5823) *In re Digiantomasso,* Case No. 12-46397 (Bankr. E.D. Mi. 2012) – Chapter 13 Case must be dismissed where Debtor died after filing petition but prior to confirmation. Rule 1016 allows a chapter 13 to continue after death of Debtor if further administration is possible and in the best interest of the parties. However, Section 1325(a)(6) requires that the "Debtor" shall make payments under the plan. Death of Debtor appears to preclude confirmation as Debtor will not make payments under the Plan. Rule 1016 permits cases to continue post confirmation but does not allow a pre-confirmation case to proceed where the Debtor dies before confirmation.

(5824) *In re Seitz,* 430 BR 761 (Bankr. N.D. Tx. 2010) – Chapter 13 allowed to proceed where Debtor-husband died before the First Meeting of Creditors. The Debtor-wife was appointed as executor of husband's estate, and could appear and testify at the §341 Meeting for both herself and her deceased husband.

11.223 Death of Debtor – Post-Confirmation

(5825) *In re Raffone,* Case No. 13-61907 (Bankr. E.D. Mi. 2015) – Death of Debtor post-confirmation does not require dismissal of case. However, case can proceed only if Debtor's personal representative appears in case or otherwise takes actions consistent with Rule 1016. Where personal representative failed to make appearance in response to Court's Order to Show Cause, Chapter 13 proceeding dismissed as to decedent.

(5826) *In re Conn,* 2015 WL 3777958 (Bankr. N.D. Ohio 2015) – Debtor required to prove that failure to complete plan is due to circumstances for which Debtor should not justly be held accountable; that payments to unsecured creditors meet the Chapter 7 liquidation amount; and that modification of the plan is impracticable. After death of Debtor, Rule 1016 allows the case to proceed as though death had not occurred, based on best interests of Debtor's surviving spouse and creditors. Although probate estate indicated that Debtor's property may have had equity, no creditors filed claims in probate estate, and mortgages on property made it likely that property could not be sold for sufficient sum to produce meaningful result in bankruptcy estate beyond payment of mortgages. Allowing hardship discharge to deceased Debtor would relieve spouse from claims of pre-petition creditors while not adversely affecting creditors who could have, but did not, file claims in probate case.

(5827) *In re Uren,* Case No. 13-90369 (Bankr. W.D. Mi. 2014) – Death of one co-Debtor in joint Chapter 13 is not basis to disallow claims. Rule 1016 provides that upon death of Debtor, case proceeds as though death had not occurred.

(5828) *In re Hennessey,* 2013 WL 3939886 (Bankr. N.D. Calif. 2013) – After death of Debtor, Rule 1016 allows for case to continue or be dismissed. Debtor's estate is not entitled to hardship discharge because that remedy is not allowed under Rule 1016. Death of Debtor is not circumstance for which Debtor is not accountable under Section 1328(b) precluding entry of hardship discharge.

(5829) *In re Levy,* 2014 WL 1323165 (Bankr. N.D. Ohio 2014) – Bankruptcy code contains no guidance on how case should proceed if Debtor dies during case. Rule 1016 indicates that case may be dismissed or, if further administration is possible, case may proceed and be concluded as if death had not occurred. Debtor is not entitled to discharge unless Debtor completes requirements including completing instructional course concerning personal financial management; and certification from Debtor that all amounts payable on a DSO that have come due have been paid. Court must also find that there is no reasonable cause to believe that Debtor has violated Section 522(q)(1) and that there is a pending proceeding in which Debtor may be found guilty of a felony as described in Section 522(q)(1). Debtor's failure to file a DSO Certificate is not impediment to discharge as DSO debts are excluded from the discharge in any event, such that certification is more from that substance, and there is no impediment to another person filing the DSO Certificate on behalf of the deceased Debtor. Court will also allow third party to file certification regarding 1322(h) given very narrow scope of matters included. Identity of person who can act on behalf of deceased Debtor is determined on case by case basis. Person purporting to file documents necessary for discharge must be person with specific knowledge of deceased Debtor's finances, and must file affidavit outlining a sufficient factual foundation. Person seeking to file end of case documents must file motion, properly served with notice, setting out (1) whether there is a probate estate or whether one is anticipated and, if not, why not; (2) the identity of the person seeking to act, his or her relationship to the Debtor, and sufficient facts to establish a foundation for personal knowledge, all of which must be in affidavit; and (3) acceptable proof of death such as death certificate.

(5830) *In re Hennessy,* 2013 WL 3939886 (Bankr. N.D.N.C. 2013) – When a Debtor dies while in confirmed chapter 13 plan, case can either be dismissed or can continue as if Debtor was still alive. However, Rule 1016 does not provide for hardship discharge based on death of Debtor. Further, hardship discharge would not benefit Debtor but would only benefit Debtor's heirs at expense of unsecured creditors. Plan provided for full payment of unsecured debts, and if hardship discharge was entered, creditors would be precluded from asserting claims against probate estate.

(5831) *In re Murray,* Case No. 07-41134 (Bankr. E.D. Mi. 2011) – Motion for Hardship Discharge denied without prejudice for lack of standing. Debtor passed away and attorney filed Motion. Upon death of Debtor, attorney's authority to act for Debtor terminated automatically. Motion could be filed only by personal representative duly appointed by the probate court.

11.224 Payment Default

(5832) *In re Camacho,* Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where 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.

(5833) *In re McMahon,* Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Case properly dismissed where Debtor did not cure the default in payments in a timely manner as required by the Trustee's Notice of Default.

11.225 ECF Deficiency

(5834) *In re Pfeiffer,* Case No. 09-52554 (Bankr. E.D. Mi. 2009) – Case dismissed where counsel's electronic signature on voluntary petition did not match the ECF login. Deficiency not corrected within time allowed by Court.

11.226 Good Faith – Section 1307

(5835) *In re Pfetzer,* 2018 WL 1448742 (Bankr. E.D. Ky. 2018) – Section 1307 allows Court to dismiss Chapter 13 case if Debtor filed petition in bad faith. Creditor who does not timely object to confirmation of Plan under Section 1325(a)(7) cannot later bring Motion to Dismiss for lack of good faith. Creditor who believes that Debtor lacks good faith must object to confirmation of Plan. Although Plan had not yet been confirmed, expiration of deadline to object to confirmation sufficient to bar later filing of Motion to Dismiss.

(5836) *In re Cummings,* 2014 WL 7202109 (Bankr. W.D. Mi. 2014) – "Cause" to dismiss case for lack of good faith is determined under totality of

circumstances. Including (i) the Debtor's income, (ii) the Debtor's living expenses, (iii) the Debtor's attorney's fees, (iv) the expected duration of the plan, (v) the sincerity with which the Debtor has petitioned for relief, (vi) the Debtor's potential for future earning, (vii) special circumstances, such as high medical costs, (viii) the circumstances under which the debt was incurred, and (ix) the amount of payment offered by the Debtor as indicative of the Debtor's sincerity, and (x) the statutorily mandated policy that bankruptcy provisions be construed liberally in favor of the Debtor. Debtors case lacked good faith and would be dismissed. Debtors were retired and had n income other than pension and social security and evidence indicated that Debtors had taken steps to reduce expenses. Debtors did not work and did not present any evidence that Debtors would be medically unable to work but record was unclear on that point. Plan term proposed minimum 36 months but could run up to 60 months as necessary to complete the plan and while Debtors could have proposed 60 month plan in first instance, that standing alone was not sufficient to find bad faith. However, Debtors schedules were materially inaccurate including a failure to disclose diamond and emerald ring and diamond and sapphire ring; failed to disclose ongoing payments to Debtor's divorce attorney to pursue appeal of domestic support order. Debtors schedules listed more than $38,000 in credit card debt, much of which was used by Debtor to fight with ex-spouse. Domestic Support obligation owed to ex-spouse exceeded $172,000 was by far the largest creditor. Debtors were not subject to any collection or judicial proceedings other than domestic support hearings that resulted from Debtor's failure to comply with prior Court Orders. Debtors proposed to retain cottage at more than $10,000 per year for mortgage and operating expenses rather than paying creditor the sums owed under domestic support award. Entire case appeared to be motivated not by desire to restructure debts but by desire to avoid paying ex-spouse. Debtors purchased two new vehicles on eve of filing and proposed to retain both where there was no indication that Debtors, both retired, had need for two vehicles. Debtors did not dispute a grossly overstated secured claim allegedly owed to Debtors' son, although the parties ultimately admitted that the claim was overstated.

(5837) *In re Lehr,* 2012 WL 3763925 (Bankr. N.D. Ca. 2012) – Dismissal for bad faith depends on (1) whether Debtor misrepresented facts in the petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed the petition in an inequitable manner; (2) the Debtor's histories of filings and dismissals; (3) whether the Debtor intended to defeat State Court litigation; and (4) whether egregious behavior is present. Lack of any one factor is not fatal to conclusion that case was filed in bad faith. Although case was Debtor's first filing, record indicated that Debtor made many misrepresentations in schedules and statement financial affairs including misrepresenting Debtor's residence in effort to claim homestead exemption on property that was not Debtor's home; sale of automobile on eve of filing for substantially less than value of car; failure to disclose sale of car in first instance and question as to whether car was actually sold as Debtor continued to have use and possession after alleged sale date; Debtor failed to disclose lease of storage unit large enough to house contents of 4 bedroom home and leased two other units under false names in effort to conceal existence; schedules listed nominal personal property, none of which would have required a storage facility; failure to disclose security deposit paid to prior landlord which had not been returned; failed to list time share unit in Hawaii; and failed to list jewelry, artwork and wine collection. Single creditor held majority of debt and bankruptcy was effort to evade that obligation. Totality of circumstances indicted egregious conduct designed to unfairly manipulate bankruptcy process.

(5838) *In re Mehlhose,* 469 BR 684 (Bankr. E.D. Mi. 2012) – Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of Debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, Debtors must have known, and in fact did know, that Schedule I was false when Debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

(5839) *Tennessee Bank, NA v. Hansen,* 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Section 1307 allows court to dismiss case for "cause", including a lack of good faith in the institution of the case. Cause is based on the totality of circumstances, including sincerity with which Debtor has petitioned for relief; amount of the proposed plan payment; the nature of the debt; how the debt arose; the timing of the petition; whether the debt would be dischargeable in Chapter 7; Debtor's motive in filing; how Debtor's actions affected creditors; treatment of creditors both before and after filing; and whether Debtor has been forthcoming with the Court and creditors. Court can also consider factors pertaining to good faith in the plan confirmation process, including amount of proposed payments; employment history and ability to earn; probable or expected duration of plan; accuracy of Debtor's schedules and statements and whether any alleged inaccuracies are an attempt to mislead court; extent of preferential treatment between classes; extent to which secured claims are modified; existence of special circumstances such as inordinate medical expenses; frequency with which Debtor sought relief; motivation and sincerity of Debtor in seeking relief; administrative burdens of administering case; and whether Debtor is abusing the spirit of the Code. Record did not support dismissal. Bank alleged that Debtors knew house on which Bank held mortgage was being used to produce methamphetamines and that production so contaminated the entire structure that, after foreclosure, Bank had to gut house and suffered large losses as a result. Bank did not produce evidence that Debtors knew of contamination and Debtors were not aware of illegal activities which were being undertaken by Debtors' grandson. Plan proposed substantial payments and to surrender house with bank holding deficiency claim. There were no irregularities in the schedules or statement of affairs. Damages to house were caused by grandson but Debtors had no knowledge of activities or damages and did not cause or intentionally allow damages.

11.227 Failure to Prosecute – Section 1307(c)(1)

(5840) *DeVito v. Pees,* Case No. 09-8072 (6th Cir. BAP 2010) – Section 1307 permits court to dismiss case for "unreasonable delay that is prejudicial to creditors." Repeated delays in confirmation process on case that was not complex causing case to remain unconfirmed after more than one year did not warrant dismissal. Although delays may have been unreasonable, delays were not prejudicial where Debtors were making all plan payments and had paid in a total of over $20,000.00. No creditors appeared at the confirmation hearings to oppose further adjournments. Burden of dismissal would fall disproportionately on creditors who would be deprived of their pro-rata share of funds

on hand.

(5841) *In re Camacho,* Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where 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.

(5842) *In re Thornton,* Case No. 08-64703 (Bankr. E.D. Mi. 2009) - Case dismissed at 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.

11.228 Nonpayment of Fees or Charges – Section 1307(c)(2)

11.229 Failure to File Plan Timely – Section 1307(c)(3)

(5843) *In re Smith,* 2017 WL 3986491 (Bankr. W.D. Mi. 2017) – Although Debtor's failure to file amended plan within deadline specified by Court may have constituted grounds to dismiss case, failure to file Plan does not constitute grounds to "strike" Plan. Motions to Strike are disfavored and used only when required for purposes of justice. Creditor did not allege any prejudice or offered and support to strike. Further, striking Plan would require debtor to file another plan which likely would result in same issues being raised in considering confirmation. Creditor did not seek either stay relief or to dismiss case and there was no basis to strike plan. Motion to Strike denied.

11.230 Failure to Commence Payments – Section 1307(c)(4)

(5844) *No. v. Gorman,* Case No. 17-1679(4th Cir. 2018) - Section 1307(c)(4) allows Court to dismiss case where Debtor does not timely commence making payments on request of party in interest after notice and hearing. Local Bankruptcy Rule that allowed Court to dismiss case without notice or hearing on certification of Chapter 13 Trustee that Debtor had not made payments was invalid as conflicting with Section 1307. Rule 9029 allows local rules that are consistent with Code but does not permit Local Rule to conflict with Code or Rules or supplant requirements of Code and Rules.

11.231 Denial of Confirmation – Section 1307(c)(5)

(5845) *In re Smith,* 2017 WL 3986491 (Bankr. W.D. Mi. 2017) – Although Debtor's failure to file amended plan within deadline specified by Court may have constituted grounds to dismiss case, failure to file Plan does not constitute grounds to "strike" Plan. Motions to Strike are disfavored and used only when required for purposes of justice. Creditor did not allege any prejudice or offered and support to strike. Further, striking Plan would require debtor to file another plan which likely would result in same issues being raised in considering confirmation. Creditor did not seek either stay relief or to dismiss case and there was no basis to strike plan. Motion to Strike denied.

(5846) *Miller v. Marshall,* 2014 WL 4674804 (7th Cir. 2014) – Court correctly denied confirmation and dismissed case where plan committed Debtor to make only 3 monthly payments of $200 each while Debtor had unsecured debt in excess of $80,000. Debtor made the three payments provided in the proposed plan but did not make any other payments and did not amend the plan to comply with requirements of Section 1325 notwithstanding extended opportunity to do so.

(5847) *Williams v. Wayne County Treasurer,* Case No. 14-11844 (E.D. Mi. 2014) – Bankruptcy court correctly dismissed case where, based on court's valuation of Debtor's property, Debtor could not propose a feasible plan. Plan proposed to value commercial property at $28,000 and to pay secured claim accordingly. Court determined that property value was actually $100,000 and the secured claim would be allowed in the full amount in excess of $80,000 and Debtor lacked the income to fund a plan to extent necessary to comply with Section 1322 and Section 1325.

(5848) *In re Ashby,* 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Dismissal is warranted where plan cannot be confirmed for failure to provide for payment of priority claims and where Debtor has not paid all DSO obligations coming due commencement of the case.

(5849) *In re Aldridge,* 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Debtors' case dismissed where Debtors could not confirm plan and given Debtors' financial condition any further effort to amend would be futile.

11.232 Material Default – Section 1307(c)(6)

(5850) *In re Vansickle,* 2017 WL 806647 (Bankr. N.D. Ohio 2017) - Section 1307(b) gives Debtor unfettered right to dismiss case unless case was previously converted. When dealing with case converted from Chapter 7, Section 1307(c) allows the Court to either convert case or dismiss case whichever is and best interest of creditors. Court must first determine whether cause exists to dismiss case and, if so, whether interests of creditors are setter served by conversion versus dismissal. Cause existed where Debtor had accrued substantial delinquency in Chapter 13 plan payments constituting material default under Section 1307(c)(6). Best interest of Debtor does not play role in analysis. Best interest of creditors is determined by whether some creditors received preferential payments such that equality of distribution would be better served by conversion; whether there would be loss of rights granted in case if it were dismissed; whether Debtor would simply file new case upon dismissal; ability of Chapter 7 Trustee to reach assets for benefits of creditors; whether conversion or dismissal of estate would maximize value as economic enterprise; whether any remaining issues would be better resolved outside bankruptcy; whether estate consists of a single asset; whether Debtor engaged in misconduct and whether creditors are in need of Chapter 7 Trustee to protect interest; whether plan has been confirmed and whether any property remains in estate to be administered; and whether appointment of Trustee is desirable to supervise administration of estate. Court may also compare creditors' interests in bankruptcy with those they would have under state law outside bankruptcy. Court would convert case to Chapter 7 rather than dismissing as requested by Debtor where Debtor's real estate had over $30,000 of nonexempt equity making a distribution to unsecured creditors likely if case is converted. Forcing creditors to resort to state law would result in one creditor obtaining judgment in seizing all of equity in property to detriment of all remaining creditors, while in Chapter 7 creditors would share in distribution. Other than nonexempt business property, Debtor had few assets and no source of income from which

to pay other creditors. There was no evidence of any misconduct by Debtor and it was unlikely that Debtor would file a new case if the current case is dismissed. However, under circumstances, interest of creditors favored conversion rather than dismissal.

(5851) *Shovlin v. Klaas,* Case No. 15-0802 (W.D. Pa. 2015) – Although court cannot confirm plan that contemplates term beyond 60 months, court is not required to dismiss case merely because case reaches 60 months without completing. Debtor who substantially complied with plan and needed to make only one final payment to achieve discharge will be given additional time. Section 1307 gives court discretion to dismiss for material default, but does not mandate dismissal even for material default where dismissal would be unfair or unduly harsh.

(5852) *In re Morrison*, 2010 WL 4929604 (Bankr. E.D. Okla. 2010) - Default in payment of post-petition taxes was not cause for conversion to Chapter 7 when Debtors were not in material default under confirmed plan and conversion was not in best interest of creditors. Debtors were 25 months into 60-month plan, were current in plan payments and were making progress paying prepetition taxes. Debtors were in default of post-petition taxes and were ordered to pay post-petition taxes, to remain current on post-petition taxes, and to timely file post-petition tax returns while case was pending.

11.233 Revocation of Confirmation – Section 1307(c)(7)

11.234 Termination of Confirmed Plan – Section 1307(c)(8)

11.235 Failure to File Documents – Section 1307(c)(9) and (10)

11.236 Failure to Pay Domestic Support – Section 1307(c)(11)

(5853) *In re Ashby,* 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Section 1307(c)(11) allows court to dismiss or convert case if Debtor fails to pay domestic support obligation that first became payable after the date of filing of the petition. Section 1307(c)(11) is limited to payments that first come due post-petition and does not look to payment of pre-petition arrearages. Debtor's failure to pay post-petition DSO constitutes grounds for dismissal.

11.237 Failure to Comply with Orders of Court

(5854) *In re Cline*, Case No. 11-8075 (6th Cir. BAP 2012) – Court properly dismissed Chapter 13 case based on Debtor's willful failure to abide by orders of court. Federal Rule of Bankruptcy Procedure 7037 and 9014 allow court to enter sanctions for failure to comply with discovery order including but not limited to entry of default. UST sought deposition of Debtor. Debtor sought protective order which was denied, and court admonished Debtor that Debtor must appear for the deposition and produce the requested documents. Debtor failed to appear and Court entered Order to Show Cause why Court should not grant pending UST Motion to Dismiss. Debtor again failed to appear, and court entered Order granting UST Motion to dismiss by default as sanction. Debtor had no lawful reason to fail to comply with discovery requests. Debtor's actions prejudiced UST in connection with the pending Motion to Dismiss based on alleged lack of good faith of Debtor. Debtor had already been warned that failure to cooperate in discovery would result in dismissal, yet Debtor continued to fail to comply. Court attempted less drastic sanction by entering Order to Show Cause to give Debtor one additional chance to cooperate, but Debtor failed to appear, leaving the court with "no alternative" but to dismiss the case by default.

11.238 Failure to Pay Post-Petition Taxes

(5855) *In re Ambrosius,* 2015 WL 4915451 (Bankr. E.D. Wis. 2015) – Failure to pay post-petition income taxes is not basis to dismiss case where confirmed Chapter 13 plan did not require Debtor to pay post-petition taxes. Creditor can elect to participate in Plan by filing Claim under Section 1305, or creditor can elect not to participate in Chapter 13 case. By same token, Debtor is not required to pay Section 1305 claims that are not filed because Section 1322(b)(6) is equally permissive, not mandatory.

11.239 Effect of Dismissal – Section 349

(5856) *Viegelahn v. Lopez,* 2018 WL 3626628 (5th Cir. 2018) – Unless court finds "cause", when case is dismissed all funds on hand with Trustee must be returned to debtor, including non-exempt proceeds from disposition of assets. Court initially granted Debtor's Motion to Sell Homestead with direction to remit all net proceeds to Trustee as non-exempt proceeds of sale. After Trustee sought to modify plan to distribute funds, Debtor (at suggestion of Bankruptcy court) voluntarily dismissed. No evidence of cause under Section 349 where there was no evidence of intent to abuse the bankruptcy process or dishonesty by debtor or bad faith by Debtor. Debtor made payments in Chapter r13 for 4 years. Debtor proposed to remit a portion of the homestead sale and to retain balance for needed medical expenses and filed Motion to Dismiss only after Bankruptcy Court stated that Debtor could voluntarily dismiss and have all proceeds refunded but would forfeit discharge. Debtor would not have known that sale of house would result in proceeds becoming property of estate if not reinvested within 180 days such that non-disclosure of initial sale would not indicate bad faith

(5857) *In re Haddad,* 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Section 349 provides that on dismissal, unless Court orders otherwise, property of estate revests in entity in which property was vested immediately before commencement of case. Section 349 applies to post-petition assets such as cause of action for post-petition auto accident even though claim did not exist as of petition date and no entity could have been vested as of commencement. Better reading is that Section 349 applies to all property of estate in Chapter 13 to revest assets in Debtor including property acquired post-petition. However, Section 349 allows Court to order that property remain in estate for cause which does not require showing of fraud or bad faith. Cause includes distribution of property of estate consistent with priority distributional scheme set out in Code. If Court allows property to vest in Debtor. Debtor will recover assets that should have been paid to creditors, departing from Code's scheme and allowing one class of claimant to jump higher ranking classes of creditors. Although Debtor professed desire to retain all proceeds of post-petition accident to pay creditors, Debtor's actual intent was to not pay creditors in full, but that Debtor would negotiate discounts with those creditors that attempted to collect, likely without disclosing settlement proceeds; and would seek to not pay creditors anything if she never heard from them given passage of time since commencement of Chapter 13. Debtor received benefit of Chapter 13

but failed to keep her end of bargain, where Debtor enjoyed benefit of automatic stay for more than 4 years while leading creditors to believe that there were no assets available to pay them. Allowing Debtor to retain settlement proceeds in excess of $700,000 would be inequitable and supports finding of cause to allow settlement proceeds to remain property of estate to extent necessary to pay a 100% dividend to unsecured creditors.

11.240 Bar to Refiling

(5858) *Lnu v. Federal National Mortgage Association,* 2016 WL 4978425 (E.D. Mi. 2016) – Court has inherent authority to impose bar to any subsequent filings without leave of court. Plaintiff had bought 6 separate actions and taken 5 separate appeals against same defendant arising out of mortgage foreclosure. Plaintiff had not prevailed at any stage of any proceedings in both state and federal court. Court would exercise inherent authority to order that plaintiffs were prohibited from filing any further actions without prior leave of court.

(5859) *In re Criscuolo,* 2014 WL 1910078 (Bankr. E.D. Va. 2014) – Chapter 13 Debtor does not have absolute right to dismiss chapter 13 case where Debtor's bad faith conduct evidences intent to abuse letter or spirit of code. Court can condition dismissal and impose sanctions as long as sanctions do not contravene any explicit provision of code. Court can grant Debtor's request to voluntarily dismiss but impose bar to future filings consistent with Section 1307.

(5860) *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 refiling. 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).

(5861) *In re Cline*, Case No. 11-8075 (6th Cir. BAP 2012) – Court properly dismissed Chapter 13 case with 2 year bar to refiling. Section 109 allows court to prevent abuse of bankruptcy system where Debtor files series of meritless petitions to improperly obtain benefit of automatic stay for purposes of staving off State Court litigation. Sections 105 and 349 provide independent bases to dismiss a case with an extended bar to refiling. Case dismissed with 2 year bar where case was Debtor's 4th petition in three years; Debtor's prior chapter 13 cases were unsuccessful; Chapter 13 Trustee and creditors objected to confirmation of plan in this case; at least one prior case was filed on eve of foreclosure sale; Debtor had not made a mortgage payment in nearly 5 years; and Debtor has systematically thwarted the creditor's efforts to pursue non-bankruptcy remedies.

(5862) *In re Mangual,* 2010 WL 5185392 (Bankr. D. P.R. 2010) – Section 1307 does not provide absolute right to dismissal where dismissal would be bad faith. Section 349 allows court to condition voluntary dismissal where circumstances are such that Debtor's petition evidences an intent to abuse the bankruptcy process does not warrant denial of a request to dismiss but dismissal does present opportunity for future bad faith conduct as to creditors Case dismissed with 1 year bar to refiling.

(5863) *In re Mallory*, 2011 WL 338826 (S.D. Tex. 2011) - Dismissal with prejudice to refiling for 180 days was appropriate when Debtor refused to make payments to Trustee for three months, causing $19,000 delinquency in payments where Debtor did so to prevent distributions to creditor whose standing the Debtor contested. Proper remedy for disputed claim is to object to claim, not refusal to abide by plan. Willful nature of plan default warranted strong sanction of dismissal with prejudice. Under section 105(a), the bankruptcy court has the ability to make any order that was appropriate for enforcing or implementing the court's orders or rules, and the judge could raise the issue *sua sponte.* Section 349(a) would normally limit the judge to dismissing without prejudice, but Debtor's willful refusal to make a plan payment as required by the court and the court's rules constituted basis to dismiss case with prejudice pursuant to 11 U.S.C. Sections 109(g) and 349(a).

(5864) *In re Rush,* Case No. 10-55737 (Bankr. E.D. Mi. 2010) – Debtor prohibited for filing another petition jointly or individually without an attorney for period of 180 days. Debtor's filing 175 days after entry of order dismissed by Court *sua sponte.*

(5865) *Cusano v. Gene Klein,* 2010 WL 2593921 (6th Cir. BAP 2010) – Court properly dismissed Chapter 13 Petition barring Debtor from re-filing for two years and limiting the effective of the automatic stay should Debtor file any future voluntary petition. Debtor and Creditors had been engaged in extensive State Court litigation which Debtor lost. Debtor engaged in serial Chapter 13 filings with no attempt to actually reorganize affairs but instead in attempt to hinder and delay Creditor's collection efforts. Debtor's third Chapter filing resulted in Debtor's filing numerous motions and adversary proceedings which produced an Order directing one Defendant to turn over $2,300 to Debtor but otherwise denying Debtor any relief. Debtor's schedules in third Chapter 13 case were materially inaccurate including failing to list a potential legal malpractice claim on which Debtor filed a complaint in State Court only one month after the petition date and in which Debtor sought damages in excess of $400,000.00; and failed to disclose receipt of funds that were subject to Creditor's lien. Debtor failed to appear at the first meeting of creditors and failed to produce documents are ordered by the Court including Debtor's prior tax returns. After Creditor filed a Motion to Convert Case to Chapter 7, Debtor sought to voluntarily dismiss. Court concluded that Debtor's Notice of Voluntary Dismissal did not terminate the Court's jurisdiction and that although Debtor had a right to dismiss the Chapter 13, Court could impose conditions and limitations on that dismissal if Debtor acts in bad faith. Serial filings are not necessarily dispositive of bad faith, but serial filings and voluntary dismissals are evidence of bad faith, particularly where the filings occur on the eve of a significant event such as foreclosure or creditor examination in aid of execution. Court has jurisdiction to impose bar to re- filing. Section 109 allows 180 day bar, but does not limit court's ability to impose longer bar if appropriate. Section 105 and Section 349 allow Court to enter such

orders as may be appropriate to protect the authority of the court including bars to re-filing and limitations on the automatic stay in future bankruptcy cases.

11.241 Distribution of Funds – Dismissal Before Confirmation

(5866) *In re Cooper,* 2018 WL 3202996 (Bankr. E.D. Mi. 2018) – Section 1326 requires Trustee to disburse funds on hand at dismissal before confirmation to pay awarded administrative expenses before funds are returned to Debtor. Fact that Debtor filed subsequent Chapter 7 before counsel's fees were approved or paid by Trustee does not removed funds on hand with Trustee from Chapter 13 estate or make funds property Debtor or Chapter 7 estate. Chapter 7 Trustee entitled to any funds remaining with Chapter 13 Trustee after payment of counsel's awarded fees.

(5867) *Commonwealth of Virginia v. Beskin,* Case No. 17-028 (D. Va. 2017) – At dismissal of case, funds on hand with Trustee are to be returned to Debtor. Trustee not required to honor State law garnishment. Section 1326 trumps State levy and Trustee not required to honor State garnishment under Supremacy Clause as State law conflicts with Section 1326.

(5868) *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.

(5869) *In re Lundy,* 2017 WL 4404271 (Bankr. N.D. Ohio 2017) – Chapter 13 Trustee not authorized to receive or retain trustee fee when case is dismissed before confirmation of Plan. Section 1326 allows disbursement of funds to creditors and payment of administrative expenses, which do not include Chapter 13 Trustee fees. While 28 USC Section 586 directs Trustee to collect the fees, Section 1326 directs that the fees not be retained after dismissal. Trustee must collect and hold trustee fee pending confirmation and refund fees if Plan is not confirmed.

(5870) *In re Fairnot,* 2017 WL 3605341 (Bankr. E.D. Mi. 2017) – In case dismissed before confirmation, Trustee must use funds on hand at dismissal to pay allowed administrative expenses including allowed attorney fees before refunding balance to Debtor, distinguishing *Harris* and *Bates on* as involving post-confirmation conversion and dismissal, respectively.

(5871) *Jeffrey P. White & Associates, PC v. Fessenden,* 2016 WL 1552389 (1st Cir. BAP 2016) – *Harris* does not apply to case that is dismissed prior to confirmation. Attorney entitled to payment of attorney fees under Section 1326(a)(2) from funds on hand at dismissal. Dismissal of case before confirmation does not terminate estate but allows Chapter 13 to continue and Trustee still has authority to disburse funds, agreeing "majority of cases" that have considered issue.

(5872) *In re Merovich,* 2016 WL 1367068 (Bankr. M.D. Pa. 2016) – Funds on hand with Trustee when case is dismissed prior to confirmation are first used to pay unpaid administrative expenses, with any remaining balance being refunded to Debtor. Funds can be used to pay fees to counsel after entry of order approving fee application.

(5873) *In re Hightower,* 2015 WL 5766676, 2015 Bankr. LEXIS 3354 (Bankr. S.D. Ga. 2015) – Funds on hand when case is dismissed prior to confirmation must be returned to Debtor. Distribution of funds in dismissed case is controlled by interplay between Section 349 and Section 1326. Specific directive in Section 1326(a)(2) controls over more general requirements of Section 349. Absent order directing payment of adequate protection pre-confirmation to secured creditors, secured creditors have no claim to funds on hand. Court without authority to direct payment to secured creditors where case dismissed prior to confirmation merely because court believes that result would be more equitable in light of length of time case had been pending and fact that creditors were prevented by stay from enforcing state law remedies.

(5874) *In re Hoggarth*, 2016 WL 1089422 (Bankr. D. Colo. 2016) (*in dicta)* – Funds on hand when case is dismissed prior to confirmation are used to pay administrative claims pursuant to Section 1326(a)(2). Dismissal differs from conversion and Supreme Court in *Harris* did not address dismissed case.

(5875) *In re Ikegwu,* 2015 WL 5608357 (Bankr. D. Md. 2015) – Section 1326 authorizes payment of awarded attorney fees in case that is dismissed prior to confirmation.

(5876) *In re Brandon,* 537 BR 231 (Bankr. N.D. Md. 2015) – *Harris* does not apply to case dismissed before confirmation. Funds on hand with trustee must be distributed according to Section 1326 which requires payment of any unpaid claim under Section 503(b), with balance of funds to be returned to Debtor.

(5877) *In re Kirk,* 2015 WL 5097741, 537 BR 856 (Bankr. N.D. Ohio 2015) – *Harris* does not apply to case dismissed before confirmation. Dismissal is governed by Section 349 which states that unless the Court Orders otherwise, funds revest in the Debtor. However, Section 1326 provides that after dismissal, the trustee is to pay allowed administrative expenses and any payments due to creditors, and to refund any remaining amount to Debtor. Specific directives in Section 1326 control over general provision of Section 349. Attorney fees awarded for services through dismissal are administrative expenses under Section 503(b) and are to be paid prior to refund to Debtor. However, unpaid adequate protection payments are not yet due and owing to creditors as court has not yet entered order directing payments of adequate protection. Although local administrative order required payment of pre-confirmation adequate protection to the Trustee rather than to the creditor, that did not translate into an order awarding creditor adequate protection payments prior to confirmation.

(5878) *In re Halabu,* 2012 WL 5306128 (Bankr. E.D. Mi. 2012) – Section 1326(a)(2) requires that when case is dismissed before confirmation, funds on hand with the Chapter 13 Trustee must, to the extent there are no payment due to creditors, refund to the Debtor after deducting claims allowed under Section 503(b). Payments "due to creditors" would be pre-confirmation adequate protection payments required by Section 1326(a)(1)(B) and (C), which apply only to leases or security interests in personal property. Holder of mortgage on Debtor's residence did not have right to adequate protection payments and is not entitled to distribution of funds on hand when case is dismissed pre-

confirmation.

(5879) *Rice v. Ables,* 2013 WL 174189 (Bankr. E.D. Ark. 2013) – Where case is dismissed before confirmation, funds held by Trustee are subject to garnishment to extent not needed to pay administrative claims. Court rejected Trustee's argument that Section 1326 required return of funds to Debtor. Upon dismissal, automatic stay terminated and property in possession of trustee ceased to be property of estate. As such, funds were subject to writ of garnishment or attachment issued by State or Federal Court.

(5880) *In re James,* 2013 WL 1700933 (Bankr. N.D. Ill. 2013) – Funds on hand at dismissal are to be paid first to unpaid administrative expenses including attorney fees, with balance of funds returned to Debtor. State Court writ of garnishment served on Trustee was invalid as issued in violation of *Barton* doctrine. Further, distribution of funds is controlled by Section 1326 which mandates that funds go to Debtor. State Court garnishment was pre-empted by the supremacy clause of the Federal Constitution.

11.242 Distribution of Funds – Dismissal After Confirmation

(5881) *Viegelahn v. Lopez,* 2018 WL 3626628 (5th Cir. 2018) – Unless court finds "cause", when case is dismissed all funds on hand with Trustee must be returned to debtor, including non-exempt proceeds from disposition of assets. Court initially granted Debtor's Motion to Sell Homestead with direction to remit all net proceeds to Trustee as non-exempt proceeds of sale. After Trustee sought to modify plan to distribute funds, Debtor (at suggestion of Bankruptcy court) voluntarily dismissed. No evidence of cause under Section 349 where there was no evidence of intent to abuse the bankruptcy process or dishonesty by debtor or bad faith by Debtor. Debtor made payments in Chapter r13 for 4 years. Debtor proposed to remit a portion of the homestead sale and to retain balance for needed medical expenses and filed Motion to Dismiss only after Bankruptcy Court stated that Debtor could voluntarily dismiss and have all proceeds refunded but would forfeit discharge. Debtor would not have known that sale of house would result in proceeds becoming property of estate if not reinvested within 180 days such that non-disclosure of initial sale would not indicate bad faith.

(5882) *In re Gonzales,* 2017 WL 6508976 (Bankr. W.D. Mi. 2017) – On dismissal of case after confirmation of Plan, funds on hand with Trustee as of dismissal must be returned to Debtor. Although Section 349 does not directly apply as Section 349 revests assets in party in whom assets were vested prior to commencement of case, and funds with Trustee were post-petition earnings of Debtor and could not have bene vested in anyone as of petition date, overall Federal Policy requires that Chapter 13 be entirely voluntary, and dismissal unwinds case to fullest extent possible. Court would not use provision of Section 349 that allows court to order otherwise and funds were not in existence as of petition date and so are beyond scope of Section 349 relief. However, Court would not enter order that required trustee to pay attorney as doing so would effectively require trustee to prefer one creditor over another which is inconsistent with treating case as if it never happened and would add some role of Federal court in distributing funds even after case has concluded.

(5883) *In re Cole,* Case No. 16-2552 (D.N.J. 2017) - Debtor not entitled to return of funds in post-confirmation dismissed the case. Section 348 is not applicable because issue involved dismissal under Section 349, not conversion. United States Supreme Court decision in *Harris* involved converted case and does not control outcome in dismissed case. Funds on hand with Trustee as of date of dismissal would be distributed to creditors.

(5884) *In re Dempsey,* Case No. 13-10783 (Bankr. W.D. La. 2017) – Funds in possession of Chapter 13 Trustee when Chapter 13 case is dismissed post-confirmation must be refunded to Debtor and cannot be used to pay attorney fees. Fee application filed after dismissal was moot because any money held by Trustee would be paid to Debtor, leaving nothing for payment of administrative expenses.

(5885) *In re Kaufman,* Case No. 12-50980 (Bankr. E.D. Mi. 2017) – Section 349 requires funds on hand with trustee at time of dismissal of case to be returned to Debtor unless court finds "cause" for funds to remain vested in estate. Cause requires some acceptable reason to depart from normal requirement. Fact that attorney fees will not be paid is not cause absent evidence of bad faith, fraud or other adequate reason. Motion for finding of cause denied with trustee directed to return funds to Debtor.

(5886) *In re Follo,* Case No. 15-32672 (Bankr. E.D. Mi. 2016) – Although Section 349 requires funds to be returned to Debtor following dismissal, Court can allow funds to remain vested in estate for purposes of paying administrative expenses on showing of cause. Counsel can include in Fee Application a statement seeking finding of cause without need to file separate application or motion for determination of cause.

(5887) *In re Bateson,* 2016 WL 3475613 (Bankr. E.D. Mi. 2016) – Funds on hand when case is dismissed post-confirmation are returned to Debtor. Following *Harris*, when case is dismissed, Chapter 13 in general and Plan in particular cease to have any efficacy. Creditors have no vested interest in funds on hand so funds must be returned to Debtor.

(5888) *In re Dubose,* 555 BR 41 (Bankr. M.D. Al. 2016) – Funds on hand with Trustee when case is dismissed, or those funds coming into possession of Trustee following dismissal, must be returned to Debtor. After case dismissed, Trustee received funds back from creditor. Those funds constitute funds on hand at dismissal and must be returned to Debtor, not redistributed to creditor.

(5889) *In re Edwards,* 2015 WL 5601577, 538 BR 536 (Bankr. S.D. Ill. 2015) – Funds on hand with Trustee when case is dismissed post-confirmation must be returned to the Debtor. Under Section 349(b)(3), Debtor has vested right in all post-petition property and wages in possession of trustee. Dismissal vacates chapter 13 plan preventing trustee from distributing funds in accordance with plan terms.

(5890) *Williams v. Marshall* 2014 WL 1457828 (N.D. Ill. 2014) – Undistributed funds in possession of trustee as of date of dismissal must be returned to Debtor. Chapter 13 plan no longer exists after dismissal of case and trustee can no longer act "under the plan". Section 349 provides that dismissal of Chapter 13 revests in Debtor all property of the estate and effectively undoes the bankruptcy case to extent possible. Funds on hand with the trustee are property of the estate and must be returned to Debtor.

(5891) *In re Tejchma,* Case No. 09-9138 (Bankr. W.D. Mi. 2013) – In Chapter 12 case, court held that under Section 349(b), Court has discretion to order that funds on hand at dismissal be disbursed to confirmed plan. Trustee is bound to act in accordance with confirmed plan and neither Debtors nor creditors nor any other party in interest may assert any claims or rights inconsistent with plan. Although Debtor has

sought dismissal and all parties agree that dismissal is warranted, case has not yet been dismissed and plan remains in effect until dismissal. Even after dismissal, that does not necessarily vacate plan or unwind actions taken while plan was in effect. While dismissal would not necessarily unwind the plan or require disbursements other than in accordance with confirmed plan, court also determined that cause existed to prevent funds from reverting to Debtor at dismissal. Requiring funds to be disbursed to creditors was consistent with the plan, on which creditors relied to their detriment, and disbursement to creditors would be in the best interests of creditors.

(5892) *In re Hamilton,* 2013 WL 2151457 (Bankr. M.D. Tn. 2013) – Funds on hand with Trustee at dismissal of case after confirmation of Plan must be used to pay any outstanding administrative costs including any previously awarded attorney fees, and any remaining balance must be returned to the Debtor. Creditors have no right to payment by the Trustee post-dismissal even from funds received by the trustee pre-dismissal.

(5893) *In re Michael,* 699 F.3d 305 (3d Cir. 2012) – Upon conversion or dismissal, Chapter 13 estate terminates. All funds on hand as of dismissal or conversion must be returned to Debtor.

(5894) *In re Strauder,* 2011 WL 4597377 (Bankr. N.D. Ohio 2011) – Upon dismissal of case post-confirmation, funds received through dismissal date must be distributed by trustee in accordance with plan. Debtor's request that funds be returned rather than distributed to creditors as inconsistent with the applicable statutes and the Confirmation Order.

(5895) *In re Hufford,* 460 BR 172 (Bankr. N.D. Ohio 2011) – At dismissal, normal rules for distribution apply to funds received by trustee through dismissal date.

(5896) *In re Marcola,* 2011 WL 7628980(Bankr. E.D. Mi. 2011) – Generally speaking, upon dismissal of Chapter 13 case, funds held by Chapter 13 Trustee are returned to the Debtor. If administrative claims exist, such as fees for Debtor's counsel, those expenses are paid and any remaining funds are paid to the Debtors. However, where obligation exists to Internal Revenue Service based on Debtor's intentional diversion of funds, exceptional circumstances exist to support exception to rule. Funds on hand ordered to be paid to IRS without prejudice to Debtor's counsel seeking to collect fees directly from Debtors after dismissal.

11.243 Garnishment of Funds in Possession of Trustee

(5897) *In re James,* 2013 WL 1700933 (Bankr. N.D. Ill. 2013) –State Court writ of garnishment served on Trustee was invalid as issued in violation of Barton doctrine where creditor did not seek bankruptcy court permission before applying to State Court for writ of garnishment directed to Trustee. Further, distribution of funds is controlled by Section 1326 which mandates that funds go to Debtor. State Court garnishment was pre-empted by the supremacy clause of the Federal Constitution.

O. Conversion

11.244 On Request of Debtor

(5898) *In re Moore,* 2017 WL 4417582 (Bankr. N.D. Ohio 2017) – Deceased Debtor in Chapter 13 cannot convert case to Chapter 7 and receive discharge. Rule 1016 allows case to either be dismissed or proceed with case administration. Rule does not mention conversion as option. Further, Section 1307 allows conversion only if Debtor would be eligible for relief under Chapter 7. Decedent's estate, which is the surviving "debtor" in the Bankruptcy Case, would not be eligible for relief under Chapter 7.

11.245 On Request of Chapter 13 Trustee

(5899) *In re Pantelides,* 2014 WL 690264 (Bankr. N.D. Ohio 2014) – Trustee's motion to convert granted. After case filed, Debtor discovered that Debtor owned interest in mother's real estate. Interest was not disclosed until more than 2 years after confirmation of the plan. Court rejected Debtor's argument that he was not aware of the recorded deed and therefore did not "accept" the deed. Recorded deed constitutes prima facie evidence of acceptance of deed and conveyance of title without any formal or informal acceptance. Presumption of delivery can be overcome only by evidence that recipient did know of and expressly rejected transfer.

(5900) *In re Carter,* 2013 WL 4039039 (Bankr. E.D. Ky. 2013) – In considering whether cause exists under Section 1307 to convert case to Chapter 7 for "cause", Court must consider totality of circumstances and whether conversion is in best interests of creditors. Factors include whether Debtor has been forthcoming with the court and creditors, Debtor's income; Debtor's living expenses; Debtor's attorney's fees; expected duration of the chapter 13 plan; sincerity with which the Debtor has petitioned for relief under chapter 13; Debtor's potential for future earning; special circumstances, such as unusually high medical expenses; frequency with which the Debtor has sought relief before in bankruptcy; circumstances under which the debt was incurred; amount of payment offered by Debtor as indicative of the Debtor's sincerity to repay the debt; burden which administration would place on the trustee; and statutorily-mandated policy that bankruptcy provisions be construed liberally. Trustee failed to demonstrate cause to convert case based solely on Debtor's failure to disclose personal injury action in schedules, SOFA or at Section 341 meeting. While non-disclosure is a serious offense, Debtor's explanation was sufficient to indicate that non-disclosure was inadvertent where Debtor had consulted with personal injury attorney but had not filed suit, nor had attorney determined that Debtor had viable cause of action, as of date of commencement of case. Further, upon learning that Debtor may recover money in the action, Debtor promptly advised the Chapter 13 Trustee of the proposed settlement indicating lack of bad faith or attempt to wrongfully conceal recovery at expense of creditors. Creditors also would do better in Chapter 13 as Debtor voluntarily agreed to remit proceeds to Chapter 13 trustee and to give up exemption to which Debtor would have been entitled, causing recovery to creditors to be greater than would have been accomplished in Chapter 7.

11.246 Effective Date

(5901) *Winnecour v. Korotko,* 545 BR 131 (Bankr. W.D. Pa. 2016) – Effective date of conversion is date on which Court enters order converting

case, not date on which notice of Conversion is filed unless Notice requests conversion *nunc pro tunc* to date of filing of Notice.

11.247 Recovery of Funds by Trustee

(5902) *Gallagher v. Dockery,* Case No. 13-1368 (9th Cir. BAP 2014) – Chapter 13 Trustee loses ability to recover funds paid in error after conversion of case to Chapter 7. After case was converted, Chapter 13 Trustee filed final report indicating the trustee would refund $8,000 to Debtor, and issued a check to the Debtors for the refund. When no party lodged an objection, the Trustee issued a declaration that there had been no objection to the final report and the court issued an order discharging the Chapter 13 trustee and exonerating her bond. The Trustee later determined that Debtor's counsel's fees which had been awarded by the court had not been paid, and the Chapter 13 Trustee began efforts to recover amount erroneously refunded to Debtors rather than being paid to counsel. Trustee would not use Section 542 to require turnover by Debtors. Upon conversion to Chapter 7, any post-petition earnings or money in the hands of the Chapter 13 Trustee did not constitute property of Chapter 7 estate but represented proceeds of post-petition earnings and wages. Where property is not property of estate, there is no basis under Section 542 to compel turnover. The Chapter 13 Trustee, upon conversion, was required to refund to Debtor all funds on hand pursuant to Section 1326(a)(2) and Section 348(f)(1)(A) free and clear of claims of creditors including administrative claims that had been allowed but not paid. Trustee could not use Section 105 to recover funds because any relief under Section 105 would directly contravene specific sections of the Code applicable to funds upon conversion. Section 105 does not permit court to do anything inconsistent with limitations of mandates of Code.

11.248 Distribution of Funds – Conversion Before Confirmation

(5903) *In re Hayden,* Case No. 15-12619 (Bankr. D. Az. 2018) – *Harris* does not extend to case that is converted before confirmation. Section 1326 provides that funds on hand when the case is converted remain property of estate and requires Trustee return funds to Debtor after payment of administrative expenses. Trustee's obligations are controlled by Section 1326 where case is converted pre-confirmation.

(5904) *In re Burkall,* 2017 WL 3890106 (Bankr. W.D. Mi. 2017) – Attorney for Debtor in case converted from Chapter 13 to Chapter 7 entitled to fees for services rendered while case was pending in Chapter 13, to be paid after payment of Chapter 7 administrative expenses under Section 726. However attorney is not entitled to compensation from estate for any services rendered after date of conversion where attorney was not retained by Chapter 7 Trustee. Debtor may pay the fees, and attorney may recover fees, but bankruptcy estate has no liability for them.

(5905) *In re Post,* 2017 WL 3822037 (Bankr. W.D. Mi. 2017) – Upon conversion of case, all funds on hand must be returned to debtor without payment of administrative expenses. There is no difference between conversion before or after confirmation. Attorney has administrative claim in Chapter 7 case subordinate to administrative expenses of Chapter 7.

(5906) *In re Yuska,* Case No. 14-1504 (Bankr. N.D. Iowa 2017) – Trustee not required to return to Debtor funds received by Chapter 13 Trustee prior to pre-confirmation conversion to Chapter 7 where funds were rent owed to Debtor by various tenants. Funds are not wages and resulted from account receivable that existed prior to Chapter 13 filing. Account receivable, and subsequent recollections, would have come into Chapter 7 estate if Debtor had initially filed under Chapter 7 rather than Chapter 13.

(5907) *In re Marshall,* 2016 WL 402386 (Bankr. W.D. La. 2016) – Upon conversion of case prior to confirmation, all funds on hand with trustee are returned to Debtor. Fact that attorney filed fee application and court awarded fees prior to conversion did not change result where case converted before Trustee paid fees as awarded. Court would not rule on fee application prior to confirmation as court could not evaluate whether services were reasonably necessary or produced any benefit to creditors or the Debtor in advance of hearing on confirmation of plan.

(5908) *In re Hoggarth*, 2016 WL 1089422 (Bankr. D. Colo. 2016) – Funds on hand when case is converted prior to confirmation must be returned to Debtor. Court lacks authority to direct payment of administrative expenses, including attorney fees, from funds even when case is converted pre-confirmation, notwithstanding provision of Section 1326(a)(2). Supreme Court made clear that upon conversion, no part of Chapter 13 applies to case, including any provision that purports to allow court to award fees to be paid out of funds on hand with trustee.

(5909) *In re Sowell,* 535 BR 824 (Bankr. D. Mn. 2015) – Funds on hand with trustee when case is converted prior to confirmation must be returned to Debtor. Court lacked authority to award "no look" fee and to direct payment after case converted.

(5910) *In re Spraggins,* 2015 WL 5227836, 2015 Bankr LEXIS 3016 (Bankr. D.N.J. 2015) – Funds on hand in case converted prior to confirmation must be returned to Debtor. Trustee lacks authority to pay attorney fees, administrative expenses, or creditors from funds on hand as of moment of conversion.

(5911) *In re Beckman,* 2015 WL 5297726 (Bankr. S.D. Ca. 2015) – In case converted prior to confirmation, Trustee lacks authority to distribute funds on hand as of conversion. All post-petition payments must be refunded to Debtor, adopting *In re Beauregard,* 533 BR 826 (Bankr. D.N. Mex. 2015). Trustee cannot pay attorney fees, other administrative expenses, or any payments to creditors.

(5912) *In re Brandon,* 537 BR 231 (Bankr. D. Md. 2015) – In case converted prior to confirmation, Trustee has lingering duty to complete administration of case including compliance with provision of Section 1326 that requires payment of attorney fees and other administrative expenses prior to refunding balance to Debtor, rejecting court's holding in *In re Beauregard,* 533 BR 826 (Bankr. D.N. Mex. 2015).

(5913) *In re Zulinsky,* Case no. 15-47315 (Bankr. E.D. Mi. 2015) – Funds on hand with chapter 13 trustee when case converts prior to confirmation must be refunded to Debtor notwithstanding separate order of court directing trustee to hold funds for payment of attorney fees. Trustee lacks authority to deal with funds in any way other than to refund to Debtor.

(5914) *In re Sowell,* 2015 WL 4718588 (Bankr. D. Mn. 2015) – Funds on hand with chapter 13 trustee when case converts prior to confirmation must be refunded to Debtor without payment of administrative expenses or attorney fees. Supreme Court decision in *Harris* mandated change in local practice that allowed fees to be paid prior to refund to Debtor. It would be inappropriate for any order regarding a fee

application filed after conversion to contain a provision directing Chapter 13 Trustee to pay fees.

(5915) *In re Ulmer,* 2015 WL 3955258 (Bankr. W.D. La. 2015) – Funds on hand with chapter 13 trustee when case converts must be refunded to Debtor. Attorney would not be permitted to seek payment of pre-confirmation attorney fees where Debtor was considering conversion of case. Request for pre-authorization and payment of administrative expense in anticipation of conversion is prohibited by *Harris.*

(5916) *In re Beauregard,* 533 BR 826 (Bankr. D.N. Mex. 2015) – Funds on hand with Chapter 13 Trustee when case is converted prior to confirmation must be refunded to Debtor without offset for payment of administrative expenses. *Harris* changed common practice under which funds would be held to permit counsel to file fee application or to pay fees prior to returning undistributed funds to Debtor.

(5917) *In re Riviera,* 2013 WL 5661477 (Bankr. D.P.R. 2013) – Chapter 13 Trustee must refund to Debtor all proceeds received by trustee, after payment of administrative expenses, when case is converted to Chapter 7 prior to confirmation of plan.

(5918) *Gallagher v. Dockery,* Case No. 13-1368 (9th Cir. BAP 2014) – Upon conversion, Chapter 13 Trustee loses authority to deal with funds on hand and funds must be immediately returned to Debtor. Neither Section 1326 nor Section 348 authorized trustee to administer funds or to disburse funds other than to Debtor, except as necessary to pay administrative fees awarded prior to date of conversion. Where attorneys did not obtain fee order until after date of conversion, attorneys could not compel trustee to pay fee order from funds on hand as of date of conversion and trustee lacked statutory authority to do so.

11.249 Distribution of Funds – Conversion After Confirmation

(5919) *In re Spraggins,* 2015 WL 5227836, 2015 Bankr LEXIS 3016 (Bankr. D.N.J. 2015) – Funds on hand in case converted after confirmation must be returned to Debtor. Trustee lacks authority to pay attorney fees that were previously awarded but are unpaid as of moment of conversion.

(5920) *In re Beauregard,* 533 BR 826 (Bankr. D. N. Mex. 2015) – Funds on hand with Chapter 13 Trustee when case is converted after confirmation must be refunded to Debtor without offset for payment of administrative expenses. Upon conversion., trustee becomes former trustee and lacks any authority to distribute funds according to confirmed plan.

(5921) *Harris v. Viegelahn,* 135 S.Ct. 1829 (2015) – Funds in possession of Chapter 13 Trustee when case is converted must be returned to Debtor and are not available for payment to creditors. After conversion, trustee becomes former trustee whose services are terminated and trustee no longer has authority to act under Chapter 13.

(5922) *In re Markham,* 2013 WL 6903753 (Bankr. D. Mass. 2013) – Funds on hand with Trustee must be disbursed pursuant to confirmed plan upon conversion of case to Chapter 7. Debtor has no interest in undisbursed plan payments derived from Debtor's post-petition income that are in the possession of the Trustee.

(5923) *In re Michael,* 2012 WL 5278411 (3d Cir 2012) – Funds received under confirmed plan in possession of Trustee on date of conversion must be returned to Debtor and not delivered either to creditors or Chapter 7 trustee, even if funds were received by Trustee as plan payments prior to conversion of case, unless conversion was done in bad faith under Section 348(f)(2). Conversion is backdated to petition date effectively revoking confirmation of plan and leaving disbursement of funds as if case had not been confirmed. Section 1326 requires funds in unconfirmed case to be refunded to Debtor after payment of allowed administrative expenses. Chapter 7 trustee has no claim to the funds.

(5924) *In re DeHart*, 446 BR 665 (D.M.D. Pa. 2011) – Trustee loses authority to distribute funds received under confirmed plan when case is converted. Funds on hand must be returned to Debtor and not delivered either to creditors or Chapter 7 trustee, even if funds were received by Trustee as plan payments prior to conversion of case.

11.250 Distribution of Funds – Assignment of Proceeds

(5925) *Harris v. Viegelahn,* 135 S.Ct. 1829 (2015) – Funds in possession of Chapter 13 Trustee when case is converted must be returned to Debtor and are not available for payment to creditors. After conversion, trustee becomes former trustee whose services are terminated and trustee no longer has authority to act under Chapter 13. "Assignment" of funds attached to notice of conversion did not allow Trustee to pay attorney fees as Trustee no longer had any authority over funds or property of estate on conversion.

11.251 Reconversion Back to Chapter 13

(5926) *In re Yao,* 2016 WL 1316066 (Bankr. D. N. Mex. 2016) – Debtor who converts Chapter 13 to Chapter 7 and then reconverts back to Chapter 13 picks up case where he left off at time of initial conversion. Conversion does not nullify plan or Confirmation Order. Reconversion serves to reappoint Trustee and Section 1327 once again binds Debtor and creditors to terms of confirmed plan. Debtor is not required to attend new Section 341 meeting or promulgate and confirm new chapter 13 plan.

P. Borrowing Money Post-Petition

11.252 Authority to Borrow

(5927) *In re Nacci,* 2018 WL 3323876 (Bankr. N.D. Ohio 2018) - Debtor's ability to incur postpetition debt during Chapter 13 case is unclear. Section 364 provides basis for obtaining unsecured credit by Trustee operating business or by self-employed Debtor engaged in business. Debtor who is not self-employed and not operating business does not have authority under Section 364. However, Section 1305 creates pathway for certain postpetition debt to be included and evidences congressional anticipation of situations where Debtor incurs postpetition debt. Although no particular provision of Code specifically authorizes Debtor to incur postpetition debt, Section 1305 acquiesces its existence.

11.253 Court Authorization Required

(5928) *In re Ward,* 546 BR 667 (Bankr. N.D. Tx. 2016) – Sections 363, 364 and 1305, read in concert, require court authorization to incur significant post-petition debt because of possible impact on Debtor's plan and prospects for rehabilitation.

11.254 Court Authorization Not Required

(5929) *In re Fields,* 551 BR 424 (D. Mn. 2016) – Nothing in Section 1304 or Section 1305 requires court authorization for Debtor to incur debt post-confirmation. If lender demands court approval, proper method is by plan modification.

11.255 Motions Generally

(5930) *In re Nacci,* 2018 WL 3323876 (Bankr. N.D. Ohio 2018) – Courts have split on issue of whether Court approval for postpetition debt is required. Court authority required were confirmed Plan prohibits Debtor from incurring debt in excess of $500 without notice to Trustee and approval of Court.

(5931) *In re Reinhart,* Case No. 10-21696 (Bankr. E.D. Mi. 2012) - Provisions of confirmed Chapter 13 Plan require court authorization to incur debt post-confirmation. Trustee has supervisory function to cause Debtors to think twice before requesting new debt which may require the Trustee to deny that request.

11.256 Notice

(5932) *In re Reinhart,* Case No. 10-21696 (Bankr. E.D. Mi. 2012) – Debtor's request to incur debt post-petition must be presented to Chapter 13 Trustee. If trustee concurs, no further notice to creditors is required.

11.257 Standards for Approval – Section 364

(5933) *In re VPH Pharmacy, Inc.,* 2018 WL 329906 (E.D. Mi. 2018) – Section 364 creates a framework for debtor to incur debt and obtain credit. Trustee or debtor who is authorized to operate debtor's business can incur unsecured debt and obtain unsecured credit in ordinary course of business without first obtaining court order and credit or loan is afforded priority status under Section 503(b)(1). Section 364(b) permits court to authorize debtor to incur unsecured debt other than in the ordinary course of business with creditor holding administrative expense claim under Section 503(b)(1), after notice and hearing. Section 364(c)(1) allows Creditor to acquire super-priority administrative status, superior to other priority claims. Section 364(d) allows court to allow borrowing on secured basis including lien that is senior or equal to existing liens. Order that approved financing secured by lien on assets did not constitute either super-priority administrative claim or priming lien. While Court orally indicated that court intended to approve super-priority status, actual Order did not do so and parties did not seek clarification or amendment of Order from Bankruptcy Court.

11.258 Burden of Proof

(5934) *In re Nacci,* 2018 WL 3323876 (Bankr. N.D. Ohio 2018) – Purpose of requiring approval of Court is to ensure decisions made to obtain credit do not interfere with ability to perform under Chapter 13 Plan and to extent possible ensure Debtor is not making imprudent financial decision. Whether to approve debt is fact intensive based on terms of postpetition debt; purpose of debt; effect on Plan; and benefit to Debtor, all with a view toward reasonableness and necessity. Court would approve Debtor's obtaing PLUS loans for child's education where Debtor's file Chapter 13 based on history of poor financial decision-making but while in Chapter 13 had adjusted expenses outlined Debtors to remain current on secured debt payments, current on all payments under Chapter 13 Plan and Debtor's work paying a 100% dividend to unsecured creditors. Propose student loans would not become due until after conclusion of Debtor's Chapter 13 Plan and would not impact confirmed Plan. Terms of loan were not unreasonable where interest rate would be fixed at 7%, loan fees are standardized and Debtors are browing less than their eligibility entitlement. Court expressed some concern as proposed loan of $15,000 would cover only first year of child's education and there was no indication as to how Debtor or child would pay for additional years of schooling. Court also expressed concern the child had chosen pricey private school over more affordable public options from which child could graduate with little or no debt. Court warned that Court may not reach the same conclusion if request is a maid again during Chapter 13 case and would be unlikely to allow Debtors to reduce Plan payments to accommodate payments on loan if loan payments become due during pendency of Chapter 13 case.

(5935) *In re Connelly,* 2011 WL 1515413 (Bankr. W.D. Ky. 2011) – Motion to Incur Debt to purchase residence denied where Debtors provided no information as to the closing costs, including the amount, or the source of payment for the closing costs; failed to provide a copy of the contract; and Debtors borrowed against their 401K for the down payment without any authority from the Court and in violation of the provisions of the confirmation order. Debtors did not state how much they borrowed, or what their repayment obligation is on the 401K loan without which the Court could not ascertain whether the Debtors can afford to borrow the money requested, cannot know if they can afford to pay the closing costs, if any, and cannot know if the Debtors can afford to make the 401K loan payments used to make the down payment.

11.259 *Nunc Pro Tunc* Relief

(5936) *McKinstry v. B&H Contractors, LLC,* 2017 WL 4564693 (Bankr. E.D. Ky. 2017) – Section 364 requires Court approval before Debtor can incur debt other than unsecured debt in Debtor's ordinary course of business. Court can approve debt on *Nunc Pro Tunc* basis if Court would have authorized loan had consent been sought; approval will not harm creditors; and lender who extended credit did so in good faith and without knowledge of need to obtain Court approval. Although record did not evidence bad faith, irregularities in extension and operation of credit facility made it impossible to determine whether Court would have approved financing in first instance or whether financing exposed creditors to harm. Financing facilitated commingling of funds from different entities that were not substantively consolidated, such that payment of obligations by one Debtor may harm creditors of second Debtor. Court would not have approved financing without clearly identifying responsible parties and obligations of each party.

(5937) *In re Ward,* 546 BR 667 (Bankr. N.D. Tx. 2016) – Motion to incur sought relief on *nunc pro tunc* basis where financing that was already effectuated before the Motion to Incur Debt was filed; Debtor paid a $500 down payment before obtaining court approval; Debtor had Car for more than three months; Debtor began making monthly payments; Debtor had the car insured; Debtor was driving it and had put 6,000 miles on it. While bankruptcy courts have ability to grant *nunc pro tunc* approval of post-petition financing *nunc pro tunc* approval of post-petition financing is limited to extraordinary or unusual circumstances. *Nunc pro tunc relief denied where* terms of this financing are onerous and unfavorable with interest rate of 20.25%; additional "Add–Ons" of $2,690, result in total loan of $16,477.44 for a five-year-old car (which will not be paid off until it is ten years old), plus finance charges of $9,853.66 over the life of the loan. The evidence did not demonstrate sufficiently to the court that this is the best option for this Debtor or that loan was reasonable and necessary. Creditor did not adequately explain why it would let the Debtor take the car, begin paying on it, insuring it, and driving it without prior court approval where creditor "knew the rules" as most of its customers are in bankruptcy. Debtor ordered to return car to creditor and creditor ordered to refund to Debtor the $500.00 deposit paid by her Proof of these various ordered actions should be provided to the Chapter 13 Trustee.

Q. Trustee Fees

11.260 Fees on Receipts

(5938) *Nardello v. Balboa,* 514 BR 105 (D.N.J. 2014) – Chapter 13 Trustee compensation controlled by 28 USC Section 586 which provides for Trustee to take percentage fee from all payments received. Trustee fee not limited to or constrained by funds paid to creditors and Trustee is entitled to fee on all funds received even if case dismissed as fees are not based on disbursements to creditors. Section 1326 allows fee to be taken before or at time of disbursement to creditors, indicating that Trustee fee is not dependent on payment to creditors.

XII. Adversary Proceeding

A. Jurisdiction

12.1 Dismissal of Bankruptcy Case

(5917) *Taleb v. Kramer,* Case No. 15-4745 (Bankr. E.D. Mi. 2015) – Dismissal of main case requires dismissal of adversary proceeding. On dismissal of main case, there is no longer any case within meaning of 28 USC 1334 or 157, and adversary cannot be considered to arise in or arise under or be related to case under Title 11. Court loses jurisdiction on dismissal of main case, mandating dismissal of adversary proceeding.

(5918) *In re Bankston,* 2015 WL 6126440 (Bankr. E.D. Tn. 2015) – Dismissal of main case ordinarily results in loss of jurisdiction over all aspects of case including pending contested matters. Court can retain jurisdiction if doing so is consistent with principals of pendant jurisdiction where retention is for purpose of vindicating court's own authority and enforcement of its own rules, such as applications for attorney fees and contempt for violation of stay. Factors to be considered include (1) judicial economy; (2) fairness; (3) convenience; and (4) comity. Court would retain jurisdiction to consider alleged disclosure of personally identifiable information as issues involve Bankruptcy Code Section 107 and Rule 9037, which relate to court's power to prevent court record from being misused to facilitate identity theft or other unlawful harm to Debtor. Judicial economy will be served as matter has been fully briefed and resolution will address all issues, and will assist counsel for other Debtors with court's understanding of powers under Section 107. Comity was not issue as there is no related State Court case to which bankruptcy court can or should defer.

(5919) *Michigan Unemployment Insurance Agency v. Edwards,* Case No. 15-4496 (Bankr. E.D. Mi. 2015) – Dismissal of main case requires dismissal of adversary proceeding. On dismissal of main case, there is no longer any case within meaning of 28 USC 1334 or 157, and adversary cannot be considered to arise in or arise under or be related to case under Title 11. Court loses jurisdiction on dismissal of main case, mandating dismissal of adversary proceeding.

(5920) *Armstrong v. Internal Revenue Service,* Case No. 11-1554 (9th Cir. BAP 2013) – Bankruptcy court does not automatically lose jurisdiction over adversary proceeding when underlying bankruptcy case is dismissed. Bankruptcy court can retain jurisdiction based on economy, convenience, fairness and comity. Although bankruptcy court assumed lack of jurisdiction, dismissal was nonetheless proper where court's decision not to retain jurisdiction was supported in the record. Adversary proceeding had been pending only 6 weeks when case was dismissed; no discovery had been taken; service of process on the defendants was questionable; no dispositive motions had been filed, and no trial had been commenced. Convenience of parties was not factor as adversary had been pending only 6 weeks, and Debtor could have filed new bankruptcy case and re-filed adversary proceeding, which is of minimal inconvenience insufficient to warrant retention of jurisdiction. No party was prejudiced by dismissal and comity weighed in favor of dismissal. Adversary proceeding did not raise any issues of bankruptcy law. Adversary was based on federal tax law and there was no indication that bankruptcy court had specialized knowledge or ability to adjudicate issues.

(5921) *In re Rodriguez,* 2012 WL 589553 (Bankr. D.N.J. 2012) – Dismissal of underlying bankruptcy case does not automatically deprive bankruptcy court of jurisdiction over adversary proceeding. Court retains jurisdiction to consider actions that allegedly violated stay. Dismissal of case does not automatically validate actions taken in violate of stay.

(5922) *In re Wcislak,* 446 BR 827 (Bankr. N.D. Ohio 2011) – Motion for damages for alleged violation of automatic stay dismissed following dismissal of underlying Chapter 13 case. Section 349 does not deprive Court of ability to proceed with motion after dismissal where there remains a basis for the court to adjudicate matter. Whether court retains jurisdiction is entirely discretionary with Court and is not mandatory regardless of basis of underlying action. Damages for stay violations are of the type of action for which retention of jurisdiction may be particularly appropriate. Court declined to retain jurisdiction where alleged stay violation was minor and technical, involving

sending of only one letter; and Debtor's case was dismissed for willful failure to abide by orders of the Court including inability to formulate a plan, failure to make plan payments, and non-disclosure of large tax refunds.

(5923) *Clarke v. Shofner,* 2011 WL 3511524(Bankr. E.D. Tn. 2011) – Adversary proceeding is normally dismissed when underlying case is dismissed, as bankruptcy court jurisdiction depends on proceeding's nexus to the underlying bankruptcy case. However, dismissal is not mandatory and court can retain jurisdiction for good cause. Court should consider judicial economy; whether the court has previously ruled on significant issues; whether dismissal would be unfair to one party; and general deference to State Court to determine State Court causes of action. Adversary proceeding to determine validity and priority of competing liens would be dismissed where court had not ruled on any significant issues, parties had not engaged in any meaningful discovery, and issues presented were entirely state law based.

(5924) *Brown v. First State Bank Mortgage Company,* Case No. 10-4004 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

(5925) *Taunt v. Jamil,* Case No. 09-6571 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntary dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.

(5926) *Taunt v. Shaytoa,* Case No. 09-6547 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntary dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.

(5927) *Dye-Shelman v. Wells Fargo Bank,* Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

(5928) *Huffman v. Chase Home Finance, LLC,* Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

(5929) *Nathan v. Hendricks,* Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

(5930) *Kyewski v. Countrywide Home Loans*, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

(5931) *Daniel v. LaSalle Bank,* Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

(5932) *Huston v. First Mariner Bank,* Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

(5933) *McDermott v. Harajli,* Adv. No. 09-5031 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after the adversary complaint was filed. Dismissal of the underlying case resulted in no case pending under Title 11, depriving court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

12.2 Relationship of Adversary to Bankruptcy Case

(5934) *Kravitz v. Local Exchange Carriers of Michigan, Inc.,* 2018 WL 3031101 (Bankr. W.D. Mi. 2018) - Court has jurisdiction over fraudulent transfer actions that arise under bankruptcy code; and may exercise jurisdiction over non-core, state law claims if claims are related to bankruptcy.

(5935) *French v. Smithey,* 2012 WL 3958060 (Bankr. N.D. Ohio 2012) – Bankruptcy court lost jurisdiction to hear fraudulent transfer action brought by Chapter 7 trustee under state fraudulent transfer law. After commencement of adversary, Trustee sold and transferred all of the Trustee's right and interest in the alleged fraudulent transfer litigation to non-Debtor parties. Plaintiffs did not seek to prosecute claims on behalf of estate and if plaintiffs prevailed, they, not the estate, would receive the benefit. Plaintiffs would not be prejudiced as plaintiffs could bring action in State Court. Outcome of litigation could not conceivably affect either the discharge or the payment of claims and for all intents and purposes constituted a dispute solely between two parties. Adversary case dismissed.

(5936) *Church Joint Venture v. Blasingame,* 2012 WL 2064417 (Bankr. W.D. Tn. 2012) – Where court has jurisdiction in first instance, court can later lose jurisdiction where events occur such that jurisdiction would not have existed in the first instance had those events occurred before adversary complaint had been filed. Later loss of jurisdiction does not eliminate power of federal court to consider and rule on matter. However, where jurisdiction originally resulted from ancillary pendent or "supplemental" to a federal claim pursuant to 28 USC Section 1367(a), court should and is allowed to relinquish jurisdiction over the supplemental claim if the federal claim falls out of the case before the judgment. As a general rule, court would not retain jurisdiction over "related to" adversary proceeding where underlying bankruptcy case is dismissed. The Chapter 7 Trustee brought actions to recover avoidable transfers pursuant to State law, over which the Court had initial jurisdiction as arising under Title 11 as part of collection of property of estate. While case was pending, Trustee sold cause of action

to third party following which the Trustee ceased to have any interest in the action. Court concluded that sale of asset resulted in loss of jurisdiction as there was no longer any pending federal cause of action and state causes of action were "supplemental" to the original federal jurisdiction without any independent bases for asserting federal jurisdiction. Court deferred on consideration as to whether to retain case notwithstanding loss of federal jurisdiction pending further briefing, although court leaned strongly toward relinquishing case to State Court absent showing of prejudice to parties.

(5937) *Meoli v. Huntington National Bank,* 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment on contract and tort claims absent consent of parties. Only Article III Court can enter final judgment on claims based on state law, even where claims are raised as part of claims resolution process and the party against whom recovery is sought has filed proof of claim.

(5938) *Gilchrist v. Bank of America National Association,* Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) – Court lost jurisdiction over adversary proceeding when Bankruptcy Trustee abandoned underlying causes of action. After abandonment, case no longer involved property of the estate and did not raise issues created by Bankruptcy Code, as it asserts only state law claims. No cause of action remained that would have effect on bankruptcy estate. As such, adversary proceeding no longer arose under Title 11; no longer arose in a case under Title 11; and no longer was related to case under Title 11 as required by 28 USC Sections 1134, 157(a) and 157(b)(1).

(5939) *Doucet v. Drydock Coal Co.,* 2009 WL 1687775 (6th Cir. BAP 2009) – Trustee has standing and Court has jurisdiction over action brought by Trustee concerning administration of estate, determination of validity, priority or extent of liens, and other proceedings affecting liquidation of estate. Debtor's argument that restrictive legend on stock prevented Trustee from obtaining an interest in stock does not affect standing of Trustee to bring action to determine whether stock is property of estate.

(5940) *Lewis v. McClatchey,* 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Bankruptcy Court lacks jurisdiction over litigation between two parties neither of whom are the Debtor and that does not involve property of estate.

(5941) *Allard v. Coenen,* 419 BR 21 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee had standing to maintain adversary proceeding arising out of alleged violations of ERISA. Although cause of action under ERISA belongs to the Pension Plan and not to the Corporation itself, the Chapter 7 Trustee overseeing the liquidation of the Debtor-Corporation could bring the adversary and the Court would have jurisdiction as "related to" the administration of the bankruptcy estate. BAPCPA expressly amended Section 704 to require that where the Debtor was an administrator of an ERISA plan, the Chapter 7 Trustee must perform the obligations of a plan administrator. Although Congress did not amend the provisions of 28 USC Sections 1334 and 157 which control the Court's jurisdiction, the Court concluded that dismissal of this case was not required notwithstanding that the cause of action alleged was entirely non-bankruptcy in origin and the "proper plaintiff" – the pension plan – was not a Debtor in bankruptcy. The claims being pursued were not property of the bankruptcy estate and none of the recovery would be property of the estate or benefit creditors of the Debtor. The actions would be non-core proceedings even though Section 704(a)(11) would appear to require the Trustee to pursue those actions. However, the Court would have "related to" jurisdiction as the outcome of the adversary proceeding could conceivably have an effect on the estate being administered in bankruptcy where the Trustee reasonably advanced, and in the future likely would reasonably advance, funds of the bankruptcy estate to pay (a) attorney fees, accountant fees, and expenses for performing the Trustee's duty to administer the ERISA Plan, not including the prosecution of this adversary proceeding; and (b) attorney fees, expert witness fees, and other litigation expenses relating to this adversary proceeding; and to the extent the Trustee is successful in recovering on these claims for the ERISA Plan, the Plan will reimburse the bankruptcy estate for the fees and expenses the estate has advanced which would ultimately affect distribution to creditors of the bankruptcy estate by the extent to which the ERISA Plan reimburses the bankruptcy estate for the fees and expenses the estate has paid to enable the Trustee to administer the Plan, including prosecution of this adversary proceeding.

12.3 "Arising In", "Arising Under" and "Related to"

(5942) *JWJ Hotel Holdings, Inc. v. W&H Realty, LLC,* 2018 WL 3772179 (S.D. Ohio 2018) – 28 USC Section 1412 allows District Court to transfer case or proceeding under Title 11 to another district in interest of justice or for convenience of parties. 28 USC Section 1404(a) allows District Court to transfer any "civil action" to any other district where action might have been brought for convenience of parties and witnesses and in interest of justice. Bankruptcy "case" is distinct from "proceeding". "Case" is commenced by filing petition with Bankruptcy Court and includes actual administration of bankruptcy. "Proceeding" is a litigated matter connected to bankruptcy case and are divided into three categories: (1) civil proceedings arising under Title 11; (2) civil proceedings arising in case under Title 11; and (3) civil proceedings related to case under Title 11. Proceedings that arise under Title 11 or arise in case under Title 11 concerns administration of bankruptcy estate. Proceeding is "related to" bankruptcy case if outcome could conceivably have effect on Debtor's estate. Complaint requesting appointment of receiver for two projects in which Debtor had an interest and request to enjoin appointment of comanager of entity in which Debtor held controlling interest did not arise in or arise under Title 11, but could conceivably affect bankruptcy estate and were "related to" bankruptcy case. Accordingly, motion to transfer governed by Section 1412. Factors under Section 1412 include whether transfer would promote economic and efficient administration of bankruptcy estate; judicial economy; whether parties would be able to receive fair trial; whether either form has interest in having controversy decided within its borders; whether enforceability of judgment would be affected by transfer; and whether plaintiff's original choice of forum should be disturbed, with Court giving greatest weight to economic and efficient administration of bankruptcy estate. Transfer of action would promote interest justice where case would be transferred to same district where bankruptcy case is pending and allow Bankruptcy Court to hear claims and determine require whether requested relief is appropriate. Resolution of case will require interpretation of confirmed Chapter 11 Plan and Courts Confirmation Order. Bankruptcy case had been pending for more than two years and Bankruptcy Court was familiar with key operative and historical facts giving inability to resolve instant claims more efficiently.

(5943) *Kravitz v. Local Exchange Carriers of Michigan, Inc.,* 2018 WL 3031101 (Bankr. W.D. Mi. 2018) - Court has jurisdiction over fraudulent transfer actions that arise under bankruptcy code; and may exercise jurisdiction over non-core, state law claims if claims are related to bankruptcy. Claims are related to bankruptcy if potential recovery from state law claims would augment creditor recovery.

(5944) *Church Joint Venture, LP v. Blasingame,* 2018 WL 2711204 (6th Cir. BAP 2018) – Creditor cannot assert derivative standing on behalf of Trustee where Trustee did not have standing in first instance. Earlier in case, Trustee and Creditor reached settlement of avoidance action with Creditor acquiring the Trustee's right to bring adversary proceedings or recover property and avoid transfers. Creditor filed adversary proceeding to avoid transfers which Bankruptcy Court dismissed for lack of jurisdiction, as proceeding did not "arise in" or "arise under" Bankruptcy Code and did not "relate to" Bankruptcy case where cause of action was state law claims and any recovery would inure solely to benefit of creditor and would not enhance or augment bankruptcy estate.

(5945) *Holcomb v. Altgen,* Case No. 17-1268 (9th Cir. BAP 2018) – Bankruptcy Court can exercise jurisdiction only for matters that arise in or arise under Bankruptcy Code or are related to bankruptcy case. Court lacked jurisdiction over Chapter 7 Debtor's cause of action against counsel for alleged malpractice after conversion of case to Chapter 7. Cause of action was state Court malpractice claim which does not arise Under Bankruptcy Code. "Arising in" jurisdiction requires that action pertain to administrative matter. Action against counsel who served as Chapter 7 attorney did not raise any issues relating to administration of case. Lawsuit was not "related to" bankruptcy case where outcome of malpractice action could have no conceivable effect on bankruptcy estate as claims belong to Debtor and were not property of estate; and all creditors of estate had already been paid in full so that estate would not receive any additional assets even if suit is successful. Action dismissed without prejudice for lack of subject matter jurisdiction.

(5946) *Farinash v. UpRight Law, LLC,* 2017 WL 5499714 (Bankr. E.D. Tn. 2017) – Minimum contacts standard articulated in *International Shoe* applies only to courts sitting in diversity where service is obtained through state long-arm service of process statute. Minimum contacts standard does not apply to action where service of process is effected pursuant to federal statute which provides for nationwide service of process. Bankruptcy Court's ability to exercise personal jurisdiction requires (1) service of process in accordance with Rule 7004; (2) the action is case under Code, arises under Code, or arises in or is related to case under the Code; and (3) exercise of jurisdiction is consistent with Constitution and laws of United States. Plaintiff served Defendant by US Mail as required by Rule 7004. Proceeding was related to bankruptcy case as action related to Defendant's conduct in providing bankruptcy assistance to Debtor that ultimately led to bankruptcy filing. Defendant's actions may constitute unauthorized practice of law which implicates administration of bankruptcy case. Outcome of proceeding could have impact on estate as any recovery by Trustee would augment Bankruptcy Estate. There is no Constitutional impediment as rules allowing nationwide service of process do not implicate minimum contact standard as long as Defendant has contact with the United States. Defendant was resident of Illinois, creating sufficient contacts with United States to support nationwide jurisdiction.

(5947) *SWM Properties Inc. v. Androla,* 2017 WL 4553412 (W.D. Ky. 2017) – 28 USC Section 157 allows District Court to refer case to Bankruptcy Court if Bankruptcy Court has jurisdiction under 28 USC Section 1334. Bankruptcy Court has jurisdiction over cases that arise under Title 11; or arise in or re related to case under Title 11. Case is "related to" bankruptcy if outcome of proceeding could have conceivable effect on Bankruptcy estate by altering debtor's rights, liabilities, options or freedom of action and that in any way impacts handling and administration of bankruptcy estate. Action against Guarantors of note on which Debtor was maker could conceivably have effect as any recovery by third party from guarantors would reduce Debtor's liability to third party. On referral, Bankruptcy Court will determine whether action is core or non-core and handle matter accordingly. Plaintiff's demand for jury trial does not prevent referral and Bankruptcy Court will handle mater until it becomes trial ready, and in meantime has authority to handle pre-trial issues and issue reports and recommendations on potentially dispositive matters.

(5948) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Bankruptcy Court has jurisdiction over cases under Title 11 and all core proceedings, defined as invoking substantive right that does not exist outside bankruptcy. Court can also consider matters related to Title 11 but, for non-core matters, cannot enter final judgment. Objection to Proof of Claim seeking determination of validity, extent and priority of lien arises in bankruptcy case and is core proceeding over which Bankruptcy Court has jurisdiction and ability to enter final order. Court has jurisdiction over remaining counts of complaint that sought remedies for various state and non-bankruptcy federal law claims only if claims are "related to" Title 11, meaning that outcome has some impact on Bankruptcy Estate. Court has jurisdiction over state and non-bankruptcy federal claims because, to extend Plaintiff is successful, any damage recovery would augment Bankruptcy Estate and provide for distribution to creditors. Jurisdiction exists even where recovery could possibly produce sufficient funds for creditors to be repaid in full with proceeds left over for distribution to Debtor or a reduction in Debtor's mortgage balance. Impact on Bankruptcy estate must only be "some" impact, not "substantial" impact.

(5949) *Scott v. City of Hamtramck Treasurer,* Case No. 17-4411 (Bankr. E.D. Mi. 2017) – Complaint did not assert any basis for jurisdiction over State of Michigan where adversary proceeding was directed to City assessed taxes being collected by County. Complaint did not allege that Debtor was indebted to State of Michigan or that Debtor had claims against State. Action is "related to" bankruptcy case only if outcome could conceivably have impact on Bankruptcy Estate. Plaintiff's complaint did not allege any connection between Estate and any claims of Estate and State as Defendant.

(5950) *Mountain Glacier, LLC v. Nestlé Waters North America, Inc.*, 2017 WL 149943 (Bankr. M.D. Tn. 2017) - Interpretation of confirmed Chapter 11 Plan is core proceeding allowing bankruptcy Court to conduct appropriate proceedings and enter final order. Interpretation of confirmed plan is within scope of courts "related to" jurisdiction as a Court has authority to interpret and enforce its own orders.

(5951) *Jones v. CitiMortgage, Inc.,* Case No. 15-14853 (11th Cir. 2016) – Although Bankruptcy Court is "unit" of bankruptcy court and district courts have original jurisdiction, Bankruptcy Court alone has jurisdiction to enforce discharge or enter sanctions for violation of discharge injunction. District court should not have entered any order or reached any decision on merits. Matter reversed and remanded to district court with direction to remand case to bankruptcy court.

(5952) *In re Ryan,* Case No. 09-1604 (Bankr. D. Hawaii 2016) – Proceeding "arises under" title 11 if it presents claims for relief created or controlled by title 11. Claims for relief "arise in" title 11 are not explicitly created or controlled by title 11 but nonetheless would have no existence outside bankruptcy case. "Related to" is exceptionally broad, encompassing issues that could in any conceivable way impact bankruptcy estate. Post-discharge and post-closing issue regarding meaning of "surrender" arise under title 11 as issue depends on substantive provisions

of Code. Issue also arises in the case as it would not independently exist outside of bankruptcy. Court had jurisdiction to re-open case to determine meaning of "surrender" in context of Chapter 7 proceeding.

(5953) *Parker v. Horvath,* 2016 WL 5887316 (Bankr. N.D. Ohio 2016) – Bankruptcy court jurisdiction is limited to cases arising in, arising under or related to the Code or case administration. Whether particular asset is property of estate is core proceeding over which court has jurisdiction as issue of whether property is property of estate cannot arise until case is filed, such that dispute necessarily "arises in" bankruptcy. The issue is also "related to" the case as the outcome could conceivably have an impact on estate being administered. Court also has jurisdiction over turnover action as issues relate to property alleged to be property of estate and related claims seeking an order of the Court for third party to not only turnover assets but to execute documents necessary to allow trustee to administer assets turned over are core proceedings. Court has jurisdiction to enter final judgments in disputes regarding title to property of estate as core proceedings. However, court lacked jurisdiction over cross-claims between defendants, neither of whom are in bankruptcy, seeking damages for alleged wrongful use and appropriation of trade secrets as outcome of that cross-claim would have no conceivable impact on bankruptcy estate.

(5954) *Reed v. Nathan,* 2016 WL 5844579 (E.D. Mi. 2016), *aff'd*, Case No. 16-2685 (6th Cir. 2017) – Bankruptcy Court has Constitutional jurisdiction to adjudicate Motion for Turnover as summary proceeding brought by Motion for Turnover rather than Adversary Proceeding. Court has constitutional jurisdiction over assets in hands of third party and subject to turnover because assets remain property of estate and are constructively possessed by Estate; and Debtor remained in control of assets notwithstanding purported ownership by third party. Court has statutory jurisdiction because turnover is core proceeding over which Court has jurisdiction to enter final judgment. Turnover involves two step process. First step is to determine whether assets are property of estate, which is power granted to Court under Section 541 and is "core". Second step is to require surrender of those assets, which is remedy created by Bankruptcy Court and expressly recognized as "core" power under 28 USC Section 157. Where there is no legitimate or bona fide dispute as to third party's interest in property, matter is core; where there is good faith or legitimate dispute as to title to assets, action is non-core as it has not yet been determined whether assets are property of estate.

(5955) *Reed v. Zwick,* 2016 WL 5763863 (Bankr. N.D. Ohio 2016) – 28 USC 1334 grants original jurisdiction to District Court, over all cases arising in or related to cases under Title 11. "Related to" has expansive definition and includes civil proceeding where *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.* Proceeding need not be against the Debtor or against the Debtor's property if the outcome could alter Debtor's rights, liabilities, options, or freedom of action or in any way impacts handling and administration of bankrupt estate. Fact that estate has no assets does not deprive court of jurisdiction to determine validity or avoidability of claims under Section 523 and Debtor can lodge objection to claim as part of adversary proceeding raising question as to whether creditor even has a claim. Debtor's adversary proceeding seeking to except student loan from discharge properly raised counts contesting Debtor's liability in first instance based on Debtor's assertion that Debtor did not sign the student loan note and that Debtor's signature was forged. Bankruptcy court has constitutional jurisdiction to adjudicate state law claims that are raised as part of claims process, although jurisdiction may be limited to disallowance of claims rather than affirmative relief by Debtor against claimant. Adversary sought only to disallow claims and did not seek any additional relief from creditor, giving bankruptcy court constitutional jurisdiction. Issues were raised within context of claims objection, and constitute core proceeding over which Bankruptcy Court can issue valid final judgment.

(5956) *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.

(5957) *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.

(5958) *MHS Capital v. Goggin,* Case No. 16-1794 (S.D.N.Y. 2016) – Cause of action between two non-Debtors does not "arise in" bankruptcy merely where triggering event between creditors was filing of bankruptcy by Debtor. Contract between parties (investors in Debtor) provided that if Debtor filed for bankruptcy, the investment company would be able to credit bid. After Debtor filed, one group of investors sued other group alleging diversion of credit bid rights. Although cause of action between investor groups could not have arisen unless and until Debtor filed bankruptcy, that did not make cause of action one that "arose in" bankruptcy for purposes of bankruptcy court jurisdiction. "Arising in" jurisdiction requires that cause of action could only arise in context of bankruptcy case, while claims in this case, while having bankruptcy as a condition precedent, raised nothing more than normal investor litigation. While action may have been related to bankruptcy as state law claims were factually related to bankruptcy, connection was insufficient for court to retain jurisdiction where remand appeared more appropriate because connection to bankruptcy case was tenuous and State Court could timely adjudicate matter.

(5959) *Passmore v. Baylor Health Care System,* Case No. 15-10358 (5th Cir. 2016) – "Related to" jurisdiction requires only that matter conceivably have some impact on bankruptcy estate. Action against Medical Center after doctor (who had filed for bankruptcy protection) allegedly committed malpractice was related to bankruptcy case, although doctor himself was not named in malpractice suit. If hospital loses malpractice action, it could have claim against doctor for contribution or indemnity. Outcome of medical malpractice suit could conceivably have effect on bankruptcy case sufficient to support "related to" jurisdiction over medical malpractice action that was entirely state law based and for which no basis for federal court jurisdiction would have existed.

(5960) *JLKX Corp. v. Bobcat Energy Resources, LLC,* 2016 WL 2899525 (N.D. Ohio 2016) – Bankruptcy court has jurisdiction over core matters; and over non-core maters to extend that court can submit proposed findings of fact and conclusions of law to District court. "Non-core" proceedings are those that (1) are not specifically identified as a core proceeding under § 157(b)(2)(B) through (N); (2) cause of action existed prior to the filing of the bankruptcy petition; (3) cause of action would continue to exist independent of the provisions of title 11; and (4) parties rights, obligations, or both, are not specifically affected as a result of the filing of the bankruptcy petition. Defendant acquired from Bankrupt Debtor interests in certain LLCs that were parties to operating agreements with third parties. Action between third party and defendant for alleged breach of operating agreements was not within scope of bankruptcy jurisdiction as dispute did not arise out of LLC interests assigned or the Bankruptcy Court's order approving the sale, but instead arose out of operating agreements to which Debtor was no longer a party, which were not sold or transferred as part of bankruptcy Court Order approving sale, and which did not otherwise impact bankruptcy case or estate.

(5961) *Citizen's Insurance Company v. FCA US LLC,* 2016 WL 2745818 (E.D. Mi. 2016) – Before court can transfer venue under Section 1334, court must first determine whether court has subject matter jurisdiction. Action against successor to Debtor was sufficiently related to bankruptcy case to support "arising under" jurisdiction. Claim arose out of pre-petition motor vehicle accident in vehicle manufactured by Debtor. FCA purchased assets of Debtor in bankruptcy with specific provision that purchaser was not liable for successor claims. Claims were "core" because FCA's liability turned entirely on interpretation of sale order in bankruptcy case, and order arose and only could have arisen under Bankruptcy code.

(5962) *Superior Contracting Group, Inc. v. Rachmale,* 2016 WL 1242432 (E.D. Mi. 2016) – Section 1334 grants bankruptcy court jurisdiction over matters that are "related to: the bankruptcy case or estate, defined as matters where the outcome of the proceeding could conceivably have any effect on estate being administered, including where outcome could alter the Debtor's rights, liabilities, options, or freedom of action or which in any way impacts upon the handling and administration of the bankruptcy estate. Suits between third parties which have an effect on the bankruptcy estate are "related to" a bankruptcy proceeding. When plaintiff alleges liability resulting from the joint conduct of the Debtor and non-Debtor defendants, bankruptcy jurisdiction generally exists over all claims under section 1334 depending on degree of identity between a Debtor and non-Debtor codefendant. Venue over any "related to" action is proper in district where underlying bankruptcy case is pending. Action by one party to joint-venture agreement against principal of joint-venture partner was related to the joint-venture's partner's bankruptcy. Any action against principal necessarily required determination and construction of parties' obligations under joint venture agreement. Further, complaint sought to pierce corporate veil which by definition argued that Debtor and principal were "one and the same". Principal also had indemnification rights against Debtor, such that adverse decision in action would necessarily affect bankruptcy estate by increasing amount of claims. Actions clearly related to bankruptcy pending in Delaware are properly venued in Delaware. Case transferred.

(5963) *Smith-Boughan, Inc. v. SunTrust Bank,* 2016 WL 1183650 (Bankr. W.D. Ohio 2016) – Court can exercise jurisdiction in adversary proceeding between two non-Debtor entities where proceeding is "related to" the bankruptcy case. A proceeding is "related to" the case if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy or outcome could alter the Debtor's rights, liabilities, options, or freedom of action and which in any way impacts upon the handling and administration of the bankrupt estate. Mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not make matter "related to" unless there is also some nexus between the proceeding and Bankruptcy case. Action between bank (acting as construction lender) and contractor was related to bankruptcy of borrower under construction loan as determination of whether bank or construction company had superior right to retainage could increase amount owed by Debtor to bank. If contractor receives retainage, bank could assert claim against Debtor under indemnification provision.

(5964) *Salamy v. Compo,* 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court lacked jurisdiction in action against two non-Debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-Debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that Debtor was member of LLC, there was no nexus between causes of action and bankruptcy court. Plaintiff sought only money judgment against non-Debtor and entry of judgment would have on effect on bankruptcy estate.

(5965) *In re CS Dip, LLC,* 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In considering settlement that involves injunction against actions by third parties, court must first determine whether it has jurisdiction to enjoin claims that would fall within injunction. If so, court must then determine if it has authority to enter injunction. Third, court must closely review scope of bar order. Court has "related to" jurisdiction where action could conceivably have any effect on estate being administered, or could alter Debtor's rights, liabilities, options or freedom of action. "Related to" jurisdiction requires some nexus between the related civil proceeding and the title 11 case, such as a dispute over property of estate or because outcome of dispute will have impact on estate. Claims against Debtor's insurance company were part of bankruptcy estate and became assets of liquidating trust through confirmed plan such that resolution of dispute with insurance company regarding scope of insurance liability was within core jurisdiction of bankruptcy court. However, proposed settlement that would enjoin all actions against insurer where injured party may have independent state law claims directly against insurer for "bad faith" refusal to settle, which would entail only rights of insurer and injured party and would not have impact on estate or on post-confirmation assets. Court otherwise has constitutional jurisdiction to review settlement as rights of third parties being settled are incidental to valuation and liquidation of asset of estate and incidental to adjustment to claims against Debtor. Bar order must be carefully tailored to extinguish only claims by non-settling defendants against settling defendants where injury to non-settling defendants is liability to underlying plaintiffs, for damages such as indemnity or contribution, such that damages are measured by defendant's liability to plaintiff. There is no legal basis to bar claims where the injured party has independent damages beyond those of any liability of settling defendants to plaintiff. Settlement agreement was overbroad as proposed bar order would bar actions directly against insurer for bad faith or violation of consumer protection statutes by injured third parties which are damages not measured by claims against Debtor directly.

(5966) *Hennessy v. Muirfield Association, Inc.,* 2015 WL 5704358 (Bankr. S.D. Ohio 2015) – While jurisdictional grant under 28 USC Section

1334 is broad, it is not unlimited. Congress granted comprehensive jurisdiction to bankruptcy courts so that courts can deal efficiently and expeditiously with all matters connected with bankruptcy case, but there must be some nexus between a civil proceeding and the Bankruptcy case itself such that outcome could conceivably have an effect on the bankruptcy case being administered, or affects the Debtor's rights, liabilities, options or freedom of action and which impacts on handling and administration of case. Cross claims between Debtor's mortgage company and Debtor's homeowner's association lacked any connection to bankruptcy case. Outcome would have no impact on bankruptcy as neither HOA nor lender filed claims in Chapter 7 estate and neither party will participate in distributions from estate. Even if claims had been filed, outcome of dispute would only lead to substitution of one claimant for the other, without altering the Debtor's underlying liability as a whole. Fact that outcome could, theoretically, lead to HOA imposing lien on Debtor's property was too tenuous and in any event would not impact administration of Chapter 7 case.

(5967) *Gardner v. Potestivo & Associates,* Case no. 15-4355 (Bankr. E.D. Mi. 2015) – Bankruptcy court has very limited jurisdiction, encompassing only actions that arise in, arise under or are related to a case under Title 11. Court lacked jurisdiction to hear adversary brought by Debtor against lender and law firm for alleged wrongful foreclosure where Court had already determined that Debtor did not have interest in property and only owner of property, Debtor's husband, was not party to the bankruptcy case. Complaint did not arise in or under Code and as outcome of case could not have any conceivable effect on Debtor's estate or case administration, court lacked related to jurisdiction.

(5968) *CH Holding Co. v. Miller Parking Co.,* 2015 WL 3868648 (E.D. Mi. 2015) – "Related to" jurisdiction is broad and encompasses any civil action that could conceivable have impact on bankruptcy estate, or it outcome could alter Debtor's rights, liabilities, options or freedom of action or in any way impacts on handling and administration of estate. Mere fact that there may be common issues of fact between civil proceeding and bankruptcy is not sufficient, and there must be some nexus between the civil proceeding and the bankruptcy. Action alleging that principal of Debtor wrongfully removed funds from Debtor for payment of personal attorney fees was "related to" bankruptcy case. Issue is whether principal converted funds belonging to Debtor in which case the funds would remain those of the Debtor and the estate would have a claim against either the principal that allegedly wrongfully removed the funds or the recipient of those funds. Although complaint allegedly sought recovery only against principal, effect of action would be to allow creditor to jump ahead of other creditors and seize funds that were property of the Debtor.

(5969) *National Union Fire Insurance Company v. CMH Liquidating Trust,* 2015 WL 3843408 (E.D. Mi. 2015) – Core proceedings are those that involve a cause of action created or determined by a statutory provision of title 11 or could arise only in bankruptcy cases. If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding. Action by Trustee was state law breach of contract case. Although defendant intended to assert provisions of bankruptcy code as defense, assertion of defenses does not convert non-core proceeding into core proceeding.

(5970) *U.S. v. Cordes,* 2015 WL 3775575 (E.D. Mi. 2015) – Actions to determine dischargeability of tax liabilities and for damages for alleged violations of the automatic stay by IRS necessarily turned on bankruptcy code provisions regarding discharge and bankruptcy definition of "property of the estate" and as such were core proceedings, arising in a bankruptcy case. Court would not withdraw reference over core proceedings. Court would withdraw reference over two non-core causes of action, one to determine whether related entity was "alter ego" of Debtor and one for determination of IRS as secured creditor, as each of these turned on state and non-bankruptcy federal statutes.

(5971) *Schwab Industries, Inc. v. Huntington National Bank.* 2015 WL 2412317 (N.D. Ohio 2015) – Action is "related to" Bankruptcy if outcome of proceeding could conceivable have any effect on estate being administered. Whether Bankruptcy Court has "related to" jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Action alleging legal malpractice by Debtor's counsel during bankruptcy case is inherently a core proceeding that arises in or is related to bankruptcy.

(5972) *Scott v. Bank of America,* 2015 WL 643334 (Bankr. W.D. Mi. 2015) – To extent cause of action arose post-petition, it is not property of estate. Bankruptcy Court can exercise jurisdiction only if outcome of lawsuit could conceivably have impact on case administration. Although outcome would have impact on Chapter 7 Debtor personally, litigation would not impact Chapter 7 estate and lacked any nexus to the estate or to the administration of the estate. As such, court lacked subject matter jurisdiction over cause of action.

(5973) *Rachmale v. Conese,* 2014 WL 4129537 (Bankr. E.D. Mi. 2014) – Action is "related to" bankruptcy if outcome could conceivably have any effect on bankruptcy estate. Suit by shareholder alleging that directors of bankruptcy company attempted to wrongfully "squeeze him out" could affect bankruptcy case as directors who were defendant had indemnification claims against company.

(5974) *File v. Boersen Farms, Inc.,* 2014 WL 1017041 (Bankr. W.D. Mi. 2014) – Bankruptcy court has jurisdiction to interpret and enforce its own orders. Court had jurisdiction to determine scope of Order allowing sale and assumption of leases to determine whether particular lease was included in leases purchased and assumed. Order allowing sale and assumption of leases under Section 365 was core proceeding and court had jurisdiction to enter orders as part of continuation of that core matter. However, having determined that purchaser did assume lease, dispute became one between non-Debtor lessor and non-Debtor lessee and court could not exercise jurisdiction to determine whether lessee had subsequently breached lease, as issue was one solely of state law between two non-Debtor entities. Issues lacked sufficient nexus to bankruptcy case to warrant exercise of "related to" jurisdiction where outcome would not have any impact on bankruptcy estate or Debtor's liabilities, rights or property.

(5975) *Murk's Village Markets, Inc. v. Bank of America,* Case No. 13-80141 (Bankr. W.D. Mi. 2013) – State law tort claims brought by Debtor's employer against Debtor's creditors for recovery of embezzled funds did not arise in a bankruptcy case or arise under the case, where all of the operative facts including the embezzlement, payment and loss, all occurred pre-petition. Actions were not related to the bankruptcy case as the outcome of the actions would not have any conceivable impact on the case. To extent Employer was successful in recovering funds from creditors, funds would be returned to employer and not to estate. Other than fact that Debtor was the embezzler, there was no connection between state law claims and bankruptcy estate and outcome of actions would have no impact on bankruptcy case or estate. However, jurisdictional allegations supported separate basis for diversity jurisdiction. Court recommended that district court withdraw reference and exercise independent basis for jurisdiction over action, rather than dismissing action and requiring plaintiff to institute new proceeding.

(5976) *Paradise Productions, LLC v. Chalin,* 2013 WL 1969310 (Bankr. E.D. Ky. 2013) – Action by Debtor for specific performance of real estate sales contract entered into pre-petition is "related to" bankruptcy. Outcome of sale would produce assets available for distribution to creditors and would affect administration of estate.

(5977) *CPC Livestock, LLC v. Fifth Third Bank. Inc.,* 2013 WL 1411222 (W.D. Ky. 2013) – 28 USC Section 1334 grants jurisdiction to District Court cases filed under Title 11; proceedings arising under Title 11; proceedings arising in a case under Title 11; and proceeding related to a case under Title 11. The "case filed" addresses just the petition and main bankruptcy case commencement. Proceeding is "related to" if outcome could conceivably have any effect on estate being administered, unless connection to estate is so extremely tenuous as to not satisfy jurisdictional requirement. Action was related to case where Plaintiffs had also filed claims in case and if plaintiffs prevail, estate would be diminished or extinguished. Further, even for plaintiffs who did not file claims, any recovery from Fifth Third would increase amount of Fifth Third's claim for indemnification by Debtor which affects size of estate and length of bankruptcy case.

(5978) *Tomassi v. MDS, Inc.,* 2013 WL 1636435 (W.D. Ky. 2013) – Action is "related to" bankruptcy for purposes of jurisdiction if proceeding could conceivably effect estate being administered in bankruptcy; if the outcome could alter Debtor's rights, liabilities, options, or freedom of action (either positively or negatively; or which impacts handling and administration of bankrupt estate. Bankruptcy Court had "related to" jurisdiction over Debtor's State Court claim for pre-petition wrongful termination once action was removed to bankruptcy court, as outcome of litigation could produce additional funds for distribution to creditors.

(5979) *In re Brown,* 484 BR 322 (Bankr. E.D. Ky. 2012) – Court lacked jurisdiction to determine whether Debtor was beneficiary under will where maker of will was still alive. Debtor's mere expectancy of inheritance is not property of estate and outcome of litigation could not impact estate, creditors or case administration.

(5980) *Johnston v. City of Middletown,* 484 BR 698 (Bankr. S.D. Ohio 2013) – Bankruptcy court lacks jurisdiction to determine whether Debtor is potentially responsible party for unpaid employment taxes. Case was no asset Chapter 7 proceeding. Determination of status as potentially responsible party could not have any conceivable effect on estate, as it did not affect property of estate or impact distributions to creditors. Issue did not arise in a case under Title 11 as those are issues that by their very nature could only arise in Bankruptcy case. Issue did not arise under bankruptcy code as those are limited to actions that are created or determined by the bankruptcy code itself, and dispute over potentially responsible party arose under tax laws independent of bankruptcy case. Although adversary complaint was couched as request for declaratory judgment that tax obligation was discharged, substance sought declaration that Debtor was not "responsible party" for purposes of tax laws. Proceeding was not "core" as it did not fit within any of the subcategories of Section 157 and does not impact, in any way, the administration of the estate, allowance of claims, or distributions to creditors.

(5981) *CH Holding Company v. Miller Parking Co.,* 2012 WL 5463128 (E.D. Mi. 2012) – State Court cause of action is "related to" bankruptcy case if outcome of that proceeding could conceivably have any effect on estate being administered in bankruptcy. Cause of action does not need to seek relief directly from Debtor, if the action could alter the Debtor's rights, liabilities, options or freedom of action. State Court action that sought to pierce corporate veil and reach assets of shareholders was "related to" where bankruptcy trustee had brought same claims against shareholders and sought same relief from same limited pool of money in the hands of the same defendants

(5982) *Marshall v. PNC Bank,* 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – "Related to" jurisdiction requires that action have some conceivable effect on outcome of bankruptcy estate. Court lacks jurisdiction over FDCPA claims that arose entirely post-discharge. Action under FDCPA does not arise in or under the Code and is not related to the case. Fact that Debtor's FDCPA Claim and claim for violation of the discharge injunction share a common factual nexus is not sufficient to establish jurisdiction. Debtor's FDCPA Claim could not have any conceivable effect on the Debtor's bankruptcy estate as claims arising from post-petition actions are not property of the estate and proceeds cannot be used to improve payments to creditors. Any recovery on the FDCPA Claim will inure solely to the benefit of the Debtor.

(5983) *Johnson v. Fifth Third Bank,* 476 BR 493 (W.D. Ky. 2012) – Action "arises in" a case under Title 11 where the proceeding must by its very nature not exist outside of the bankruptcy context, and includes items such as administrative matters, orders to turn over property, and determination of validity, extent and priority of liens. Complaint that stated state law claims for conversion, theft and unjust enrichment did not arise in bankruptcy case. Further, suits between non-Debtor parties based on state law claims do not arise under Code. Sixth Circuit has adopted expansive definition of a "related to" proceeding to encompass any action where the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. However, where connection to estate is extremely tenuous, action would not satisfy the jurisdictional requirement. State-court action brought by cattle sellers against Debtor's lender, alleging lender intentionally froze Debtor's accounts without informing the Debtor, with knowledge that the Debtor would purchase a large sum of cattle the following day, was "related to" the Debtor's bankruptcy. Cattle sellers were listed as creditors in the Debtor's bankruptcy, where they sought to recover the value of the cattle sold to the purchaser and also sought to recover from Debtor's lender. To the extent that the sellers were successful in their case against lender, their claims in the bankruptcy estate would be reduced or extinguished. Potential reduction in claim against estate constitutes conceivable effect sufficient to confer "related to" jurisdiction.

(5984) *GLC, Ltd. v. Smith,* 475 BR 618 (Bankr. S.D. Ohio 2012) – Bankruptcy Court is court of limited jurisdiction. Court lacks subject matter jurisdiction to hear cases that are not at least "related to" bankruptcy, such that outcome of case could have some conceivable effect on estate or case administration. Adversary defendant's third-party complaint for indemnification and contribution was not related to bankruptcy case. Both parties were non-Debtors, the indemnification claim could not be said to have any effect on Debtor's estate or the underlying bankruptcy case, the unjust enrichment and conduit claims were likewise unrelated because they were simply additional theories to obtain the same relief sought by indemnification, and the setoff claim was even more remote, as it was not an independent claim but was dependent upon success under one of the first three counts. Ultimately, the third-party complaint was about the rights created under defendant's divorce decree, which presented a complex issue under state law that was better left to the interpretation of the state divorce court.

(5985) *French v. Johnson Law Group,* 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Court lacks jurisdiction to enter final judgment in action

brought by Chapter 7 Trustee against law firm that allegedly agreed to provide pre-petition debt settlement services without compliance with Section 526. Action is core proceeding as it involves substantive rights created by the bankruptcy code. Ancillary state law claims for breach of contract, unjust enrichment and fraudulent misrepresentation became property of estate when case was filed and were related to the bankruptcy case as any recovery would be an asset available for distribution to creditors, but are not core proceedings as they do not invoke a substantive right created under the code. Court may not enter final judgment on related but non-core claims. In light of interrelatedness of claims, court would submit entire matter to district court on proposed findings of fact and conclusions of law.

(5986) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.,* 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized Debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized Debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be "related to" the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.

(5987) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.,* Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Core proceedings include matters arising under Title 11, which is the bankruptcy petition itself; civil proceedings arising in a case under title 11, which are those created or determined by a statutory provision of title 11; and proceedings "arising in" a case under title 11, which are proceedings that by their very nature could only arise in the bankruptcy and cannot exist outside the bankruptcy. "Related to" proceedings are those that could conceivable have an effect on the estate being administered. Action is related to if the outcome could alter the Debtor's rights, liabilities, options or freedom of action in a way that impacts case administration. Cause of action based on state law that seeks damages from Debtor is not "core" where plaintiff does not assert claim in the bankruptcy case; or where plaintiff files proof of claim reserving right to withdraw proof of claim upon remand. Plaintiff's non-core proceedings which sought entry of monetary judgment against Debtor could conceivable affect the administration of the case even where Plaintiff has agreed that it seeks recovery solely against a guarantor and would not recovery from the estate, rusting in non-core proceedings that are "related to" the estate. Count of complaint that sought recovery from guarantor only is non-core and cannot have any impact on administration of estate, such that non-core proceeding is not related to.

(5988) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Action for contempt based on alleged violation of discharge injunction is clear "core" proceeding over which Court has subject matter jurisdiction. Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of Debtor's civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not "related to". Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.

(5989) *McKinstry v. Sergent,* 442 B.R. 567 (E.D. Ky. 2011) – Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were "related to" bankruptcy for purposes of jurisdiction. "Related to" jurisdiction exists even after confirmation of Chapter 11 Plan where claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.

(5990) *Uber v. Nelnet, Inc.,* 443 BR 500 (Bankr. S.D. Ohio 2011) – Core proceedings include: 1) those "arising under title 11" such as causes of action created or determined by a statutory provision of the Bankruptcy Code; and 2) "arising in" proceedings which are those that, by their very nature, could arise only in bankruptcy cases. A bankruptcy court is vested with full judicial power to hear and decide core proceedings pursuant to 28 U.S.C. § 157(b)(1). A non-core proceeding is one that does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of ... bankruptcy but may still be related to bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy or could alter the Debtors' rights, liabilities, options or freedom of action. Bankruptcy court has jurisdiction to hear non-core but "related to" proceedings, its powers are limited to submission of proposed findings of fact and conclusions of law to the district court for de novo review. Debtor's complaint against student lender for declaratory relief regarding amounts accruing post-petition on non-dischargeable loan exceeds court's jurisdiction. All issues arise under non-bankruptcy law and outcome will not have any impact on administration of Debtor's case. However, Court does have jurisdiction to determine whether creditor properly accounted for all sums paid to it through the Chapter 13 plan as efforts to collect sums paid through plan would constitute violation of terms of confirmed plan.

(5991) *LaVoie v. LaVoie,* 2011 WL 2464169 (Bankr. W.D. Mi. 2011) – Bankruptcy Court has jurisdiction to consider adversary proceeding for violation of discharge injunction. Action is core proceeding as it involves administration of the case and is an action created or determined by a provision of Title 11.

(5992) *McTevia & Associates, LLC v. United States Debt Recovery III, LP,* 446 BR 808 (E.D. Mi. 2011) – Bankruptcy Court retains jurisdiction post-confirmation of Chapter 11 plan to resolve disputes concerning claims that were included in confirmed plan. Creditor's claim was traceable to terms of confirmed plan that called for collection of assets by liquidating trustee and payment to creditor. As long as bankruptcy case remained open post-confirmation, Bankruptcy Court retained jurisdiction to enforce terms of plan. Action asserting breach of contract arising out of confirmed plan is core proceeding. Once bankruptcy case is closed, however, Court would lose jurisdiction over actions and parties would be left to non-bankruptcy remedies for breach of the confirmed plan.

(5993) *Swain v. U.S.,* 2010 WL 3832046 (Bankr. E.D. Mi. 2010) – Court has subject matter jurisdiction over actions that arise in, arise under or are related to a case under Title 11. "Arising under Title 11" refers to the bankruptcy petition itself under Sections 301, 302 and 303. "Arising Under" refers to those proceedings that involve a cause of action created or determined by a statutory provision of Title 11 and could arise only in bankruptcy. "Related to" means that the outcome of the proceeding could conceivably have an effect on the estate being administered. Debtor's action to determine validity, priority and extent of Debtor's liability to the Internal Revenue Service was statutory proceeding under the Internal Revenue Code and, at best, is "related to". However, action could not have any impact on the bankruptcy case where the parties already stipulated that to the extent liability existed, it was non-dischargeable; and only issue remaining

was whether there was a liability. Outcome of litigation was immaterial as the case involved an insolvent estate and the existence and amount of the debt, admitted to be non-dischargeable, could not in any way impact the administration of the estate or the validity or scope of the discharge. Case dismissed.

(5994) *Baker v. Simpson,* 2010 WL 2977329 (2d Cir. 2010) – Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action "arising in" the bankruptcy case over which Bankruptcy court had exclusive jurisdiction. The fact that the "origin" of the claims was found in state law is not dispositive where claims that appear to be based in state law are really an extension of the proceedings already before the bankruptcy court. Professional malpractice claims alleged were "inseparable from the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.

12.4 Personal Jurisdiction Over Defendant – "Minimum Contacts"

(5995) *Kasolas v. Yau,* Case No. 18-4012 (Bankr. N.D. Ca. 2018) – Specific Personal Jurisdiction over nonresident defendant exists where defendant purposely directed activities at forum and litigation results from injuries arising out of forum. Plaintiff must prove that defendant did some act or consummated transaction in forum by which defendant purposely availed himself of privilege of conducting activities in forum; claim must arise out of or result from defendant's forum-related activities; and exercise of jurisdiction must be "reasonable". Defendant, a resident of Hong Kong, subject to personal jurisdiction in adversary proceeding alleging fraudulent transfer where defendant purchased and received several hundred thousand dollars in wine over Internet purchase from Debtor that ultimately proved to be Ponzi scheme. Defendant purposely availed himself of privilege of conducting activities in California by consummating many transactions by which defendant purchased goods from Debtor in California. Exercise of jurisdiction in California not unreasonable where defendant had shown himself capable of hiring California counsel; traveled to California several times each year to visit family; and it was "unlikely" that defendant might be required to appear in Court. Burden on Trustee to sue in Hong Kong would be manifestly greater and may require separate lawsuits in jurisdictions all over the world.

(5996) *Fitzpatrick v. Law Solutions Chicago, LLC,* 2018 WL 1413180 (E.D. Tn. 2018) – Personal jurisdiction of Bankruptcy Court requires (1) defendant must be properly served pursuant to Rule 7004; (2) case arises in, arises under, or is related to case under Bankruptcy Code; and (3) exercise of jurisdiction is consistent with Constitution and laws of United States. "Minimum contacts" standard of *International Shoe* do not apply where basis of jurisdiction is not diversity of citizenship but rather arises from Statutory power of Bankruptcy Court to exercise nationwide jurisdiction, subject only to whether defendant has sufficient contacts with United States, and not any particular state or forum. Court has jurisdiction over defendants who resided in Chicago where action was brought in Bankruptcy Case. Defendants all live and work in Illinois, creating clear minimum contacts with United States to support jurisdiction.

(5997) *Farinash v. UpRight Law, LLC,* 2017 WL 5499714 (Bankr. E.D. Tn. 2017) – Minimum contacts standard articulated in *International Shoe* applies only to courts sitting in diversity where service is obtained through state long-arm service of process statute. Minimum contacts standard does not apply to action where service of process is effected pursuant to federal statute which provides for nationwide service of process. Bankruptcy Court's ability to exercise personal jurisdiction requires (1) service of process in accordance with Rule 7004; (2) the action is case under Code, arises under Code, or arises in or is related to case under the Code; and (3) exercise of jurisdiction is consistent with Constitution and laws of United States. Plaintiff served Defendant by US Mail as required by Rule 7004. Proceeding was related to bankruptcy case as action related to Defendant's conduct in providing bankruptcy assistance to Debtor that ultimately led to bankruptcy filing. Defendant's actions may constitute unauthorized practice of law which implicates administration of bankruptcy case. Outcome of proceeding could have impact on estate as any recovery by Trustee would augment Bankruptcy Estate. There is no Constitutional impediment as rules allowing nationwide service of process do not implicate minimum contact standard as long as Defendant has contact with the United States. Defendant was resident of Illinois, creating sufficient contacts with United States to support nationwide jurisdiction.

(5998) *Redhawk Global, LLC v. World Projects International,* 2013 WL 2948383 (S.D. Ohio 2013) – Federal Court exercising federal question jurisdiction may exercise personal jurisdiction over any person located within, or who has minimum contacts with, the United States. Unlike State Court jurisdiction which would be applicable in diversity jurisdiction case, under federal question jurisdiction, defendant does not need to have had minimum contacts with specific forum for purposes of due process. Although defendant never did business in Ohio and arguably did not have "minimum contacts" with Ohio, that was not relevant to action brought in Bankruptcy court where Rule 7004 allows for nationwide exercise of jurisdiction. Bankruptcy Rules apply where action is one brought "under Title 11". Action is brought "under Title 11" if the bankruptcy code created the cause of action or if the action is determined by statutory provision of bankruptcy code. Action is "related to" title 11 if the outcome could have some conceivable effect on case administration. Complaint was brought under title 11 where majority of counts sought recovery under provisions of bankruptcy code including avoidance of preferential and fraudulent transfers and remaining counts were "related to" as involving counts that would affect assets and liabilities of Debtor.

(5999) *Steed v. Buckalew,* 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – Personal jurisdiction is a three-part test, requiring (1) proper service, (2) subject matter jurisdiction, and (3) consistency with other legal limits on the exercise of jurisdiction. Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail. To determine whether Defendant has sufficient minimum contacts with the forum, in a "federal question" case the issue focuses on whether the Defendant had minimum contacts with the United States as a whole, not whether the Defendant had minimum contacts with the particular state in which the federal court sits. Defendant who resided in Florida indisputably had minimum contacts with the United States and could be sued in Tennessee Bankruptcy Court in action under Section 548.

(6000) *Simon v. ASIMCO Technologies, Inc.,* 410 BR 765 (Bankr. E.D. Mi. 2009) – Court can assert personal jurisdiction over defendant only to the extent due process permits. Non-resident defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; the cause of action must arise from the defendant's activities there; and the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Corporate Defendant's actions in convening board meetings in the United States at which

affairs of company were decided constitutes "purposeful availment" of rights and privileges of conducting business in United States. Complaint alleged causes of action based expressly on policies approved and enacted at board meeting alleged sufficient causal connection between actions and forum to support jurisdiction and creates sufficient nexus between action and forum to make exercise of jurisdiction reasonable.

12.5 Personal Jurisdiction Over Defendant – Forum Selection Clauses

(6001) *Lipscomb v. Clarivest Equity Partners, LP,* Case No. 15-51069 (Bankr. D. Del. 2016) – While forum selection clauses that are freely bargained for are presumed to be enforceable, court can decline to enforce clause where defendants are sued who are not covered by forum selection clause but against whom causes of action turn on some of the same facts as claims against the defendant with the forum selection clause right. Creditor's trust sued Debtor's lender and more than a dozen different defendants for breach of contract and aiding and abetting the other defendants in breach of fiduciary duties. Contract between lender and Debtor that was basis of breach of contract claim contained forum selection clause between Debtor and bank. Lender requested that bankruptcy court sever breach of contact action and transfer it to designated forum. Recognizing that court must enforce forum selection clauses in all but most exceptional circumstances, court held that because forum selection clause did not encompass aiding and abetting claims and the claims were so intertwined and interrelated that severance was not practical and would be inconsistent with judicial economy as well as interest of other defendants.

(6002) *Chinook USA, Inc. v. Duck Commander, Inc.,* 2016 WL 110594 (W.D. Ky. 2016) – To determine validity of forum selection clause, court must first determine whether a valid clause exists, taking into consideration whether the clause was obtained by fraud, duress or other unconscionable means; whether designated forum would be ineffective or unfair; and whether designated forum would be so inconvenient as to be unjust. Plaintiff's argument that designated forum would be unfair "because of the views of Louisiana citizens" was intellectually dishonest, logically flawed and needlessly offensive. Whether defendant had some economic position in the designated forum was known when clause was executed, and alleged economic power alone is not basis to conclude that forum is incapable of a fair trial. Defendant was amenable to suit in designated forum as its principal place of business and designated forum provided adequate and satisfactory forum for resolution. Forum selection clause which required resolution of all disputes in Louisiana was bargained for and protected legitimate interests and expectations of parties. Public interest also supported enforcement of clause, taking into account court congestion, local interest in the matter, interest in having the trial in the forum whose law governs, and burden on local citizens with jury duty.

(6003) *I.E. Liquidation, Inc. v. Litostroj Hydro, Inc.,* 2015 WL 5307446 (Bankr. N.D. Ohio 2015) – Otherwise valid and enforceable forum selection clause will be enforced in adversary proceeding unless extraordinary circumstances unrelated to convenience of parties clearly disfavors transfer. Where the contract contains a forum selection clause, the plaintiff's choice of forum merits no weight and all private interest factors are deemed to weigh in favor of enforcement of clause. Court may consider public interest factors including enforceability of any judgment rendered by another court, administrative burden of piling up litigation in congested courts, the burden of imposing jury duty on members of a community with little relation to the litigation, the interest of a community in having localized controversies litigated locally, and the appropriateness of trying diversity cases in a forum most at home with the governing law. Forum selection clause designated Canada as correct forum. Court congestion slightly favored US forum as case had already been pending in Canada for years and while ready for trial likely would not be tried for another 5 years while trial in US would be far quicker. Litigation costs strongly favored Canada as case has been pending in Canada for years and transfer back to US would greatly increase costs and produce duplicate expenses. Both Canada and US had substantial interest in litigation as one party was US Corporation and other party was Canadian Corporation and forum selection clause appeared to require application of Canadian law and Canadian Courts would be far better able to apply Canadian law. Transfer to US would produce possibility of additional litigation regarding enforcement of US judgment in Canada.

(6004) *Icenhower v. Diaz-Barba,* 22014 WL 3978491 (9th Cir. 2014) – Bankruptcy Court can decline to enforce forum selection clause if enforcement would contravene strong public policy of the forum in which the case is brought. Bankruptcy Code has primary purpose of centralizing all litigation regarding Debtor's assets and legal obligations such that Bankruptcy Court will decline to honor contractual forum selection clause in core proceedings. Court declined to enforce forum selection clause in action to avoid post-petition transfer of property of estate.

(6005) *Price v. PBG Hourly Pension Plan,* 921 F.Supp.2d 764 (E.D. Mi. 2013) – Contractual forum selection clauses are to be enforced absent strong showing that clause was either obtained by fraud, duress or unconscionable means; designated forum would ineffectively or unfairly handle suit; or designated forum would be so seriously inconvenient that requiring plaintiff to bring suit there would be unjust. Labor contract between employer and union that included forum selection clause indicated that clause was not procured by fraud but through negotiations of terms with union; designated forum, Southern District of New York, could effectively and fairly handle action; and litigating in New York was not so onerous where both parties had adequate resources to fund litigation in New York versus Michigan.

(6006) *KFC Corp. v. Wagstaff,* 2013 WL 3166165 (W.D. Ky. 2013) – Party to contract may waive its right to challenge personal jurisdiction by consenting to personal jurisdiction through forum selection clause. Forum selection clauses are prima facie valid and are one way in which contracting parties agree in advance to jurisdiction of particular court. Forum Selection clauses will be disregarded only where enforcement is fundamentally unfair or unreasonable, such as where the clause results from fraud, undue influence or overwhelming bargaining power. Guarantor of note can be held to forum selection clause in note where guarantee obligates guarantor to "full payment, performance and observation" of all agreements in the note. However, where guarantee covers only "prompt payment when due" of sums under the note, the guarantor is not bound by a forum selection clause in the note but not in the guarantee itself. Further, note and guarantees were not signed at same time, evidencing a lack of integration between the note and the guarantee.

12.6 Third Party Complaint

(6007) *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. Court can exercise supplemental

jurisdiction under 28 USC 1367 even where federal court would not normally have jurisdiction had third party complaint been filed as separate lawsuit. Jurisdiction is proper as long as initial complaint properly invoked jurisdiction and other claims are so related as to from part of same case or controversy. Third party complaint was part of same case or controversy as main action where property owners asked for determination of rights and interests of parties in property which necessarily requires determination as to whether property was correctly foreclosed and relative priorities of liens on property, which are common facts to main complaint that sought determination as to proper party to receive proceeds of sale.

12.7 Diversity Jurisdiction – Generally

(6008) *Podewell v. Vandenberg,* 2016 WL 6927457 (W.D. Mi. 2016) – Diversity jurisdiction requires complete diversity between all plaintiffs and all defendants. Complaint failed to demonstrate diversity jurisdiction where complaint did not address diversity at all and civil cover sheet demonstrated that plaintiff and at least one defendant were residents of state of Michigan.

(6009) *MetLife Securities, Inc. v. Holt,* 2016 WL 3964459 (E.D. Tn. 2016) – Federal court is able to exercise diversity jurisdiction over an action only if no plaintiff and no defendant are citizens of the same state and the amount in controversy is more than $75,000 exclusive of interest and costs. All parties' citizenships must be such that complete diversity can be confirmed. When a party to a suit is a corporation, the pleading must contain both the corporation's place of incorporation and its principal place of business, each of which constitutes a state of citizenship for the corporation. Amount-in-controversy requirement requires good-faith allegation that the amount in controversy exceeds $75,000 unless it is obvious from face of pleadings that the suit cannot involve sufficient amount based on the pleading's face. Complaint adequately plead diversity by alleging that corporate plaintiff was incorporated and had principal place of business in state other than that in which defendant was resident. Amount in controversy met where suit involved alleged loss of more than $1.9 million coupled with settlement demand of $3 million. Based on figures stated in the pleadings, it is "not obvious" that actual amount is less than $75,000.00.

12.8 Diversity Jurisdiction- Interpleader

(6010) *UBS Financial Services, Inc. v. Kaufman,* 2016 WL 3199535 (W.D. Ky. 2016) – Interpleader action requires "minimal diversity", requiring that any two adverse claimants have diverse citizenship. Citizenship of party commencing action is not considered where party filing action is disinterested stakeholder. Defendants were not adverse where individual defendants were residents of Kentucky and corporate defendant was Kentucky corporation. While stakeholder justifiably fears double liability if it pays wrong person, stakeholder does not deny that it is liable to someone for payment of funds, and asks only that funds be paid into court and that plaintiff be dismissed, allowing defendants to file competing claims Absent diversity of any of the competing claimants, court lacked subject matter jurisdiction.

(6011) *Watson v. Cartee,* 2016 WL 1084764 (6th Cir. 2016) – District Court has jurisdiction over any action contesting a fund of $500 or more if two or more of the adverse claimants are of diverse citizenship. Surplus proceeds from foreclosure sale exceeded $500. "Minimal diversity" requires diversity only of two or more claimants, without regard to whether other claimants are also diverse or are co-citizens.

12.9 Supplemental Jurisdiction

(6012) *Bowers v. Ophthalmology Group, LLP,* 2016 WL 2849289 (6th Cir. 2016) – Federal Court can retain jurisdiction over pendant State Court claims after dismissal of federal causes of action where doing so is in the interest of judicial economy. Presumption is that upon dismissal of federal counts, such that the remaining counts leave on basis of federal jurisdiction, case should be remanded to State Court if action was originally removed, or dismissing outright if no State Court action predated removal. District Court correctly declined to exercise supplemental jurisdiction where retaining jurisdiction would not further judicial economy, as State Court action was well developed while federal court proceedings were still in infancy.

(6013) *UBS Financial Services, Inc. v. Kaufman,* 2016 WL 3199535 (W.D. Ky. 2016) – Supplemental jurisdiction allows court having original jurisdiction over action to exercise jurisdiction over all other claims that are so related that they form part of same case or controversy, but over which court would not have jurisdiction had actions been brought intendent of main action. Where court determines that it is without jurisdiction over main action, court must dismiss actions brought under "supplemental jurisdiction".

(6014) *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.

12.10 Jurisdiction – US Claims Court

(6015) *Milgroom v. U.S.,* Case No. 2015-5145 (Fed. Ct. App. 2016) – US Claims Court is court of limited jurisdiction and can only address claims against United States for money damages based on substantive law that fairly mandates monetary compensation. Claims under Fourth Amendment, Due Process Clause of Fifth Amendment, and Tenth Amendment are not tied to money-mandating statues or provisions of law or contract with the United States. Claims based on takings clause of Fifth Amendment are within scope of Claims Court jurisdiction if Plaintiff acknowledges validity of government action which is basis for claim and only issue is compensation. However, plaintiff sought to recover damages from United States based on judgment entered in separate actions by State Court and by United States District Court and judgments themselves were not appealed. Plaintiff was attempting to use Claims Court to review and collaterally attack State and District Court judgments. Claims Court lacks jurisdiction to review judgments of other courts or to pass on validity or correctness of those judgments. Although plaintiff attempted to couch action in terms of taking, actions resulted from collection efforts undertaken to enforce District Court judgment and necessarily called on Claims Court to second guess District Court.

12.11 Jurisdiction – Fannie Mae

(6016) *Lightfoot v. Cendant Mortgage Corp.,* ___ U.S. ___, 137 S.Ct. 553, 2017 WL 182911 (2017) – "Sue-or-be-sued" clause in Fannie Mae Charter provides for Fannie Mae to have authority to sue and can be sued in any State or Federal Court of competent jurisdiction. Clause does not grant jurisdiction to Federal Courts in actions against Fannie Mae. Clause is not independent grant of jurisdiction to Federal Court. Action cannot be removed to Federal Court based solely on clause in Fannie Mae charter as inclusion in charter does not create federal question. Action can be removed to federal Court only if there is independent basis to remove action under 28 USC Section 1441 and must be remanded to State Court for lack of federal jurisdiction.

12.12 Limitations on Jurisdiction – Probate Exception

(6017) *Parker v. Horvath,* 2017 WL 3707325 (Bankr. N.D. Ohio 2017) – "Probate exception" to Federal Jurisdiction allows Federal Court to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish claims so long as the Federal Court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. Federal Court may not exercise its jurisdiction to disturb or affect possession of property in the custody of a state court, but *may adjudicate rights in property* as long as Final Judgment does not interfere with State Court's possession of the property except to extent that State Court is bound by Federal Court judgment. Exception is limited to three narrow circumstances: (1) plaintiff seeks to probate a will; (2) plaintiff seeks to annul a will; or (3) plaintiff seeks to reach *res* over which State Court has custody. Probate exception did not prevent Bankruptcy Court for determining title to assets owned by Decedent or in determining Debtor's ownership of those assets where decedent has died 12 years earlier yet nobody sought to open an estate. In subsequent State Court litigation, State Court entered Order determining ownership of assets and since commencement of Bankruptcy, Bankruptcy Court has exercised exclusive jurisdiction over property estate. Probate Court action was not brought and Probate Court was not asked to assert jurisdiction until years after commencement of Bankruptcy as assumption by Bankruptcy Court of jurisdiction over assets. Further, Bankruptcy Court's Orders determining ownership would prevent Probate Court from collaterally attacking determination of ownership of assets, as 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. Neither prior State Court Judgment nor Bankruptcy Court Judgments determining title to property were "void" for lack of jurisdiction under Rule 60(b)(4), which requires that judgment, from its inception, that was complete nullity and without legal effect, and is narrowly construed and does not include a judgment that is merely erroneous. 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.

(6018) *Banfield v. Gentry,* 2016 WL 4061248 (E.D. Mi. 2016) – "Probate exception" precludes Federal Court from exercising jurisdiction over state probate matters even where Federal Court otherwise has jurisdiction. Federal Court cannot rule on issues regarding the trust *res* under the custody of a state probate court. Probate exception does not bar federal courts from adjudicating matters *outside* those confines and otherwise within federal jurisdiction, such as ort claim where the claimant seeks only an *in personam* judgment, not the probate or annulment of a will. Complaint that sought to surcharge prior Trustee of Testamentary Trust for alleged breach of trust, and to compel an accounting and turnover by former Trustee clearly involved *res* of Trust and are supplemental to administration of trust and fall squarely within probate exception. Resolution of breach of trust action requires court to look to the trust instrument to determine the powers and duties of trustees and the settlor's intent regarding the purpose of the trust's creation and its operation. Under Michigan law, the probate courts have exclusive jurisdiction to determine whether the trustee breached the trust instrument and whether the trustee must be removed or account to the beneficiaries of the two Trusts. The Breach of Trust claims by the beneficiaries are not tort claims outside the realm of the Trust instruments which are before the probate court. The beneficiaries' claims against Trustee in the petition filed before the probate court do not allege tort claims against Trustee, only that Trustee breached the two Trusts at issue, which necessarily means interpreting the language of the two Trusts. Michigan law provides that the probate court has exclusive jurisdiction over the settlement of the trusts and the rights involving the trusts, trustees and the beneficiaries. Further, any supplemental issues regarding administration of trust or surcharge or damages would require returning assets or payment of damages to the Trust, not to the individual beneficiaries, and the *res* of the Trust is clearly at issue, bringing matter squarely within scope of probate exception that cannot be raised or adjudicated in Federal Court. State Court action removed to Bankruptcy Court remanded to State Court.

(6019) *Kiser v. Olsen,* 2015 WL 507496 (E.D. Ohio 2015) – Probate exception to Federal Court jurisdiction does not extend to disputes regarding inter vivos trusts, even if trust was intended to act as "will substitute".

(6020) *Meoli v. Thrun,* Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Federal courts routinely resolve issues involving trusts and trustees notwithstanding probate exception to jurisdiction. Probate exception to federal jurisdiction does not apply where there is no probate proceeding pending in which a probate court has custody or jurisdiction over the Trust *res*.

(6021) *In re Brown,* 484 BR 322 (Bankr. E.D. Ky. 2012) – Under "probate" exception to Federal Jurisdiction, Bankruptcy Court lacked jurisdiction to approve settlement to extent that settlement provided that new will prepared by Debtor for her husband would be invalid. Probate exception precludes federal court from exercising jurisdiction over probate or annulment of a will or administration of decedent's estate. Declaratory relief requested finding that new will was enforceable and valid and that Debtor was entitled to take property as beneficiary of new will. Relief falls squarely into prohibition against federal court taking action to annul a will.

12.13 Limitations on Jurisdiction – FIRREA

(6022) *SMS Financial JDC, LP v. Cope,* Case No. 16-6063 (10th Cir. 2017) – A lack of valid reaffirmation agreement renders underlying obligation void, not merely voidable. Improperly reaffirmed debt is not subject to ratification as Bankruptcy Court approval is required before entry of discharge. FDIC could not use *Doench Duhme* doctrine to avoid effect of in valid reaffirmation agreement. *Doench* applies where there is an otherwise enforceable agreement and borrower is relying on agreements allegedly reached between bank and borrower that are not in banks books and records and were not made according to proper bank procedure. Although Debtor attempted to reaffirm debt by signing

note allegedly reaffirming obligation, reaffirmation was never presented to Bankruptcy Court and was never approved by Court. *D'Oench* cannot be used to breathe life into void agreements notwithstanding that lender held signed note "reaffirming" debt and there was no indication in bank records that reaffirmation had not taken place.

(6023) *National Credit Union Board v. Zovkic,* 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) and Section 523(a)(2)(B) require reliance as element of recovery. *D'Oench Duhme* doctrine and 12 USC Section 1787(p)(2) provide that no agreement is enforceable against liquidator of insolvent financial institution unless agreement is in writing and signed by representative of institution and approved by institution's board of directors and included in official records of institution. Neither *D'Oench* nor Section 1787 excuses liquidating agent from proving that institution relied on false statements for purposes of non-dischargeability.

(6024) *Brandt v. FDIC,* Case No. 11-2215 (Bankr. E.D. Ill. 2016) – FDIC stands in shoes of failed financial institution for purposes of administering the assets of the failed bank. Complaint seeking to recover allegedly fraudulent transfers to bank by Debtor barred by *D'Oench Duhme* and 12 USC Section 1823(e). FDIC cannot be liable for secret side agreements or any unrecorded or secret agreement not contained in records of bank. Scope of "agreements" that cannot be enforced is broad and includes not only misrepresentations but also omissions, promises to perform, and fraudulent misrepresentations or warranties; and includes schemes and arrangements including outright misrepresentations and misleading half-truths. The only relevant question is whether the agreement or representation is contained in the books and records of the institution. Trustee's attempt to recover funds based on alleged fraudulent scheme between Debtor and equipment financing company that resulted in loans from bank and subsequent repayments. Entire cause of action was predicated on secret agreement between equipment seller/lessee and equipment buyer/lessor to falsify sale-leaseback transactions included secret agreement between seller and buyer to falsify records and obtain financing for nonexistent transactions, agreements that were not disclosed in records of bank. Fact that bank was not party to fraudulent scheme did not limit FDICs defense as alleged scheme was being asserted to diminish or defeat FDIC's right, title and interest in the funds now sought to be recovered by Trustee. Scheme was one by which the institution itself was likely to be misled and were not in writing, executed by bank, or approved by board of directors of bank.

(6025) *Sicherman v. National Credit Union Administration Board,* 2015 WL 4430423 (N.D. Ohio 2015) – Financial Institution Reform, Recovery, and Enforcement Act ("FIRREA") overrides Bankruptcy Court jurisdiction over property that the Trustee contends is property of the estate. NCUA Board is charged with placing insolvent or undercapitalized credit unions in conservatorship or liquidation and succeeds to all right, title, power and privilege of the credit union. Where credit union is placed into receivership before Debtor files bankruptcy, any disputes between Debtor or trustee and credit union regarding validity, priority or extent of liens must be resolved by FIRREA provisions. Bankruptcy Court lacks jurisdiction to adjudicate any claim or action for payment from credit union or any action seeking to determine rights with respect to assets of credit union. Adversary seeking to invalidate lien held by credit union is action to determine rights to asset of failed credit union over which exclusive jurisdiction is vested in NCUAB.

12.14 Limitations – *Rooker-Feldman*

(6026) *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.

(6027) *Hake v. Simpson,* 2018 WL 3973098 (S.D. Ohio 2018), *Notice of Appeal filed,* (6th Cir. 2018) – *Rooker-Feldman* is based on principle that federal trial courts have only original subject matter, and not appellate, jurisdiction and cannot entertain actions which amount to appellate review of State Court judgment. Party losing case in state Court is barred from seeking what in substance would be appellate review of State judgment. Complaint alleging wrongful foreclosure was based on arguments already presented to state Court and rejected on multiple occasions. Every claim in complaint would in effect overturn orders of State Court requiring dismissal of action.

(6028) *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 Sate Court specified interest rate in judgment or adjudicating correctness or propriety of Writ itself.

(6029) *Isaacs v. DBI-ASG Coinvestor Fund III, LLC,* 2018 WL 3453360 (6th Cir. 2018) - *Rooker-Feldman* doctrine prevents Federal Court from acting as Court of Appeals for state Court judgment. Doctrine is applied on a "claim-by-claim" basis. State Court Judgment of foreclosure precluded later Bankruptcy Court consideration of whether mortgage was enforceable as relief effectively asks Bankruptcy Court to vacate State Court judgment and clearly identifies State Court judgment as source of plaintiff's injury. Bankruptcy Court would be required to reach conclusion precisely opposite from that reached by State Court on issue of whether mortgage lien attached. However, Rooker-Feldman does not preclude bankruptcy courts use of Section 544 "Strong-arm" power to avoid mortgage that was not perfected. Issue of whether mortgage is unperfected and avoidable is separate from issue of whether mortgage was valid in first instance. Determining avoidability under Section 544 does not require Court to review State Court conclusion that mortgage was valid as mortgage can be avoided even assuming that State Court correctly determined that mortgage constituted valid lien on real estate. State Court order made no findings regarding perfection as none were necessary to State Court judgment.

(6030) *In re Wigger,* 2018 WL 2759385 (Bankr. W.D. Mi. 2018) – Bankruptcy Court lacks jurisdiction to set aside State Court Order awarding State Treasurer lien on Debtor's property pursuant to State Correctional Facility Reimbursement Act. Lower Federal Courts have no authority to modify orders of State Courts, leaving Bankruptcy Court with no authority to rescind or modify State Court Order. However, Bankruptcy

Court does have authority to modify property interests or claims including determining validity, priority and extent of liens and interest in property in a properly filed adversary proceeding.

(6031) *White v. Corcoran,* Case No. 17-13810 (E.D. Mi. 2018) – *Rooker-Feldman* precludes losing party and state Court from seeking and federal Court what amounts to appellate review of state Court judgment. Doctrine applies even worse take Court judgment may be in error unless the state Court judgment was procured through fraud, deception, accident or mistake. State Court correctly entered dismissal of litigation with prejudice based on settlement agreement between Chapter 7 Trustee and defendant agreed to as part of creditors agreement to accept less than the full amount of the debt in exchange for allowing Chapter 7 Trustee to sell property. There was no evidence that state Court order dismissing litigation was procured through fraud, deception, accident or mistake but was, instead, the implementation of a Bankruptcy Court approved the settlement.

(6032) *Green v. Halbleib,* 2018 WL 1997766 (W.D. Ky. 2018) – *Rooker-Feldman* doctrine prohibits federal district courts from reviewing state court decisions and orders. Court must determine whether federal claim is inextricably intertwined with state court judgment such that federal claim succeeds only to extent state court wrongfully decided issues before it. Doctrine does not prevent action based on conduct of parties during prior litigation even if outcome would undermine state court judgment itself, as action is not direct attack on validity of State Court order. Court lacked jurisdiction where Complaint challenged certain State Court decisions in foreclosure proceedings such as applicability of statute of limitations Plaintiff was challenging state court decisions and orders related to foreclosure proceedings rather than Defendants' alleged misconduct throughout the proceedings.

(6033) *Jodway v. Orlans, PC,* 2018 WL 1570303 (E.D. Mi. 2018) – *Rooker-Feldman* doctrine does not stop Federal Court from exercising subject-matter jurisdiction simply because party attempts to litigate in federal court matter previously litigated in state court. Federal courts are precluded from exercising appellate jurisdiction over final state-court judgments but if plaintiff presents independent claim *Rooker-Feldman* does not prevent Court from exercising jurisdiction even if claim denies a legal conclusion that state court reached in case to which Plaintiff was party. Debtors' action not precluded where Debtors were not alleging harm from the state court judgment regarding foreclosure, but rather from Defendants' purportedly unlawful conduct that caused the state court decision in foreclosure case.

(6034) *Lancaster v. Educational Finance Services,* 2017 WL 7310273 (W.D. Mi. 2017) – *Rooker-Feldman* does not prevent Federal Court from exercising jurisdiction over state court judgment allegedly entered in violation of discharge injunction. Debtor's action alleging that Creditor violated discharge injunction by seeking entry of judgment in state court not barred by *Rooker-Feldman*. Appeal based on alleged violation Rooker-Feld man did not state any substantial ground for difference of option for purposes of interlocutory appeal.

(6035) *Jodway v. Fifth Third Bank,* 2018 WL 300438 (6th Cir. 2018) – *Rooker-Feldman* prevents Bankruptcy Court from reviewing and rejecting state court judgments. Bankruptcy Court's Order dismissing Debtor's Chapter 13 Case based on material non-compliance did not implicate State Court Order staying foreclosure proceedings.

(6036) *Sullen v. Bray,* 2017 WL 4777056 (N.D. Ohio 2017) – *Rooker-Feldman* doctrine prohibits federal court from sitting as court of appeals to review state court rulings. Even party raising a federal question must appeal state court decision through state system and directly to U.S. Supreme Court. Doctrine applies where case is brought by party who lost in state court and complains of injuries caused by the state court judgment. If source of plaintiff's injury is state court judgment itself, then *Rooker-Feldman* doctrine prevents district court from asserting jurisdiction. If there is some other source of injury, then plaintiff has asserted an independent claim. Plaintiff's action challenged mortgage holder's to bring foreclosure action; requests that District Court vacate and reverse state court orders or rulings; requests that District Court rescind foreclosure sale and declare the Mortgage, Note and assignment void; and requests that District Court enjoin sale of Property and declare that Plaintiff is rightful owner of Property. Source of injury are the state court rulings and judgment of foreclosure, *Rooker-Feldman* doctrine bars litigation of case.

(6037) *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.

(6038) *Jackson v. US Bank, NA,* 2017 WL 4011145 (W.D. Mi 2017) – *Rooker-Feldman* doctrine prevents Federal Court for asserting jurisdiction in case brought by state-court loser complaining of injuries caused by State Court judgment rendered before Federal Court proceedings commenced and inviting Federal Court to review and rejection of State Court judgment. Pertinent inquiry is the "source of the injury" upon which plaintiff bases federal claim. If source of injury is State Court decision, the *Rooker-Feldman* doctrine prevents Federal Court from asserting jurisdiction. If there is some other source of injury, such as third party's actions, then plaintiff asserts an independent claim. Bankruptcy Court lacked subject matter jurisdiction to award Plaintiff possession of home that had been foreclosed and State Court had already approved foreclosure action and entered separate Order awarding possession of property to Defendant as successful purchaser at sale. Plaintiff's complaint sought to regain possession of property over which State Court had already entered Order awarding possession to Defendant, and Plaintiff's Complaint necessarily sought to have Federal Court overturn the State Court Order.

(6039) *Isaacs v. DBI-ASG Coinvester Fund III, LLC,* Case No. 16-8041 (6th Cir. BAP 2017) - Rooker-Feldman doctrine precludes Bankruptcy Court from avoiding State Court foreclosure judgment where mortgage was enforceable against Debtor as of commencement date of Debtor's prior Chapter 7, even if mortgage was unrecorded and, therefore, unenforceable against third parties as of that same date. Mortgage does not have to be recorded to be valid and enforceable against Debtor and mortgage "rides through" Chapter 7 proceeding on altered. Neither Debtor nor Trustee made any attempt in prior Chapter 7 case to avoid mortgage. Subsequent state Court foreclosure judgment specifically stated that mortgage was valid and enforceable lien. Relief requested by Debtor in adversary complaint necessarily would have required Bankruptcy

Court to serve as appellate capacity over State Court judgment of foreclosure or adversary proceeding site order declaring's mortgage to be avoided, to set aside the state Court judgment of foreclosure and to determine that any action to enforce mortgage was barred by statute of limitations. State Court judgment did not purport to modify discharge order as state Court foreclosure judgment purport to impose any personal liability and was limited to in rem relief.

(6040) *In re Helligrath,* 2017 WL 3173969 (Bankr. S.D. Ohio 2017) – Bankruptcy Code controls over State Law for determining priority of distribution. State Court Order that appointed receiver and directed that receiver be paid fees and costs first from the property did not control priority of distribution in Bankruptcy. Receiver was unsecured creditor and would be treated as such in bankruptcy notwithstanding State Court Judgment. Using Bankruptcy Code does not violate Full Faith and Credit clause and State Court Order is not res judicata on issue of priority in bankruptcy. *Rooker*-Feldman does not require Bankruptcy Court to follow State Court Order s Court is not determining correctness of State Court Order but merely construing Order in context of Bankruptcy Code. Further, even if res judicata could apply, issue of priority in bankruptcy is not issue that was actually and necessarily litigated or determined as part of proceeding to appoint receiver.

(6041) *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.

(6042) *Gray v. Nussbeck,* 2017 WL 2484824 (Bankr. D. Kan. 2017) – Improperly executed Reaffirmation Agreement is void and unenforceable. State Court Judgment obtained after entry of discharge based on ineffective Reaffirmation Agreement is, itself, void as violation of Discharge Injunction. *Rooker-Feldman* does not deprive Bankruptcy Court of jurisdiction to void State Court Judgment where State Court Judgment is void and a legal nullity. Although *Rooker-Feldman* precludes Federal Court from reviewing a State Court decision that is merely "wrong", there is substantial difference between "incorrect" judgment and judgment which is void.

(6043) *Underwood v. Silent,* 2017 WL 955130 (E.D. Mi. 2017) - Federal Court does not stand as appellate Court for decision of State Court. *Rooker-Feldman* prevents Federal Court from exercising jurisdiction over claim alleging error in State Court decision. *Rooker-Feldman* does not deprive Federal Court of subject matter jurisdiction. Court must determine whether complaint constitutes impermissible attack on State Court, Judgment or, instead, whether complaint asserts independent claims. Inquiry focuses on whether claim is based on State Court, Judgment or whether complaint is merely intertwined with State Court, Judgment. Federal Court action seeking to Declare State Court, Judgment void based on alleged violation of due process rights and errors in calculating damages directly implicated *Rooker-Feldman,* as plaintiff was seeking Federal Court review and rejection of State Court Judgment.

(6044) *In re Thomas,* 2017 WL 1134581 (Bankr. W.D. Tn. 2017) – *Rooker-Feldman* doctrine expresses principle that federal trial courts may not entertain appellate review or collateral attack on State Court judgment. Doctrine is broader than claim and issue preclusion because it does not depend on Final Judgment on merits.

(6045) *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.

(6046) *Kirschbaum v. Wells Fargo, NA,* 2017 WL 1190914 (E.D. Ky. 2017) – *Rooker-Feldman* precludes Federal Court from exercising appellate jurisdiction over final State-Court judgments. Doctrine does not apply where Complaint filed in Federal Court presents some independent claim even if that claim addresses legal conclusion reached by State Court. TILA Complaint seeking rescission not barred by *Rooker-Feldman* notwithstanding prior State Court foreclosure judgment where alleged injury is not State Court foreclosure judgment itself, but failure of lender to make disclosures required.

(6047) *In re Ferguson,* Case No. 14-30604 (Bankr. W.D. Mo. 2017) - State Court judgment entered by consent between creditor and Debtor does not prohibit Trustee from later objecting to claim. *Rooker-Feldman* which prohibits party to State Court, Judgment from seeking Federal Court review of correctness of judgment does not apply as Trustee was not a party to State Court lawsuit. Collateral estoppel applies only when a judgment is rendered on merits. Under Missouri law, consent judgment is not judgment on the merits as issues were not "actually litigated". Res judicata requires that parties be identical or in privity. Bankruptcy Trustee owes duty to estate and is not in privity with either Debtor or creditor, such that res judicata did not preclude Trustee's objection to claim. Trustee entitled to present evidence in support of objection to claim to show that claims should be disallowed in whole or in part.

(6048) *Zadeh v. Nelson,* 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – *Rooker-Feldman* doctrine prevents Federal Court from ruling on matter previously adjudicated by State Court where Federal Court would essentially be sitting as appellate court to review and reverse unfavorable State Court ruling. Doctrine prevents federal court action by State Court loser complaining of injuries caused by State Court judgment rendered before the federal court action commenced, and asking federal court to review the correctness of those judgments. State Courts have concurrent jurisdiction with Bankruptcy Courts to determine whether debt is excepted from discharge under Section 523(a). State Court had previously determined on multiple occasions that obligation owed by Debtor to creditor was not DSO. Action brought in Bankruptcy Court seeking to except debt from discharge blocked by *Rooker-Feldman* as any judgment by Bankruptcy Court would necessarily amount to Federal Court review of State Court judgment.

(6049) *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.

(6050) *Lnu v. Federal National Mortgage Association,* 2016 WL 4978425 (E.D. Mi. 2016) – Rooker-Feldman precluded Federal Court action where action would necessarily call into question correctness of prior judgment of State Court. Plaintiff's complaint absent defendant predicated on "Notice of Lien" recorded by plaintiff barred by Rooker-Feldman where State Court previously considered and ruled Notice of Lien to be unenforceable. Current action would require Federal Court to determine validity of Notice of Lien calling into question correctness of State Court judgment.

(6051) *In re Parsons,* 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Rooker-Feldman precludes Federal Court from assessing correctness of prior State Court judgment. Federal Court is not proper alternative to appeal of State Court judgment, where party seeking relief is merely contesting correctness of prior order. Doctrine does not apply where issue raised is one of independent federal claim. Doctrine did not preclude creditor form asserting mortgage interest in Debtor's property where prior State Court judgment, entered by default, foreclosed tax lien and declared mortgagee's interest to be removed from the property. Debtor filed bankruptcy in effort to avoid lien, clearly asserting an independent right under federal law. Neither Debtor nor creditor were seeking review of State Court judgment. Rather, Debtors were relying on judgment to improve its position in bankruptcy court. Creditor's claim that the State Court judgment is not entitled to automatically determine the lien priority issue takes the judgment as it is and does not force court to reject the judgment as wrongly decided.

(6052) *Southwest Airlines Co. v. Tidewater Finance Co.,* Case No. 15-70960 (N.D. Ga. 2016) – State Court has concurrent jurisdiction to determine applicability of stay but Bankruptcy Court has exclusive jurisdiction to grant relief from stay and State Court actions taken in in violation of stay are void. *Rooker-Feldman* doctrine does not prevent Federal court from reviewing State Court determination that stay did not apply. Stay is one of the most fundamental protections in Bankruptcy Code warranting Federal Court's exercise of jurisdiction. Bankruptcy court is not bound by State Court ruling on applicability of stay and can determine that actions of creditor violate stay even after State Court determined that stay did not apply, agreeing with Third and Ninth Circuits and disagreeing with Sixth Circuit BAP and bankruptcy courts in New York and Florida.

(6053) *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.

(6054) *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.

(6055) *Deutsche Bank National Trust Co. v. Wolf,* 2016 WL 1658775, *report and recommendations adopted,* 2016 WL 1690697 (S.D. Ohio 2016) – *Rooker-Feldman* doctrine prohibits federal court from exercising jurisdiction over action that is mere attempt to obtain federal court review of correctness of State Court judgment. Complaint challenged propriety of State Court judgment of foreclosure, claiming that State Court judge acted beyond authority in entering foreclosure judgment and that judge was not impartial. Action directly challenged correctness of State Court judgment and for which sole remedy lies in state appellate court.

(6056) *Jackson v. US Bank National Association,* 2016 WL 1211278 (Bankr. W.D. Mi. 2016) *aff'd,* 2017 WL 3981109 (W.D. Mi. 2017) – Bankruptcy court lacks jurisdiction to review propriety of State Court judgment in foreclosure action. Real estate foreclosure process is generally matter for State Court and litigant who loses in State Court cannot turn to federal courts to overturn adverse State Court rulings.

(6057) *O'Brien v. Brunner,* 2016 WL 1059683 (S.D. Ohio 2016) – *Rooker-Feldman* doctrine prevents suits in federal court that are effectively attempts to contest correctness of State Court judgment or amount to attempt to appeal State Court Order. Circuit has adopted a source of injury approach to determining if a claim is barred by *Rooker-Feldman*. When a count alleges that a State Court Order was itself illegal and harmed the plaintiff, *Rooker-Feldman* will apply. *Rooker-Feldman* doctrine does not prohibit federal district courts from exercising jurisdiction where plaintiff's claim is merely general challenge to constitutionality of state law applied in the state action, rather than a challenge to the law's application in a particular state case. Complaint that alleged that default entered by State Court judges denied plaintiff his due process rights and deprived plaintiff liberty and property interests, action was directed to specific order of court and not to general constitutional challenge to state law.

(6058) *Woods v. Bank of New York,* 2016 WL 105928 (Bankr. N.D. Ohio 2016) – Complaint that alleged that lender did not possess note and mortgage and lacked standing to foreclose barred by State Court Order that foreclosed equity of redemption and specifically found that mortgage had been validly assigned to BONY and that BONY was the owner and holder of the note and mortgage. Any attempt by Federal Court in later action to challenge lender's standing to foreclose would necessarily require Federal court to review State Court's definitive ruling on lender's standing to foreclose.

(6059) *Veasley v. Federal National Mortgage Association,* 2015 WL 5729537 (6th Cir. 2015) – Federal Court lacked jurisdiction under *Rooker-Feldman* to entertain challenge to mortgage holder's standing to foreclose or alleged defect in foreclosure process where State Court had already entered judgment of possession and order for eviction, time to appeal judgment expired ten days after entry of judgment, and that judgment was not appealed or challenged within those ten days. However, to extent complaint sought damages resulting from alleged

defective assignment of mortgage to lender who ultimately foreclosed, root of complaint did not lie in foreclosure process or judgment, such that Federal Court is not deprived of jurisdiction. While action may ultimately implicate validity of final judgment of foreclosure, action is not a direct attach on judgment and is beyond scope of *Rooker-Feldman.*

(6060) *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.

(6061) *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.

(6062) *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,

(6063) *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

(6064) *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.*

(6065) *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 if 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.

(6066) *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.

(6067) *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.

(6068) *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.

(6069) *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 stat 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.

(6070) *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.

(6071) *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.

(6072) *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.

(6073) *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.

(6074) *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.

(6075) *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.

(6076) *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.

(6077) *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.

(6078) *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.

(6079) *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.*

(6080) *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.

(6081) *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.

(6082) *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.

(6083) *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.

(6084) *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.

(6085) *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.

(6086) *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.

(6087) *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.

(6088) *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.

(6089) *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.

(6090) *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.

(6091) *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.

(6092) *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.

(6093) *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.

(6094) *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.

(6095) *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.

12.15 Limitations – Jurisdictional Priority

(6096) *Groce v. Medcare Investment Corp.,* 2018 WL 2364050 (M.D. Tn. 2018) – Motion to transfer venue under "first-to-file" doctrine is distinct from motion to transfer under 28 USC Section 1404. First-to-file is judicially established doctrine that provides that when actions involving nearly identical parties and issues have been filed in 2 different Federal Courts, Court in which first suit was filed should generally proceed to judgment. Rule is not absolute and is within sound discretion of District Court where equity demands, such as evidence of forum shopping, bad faith or inequitable conduct. If first-to-file rule is properly raised, District Court presiding over 2nd case may dismiss case without prejudice; stay suit before it; allow both suits to proceed; or enjoin parties from proceeding in other suit. Courts generally evaluate chronology of events; similarity of parties involved; and similarity of issues or claims at stake. First lawsuit was filed in Louisiana, predating filing Tennessee case by more than one year. Claims in both cases arose out of alleged WARN Act violations seeking recovery of severance and unpaid time off. Both cases were class actions with overlapping definitions of class certifications. All claims were treated under employer's Chapter 11 confirmed Plan that resolved all employee claims including WARN Act claims other than any employee who expressly opted out of Chapter 11 Plan. Although named plaintiffs in Louisiana class action suit were not also plaintiffs in Tennessee class action suit, there was substantial overlap between proposed classes. Issue substantially overlapped where all actions asserted WARN Act claims although cases included separate state law claims for unpaid time off and severance. Allowing 2 cases to proceed separately could result in different rulings on WARN Act claims. Louisiana Court already denied class certification and allowing action to seek class certification in Tennessee would amount to "2nd bite at Apple". Record did not indicate any inequitable conduct by either defendants or Louisiana plaintiffs that would justify not transferring action. Transfer would support judicial consistency, economy and comity.

(6097) *Oldham Group, Inc. v. Davis,* 2018 WL 1147524 (W.D. Tn. 2018) - General principle is to avoid duplicative litigation. Federal court may exercise its discretion to stay suit before it; to allow both suits to proceed; or to enjoin the parties from proceeding in the other suit. In general, entire action should be decided by court in which action was first filed. Lawsuits are duplicative if determination in one action leaves little or nothing to be determined in other considering three factors: (1) chronology of actions; (2) similarity of parties involved; and (3) similarity of the issues at stake. Parties and issues do not need to be identical; only that parties and issues substantially overlap. Court can stay the second-filed action pending the outcome of the first-filed suit or transfer second-filed action to court of first-filed action.

(6098) *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.

12.16 Particular Causes of Action

(6099) *Rosenfeld v. Rosenfeld,* 2015 WL 4623586 (Bankr. E.D. Mi. 2015), *aff'd* 2016 WL 4761786 (E.D. Mi. 2016), *aff'd,* 2017 WL 4461037 (6th Cir. 2017) – Bankruptcy court lacks subject matter jurisdiction when court cannot fashion effective relief in adversary proceeding.

Adversary seeking to deny Debtor discharge dismissed where plaintiff had already received an order declaring debt to be excepted from discharge. Adversary did not propose any relief as to plaintiff than was greater than that already awarded.

(6100) *Podewell v. Vandenberg,* 2016 WL 6927457 (W.D. Mi. 2016) – Diversity jurisdiction requires complete diversity between all plaintiffs and all defendants. Complaint failed to demonstrate diversity jurisdiction where complaint did not address diversity at all and civil cover sheet demonstrated that plaintiff and at least one defendant were residents of state of Michigan. Complaint failed to allege cause of action under 28 USC Section 1983 as complaint failed to allege that any defendant was "state actor".

(6101) *Valdiva v. Hauk,* 2016 WL 39912029 (E.D. Mi. 2016) – Bankruptcy Court abused discretion in denying Rule 60 Motion to set aside Order in Adversary Proceeding declaring unpaid property settlement to be non-dischargeable and liquidating debt. Creditor holding claims that were all excepted from discharge under Section 523(a)(5) and (15) lacks standing to seek to deny discharge under Section 727. Denial of discharge would not improve creditor's position and lacks standing to object to object to discharge solely on behalf of other creditors. There was no actual case or controversy as the Court lacked the ability to grant creditor any relief beyond that which creditor already received. Although Debtor failed to raise issue before Bankruptcy Court either in first instance or in Rule 60 Motion, issue of standing is question of law and Bankruptcy Court erred in failing to determine that Plaintiff had standing in first instance.

(6102) *Wellness International Network, Ltd. v. Shariff,* ____ S.Ct. _____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.

(6103) *Miller v. Bruemmer,* 2014 WL 3568371 (Bankr. E.D. Mi. 2014) – Third party complaint for pre-petition legal malpractice is beyond court's jurisdiction. Chapter 7 trustee sued recipient of allegedly fraudulent transfer. Transferee filed third party complaint against attorney who allegedly advised Debtor and transferee to make transfer for legal malpractice. Claim was one arising under state law that was fully cognizable in State Court and had no connection or relationship to bankruptcy code or case. Case did not arise under or in Title 11 as case did not present any issues of law created by bankruptcy code. Case was not related to bankruptcy as outcome of third party complaint could not have any conceivable impact on bankruptcy estate. Claims were being asserted by one non-Debtor against another non-Debtor and proceeds of those proceedings, if any, would not be within scope of bankruptcy estate. Although there may be overlap of issues in main case and third party case, overlap of issues and considerations of judicial economy are not a basis for the court to exercise subject matter jurisdiction where none exists by statute and exercise would exceed constitutional power of bankruptcy court. Consent of all parties also cannot create subject matter jurisdiction where none otherwise exists.

(6104) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.,* 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized Debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized Debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be "related to" the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.

(6105) *Rhiel v. Central Mortgage Company,* 444 BR 871 (Bankr. S.D. Ohio 2011) – Court lacked jurisdiction over third party complaint filed by property owner against notary public for failing to properly notarize and record deed. Although defective deed allowed Trustee to recover property in action against owner, owner's negligence action against notary was not core matter and did not involve Debtor or property of the estate. District Court can exercise "supplemental jurisdiction" pursuant to 28 USC Section 1367 over claims that are so related to claims in the action within such original jurisdiction that they from part of the same case or controversy under Article III of the United States Constitution. Courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. Bankruptcy Courts may lack authority to exercise supplemental jurisdiction as Section 1367 refers to "district court". Assuming Bankruptcy Court could do so, Court declined to exercise supplemental jurisdiction where claims raised novel issues of state law regarding liability of notary public or closing agent to purchaser on "third party beneficiary" theory. Exercising supplemental jurisdiction would not materially aid the disposition of the case as the case would be within court's "related to" jurisdiction, requiring court to issue report and recommendations to District Court which would delay resolution; and it is possible that defendant would have right to jury trial at state law which Bankruptcy Court lacks authority to conduct.

(6106) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of Debtor's civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not "related to". Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.

(6107) *Harker v. Countrywide Homes, Inc.,* 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor's note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the Debtors' bankruptcy estates and that it is the holder of notes or mortgages on real estate of the Debtors on the date of Debtors' bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental

office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

12.17 Authority of Bankruptcy Court to Enter Final Judgment – Generally

(6108) *Ralph Roberts Realty, LLC v. Savoy,* 2016 WL 7655141(Bankr. E.D. Mi. 2016) – After *Stern*, there are three classes of claims in which the bankruptcy court may enter final judgment: claims that are defined as core" proceedings were Bankruptcy Court has statutory and constitutional authority to enter final judgment; claims that are defined as "core" proceedings but in which Bankruptcy Courts do not have constitutional authority to enter final judgments absent consent of all parties; and claims that are defined as non-core proceedings and Bankruptcy Courts do not have statutory or constitutional authority to enter final judgments absent consent of all parties. Bankruptcy Court has authority to enter final judgment to enforce agreement between Debtor and investors to share profits from acquisition and resale. Nature of cause of action and status of proceedings afforded Bankruptcy Court authority under any of three alternatives to enter final judgment.

(6109) *Wellness International Network, Ltd. v. Shariff,* ____ S.Ct. _____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.

(6110) *Hagan v. Koviack Irrigation and Farm Services, Inc.,* 2014 WL 5426876 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final judgment in preference action under Section 547. Defendant in action was creditor in case and court cannot complete claim allowance process without first resolving preference action.

(6111) *Executive Benefits Insurance Agency v. Arkison (Bellingham Insurance Agency),* ___ US ___, 2014 WL 2560461 (2014) – Bankruptcy Court has jurisdiction to enter final orders in core proceedings and to enter findings of fact and conclusions of law in non-core proceeding. Matter that is defined as core proceeding but exceeds bankruptcy court Article I jurisdiction is not "core" proceeding allowing court to enter proposed findings of fact and conclusions of law. Although bankruptcy Court Order is captioned "Final Judgment", District Court on appeal considered issues using *de novo* standard, which is same standard that would have been applied had "Judgment" been captioned "Findings of Fact and Conclusions of Law". District Court's *de novo* review of "Judgment" was sufficient for Article III Jurisdictional purposes and cured any error in bankruptcy court's entry of "Judgment" rather than "Proposed Findings".

(6112) *Stern v. Marshall,* 131 S. Ct. 2594 (2011) – A return to jurisdiction 30 years after *Northern Pipeline* - Bankruptcy Court lacks jurisdiction to enter final judgments even in "core" proceeding where case is based solely on state common law cause of action, is between two private parties, does not flow from federal statutory scheme, and would not necessarily be resolved in ruling on objection to proof of claim. Creditor filed proof of claim and also filed adversary proceeding alleging that Debtor defamed creditor and sought determination that debt based on defamation was not dischargeable. Debtor filed a counterclaim for tortious interference with an expected inheritance. Although counterclaim would constitute "core" proceeding as Section 157(c)(2)(C) defines any counterclaim by the estate against a person who filed a proof of claim. However, Constitutional limitations prevent Bankruptcy Court from exercising jurisdiction over "core" proceeding even where defendant arguably consented to jurisdiction by filing proof of claim and failing to contest issue prior to entry of Judgment. Article III of the Constitution vests jurisdiction solely in the District Court for actions that do not flow from the Bankruptcy Code or where are dependent for resolution on state common law and involve two private parties. Article III prevents the entry of a final, binding judgment by a bankruptcy court, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.

12.18 Authority of Bankruptcy Court to Enter Final Judgment - Default Judgment

(6113) *Kravitz v. Deacons,* Case No. 17-1137 (Bankr. S.D.N.Y. 2018) - the bankruptcy Court has Constitutional jurisdiction to enter default judgment in any adversary proceeding in which defendant has failed to respond to properly serve a summons and complaint. Supreme Court concluded in *Wellness International* that objection to power of Bankruptcy Court to enter final order can be waived and creditor's inaction can result in implied consent.

12.19 Authority of Bankruptcy Court to Enter Final Judgment - Dischargeability Actions

(6114) *Oliver v. Zimmerman,* 2017 WL 663196 (Bankr. N.D. Ohio 2017) - Court has jurisdiction in nondischargeability action to enter monetary final judgment liquidating amount of debt. However, Court will not do so where prayer for relief in complaint asks only for determination of dischargeability without requesting that amount of debt be determined, and trial record did not contain sufficient evidence to allow Court to liquidate debt. Court would determine debt to be nondischargeable but allow State Court to liquidate debt and enter money judgment.

(6115) *Gomez v. Saenz,* Case No. 13-7024 (Bankr. S.D. Tx. 2016) – *Stern* does not deprive Bankruptcy Court of authority to enter final judgment liquidating amount of debt as incident to action determining debt to be nondischargeable. Determination of nondischargeability and amount of nondischargeable debt are "directly intertwined" and action to except debt from discharge "arises in" title 11 because dischargeability claim has no existence outside of bankruptcy.

(6116) *Siragusa v. Collazo,* Case No. 15-2324 (7th Cir. 2016) – Bankruptcy court has jurisdiction to award money damages in connection with action to except debt from discharge. Action is "related to" bankruptcy case. To extent court is uncertain of jurisdiction, court is not required to abstain or send matter back to State Court to liquidate claim as court can enter money judgment with consent of parties, or can issue report and recommendation to District Court which has clear jurisdiction to enter final monetary judgment.

(6117) *Dietz v. Ford,* Case No. 12-60036 (9th Cir. 2014) – Bankruptcy court has inherent jurisdiction over action to except debt from discharge.

Dischargeability issues are central to federal bankruptcy proceedings and are necessarily resolved during the process of allowing or disallowing claims. Bankruptcy court has constitutional jurisdiction to enter judgment determining debt to be non-dischargeable. Court also has jurisdiction to liquidate amount of claim as part of resolution of adversary proceeding. Determination of amount of non-dischargeable debt is inexorably intertwined with determination that debt is not dischargeable.

(6118) *Hart v. Southern Heritage Bank,* 2014 WL 1663029 (6th Cir. 2014) – Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating claim is inherently part of claims allowance process and did not implicate any state law counterclaims brought by Debtor against creditor and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction. Fact that Debtor may have had counterclaims that, if asserted, may have caused *Stern* issue did not change outcome where Debtor did not assert those counterclaims in Section 523 action.

(6119) *Cai v. Shenzhen Smart-In Industry Co.,* Case No. 12-56656 (9th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating state law counterclaim is inherently part of claims allowance process and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction.

(6120) *Eaton v. Ford Motor Credit Co., LLC,* 2012 WL 3579644 (M.D. Tn. 2012) – Bankruptcy court has jurisdiction under *Stern* to enter final judgments in non-dischargeability actions. Discharge is fundamental part of bankruptcy process.

12.20 Authority of Bankruptcy Court to Enter Final Judgment – Post-Petition Causes of Action

(6121) *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. Fact that cause of action was based on state law professional malpractice did not preclude finding of "core" as cause of action against counsel for Committee could not exist outside of bankruptcy case. Case dismissed because counsel owed duty to Committee as a whole, and did not owe duty to individual members of Committee.

12.21 Authority of Bankruptcy Court to Enter Final Judgment – Consent of Parties

(6122) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Bankruptcy Court has jurisdiction to enter final judgment in non-core proceedings or in certain core proceedings that otherwise constitutionally require hearing before Article III judge with consent of parties. Parties are required to file Statement under Rule 7012 indicating whether party consents to Bankruptcy Court entry of final judgment. If all parties do not consent, then opinion of Bankruptcy Court is treated as Report and Recommendations for review by District Court.

(6123) *Sicherman v. World Auto Network, Inc.,* 2017 WL 2372375 (Bankr. N.D. Ohio 2017) - Trustees complaint seeking recovery of damages under state consumer protection law and federal Truth in Lending Act based on prepetition conduct is statutory core proceeding as proceeding concerns administration of estate and attempts to obtain and liquidate estate property. However, actions are Constitutionally non-core as they arise exclusively out of prepetition state law and federal law originally held by Debtor and brought by Trustee on behalf of bankruptcy estate against third party. Bankruptcy judge may hear a Constitutionally non-core proceeding only with the consent of the parties. Trustee expressly consented to jurisdiction in bringing adversary complaint. Defendant's filing of Motion to Stay Pending Arbitration impliedly consented to Court entering final order on that Motion.

(6124) *Wellness International Network, Ltd. v. Shariff,* ____ S.Ct. _____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.

(6125) *In re BP,* 735 F.3d 239 (5th Cir. 2013) – Parties cannot consent to bankruptcy court entry of final judgment on State Court claims. Article III jurisdiction limits bankruptcy court jurisdiction and parties cannot cure constitutional deficiency my consent.

12.22 Authority of Bankruptcy Court to Enter Final Judgment – State or Non-Bankruptcy Federal Law Claims

(6126) *Sicherman v. World Auto Network, Inc.,* 2017 WL 2372375 (Bankr. N.D. Ohio 2017) - Trustees complaint seeking recovery of damages under state consumer protection law and federal Truth in Lending Act based on prepetition conduct is statutory core proceeding as proceeding concerns administration of estate and attempts to obtain and liquidate estate property. However, actions are Constitutionally non-core as they arise exclusively out of prepetition state law and federal law originally held by Debtor and brought by Trustee on behalf of bankruptcy estate against third party. Bankruptcy judge may hear a Constitutionally non-core proceeding only with the consent of the parties. Trustee expressly consented to jurisdiction in bringing adversary complaint. Defendant's filing of Motion to Stay Pending Arbitration impliedly consented to Court entering final order on that Motion.

(6127) *Wellness International Network, Ltd. v. Shariff,* ____ S.Ct. _____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.

(6128) *Executive Benefits Insurance Agency v. Arkison (Bellingham Insurance Agency),* ___ US ___, 2014 WL 2560461 (2014) – Bankruptcy Court

has jurisdiction to enter final orders in core proceedings and to enter findings of fact and conclusions of law in non-core proceeding. Matter that is defined as core proceeding but exceeds bankruptcy court Article I jurisdiction is not "core" proceeding allowing court to enter proposed findings of fact and conclusions of law. Although bankruptcy Court Order is captioned "Final Judgment", District Court on appeal considered issues using *de novo* standard, which is same standard that would have been applied had "Judgment" been captioned "Findings of Fact and Conclusions of Law". District Court's *de novo* review of "Judgment" was sufficient for Article III Jurisdictional purposes and cured any error in bankruptcy court's entry of "Judgment" rather than "Proposed Findings".

(6129) *Langland v. Cadwallader,* 2013 WL 1737360 (Bankr. W.D. Mi. 2013) – Complaint to liquidate contract claim held by Debtor prior to commencement of bankruptcy and based entirely on state law is not core proceeding and Bankruptcy Court lacks jurisdiction to enter final judgment. Complaint sought to recover on promissory notes between Debtor and defendants that substantially preceded bankruptcy proceeding. Default by defendants in failing to respond to complaint does not constitute consent by defendants to entry of judgment. Court would enter report and recommendations on Plaintiff's Motion for Default Judgment for review by District Court.

(6130) *In re City of Detroit,* 2013 WL 5425104 (Bankr. E.D. Mi. 2013) – Under *Stern*, when a claim is a state law action independent of the bankruptcy code and not necessarily resolvable by a ruling on the creditor's proof of claim, the bankruptcy court cannot enter a final judgment but is limited to entry of proposed findings of fact and conclusions of law. Otherwise state law based claims can be asserted in bankruptcy court and ruled upon where claims are asserted in effort to disallow claim. Bankruptcy Court has jurisdiction to enter final orders on eligibility of municipality to file Chapter 9 proceedings. Eligibility to file chapter 9 stems directly from rights established by the bankruptcy code. Although legal basis to oppose eligibility may turn on state or non-bankruptcy federal law, that does not deprive court of jurisdiction to enter final order regarding eligibility for bankruptcy protection.

(6131) *TTOD v. Lim,* 2012 WL 3257882 (E.D. Mi. 2012) – Counterclaim brought by Chapter 7 trustee against creditor sought relief under State and Common Law remedies. Bankruptcy Court lacks jurisdiction to enter final judgment. Reference would be withdrawn to allow case to proceed in Article III district court.

(6132) *French v. Johnson Law Group,* 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Court lacks jurisdiction to enter final judgment in action brought by Chapter 7 Trustee against law firm that allegedly agreed to provide pre-petition debt settlement services without compliance with Section 526. Action is core proceeding as it involves substantive rights created by the bankruptcy code. Ancillary state law claims for breach of contract, unjust enrichment and fraudulent misrepresentation became property of estate when case was filed and were related to the bankruptcy case as any recovery would be an asset available for distribution to creditors, but are not core proceedings as they do not invoke a substantive right created under the code. Court may not enter final judgment on related but non-core claims. In light of interrelatedness of claims, court would submit entire matter to district court on proposed findings of fact and conclusions of law.

(6133) *Tolliver v. Bank of America,* 464 BR 720 (Bankr. E.D. Ky. 2012) - Bankruptcy Court lacks jurisdiction to enter final judgment on complaint alleging violations of state consumer protection act. Adversary complaint filed in response to proof of claim filed by creditor does not sport and exercise of jurisdiction by the bankruptcy court clerk purely state law claims unless both parties consent to entry of a final judgment by the bankruptcy court. However, those portions of the adversary complaint which were predicated on the enforceability of the loan documents in determination of the charges authorized under the loan documents constitutes the type of claims which are "necessarily resolved" in the claims objection process over which the court has jurisdiction and can enter a final judgment.

(6134) *Ortiz v. Aurora Health Care, Inc.,* Case No. 10-3465 (7th Cir. 2011) – Bankruptcy court does not have constitutional authority to issue a final judgment in adversary proceedings involving claims defined by state law and that were independent of federal bankruptcy law. The adversary proceedings were filed by the Debtors against a creditor who had filed a proof of claim. Although the Debtors' claims were "core proceedings", the claims were ordinary state law claims that would not generally be resolved in the claims allowance process. As such, the Court decided that the Debtors' claims must be adjudicated by an Article III court, and the bankruptcy court did not have authority to issue final judgment on the merits of the Debtors' claims.

(6135) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) - Debtor filed action for injunction to compel City to continue water service and for damages for alleged improper assessment of late fees and efforts to collect pre-petition, discharged portion of account. Complaint which was based on 42 USC Section 1983 was suit at common law which is assigned solely to Article III Court for resolution. However, court does have jurisdiction over those portions of complaint that sought damages for alleged violations of Section 362 and Section 366 and discharge injunction under Sections 727 and 524.

(6136) *In re Peacock,* 2011 WL 3874461 (Bankr. M.D. Fl. 2011) - Court can exercise jurisdiction over suit brought by Chapter 7 Trustee for violations of Florida Consumer Collections Practices Act. Action is only "related to" case and so is not core proceeding. As such, Court can consider and enter final judgment only with consent of parties. Defendant consented to jurisdiction in answer to complaint and by failing to raise issue until eve of trial.

(6137) *In re Olde Prairie Block Owner, LLC,* 201 WL 3792406 (Bankr. N.D. Il. 2011) - Bankruptcy court lacks constitutional authority to enter final judgment on state law counterclaim that is not necessarily resolved in the process of ruling on the creditor's proof of claim. Creditor filed proof of claim based on Debtor's failure to repay loan. Debtor filed counterclaim alleging rescission and breach of good faith. Resolution of issues is necessarily implicated by resolution of creditor's proof of claim, allowing bankruptcy court to enter final judgment.

(6138) *Chernich v. Cayo,* 2011 WL 1596228 (Bankr. W.D. Mi. 2011) – Action by Trustee to recover pre-petition accounts receivable owed to Debtor is a state law cause of action over which Court has only "related to" jurisdiction. As matter is not "core proceeding", Court lacks jurisdiction to enter final judgment. Court would instead issue Report and Recommendation on Plaintiff's Motion for Default Judgment for District Court review.

12.23 Authority of Bankruptcy Court to Enter Final Judgment – Fraudulent Transfer Claims

(6139) *Bodenstein v. University of Northern Iowa,* Case No. 14-0441 (Banker. N.D. Ill. 2018) – Bankruptcy Court has jurisdiction to enter final judgment in fraudulent transfer action where no party has requested jury trial. Although Supreme Court *Granfinanciera* held that defendant who had not filed a claim was entitled to jury trial, *Granfinanciera* did not address constitutional authority of Bankruptcy Court to enter final judgment after bench trial.

(6140) *Silgay v. Morris,* 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Bankruptcy Court lacks jurisdiction to enter final judgment in fraudulent transfer action based on state law where defendant has not filed Proof of Claim in case. Although fraudulent transfer action is core proceeding, court cannot adjudicate what amounts to "private rights". Court can conduct hearings and issue report and recommendations to District Court for entry of final judgment.

(6141) *Austin v. FNMA,* 2013 WL 2898037 (E.D. Mi. 2013) – Court would not exercise discretion to withdraw reference to consider motion for Rule 2004 Examination based on Debtor's attempt to bring action against lender to recover fraudulent transfers. Action to recover fraudulent transfer can be brought solely by Trustee and involved pure bankruptcy matters that belong in Bankruptcy Court within Bankruptcy Court's jurisdiction.

(6142) *Still v. Hopkins,* 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Court not required to determine at early stages of fraudulent transfer and preference action whether Court has jurisdiction over action. If Court can exercise jurisdiction under *Stern,* court will do so. If it is ultimately determined that Court lacks jurisdiction to enter final judgment, action would also be "related to" case as outcome of action will have impact on administration of case, such that court can enter proposed findings of fact and conclusions of law for consideration by District Court.

(6143) *Meoli v. Huntington National Bank,* Adv. No. 07-80037 (Bankr. E.D. Mi. 2012) – Court lacks jurisdiction to enter potentially multi-million dollar judgment based on alleged fraudulent transfers.

(6144) *Sweet v. Chambers,* Adv. No. 11-3071 (Bankr. E.D. Mi. 2012) – Court lacks authority to enter final judgment in fraudulent transfer action. However, lack of jurisdiction does not require dismissal. Bankruptcy court can preside over all pre-trial matters and case can be referred to District Court for trial.

(6145) *Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc.,* 472 BR 731 (E.D. Ky. 2012) – Bankruptcy Court, as non-Article III Court, has jurisdiction to enter final judgments on fraudulent transfer and preference claims.

(6146) *Richardson v. Checker Acquisition Corporation,* 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court has jurisdiction to enter final judgments in actions to recover fraudulent transfers and preferential transfers. *Stern* decision is extremely narrow and does not deprive Bankruptcy Court of jurisdiction to enter final judgments except in those limited types of counterclaims outlined in *Stern*. Further, even if Court may lack jurisdiction to enter final judgment, Court retains jurisdiction to handle matters where no final order is presently contemplated or necessary and issues may be resolved before Court's authority to enter final judgment is required.

(6147) *Meoli v. Huntington National Bank,* 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment in action to recover damages for fraudulent transfers absent express consent by all parties. Final judgment awarding money damages would deprive defendant of property without due process, as judgment would not be entered by Article III judge. Bankruptcy Court must instead issue written report and recommendations and forward those to the District Court for review.

12.24 Authority of Bankruptcy Court to Enter Final Judgment – Preferential Transfers

(6148) *Hagan v. Koviack Irrigation and Farm Services, Inc.,* 2014 WL 5426876 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final judgment in preference action under Section 547. Defendant in action was creditor in case and court cannot complete claim allowance process without first resolving preference action.

(6149) *Still v. Hopkins,* 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Court not required to determine at early stages of fraudulent transfer and preference action whether Court has jurisdiction over action. If Court can exercise jurisdiction under *Stern,* court will do so. If it is ultimately determined that Court lacks jurisdiction to enter final judgment, action would also be "related to" case as outcome of action will have impact on administration of case, such that court can enter proposed findings of fact and conclusions of law for consideration by District Court.

(6150) *Onkyo Europe Electronics GMBH v. Global Technovations, Inc.,* 694 F.3d 705 (6th Cir. 2012) – In preference action, once Bankruptcy Court determines that amount paid by Debtor exceeded value of assets received, Court had jurisdiction to determine the amount of the overpayment and to order the transferee to pay excess. Transferee, as "good faith" transferee, was entitled to offset value of property transferred by purchase price paid, with the remaining balance being the preferential transfer that must be repaid. Creditor filed proof of claim and adversary proceeding was brought as a defense to proof of claim. Under *Stern*, Bankruptcy Court has jurisdiction to enter money judgment where action is based on state law, where action is itself integral to the claims resolution process. Judgment not limited to amount necessary to offset claim amount. Court has jurisdiction to enter affirmative relief beyond disallowance of claim itself.

(6151) *Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc.,* 472 BR 731 (E.D. Ky. 2012) – Bankruptcy Court, as non-Article III Court, has jurisdiction to enter final judgments on fraudulent transfer and preference claims.

(6152) *Richardson v. Checker Acquisition Corporation,* 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court has jurisdiction to enter final judgments in actions to recover fraudulent transfers and preferential transfers. *Stern* decision is extremely narrow and does not deprive Bankruptcy Court of jurisdiction to enter final judgments except in those limited types of counterclaims outlined in *Stern*. Further, even if Court may lack jurisdiction to enter final judgment, Court retains jurisdiction to handle matters where no final order is presently contemplated or necessary and issues may be resolved before Court's authority to enter final judgment is required.

(6153) *Richardson v. BDSM Corp*., 2011 WL 4793343 (Bankr. W.D. Mi. 2011) – Although preference action has its origins in Bankruptcy Code, ultimate relief would be to seek collection by taking property of non-Debtor. Defendant who defaulted by not responding to complaint did

not consent to Bankruptcy Court jurisdiction. Because of uncertainty as to scope of Stern, court would adopt prudent course and issue Report and Recommendation to District Court, in effort to insulate Judgment from later collateral attack.

12.25 Authority of Bankruptcy Court to Enter Final Judgment – Adjudication of Claims and Liens

(6154) *Reed v. Zwick,* 2016 WL 5763863 (Bankr. N.D. Ohio 2016) – 28 USC 1334 grants original jurisdiction to District Court, over all cases arising in or related to cases under Title 11. "Related to" has expansive definition and includes civil proceeding where *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.* Proceeding need not be against the Debtor or against the Debtor's property if the outcome could alter Debtor's rights, liabilities, options, or freedom of action or in any way impacts handling and administration of bankrupt estate. Fact that estate has no assets does not deprive court of jurisdiction to determine validity or avoidability of claims under Section 523 and Debtor can lodge objection to claim as part of adversary proceeding raising question as to whether creditor even has a claim. Debtor's adversary proceeding seeking to except student loan from discharge properly raised counts contesting Debtor's liability in first instance based on Debtor's assertion that Debtor did not sign the student loan note and that Debtor's signature was forged. Bankruptcy court has constitutional jurisdiction to adjudicate state law claims that are raised as part of claims process, although jurisdiction may be limited to disallowance of claims rather than affirmative relief by Debtor against claimant. Adversary sought only to disallow claims and did not seek any additional relief from creditor, giving bankruptcy court constitutional jurisdiction. Issues were raised within context of claims objection, and constitute core proceeding over which Bankruptcy Court can issue valid final judgment.

(6155) *First National Bank v. Crescent Electric Supply Co.,* Case No. 12-10386 (5th Cir. 2013) – Bankruptcy Court has jurisdiction to resolve disputes regarding validity, priority and extent of liens as between lender and various mechanics and materialmen's liens against property of the estate.

(6156) *Lawson v. Conley,* 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Court has constitutional authority to enter final judgment in non-dischargeability action to also liquidate amount of previously unliquidated claim of creditor against Debtor.

(6157) *Waldman v. Stone,* 2012 WL 5275241 (6th Cir. 2012) – Bankruptcy Court had authority to disallow claim where claim resulted from creditor's own fraud perpetrated on the Debtor. Although the Debtor's claims against creditor did not themselves arise under federal law (all were based on state law fraud), even a state law claim can be asserted and adjudicated by bankruptcy court as a defense to a claim asserted by the creditor, as it relates to the bankruptcy case and is at least related to the bankruptcy case as the outcome "conceivable" has an impact on the outcome of the case. However, Bankruptcy court lacked jurisdiction to enter further judgment in favor of Debtor and against creditor awarding damages arising out of that same fraudulent conduct. Article III, Section 1 of the Constitution vests jurisdiction for non-bankruptcy matters exclusively in the District Court. Issue to be adjudicated involved one solely of "private rights" that exist outside of and independent of the bankruptcy code. Affirmative claims required proofs beyond those necessary to resolve objection to claim itself, and included both actual and punitive damage claims. Case remanded for Bankruptcy Court to convert judgment into proposed findings of fact and conclusions of law for review and action by District Court.

12.26 Authority of Bankruptcy Court to Enter Final Judgment – Confirmed Plan

(6158) *In re Grove Instruments, Inc.,* Case No. 15-40733 (Bankr. C.D. Mass. 2017) – Court raised, but did not decide, whether Court has subject-matter jurisdiction to enter "bar order" in connection with proposed settlement of Chapter 7 Trustee's adversary proceeding to recovery preferential payments to creditors where Section 524(e) specifically provides that discharge of Debtor does not discharge liability of any third party.

(6159) *Opt-Out Lenders v. Millennium Lab Holdings II, LLC,* Case No. 16-110 (D. Del. 2017) – Bankruptcy Court lacks jurisdiction to approve third-party releases as part of confirmation of Chapter 11 plan. Third-party releases are not "core" matters where creditors who would have claims released held claims for common-law fraud and RICO which are not closely intertwined with Federal regulatory program and are entitled to Article 3 adjudication. Plan's release would permanently extinguish claims amounting to resolution of claims on merits against lender. If Bankruptcy Court lacks adjudicatory authority, Bankruptcy Court must submit proposed findings of fact and conclusions of law to District Court for de novo review.

(6160) *In re SAI Holdings, Ltd.,* 2012 WL 3185826 (Bankr. N.D. Ohio 2012) – Subject matter jurisdiction is governed by 28 USC Section 1334. Parties cannot create or confer subject matter jurisdiction over a dispute. Court lacked jurisdiction over dispute arising out of property held by Chapter 11 Debtor's Liquidating Trust as part of confirmed and consummated Chapter 11 Plan. Creditor's challenge to Liquidating Trustee's decisions, although impacting the value of the property held by the Trust, did not provide the required close nexus to the bankruptcy proceedings to support jurisdiction. Any nexus is remote. The Motion addresses decisions made by the Liquidating Trustee 4 years after confirmation of the Plan. The Motion did not involve a pre-petition or pre-confirmation claim. All of the facts underlying the action occurred years after confirmation and consummation of the plan. At confirmation, all property vested in the Liquidating Trustee. As such, the property in the Trust was no longer property of the estate and court lacked authority to order property abandoned as property was not held by bankruptcy trustee.

12.27 Authority of Bankruptcy Court to Enter Final Judgment – Turnover from Non-Debtor

(6161) *Moyer v. Koloseik,* Case No. 11-80269 (Bankr. W.D. Mi. 2012) – Due process principals delineated in *Stern* must be construed broadly. A narrow construction allows courts to retain actions that properly should be handled by Article III Courts. Action to recover under Section 542(b) is an action brought by the Trustee to recover money from non-Debtor. Although there is no doubt that if the defendant owes money to the estate, the defendant should be made to answer. However, fact that money is owed to the estate is not basis to ignore limitations and precepts of Article III that the final judgment be entered by an Article III Court. Defendant does not consent to entry of final judgment merely by defaulting. Waiver of a right to have an Article III Court enter the final judgment requires knowing and intentional relinquishment of right. Mere silence, even if that results in a default judgment, is not a waiver. Rule 55, which allows entry of a final judgment by the clerk

when the complaint seeks damages in a sum certain, cannot trump constitutional limitations on power of Article I court. Action sent to District Court with report and recommendation for entry of final judgment.

(6162) *Hagan v. Classic Products Corp.,* Case No. 11-80417 (Bankr. W.D. Mi. 2011) – Court declined to extend Stern to avoidance and recovery action under Chapter 5, particularly where the amount involved is relatively small. 28 USC Section 157 is not a jurisdictiona1 statute and Court is not required to raise the issues *sua sponte*. Complaint alleged cause of action and Defendant failed to answer or timely respond. Court could enter final default judgment or could issue Report and Recommendation which would be unopposed and adopted by the District Court. Court would enter Final default Judgment that avoided the transfer and awarded monetary relief for the amount of the transfer.

12.28 Authority of Bankruptcy Court to Enter Final Judgment – Section 544 "Strong Arm" Powers

(6163) *Tribble v. Wells Fargo Bank, N.A.,* 2011 WL 3583278 (Bankr. W.D. Mi. 2011) – Bankruptcy Court is constitutionally prohibited from entering a final order in core proceedings based on State law claims absent explicit consent of the parties. Bankruptcy Court retains constitutional jurisdiction to render final judgment in action that arises under Title 11 even if that resolution necessarily relies on state law for determination. Action by Trustee to avoid lien under Section 544 is action "arising in" or "arising under" Bankruptcy Code allowing Bankruptcy Judge to constitutionally enter Final Judgment.

12.29 Authority of Bankruptcy Court to Enter Final Judgment – Stay Issues and Discharge Injunctions

(6164) *Jones v. CitiMortgage, Inc.,* Case No. 15-14853 (11th Cir. 2016) – Although Bankruptcy Court is "unit" of bankruptcy court and district courts have original jurisdiction, Bankruptcy Court alone has jurisdiction to enforce discharge or entre sanctions for violation of discharge injunction. District court should not have entered any order or reached any decision on merits. Matter reversed and remanded to district court with direction to remand case to bankruptcy court.

(6165) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) - Debtor filed action for injunction to compel City to continue water service and for damages for alleged improper assessment of late fees and efforts to collect pre-petition, discharged portion of account. Complaint which was based on 42 USC Section 1983 was suit at common law which is assigned solely to Article III Court for resolution. However, court does have jurisdiction over those portions of complaint that sought damages for alleged violations of Section 362 and Section 366 and discharge injunction under Sections 727 and 524.

12.30 Authority of Bankruptcy Court to Enter Final Judgment – Property of Estate

(6166) *In re Ambac Financial Group, Inc.,* 2011 WL 4436126 (Bankr. S.D.N.Y. 2011) - Bankruptcy Court has jurisdiction to approve compromise and settlement of claim that is property of the estate. Debtor-in- possession brought shareholder derivative action against former directors and then sought to settle those claims.

12.31 Certifying Questions to State Court

(6167) *Church Joint Venture v. Blasingame,* 2016 WL 3248044 (W.D. Tn. 2016) – Whether to certify question to State Supreme Court lies in sound discretion of Court and is appropriate only where question is new and state of law is unsettled. Federal Court will not certify arguably unsettled question of law when there is reasonably clear and principled course of action that court can take. Court would not certify question of reverse corporate veil piercing where there was no authority under state law to pierce corporate veil outside of parent-subsidiary relationship. State Supreme Court had never recognized reverse piercing in corporation/shareholder context or a trust/beneficiary context. Although State Supreme Court had not weighed in on issue, there was precedent from other Federal Courts holding that outside of parent-subsidiary context, State law did not recognize any effort to pierce corporate veil. Questions presented were not new and law was not unsettled.

(6168) *Kentucky Employees Retirement System v. Seven Counties Services, Inc.,* 2016 WL 1274595 (W.D. Ky. 2016), *reversed* 2018 WL 4042666 (6th Cir. 2018) – Federal Court has authority to certify to State Court questions of state law that may decide a case where it appears that there is no binding precedent from State Supreme Court or Court of Appeals and is vested in sound discretion of court. Question must present issue of State Law; resolution is possibly determinative; and there is no controlling precedent. Certification is tool meant to give court guidance from State Court on issue where federal court is bound to defer to state law. Certification is not mandatory even if case presents issues of particular importance to state or there is doubt regarding state law. Issue of whether Debtor was "agency of State" turned on issues of State statutes and case law regarding nature of agreement between State and health care provider, constituting mixed question of law and fact for which certification was proper. State Supreme Court decision would likely be dispositive as to whether Debtor can reject contract between Debtor and State regarding Pension liabilities. State law lacked any clear guidance on issue of relationship between State and health care agency such as debtor. Outcome could have significant financial impact on State public pension system and retirem3nt benefits of every State retiree.

B. Venue

12.31 Generally

(6164) *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 lean but only to recover money judgment. "Judicial district or similar legal entity" determined by applicable local judicial districts. Venue appropriate in Oakland County where deed by which Debtor obtained title to condominium and related mortgage were signed, notarized and recorded in Oakland County and subsequent action was brought in District Court in Oakland County. Action brought in 51st Judicial District complied with venue provisions as 51st Judicial District was location of condominium unit although defendant allegedly resided in 52nd Judicial District. Bringing action in 51st Judicial District, even when viewed through the lens of lease sophisticated consumer, could not be characterized as "so distant or inconvenient" that Debtor would be unable to appear or that plaintiff was attempting to obtain default judgment or engage in other deceptive practices.

(6165) *Ackison Surveying, LLC v. Focus Fiber Solutions, LLC,* 2016 WL 1449456 (S.D. Ohio 2016) – 28 U.S.C. § 1391(b) allows civil action to be brought in federal district court in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. test for proper venue is whether there is a substantial connection between the forum and the plaintiff's claim, not whether it is the only forum with a substantial connection, or whether it is the forum with the *most* substantial connection to the claim. Venue for contract action is based on (1) where the contract was negotiated and executed, (2) where the contract was performed, and (3) where the alleged breach occurred. Venue appropriate where although there was no contract between plaintiff and defendant, defendant solicited a bid from plaintiff by communicating with plaintiff in its Ohio office; contract was performed in both Virginia and Ohio, with bulk of the work taking place in plaintiff's Ohio office; alleged breach occurred after plaintiff demanded payment by sending invoices from Ohio to Virginia and defendant declined to pay; and plaintiff alleged economic harm from the breach by being unable to pay its employees and subcontractors in Ohio. Venue was also proper in action to pierce corporate veil and to recover fraudulent transfers because key facts underlying actions arose out of contractual relationship between parties including initial refusal to pay for services provided.

(6166) *Superior Contracting Group, Inc. v. Rachmale,* 2016 WL 1242432 (E.D. Mi. 2016) – Section 1334 grants bankruptcy court jurisdiction over matters that are "related to: the bankruptcy case or estate, defined as matters where the outcome of the proceeding could conceivably have any effect on estate being administered, including where outcome could alter the Debtor's rights, liabilities, options, or freedom of action or which in any way impacts upon the handling and administration of the bankruptcy estate. Suits between third parties which have an effect on the bankruptcy estate are "related to" a bankruptcy proceeding. When plaintiff alleges liability resulting from the joint conduct of the Debtor and non-Debtor defendants, bankruptcy jurisdiction generally exists over all claims under section 1334 depending on degree of identity between a Debtor and non-Debtor codefendant. Venue over any "related to" action is proper in district where underlying bankruptcy case is pending. Action by one party to joint-venture agreement against principal of joint-venture partner was related to the joint-venture's partner's bankruptcy. Any action against principal necessarily required determination and construction of parties' obligations under joint venture agreement. Further, complaint sought to pierce corporate veil which by definition argued that Debtor and principal were "one and the same". Principal also had indemnification rights against Debtor, such that adverse decision in action would necessarily affect bankruptcy estate by increasing amount of claims. Actions clearly related to bankruptcy pending in Delaware are properly venued in Delaware. Case transferred.

(6167) *Gold v. Bandman,* 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order. Although Appellant did not file separate Motion for Leave to appeal, under Rule 8003 appellate court can treat notice of appeal itself as request for leave to appeal. District Court's issuance of a scheduling order is ministerial task and does not constitute order authorizing interlocutory appeal. Appellant failed to demonstrate any substantial grounds to overturn Bankruptcy Court Order. Bankruptcy Court's conclusion that 28 USC Section 1409(b) does not apply to avoidance actions because those arise under Title 11 with venue being appropriate in district where case is pending; rather than action arising in or related to Title 11 where venue is appropriate only in the district court where the defendant resides. Although there was split of authority on the issue at the Bankruptcy Court level, the majority of decisions were consistent with that reached by Bankruptcy Court. Further, immediate appeal would not materially advance the litigation but would only delay litigation and increase costs without reaching ultimate issue as to whether Trustee could recover allegedly fraudulent transfers.

12.32 Forum Selection Clauses

(6168) *Booth v. Trans Union, LLC,* 2018 WL 3069295 (E.D. Mi. 2018) – Forum Selection Clause in contract will be enforced unless formation was induced by fraud; plaintiff would be deprived of day in court; chosen law would deprived plaintiff of remedy; or enforcement contravenes public policy. Forum Selection clause in Promissory note that provided that any dispute under Note could be raised only in South Dakota did not apply to action by consumer against Credit Reporting Agency under FCRA. Action under FCRA was not action under Note notwithstanding that FCRA action was based on allegedly false information on credit report related to Note. Substance of action was that Defendants did not investigate and remove false information from credit report and did not rely on and were not based on Note.

(6169) *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.

12.33 "Small-dollar" Venue

(6170) *In re Nukote International, Inc.,* 2011 WL 3874473 (Bankr. M.D. Tn. 2011) – 28 USC Section 1409 states general rule for venue that adversary proceedings arising in, arising under or related to bankruptcy case is proper in district where bankruptcy case is pending. however, Section 1409(b) provides that in any action by the trustee arising in or related to a bankruptcy case to recover a debt against a non-insider of less than $11,725, venue is proper only in the district here the defendant resides. Section 1409(b) excludes from "small dollar venue" rule any proceeding "arising under" a case under Title 11. Trustee's action to recover preferential transfer "arises in" a Bankruptcy case, triggering "small-dollar venue" exception.

12.34 Change of Venue – "First to File"

(6171) *Groce v. Medcare Investment Corp.,* 2018 WL 2364050 (M.D. Tn. 2018) – Motion to transfer venue under "first-to-file" doctrine is distinct from motion to transfer under 28 USC Section 1404. First-to-file is judicially established doctrine that provides that when actions involving nearly identical parties and issues have been filed in 2 different Federal Courts, Court in which first suit was filed should generally proceed to judgment. Rule is not absolute and is within sound discretion of District Court where equity demands, such as evidence of forum shopping, bad faith or inequitable conduct. If first-to-file rule is properly raised, District Court presiding over 2nd case may dismiss case without prejudice; stay suit before it; allow both suits to proceed; or enjoin parties from proceeding in other suit. Courts generally evaluate chronology of events; similarity of parties involved; and similarity of issues or claims at stake. First lawsuit was filed in Louisiana, predating filing Tennessee case by more than one year. Claims in both cases arose out of alleged WARN Act violations seeking recovery of severance and unpaid time off. Both cases were class actions with overlapping definitions of class certifications. All claims were treated under employer's Chapter 11 confirmed Plan that resolved all employee claims including WARN Act claims other than any employee who expressly opted out of Chapter 11 Plan. Although named plaintiffs in Louisiana class action suit were not also plaintiffs in Tennessee class action suit, there was substantial overlap between proposed classes. Issue substantially overlapped where all actions asserted WARN Act claims although cases included separate state law claims for unpaid time off and severance. Allowing 2 cases to proceed separately could result in different rulings on WARN Act claims. Louisiana Court already denied class certification and allowing action to seek class certification in Tennessee would amount to "2nd bite at Apple". Record did not indicate any inequitable conduct by either defendants or Louisiana plaintiffs that would justify not transferring action. Transfer would support judicial consistency, economy and comity.

(6172) *Oldham Group, Inc. v. Davis,* 2018 WL 1147524 (W.D. Tn. 2018) - General principle is to avoid duplicative litigation. Federal court may exercise its discretion to stay suit before it; to allow both suits to proceed; or to enjoin the parties from proceeding in the other suit. In general, entire action should be decided by court in which action was first filed. Lawsuits are duplicative if determination in one action leaves little or nothing to be determined in other considering three factors: (1) chronology of actions; (2) similarity of parties involved; and (3) similarity of the issues at stake. Parties and issues do not need to be identical; only that parties and issues substantially overlap. Court can stay the second-filed action pending the outcome of the first-filed suit or transfer second-filed action to court of first-filed action.

(6173) *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

12.35 Change of Venue – Chosen Venue Proper

(6174) *JWJ Hotel Holdings, Inc. v. W&H Realty, LLC,* 2018 WL 3772179 (S.D. Ohio 2018) – 28 USC Section 1412 allows District Court to transfer case or proceeding under Title 11 to another district in interest of justice or for convenience of parties. 28 USC Section 1404(a) allows District Court to transfer any "civil action" to any other district where action might have been brought for convenience of parties and witnesses and in interest of justice. Bankruptcy "case" is distinct from "proceeding". "Case" is commenced by filing petition with Bankruptcy Court and includes actual administration of bankruptcy. "Proceeding" is a litigated matter connected to bankruptcy case and are divided into three categories: (1) civil proceedings arising under Title 11; (2) civil proceedings arising in case under Title 11; and (3) civil proceedings related to case under Title 11. Proceedings that arise under Title 11 or arise in case under Title 11 concerns administration of bankruptcy estate. Proceeding is "related to" bankruptcy case if outcome could conceivably have effect on Debtor's estate. Complaint requesting appointment of receiver for two projects in which Debtor had an interest and request to enjoin appointment of comanager of entity in which Debtor held controlling interest did not arise in or arise under Title 11, but could conceivably affect bankruptcy estate and were "related to" bankruptcy case. Accordingly, motion to transfer governed by Section 1412. Factors under Section 1412 include whether transfer would promote economic and efficient administration of bankruptcy estate; judicial economy; whether parties would be able to receive fair trial; whether either form has interest in having controversy decided within its borders; whether enforceability of judgment would be affected by transfer; and whether plaintiff's original choice of forum should be disturbed, with Court giving greatest weight to economic and efficient administration of bankruptcy estate. Transfer of action would promote interest justice where case would be transferred to same district where

bankruptcy case is pending and allow Bankruptcy Court to hear claims and determine require whether requested relief is appropriate. Resolution of case will require interpretation of confirmed Chapter 11 Plan and Courts Confirmation Order. Bankruptcy case had been pending for more than two years and Bankruptcy Court was familiar with key operative and historical facts giving inability to resolve instant claims more efficiently.

(6175) *Cole v. JPMorgan Chase Bank,* 2016 WL 319866 (S.D. Ohio 2016) – 28 USC Section 1404 allows court to transfer jurisdiction for convenience of parties or witnesses in the interests of justice. Threshold consideration is whether action could have been brought in transferee court in first instance, and moving party must prove that transferee court is more convenient, not equally convenient. Plaintiff's forum choice is given preference, and court will also consider whether claim arose elsewhere, convenience of parties as indicated by relative financial and physical condition; convenience of witnesses to extent that they may be unavailable for trial; and location of books and records, limited to the extent that files would not be produced in alternate forum; enforceability of any judgment; practical considerations that could make trial easy, inexpensive or expeditions; administrative difficulties in administering case based on court congestion; local interests in in resolving local controversies; public policies of respective forums; and familiarity of trial court with applicable state law in diversity cases. Plaintiff's action against mortgage servicer alleging violation of RESPA properly brought in district where violation is alleged to have occurred, and plaintiff's choice of venue is entitled to substantial deference, although plaintiff acknowledge that desired transferee forum would also have been proper forum. Locus of operative facts weighted against transfer where cause of action alleged that posting of information on web page violated RESPA such that cause of action arose in Ohio. Ohio was equally convenient for servicer as servicer had Ohio as a principal place of business; cause of action involved servicer's application of policies and procedures relating to plaintiff's mortgage loan on property in Ohio; servicer did not identify any non-party witnesses intended to be called, stating only that many of the witnesses were located in Colorado although servicer did not state that any of them would not be available for trial. Servicer did not identify any witnesses who would be unwilling to attend depositions or trial. Cause of actin raised solely federal law based claims. Such that both Ohio and Colorado had equal interests in outcome and were equally familiar with controlling law and would be competent to adjudicate claims. Although Colorado court docket was slightly shorter and would allow trial roughly 2.5 months sooner that Ohio, minimal difference in judicial resources did not overcome other factors.

(6176) *Citizen's Insurance Company v. FCA US LLC,* 2016 WL 2745818 (E.D. Mi. 2016) – Before court can transfer venue under Section 1334, court must first determine whether court has subject matter jurisdiction. Action against successor to Debtor was sufficiently related to bankruptcy case to support "arising under" jurisdiction. Claim arose out of pre-petition motor vehicle accident in vehicle manufactured by Debtor. FCA purchased assets of Debtor in bankruptcy with specific provision that purchaser was not liable for successor claims. Claims were "core" because FCA's liability turned entirely on interpretation of sale order in bankruptcy case, and order arose and only could have arisen under Bankruptcy code. Once jurisdiction is established, Court must determine whether transfer is appropriate under Section 1412, which allows court to transfer action in interest of justice or for convenience of parties and is within discretion of court. Factors to be considered include whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness and fairness taking into account (1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; (2) whether the interests of judicial economy would be served by the transfer; (3) whether the parties would receive a fair trial; (4) the willingness and ability of the parties to participate in the case; (5) the plaintiff's choice of forum; (6) the effect of a transfer on the enforceability of a judgment; and (7) whether either forum has an interest in having the controversies resolved within its borders; with the most important consideration is whether the transfer would promote the economic and efficient administration of the estate. Factors supported transferring action to District in which Chrysler bankruptcy case was filed. Bankruptcy Court sale order specifically retained jurisdiction over order and failing to ask Bankruptcy Court to interpret order risks inconsistent and conflicting adjudications. Judicial economy weighed in favor of transfer as Bankruptcy Court that issued sale order was in best position to interpret and enforce order, and there was no indication that parties would not receive fair trial or that judgment in New York would not be enforceable in Michigan.

(6177) *Brown v. Florida Coastal Partners, LLC,* 2014 WL 2169561 (S.D. Ohio 2014) – Motion for change of venue denied where Motion sought to change "venue" of action from State Court to Federal Court. Proper vehicle is removal under 28 USC Section 1446.

(6178) *Construction Data Solutions, LLC v. Grant,* 2013 WL 4462706 (Bankr. N.D. Ohio 2013) – "Strong presumption" for venue over adversary proceeding to be placed in same District where bankruptcy case is pending. Court can transfer venue for interests if justice, based on 1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; 2) whether the interests of judicial economy would be served by the transfer; 3) whether the parties would be able to receive a fair trial in each of the possible venues; 4) whether either forum has an interest in having the controversy decided within its borders; 5) whether the enforceability of any judgment would be affected by the transfer; and 6) whether the plaintiff's original choice of forum should be disturbed; with primary focus on efficient and effective administration of estate. Substantial interrelationship between adversary to except debt from discharge and the main asset of the bankruptcy estate favored leaving adversary in jurisdiction where main action was pending, to allow Chapter 7 trustee to effectively monitor action and asses impact on estate's largest asset. Adverse impact that would result from transfer outweighed any concerns about state law claims or any connection between non-forum state and underlying causes of action. Transfer also not proper for convenience of parties where only physical evidence consists of business records that are easily transportable, parties have relatively equal financial ability to litigate in chosen forum, and witnesses would be equally inconvenienced regardless of forum in which action is ultimately tried.

(6179) *Apperson v. Old Fort Banking Co.,* 2012 WL 4760799 (Bankr. W.D. Ky. 2012) – "Strong presumption" for venue over adversary proceeding to be placed in same District where bankruptcy case is pending. Transfer of venue where venue is otherwise proper is in the discretion of the Bankruptcy Court, to be changed with caution. Movant must prove either that transfer is in the interests of justice or that transfer would serve the convenience of the parties. in considering "interests of justice" Courts will consider: 1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; 2) whether the interests of judicial economy would be served by the transfer; 3) whether the parties would be able to receive a fair trial in each of the possible venues; 4) whether either forum has an interest in having the controversy decided within its borders; 5) whether the enforceability of any judgment would be affected by the transfer;

and 6) whether the plaintiff's original choice of forum should be disturbed. In determining convenience of parties, court must consider (1) location of the plaintiff and defendant, (2) ease of access to the necessary proof, (3) convenience of the witnesses and the parties and their relative physical and financial condition, (4) availability of the subpoena power for unwilling witnesses (5) expense of obtaining unwilling witnesses and (6) whether the issues are those where state law governs; and (7) local interest in having localized controversies decided locally. Transfer would not be in interest of justice where transferring court has extensive experience in bankruptcy case while transferee court has no knowledge of case; and transfer would unnecessarily increase expenses of administration of case. Parties could receive fair trial in either forum and neither forum has a particular interest in the outcome. However, convenience of parties warranted transfer. Action had tenuous connection to Kentucky. Debtor and both defendants are located in Ohio, and most if not all witnesses and evidence are in Ohio. Requiring defendants to produce multiple witnesses in a forum more than 5 hours away, with attendant traveling costs supports transfer, particularly where Trustee's travel costs would be minimal by comparison.

(6180) *Foser v. SLM Financial Corp,* 2012 WL 3264991 (W.D. Ky. 2012) – Court can transfer venue of otherwise properly located case in interest of justice and for convenience of witnesses. Party seeking transfer bears burden to present strong evidence to warrant transfer. Court will consider (1) the convenience of witnesses; (2) the location of the 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 plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Student Loan Creditor's concern that failure to transfer venue could lead to inconsistent results not warranted where student loan debts could not be discharged in primary obligor's bankruptcy. Defendant in this case was co-signor. Even if co-signor prevailed in action asserting forgery, that would not in any way impact creditor's ability to recover from bankruptcy Debtor. Alleged "burdens of travel" were insufficient as the current venue lay only 6 miles from venue to which creditor sought transfer.

(6181) *In re Barnes,* Case No. 10-55870 (Bankr. E.D. Mi. 2010) - Debtors' unopposed Motion to Transfer Venue denied where Motion failed to demonstrate that transfer was in the interest of justice or for the convenience of the parties as required by 28 USC Section 1412.

(6182) *Steed v. Buckalew,* 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – In determining whether to change venue "in the interest of justice" under Section 1404 and Section 1412, Court must consider (1) convenience of witnesses; (2) availability of judicial process to compel the attendance of unwilling or uncooperative witnesses; (3) location of the relevant documents or records, and the relative ease of access to sources of proof; (4) residence and convenience of the parties; (5) relative financial means of the parties; (6) locus of the operative facts and events that gave rise to the dispute or lawsuit; (7) each forum's familiarity with the governing law; (8) the deference and weight accorded to the plaintiff's choice of forum; and (9) trial efficiency, fairness, and the interests of justice based on the totality of the circumstances. Defendant's conclusory assertion that the witnesses to the transaction were located in Florida not sufficient to overcome presumption that action filed in correct venue should remain in that venue, where Defendant failed to identify these witnesses or provide sufficient information to allow court to determine what and how important their testimony may be. Defendant's argument that documents related to transaction were located in Florida insufficient where Defendant failed to explain why documents could not be copied, mailed, e- mailed, faxed or otherwise sent to Tennessee. Although all events pertaining to transfers occurred in Florida and transferred property largely remained in Florida, all documents relating to transfers and items of personal property involved could be easily relocated to Tennessee. Plaintiff's choice of venue is entitled to great deference and will be rejected only where another venue is clearly preferable. Leaving case in Tennessee would further judicial economy and efficiency where similar preference actions were already pending in Tennessee and Court was familiar with Debtor and other underlying issues.

12.36 Change of Venue – Chosen Venue Improper

(6183) *KFC Corp. v. Wagstaff,* 2013 WL 3166165 (W.D. Ky. 2013) – Where court lacks personal jurisdiction over defendant, court can either dismiss case or transfer case to a more suitable court. Court need not resolve whether it has authority to adjudicate claim (subject matter jurisdiction) or jurisdiction over the defendant before it can determine whether a more suitable forum exists. Defendants were co-guarantors of corporate obligations of the Corporate Debtors who had filed Chapter 11 proceedings in Minnesota Plaintiff had participate in those bankruptcy proceedings. Plaintiff's actions to enforce guarantees of defendants were "related to" defendants' individual Chapter 11 proceedings as the outcome could conceivably have an effect on administration of the case by impacting possible indemnification claims by the defendants against the Debtor. Although any indemnification claims are indefinite and may or may not ever arise, contingent nature of obligation does not prevent obligation from being related to bankruptcy case. 28 USC allows transfer of "related to" proceedings where transfer serves interest of justice. Transfer is appropriate where transfer would be to court where related bankruptcy is pending, enhancing economics of administration of estate and fostering judicial efficiency given location of most witnesses and parties. Neither Minnesota nor Kentucky held an overwhelming interest in resolution of controversy or the ability of the parties to obtain a fair trial.

C. Trial

12.37 Generally

(6184) *In re Merena,* Case No. 08-1342 (9th Cir. BAP 2009) – Trial court denial of request to bifurcate trial of claims under Section 523 from trial of claims under Section 727 is reviewed for abuse of discretion. Lower Court will abuse its discretion is the court's application of the correct legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Trial court can bifurcate action to avoid prejudice to a party or to promote judicial economy. Trial court correctly denied request to bifurcate where bifurcation would have required parties to litigate section 727 claim at one time and return at a later, indeterminate date, to litigate section 523 claim which would do nothing but increase litigation costs for all parties. Denial of bifurcation would produce a more efficient use of judicial resources and would promote judicial economy while also assisting Debtor in obtaining "fresh start" by avoiding unnecessary delays in deciding issues raised.

12.38 Arbitration

(6185) *In re Bateman,* Case No. 14-5369 (Bankr. M.D. Fl. 2018) - Arbitration agreement in contract between consumer and creditor did not require arbitration of class action brought by consumer alleging creditor violated discharge injunction. Although federal policy has strong presumption in favor of arbitration, and arbitration clauses survives discharge of underlying debt, before ordering arbitration, Court must first decide whether parties actually agree to arbitrate and, if so, whether there are any legal constraints for closing arbitration. Arbitration clause in contract lacked any nexus with alleged discharge violation because resolution of discharge violation would not entail reference to or construction of contract; and complained of conduct involved breach of duty imposed by law, not breach of customer agreement. Further, Bankruptcy Court has significant interest in enforcing any injunction issues including discharge injunctions, and arbitration of contempt proceeding for discharge injunction inherently conflicts with Bankruptcy Code and undermines Court authority.

(6186) *Credit One Financial v. Anderson,* 553 BR 221 (S.D. N.Y. 2016), *aff'd,* 884 F.3d 382 (2d Cir. 2018) – Class Action Claim for violation of discharge injunction is not subject to arbitration even where underlying agreement has valid arbitration clause. While Federal Arbitration Act generally supports arbitration clause. Bankruptcy Court can override clause if lawsuit is core proceeding that either is inherently in conflict with Federal Arbitration Act, or that arbitration would necessarily jeopardize purposes of Bankruptcy Code. Discharge injunction is Core proceeding because discharge is right created by bankruptcy code, and arbitrating claims would necessarily jeopardize objectives of Code. Denial of arbitration would also further goal of uniformity as arbitration creates risk of wildly divergent decisions.

(6187) *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.

(6188) *Navient Solutions, LLC v. Farmer,* 2017 WL 4619209 (W.D. Wash. 2017) – Federal Arbitration Act, 9 USC Section 1, establishes Federal policy favoring arbitration that may be overridden only by contrary Congressional command. Congress expresses intent for Statute to override FAA by text of Statute; Statute's legislative history; or absent an express conflict, whether there is inherent conflict between arbitration and underlying purposes of Statute. Bankruptcy Code inherently conflicts with FAA where issue is dischargeability of debt. Student lender not entitled to arbitrate issue of whether debt qualifies as educational loan for purposes of Section 523(a)(8) as dischargeability of loan is core proceeding and allowing arbitration to decide would conflict with underlying purpose of Code.

(6189) *McMahan v. Byrider Sales of Indiana, LLC,* 2017 WL 4077013 (W.D. Ky. 2017) – Under the Federal Arbitration At, 9 USC Sections 1-16 written agreement to arbitrate dispute arising out of contract involving interstate commerce shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. In determining whether to compel arbitration, Court must decide (1) whether parties agreed to arbitrate; (2) scope of agreement; (3) whether Congress intended claims to be non-arbitrable; and (4) if some but not all claims are subject to arbitration, whether to stay remainder of proceedings. Generally, doubts regarding arbitrability are to be resolved in favor of arbitration. Whether valid agreement to arbitrate exists is based on State Law contract interpretation, not specific to arbitration. Loan agreement between Lender and Borrower contained valid arbitration agreement where agreement provide that any action, dispute, claim or controversy of any kind arising out of, in connection with or in any way related to the Contract, the sale of the Vehicle, financing, contracts, origination, servicing, service agreements, collection, reporting, or any other aspect whatsoever of the past, present or future relationship or conduct of the Parties, clearly indicating agreement to arbitrate. Claim based on alleged violation of Fair Credit Reporting Act for alleged wrongful post-repossession of vehicle accessing of credit report was dispute arising out of loan arrangement. Assignment of contact from original lender to successor did not defeat arbitration agreement where contract specifically allowed assignment and that agreement would be enforceable following assignment. Claims will be congressionally non-arbitrable if Congress specifically intended action to be excluded from Arbitration. Fair Credit Reporting Act did not contain any indication that Congress intended to supersede arbitration of disputes. Fact that Plaintiff previously received discharge in bankruptcy of debt owed to lender did not terminate either party's obligation to arbitrate, as discharge only wipes out personal liability but does not dissolve contact and there was no inherent conflict between Bankruptcy Code and arbitration of Plaintiff's action for post-discharge alleged violation of FCRA.

(6190) *Treinish v. BorrowerFirst, Inc.,* 2017 WL 3971854 (N.D. Ohio 2017) - Court applies four-pronged test to determine whether to compel arbitration: (1) Court must determine whether parties agreed to arbitrate; (2) Court must determine scope of agreement(3) if federal statutory claims are asserted, Court must consider whether Congress intended claims to be non-arbitrable; and (4), if Court concludes that some, but not all, claims in action are subject to arbitration, Court must determine whether to stay remainder of proceedings pending arbitration. Contract between Debtor and Lender contained arbitration agreement that required arbitration of any dispute arising out of contract, and contained "survivor" clause. Debtor's phone call to Lender revoking right to call Debtor did not terminate underlying contact or arbitration provision. Debtor's bankruptcy filing did not terminate contract and Debtor's alleged breach of contract did not terminate contract of cut off right to arbitration. Trustee of Debtor's estate had no special right to terminate arbitration provision. Trustee bound by provision to same extent as Debtor. Adversary proceeding for alleged violation of Telephone Solicitation Act dismissed.

(6191) *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 s 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.

(6192) *Farley v. Eaton Corp.,* 2017 WL 3084417 (6th Cir. 2017) – Under Federal Arbitration Act, once arbitration award is made, party to arbitration may move to confirm award pursuant to 9 USC Section 9. Court must confirm award unless award is vacated, modified, or corrected where arbitrator exceeded powers. 9 USC Sections 10 and 11 provide exclusive regime basis for federal court review of arbitrator's award. Federal Arbitration Act grants strong presumption in favor of confirming arbitration award and Court's review of an arbitrator's decision is one of narrowest standards of judicial review in all of American jurisprudence. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, fact that court is convinced arbitrator committed serious error does not suffice to overturn decision.

(6193) *In re Patriot Solar Group Inc.,* 569 BR 451 (Bankr. W.D. Mi. 2017) - Federal Arbitration Act makes written agreements to arbitrate valid, irrevocable and enforceable except upon grounds in law or equity to revoke contract. Act represents liberal federal policy favoring arbitration and is designed to encourage efficient and speedy resolution of disputes. Court must rigorously enforced agreements to arbitrate even if result is piecemeal litigation absent countervailing policy manifested in another federal statute. Whether Arbitration Act mandate is overridden by contrary Congressional command depends on (1) text of the statute; (2) statutes of legislative history; or (3) inherent conflict between arbitration and statutes underlying purpose. Neither legislative history nor text of Bankruptcy Code reflects congressional intent to preclude enforcement of arbitration agreements. In bankruptcy case, whether arbitration "inherently conflicts" with bankruptcy code depends in part on whether subject of arbitration is core or non-core proceeding. If dispute is non-core, Court is generally without discretion to preclude enforcement of arbitration. Moving party sought to arbitrate claims against the Debtor. Claims resolution process is core proceeding even where all facts and circumstances of rows before the filing of bankruptcy and all issues to be addressed were based on state law. Debtor was seeking to reorganize under Chapter 11, giving other creditors direct interest in the liquidation of movants claim which posed risk of significantly reducing amount available for distribution to other creditors. Debtors major secured creditor and major unsecured creditor sought to participate in claims resolution process and would be denied opportunity if arbitration agreement was enforced. Enforcement of arbitration did not appear to promote judicial economy where arbitration proceeding was in its infancy and moving party had not presented arbitration schedule indicating that arbitration would be more efficient than allowing Court to resolve claims process. Enforcement of arbitration provision would deprive Debtor of relief that Chapter 11 is intended to provide including modification of rights between Debtors and creditors by centralizing disputes in Bankruptcy Court. Debtor asserted desperate need for respite from dispute with moving party in order to avoid immediate liquidation given Debtor's limited resources. Centralization of disputes between Debtors and creditors is particularly critical in Chapter 11, particularly where arbitration would make it difficult for Debtor to attract additional funding, would undermine creditor confidence in Debtor's ability to reorganize, would undermine confidence of 3rd parties conducting business with Debtor, and would impose additional costs on estate while diverting attention of Debtor's management. Enforcement of arbitration agreement in this case would deprive Debtor of breathing spell during which it can develop exit strategy and allowing arbitration to proceed would interfere with Debtor's efforts to execute rehabilitation. Chapter 11 case was less than 4 months old. Debtor should be given reasonable period of time to proposed Plan without simultaneously having to devote significant time and resources toward arbitration process.

(6194) *In re Jorge,* 2017 WL 2333587 (Bankr. N.D. Ohio 2017) - Federal Arbitration Act requires Court to determine if arbitration a particular dispute is appropriate based on whether there is a valid agreement to arbitrate between the parties; and whether did the dispute in question falls within the scope of the agreement. If so, Court must then determine whether any legal constraints external to agreement forecloses use of arbitration such as statutes identifying categories of claims for which arbitration agreements should not be enforceable. Arbitration agreement in cell phone service contract did not apply to Debtor-wife's motion for sanctions for violation of automatic stay as Debtor-wife did not sign any contract containing an arbitration clause. Contract was signed exclusively by Debtor-husband. Fact that allowing arbitration as to Debtor-husband while denying arbitration as to Debtor-wife would result in expense, duplication of effort and possibility of inconsistent outcomes had no bearing on applicability of arbitration clause where Debtor-wife never agreed to arbitration. Arbitration clause in contract is no longer enforceable where Debtor has obtained discharge of underlying debt and did not enter into reaffirmation agreement. Debtor was not attempting to take advantage of contract was simultaneously seeking not to honor agreement to arbitrate. Motion for Contempt for violation of automatic stay and discharge injunction did not rely on any terms of contract and were based solely on creditors post-petition conduct. Terms of arbitration clause were wholly inapplicable to claims for violation of automatic stay and discharge injunction. Fact that matter to be determined is "core" proceeding does not automatically remove matter from scope of arbitration clause. Motion for Contempt for alleged violation of automatic stay and discharge injunction derived exclusively from provisions of Bankruptcy Code and are unique to Bankruptcy Code. Issue related to whether creditor violated discharge injunction, which is injunction entered by Bankruptcy Court such that Bankruptcy Court can and should determine if there has been a violation. Parties cannot, through pre-dispute arbitration agreement, strip Court of its inherent power to enforce its own orders. Violations of the discharge injunction are inherently nonarbitrable and arbitration of those claims would conflict with purposes of Bankruptcy Code.

(6195) *Sicherman v. World Auto Network, Inc.,* 2017 WL 2372375 (Bankr. N.D. Ohio 2017) - Federal Arbitration Act, 9 USC §1, requires Court to enforce privately made agreement to arbitrate absent grounds at law or in equity to revoke contract. When asked by party to compel arbitration, Court must determine whether parties agree to arbitrate the dispute and to construe any ambiguities or doubts in favor of arbitration. Courts must then determine scope of arbitration agreement; whether Congress intended that any asserted statutory claim be nonarbitrable; and whether to stay remaining claims of only a portion of action is subject to arbitration. Parties may delegate Gateway issues of arbitrability to the arbitrator if parties clearly and unmistakably provide for that determination in the arbitration agreement. Absent a clear

and unmistakable delegation to the arbitrator to determine arbitrability, Court will first determine arbitrability. Parties clearly and unmistakably agreed to submit gateway questions of arbitrability to arbitration where arbitration agreement provided "to the extent allowed by law, the validity, scope, and interpretation of this arbitration provision RDB decided by neutral, binding arbitration" and "any dispute shall be resolved by binding arbitration" including "any disagreement over the interpretation and scope of this clause". Fact that arbitration clause was contained in only some, but not all, documents executed as part of transaction did not defeat the enforceability of arbitration clause where each document incorporated the remaining documents by reference resulting in a single, integrated agreement. Fact that the estate may not have sufficient funds to pay cost of arbitration does not create inherent conflict between arbitration and Bankruptcy Code as claims at center of dispute were not directly related to Bankruptcy Code and all Bankruptcy Trustees must deal with costs associated in liquidating contingent and on condition claims of Debtor's estate.

(6196) *Kiskaden v. LVNV Funding, LLC,* 2017 WL 1323409 (Bankr. E.D. Ky. 2017) – Federal Arbitration Act requires that any written commercial contract provision to settle controversy by arbitration is valid, irrevocable and enforceable absent grounds at law or equity for revocation of contract. Court must stay proceedings if Court is satisfied that issue before it is arbitrable under agreement and Court can issue Order compelling arbitration if there has been failure, neglect or refusal to comply with arbitration. FAA mandate may be overridden by clear showing that Congress intended to preclude waiver of judicial remedies for particular statutory rights. In determining whether to compel arbitration, Court must (1) determine whether parties agreed to arbitrate; (2) determine the scope of the arbitration agreement; (3) consider whether Congress intended claims to be non-arbitrable; and (4) if Court concludes that some, but not all, claims are arbitrable, Court must determine whether to stay remainder of proceedings. Contract between parties contained clear enforceable and valid arbitration clause. Counts of Complaint that sought declaration that loan was void under state law and that creditor unlawfully and fraudulently filed materially false proof of claim in bankruptcy case raised "core" claims that would be resolved in claims allowance process. Remaining counts sought damages which are statutorily core but not Constitutionally core under *Stern* as actions seek to augment estate by recovering damages, not to resolve disputes as to whether creditor is entitled to share of bankruptcy estate; and all causes of action asserted were based on non-bankruptcy federal and state statutes. Court lacked authority to decline to enforce Arbitration Provision as to causes of action that were not Constitutionally core, leaving parties in same position as they would have been had no bankruptcy been filed. As to counts of complaint that were Constitutionally core as addressing the claims allowance process, Bankruptcy Court had discretion to deny motion to enforce arbitration provision as arbitration or directly conflict with bankruptcy purpose of prompt and effective administration of estate.

(6197) *Gray v. Midland Funding, LLC,* 2017 WL 1293995 (W.D. Ky. 2017) – Validity of arbitration clauses in contracts is question of state law, requiring determination of whether both parties agreed. Record was unclear for purposes of summary judgment whether Plaintiff agreed to arbitration clause in credit card agreement, where Plaintiff alleged that she opened account by phone, made purchases exclusively by phone, never visited the Card Issuer's website, never placed an online order, does not own a computer, and never received a credit card associated with credit account. Credit card debt purchaser contended that plaintiff opened account online through online application, the application contained the terms and conditions of Credit Agreement, and that application could not have been processed until she clicked a box labeled "Yes! I accept these terms." and that Plaintiff accepted terms acceptance of Credit Agreement as a matter of law through her conduct after the agreement was mailed to her, she used the credit card, and she made payments on her account. Party seeking to stay arbitration not entitled to jury trial on disputed factual issues, unlike Motion to Compel Arbitration where jury trial is available on issue of enforceability of arbitration agreement.

(6198) *Williams v. Navient Solutions LLC,* Case No. 16-1244 (S.D. Fl. 2017) - Federal Arbitration Act favors arbitration of any matter within scope of valid arbitration agreement. Court can override arbitration agreement if arbitration inherently conflicts with underlying purposes of Bankruptcy Code. Arbitration of post discharge dispute regarding dischargeability of student loan did not inherently conflict with Bankruptcy Code. Bankruptcy case had been closed, precluding any interference with distribution of the estate or ongoing reorganization and Debtor's request for class action status weighed in favor of arbitration. Bankruptcy Court does not have exclusive jurisdiction to determine whether claims are excepted from discharge. Bankruptcy adversary proceeding dismissed and parties compelled to proceed to arbitration.

(6199) *Preferred Care of Delaware, Inc. v. Hopkins,* 2017 WL 104830 (6th Cir. 2017) - Federal Arbitration act prohibits appeals from District Court Orders compelling arbitration. Federal Arbitration Act policy favors agreements to arbitrate disputes and prohibits appeals from orders granting a stay of any action; directing arbitration; compelling arbitration; and refusing to enjoin arbitration. Federal Arbitration Act allows appeals only from orders that interfere with arbitration. Litigant may not appeal until final decision has been rendered in arbitration. Where order does nothing more than compel arbitration, Circuit Court lacks jurisdiction to consider appeal of that order.

(6200) *In re No Place Like Home, Inc.,* 559 BR 863 (Bankr. W.D. Tn. 2016) – Federal Arbitration Act requires that courts rigorously enforce agreements to arbitrate even if result is piecemeal litigation. FAA mandate can be overridden by clear congressional command, determined by (1) statutory text; (2) legislative history; or (3) inherent conflict between arbitration and statue's underlying purpose. If there is inherent conflict, court has discretion to order arbitration. If underlying issue is non-core matter, courts lack discretion to refuse arbitration. If matter is core proceeding, that involves claims that substantially affect estate or are essential to bankruptcy case as a whole, issue may raise more pressing bankruptcy issues affording court discretion to deny arbitration. Disputes regarding claims would be ordered to arbitration where issues were based on claims for overtime pay under federal labor laws. Dispute did not affect dischargeability and did not affect claims arising under code, but only claims arising pre-petition under other federal statutes. Once provision is deemed valid and dispute is determined to be within scope of that provision, court must leave remainder of issue for arbitrator to decide. Whether arbitration would be helpful to exercise of bankruptcy jurisdiction depends on whether arbitration was commenced pre-petition; whether party seeking arbitration has appeared in bankruptcy case; whether arbitrator has special knowledge or expertise; whether there is strong likelihood that Debtor will have plan confirmed; whether there is international arbitration provision; likelihood of piecemeal litigation; whether issue to be arbitrated is core or non-core; and impact of resolution on bankruptcy case. Court would order arbitration where majority of arbitration proceedings were commenced pre-petition; party seeking to compel arbitration had chosen non-bankruptcy forum to arbitrate disputes; issues required specialized knowledge and experience; although piecemeal litigation may result, that does not override arbitration agreement where issues were complex and involved non-bankruptcy law, resolution would not be subject to appeal, speeding finality, and issues would not later be

re-litigated in bankruptcy court; claims are technically core proceedings as involving liquidation claims against estate; and there would be little if any impact on bankruptcy case as plan has already been confirmed and resolution of claims already factored into confirmed plan.

(6201) *Metlife Securities, Inc. v. Holt,* 2016 WL 6127138 (E.D. Tn. 2016) – Party opposing arbitration has right to jury trial on issue of whether dispute is subject to arbitration. Under Federal Rule 38, any demand for Jury Trial must be made before date on which opposition to motion to compel arbitration is due. Court not required to empanel jury to determine whether genuine issue of material fact exists as to validity and scope of arbitration agreement. If court determines a genuine issue of material fact exists, court will then empanel jury to resolve that issue only.

(6202) *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, it successors and assigns. Case dismissed without prejudice to parties invoking arbitration provisions of Agreement.

(6203) *344 Individuals v. Giddens,* 2016 WL 58532675 (2d Cir. 2016) – In deciding whether to compel arbitration in a bankruptcy context, courts apply a two-part test. First, the court must determine whether the proceeding at issue is core or non-core. If the proceeding is non-core, generally the bankruptcy court must stay the proceedings in favor of arbitration, as non-core proceedings usually do not warrant overriding the presumption in favor of arbitration. Second, if the proceedings are core, a court must consider whether enforcing the arbitration provisions would seriously jeopardize any underlying purpose of the Bankruptcy Code. If arbitration would severely conflict with the text, history, or purposes of Bankruptcy Code, bankruptcy court has discretion to compel or to stay arbitration. Dispute over where plaintiff's claims fell in priority scheme of distributions and whether those claims should be subordinated to claims of general unsecured creditors is core proceeding. Compelling arbitration would jeopardize objectives of Code and there was no evidence that Congress intended to turn over to arbitration the determination of relative priority of claims against the estate and equitable distribution of assets.

(6204) *Drozdowski 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 is in the scope of that agreement; (3) if federal statutory claims are involved, did Congress intended 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.

(6205) *Ohio Land Management, LLC. V. Chesapeake Exploration, LLC,* 2016 WL 4430833 (N.D. Ohio 2016) – Obligation to arbitrate arises only when there is valid contract containing arbitration clause. Debtor's lease of property post-petition was invalid as property was property estate and lease was not executed or approved by Trustee. Arbitration clause in lease was invalid as Debtor lacked authority to enter into lease in first instance.

(6206) *MetLife Securities, Inc. v. Holt,* 2016 WL 3964459, *motion to amend denied*, 2016 WL 5174942 (E.D. Tn. 2016) – Federal Arbitration Act limits court's consideration of motion to compel arbitration to whether parties entered into valid agreement to arbitrate. Arbitration clause is valid, irrevocable, and enforceable unless grounds exist at law or in equity for the revocation of any contract. Any doubts regarding arbitrarily should be resolved in favor of arbitration as long as agreement to arbitrate remains a matter of consent, not coercion. Federal court has jurisdiction over Motion to Compel Arbitration only if Federal Court would have jurisdiction over action itself. FAA does not create independent basis for Federal Court jurisdiction. Arbitration clause can be avoided where party now seeking to compel arbitration has waived its right to do so as determined by federal, not state, law. Waiver requires actions that are completely inconsistent with reliance on arbitration agreement coupled with delaying assertion to right to arbitrate to extent opposing party incurs actual prejudice. Waiver will not

be lightly inferred and applies only where there are most compelling facts. Plaintiff did not waive arbitration in State Court action by indicating that it would arbitrate only after State Court determination of arbitrability of dispute. Plaintiff also expressed interest in mediation which is not inconsistent with arbitration. Arbitration clause was not "contract of adhesion". Factors include (1) whether subject of contract involves a necessity of life; (2) a contract for the excessive benefit of the offeror; (3) an economic or other advantage of the offeror; and (4) the offer of the proposed contract on a take it or leave it basis. Mere unequal bargaining power is not sufficient – party must prove both no realistic bargaining power and that party is unable to obtain desired services elsewhere without consenting to identical contract terms. Arbitration clause in agreement by which MetLife would invest client's money was not "necessity of life" such as food or shelter. There was no evidence of disparity in bargaining power or high pressure sales tactics, as client could easily have elected not to agree to the arbitration provision and seek services of competitor. Arbitration clause was open and obvious and required signature that client acknowledged and understood that arbitration was included in contract.

(6207) *Bazemore v. Jefferson Capital Systems, LLC,* Case No. 15-12607 (11th Cir. 2016) – Federal Arbitration Act, 9 USC Section 1, embodies liberal federal policy of enforcing arbitration agreements. FAA creates presumption of arbitrability and any doubts concerning scope of arbitrable issues should be resolved in favor of arbitration. However, issue of whether agreement arbitrate exists is matter of contract to be determined by court under applicable state law. Contract generally requires capacity of parties to contract, assent to terms consisting of meeting of minds on essential terms. And subject matter up on which contract can operate, with existence and terms to be proven by preponderance of evidence. Evidence submitted by Credit Card issues seeking to enforce arbitration agreement failed to demonstrate the Debtor assented to arbitration provision. Affidavit stated that Debtor had applied for the credit card over the internet and had "accepted the terms" but did not provide details on the "terms" that were supposedly accepted and did not state how affiant knew of the acceptance. Affidavit also stated that Welcome Kit with terms "would have been sent" to Debtor but never asserted that Kit was sent, that affiant had any personal knowledge of sending of Kit, or whether arbitration clause was included in the "kit" terms. Credit Card issuer acknowledged that terms changed frequently and while declaration attached a sample of what would have been sent, credit card issuer could not prove that the version attached to the Motion was the form sent to Debtor. While evidence that specific agreement was sent to borrower and the specific terms are enforceable if borrower thereafter uses the card, Issuer failed to demonstrate the specific terms of the agreement to which Debtor allegedly consented in this case.

(6208) *Kirkland v. Rund,* Case No. 14-55740, 2016 U.S. App. LEXIS 8570 (9th Cir. 2016) – Bankruptcy Court has discretion to deny enforcement of arbitration agreement where matters involved are core proceedings. Trustee's actions to avoid fraudulent transfers and for subordination and disallowance of claims were core proceedings. Court will then consider Code purpose of having bankruptcy law issues decided by bankruptcy court, centralizing resolution of bankruptcy cases, and protecting parties from piecemeal litigation. Although fraudulent transfer action is one over which only Article III Court can enter judgment, that does not remove cause of action from definition of "statutory core". Further, arbitration agreements were between Debtor and defendant, a former principal of Debtor. Trustee under Section 544 steps into shoes of unsecured creditors. There was no evidence of any arbitration agreement between Debtor and any unsecured creditor that would be binding on Trustee. Trustee does not stand in shoes of Debtor and is not bound by agreements between Debtor and third parties who are not predecessors to trustee in cause of action.

(6209) *Danley v. Encore Capital Group, Inc.,* 2016 WL 2851343 (E.D. Mi. 2016) – When a contract contains an arbitration clause, court's sole review is to determine whether there is valid agreement to arbitrate and whether the specific scope of the dispute falls within the scope of the arbitration clause. Court can consider challenges to the validity of the arbitration clause itself but cannot consider matters beyond that such as whether the contract as a whole is valid or that otherwise directly affects the entire agreement such as fraudulent inducement; or alleged illegality of contract itself. Defendant produced adequate proof that card agreement included arbitration agreement that covered all claims related to the account, which would include claims that defendant illegally collected interest. Plaintiff's argument that clauses were not enforceable by successor to credit card issuer was issue contesting application of contract as whole and is left to jurisdiction of arbitrator. Plaintiff's contention that debt purchaser was precluded by purchase agreement between card issuer and debt purchaser involved question of whether purchaser acquired right to require arbitration which is also delegated to arbitrator's decision.

(6210) *Kirkland v. Rund,* 2016 U.S. App. LEXIS 8510 (9th Cir. 2016) – Bankruptcy Court has discretion to deny motion to compel arbitration notwithstanding otherwise valid arbitration agreement where issues presented including fraudulent conveyance, subordination and disallowance of claims are core proceedings. Arbitration provisions conflict with Code purposes of having bankruptcy court decide bankruptcy law issues and in centralizing resolution of bankruptcy disputes and protecting parties from piecemeal litigation. Fact that one defendant demanded jury trial removing matter from jurisdiction of bankruptcy court to enter final judgment does not alter "core" nature of actions but only requires bankruptcy court to transfer action to District Court for trial. Fact that fraudulent transfers claims were based on State law did not alter, conclusion that matters were not within scope of arbitration agreement between Debtor and plaintiff because Trustee stands in shoes of creditors in general under Section 544 and the creditors in whose shoes the trustee stands did not sign arbitration agreement.

(6211) *Goldstein v. Pas-Coy, LLC,* 2016 WL 2641042 (E.D. Tn. 2016) Arbitration agreement is enforceable in bankruptcy case where claims to be arbitrated were not created by Bankruptcy Code unless Debtor can demonstrate substantial bankruptcy interest that can overcome enforcement of pre-petition arbitration agreement.

(6212) *Flagg v. First Premier Bank.,* Case No. 15-14052 (11th Cir. 2016) – Arbitration agreement that specified National Arbitration Forum as arbitrator was unenforceable where NAF no longer conducted consumer based arbitrations. Choice of NAF was "integral part of the agreement to arbitrate" and court could not compel arbitration and appoint different arbitrator.

(6213) *Portfolio Recovery Associates, LLC v. Dixon,* Case No. 113,077 (Ks. Ct. App. 2016) – Arbitrator, not court ,must determine whether dispute is within scope of arbitration clause or whether plaintiff forfeited right 1371181 arbitrate counterclaims when plaintiff initially filed suit in State Court rather than demanding enforcement of arbitration clause. If court concludes that there is a valid arbitration agreement. Court must defer to arbitrator regarding whether issues are within scope of agreement.

(6214) *Hayes v. Delbert Services Corp.* Case No. 11-1170 (4th Cir. 2016) – Arbitration clause that purported to not only set forum for arbitration but specified that no state or federal law would be considered or applicable to proceeding was gross overreach rendering clause unenforceable. FAA does not protect arbitration agreement that unambiguously forbids arbitrator from applying applicable law.

(6215) *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.

(6216) *McGehee v. Navient Solutions, Inc.,* 2016 WL 313626 (Bankr. E.D. Tn. 2016) – Federal Arbitration Act establishes federal policy favoring arbitration and requiring courts to rigorously enforce arbitration agreements. Party opposing arbitration must prove that enforcing clause would violate state law or that there are grounds in equity to revoke the contract entirely. Court must only determine if there is valid arbitration agreement and whether dispute falls within scope of agreement, with any doubts resolved in favor of arbitration. Agreement required arbitration of any dispute or civil claim between parties. Debtor's suit against educational institution claiming that school defrauded Debtor by promising education and employment that never materialized was within scope of arbitration agreement. Adversary proceeding stayed pending completion of arbitration.

(6217) *Larson v. Swift Rock Financial, Inc.,* 2015 WL 8472262 (D. Co. 2015) – Arbitration agreement in contract between Debtor and debt resolution company did not compel arbitration of adversary by trustee alleging that fees paid exceeded reasonably equivalent value. Trustee was not signatory to contract and so was not bound. Further, enforcement of clause would frustrate efficient administration of the Section 548 action.

(6218) *Robinson v. Alston,* 2015 WL 105821 (11th Cir. 2015) – Party waives right to arbitrate where party acts inconsistently with arbitration right and conduct prejudices other party. Defendant waived arbitration where party ignored requests by opposing party to institute arbitration proceedings and instead chose to hire bankruptcy attorney and place party in bankruptcy. Party then participated in both district court and bankruptcy court proceedings, driving up costs and attorney fees for opposing party.

(6219) *Johnson v. Stellar Recovery, Inc.,* 2014 WL 5705027 (E.D. Mi. 2014) – Arbitration agreement does not require written agreement between parties. Debtor purchased phones from independent cell phone dealer and Terms and Conditions provided that terms were agreed to upon activation of phones. Debtor did not sign any document that included an arbitration agreement and did not sign the Terms and Conditions. However, absent a written and signed agreement, there is no presumptively enforceable arbitration agreement and Court must conduct trial to determine whether party agreed to submit disputes to arbitration. Evidence was disputed for purposes of summary judgment where Debtor filed affidavit stating that she never saw and was never referred to any agreement that contained arbitration clause. However, even if arbitration agreement existed between Debtor and cell carrier, there was no arbitration agreement between Debtor and debt collector acting on behalf of cell carrier.

(6220) *Flintkote Co. v. Aviva, PLC,* 769 F.3d 215 (3d Cir. 2014) – Federal Arbitration Act expresses strong federal policy in favor of resolving disputes through arbitration. Arbitration is strictly a matter of contract and where a party has not agreed to arbitrate, the courts have no authority to mandate that he do so. In ruling on Motion to Compel Arbitration, court must consider (1) whether there is a valid agreement to arbitrate between the parties and, if so, (2) whether the merits-based dispute in question falls within the scope of that valid agreement. Party who is non-signatory to an arbitration agreement, may be equitably bound to arbitrate under traditional principles of contract and agency law. Party will be bound where party has directly benefitted from terms of contract and maintains that other provisions of contract should be enforced as to him or otherwise attempts to enforce terms of contract that it likes while attempting to disavow those that party does not like. Party can also be bound where party either intentionally leads another to change position in reliance on party's conduct. Party alleging estoppel must show that party lacked knowledge or means of obtaining knowledge of truth of matters in question; reasonable reliance on conduct of party against whom estoppel is asserted; and party suffered prejudicial change in position in reliance. Party failed to demonstrate reliance where opposing party initially consented to arbitration as part of attempt to mediate dispute but later chose to litigate matter, where party was signatory to underlying contract in which opposing party specifically reserved right to litigate disputes such that party seeking arbitration knew of actual state of facts. Further, there was no reasonable basis to rely on party's statements regarding arbitration where mediation agreement did not contemplate arbitration in lieu of litigation if mediation was unsuccessful.

(6221) *Blackburn v. Capital Transaction Group, Inc.,* 2014 WL 923316 (E.D. Tn. 2014) – Federal law establishes liberal policy favoring arbitration agreements. Claims in bankruptcy are subject to arbitration unless the issues presented derive exclusively from the provisions of the Bankruptcy Code. Dispute underlying claim in bankruptcy case was based on pre-petition contract and issues were controlled by state law. Court properly entered order requiring parties to arbitrate dispute consistent with terms of arbitration clause.

(6222) *Washington v. Roosen, Varchetti & Oliver, PPLC,* 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – Court could not compel arbitration when issue presented under Rule 12(b)(6) as credit card agreement which contained alleged arbitration clause was not attached to the complaint as an exhibit. In considering a motion to dismiss under Rule 12(b)(6), court is limited to four corners of complaint, and could not consider additional documents attached to Motion itself but not part of the complaint.

(6223) *Green v. G. Reynolds Sims & Assoc, P.C.,* 2013 WL 1212775 (E.D. Mi. 2013) – Federal Arbitration Act makes arbitration clauses generally enforceable. Arbitration clause in Credit Card Agreement sufficiently broad to encompass alleged action against collection agency for breach of Fair Debt Collection Practices Act. Sole issues for Court to consider are whether the dispute is one within the substantive scope of the arbitration agreement and whether the arbitration agreement itself was validly obtained, judged by state law generally applicable to contracts and not specific to arbitration agreements. If Court concludes that dispute is within scope of enforceable arbitration agreement, court must either stay proceedings or dismiss proceedings. Further, if agreement delegates to arbitration the issue of whether the dispute falls within scope of arbitration clause or the validity of the arbitration clause as a whole, that dispute must also be submitted to the arbitrator for resolution. Action stayed pending arbitration including arbitration of disputes concerning enforceability and validity of arbitration agreement

itself.

(6224) *Ackerman v. Eber,* Case No. 10-4974 (9th Cir. 2012) – Federal Arbitration Act provides that arbitration agreement is to be valid, irrevocable and enforceable absent ground to revoke the contract. Court must stay litigation if the issue in the proceeding is arbitrable. Bankruptcy code does not create any exception to the FAA and Bankruptcy Court can deny enforcement of arbitration agreement only if there is an "inherent conflict" between arbitration and underlying purposes of Code. Issues in arbitration were so closely intertwined with dischargeability proceedings under Section 523 such that arbitration would conflict with underlying policies of the Code. Dischargeability is at heart of bankruptcy code. Plaintiff was seeking arbitration proceedings to establish liability and damages that would then be used as collateral estoppel in adversary proceeding under Section 523.

(6225) *Pfeiffer v. Dominion Management of Delaware,* 2011 WL 4005504 (Bankr. E.D. Pa. 2011) - Bankruptcy Court required to stay adversary proceeding pending arbitration where contract between parties contained valid arbitration agreement and matters in dispute fell within scope of claims designated in arbitration clause.

(6226) *In re Rust of Kentucky, Inc.,* 2010 WL 4510894 (Bankr. W.D. Ky. 2010) - Court would not stay adversary proceeding and compel arbitration were contractual conditions to obligation to arbitrate were not fulfilled prior to commencement of bankruptcy case. Party requesting arbitration failed to participate in mandatory mediation and direct discussions which were conditions precedent to arbitration requirement. Although courts have a clear preference for arbitration, court may refuse request for arbitration were arbitration was not commenced prior to adversary proceeding being filed; all parties to the arbitration are parties in the underlying bankruptcy; Court is familiar with and routinely adjudicates breach of contract cases; Debtor also has no prospect of confirming a plan until adversary proceeding is resolved; retaining case before Court would not produce piecemeal litigation; and arbitration would subject the estate to needless expense.

12.39 Arbitration – Confirmation of Award

(6227) *Altruist, Inc. v. Medex Patient Transport, LLC,* 2018 WL 1704111 (M.D. Tn. 2018) - Federal Arbitration Act expresses presumption that arbitration awards will be confirmed. Court review of arbitrator decision is one of narrowest standards of judicial review and all jurisprudence and Court may vacate arbitration award only where arbitrator dispenses "own brand of industrial justice". Material disregard for law requires more than beer errors in interpretation or application and must fly in face of clearly established legal precedent, where applicable legal principle is clearly defined and not subject to reasonable debate and arbitrator refuses to heed that legal principle such that no judge or group of judges could conceivably come to same determination as arbitrators. Unless Arbitration Agreement requires arbitrator to explain decision, Arbitrator is not required to explain decisions if they choose not to do so, leaving at all but impossible to determine whether arbitrator acted with manifest disregard for law.

12.40 Bifurcation of Issues for Trial

(6228) *Metlife Securities, Inc. v. Holt,* 2016 WL 6127138 (E.D. Tn. 2016) – Party opposing arbitration has right to jury trial on issue of whether dispute is subject to arbitration. Under Federal Rule 38, any demand for Jury Trial must be made before date on which opposition to motion to compel arbitration is due. Court not required to empanel jury to determine whether genuine issue of material fact exists as to validity and scope of arbitration agreement. If court determines a genuine issue of material fact exists, court will then empanel jury to resolve that issue only.

(6229) *DeGirolamo v. McIntosh Oil Co.,* 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Court can bifurcate issues in case for separate hearings if the issues presented do not result in "evidentiary overlap". Factual issues of good faith under Section 548(c) substantially 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.

D. Non-Bankruptcy Actions

12.41 Referral to Bankruptcy Court

(6230) *SWM Properties Inc. v. Androla,* 2017 WL 4553412 (W.D. Ky. 2017) – 28 USC Section 157 allows District Court to refer case to Bankruptcy Court if Bankruptcy Court has jurisdiction under 28 USC Section 1334. Bankruptcy Court has jurisdiction over cases that arise under Title 11; or arise in or re related to case under Title 11. Case is "related to" bankruptcy if outcome of proceeding could have conceivable effect on Bankruptcy estate by altering debtor's rights, liabilities, options or freedom of action and that in any way impacts handling and administration of bankruptcy estate. Action against Guarantors of note on which Debtor was maker could conceivably have effect as any recovery by third party from guarantors would reduce Debtor's liability to third party. On referral, Bankruptcy Court will determine whether action is core or non-core and handle matter accordingly. Plaintiff's demand for jury trial does not prevent referral and Bankruptcy Court will handle mater until it becomes trial ready, and in meantime has authority to handle pre-trial issues and issue reports and recommendations on potentially dispositive matters.

(6231) *Church Joint Venture v. Grusin,* 2012 WL 1982337 (W.D. Tn. 2012) – Under Court's Administrative Procedure, any action filed in United States District Court that arises under or is related to case under Title 11 is automatically referred to Bankruptcy Court. Chapter 7 Trustee commenced litigation in District Court against Debtor's former attorney for malpractice. Action constitutes property of estate as cause of action arose pre-petition; therefore, action "arises in" a bankruptcy case making referral to Bankruptcy Court automatic under Administrative Procedure.

(6232) *McKinstry v. Sergent,* 442 B.R. 567 (E.D. Ky. 2011) – District Court considering removal of action to bankruptcy court must first determine whether District Court has jurisdiction over action. If Court lacks jurisdiction, case cannot be referred even with consent of opposing party. Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were "related to" bankruptcy for purposes of jurisdiction. "Related to" jurisdiction exists even after confirmation of Chapter 11 Plan where

claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.

(6233) *U.S. v. Vestal,* 2011 WL 1627985 (N.D. Ohio 2011) – District Court would not refer to Bankruptcy Court action to determine tax liabilities. Connection to bankruptcy case was tangential where bankrupt party was potential claimant to assets of taxpayer depending on amount of tax liability as ultimately determined. Bankruptcy Trustee had already abandoned the possible claim and the Bankruptcy Court had granted stay relief to allow case to proceed at District Court. Action was not core proceeding in bankruptcy case, particularly in light of trustee abandonment of asset and outcome of District Court proceeding could not have any effect on or relate to the bankruptcy case.

(6234) *Omega Consulting v. Kirwood General Hospital,* Case No. 10-13231 (E.D. Mi. 2011) – 28 USC Section 157(a) permits District Court to refer any or all proceedings relating to a bankruptcy case to the Bankruptcy Court for disposition. Bankruptcy Court has jurisdiction to determine whether matter is "core" or "non- core". Matter referred to Bankruptcy Court to determine whether Creditor's attempt to garnish unclaimed funds remaining from liquidation of Debtor constitutes core proceeding and, if so, may supervise the distribution of those funds. Bankruptcy Court also has jurisdiction to determine whether creditor's actions violated automatic stay and to interpret and enforce its own orders. Even if dispute is not "core" proceeding, it is an action to obtain unclaimed funds that could conceivably have an effect on the bankruptcy case, giving Bankruptcy Court jurisdiction as matter is "related to" bankruptcy case.

(6235) *McKinstry v. Sergent,* 2011 WL 94606 (E.D. Ky. 2011) – Before District Court can consider referring matter to Bankruptcy Court, District Court must first determine whether bankruptcy court can exercise jurisdiction over the referred matter. Although Bankruptcy Court can determine whether the matter is core or non-core, that does not relieve District Court of obligation to determine jurisdiction in the first instance. "Related to" is a broad grant of jurisdiction. Bankruptcy Court has jurisdiction as the causes of action all arise out of the confirmed Chapter 11 plan and were prosecuted by the liquidation trust named in the Plan and in which the Plan vested the causes of action. Bankruptcy jurisdictional statute does not distinguish between pre- and post-confirmation jurisdiction. Although Bankruptcy Court may be more reluctant to exercise jurisdiction post-confirmation, that decision is prudential, not jurisdictional.

E. Withdrawal of Reference

12.42 Mandatory

(6236) *Sweet v. United States,* 2018 WL 3574721 (E.D. Mi. 2018) – 28 USC Section 157 provides for mandatory withdrawal of reference if resolution of proceeding requires consideration of both Bankruptcy Code and other laws of United States. Mandatory withdrawal should be granted only if current proceeding cannot be resolved without substantial and material consideration of federal law to regulate interstate commerce. Criminal and civil forfeiture laws regulate interstate commerce and resolution of dispute regarding forfeited property will require substantial and material consideration of federal forfeiture laws. Further, applying forfeiture laws produced conclusion that property subject to forfeiture is not property of bankruptcy estate. Withdrawal of reference for portion of bankruptcy proceeding that encompassed forfeited money was mandatory.

(6237) *McDonald v. Wenzloff,* 2018 WL 1185283 (E.D. Mi. 2018) – 28 USC Section 157(d) allows withdrawal of reference on either mandatory or discretionary basis. Mandatory withdrawal applies only when proceeding involves substantial and material considerations of non-bankruptcy federal law. Existence of bankruptcy issue and a state law claim, standing alone, does not require withdrawal of reference. Factors to be considered on request for discretionary withdrawal include whether claim is core or non-core; promotion of efficient use of judicial resources; avoiding delay and cost to parties; promoting uniformity of bankruptcy administration; prevention of form shopping; and any other related factors. Issues raised involved core proceedings as they required interpretation of prior Bankruptcy Court orders; and raised allegations concerning attempting to pressure Debtors to convert or dismiss bankruptcy case and slandering Trustee in performance of his duties. Bankruptcy Court is in better position to make initial determinations as all causes of action arose during course of bankruptcy case.

(6238) *Walker v. McLemore,* 2017 WL 3149584 (M.D. Tn. 2017) – 28 USC Section 157(d) requires Court to withdraw reference if resolution of proceedings requires consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. Withdrawal of reference is not required simply whenever non-Code federal statutes will be considered, but only when that consideration is necessary for a resolution of the case or proceeding. Party seeking to withdraw reference must show significant interpretation of non-Code statute or Constitution is required. Debtor's allegation that Trustee's proposed sale of property violated Constitution did not require withdrawal of reference where Debtor did not demonstrate that Court needed substantial and material consideration of constitutional issues or that Constitutional challenges required anything more than application of well-settled non-bankruptcy law. Resolution of issues did not require consideration of both Title 11 and non-bankruptcy law where all issues would be decided under Title 11.

(6239) *Dietrich v. Simon,* Case No. 16-14389 (E.D. Mi. 2017) – 28 USC Section 157(d) requires Court to withdraw reference if outcome requires consideration of both title 11 and other laws of the United States. However, withdrawal is not required by mere presence of non-title 11 issue even if that issue is outcome determinative. Allegations that Chapter 7 Trustee seized Debtor's Social Security without explanation of circumstances of alleged seizure or any actions taken by bankruptcy court to resolve dispute were incidental references to non-bankruptcy federal law which are insufficient to trigger mandatory withdrawal.

(6240) *Buck v. Caudill,* 2016 WL 3881133 (S.D. Ohio 2016) – Withdrawal of reference of matter to Bankruptcy Court is mandatory when party files timely motion to withdraws reference and resolution of proceedings requires consideration of both Bankruptcy Code and other laws of United States. Resolution of fee dispute between UST and Debtor's counsel did not require consideration of other laws of United States. Resolution of fee dispute is entirely bankruptcy related matter. While UST had opposed discovery based on 28 CFR 16.21, there was no evidence that movant had complied with administrative requirements or that movant was being deprived of due process as a result of the inability to obtain discovery and did not allege that regulations themselves infringed on due process. Bankruptcy Code and Rules both contemplate that Bankruptcy Court would handle these types of discovery disputes and Bankruptcy Court is better situated to deal with

discovery disputes in the bankruptcy context.

(6241) *United States v. Mehmood,* Case No. 16-11646 (E.D. Mi. 2016) – Withdrawal of reference is mandatory where case requires resolution of issues arising under or involving regulation of organizations or activities that affect interstate commerce. Criminal forfeiture proceedings brought against Debtor, company owned by Debtor, and second company controlled by Debtor's wife to which Debtor's company allegedly transferred assets were non-core criminal proceedings and raised issues under federal law governing criminal activate and civil forfeiture statues. Withdrawal of reference mandatory to allow forfeiture action to proceed.

(6242) *In re Maynard,* 2016 WL 1449459 (S.D. Ohio 2016) – Withdrawal of the reference is mandatory if the outcome of the case raises substantial and material non-bankruptcy code law. Law must involve more than mere rote application of federal law and must require actual application of non-bankruptcy law rather than mere interpretation of non-bankruptcy law. Defendant's defense of action by UST to disgorge fees raises substantial question so due process, where UST refused to respond to discovery requests relative to fee issue. Defendant's constitutional right to due process of law is significant and determining the scope and effect of due process rights in the course of this matter would require a court to interpret substantial federal law beyond the Bankruptcy Code.

(6243) *In re Brown,* 2015 WL 2416143 (S.D. Ohio 2015) – District Court must withdraw reference if resolution requires consideration of both Title 11 and laws of the United States. Motion to Withdraw Reference must be made as soon as possible after moving party is aware of grounds to withdraw reference. Debtors failed to timely seek to withdraw reference where Debtors had been in bankruptcy since 2011 and had repeatedly, and unsuccessfully, attempted to withdraw reference as to adversary proceedings and had unsuccessfully filed two separate adversary proceedings against lender and had otherwise exhausted all possible remedies in bankruptcy court. Current motion to withdraw reference over entire bankruptcy case was nothing more than an attempt to stall or delay proceedings.

(6244) *CitiMortgage, Inc. v. Crawford,* 2012 WL 1867518 (S.D. Ohio 2012) – Under 28 USC Section 157(d), a district court "shall" withdraw the reference "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." Court granted motion to withdraw reference where defendant failed to file any response to the Motion to Withdraw Reference within time permitted. After Lender commenced foreclosure proceedings, defendant filed a Class Action counterclaim alleging breach of contract, misrepresentations, and violation of State Deceptive Trade Practices Act. Lender then filed Motion to Withdraw the reference, and defendant failed to file any response or opposition.

(6245) *Antiock Company Litigation Trust v. Morgan,* Case No. 09-3409 (Bankr. S.D. Ohio 2010) – A motion to withdraw the reference is mandatory if the District resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. Withdrawal is mandatory only mandatory when `substantial and material' consideration of non- Bankruptcy Code law is necessary for the resolution of a case or proceeding. The application of established federal law to particular facts has been determined to not constitute a "significant and material" application. Adversary proceeding involving ERISA did not require mandatory withdrawal of the reference. Bankruptcy Court would not be addressing novel issues of law and would be merely applying existing law to new facts. Although the specific facts are complex the applicable law is settled.

(6246) *In re Matheson Industries, Inc.,* 408 B.R. 888 (E.D. Mich. 2009). Creditor, who was defendant in an adversary proceeding initiated by the Chapter 7 trustee, moved to withdraw the reference and move the dispute to the district court. The district court held that the allegations of bid rigging and other interference with the auction of injection molding machines that creditor neglected to perfect a security interest in, did not require mandatory withdrawal of reference, nor was permissive withdrawal of the reference granted. So, the adversary proceeding remained with the bankruptcy court.

(6247) *Lewis v. Negri Bossi USA, Inc.,* Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is mandatory when resolution of proceeding requires consideration of both Bankruptcy Code and other laws of the United States. Complaint alleging that defendant attempted to improperly "chill" bidding at bankruptcy auction and that defendant attempted to control property of estate are actions based on Bankruptcy Code and do not require consideration of antitrust restrictions under Sherman Act. Plaintiff's decision to include in complaint only "core" matters in effort to ensure case remained in Bankruptcy Court did not constitute "forum shopping" but was an election of causes of action.

(6248) *Angelucci v. Farmers Bank & Trust Co.,* 2009 WL 798805 (E.D. Ky. 2009) – Withdrawal of reference is mandatory when resolution of the case will require substantial and material consideration of non- Bankruptcy Code statutes.

(6249) *Stevenson v. Polymerica, Ltd.,* 2009 WL 230598 (E.D. Mi. 2009) – Withdrawal of reference mandatory under 28 USC Section 157 where resolution of case requires consideration of both Bankruptcy Code and other laws of the United States regulating organizations of activities affecting interstate commerce. Mandatory withdrawal requires that substantial and material consideration of non-bankruptcy law will be required in the proceeding and that a resolution would require "significant interpretation" of non- Bankruptcy law. Mandatory withdrawal denied where consideration of underlying action will require "some consideration" but not "substantial and material" consideration of non-Bankruptcy law.

(6250) *Anderson v. Countrywide Home Loans, Inc.,* 395 BR 7 (E.D. Mi. 2008) – Court not required to withdraw reference in action brought by Debtor for violation of automatic stay and alleged violations of Home Owner's Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). "Substantial and material" standard excludes from mandatory withdrawal cases involving "straightforward application of a federal statute to a particular set of facts". Non-Bankruptcy law will be implicated in the decision but will not be "substantial and material" as the claims are primarily Bankruptcy law related, based on alleged violations of automatic stay and discharge injunction.

(6251) *Prince v. Countrywide Home Loans, Inc.,* 2008 WL 4572545 (E.D. Tn. 2008) – Withdrawal of reference is mandatory only when "substantial and material" consideration of non-Bankruptcy law is necessary to determine outcome. That Bankruptcy Court may have to

"consider" non-bankruptcy statutes is not enough for mandatory withdrawal. Plaintiff's claims based on Real Estate Settlement Procedures Act and Fair Debt Collection Practices Act involve matters routinely considered by Bankruptcy Courts. Statutes do not require specialized expertise that Bankruptcy Court lacks and record does not demonstrate that resolution of claims will require "substantial and material" consideration of RESPA and FDCPA in comparison to the other claims in made in the Bankruptcy Court. Judicial economy and orderly administration of dispute best served by Bankruptcy Court continuing to administer the entire case.

12.43 Discretionary – Cause for Withdrawal

(6252) *Hadla v. Shapiro,* 2017 WL 3309648 (E.D. Mi. 2017) – District Court may withdraw reference for cause based on whether action is core or non-core, most efficient use of judicial resources, delay and cost to parties if reference is withdrawn, promotion of uniform bankruptcy administration, potential forum shopping, and any other related factor. Motion to Withdraw Reference at early stage of proceeding premature as it action to avoid fraudulent transfer is core proceeding and allowing matter to remain in bankruptcy court would be most efficient use of judicial resources where there were related matters pending in bankruptcy court and withdrawal of reference at early stage could result In judicial overlap and unnecessary expenditure of judicial resources. Only asserted basis to withdraw reference was right to jury trial, but denial of Motion to Withdraw Reference would allow all pre-trial matters to be handled by bankruptcy court potentially including dispositive motions. Motion to Withdraw Reference denied without prejudice to renew Motion when action is ready for trial.

(6253) *Feiger & Feiger, PC v. Nathan*, 2017 WL 359289, *reh'g denied*, 2017 WL 1130091 (E.D. Mi. 2017) – District Court has broad discretion in deciding whether reference should be withdrawn under Section 157(d). Discretionary abstention requires consideration of whether claim is core or non-core; most efficient use of judicial resources; delay and cost to parties; uniformity of bankruptcy administration; forum shopping; and any other related factors. Claims in adversary proceeding did not qualify as core proceedings as proceeding did not invoke substantive rate created by federal bankruptcy law and claim could exist outside of bankruptcy. Although claims were related to bankruptcy case, claims could have, and did, exist in State Court prior to commencement of involuntary bankruptcy proceedings. Bankruptcy judge retains authority to rule in non-core matters either with consent of the parties or by issuing Report & Recommendation to District Court. Fact that matter is non-core, standing alone, is not basis to withdraw a reference. Case was an early stage of litigation and certainty and timing of trial were far from clear. Withdrawal of reference at early stage would create two distinct, concurrent discovery processes, one in District Court and one in Bankruptcy Court where related discovery continues outside of adversary proceeding potentially needlessly increasing cost and duplication of effort by two Courts as well as risk of inconsistent rulings. Fact that party has right to jury trial and will not consent to jury trial in Bankruptcy Court is not basis for early withdrawal of reference as matters may resolve prior to trial. Motion to withdraw reference denied without prejudice to renewing motion at time when matter is approaching trial.

(6254) *Onewoo Corp. v. Hampshire Brands, Inc.,* Case No. 17-1008 (Bankr. S.D.N.Y. 2017) – Bankruptcy Court lacks ability to "un-remand" action that has been referred by District Court. Even where all parties sought action to be returned to District Court, any request to withdraw he reference must be addressed to District Court that remanded action in first instance.

(6255) *Dietrich v. Simon,* Case No. 16-14389 (E.D. Mi. 2017) – 28 USC Section 157(d) grants discretion to District Court to withdraw reference for "cause". Courts generally consider (1) whether matter is core or non-core; (2) most efficient use of judicial resources; (3) delay and cost to parties if reference is withdrawn; (4) promotion of uniformity of bankruptcy administration; (5) preventing forum shopping; and (6) any other related factors. Of these factors, whether matter is core or non-core is most important. Debtor's request to withdraw reference was based on Debtor's frustration with bankruptcy proceedings and manner in which trustee was discharging duties. Debtor does not address whether matter is core or non-core and withdrawing reference after more than three years of bankruptcy proceedings is not efficient use of judicial resources and would likely delay proceedings. Bankruptcy Court in better position to promote uniformity as issues fall within Bankruptcy Court expertise, and withdrawing reference would reflect forum shopping by allowing Debtor to escape the District Court whenever bankruptcy case is not perceived to Debtor's satisfaction.

(6256) *National Medical Imaging, LLC v. DVI Receivables XIV, LLC,* Case No. 15-147 (E.D. Pa. 2016) – Request for punitive damages following dismissal of involuntary petition triggers right to jury trial. District Court would withdraw reference in interest of judicial economy as only District Court could conduct jury trial.

(6257) *In re Maynard,* 2016 WL 1449459 (S.D. Ohio 2016) – Discretionary withdrawal requires withdrawal of reference of bankruptcy proceeding on timely motion if resolution of proceeding requires consideration the goals of uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the Debtors' and creditors' resources, and expediting the bankruptcy process. Factors include: (1) whether the claim is core or non-core, (2) the most efficient use of judicial resources, (3) the delay and costs to the parties, (4) what will promote uniformity of bankruptcy administration, (5) what will prevent forum shopping, and (6) other related factors. Withdrawal of reference regarding discovery dispute between UST and defendant in connection with UST refusal to respond to discovery requests relative to fee issue. Defendant will be directly pecuniarily affected by outcome and withdrawing reference for limited purpose of resolving discovery dispute will prevent duplicative litigation and streamline course of bankruptcy case.

(6258) *Sweet v. Liberty Insurance Corp.,* 2015 WL 9684724 (E.D. Mi. 2015) – Discretionary withdrawal of reference is based on whether proceeding is core or non-core; the efficient use of court resources; uniformity of bankruptcy case administration; discouragement of forum shopping; and other factors that the court may deem relevant; with issue of core versus non-core being the most important. Trustee's suit against insurance company for alleged failure to pay claim was entirely non-core, as existence did not arise out of bankruptcy code. Entire cause of action was based on state law and could have been brought even if the bankruptcy had never been filed. Outcome is based entirely on Michigan contract law. Bankruptcy Court lacked authority to enter final judgment and would have to enter report and recommendations for District Court, such that judicial resources would be more efficiently used and parties would be able to mitigate costs by proceeding in District Court in first instance. District court was familiar with background resulting from other, related adversary proceedings, and there was no evidence that proceeding in District Court would impede or interfere with bankruptcy proceedings.

(6259) *Walker v. Selene Finance, LP,* 2015 WL 19967446 (M.D. Tn. 2015) – First inquiry in considering request for discretionary withdrawal of

reference is whether cause of action is core proceeding. Bankruptcy court can hear and enter final judgment in core proceeding, and can hear and enter proposed findings of fact and conclusions of law in non-core proceeding. Action to determine validity of claim is core proceeding such that withdrawal of reference would be denied. To extent cause of action asserted other matters not directly related to claims adjudication, bankruptcy court would issue proposed findings and matters were at least related to core proceedings, such that allowing matters to remain in bankruptcy court would promote judicial economy and uniformity in case administration and would reduce expenses and burden on parties by having one court adjudicate all matters at one time.

(6260) *National Union Fire Insurance Company v. CMH Liquidating Trust,* 2015 WL 3843408 (E.D. Mi. 2015) – Whether "cause" exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. District Court has authority to make determination of whether adversary proceeding is core or non-core and is not required to defer to bankruptcy court for that determination. Bankruptcy court's decision as to whether matter is core or non-core would be subject to appeal to district court, such that allowing district court to make determination in first instance promotes judicial economy. Core proceedings are those that involve a cause of action created or determined by a statutory provision of title 11 or could arise only in bankruptcy cases. If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding. Action by Trustee was state law breach of contract case. Although defendant intended to assert provisions of bankruptcy code as defense, assertion of defenses does not convert non-core proceeding into core proceeding. Even where withdrawal of reference is appropriate, court can defer ruling where case is in early stages, bankruptcy court continues to address proceedings which are related but beyond the scope of the adversary proceeding that could produce inconsistent results, and no party will be prejudiced by allowing bankruptcy court to preside until matter is ready for trial.

(6261) *Dzierzawski v. Vulpina, LLC,* 2015 WL 3843612 (E.D. Mi. 2015) – Whether "cause" exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. If matter is core proceeding, bankruptcy court has power to enter final judgment. Where matter is non-core, bankruptcy court cannot enter final judgment which provides stronger case for withdrawing reference as matter will inevitably involve district court proceedings. However, where party is entitled to jury trial, status of matter as core proceeding is less important as bankruptcy court lacks authority to conduct jury trial over objection of any party, and matter will have to be referred to district court for trial. Court has discretion to delay withdrawal of reference if allowing matters to remain in bankruptcy court would expedite resolution and promote judicial economy. Court would defer where matter was in early stages of litigation, certainty and timing of trial were far from clear, and bankruptcy court had already adjudicated a number of discovery disputes and was familiar with the underlying issues. Withdrawal of reference could also produce duplicate efforts as similar discovery matters would remain in bankruptcy court on related proceedings and could produce inconsistent rulings.

(6262) *U.S. v. Cordes,* 2015 WL 3775575 (E.D. Mi. 2015) – Whether "cause" exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. Court will not withdraw reference where underlying case is core matter, arising out of the Bankruptcy Code and that would not exist outside the bankruptcy case. Court denied request to withdraw reference as actions requested determination of dischargeability of tax liabilities and damages for alleged violations of the automatic stay by IRS. Actions necessarily turned on bankruptcy code provisions regarding discharge and bankruptcy definition of "property of the estate". Court would withdraw reference over two non-core causes of action, one to determine whether related entity was "alter ego" of Debtor and one for determination of IRS as secured creditor, as each of these turned on state and non-bankruptcy federal statutes.

(6263) *In re Brown,* 2015 WL 2238097 (S.D. Ohio 2015) – Court has discretion to withdraw reference with consideration to whether action is core or non-core and whether bankruptcy court can enter final judgment. Moving party filed adversary alleging that action was core proceeding and moving party also expressly consented to bankruptcy court jurisdiction even if case is non-core. Considerations of judicial economy, uniformity of bankruptcy administration, conservation of Debtor and creditor resources, expending bankruptcy process, the lack of a right to jury trial, and evidence of forum shopping all supported denial of request for withdrawal.

(6264) *Irvin v. Faller,* 2015 WL 2151926 (W.D. Ky. 2015) – District Court can withdraw reference of matter to Bankruptcy Court on motion that is timely filed and on showing of cause. Cause to withdraw reference is based on balancing of factors including whether matter is core or non-core; whether right to jury trial exists; judicial economy; promoting uniform bankruptcy administration; whether motion indicates forum shopping or creates risk of confusion; conservation of creditor and Debtor resources; and expediting bankruptcy process. Proceeding is "core" if it invokes substantive right provided by Title 11 or that by its nature could arise only in context of bankruptcy case. Action to except debt from discharge is core proceeding. While facts underlying action may raise State Court claims for defamation and abuse of process that do not, themselves, emanate from Title 11, the relief sought was unique to bankruptcy and could arise only in bankruptcy case. Defendant had no right to jury trial on action to except debt from discharge, although claims were based on state law causes of action that, themselves, would have been subject to jury trial. Action to except debt from discharge is equitable in nature not subject to Seventh Amendment requirement for jury trial. Further, Debtor voluntarily submitted himself to bankruptcy court jurisdiction over case when Debtor filed for bankruptcy in first instance, thereby acquiescing in bankruptcy court exercise of jurisdiction. Debtor cannot simultaneously seek bankruptcy protection and then complain that bankruptcy forum deprives him of state law rights.

(6265) *Getzler Heinrich & Assoc. LLC v. Wojcik,* 2015 WL 235819 (N.D. Ohio 2015) – Bankruptcy Court lacks jurisdiction to enter final judgment in action brought by trustee under Section 544 to recover allegedly fraudulent transfers using state fraudulent transfer law. Defendant had timely requested jury trial and bankruptcy court lacked ability to conduct jury trial. Pretrial proceedings had been completed and case was ready for trial, such that all remaining judicial work was beyond the statutory and constitutional limits of the bankruptcy court's authority. Motion to withdraw reference made after completion of pretrial proceedings was timely.

(6266) *Williams v. Flying J, Inc.,* 2014 WL 7411798 (W.D. Tn. 2014) – 28 USC Section 157 permits court to withdraw reference for cause. Cause is not defined but is based on factors such as whether cause of action is core or non-core; whether action is legal or equitable in nature; efficient use of judicial resources; prevention of forum shopping; and effect of rulings on uniformity of case administration in bankruptcy. Complaint alleged multiple counts including one "non-core" state law claim. Bankruptcy court can enter final judgment on core proceedings and enter report and recommendations on non-core matter, such that judicial economy would be furthered by allowing matters to remain in bankruptcy court. Request for jury trial is not basis to withdraw reference at early stages of case. Bankruptcy Court can preside over case including ruling on potentially dispositive motions. Once case is ready for trial, reference can be withdrawn and matter can proceed at that point in District Court.

(6267) *Brown v. Florida Coastal Partners, LLC,* 2014 WL 2169561 (S.D. Ohio 2014) – Court can withdraw reference for "cause". Court would not withdraw reference of adversary proceeding previously filed in Bankruptcy case where adversary proceeding had already been dismissed by bankruptcy court with prejudice.

(6268) *McKinstry v. Genser,* 2014 WL 549202 (E.D. Ky. 2014) – District Court withdrew reference to determine motion for sanctions for spoliation of evidence. Withdrawal of reference would promote judicial economy as court had previously withdrawn reference over entire case except for certain matters, and resolution of spoliation motion would exceed scope of matters that remained in Bankruptcy Court. Spoliation motion could be equally decided by District Court or Bankruptcy Court as District Court retained jurisdiction over matter as a whole. Spoliation sanctions bore no special connection to bankruptcy case itself and there was no special expertise of bankruptcy court that would favor resolution by that court.

(6269) *PNC Bank, NA v. Fairburn,* 2013 WL 5604362 (N.D. Ohio 2013) – Court generally will not withdraw reference of core proceeding. However, determination of core versus non-core should be first made by bankruptcy court. Court would deny Motion to Withdraw Reference as premature, pending determination by bankruptcy court as to whether proceedings are core or non-core.

(6270) *Hauk v. Dan's Excavating, Inc.,* Case No. 13-11607 (E.D. Mi. 2013) – Court may withdraw reference for cause shown. Cause depends on weighing goals of promoting uniformity in case administration, reducing forum shopping, fostering economical use of resources, and expediting bankruptcy process. Debtor filed adversary complaint against non-Debtor in bankruptcy court. In complaint, Debtor alleged that matter was not core proceeding but that Debtor consented to bankruptcy court exercise of jurisdiction. Debtor's consent to bankruptcy court jurisdiction extended to allowing bankruptcy court to conduct jury trial. Even if bankruptcy court then lacked jurisdiction to enter final order, court was not required to withdraw the reference as court could consider matter on report and recommendation from bankruptcy court after trial. Motion evidenced effort to forum shop. But for bankruptcy, action would have been pending in State Court as there was no independent basis for federal jurisdiction. Debtor appeared to be steering case to district court by first filing in bankruptcy court and then seeking to move it to federal court by withdrawing reference.

(6271) *Austin v. FNMA,* 2013 WL 2898037 (E.D. Mi. 2013) – Court would not exercise discretion to withdraw reference to consider motion for Rule 2004 Examination based on Debtor's attempt to bring action against lender to recover fraudulent transfers. Action to recover fraudulent transfer can be brought solely by Trustee and involved pure bankruptcy matters that belong in Bankruptcy Court. Request to withdraw reference, to extent based on Order Lifting Stay entered by Bankruptcy Court, was too late, and to extent related to alleged fraudulent transfer was matter governed entirely by Title 11 and within Bankruptcy Court's jurisdiction.

(6272) *Okke v. Okke,* 513 BR 896 (Bankr. W.D. Mi. 2013) – 28 USC Section 1334(c)(1) provides for permissive abstention based on effect or lack of effect on efficient administration of case; extent to which state law issues predominate over bankruptcy issues; difficulty or unsettled nature of applicable state law; presence of related proceedings in State Court or other non-bankruptcy court; jurisdictional basis, if any, other than 28 USC Section 1334; degree of relatedness or remoteness of proceeding to main bankruptcy case; substance rather than from of asserted core proceeding; feasibility of severing state law claims from core proceedings to allow State Court to enter judgments that would be enforced by bankruptcy court; burden on court's docket; likelihood that commencement of proceedings in bankruptcy involve forum shopping; presence of non-Debtor parties; and any unusual or significant factors. Although bankruptcy court traditionally defers to State Court in domestic matters, in this case the parties had extensively negotiated regarding treatment of wife's claim in Chapter 13 plan resulting in plan that pays wife $1400 per month. Although Code reserves to State Court the amount of any DSO payment, it preserves to federal court division of former marital property. Issues did not involve jury trial and legal issues were not difficult or unsettled Retaining case did not present any burden on court as Chapter 13 plan had already been confirmed and Debtor was performing as required.

(6273) *Apperson v. Bleckner,* 2012 WL 4324930 (W.D. Ky. 2012) – District Court has discretion to withdraw reference and to have action considered by District Court for "cause". Withdrawal is appropriate where the cause is shown to be compelling or truly exceptional circumstances. Status of matter as "core" versus "non-core" does not control withdrawal, as bankruptcy court can hear and consider non-core matters subject to the requirement of a report and recommendation with the District Court to enter the actual judgment. Judicial economy and the resources of the parties are best served by the court that is most familiar with the parties and the issues performing the first review of those issues. District Court's review of those findings and conclusions *de novo* is an efficient use of the courts' and the parties' resources. *Stern* did not mandate withdrawal of reference in adversary proceeding involving contractual indemnity claim against Debtor. Timely demand for jury trial did not require abstention as bankruptcy court can preside over matter and enter final judgments in core matters or reports and recommendations in non-core matters and may otherwise preside over case until a trial is actually necessary and the possibility of summary judgment is extinguished. Motion to Withdraw Reference denied without prejudice to renewal if and when case is actually ready for trial.

(6274) *In re Church Street Health Management, LLC,* 2012 WL 4035971 (M.D. Tn. 2012) – 28 USC Section 157 allows District court to withdraw reference to bankruptcy court for cause. Congressional intent is to have bankruptcy matters resolved by bankruptcy court unless rebutted by some contravening policy. Courts must consider (1) whether the proceeding is "core" or "non-core;" (2) the efficient use of judicial resources; (3) the delay and costs to the parties; (4) promoting uniformity of bankruptcy administration; (5) the prevention of forum shopping;

and (6) other related factors, such as expediency of the bankruptcy process and whether there has been a jury trial demanded. Creditor sought to withdraw reference concerning Creditor's Motion to Modify the Automatic Stay to allow litigation to proceed in non-bankruptcy forum. Motion to Terminate or Alter Automatic Stay is core proceeding as automatic stay is one of fundamental Debtor protections afforded under Code. Bankruptcy Court had already ruled on Motion and bankruptcy court is in better position to assess issues and effect of lifting stay.

(6275) *TTOD v. Lim,* 2012 WL 3257882 (E.D. Mi. 2012) – Counterclaim brought by Chapter 7 trustee against creditor sought relief under State and Common Law remedies. Bankruptcy Court lacks jurisdiction to enter final judgment. Reference would be withdrawn to allow case to proceed in Article III district court. Inability of Bankruptcy Court to constitutionally enter final judgment is "cause" under 28 U.S.C. § 157(d) to warrant withdrawal of the reference to the bankruptcy court.

(6276) *Official Committee of Unsecured Creditors v. Entergy Coal Resources, Inc.,* 472 BR 731 (E.D. Ky. 2012) – Courts consider the following factors to determine whether cause exists: (1) judicial economy; (2) uniformity in bankruptcy administration; (3) reducing forum shopping and confusion; (4) fostering economical use of the Debtor's and creditor's resources; (5) expediting the bankruptcy process; and (6) the presence of a jury demand. Further, whether matter is core or non-core is central question, as bankruptcy courts can enter final judgments in core proceedings but cannot do so in non-core proceedings. However, core versus non-core is not the controlling issue. Mix of core and non-core actions did not mandate withdrawal of reference where core proceedings predominate and to extent proceedings involve non-core matters, bankruptcy court can issue report and recommendations to District Court. Judicial economy is furthered by allowing matter to remain in bankruptcy court as bankruptcy cases are regularly handled by bankruptcy judges and that they have special expertise in handling these particular cases. Underlying case had been pending in bankruptcy court for over 2 years allowing court to become familiar with the facts and circumstances. Although several defendants are entitled to jury trials, bankruptcy court can retain jurisdiction over pre-trial proceedings including dispositive motions, and reference can be withdrawn once matter is ready for trial.

(6277) *Boyd v. King Par, LLC,* 2011 WL 5509873 (Bankr. W.D. Mi. 2011) – Court may withdraw the reference for "cause". Court will consider (1) whether claim is core or non-core; (2) the most efficient use of judicial resources; (3) what delay and cost would result; (4) whether withdrawal would promote or inhibit uniformity of bankruptcy administration; (5) prevention of forum shopping; and (6) other factors that the Court considers relevant. Trustee's action to recover fraudulent transfers under both state and federal law is "core" proceeding. Although Court may or may not be able to enter final judgment in light of *Stern*, Court can nonetheless preside over matter and determine ability to enter final judgment at later date. Defendant's right to jury trail does not require immediate withdrawal of reference as Bankruptcy Court still has jurisdiction to enter final judgment and to entertain all other pretrial proceedings including motions for summary judgment, and reference can be withdrawn immediately before trial, if appropriate. Efficient use of judicial resources would be promoted by leaving case with Bankruptcy Court as Court is familiar with eh parties, court is familiar with fraudulent transfer proceedings in general and allowing Bankruptcy Court to oversee discovery and pre-trial matters would promote uniformity of bankruptcy administration. If after discovery and resolution of pre-trial matters it appears that the case requires a jury trial, court will withdraw reference at that time and refer matter to District Court for trial.

(6278) *Welch v. Gordulic,* 2011 WL 2490943 (N.D. Ohio 2011) – District court should consider whether the proceeding is non-core and, thus, whether the bankruptcy court has jurisdiction to hear it; the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion; and expediting the bankruptcy process as well as whether a jury demand has been made. Trustee alleged that the adversary proceeding is a core proceeding, an allegation admitted by Defendant in his answer. Even if the proceeding were non-core, judicial economy weighed against withdrawal where case proceeded in bankruptcy court for six months prior to the filing of the motion to withdraw the reference and case continued to proceed through bankruptcy court for an additional year after the filing of the motion. Bankruptcy court was far more familiar with the issues in the adversary proceeding. Allowing bankruptcy court to proceed promoted uniformity in bankruptcy administration and reduced forum shopping where the adversary proceeding represented the only hope creditors had for realizing a distribution on their claims.

(6279) *Antiock Company Litigation Trust v. Morgan,* Case No. 09-3409 (Bankr. S.D. Ohio 2010) – In determining cause for discretionary withdrawal of the reference, a district court can consider promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economic use of the Debtors' and creditors' resources, and expediting the bankruptcy process. District Court will not withdraw reference at early stage of proceedings based merely on a demand for a jury trial. Bankruptcy courts cannot conduct a jury trial without the consent of all the parties but Bankruptcy Court can preside over matter until it is ready for trial, at which point the reference can be withdrawn for purposes of the trial only. Court will not exercise discretion to withdraw reference at early stage of proceeding where the complaint contains both core and non-core causes of action. Court can delay withdrawing the reference until the time of trial. Judicial economy does not support permissive withdrawal of the reference at the pre-trial stage of this litigation even where adversary proceeding bears "limited commonality" to other actions already pending at District Court where there was no evidence that leaving proceedings in two different courts would cause harm or result in duplicate discovery or pre-trial proceedings.

(6280) *Ormsby v. First American Title Company,* 591 F.3d 1199 (9th Cir. 2010) – District Court properly withdrew reference of Motion to Tax Attorney Fees arising out of appeal of judgment of non-dischargeability. Withdrawal of reference supported by judicial economy.

(6281) *Steed v. Knox Forex Group, LLC,* 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – District Court may withdraw reference for "cause". Permissive withdrawal of reference is not intended to be an escape hatch from Bankruptcy Court, and the reference will be withdrawn only for a compelling cause. Court should consider whether the matter at issue is a "core" preceding; judicial economy; promotion of uniformity in bankruptcy administration; reduction in forum shopping; conservation of creditor and Debtor resources; expediting the bankruptcy process; and a jury demand. Core proceedings are less likely to be withdrawn as core proceedings invoke substantive rights created by bankruptcy law. Defendant's demand for a jury trial weighs heavily in favor of withdrawing the reference. Demand for a jury trial, standing alone, constitutes sufficient "cause" to withdraw the reference. Defendant is entitled to jury trial on action to recover fraudulent transfers as long as Debtor has preserved the right by making a timely demand for a jury trial and defendant has not filed any claims against the bankruptcy estate.

(6282) *Lewis v. Negri Bossi USA, Inc.,* Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is permissive for "cause" based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Claims asserted by Plaintiff were predicated on Sections 362 and 363 of the Bankruptcy Code and constituted "core" proceedings. Efficiency of administration improved by allowing matter to remain in Bankruptcy Court which has more familiarity with facts and issues. Plaintiff's decision to include in complaint only "core" matters in effort to ensure case remained in Bankruptcy Court did not constitute "forum shopping" but was an election of causes of action.

(6283) *Omega Tool Corp v. Alix Partners, LLP.,* 2009 WL 1868410 (E.D. Mi. 2009) – District Court can withdraw reference for "cause" based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Non-core proceeding with jury demand does not make future withdrawal of reference inevitable. District Court must consider (1) whether the case is likely to reach trial, (2) whether protracted discovery with Court oversight will be required, and (3) whether the bankruptcy Court has familiarity with the issues presented.

(6284) *Polar Molecular Corp. v. Petroleum Enhancer, LLC,* 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.

(6285) *Angelucci v. Farmers Bank & Trust Co.,* 2009 WL 798805 (E.D. Ky. 2009) – District Court can withdraw the reference of either a core or a non-core proceeding. Withdrawal of reference is discretionary for cause shown on timely motion. "Cause" includes (1) judicial economy, (2) uniformity in bankruptcy administration, (3) reducing forum shopping and confusion, (4) fostering economical use of the Debtor's and creditor's resources, (5) expediting the bankruptcy process, and (6) the presence of a jury demand.

(6286) *Silverman & Morris, PLLC v. Uniform Color Company Services, LLC,* 2009 WL 365650 (E.D. Mi. 2009) – District Court has discretion to withdraw reference for "cause". "Cause" includes right to a jury trial and efficient use of judicial resources. Core proceeding does not deprive defendant of right to jury trial under Seventh Amendment.

(6287) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC,* 2009 WL 248489 (S.D. Ohio 2009) – Court should withdraw reference only in extraordinary, unusual, or compelling circumstances. Court will consider whether the proceeding is core or non-core; whether it is legal or equitable in nature; the efficient use of judicial resources; prevention of forum shopping; and the effect of the ruling on uniformity in administering bankruptcy law. Demand for a jury trial weighs in favor of withdrawal because bankruptcy Courts cannot hear jury trials without the consent of the parties.

(6288) *Anderson v. Countrywide Home Loans, Inc.,* 395 BR 7 (E.D. Mi. 2008) – Court would not exercise discretion to withdraw reference in action based on alleged violations of Automatic Stay and Discharge Injunction as well as Home Owner's Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). Matters are within the special expertise of the Bankruptcy Court; claims are all core proceedings; plaintiff does not allege any state law claims; and judicial economy will be served by leaving matter with Bankruptcy Court which is already familiar with the matters presented.

(6289) *Burgess v. Lee Acceptance Corp.,* 2008 WL 4388270 (E.D. Mi. 2008) – Permissive withdrawal requires consideration of (1) whether the claim is core or non-core; (2) what is the most efficient use of judicial resources; (3) what is the delay and what are the costs to the parties; (4) what will promote uniformity of bankruptcy administration; (5) what will prevent forum shopping; and (6) other related factors.

(6290) *Gold v. Dobday Manufacturing Co., Inc.,* 2008 WL 4239146 (E.D. Mi. 2008) – Although 28 USC Section 157(d) permits Court to withdraw reference, Congress intended that Bankruptcy Courts hear and adjudicate bankruptcy matters. Demand for jury trial may constitute "cause" for withdrawal.

(6291) *McClatchey v. Nicole Energy Marketing, Inc.,* 2009 WL 1416056 (S.D. Ohio 2009) – Permissive withdrawal requires "compelling or extraordinary circumstances" which require the District Court to take such an extraordinary step. Court to consider factors including whether the withdrawal would contravene the goal of uniformity and efficiency in the administration of bankruptcy law; whether withdrawal would allow a dissatisfied litigant to engage in forum shopping; whether the parties' resources would be unnecessarily expended if the matter were withdrawn; and whether the withdrawal would facilitate the bankruptcy process. Court denied request for permissive withdrawal where Chapter 11 Trustee had pending liquidating plan that could resolve all issues between parties, and Trustee had negotiated sale of major assets of Debtor that could result in transfer of fraudulent transfer claims to creditors which would substantially alter causes of action.

(6292) *Fokkena v. Countrywide Home Loans, Inc.,* 2008 WL 3932153 (N.D. Ohio 2008) – Permissive withdrawal of reference based on non-exclusive list of factors including judicial economy; uniformity in bankruptcy administration; reducing forum shopping and confusion; conserving Debtor and creditor resources; expediting the bankruptcy process; whether a party has requested a jury trial; and whether the proceeding is core or non-core. If one or more of these factors exist, the District Court has discretion to withdraw the reference. District Court would not withdraw reference where Motion for Sanctions was based on abusive actions before the Bankruptcy Court; the claim implicates the inherent powers of Bankruptcy Court; Bankruptcy Court was more familiar with the issue making the matter more efficiently handled by the Bankruptcy Court; Bankruptcy Court will be in a better position to gauge the propriety of the allegedly improper filings; and Motion to Withdraw Reference filed in response to an adverse party's motion for sanctions raising forum shopping concerns. Court would not withdraw reference in action seeking sanctions against 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.

12.44 Timing of Motion

(6293) *Hadla v. Shapiro,* 2017 WL 3309648 (E.D. Mi. 2017) – District Court may withdraw reference for cause based on whether action is core or non-core, most efficient use of judicial resources, delay and cost to parties if reference is withdrawn, promotion of uniform bankruptcy administration, potential forum shopping, and any other related factor. Motion to Withdraw Reference at early stage of proceeding premature as it action to avoid fraudulent transfer is core proceeding and allowing matter to remain in bankruptcy court would be most efficient use of judicial resources where there were related matters pending in bankruptcy court and withdrawal of reference at early stage could result In judicial overlap and unnecessary expenditure of judicial resources. Only asserted basis to withdraw reference was right to jury trial, but denial of Motion to Withdraw Reference would allow all pre-trial matters to be handled by bankruptcy court potentially including dispositive motions. Motion to Withdraw Reference denied without prejudice to renew Motion when action is ready for trial.

(6294) *Northstar Disposal Services VI, LLC v. DeGirolamo,* 2016 WL 6275125(N.D. Ohio 2016) – Motion to withdraw reference over two fraudulent transfer actions premature. Proceeding was core matter to avoid fraudulent transfers under Section 548. While *Stern* would require withdrawal of reference if mater is to be tried, *Stern* does not require Bankruptcy Court to be removed from proceedings at preliminary stage and can issue report and recommendation if warranted. Removal at early stage of proceeding does not increase judicial economy where discovery was in infancy and there are no dispositive motions or discovery schedule. Bankruptcy Court would be in superior position to manage pre-trial proceedings and would avoid need for District Court to marshal effort and resources to become familiar with matters already familiar to bankruptcy court.

(6295) *In re Brown,* 2015 WL 2238097 (S.D. Ohio 2015) – Motion to withdraw reference must be made as soon as possible after moving party is aware of grounds to withdraw reference. Moving party waited for more than one year after commencement of adversary proceeding where moving party was, at all times, aware of grounds for removal and grounds were fundamental basis of adversary proceedings commenced by moving party evidenced nothing more than attempt to forum shop, stall and engage in obstructionist tactics.

(6296) *Irvin v. Faller,* 2015 WL 2151926 (W.D. Ky. 2015) – District Court can withdraw reference of matter to Bankruptcy Court on motion that is timely filed and on showing of cause. Motion is "timely" if made as soon as possible after moving party becomes aware of grounds to withdraw reference, or at first reasonable opportunity after moving party is aware of grounds to withdraw reference. Motion brought one year after commencement of adversary proceeding, and after parties had filed various motions including motions for summary judgment and the setting of motion for oral argument was not timely. Grounds for removal, based on circumstances surrounding underlying debt. Were at all times evident from face of complaint and defendant has notice from outset of adversary that grounds existed to seek withdrawal of reference. Instead, defendant waited until day before oral argument on plaintiff's motion for summary judgment, indicting a desire to forum shop rather than to actually protect defendant's interests.

(6297) *Getzler Heinrich & Assoc. LLC v. Wojcik,* 2015 WL 235819 (N.D. Ohio 2015) – Motion to withdraw reference made for first time after completion of pretrial proceedings was timely. Bankruptcy Court lacks jurisdiction to enter final judgment in action brought by trustee under Section 544 to recover allegedly fraudulent transfers using state fraudulent transfer law. Defendant had timely requested jury trial and bankruptcy court lacked ability to conduct jury trial. Pretrial proceedings had been completed and case was ready for trial, such that all remaining judicial work was beyond the statutory and constitutional limits of the bankruptcy court's authority.

(6298) *PNC Bank, NA v. Fairburn,* 2013 WL 5604362 (N.D. Ohio 2013) – Court has discretion to withdraw reference on timely filed motion. Motion to withdraw reference filed three months after Debtor filed adversary proceeding and less than one month after defendant filed an answer to the complaint was not untimely. Bankruptcy court had not set briefing schedule or approved any potential discovery plan in bankruptcy court. Chronology of case indicated that three months between complaint and motion was not unreasonable.

(6299) *Madden v. Ontility, LLC,* 2013 WL 3324223 (Bankr. E.D. Mi. 2013) – Bankruptcy court recommended withdrawal of reference in connection with adversary proceeding, where defendant had right to jury trial and did not consent to trial in the bankruptcy court, leaving bankruptcy court without power to proceed. Prior motion to withdraw the reference had been denied as premature as case was not ready for trial, without prejudice to either party re-filing motion when case was ready for trial. Claims in case were non-core proceedings related to bankruptcy case, removing them from ability of bankruptcy court to hear under *Stern.*

(6300) *Official Committee of Unsecured Creditors v. Entergy Coal Resources, Inc.,* 472 BR 731 (E.D. Ky. 2012) – Motion to Withdraw Reference requires motion to be filed as soon as possible after the moving party is aware of grounds for withdrawal of reference or at the first reasonable opportunity after the moving party is aware of grounds for withdrawal of reference. Motion was timely where adversary proceeding was initiated on June 22, 2011 and Amended Complaint was filed on August 19, 2011. Motions to withdraw reference were filed between October 31 and November 10, 2011, less than three months after the Amended Complaint was filed; and moving Defendants had advised Plaintiff early on that they intended to file motions for withdrawal of the reference.

(6301) *Steed v. Knox Forex Group, LLC,* 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – Court would withdraw the reference where trial was imminent and granting the motion would not be premature or inconsistent with interest of judicial economy.

(6302) *Omega Tool Corp v. Alix Partners, LLP.,* 2009 WL 1868410 (E.D. Mi. 2009) – Court will not withdraw reference based on jury demand at early stages of case as Bankruptcy Court can consider and make recommendations on dispositive motions based on proposed findings of fact and conclusions of law, which could obviate jury trial demand. Withdrawal of reference based on jury demand becomes appropriate only if and when the case becomes "trial ready".

(6303) *Polar Molecular Corp. v. Petroleum Enhancer, LLC,* 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.

(6304) *Angelucci v. Farmers Bank & Trust Co.,* 2009 WL 798805 (E.D. Ky. 2009) – Motion to withdraw reference premature where Bankruptcy Court had not determined whether case was core or non-core; Bankruptcy Court authorized to decide dispositive motions subject to the parties' rights to appeal as parties had consented to Court's exercise of jurisdiction over non-core matters; and pending demand for jury trial did not compel withdrawal of reference until it appeared case would actually proceed to trial. Judicial economy and uniformity would be furthered by allowing case to remain in Bankruptcy Court as case had been pending in the Bankruptcy Court for more than a year; Bankruptcy Court was more familiar with the parties, their claims, and the substantive law; resolution of the adversary proceeding would affect priority of liens in the Chapter 7 proceedings; removing case would waste the parties' resources, the resources of both Courts, and would unnecessarily slow the bankruptcy process; and timing of request to withdraw the reference indicated intent to shop for a more favorable forum.

(6305) *Silverman & Morris, PLLC v. Uniform Color Company Services, LLC,* 2009 WL 365650 (E.D. Mi. 2009) – Although Bankruptcy Court could manage all pre-trial matters and the District Court could reconsider withdrawing the reference when the case is ready for trial, District Court found that judicial economy would be better served by withdrawing reference now rather than reconsider the issue later.

(6306) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC,* 2009 WL 248489 (S.D. Ohio 2009) – District Court would deny motion to withdraw without prejudice where the Bankruptcy Court was better suited to conduct the pretrial proceedings; adversary proceedings were complex; underlying bankruptcy proceedings have been pending for more than one year; adversary proceedings have been pending for approximately six months; Bankruptcy Court had adjudicated dismissal motions and was more familiar with case; and resolution of the adversary proceedings will affect the bankruptcy. Parties could renew Motion to Withdraw Reference once there is an imminent trial date.

(6307) *Stevenson v. Polymerica, Ltd.,* 2009 WL 230598 (E.D. Mi. 2009) – "Better and normal practice" is to deny without prejudice motion for withdrawal of reference made early in the case so that the Bankruptcy Court may manage the pre-trial phase of the litigation. Withdrawal may be revisited when the case is ready for trial.

(6308) *Gold v. Dobday Manufacturing Co., Inc.,* 2008 WL 4239146 (E.D. Mi. 2008) – Demand for jury trial may constitute "cause" for withdrawal; however, withdrawal of the reference is premature at early stage of litigation. Better practice is to allow Bankruptcy Court to manage pre-trial phase of litigation with District Court to reconsider withdrawal of reference when case is ready for trial.

12.45 Burden of Proof

(6309) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC,* 2009 WL 248489 (S.D. Ohio 2009) – Party seeking discretionary withdrawal of reference bears burden of proof.

12.46 Waiver of Right to Object

(6310) *CitiMortgage, Inc. v. Crawford,* 2012 WL 1867518 (S.D. Ohio 2012) – Under 28 USC Section 157(d), a district court "shall" withdraw the reference "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." Court granted motion to withdraw reference where defendant failed to file any response to the Motion to Withdraw Reference within time permitted. After Lender commenced foreclosure proceedings, defendant filed a Class Action counterclaim alleging breach of contract, misrepresentations, and violation of State Deceptive Trade Practices Act. Lender then filed Motion to Withdraw the reference, and defendant failed to file any response or opposition.

(6311) *Hagan v. Okony,* 2008 WL 4722747 (W.D. Mi. 2008) – Failure to object to Court's Report and Recommendation on Motion to Withdraw Reference constitutes waiver of any further review by District Court. District Court will adopt Report and Recommendation without further consideration or argument. Bankruptcy Court entered report recommending that reference be withdrawn as matter was non-core and Bankruptcy Court could not enter a final judgment. Defendant failed to respond to the Complaint and a default had been entered. Withdrawal of reference appropriate for purposes of allowing District Court to enter Final Default Judgment.

12.47 Stay of Proceedings While Pending

(6312) *In re City of Detroit,* 2013 WL 5425104 (Bankr. E.D. Mi. 2013) – Rule 5011(c) provides that the filing of a motion to withdraw the reference or for abstention does not stay administration of the case or any proceeding except that the bankruptcy court can enter a stay pending disposition of the motion. Granting of stay would be exception, not the general rule, and will be granted only when the party requesting the stay can meet the standards for preliminary injunctive relief under Rule 65. Creditors seeking to stay proceedings in bankruptcy court pending motion to withdraw reference must prove likelihood that reference will be withdrawn, that creditor will seek irreparable harm if a stay is not granted, that any harm suffered by the non-moving parties would not exceed that which would be suffered by the creditors if the stay is denied, and that a stay would be in the public interest. Creditors failed to demonstrate any likelihood that reference would be withdrawn, where basis for withdrawal was alleged lack of jurisdiction by the bankruptcy court to issue final ruling on eligibility of City to be Debtor under Chapter 9. Issues presented were created by and arose directly out of bankruptcy code, such that Court has jurisdiction to issue final order. Creditors were not likely to suffer any irreparable harm, as any future order entered by the court would be subject to appellate review at that time. Debtor would suffer substantial harm and public interest would not be served by stay where City had need to proceed with process expeditiously to address financial conditions.

12.48 Appeal of Grant or Denial of Motion

(6313) *Smith v. Bluegrass Mortgage Services, Inc.,* Case No. 10-5785 (6th Cir. 2012) – District Court Order denying Motion to Withdraw Reference is non-final, non-appealable order.

(6314) *K & B Capital, LLC v. Official Unsecured Creditors' Committee,* 2009 WL 1747834 (6th Cir. 2009) – Order denying motion to withdraw a

reference and have proceeding adjudicated in District Court is a non-final, non-appealable order.

12.49 Stay Pending Appeal

(6315) *Antioch Company Litigation Trust v. Morgan,* Case No. 09-3409 (Bankr. S.D. Ohio 2010) – Appeal of Order Denying Motion to Withdraw Reference does not divest Bankruptcy Court of jurisdiction. Bankruptcy Court may stay proceedings during pendency of appeal if moving party can show (1) the likelihood that the pending motion to withdraw will be granted (i.e. likelihood of success on the merits); (2) that the movant will suffer irreparable harm if the stay is denied; (3) that the non-movants will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay. Movant failed to demonstrate that District Court would withdraw reference in the early stages of litigation and failed to demonstrate irreparable harm based solely on allegation that Bankruptcy Court may overstep jurisdictional bounds. Stay of proceedings would only delay Plaintiff's attempt to collect funds on behalf of creditors and would result in harm to Plaintiff with no corresponding benefit to the defendants. Denial of stay furthers public interest in efficient and expeditious resolution of pending litigation without unnecessary delay.

F. Abstention and Removal

12.50 Actions Subject to Removal or Abstention

(6316) *Village Capital & Investment, LLC v. Hummeldorf,* 2018 WL 2091407 (S.D. Ohio 2018) – 28 USC Section 1441 allows removal of action brought in State Court to Federal Court if action could have been brought in Federal Court in first instance. "Federal Question" Jurisdiction requires complaint to establish either that federal law creates cause of action or plaintiff's right to relief necessarily depends on resolution of substantial question of federal law. Case does not assert Federal Question where issue is raised solely as defense, even if defense is anticipated in complaint and parties agree that resolution of federal defense is only question at issue. Diversity of Citizenship requires complete diversity of citizenship between plaintiff and all defendants, and defendants are not citizens of forum state. Defendant could not remove foreclosure action where foreclosure complaint did not raise any federal question; only federal issues were raised by Defendant's affirmative defenses based on alleged violations of due process and Fair Debt Collection Practices Act; and Defendant was citizen of state in which action brought. Petition for Removal denied and matter remanded to state court.

(6317) *Fuller v. Shellpoint Mortgage,* 2017 WL 4326100 (W.D. Mi. 2017) – Defendant seeking to remove case from State Court to Federal Court must show basis for Federal Jurisdiction. Federal Courts have jurisdiction when case raises under Constitution, laws or treaties of United States; or where there is diversity of citizenship between plaintiffs and defendants and amount in controversy exceeds $75,000.00. If Court determines, after removal, that jurisdiction does not exist, Court must remand case to State Court. Case originally removed because Plaintiff sought recovery under RESPA. Plaintiff later amended complaint to drop RESPA count, add a "patently frivolous" 14th Amendment count, and to add non-diverse defendants, destroying any basis for Federal Jurisdiction. Court determines diversity at time complaint is filed and filing of Amended Complaint can destroy diversity if non-diverse defendants are added. Fact that non-diverse defendants may later be dismissed does not alter fact that action was not removable in first instance. Exception will be made where non-diverse defendants are added "fraudulently", amounting to joinder of state defendant having no real connection with the controversy, solely as device to prevent removal. Inquiry is whether plaintiff has colorable claim against non-diverse defendants, resolving all doubts in favor of Plaintiff. Complaint arguable contained colorable claim against law firm that represented lender in foreclosure proceedings where Complaint alleged that law firm fraudulently represented that lender would enter into and abide by loan modification. Michigan Court will enforce clear and definite promise under doctrine of promissory estoppel if promisee reasonably relied on promise and injustice can be avoided only by enforcing promise. While Plaintiff's claim may be deficient, it cannot be said it is without a glimmer of hope. Fourteenth Amendment applies only to state actions. None of the Defendants in action were "State Actors" but were all private individuals and corporations. Fourteenth Amendment count dismissed and remainder of action remanded.

(6318) *Feiger & Feiger, PC v. Nathan,* 2017 WL 1130092*, reh'g denied,* 2017 WL 1130091 (E.D. Mi. 2017) – Order denying Motion for Abstention is nonfinal order appealable only with leave of Court. 28 USC Section 1334(d) does not authorize appeal of order denying motion for discretionary abstention. 28 USC Section 1334(d) authorizes appeal of order denying mandatory abstention, but does not make order final" for purposes of immediate appeal. Party seeking to appeal order denying mandatory abstention must either wait until entry of final order in case or file motion for leave to appeal under 28 USC Section 158(a)(3). Appellate Court lacks jurisdiction to consider merits of appeal absent properly filed motion for leave to file appeal.

(6319) *Lightfoot v. Cendant Mortgage Corp.,* ___ U.S. ___, 137 S.Ct. 553, 2017 WL 182911 (2017) – "Sue-or-be-sued" clause in Fannie Mae Charter provides for Fannie Mae to have authority to sue and can be sued in any State or Federal Court of competent jurisdiction. Clause does not grant jurisdiction to Federal Courts in actions against Fannie Mae. Clause is not independent grant of jurisdiction to Federal Court. Action cannot be removed to Federal Court based solely on clause in Fannie Mae charter as inclusion in charter does not create federal question. Action can be removed to federal Court only if there is independent basis to remove action under 28 USC Section 1441 and must be remanded to State Court for lack of federal jurisdiction.

(6320) *Carter Jones Lumber Co. v. Eshler,* 2017 WL 213810 (Bankr. N.D. Ohio 2017) – 28 USC Section 1452(e) authorizes removal of action from State Court to Federal Court only if Federal Court has jurisdiction over claim or cause of action under Section 1334. Whether Federal Court has jurisdiction is determined at time of removal. Prepetition State Court litigation is not a "bankruptcy case" over which Federal Court would have original and exclusive jurisdiction. Federal Courts also have original, nonexclusive jurisdiction of all civil proceedings arising in or related to cases under Bankruptcy Code. Fact that claims were filed prior to bankruptcy case indicates that claims do not arise under Title 11. Only basis for removal would be that claims are related to case under Title 11, requiring that outcome of removed action conceivably have effect on bankruptcy case. State Court action that seeks judgment against Debtor will conceivably have impact on bankruptcy case, giving Federal Court subject matter jurisdiction to support removal.

(6321) *Hamilton County Treasurer v. Nesbitt,* 2016 WL 7732239 (S.D. Ohio 2016) – Action is subject to removal from State Court to Federal Court

under 28 USC Section 1441 only where District Court would have had original jurisdiction. If action is not one over which District Court has independent jurisdiction, or if jurisdiction is in doubt, matter should be remanded to State Court. Notice of Removal failed to demonstrate any basis for removal. Underlying action was State Court action brought in Ohio to foreclose mortgage on property located in Ohio. Foreclosure complaint raised only State Court law issues and did not raise any federal questions. Defendant cannot create "federal question" for purpose of removal by pleading some general Constitutional or Federal Statutory issue. Case remanded to State Court.

(6322) *Dietrich v. JPMorgan Chase Bank,* 2017 WL 57240 (E.D. Mi. 2017) - Action properly removed from State Court to Federal Court where complaint alleged complete diversity of citizenship between Plaintiff and Defendant and Plaintiff sought injunction against sale of property valued in excess of $75,000. Motion to remand properly removed action is denied.

(6323) *U.S. Bank, N.A. v. Jones,* 2016 WL 3360445 (S.D. Ohio 2016) – Removal is governed by 28 USC Section 1441 and is limited to State Court actions that could have been originally filed in Federal Court. Defendant who seeks removal bears burden of showing that federal court has original jurisdiction to hear case. Defendant cannot remove action based on diversity where State Court action was brought in state where at least one defendant resided, even if there is otherwise complete diversity of all parties. Federal Question jurisdiction requires that action arise under the Constitution, laws or treaties of the United States and is determined based on well pled allegations in complaint that establish either that federal law created the cause of action or plaintiff's right to relief necessarily depends on resolution of substantial question of federal law. Plaintiff may avoid federal jurisdiction by relying exclusively on state law. Defendant cannot remove action to federal court based on federal defense asserted by defendant. Plaintiff's complaint to foreclose mortgage did not allege or rely on any federal law and was entirely based on state law. Only possible "federal question" arise from affirmative defense that foreclosure violated defendant's civil and constitutional rights, which is not sufficient to support removal based on federal question jurisdiction.

(6324) *Deutsche Bank National Trust Co. v. Wolf,* 2016 WL 1658775 (S.D. Ohio 2016) – Action cannot be removed to federal court absent basis for federal court jurisdiction in first instance. Defendant cannot create "federal question" basis for removal by filing answer that raises federal issues as defenses, where initial complaint is predicated entirely on state law causes of action. Defendant cannot remove based on diversity jurisdiction where cause of action was instituted in Debtor's home state. Notice of removal failed to allege any basis for federal court jurisdiction requiring remand of action back to State Court.

(6325) *Laber v. United Steel Workers International Union,* 2015 WL 5085774 (N.D. Ohio 2015) – Removal of State Court action based on alleged "Federal Question" requires that complaint itself raise issues of federal law. Potential or actual affirmative defense based on federal law is not sufficient. However, where Complaint purportedly is based entirely on state law but raises issues that have been preempted by federal statue, then claim itself is deemed to have arisen under Federal Law.

(6326) *Wells Fargo Bank, NA v. Smith,* 2016 WL 1271028 (E.D. Ky. 2016) – Removal notice failed to state basis for federal jurisdiction where caption of Notice indicated diversity of citizenship but body of Notice referenced Federal Fair Debt Collection Practices Act. Defendant could not allege diversity as defendant was citizen of state in which cause of action was originally commenced. Removal based on federal question also not warranted where FDCPA action was based on letters received by defendant 14 months prior, during pendency of litigation. Cause of action, if any, accrued more than 30 days prior to removal petition rendering petition untimely. Further, federal questions were first raised by defendant as affirmative defenses. Party cannot request removal based on federal question that party himself first raised. Removal based on federal question must result from federal question raised by opposing party.

(6327) *Rajapakse v. Wells Fargo Home Mortgage,* 2015 WL 4133179 (W.D. Tn. 2015) – Case can be removed from State Court to federal court where action could have been brought in federal court in first instance. Notice of Removal alleged that parties were diverse and amount in controversy exceeded $75,000 and party opposing removal did not contest either of these elements.

(6328) *Muheljic v. Bank of America,* 2014 WL 6085869 (D.M.D. 2014) – Case can be removed to Federal Court only when there is independent basis for federal jurisdiction. Action improperly removed based on diversity where parties were diverse, with plaintiff being a Tennessee resident and B of A being a National Banking Association with its principal place of business in North Carolina. However, defendant failed to demonstrate that action met $75,000 amount in controversy requirement. Complaint sought some unspecified amount that was not self-evidently greater or less than diversity amount, leaving defendant to prove by preponderance of evidence that amount in controversy exceeded jurisdictional requirement. If action seeks equitable relief, then jurisdictional limit is determined by economic value of the rights that plaintiff seeks to protect. Where the underlying action seeks equitable relief based on alleged wrongful foreclosure, "economic value" is based on fair market value of property, not the balanced owed on the mortgage. Evidence indicated that value was far below threshold where appraised value of property was $24,000; and successful bid at contested foreclosure sale was $40,000.00. Although statute on which cause of action was based allowed attorney fees and costs, it was highly unlikely that fees would be sufficient to meet jurisdictional limit. Action remanded as improperly removed.

(6329) *Crehan v. Maiden Lane, LLC,* 2014 WL 467568 (W.D. Mi. 2014) – Action can be removed from State Court to Federal Court if Federal Court would have had jurisdiction in first instance. Action against Federal Home Loan Mortgage Corporation based on alleged wrongful foreclosure deemed to arise under laws of the United States, such that District Court had "federal question" jurisdiction, such that Defendant could remove action to Federal Court. Nominal defendants Maiden Lane entities were created by Federal Reserve Bank of New York and are mere corporate entities created to facilitate efforts of Federal Reserve to address foreclosure crisis. Federal Reserve Bank was real party in interest for purposes of federal question jurisdiction and removal.

(6330) *CPC Livestock, LLC v. Fifth Third Bank, Inc.,* 2013 WL 1411222 (W.D. Ky. 2013) – Removal from State Court to federal court is proper in any civil action where the Federal Court would have had jurisdiction in the first instance. Where jurisdiction would be based on diversity jurisdiction, fraudulent joinder of non-diverse defendants will not defeat diversity for purposes of federal jurisdiction. Fraudulent joinder requires evidence that plaintiff could not have established cause of action against non-diverse defendant as matter of state law. Action must be remanded for lack of diversity if there is any colorable basis for predicting that a plaintiff may recover from the non-diverse defendant. In considering remand, court must determine whether court had jurisdiction as of date of removal. Defendant filed Notice of Removal filed

after First Amended Complaint caused removal of case. Plaintiff's later filed second amended complaint did not control jurisdiction for purposes of remand, as first amended complaint was the operative complaint at time case removed in first instance. Although first amended complaint joined non-diverse defendant, complaint did not demonstrate no possibility of recovery by plaintiff.

(6331) *Baer v. Cabrian,* 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.

(6332) *Church Joint Venture v. Grusin,* 2012 WL 1982337 (W.D. Tn. 2012) – 28 USC Section 1334(c) addresses mandatory and discretionary abstention in favor of State Court adjudication. Section 1334 does not provide any basis for abstention in favor of United States District Court in which action is pending, even if action is based on state law.

(6333) *In re T.S.P. Inc.,* 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1441 allows a case to be removed to Bankruptcy Court only if the action is a civil action brought in State Court. Administrative proceedings such as proceedings before Kentucky Department of Labor for alleged safety violations is not a civil action brought in State Court and cannot be removed to Bankruptcy court. Section 1452 permits the Debtor to remove to Bankruptcy Court any civil action except for tax court proceedings, actions by governmental units to enforce police or regulatory powers, or action over which the district court would not have jurisdiction. Administrative proceedings are not "civil actions" and cannot be removed under Section 1452.

(6334) *Essek v. Vanderbilt Mortgage, Inc.,* 2011 WL 97716 (E.D. Ky. 2011) – Court would abstain in action against mortgage lender based on foreclosure proceedings where those proceedings remained pending and ongoing in State Court. District Court's involvement would unnecessarily interfere with ongoing state judicial proceedings.

(6335) *McKibben v. Fair Finance Company,* Case No. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Bankruptcy Court is not required to have had original jurisdiction over the case as long as case relates to a proceeding under Title 11 to support removal under Section 1452. Case is "related to" if the outcome of the proceeding could conceivably have some effect on the bankruptcy estate. State Court litigation against Debtor would affect estate as any award to the plaintiffs in that action would necessarily diminish the funds available for the remaining creditors. Court would not abstain or remand where abstention would cause delay of administration of estate; the issues presented were analogous to issues routinely covered in bankruptcy cases; Bankruptcy Court was capable of adjudicating the issues presented; and case was related to bankruptcy based on the possible impact on creditors.

(6336) *In re Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.,* Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1452 allows removal of any claim or cause of action if the district court has jurisdiction over the action under Section 1334. Section 1134 lists four types of matters over which the district court has jurisdiction: (1) "cases under title 11," (2) "proceedings arising under title 11," (3) proceedings "arising in" a cause under title 11, and (4) proceedings "related to" a case under title 11. A civil proceeding is "related to" the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the Debtor's rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate Debtor's president based on president's personal guarantee is "related to" the bankruptcy estate. Corporate president is listed as co-Debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor's claim against assets of the bankruptcy estate.

12.51 Grounds – Mandatory Abstention

(6337) *Giese v. Lexington Coal Company,* 2018 WL 2453104 (6th Cir. BAP 2018) - 28 USC Section 1334 requires Bankruptcy Court to abstain where proceeding is based on state law claim or cause of action; Federal Court lacks jurisdiction absent connection to bankruptcy case; case has been commenced in state forum of appropriate jurisdiction; proceeding is capable of timely adjudication; and proceeding is non-core. "Proceeding" takes into account entire case, not anyone discrete claim. Adversary Proceeding was not "proceeding where action raised seven counts, five of which were core proceedings. Statute does not prevent Court from hearing to arguably non-core claims when Court is already hearing five other core claims that are inextricably intertwined and based on same facts and involving same parties. Abstaining from two claims would not promote judicial economy and raises the specter of duplicate discovery efforts and double the litigation required to resolve disputes; and would require two different venues to consider same facts and evidence potentially reaching different findings;

(6338) *Younes v. McCallister,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) - 28 USC Section 1334 Requires Court to abstain from proceeding based on state law claim or state law cause of action which does not arise under Title 11 or a case under Title 11, with respect to which action could not have been brought in federal Court absent jurisdiction related to bankruptcy estate. Mandatory abstention applies where (1) there is timely motion for mandatory abstention; (2) civil proceeding that is subject of motion must be based on state law claim or cause of action; (3) civil proceeding must lack basis for federal jurisdiction absent bankruptcy case; (4) civil proceeding must be commenced in state forum of appropriate jurisdiction; (5) civil proceeding must be capable of timely adjudication in state forum; and civil proceeding must be non-core proceeding. Complaint that sought to adjudicate State Court law claims and causes of action arising out of domestic relations dispute were subject to mandatory abstention. Debtor did not identify any federal jurisdiction for claims absent bankruptcy case. State Court entered judgment of divorce and presumably was better form for jurisdiction in interpreting and modifying divorce decree. There was no evidence that State Court was not capable of timely adjudication and matter asserted entirely non-core claims. Claims were such that do not arise in or under bankruptcy code and are, at most, related to bankruptcy case.

(6339) *Mountain Glacier, LLC v. Nestle Waters North America, Inc.,* 2016 WL 3883025 (M.D. Tn. 2016) – District court shall withdraw an adversary proceeding if resolution of the proceeding requires consideration of both Title 11 and other laws of the United States. Proceedings must be such that matter cannot be resolved without substantial and material consideration of non-Code provisions. Mere fact that

bankruptcy court must consider non-bankruptcy statutes in order to resolve a dispute is not grounds for mandatory withdrawal. Court would not withdraw reference where matter is a "core proceeding" involving interpretation the Chapter 11 Reorganization Plan and Confirmation Order. Court would not withdraw reference where doing so would then require District Court to interpret another court's Order.

(6340) *Giese v. Community Trust Bank,* 2015 WL 5299468 (Bankr. E.D. Ky. 2015) – Court must abstain from action based on state law claim or cause of action where court could not have asserted jurisdiction but for bankruptcy proceeding. Mandatory abstention requires that the claims be based entirely on state law; that the only basis for jurisdiction is "related to" jurisdiction; action was commenced in State Court; and State Court can timely adjudicate action. Mandatory abstention is not appropriate in core proceeding. State Court action constituted core proceeding where action challenged division of proceeds of sale of Debtor's assets between two different creditors and bankruptcy court had already entered final, non-appealed order distributing funds pursuant to confirmed Chapter 11 Plan. State Court complaint included the majority of counts alleging bad acts taken in the bankruptcy case and the very causes of action were based on facts that happened during bankruptcy pursuant to orders of the bankruptcy court.

(6341) *Etterbeek v. APTCAP. LLC,* 521 BR 811 (Bankr. E.D. Mi. 2014) – Bankruptcy Court must abstain from hearing action removed from State Court where abstention is timely requested; civil proceedings are based on state law; sole basis for federal jurisdiction is connection to bankruptcy case; proceedings were commenced in state forum that can timely adjudicate causes of action; and civil proceeds are non-core. State law action brought by one group of members of Debtor-LLC against other members were non-core proceedings where all actions were based entirely on state law and neither invoked nor depended on either bankruptcy case or bankruptcy code. Neither the Trustee nor the Debtor were either plaintiff or defendant and plaintiff did not seek any relief in lawsuit against bankruptcy estate. Action had no effect on administration of estate and did not seek recover property of estate or affect liquidation of estate assets. Action was not "related to" bankruptcy case for purposes of allowing Bankruptcy Court to exercise jurisdiction where outcome of case would not have any conceivable impact on estate or case administration. All elements of mandatory abstention were present requiring court to abstain and send matter back to State Court.

(6342) *In re STAR Dynamic Corp.,* 2014 WL 407370 (Bankr. S.D. Ohio 2014) – Federal Courts are required to abstain and remand matters to State Courts where (1) there is a timely abstention motion; (2) the claims are based on state law; (3) there is no independent federal jurisdictional basis other than the bankruptcy filing; (4) the claim is "related to" but not "arising in" or "arising under" Title 11; (5) there is a pending parallel action commenced in State Court; and (6) the action can be timely adjudicated by the State Court. In determining whether action can be timely adjudicated in State Court, court will consider length of time that State Court has expended on case, proximity of case to trial, and whether allowing case to remain in State Court would have negative impact on bankruptcy case. Facts indicated that State Court would not be able to expeditiously handle matter where complaint needed to be amended and there was no reason to believe State Court could otherwise resolve dispute without impairing ability of bankruptcy to proceed. Issue presented was ownership of assets and technology of Debtor, and bankruptcy could not proceed without final determination of "who owns what" sufficient to allow Debtor to complete going concern sale of property free and clear of adverse interests and liens.

(6343) *Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade,* 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Plaintiff's actions against Debtor met first four requirements, where plaintiff, prior to bankruptcy case, bought suit in State Court alleging that Debtor had misappropriated corporate funds and breached fiduciary obligations. All claims were based on state law; federal court lacked jurisdiction absent bankruptcy; State Court had jurisdiction; and State Court could timely adjudicate the matter. However, adjudicating litigation directly implicates claims allowance process as outcome will determine existence and amount of claims against estate such that action is a core proceeding; and plaintiff had also brought adversary seeking to except debt from discharge under Section 523 based on same operative facts and transactions, which is also core proceeding.

(6344) *Villages of Capital Pointe, LLC v. Huntington Bank,* 2013 WL 4523305 (E.D. MI. 2013) – To invoke mandatory abstention, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Mandatory abstention did not apply as parties were "diverse" for purposes of diversity jurisdiction, creating basis for federal jurisdiction not predicated on Title 11.

(6345) *Okke v. Okke¸* 513 BR 896 (Bankr. W.D. Mi. 2013) – Mandatory abstention does not apply to core proceedings. Adversary proceeding sought determination as to title of former marital assets. State Court judgment of dissolution of marriage was not clear on title to the assets. Debtor filed action for turnover of assets in possession of ex-spouse. State Court had awarded assets to Debtor and Debtor filed Chapter 13 before State Court could reconsider award. As such, as of date of commencement of case, Debtor had legal or equitable interest that became property of estate at commencement of case.

(6346) *CPC Livestock, LLC v. Fifth Third Bank. Inc.,* 2013 WL 1411222 (W.D. Ky. 2013) – 28 USC Section 1334 requires Bankruptcy Court and District Court to abstain in any proceeding based on state law claim or state law cause of action where the cause of action does not arise under Title 11 or arise in a case under Title 11, where the action could not have been commenced in Federal Court but for the Bankruptcy filing. For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Complaint was based entirely on state law fraudulent transfer statute and bankruptcy court lacked independent basis for jurisdiction as parties were not diverse and action did not present any substantial element of federal question. Action did not arise under Title 11 where action did not require court to determine validity or priority of any lien, but was action to recover fraudulent transfers; and did not arise in the case because the action was not based on bankruptcy code and by its very nature could have and did exist outside bankruptcy context.

(6347) *Tomassi v. MDS, Inc.,* 2013 WL 1636435 (W.D. Ky. 2013) – Before addressing possible abstention, court must first determine whether court

has jurisdiction in first instance. If so, court must abstain if action is based on state law claim that could not have been commenced in Federal court except for the pending bankruptcy case, if the action can be timely adjudicated in State Court. Motion for abstention filed in District Court would be remanded to Bankruptcy Court for consideration, as Bankruptcy Court is in best position to determine whether action involves core proceeding such that abstention would be inappropriate.

(6348) *Timco, LLC v. T and M Sales Agency, Inc.,* 2013 WL 150105 (6th Cir. 2013) - Mandatory abstention provision of 28 USC Section 1334 precludes appellate review of Order remanding case to State Court. Action was based on state law, action was non-core proceeding, no basis existed for federal jurisdiction other than pending bankruptcy case, and action could be timely adjudicated in State Court of competent jurisdiction.

(6349) *In re Trish Enterprises, LLC,* Case No. 12-21729 (Bankr. E.D. Mi. 2012) – 28 USC Section 1334(c)(2) requires bankruptcy court to abstain when (1) a motion is timely filed; (2) proceedings are based on state law claims or causes of action; (3) claim is related to bankruptcy case but did not arise in or under the bankruptcy case; (4) only basis for original jurisdiction is the bankruptcy filing; (5) state law claim is the subject of an action pending in State Court; and (6) State Court action can be timely adjudicated. Prior to commencement of bankruptcy case, Plaintiff and Debtor were engaged in litigation in State Court based on alleged breach of contract. Motion for abstention filed one month post-petition is timely. State Court action concerning enforceability of lease is state law claim. Although claim was related to bankruptcy case, it arise strictly under state law and did not arise from Bankruptcy Code. Only basis for federal jurisdiction was pendency of bankruptcy case – case did not have any independent basis for federal jurisdiction, either based on federal question or on diversity of citizenship. State law cause of action was pending when bankruptcy was filed, and claim has largely been adjudicated or can be quickly adjudicated.

(6350) *Johnson v. Fifth Third Bank,* 476 BR 493 (W.D. Ky. 2012) – 28 USC Section 1334 requires abstention over cause of action where the action (1) is based on a state law claim or cause of action; (2) lacks a federal jurisdictional basis absent the bankruptcy; (3) is or can be commenced in a state forum of appropriate jurisdiction; (4) is capable of timely adjudication; and (5) is a non-core proceeding. Court would abstain in action by sellers of cattle against Debtor's Bank. Action was based entirely on state law causes of action for conversion, unjust enrichment, and theft. Court lacked diversity jurisdiction because complaint did not reach $75,000 threshold. Action had been commenced in State Court and later removed to Federal court – element does not require that action have been filed in State Court before bankruptcy is filed, only that it has been or can be timely filed in State Court. Although defendant claimed a right to indemnity from Debtor, claim was not absolute as it appeared that bank may have been culpable, removing action from scope of indemnity agreement. Action could proceed against bank without being stayed by bankruptcy, although bank's indemnity claim against Debtor was stayed. Action was non-core as case did not invoke substantive right created by the bankruptcy code and was not action to determine validity, priority or extent of lien, but was state law cause of action for damages for torts of conversion, unjust enrichment and theft.

(6351) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.,* Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Mandatory abstention requires that the proceeding (1) be based on state law claim or cause of action; (2) lack any independent basis for federal jurisdiction unrelated to bankruptcy case; (3) be commenced in State Court of appropriate jurisdiction; (4) be capable of timely administration; and (5) be a non-core proceeding. Court must separately scrutinize each cause of action and ground for relief to determine if the claim is a core claim, a "related to" claim or an unrelated claim over which the Court lacks jurisdiction. Joinder of core and non-core proceedings does not convert non-core proceedings into core proceedings. Core proceedings include matters arising under Title 11, which is the bankruptcy petition itself; civil proceedings arising in a case under title 11, which are those created or determined by a statutory provision of title 11; and proceedings "arising in" a case under title 11, which are proceedings that by their very nature could only arise in the bankruptcy and cannot exist outside the bankruptcy. "Related to" proceedings are those that could conceivable have an effect on the estate being administered. Action is related to if the outcome could alter the Debtor's rights, liabilities, options or freedom of action in a way that impacts case administration. Cause of action based on state law that seeks damages from Debtor is not "core" where plaintiff does not assert claim in the bankruptcy case; or where plaintiff files proof of claim reserving right to withdraw proof of claim upon remand. State law claim against guarantor of corporate Debtor's debts is dispute between two non-Debtors which is non-core. Debtor's counterclaim brought in response to non-core complaint is by definition non-core. Where proceedings are non-core, court must abstain and cannot hear matters. Plaintiff's non-core proceedings which sought entry of monetary judgment against Debtor could conceivable affect the administration of the case even where Plaintiff has agreed that it seeks recovery solely against a guarantor and would not recovery from the estate, rusting in non-core proceedings that "related to" the estate. Count of complaint that sought recovery from guarantor only is non-core and cannot have any impact on administration of estate, such that non-core proceeding is not related to. Court would mandatorily abstain from hearing non-core counts of complaint where creditor timely filed motion for abstention; claims were based on state law and lacked any basis for federal jurisdiction; claims were commenced in State Court pre-petition; and State Court can timely adjudicate claims to avoid any unfavorable effects on bankruptcy proceeding. Court would permissively abstain over one "related to" non-core count where it would be more efficient to have all proceedings determined in a single proceeding and separate litigation of claims in two different courts world complicate administration of Debtor's estate. Discovery in State Court proceeding has already closed and case was ready for trial, meaning that State Court litigation would proceed more efficiently and with less disruption. Non-Debtor has right to jury trial which is compelling argument for abstention.

12.52 Grounds – Permissive Abstention

(6352) *State Farm Mutual Automobile Insurance Company v. Vital Community Care, PC,* 2018 WL 2194019 (E.D. Mi. 2018) - Federal Court can abstain under *Burford* doctrine where abstention would avoid conflict with state's administration of its own affairs, such that Federal Court decision on State law issue is likely to interfere with proceedings or Orders of State administrative agencies. *Burford* doctrine did not apply were Defendants did not identify any State administrative proceeding or Order that would be impacted by litigation over alleged fraudulent billing under Michigan's no-fault automobile insurance scheme. Court can abstain under *Colorado River* in deference to parallel State-Court proceedings if abstention promotes efficient dispute resolution and judicial economy. *Colorado River* requires that State Court has assumed jurisdiction over res or property; federal forum is less convenient to parties; abstention avoids piecemeal litigation; and State Court

jurisdiction attached prior to Federal Court jurisdiction. Defendant made only generalized and conclusory statement that there were ongoing active cases in Michigan Courts between Plaintiff and various Defendants, but Defendant did not identify any specific State Court case which would warrant abstention. Court can abstain under *Brillhart* doctrine where suit is pending in State Court presenting identical issues governed by State law. Standard for determining whether to abstain under *Brillhart* is highly discretionary and is limited to actions where only declaratory relief is sought. Doctrine did not apply where Plaintiff was seeking both declaratory relief and monetary damages for fraud, unjust enrichment and RICO.

(6353) *Fitzpatrick v. Law Solutions Chicago, LLC,* 2018 WL 1413180 (E.D. Tn. 2018) – 28 USC 1334 allows but does not require Court to abstain, based on interests of justice, interest of comity with Sate Court and respect for state law. Although Complaint presented issues exclusively of State law regarding alleged unauthorized practice of law, Court would not abstain where neither party requested abstention and abstention would likely have adverse effects on pending bankruptcy proceedings and administration of justice.

(6354) *Parker v. Nationwide Mutual Insurance Company,* 2018 WL 989016 (Bankr. N.D. Ohio 2018) – 28 USC Section 1334(c)(1) allows Bankruptcy Court to abstain from proceeding in interest of justice or interest of comity with State. Federal courts should not be hesitant to decline to exercise jurisdiction when state issues substantially predominate, whether in terms of proof, of scope of issues raised, or comprehensiveness of the remedy sought. Factors to be balanced include 1) the effect or lack of effect on the efficient administration of the estate if a court abstains; 2) the extent to which state law issues predominate over bankruptcy issues; 3) the difficulty or unsettled nature of the applicable state law; 4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; 5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 7) the substance rather than form of an asserted "core" proceeding; 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; 9) the burden of this court's docket; 10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; 11) the existence of a right to a jury trial; 12) the presence in the proceeding of non-debtor parties; and 13) any unusual or other significant factors. Abstention would not impact efficient administration as estate had sufficient funds to pay claims in full and was nearing completion without need for resolution of state court matter; issues raised were entirely stat law based and relationship with bankruptcy was only because Debtor happened to file for bankruptcy protection, and with the case nearing an end that basis for jurisdiction would soon be non-existent. Right to jury trial further supported abstention as neither party consented to bankruptcy Court conduct of jury trial. Further, Court will generally defer to Plaintiff's choice of forum. Plaintiff chose to file action in state court and there was no overriding bankruptcy purpose in keeping matter in Federal court.

(6355) *Walker v. McLemore,* 2017 WL 3149584 (M.D. Tn. 2017) – 28 USC Section 157(d) permits Court to withdraw reference in exercise of Court's discretion based on (1) whether claim is core or non-core; (2) most efficient use of judicial resources; (3) delay and cost to parties if reference withdrawn; (4) promotion of uniform and efficient bankruptcy administration; (5) possible forum shopping; and (6) other related factors. Dispute raised issues of Debtor's objection to Trustee's Plan of Reorganization which are core proceedings under 28 USC Section 157(b)(2)(L). Withdrawal of reference would thwart efficient administration of estate and cause undue delay. Court would not permissively withdraw reference.

(6356) *In re Patriot Solar Group Inc.,* 569 BR 451 (Bankr. W.D. Mi. 2017) - Federal Arbitration Act makes written agreements to arbitrate valid, irrevocable and enforceable except upon grounds in law or equity to revoke contract. Act represents liberal federal policy favoring arbitration and is designed to encourage efficient and speedy resolution of disputes. Court must rigorously enforced agreements to arbitrate even if result is piecemeal litigation absent countervailing policy manifested in another federal statute. Whether Arbitration Act mandate is overridden by contrary Congressional command depends on (1) text of the statute; (2) statutes of legislative history; or (3) inherent conflict between arbitration and statutes underlying purpose. Neither legislative history nor text of Bankruptcy Code reflects congressional intent to preclude enforcement of arbitration agreements. In bankruptcy case, whether arbitration "inherently conflicts" with bankruptcy code depends in part on whether subject of arbitration is core or non-core proceeding. If dispute is non-core, Court is generally without discretion to preclude enforcement of arbitration. Moving party sought to arbitrate claims against the Debtor. Claims resolution process is core proceeding even where all facts and circumstances of rows before the filing of bankruptcy and all issues to be addressed were based on state law. Debtor was seeking to reorganize under Chapter 11, giving other creditors direct interest in the liquidation of movants claim which posed risk of significantly reducing amount available for distribution to other creditors. Debtors major secured creditor and major unsecured creditor sought to participate in claims resolution process and would be denied opportunity if arbitration agreement was enforced. Enforcement of arbitration did not appear to promote judicial economy where arbitration proceeding was in its infancy and moving party had not presented arbitration schedule indicating that arbitration would be more efficient than allowing Court to resolve claims process. Enforcement of arbitration provision would deprive Debtor of relief that Chapter 11 is intended to provide including modification of rights between Debtors and creditors by centralizing disputes in Bankruptcy Court. Debtor asserted desperate need for respite from dispute with moving party in order to avoid immediate liquidation given Debtor's limited resources. Centralization of disputes between Debtors and creditors is particularly critical in Chapter 11, particularly where arbitration would make it difficult for Debtor to attract additional funding, would undermine creditor confidence in Debtor's ability to reorganize, would undermine confidence of 3rd parties conducting business with Debtor, and would impose additional costs on estate while diverting attention of Debtor's management. Enforcement of arbitration agreement in this case would deprive Debtor of breathing spell during which it can develop exit strategy and allowing arbitration to proceed would interfere with Debtor's efforts to execute rehabilitation. Chapter 11 case was less than 4 months old. Debtor should be given reasonable period of time to proposed Plan without simultaneously having to devote significant time and resources toward arbitration process.

(6357) *Younes v. McCallister,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) - Permissive abstention and equitable remand may be raised *sua sponte* by Bankruptcy Court notwithstanding absence of Motion to Remand. Permissive abstention is governed by 28 USC Section 1334 and allows Court, and interest of justice or interest of comity with State Court or respect for state law to abstain from hearing proceeding. Factors include effect or lack of effect on an efficient administration of estate if Court of stains; extent to which estate law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceeding commenced in State Court or other non-Bankruptcy Court;

jurisdictional basis, if any, other than 28 USC Section 1334; degree of relatedness or remoteness to proceedings in main bankruptcy case; substance rather than form of asserted "core" proceeding; feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in State Court with enforcement left to Bankruptcy Court; burden on Bankruptcy Court docket; likelihood that commencement of proceedings in Bankruptcy Court involves forum shopping; existence of right to jury trial; presence of non-debtor parties; and any unusual or other significant factors. Court would abstain where State Court case raised only issues of Florida family law that are easily severable from Debtor's Chapter 13 case and involve non-debtor party. Removal from Florida Court to Bankruptcy Court most certainly involves forum shopping. "Domestic Relations Exception" to federal jurisdiction would prevent Bankruptcy Court from exercising jurisdiction over suits for divorce or allowance for alimony or child custody, and prevents Federal Court from ruling in action where substance is domestic relations generally even if brought under guise of federal question jurisdiction.

(6358) *In re Johnson,* 565 BR 835 (Bankr. S.D. Ohio 2017) – Court can permissively abstain in interest of justice and comity with State Courts and State law. Abstention from State Court action over-extension of bankruptcy court jurisdiction. Debtor's bankruptcy filing was effort to gain benefits of partnership liquidation through bankruptcy process without necessity of either filing bankruptcy petition on behalf of partnership or going through State law dissolution proceedings. At conclusion of dissolution and winding up of partnership affairs, any remaining economic interest of Debtor is property of estate and must be paid to bankruptcy estate for distribution to creditors.

(6359) *McAllister v. Younes,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) – Court has jurisdiction to consider permissive abstention and equitable remand *sua sponte* notwithstanding absence of motion to remand by any party. Permissive abstention applies to preceding removed from State Court in interest of justice or in interest of comity with State Court or respect for State law. Debtor's notice of removal of State Court case indicates that State Court has already fully adjudicated matter and entered final judgment. Only activity in State Court case consists of supplementary proceedings to collect judgment which should be brought in Court that issue judgment. Record indicated that there was nothing left for Bankruptcy Court to adjudicate and Debtor's attempt to remove State Court case will merely delay enforcement of default judgment obtained by Debtor in State Court.

(6360) *In re Ryan,* Case No. 09-1604 (Bankr. D. Hawaii 2016) – 28 USC Section allows court to abstain based on considerations of effect or lack thereof on efficient administration of estate if court abstains; extent to which state law issues predominate over bankruptcy issues; difficulty or unsettled nature of applicable law; presence of related proceeding in State Court; jurisdictional basis if any other than 28 USC Section 1334; degree of relatedness or remoteness of proceedings to main case; substance rather than form of alleged core proceeding; feasibility of severing state law claims from bankruptcy issues; burden on bankruptcy court docket; likelihood that commencement involves forum shopping, existence of right to jury trial; and presence of non-Debtor parties. Court would not abstain from determining meaning of "surrender". Case had already been fully administered, proceedings were closely related to State Court action, which support abstention; but dispute was solely one of bankruptcy law, law was unsettled and confusing, Section 1334 was sole basis of federal jurisdiction, issue directly related to extent of relief extended to chapter 7 Debtor, issue was core proceeding as it involved meaning and effect of code provisions, bankruptcy issues were easily severable, there was no burden on bankruptcy court docket, there was no indication of forum shopping as issue arose in main bankruptcy case, there was no right to jury trial on narrow issue to be determined by bankruptcy court, and there were no non-Debtor parties other than secured creditor, all of which weight against abstention.

(6361) *Simon v. Zorn,* 2016 WL 6083754 (E.D. Mi. 2016) – 28 USC Section 157(d) allows the District Court to withdraw the reference of a case or controversy for "cause shown". Statute does not define "cause" but courts generally consider (1) whether the claim is core or non-core, (2) what is the most efficient use of judicial resources, (3) what is the delay and what are the costs to the parties, (4) what will promote uniformity of bankruptcy administration, (5) what will prevent forum shopping, and (6) other related factors. Request to withdraw reference was premature where litigation was in its infancy. Bankruptcy Court was more familiar with underlying facts than District Court as bankruptcy had bene pending for over a year; and possibility existed that case would be resolved on dispositive motions before trial. Litigation was related to bankruptcy case as action was brought by Trustee of Debtor against former officer and former attorney for breach of fiduciary duty and malpractice, increasing judicial efficiency if one judge handles matters; and moving party did not demonstrate any prejudice form allowing case to remain in bankruptcy court during pretrial proceedings.

(6362) *Estate of Jackson v. Hardaway,* 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Court has discretion to abstain from proceeding in interest of justice or comity with State Courts or respect for state laws. Factors to consider include (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in State Court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. Section 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of this court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any unusual or other significant factors. Court would abstain from hearing wrongful death action following determination by court that any award would be non-dischargeable under Section 523(a)(6). Plaintiff was entitled to jury trial which bankruptcy court is statutorily prohibited from conducting. All remaining issues were matters of state law including both liability and damages. There was no independent basis for federal court jurisdiction beyond relationship to bankruptcy case. Trustee had already filed "No Asset" report so outcome of proceeding would have no bearing on administration of bankruptcy case. Allowing case to proceed in State Court will not constitute forum shopping by plaintiff as action would be remanded to court where plaintiff instituted action in first instance. Court abstained from further rulings on liability and damages, as State Court where wrongful death action was pending was better forum to determine issues, with Court finding only that to extent decedent's estate prevails in State Court wrongful death action, any award that State Court may order will survive discharge.

(6363) *MetLife Securities, Inc. v. Holt,* 2016 WL 3964459 (E.D. Tn. 2016) – Court has discretion to abstain from any action in deference of State Court jurisdiction based on considerations of judicial administration, conservation of judicial resources, and comprehensive disposition of

litigation. Abstention is exception, not rule, and is appropriate only where it serves important countervailing interest. Factors to consider include (1) whether State Court has assumed jurisdiction over any res or property, (2) whether the federal forum is less convenient to the parties (3) avoidance of piecemeal litigation (4) order in which jurisdiction was obtained (5) whether the source of governing law is state or federal (6) adequacy of the State Court action to protect the federal plaintiff's rights (7) relative progress of the state and federal proceedings and (8) the presence or absence of concurrent jurisdiction. Court would not abstain over action brought to compel arbitration in matter pending in State Court. Federal Arbitration Act requires district court to determine whether to compel arbitration, even where there is pending State Court motion addressed to same issue and district court's exercise of authority results in inefficient and piecemeal resolution of issues. Question of enforcement of arbitration clause is based on federal, not state law and federal court has independent basis for jurisdiction over underlying action. Motion to compel arbitration filed in State Court had languished for 7 years during which time pleadings have not progressed beyond early stages and discovery had reached an impasse. District court's failure to consider Motion, particularly in light of the multiyear delay in the state-court proceedings, would contravene Congress's clear intent in the FAA to move the parties into arbitration as quickly and easily as possible.

(6364) *Mountain Glacier, LLC v. Nestle Waters North America, Inc.,* 2016 WL 3883025 (M.D. Tn. 2016) – District court may withdraw, in whole or in part, any adversary case or proceeding from the bankruptcy court on its own motion or on timely motion of any party, for cause shown. Cause for non-mandatory withdrawal provision is a high burden. Court would not withdraw reference where matter is a "core proceeding" involving interpretation the Chapter 11 Reorganization Plan and Confirmation Order. Court would not withdraw reference where doing so would then require District Court to interpret another court's Order.

(6365) *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 re-determine 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.

(6366) *Bennett v. Morton Buildings, Inc.,* 2015 WL 9491184 (Bankr. N.D. Ohio 2015) – Bankruptcy Court can abstain from hearing pre-petition State Court litigation against Debtor where abstention would avoid duplication of effort or expense and avoid possibility of inconsistent outcomes. Defendant's request to abstain based on pending State Court action not required where defendant's liability on adversary proceeding was predicated on different factual circumstances than those alleged in State Court action brought by third party and there was no risk of inconsistent results as mental states of Debtor and defendant must be determined individually. Current bankruptcy adversary involved claim that defendant had violated discharge injunction by maintaining action against Debtor for allegedly non-dischargeable debt. Outcome of adversary proceeding predicated entirely on whether debts were non-dischargeable are within procedural contest of claims in adversary. Even if State Court ultimately determined that Debtor owed no debt to State Court plaintiff and so there was no debt to except from discharge, action of State Court plaintiff in bringing action in first instance would still violate discharge injunction.

(6367) *In re Hakes,* Case no. 14-32139 (Bankr. E.D. Mi. 2015), *reconsideration denied,* (Bankr. E.D. Mi. 2015), *aff'd,* 2016 WL 463315 (E.D. Mi. 2016) – 28 USC Section 1334 allows court to permissively abstain in interest of comity with State Courts or respect to state law, or otherwise in the interest of justice. Factors to consider include effect of abstention on efficient administration of estate; extent to which state law issues predominate; difficulty or unsettled nature of state law; presence of related proceedings commenced in non-bankruptcy forum; jurisdictional basis for Bankruptcy Court other than Section 1334; degree of relatedness or remoteness of proceedings to main bankruptcy case; substance rather than from of asserted "core" proceedings; feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered by State Court but enforced by bankruptcy court; burden of case on bankruptcy court's docket; likelihood that commencement of action in bankruptcy court is forum shopping; existence of a right to jury trial; presence of non-Debtor parties; and any other unusual or significant factors. Court would permissively abstain from state law action where litigation has been pending in State Court for 2 years prior to commencement of bankruptcy case, and State Court had extensive contact with and knowledge of the case, the parties, and the underlying facts. Issues presented were entirely state law based. Bankruptcy court lacked any jurisdictional basis other than fact that one party was Debtor in bankruptcy and but for bankruptcy case, action could not have been brought in Federal court. Defendant has demanded jury trial in action which would preclude bankruptcy court from conducting trial. Granting of abstention necessarily carries with it a modification of automatic stay to allow parties to litigate in non-bankruptcy forum and stays dischargeability adversary proceeding based on same facts and circumstances until State Court proceedings are resolved.

(6368) *Etterbeek v. APTCAP. LLC,* 521 BR 811 (Bankr. E.D. Mi. 2014) – Bankruptcy Court can abstain from hearing action removed from State Court where abstention is consistent with interests of justice and comity with State Courts. Factors to consider include effect or lack of effect on case administration; extent to which state law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceeding commenced in State Court; jurisdictional basis for federal court jurisdiction beyond pending bankruptcy case; substance rather than from of alleged core proceeding; feasibility of severing state law claims from core bankruptcy matters; burden on court docket; likelihood that commencement of bankruptcy proceeding was result of forum shopping; existence of right to jury trial; presence of non-Debtor parties; and other unusual or significant factors. State law action brought by one group of members of Debtor-LLC against other members were non-core proceedings where all actions were based entirely on state law and neither invoked nor depended on either

bankruptcy case or bankruptcy code. Neither the Trustee nor the Debtor were either plaintiff or defendant and plaintiff did not seek any relief in lawsuit against bankruptcy estate. Action had no effect on administration of estate and did not seek recover property of estate or affect liquidation of estate assets. Action was not "related to" bankruptcy case for purposes of allowing Bankruptcy Court to exercise jurisdiction where outcome of case would not have any conceivable impact on estate or case administration. All elements of permissive abstention were present allowing court to abstain and send matter back to State Court.

(6369) *Junk v. CitiMortgage, Inc.,* 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Court would lift stay and permissively abstain from State Court litigation where abstention would have little if any effect on bankruptcy proceedings; state law issues dominated litigation; state law was unsettled on the controlling issues; bankruptcy court would not have had jurisdiction but for filing of bankruptcy by one party; there was some indication of forum shopping by Debtors who filed bankruptcy in Ohio and then commenced adversary proceeding to litigate same issues as had been subject of South Carolina action and only after they had suffered series of adverse rulings in State Court; and continuing in State Court would avoid piecemeal litigation and be consistent with comity with State Courts.

(6370) *Cohen v. Schonsheck,* 2014 WL 1153728 (E.D. Mi. 2014) – Permissive abstention will be based on factors including (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in State Court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-Debtor parties. The test is a multi-factor balancing test, and it is not necessary the very element be satisfied or weigh in favor of abstention. Adversary proceeding to determine debt to be non-dischargeable does not prevent abstention just because same operative facts are basis for State Court litigation. Factual basis for adversary proceeding was different than factual basis for State Court litigation such that resolution of adversary would not impinge on State Court jurisdiction. Case had been pending in State Court for two years and if court does not abstain, efforts of State Court would be wasted. Allowing State Court to proceed would further efficient administration of estate; state law issues predominate action for fraud; there are pending proceedings in the State Court; the issues were not so directly related to the bankruptcy case such that the State Court could not adjudicate issues presented; removal to bankruptcy court smelled of forum shopping, and there were multiple non-Debtor parties. Only jurisdictional basis was bankruptcy case, as there was no independent basis for federal jurisdiction. Further, underlying bankruptcy case had already been dismissed, presenting no reason why the Federal Court should retain control over what was now a purely State Court matter.

(6371) *PRN Pharmaceutical Services, LP v. Brownsburg Healthcare LLC,* 2014 WL 906121 (W.D. Ky. 2014) – Permissive abstention is exception rather than rule. Court must consider whether abstention is in interest of justice or in respect to comity with State Courts. Factors include effect or lack of effect on administration of bankruptcy estate; extent to which state law claims predominate over bankruptcy issues; difficulty or unsettled nature of state law; presence of related proceedings in either state or bankruptcy court; jurisdictional basis for federal court other than 28 USC Section 1334; degree of relatedness or remoteness to bankruptcy case; substance, rather than from of core proceeding, feasibility of severing state law claims from core bankruptcy maters; burden on federal court docket; likelihood that bankruptcy was forum shopping by one party, existence of right to jury trial, presence of non-Debtor parties, and any other unusual or significant factor. Court would abstain where action began as "garden variety" State Court litigation; the adversary presented no issues of federal law; there were no independent bases for federal court jurisdiction; and action involved at least seven non-Debtor parties. Principal claims were against defendants other than the Debtor and only connection to bankruptcy case was claims filed by defendants for indemnification. Resolution of State Court action only tangentially impacted bankruptcy case. Plaintiff had right to jury trial which could be conducted more efficiently by State Court. State law claims were easily severable from any core proceedings and post-trial enforcement of State Court judgment could be handled in bankruptcy court. Case was not ready for trial and transfer of action to State Court would not adversely impact bankruptcy administration.

(6372) *Villages of Capital Pointe, LLC v. Huntington Bank,* 2013 WL 4523305 (E.D. MI. 2013) – Permissive abstention is based on (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in State Court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than from of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of this court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any unusual or other significant factors. Plaintiff's (Debtor's) Motion denied. Although defendant was not creditor, its wholly owned subsidiary is. Issue is narrow issue of state law, and there were not State Court proceedings pending. There was no indication of forum shopping and parties waived right to jury trial.

(6373) *American Discount Cycle Mart, Inc. v. Chuby,* 2013 WL 3457723 (Bankr E.D. Mi. 2013) – Factors considered in the analysis of permissive abstention are (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in State Court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-Debtor parties. Court would permissively abstain in favor of State Court where

Complaint sought relief under state law for alleged conspiracy to convert vehicles belonging to plaintiff and included counts for conversion, conspiracy, unjust enrichment, fraudulent conveyances, and interference with business relationships. State law predominated; there was pending State Court proceeding that had proceeded for over one year and was moving toward trial; Bankruptcy Court jurisdiction over the counts against the non-Debtor defendants was tenuous at best; timing evidenced element of forum-shopping by Plaintiffs; there may be a right to a jury trial in the State Court; and obviously the many of the defendants were non-Debtor parties. Although court would not abstain over counts objecting to discharge and dischargeability under Sections 727 and Section 523, Court would abstain as to all remaining counts, notwithstanding possible inconsistent verdicts in the State Court action versus the Section 523 and 727 actions.

(6374) *Meoli v. Thrun,* Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Court is not required under probate exception to jurisdiction to abstain where there is no action pending in probate court concerning Trust *res.* Court can permissively abstain in interest of justice of comity with State Courts or respect for state law. Action against trustee of probate trust in which Debtor held beneficial interest for alleged breaches of fiduciary duty could be equally well served in State Court or bankruptcy court. However, interests of comity and respect for state law favored abstention. After *Stern*, ability of Bankruptcy Court to enter final judgment was in question. All questions were ones of state law and Michigan's relatively new trust statute, favoring State Court resolution of unsettled questions of state law, and State Court had unquestionable ability to render final judgment.

(6375) *CPC Livestock, LLC v. Fifth Third Bank. Inc.,* 2013 WL 1411222 (W.D. Ky. 2013) – Permissive abstention warranted where interest of justice and comity with State Courts support allowing State Court to handle proceedings. Court will consider (1) the extent to which state law issues predominate over bankruptcy issues; (2) the unsettled nature of the applicable state law; (3) the jurisdictional basis; (4) the impact on the efficient administration of the estate; (5) the degree of relatedness to the bankruptcy case; (6) the presence of a related proceeding commenced in State Court or other non-bankruptcy court; and (7) the existence of forum shopping. Court would abstain where state law issues predominate and action did not involve any federal causes of action; action presented unsettled questions of state law including applicable statutes of limitations, misrepresentations and common law fraud; although case was related to bankruptcy, abstention would not adversely affect deficient administration of bankruptcy case; and while outcome could implicate claims against estate, the connection was tenuous at best where total claims exceeded $60 million while claims at issue in this case were less than $1 million. State Courts were already handling other related claims and there was no evidence of forum shopping in attempt to evade proper exercise of jurisdiction or any fraudulent purpose.

(6376) *Johnston v. City of Middletown,* 484 BR 698 (Bankr. S.D. Ohio 2013) – Assuming Court had jurisdiction to rule on issue of Debtor's status as responsible party for unpaid employment taxes, court would abstain. Abstention is permissible when interests of justice or comity would be better served. Lists of non-exclusive factors includes :(1) effect or lack of effect on efficient administration of estate if court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) difficulty or unsettled nature of applicable state law;(4) presence of related proceeding commenced in nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) degree of relatedness or remoteness of the proceeding to main bankruptcy case; (7) substance rather than from of asserted core proceeding; (8) feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) burden of this court's docket; (10) likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) existence of a right to a jury trial; (12) presence in the proceeding of non-Debtor parties; and (13) any unusual or other significant factors. Court would abstain from determination of Debtor as responsible party. Action had no impact on administration of estate as case was no asset Chapter 7 that had been fully administered. Controlling issues were non-bankruptcy, based entirely on tax laws. Alternative forums existed within which matters could be efficiently resolved. Bankruptcy court had no independent basis for jurisdiction other than as ancillary to bankruptcy case. There was no evidence of forum shopping, no right to jury trial.

(6377) *CH Holding Company v. Miller Parking Co.,* 2012 WL 5463128 (E.D. Mi. 2012) – District Court would not permissively abstain where allowing litigation to continue in State Court would interfere with administration of bankruptcy case. Plaintiff's State Court complaint seeking to pierce Debtor-corporation's veil and reach assets of shareholders substantially overlapped with Chapter 7 Trustee's action seeking same relief. Although some of the relief sought by Plaintiff may not affect administration of case, those claims directly impacted the purposes and goals of Title 11.

(6378) *Duncan v. Deutsche National Bank Trust Co.,* 2012 WL 4322667 (N.D. Ohio 2012) – Bankruptcy court properly abstained from counterclaims filed by Debtor in response to Bank's proof of claim. Counterclaims alleged multiple counts based on Fair Debt Collection Practices Act, RESPA, and 18 separate state law causes of action. Although filed as response to claim, issues were not core proceedings. Resolution of claims would not assist in the administration of assets as all were directed at enforceability of allegedly assigned note and mortgage. State law issues predominated and there were already two related State Court cases pending when Debtor filed for bankruptcy protection. Causes of action were not based on and were easily separated from main bankruptcy law. Fact that one count of 21 total was allegedly a core proceeding did not preclude abstention, particularly where that issue was to determine value of property which is not properly an adversary proceeding in the first instance. Bankruptcy court could retain that discrete issue as contested matter while abstaining on all remaining issues in favor of State Court.

(6379) *Moyer v. Carlyle,* Case No. 11-80450 (Bankr. W.D. Mi. 2012) – Bankruptcy Court has broad discretion to abstain from hearing matters over which it would otherwise have jurisdiction in the interests of justice or in the interest of comity with State Courts or State law. Discretionary abstention extends even to core matters when court determines to defer to State Court jurisdiction. Court must consider effect on efficient administration of estate; extent to which state law issues predominate; difficulty or unsettled nature of applicable law; presence of a related proceeding commenced in State Court or other non-bankruptcy forum; jurisdictional basis for federal jurisdiction if other than Section 1334; degree of relatedness or remoteness of the proceedings to the main bankruptcy case; substance rather than from of alleged core proceeding; feasibility of severing state law claims from core matters to allow judgments to be entered in State Court with enforcement left to bankruptcy court; burden on bankruptcy court docket; likelihood that commencement of proceeding in bankruptcy court involves forum shopping by one of the parties; existence of right to jury trial; and presence in proceeding of non-Debtor parties. Court would abstain from hearing legal

malpractice suit brought by Trustee against Debtor's prior attorney. Defendants have not consented to bankruptcy court entry of final judgment or to bankruptcy court conduct of jury trial resulting in inefficiency and delay. State Court jurisdiction is beyond question and bankruptcy court can conduct all proceedings, including jury trial, in full. Adversary proceeding based entirely on state law governing attorney's professional responsibility which is traditionally within State control. All claims are between Michigan residents, such that there is no basis for federal court jurisdiction other than Section 1334.

(6380) *Dodd v. Micek,* 2012 WL 4107230 (Bankr. E.D. Ky. 2012) – A bankruptcy court may, *sua sponte,* in the interest of justice, comity with State Courts or respect for State law, abstain from hearing a particular proceeding arising in a bankruptcy case. Factors to consider in determining whether permissive abstention is appropriate include: (1) the effect of abstention upon the administration of the estate; (2) the extent to which state law 4 issues predominate; (3) the difficulty of applicable state law; (4) the existence of a jurisdictional basis other than the bankruptcy court's jurisdiction; (5) the feasibility of permitting judgment to be entered in State Court; (6) the burden on the bankruptcy court's docket; (7) evidence of forum shopping; (8) a right to a jury trial combined with a refusal to consent to jury trial before the bankruptcy judge; (9) the financial condition of the parties; and (10) whether there are non-Debtor parties involved. Court would abstain where only remaining issue was validity of alleged attorney fee lien grounded entirely in state law, that is whether Kentucky law permits an attorney fee award to attach to a maintenance award in domestic proceeding. Issue was one of first impression and Divorce court has expertise that makes it more appropriate forum. State Court has jurisdictional basis as State Court entered order that forms the basis of the dispute. Resolution of dispute would not have no effect possible effect on bankruptcy case as trustee already filed report of no distribution.

(6381) *Kozel v. Andrews,* 2012 WL 1790292 (Bankr. N.D. Ohio 2012) – 28 U.S.C. § 1334(c)(1) allows a district court in the interest of justice, or in the interest of comity with State Courts or respect for State law to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11 Factors to consider include (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in State Court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-Debtor parties. This is a multi-factor balancing test where every element need not be met and not all factors need to weigh in favor of permissive abstention for it to be appropriate. Abstention appropriate where complaint consisted entirely of state laws claims over which the State Court is capable of presiding; there was no jurisdictional basis in bankruptcy court other than Section 1334; entire complaint consisted of non-core proceedings; causes of action can be easily severed from any issues in bankruptcy proceeding; and matter is not related to bankruptcy case to any significant degree and outcome of complaint will not have any effect on administration of the case. Further, defendants have reserved the right to demand a jury trial and did not consent to trial by jury by the bankruptcy court. All of the defendants are non-Debtor parties. If proceeding is unduly delayed in State Court, court would consider a motion to vacate order of abstention.

(6382) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.,* Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Court can abstain where interests of justice or interests of comity dictates. Court will consider effect or lack of effect on efficient administration of bankruptcy case; extent to which state law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceedings commenced in State Court; existence of basis for federal jurisdiction other than bankruptcy proceeding; degree of relatedness or remoteness of proceeding to main bankruptcy case; substance of the relief requested; feasibility of severing state law claims from core proceedings; burden on court docket; likelihood that commencement of proceedings in bankruptcy court involves forum shopping; existence of right to jury trial; presence of non-Debtor parties; and any other unusual or significant factors.

(6383) *IRS v. Hayes,* 2011 WL 2490945 (E.D. Mi. 2011) – IRS failed to demonstrate basis for permissive abstention to allow proceedings to be heard in Tax Court. Co-obligor had already defaulted in the collection proceedings, eliminating any concerns about comity. Judicial economy would be promoted by allowing matter to proceed in Bankruptcy Court.

(6384) *In re T.S.P. Co., Inc.,* 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1334(c)(2) requires court to which action has been removed to abstain if (1) the case is based on a state law claim or cause of action which, although related to a title 11 case, did not arise under Title 11 or out of a Title 11 case; (2) the case could not have been commenced in Federal court absent the fact of a bankruptcy petition; and (3) if the case were commenced in State Court, it could be timely adjudicated. Action pending before state department of labor for alleged safety violations did not meet diversity requirements and did not raise federal question, precluding Federal court from exercising jurisdiction; and state administrative proceeding afforded timely resolution of issues presented. Court would mandatorily abstain from proceeding.

(6385) *Willis v. Chase Home Finance, LLC.,* 2010 WL 3430712 (N.D. Ohio 2010) – *Younger* doctrine requires Federal Court to abstain where there are pending State Court proceedings that implicate an important state interest and the state proceedings afford an adequate opportunity to raise federal questions. Pending State Court foreclosure action precluded Federal Courts from asserting jurisdiction in an action for loan fraud, illegal foreclosure or breach of loan modification where issues could be adequately raised in State Court proceedings.

(6386) *Baker v. Simpson,* 2010 WL 2977329 (2d Cir. 2010) – Mandatory abstention applies when a proceeding based upon a state law claim or state law cause of action is "related to" a case under Title 11 but does not arise under or arise in a case under Title 11. A proceeding "arising in" Title 11 is one that is not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy. Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action "arising in" the bankruptcy case. The "appellant's relationship with all appellees arose only in connection with his Title 11 proceeding. Bankruptcy Court has the ability to review the conduct of attorneys who are appointed by the court to aid a person in need of counsel in a proceeding pursuant to Title 11. Professional malpractice claims alleged were "inseparable from

the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.

(6387) *In re Mayer,* Case No. 09-60536 (Bankr. E.D. Mi. 2010) – Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in State Court or other non- bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than from of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-Debtor parties; and (13) any other significant factors. Court would not abstain from dispute over whether State Court Divorce judgment created constructive trust in specific assets for payment of Debtor's attorney fees. Bankruptcy Court could adjudicate related state law claims; issues involved necessarily impacted on administration of estate including possible preference litigation; resolution in State Court would necessarily result in further proceedings in Bankruptcy Court, resulting in duplication of judicial effort and expense; Bankruptcy Court can efficiently handle the issues presented; the only non-Debtor parties in the State Court are the creditors who have actively participated in the Bankruptcy proceeding; no party demanded a jury trial and there would be no right to a jury trial if the matter were returned to State Court; and there are no unusual or significant factors that would indicate that abstention would produce better or more efficient result.

(6388) *LaBankoff v. GMAC Mortgage, LLC.,* Case No. 09-1294 (9th Cir. BAP. 2010) – A bankruptcy court may abstain from hearing an adversary in the interests of justice or in the interest of comity with State Courts or respect for State law. Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in State Court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than from of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-Debtor parties. Court properly abstained where all allegations in the complaint were "non-core" and arose entirely from pre-bankruptcy conduct and claims were principally state law claims that could have been pursued in State Court and three of four plaintiffs and at least two defendants were neither Debtors nor creditors in the bankruptcy case.

(6389) *In re Porrello,* Case No. 07-10053 (Bankr. N.D. Ohio 2009) – Bankruptcy courts have the authority to abstain from hearing matters that may be heard in State Court within sound discretion of the bankruptcy judge and can be raised sua sponte. A Court will consider (1) the effect on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in State Court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than from of an asserted `core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping byone of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-Debtor parties. Court would abstain from ruling on Debtor's objection to Claim Debtor will not receive a general discharge in bankruptcy and the outcome of the objection would have no effect on the efficient administration of the Debtor's estate; the lack of other pending bankruptcy matters combined with the presence of a related fraud claim proceeding pending in State Court; Debtor's estate has been fully administered by the case trustee; and the relief sought herein is truly a matter rooted in state law. Court remanded the Debtor's Objection to Claim to the appropriate State Court for its consideration and determination.

(6390) *Lone Star Fund V (U.S.), L.P. v. Barclays Bank Plc,* 594 F.3d 383 (5th Cir. 2010) – Court can remove non- bankruptcy case to federal court pursuant to 28 USC Sections 1334(b) and 1452(a) where the underlying action is "related to" a pending bankruptcy proceeding. "Related to" jurisdiction includes any litigation where the outcome could alter, positively or negatively, the Debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. An indemnification provision in which the bankrupt Debtor agrees to indemnify one party to a transaction is a sufficient nexus to allow removal of action between other party to transaction and unrelated third party. Mortgage company originated loans and sold loans to buyer, with agreement to indemnify buyer from any losses on mortgages that defaulted. Buyer in turn sold the mortgages to third party with similar indemnification provision. When mortgages defaulted, third party sued buyer on indemnification provision. Buyer removed action to Federal Court where the underlying bankruptcy case was pending. To the extent Buyer was liable to third party on its indemnification provision, Buyer would have corresponding claim against Debtor. Therefore, claims of third party against Buyer were sufficiently "related to" bankruptcy to support removal.

(6391) *MR Crescent City, LLC., v. Draper,* 588 F.3d 822 (4th Cir. 2009) – 28 USC Section 1447(c) permits imposition of legal fees against a party who removed a case from State Court to federal court if the federal court later remands the case to the State Court. Section 1447(c) authorizes recovery of fees only from party who caused case to be removed, and does not create personal liability of attorney for party who filed removal petition. Section 1447 does not repeal "American Rule" presumption that each party to litigation bears its own fees and costs or that only parties to proceeds can be held responsible for payment of legal fees. Fee shifting statutes must be construed narrowly and will not be construed to include awarding fees against counsel for a represented party absent clear indication that Congress intended that result.

(6392) *Collins & Aikman Litigation Trust v. Detkowski,* 2009 WL 1469630 (E.D. Mi. 2009) - Action for personal injury or death – 28 USC Section 157(b)(5) requires that the action be tried either in the District Court where the bankruptcy case is pending or in the District Court where the claim arose, as determined by the District Court where the bankruptcy case is pending. Section 157 does not prohibit the District Court from abstaining entirely in favor of pending State Court suit as provided in 28 USC Section 1334(c)(1). Factors to determine whether abstention is appropriate include (i) whether the District Court's exercise of jurisdiction will result in piecemeal litigation, with the pending personal injury suit going forward as to other non-Debtor parties who cannot be transferred out of the jurisdiction they are now in, (ii) whether issues of state law are predominant, (iii) considerations of judicial economy, (iv) effect of abstention on the efficient administration of the bankruptcy estate, and (v) the degree of relatedness of the personal injury suit to the bankruptcy case. Abstention is appropriate where State Court personal injury action includes claims against non-Debtor defendants that could not be transferred and which would require personal injury suit to be tried twice in different Courts; state issues predominate in personal injury action with federal law playing no role whatsoever; State Court suit has progressed through the pre-trial phase and is now ready for trial; and there is no reason to believe that the claims against Debtor could not be tried in a similarly expeditious manner. Alleged increased cost to Debtor of litigating in State Court not sufficient to overcome factors that support abstention where State Court is still proximate to and is actually located in same District as bankruptcy case and Debtor failed to produce any evidence that litigating in State Court would actually be significantly more expensive than doing so in District Court.

(6393) *Commonwealth of Kentucky v. Young Oil Corp.,* 2009 WL 1475512 (E.D. Ky. 2009) – Action by governmental unit to enforce police or regulatory power is not subject to removal to either Bankruptcy Court or District Court after the defendant files for bankruptcy protection. Action by governmental unit to enforce State Securities Act is not adjudication of private right but is effectuation of public policy precluding removal to Federal Court. Action must be remanded to Kentucky Court.

12.53 Timeliness of Notice of Removal

(6394) *Forest Creek Townhomes, LLC v. Carroll Property Management, LLC,* 2017 WL 2557716 (6th Cir. 2017) – Deadline for removal of action is 30 days after service of initial pleading if initial pleading sets out grounds for Federal court jurisdiction. If initial pleading does not indicate basis for Federal Court jurisdiction, then deadline for removal is 30 days after first receipt of a paper form which it may be ascertained that case is or has become removable. Thirty day period begins when defendant has solid and unambiguous information that Federal Court would have jurisdiction. Where initial pleading does not present solid and unambiguous information that case is removable, but at minimum suggests removability, party has duty to inquire about removability within reasonable time. Complaint alleged that Plaintiff was LLC but did not plead residency of any members. For purposes of diversity, LLC has citizenship of each of its members. Time to remove ran from date on which Defendant first learned that Plaintiff was single member LLC whose citizenship resulted in total diversity creating basis of Federal Court to assert jurisdiction.

(6395) *Deutsche Bank National Trust Co. v. Wolf,* 2016 WL 1658775 (S.D. Ohio 2016) – Notice of removal must be filed within 30 days of receipt by defendant of initial pleading. Attempt to remove case from state to federal court in notice filed 8 months after complaint served was untimely and required remand.

(6396) *Laber v. United Steel Workers International Union,* 2015 WL 5085774 (N.D. Ohio 2015) – Removal notice must be filed within 30 days of receipt of first paper that indicates that action may be removable. Answers to interrogatories and pretrial statement constitute "other papers" that trigger time for filing notice. Notice filed within 30 days of receipt of these pleadings which first disclosed federal basis for cause of action was timely.

(6397) *Wells Fargo Bank, NA v. Smith,* 2016 WL 1271028 (E.D. Ky. 2016) – Removal notice failed to state basis for federal jurisdiction where caption of Notice indicated diversity of citizenship but body of Notice referenced Federal Fair Debt Collection Practices Act. Defendant could not allege diversity as defendant was citizen of state in which cause of action was originally commenced. Removal based on federal question also not warranted where FDCPA action was based on letters received by defendant 14 months prior, during pendency of litigation. Cause of action, if any, accrued more than 30 days prior to removal petition rendering petition untimely.

(6398) *Akwei v. JBS USA LLC,* 2014 WL 2457389 (W.D. Ky. 2014) – Notice of removal must be filed within 30 days of the date on which either the initial pleading or an amended pleading is filed that allows the parties to first ascertain that the action is or has become removable. Time starts to run from date on which defendant has solid and unambiguous information that a case is removable, and is based on defendant's actual knowledge. Initial complaint sought only recovery of 6 months back wages which totaled about $12,000, plus unspecified amounts for "mental anguish". Plaintiff in the Amended Complaint for the first time asserted damages exceeding $75,000 threshold for federal court jurisdiction. Notice of removal filed within 30 days of filing of amended complaint was timely.

(6399) *NYCB Mortgage Co., LLC v. Capital Financial Mortgage Corp.,* 2014 WL 535706 (N.D. Ohio 2014) – Defendants can remove State Court action to federal court if action could have been brought in federal court in first instance. Request for removal must be joined by all defendants and must be filed within 30 days of summons where basis for removal can be determined from initial pleading; or 30 days from receipt of another paper that indicates a previously unremovable case becomes removable. Joinder of defendants is not required if non-joining defendant has not been served with process at time of removal petition, or non-joining defendant is merely nominal or formal party.

(6400) *Church Joint Venture v. Graphic Enhancement Technologies Corp.,* 2013 WL 3929725 (W.D. Tn. 2013) – State Court action pending at commencement of bankruptcy case can be remove to Federal Court upon timely filed notice of removal. Notice must be filed no later than the longer of (1) 90 days after the order for relief; or (2) 30 days after entry of an order terminating a stay; or (3) 30 days after a trustee qualifies in a Chapter 11 Case. Petition constitutes order for relief triggering running of 90 day limit. Court's Order denying Debtor a discharge constitutes an order terminating the stay. Notice of Removal filed more than 90 days after commencement of case and more than 30 days after order denying discharge was untimely. Case must be remanded back to State Court.

(6401) *Lunan v. Jones,* 489 WL 711 (Bankr. E.D. Tn. 2012) – Chapter 7 Trustee's 30 day window to request removal did not run until trustee was

formally served with summons and complaint. Mere "receipt" of summons and complaint is not sufficient – technical requirements for service must be fulfilled before time period commences.

(6402) *Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.,* Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1446 requires notice of removal of a civil action or proceeding to be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. If civil action was initiated before commencement of the bankruptcy case, a party has 90 days after the bankruptcy petition is filed to seek removal if the State Court proceeding is "related to" the bankruptcy proceeding. A civil proceeding is "related to" the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the Debtor's rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate Debtor's president based on president's personal guarantee is "related to" the bankruptcy estate. Corporate president is listed as co-Debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor's claim against assets of the bankruptcy estate. Thus, corporate president had 90 days from commencement of the bankruptcy case to seek removal under section 1452 and Federal Rule 9027.

12.54 Waiver of Right to Remove

(6403) *Akwei v. JBS USA LLC,* 2014 WL 2457389 (W.D. Ky. 2014) – Defendant waives right to remove where defendant expresses clear and unequivocal waiver of intent to remove. Waiver does not include defensive actions in State Court short of efforts that result in actual disposition of action. Defendant did not waive right to remove by filing answer to complaint and amended complaint or by exchanging interrogatories and requests for production.

12.55 Procedure

(6404) *Indiana Hotel Equities, LLC v. Indiana Airport Authority,* Case No. 18-4307 (Bankr. E.D. Mi. 2018) – 28 USC Section 1452(a) requires Notice of Removal to be filed in District Court where the civil action is located. Notice of Removal filed in Eastern District of Michigan defective where underlying action pending in the Southern District of Indiana. Case remanded without prejudice to Plaintiff filing Notice of Removal in correct District Court. If Notice of Removal is filed and Case is later transferred to Eastern District of Michigan, Court would like remand again as case involved appeal of State Court judgment and State Court is better suited to consider and rule on merits

(6405) *Schaller v. Banfield,* 2016 WL 4055036 (E.D. Mi. 2016) – Removal petition must state basis for federal court jurisdiction. Removal petition that cites only 28 USC Section 1441, the removal procedure statue, is not sufficient to support removal. Further, removal petition appeared to be attempt to circumvent prior Bankruptcy Court ruling remanding case to State Court by attempting to remove action directly to district court.

(6406) *Wells Fargo Bank, NA v. Smith,* 2016 WL 1271028 (E.D. Ky. 2016) – Court could not determine whether defendant qualified for waiver of fee in connection with removal where defendants was married but financial disclosure failed to list income of defendant's spouse. Based on prior bankruptcy filing, it appeared that spouse had ample income to allow defendant to pay required removal fee. Defendant also failed to attach the State Court record. Defendant's statement that record was over 1000 pages and she could not afford copy did not allow court to ignore requirement that removing party provide record or to order State Court to produce record without charge. Petition also failed to state basis for federal jurisdiction where caption of Notice indicated diversity of citizenship but body of Notice referenced Federal Fair Debt Collection Practices Act. Defendant could not allege diversity as defendant was citizen of state in which cause of action was originally commenced.

(6407) *Cart Cherokee Basin Operating Co. v. Owens,* ____ S. Ct. ____ (2015) – Notice of removal needs only to contain a plausible allegation that the action involves an amount in controversy in excess of the jurisdictional requirement. District Court incorrectly remanded case where notice contained statement that amount in controversy met requirement but did not contain any evidentiary foundation for that contention. Removal notice is governed by normal rules of pleading, which requires allegation that case meets jurisdictional standard but does not require evidentiary foundation to support allegation.

(6408) *In re T.S.P. Co., Inc.,* 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – A party removes a case under 28 U.S.C. § 1441 by taking three procedural steps: (1) filing a notice of removal in the federal court; (2) filing a copy of this notice in the State Court; and (3) giving prompt written notice to all adverse parties. Once these steps are taken, removal is effective and the State Court "shall proceed no further unless and until" the federal court remands the matter. Although underlying action was not properly removable under 28 USC Sections 1441 or 1442, the notice of removal nonetheless divested state tribunal of jurisdiction and action should not have proceeded.

(6409) *McKibben v. Fair Finance Company,* Case No. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Section 1441 requires the joinder or consent of all co-defendants to a Notice of Removal. Failure to obtain consent mandates that court deny removal of action to Bankruptcy Court. However, Section 1452(a) provides a separate basis to remove action that is "related to" a bankruptcy case without the consent of all co-defendants.

(6410) *Mills v. Ellis,* 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Service of the notice of removal alerts parties in the removed case to the change of court, as well as starts the clock for filing a motion to remand or to respond to the complaint if time remains to do so. Further, the Notice of Removal was not accompanied by any pleading which would have placed issue of non-dischargeability before the Bankruptcy Court. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed

12.56 Removal – Consent of All Defendants

(6411) *Wells Fargo Bank, NA v. Smith,* 2016 WL 1271028 (E.D. Ky. 2016) - Removal petition defective where it was not signed by and did not reflect unanimous consent by all defendants.

(6412) *NYCB Mortgage Co., LLC v. Capital Financial Mortgage Corp.,* 2014 WL 535706 (N.D. Ohio 2014) – Defendants can remove State Court action to federal court if action could have been brought in federal court in first instance. Request for removal must be joined by all defendants and must be filed within 30 days of summons where basis for removal can be determined from initial pleading; or 30 days from receipt of another paper that indicates a previously unremovable case becomes removable. Joinder of defendants is not required if non-joining defendant has not been served with process at time of removal petition, or non-joining defendant is merely nominal or formal party. Defendant may waive formal service of process and voluntarily join litigation. If defendant waives service prior to filing of removal petition, that defendant must also consent to removal for purposes of unanimity of defendants. Fact that non-joining defendant was under receivership did not excuse unanimity requirement for removal. Defendant was not "nominal party" were complaint contained sever causes of action directed specifically against it, including action for specific performance. Although party may not have assets or ability to answer judgment does not mean that party has no legal interest in outcome of action.

(6413) *Crehan v. Maiden Lane, LLC,* 2014 WL 467568 (W.D. Mi. 2014) – Only defendants on which service has been effectuated are required to join in request for removal.

(6414) *Crockett v. Mutual of Omaha Bank,* 2013 WL 2384388 (M.D. Tn. 2013), *report and recommendations adopted,* 2013 WL 3335113 (M.D. Tn. 2013) – Defendant has a right to remove action from State Court to District Court if the district court has basis for original jurisdiction. However, as removal encroaches on State Court jurisdiction, statutes regarding removal are to be strictly construed. If an action lists multiple defendants, all defendants who have been properly joined and served must join in or consent to removal. Request for removal signed by only 2 of 4 listed and served defendants violates rule of unanimity and must be remanded to State Court.

12.57 Removal – Lack of State Court Jurisdiction

(6415) *Federal Home Loan Mortgage Corporation v. Gilbert,* 2016 WL 3626827 (6th Cir. 2016) – Where Federal Court has independent basis for jurisdiction over removed action, fact that State Court may have lacked jurisdiction over action before removal does not deprive federal court of jurisdiction. Federal Jurisdiction in removed action is not dependent on or derivative of State Court jurisdiction but is independent basis for Court to exercise authority. Lack of State Court jurisdiction is, at most, procedural issue that is resolved when matter is removed to Federal Court.

12.58 Removal – FHLMC

(6416) *Federal Home Loan Mortgage Corporation v. Gilbert,* 2016 WL 3626827 (6th Cir. 2016) – Federal Home Loan Mortgage Corporation Act, 12 USC Section 1452, grants District Court original Jurisdiction over civil actions to which FHLMC is party and allows FHLMC to remove all state action to Federal Court. FHLMC properly removed action for eviction to Federal Court and Federal Court had jurisdiction to enter Final Judgment of eviction.

12.59 Removal – Securities Actions

(6417) *Cobalt Partners v. SunEdison, Inc.,* Case No. 16-2264 (N.D. Ca. 2016) – Provision of Section 22(a) of Securities Act of 1935, 15 USC Section 77v(a), bars removal of any action based on alleged violations of Securities Act except for specified class action suits, does not override specific removal provisions of 28 USC Section 1452(a). Removal of action to Bankruptcy Court warranted where outcome could conceivably have impact on bankruptcy case given Debtor's indemnification obligation in favor of officers, directors and underwriters. Motion to remand action to State Court denied.

12.60 Burden of Proof

(6418) *Cohen v. Schonsheck,* 2014 WL 1153728 (E.D. Mi. 2014) – Bankruptcy court has broad latitude in ruling on Motions to Abstain. Appellate court will not reverse absent a showing that the bankruptcy court committed clear error of judgment in the conclusion reached after weighing or relevant factors.

(6419) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.,* Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Party seeking abstention bears burden of proof on every element of abstention. Failure to satisfy even one factor will be fatal to request.

12.61 Effect of Removal

(6420) *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.

(6421) *Burniac v. Wells Fargo Bank,* 2016 WL 146515 (6th Cir. 2016) – Neither clerk's default nor State Court preliminary injunction are "final

judgments" that would bind Federal court after removal of action. On removal, Federal Court takes case as it stands as of moment of removal. Defendant against whom default had been entered but final judgment had not been entered properly requested Federal court to vacate default where record indicated that defendant had never been properly served with complaint or summons and so State Court lacked jurisdiction over defendant when default issued. Prior preliminary injunction against defendant does not prevent Federal court from granting judgment in favor of defendant on merits.

G. Remand

12.62 Grounds

(6422) *Indiana Hotel Equities, LLC v. Indiana Airport Authority,* Case No. 18-4307 (Bankr. E.D. Mi. 2018) – 28 USC Section 1452(a) requires Notice of Removal to be filed in District Court where the civil action is located. Notice of Removal filed in Eastern District of Michigan defective where underlying action pending in the Southern District of Indiana. Case remanded without prejudice to Plaintiff filing Notice of Removal in correct District Court. If Notice of Removal is filed and Case is later transferred to Eastern District of Michigan, Court would like remand again as case involved appeal of State Court judgment and State Court is better suited to consider and rule on merits

(6423) *Younes v. McCallister,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) - 28 USC Section 1452 allows Court to which claim or action is removed to remand claim or action on any equitable ground, based on factors including duplicative and uneconomical effort of judicial resources; prejudice to involuntarily removed parties; forum non-conveniens; finding that State Court is better able to respond to suits involving questions of state law; comity considerations; less and possibility of inconsistent results; and expertise of Court in which matter was originally pending. Court would remand action to State Court where case raised only issues of Florida family law that are easily severable from Chapter 13 case and involved non-debtor party, and allegations fit within "Domestic Relations Exception" to Federal Court jurisdiction which prevents Federal Court from ruling in action who substance is domestic relations.

(6424) *Carter Jones Lumber Co. v. Eshler,* 2017 WL 213810 (Bankr. N.D. Ohio 2017) – Remand can be ordered on any "equitable ground" and lies within discretion of Court. Remand factors include (1) duplicative and uneconomical use of judicial resources in two forums; (2) prejudice to the involuntarily removed parties; (3) forum non conveniens; (4) State Court ability to handle suit involving questions of state law; (5) comity considerations; (6) possibility of inconsistent results; and (7) expertise of Court in which matter was originally pending. Court may also consider whether there is jurisdictional basis other than fact that matter relates to bankruptcy case; substance, rather than form, of "core" proceedings; burden on Court's docket; and existence of right to jury trial. State Court complaint filed by plaintiff to hold Debtor personally liable for debts of two limited liability companies in which Debtor has interest was in its infancy, limiting concern of duplicate litigation and eliminating need for Bankruptcy Court to spend extraordinary amount of resources to "bring itself up to speed". However, action was related to two other proceedings also pending in State Court in which State Court Judge had "vastly deeper knowledge" of facts and history than Bankruptcy Court. Case did not appear to be unduly burdensome to either Court. Removal would not unduly prejudice plaintiff other than removal would divest plaintiff of right to jury trial, where plaintiff had already filed a claim in Bankruptcy Court, thereby forfeiting its right to jury trial in Bankruptcy Court, while remaining matter to State Court would allow plaintiff the right to a jury trial. State Court and Federal Court were located within blocks of each other rendering change of forum insignificant. Complaint did not raise any particularly thorny issues of state law that would make State Court more appropriate venue, but State Court does have more experience with claims of this type and comity prefers deference to State Courts when state law claims predominate. Only basis for Federal Court jurisdiction is relationship to bankruptcy case under 28 USC Section 1334 And the State Court can adjudicate issues regarding claims notwithstanding status of claims resolution process as "core". Action remanded to State Court for further proceedings.

(6425) *Hamilton County Treasurer v. Nesbitt,* 2016 WL 7732239 (S.D. Ohio 2016) – Action is subject to removal from State Court to Federal Court under 28 USC Section 1441 only where District Court would have had original jurisdiction. If action is not one over which District Court has independent jurisdiction, or if jurisdiction is in doubt, matter should be remanded to State Court. Notice of Removal failed to demonstrate any basis for removal. Underlying action was State Court action brought in Ohio to foreclose mortgage on property located in Ohio. Foreclosure complaint raised only State Court law issues and did not raise any federal questions. Defendant cannot create "federal question" for purpose of removal by pleading some general Constitutional or Federal Statutory issue. Case remanded to State Court.

(6426) *Dietrich v. JPMorgan Chase Bank,* 2017 WL 57240 (E.D. Mi. 2017) - Action properly removed from State Court to Federal Court where complaint alleged complete diversity of citizenship between Plaintiff and Defendant and Plaintiff sought injunction against sale of property valued in excess of $75,000. Motion to remand properly removed action is denied.

(6427) *Schaller v. Banfield,* 2016 WL 4055036 (E.D. Mi. 2016) – Removal petition must state basis for federal court jurisdiction. Removal petition that cites only 28 USC Section 1441, the removal procedure statue, is not sufficient to support removal. Further, removal petition appeared to be attempt to circumvent prior Bankruptcy Court ruling remanding case to State Court by attempting to remove action directly to district court.

(6428) *MHS Capital v. Goggin,* Case No. 16-1794 (S.D.N.Y. 2016) – Cause of action between two non-Debtors does not "arise in" bankruptcy merely where triggering event between creditors was filing of bankruptcy by Debtor. Contract between parties (investors in Debtor) provided that if Debtor filed for bankruptcy, the investment company would be able to credit bid. After Debtor filed, one group of investors sued other group alleging diversion of credit bid rights. Although cause of action between investor groups could not have arisen unless and until Debtor filed bankruptcy, that did not make cause of action one that "arose in" bankruptcy for purposes of bankruptcy court jurisdiction. "Arising in" jurisdiction requires that cause of action could only arise in context of bankruptcy case, while claims in this case, while having bankruptcy as a condition precedent, raised nothing more than normal investor litigation. While action may have been related to bankruptcy as state law claims were factually related to bankruptcy, connection was insufficient for court to retain jurisdiction where remand appeared more appropriate because connection to bankruptcy case was tenuous and State Court could timely adjudicate matter.

(6429) *Citizen's Insurance Company v. FCA US LLC,* 2016 WL 2745818 (E.D. Mi. 2016) – After court severed and transferred bankruptcy claims

to bankruptcy court, only remaining issues were state law claims against parties other than Debtor or its successor and raised entirely state law based claims. Remaining claims remanded to State Court in interest of justice, comity and respect for state law.

(6430) *Giese v. Community Trust Bank,* 2015 WL 1481618 (E.D. Ky. 2015) – Remand of action removed from State Court not warranted where causes of action, while based almost entirely on state law causes of action, involved competing claims to property of estate. Action was "core" proceeding over which court had jurisdiction as "related to" bankruptcy case. Action raised questions about Plaintiff's standing to bring action after confirmation of Chapter 11 plan and Sale of asserts under Section 363. Bankruptcy Court specifically reserved jurisdiction to enforce provisions of sale order including determination of entitlement to proceeds of sale which were at issue in this case. Legal issues flowed directly from Bankruptcy Court Orders that would necessarily be central to the resolution of the case. Outcome could affect final administration of Debtor's estate. Court then referred matter to Bankruptcy Court for further proceedings.

(6431) *Burniac v. Wells Fargo Bank,* 2016 WL 146515 (6th Cir. 2016) – Remand to State Court not warranted where State Court had issued clerk's default but never issued final judgment. Neither clerk's default nor temporary injunction did not bar removal of action. 28 USC Section 1450 provides that on removal, all injunctions, orders and other proceedings in the action prior to removal remain in force and effect.

(6432) *Muheljic v. Bank of America,* 2014 WL 6085869 (D.M.D. 2014) – Case can be removed to Federal Court only when there is independent basis for federal jurisdiction. Action improperly removed based on diversity where parties were diverse, with plaintiff being a Tennessee resident and B of A being a National Banking Association with its principal place of business in North Carolina. However, defendant failed to demonstrate that action met $75,000 amount in controversy requirement. Complaint sought some unspecified amount that was not self-evidently greater or less than diversity amount, leaving defendant to prove by preponderance of evidence that amount in controversy exceeded jurisdictional requirement. If action seeks equitable relief, then jurisdictional limit is determined by economic value of the rights that plaintiff seeks to protect. Where the underlying action seeks equitable relief based on alleged wrongful foreclosure, "economic value" is based on fair market value of property, not the balanced owed on the mortgage. Evidence indicated that value was far below threshold where appraised value of property was $24,000; and successful bid at contested foreclosure sale was $40,000.00. Although statute on which cause of action was based allowed attorney fees and costs, it was highly unlikely that fees would be sufficient to meet jurisdictional limit. Action remanded as improperly removed.

(6433) *Williamson v. Recovery Limited Partnership,* 2014 WL 4748430 (S.D. Ohio 2014) – District Court can abstain and remand matter to State Court where there are parallel State Court proceedings pending and remand is in interests of wise judicial administration, conservation of judicial resources, and a comprehensive disposition of litigation. Proceedings are "parallel" if there is substantial similarity, not necessarily identity of issues of facts. However, district court had jurisdiction over parties who were not parties to State Court action, leaving district court in better position to conclude all issues in litigation. Case had been pending 8 years in district court and court was fully aware of issues and case, while State Court had far more limited exposure to case and remand would require extensive work by State Court to gain basic understanding of case. Legal issues were entirely controlled by federal maritime law. While action was originally filed in State Court, it was removed shortly thereafter and has remained in federal court since, mooting any issue regarding the State Court's initial acquisition of jurisdiction. Remand denied where remand would delay proceedings and inject additional delays without furthering judicial convenience or economies.

(6434) *Collette v. Wal-Mart Stores East, LP,* 2013 WL 6634959 (E.D. Tn. 2013) – Whether diversity exists to support Federal Court jurisdiction is determined when complaint is filed. However, if the plaintiff later amends the complaint to include identity of previously unidentified defendants, diversity must be determined at time of filing of amended complaint, and if amendment destroys diversity, court must remand case as federal court no longer has jurisdiction.

(6435) *Anthony Marano Company v. Sherman,* 925 F.Supp.2d 864 (E.D. Mi. 2013) – District Court has authority to sua sponte order remand for lack of subject matter jurisdiction. Although Notice of Removal asserted diversity jurisdiction, Notice did not allege any facts showing plaintiff's citizenship and Defendant did not respond to order to show cause why the case should not be remanded. Failure to allege sufficient jurisdictional facts results in the absence of jurisdiction. Once District Court remanded action, Court lacked jurisdiction to reconsider or reopen the case.

(6436) *Church Joint Venture v. Graphic Enhancement Technologies Corp.,* 2013 WL 3929725 (W.D. Tn. 2013) – State Court litigation would be remanded where notice of removal was not timely filed.

(6437) *Lunan v. Jones,* 489 BR 711 (Bankr. E.D. Tn. 2013) – Court can remand action to State Court where there is no independent basis for federal jurisdiction. Although State Court action included count for violation of federal civil rights under 42 USC Section 1983 over which the District Court would have federal jurisdiction, there is no statutory authority to refer an action under Section 1983 to the Bankruptcy Court. Removal was otherwise proper where State Court litigation involved action against Chapter 7 trustee by non-Debtor for allegedly wrongfully selling assets that did not belong to the Debtor. Action is "related to" bankruptcy case where it could conceivable have an effect on administration of estate. Every claim pertains to the Trustee's conduct while administering the assets of the bankruptcy estate under authority of, and pursuant to orders of bankruptcy court. Plaintiff sought disgorgement of funds Trustee received in official capacity as the chapter 7 trustee and court-appointed auctioneer, and damages for the conduct that the bankruptcy Court Ordered. To extent that a reviewing court would determine that bankruptcy court's orders were improper, that the Trustee utilized the wrong bankruptcy procedure and/or committed a fraud on the bankruptcy court, or that Trustee is required to disgorge funds received in official capacity, Plaintiff's claims will have an impact on the bankruptcy estate. Further, action brought in State Court was core proceeding as directly involving the liquidation of assets of the estate which is core proceeding under 28 USC Section 157.

(6438) *CPC Livestock, LLC v. Fifth Third Bank, Inc.,* 2013 WL 1411222 (W.D. Ky. 2013) – In considering whether Federal court has jurisdiction over State Court action removed to federal court, Court must use complaint in place at time of removal. Where Plaintiff had filed an initial complaint plus two amended complaints before request for removal was filed, Court would base federal jurisdiction on allegations contained in Second Amended complaint. Removal is appropriate where Second Amended Complaint states diversity of citizenship between all

plaintiffs and all defendants. However, non-diversity will not prevent removal if joinder of non-diverse defendants is done for fraudulent purpose of defeating Federal Court jurisdiction. Joinder will be fraudulent where Plaintiff could not have maintained action against non-diverse defendants as a matter of state law. If there is colorable or reasonable basis for predicting that state law might impose liability on facts alleged, then joinder is not fraudulent. Record did not conclusively establish that actions against non-diverse defendants would have been barred by statute of limitations. Federal Jurisdiction sufficient for removal can also be based on federal question, if action is created by federal law; or state law claim necessarily raises disputed federal issue that is substantial, and exercise of jurisdiction would not disburse balance of state and federal judicial responsibilities.

(6439) *CH Holding Company v. Miller Parking Co.,* 2012 WL 5463128 (E.D. Mi. 2012) – District Court can remand case to State Court where action was pending in State Court prior to commencement of bankruptcy case and was removed based on commencement of bankruptcy case. Complaint sought to pierce corporate veil of Debtor to impose liability on shareholders. Action related to bankruptcy case as action to pierce corporate veil is one that belongs first to the corporation, and recovery would affect estate, even if cause of action is entirely state law based. Further, Chapter 7 Trustee of Debtor had commenced separate action in bankruptcy court seeking same relief. Court not required to remand case where case "related to" pending bankruptcy.

(6440) *Anderson v. Banks,* 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – 28 USC Section 1452 allows Bankruptcy Court to remand any action that was removed to Bankruptcy Court as a result of the bankruptcy filing. Bankruptcy Court could not remand action that was filed in the first instance in the Bankruptcy Court. Remand means "send back", not "sent elsewhere". Remand is contemplated only to allow action to be sent back to State Court from which it was removed.

(6441) *Brown v. Metropolitan Life Insurance Company,* 2011 WL 6826638 (W.D. Ky. 2011) – When considering request for remand, court must examine whether case was property removed to federal court in the first instance. Where action was removed based on alleged federal subject matter jurisdiction, cause of action must arise under Constitution, laws or treaties of United States or if Congress has completely pre-empted particular area of law. ERISA claim is pre-empted if the state law claim could also have been brought pursuant to ERISA enforcement provision. Plan falls within ERISA if plan covers participants because of their employee status and the employer maintains the plan. Open membership organization that operates welfare benefit plan is not ERISA plan. State Court lawsuit alleging violation of state regulations for operation of welfare benefit program not pre-empted by ERISA. Action should not have been removed as action was not based on Federal law and state law claims were not pre-empted, such that no independent basis for federal jurisdiction existed.

(6442) *Mills v. Ellis,* 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

(6443) *Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.,* Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) - Courts have discretion to remand state law causes of action whenever doing so presents appropriate equitable grounds. The factors to be taken into account include: 1) duplicative and uneconomical use of judicial resources in two forums; 2) prejudice to the involuntarily removed parties; 3) forum non conveniens; 4) the State Court's ability to handle a suit involving questions of state law; 5) comity considerations; 6) lessened possibility of an inconsistent result; and 7) the expertise of the court in which the matter was originally pending. Court would not remand action against corporate president on personal guarantee where we men would result in duplicate dividend uneconomical use of judicial resources and would produce a substantial possibility of inconsistent results. Burden of litigating in bankruptcy court was not prejudicial to creditor given that creditor is already a party to the bankruptcy case and will be litigating corporate Debtor's liability. Although claims were based in state law, claims did not raise unique issues of state law that would see the adjudicative abilities of the bankruptcy court. Creditor's motion for remand denied.

12.63 Equitable Remand

(6444) *Parker v. Nationwide Mutual Insurance Company,* 2018 WL 989016 (Bankr. N.D. Ohio 2018) – Permissive abstention under 28 USC Section 1334(c)(1) and equitable remand under 28 USC section 1452(b) are essentially identical. 28 USC Section 1452(b) allows Court to remand any claim on any equitable ground. Courts use flexible, factor-based balancing test considering (1) duplicative and uneconomical use of judicial resources in two forums, (2) prejudice to the involuntarily removed parties, (3) forum non conveniens, (4) the state court's ability to handle a suit involving questions of state law, (5) comity considerations, (6) lessened possibility of an inconsistent result and (7) the expertise of the court in which the matter was originally pending. Removed action was non-core; Plaintiff demanded a jury trial, and parties did not consent to Bankruptcy Court entry of final orders or conducting jury trial which would lead to uneconomical use of judicial resources; state court of general jurisdiction is well-suited to resolving removed state court action given State Court familiarity with and routine application of state law; removed state court action was only distantly related to Debtor's bankruptcy case and bankruptcy law; and interests of comity support resolution of these issues by state court in light of removed action's dependence on state law.

(6445) *Younes v. McCallister,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) - Permissive abstention and equitable remand may be raised *sua sponte* by Bankruptcy Court notwithstanding absence of Motion to Remand. Permissive abstention is governed by 28 USC Section 1334 and allows Court, and interest of justice or interest of comity with State Court or respect for state law to abstain from hearing proceeding. Factors include effect or lack of effect on an efficient administration of estate if Court of stains; extent to which estate law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceeding commenced in State Court or other non-Bankruptcy Court; jurisdictional basis, if any, other than 28 USC Section 1334; degree of relatedness or remoteness to proceedings in main bankruptcy case; substance rather than form of asserted "core" proceeding; feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in State Court with enforcement left to Bankruptcy Court; burden on Bankruptcy Court docket; likelihood that commencement of proceedings in Bankruptcy Court involves forum shopping; existence of right to jury trial; presence of non-debtor parties; and any unusual or other significant factors. Court would abstain where State Court case raised only issues of Florida family law that are

easily severable from Debtor's Chapter 13 case and involve non-debtor party. Removal from Florida Court to Bankruptcy Court most certainly involves forum shopping. "Domestic Relations Exception" to federal jurisdiction would prevent Bankruptcy Court from exercising jurisdiction over suits for divorce or allowance for alimony or child custody, and prevents Federal Court from ruling in action where substance is domestic relations generally even if brought under guise of federal question jurisdiction.

(6446) *McAllister v. Younes,* 2017 WL 9963364 (Bankr. E.D. Mi. 2017) – 28 USC Section 1452(b) allows Court to which a claim or cause of action is removed to remand the claim or cause of action on any equitable ground. Analysis under Section 1334(c)(1) for permissive abstention is largely the same as under Section 1452(b). Bankruptcy Court would remand case to State Court where State Court had already entered final judgment and only activity in State Court case consisted of supplementary proceedings to collect judgment which are more appropriately brought in Court that entered judgment.

(6447) *Rachmale v. Conese,* 2014 WL 4129537 (Bankr. E.D. Mi. 2014) – 28 USC Section 1452(b) allows court to remand "on any equitable ground". Factors include duplicative and uneconomical use of judicial recourses to resolve matters in two separate forums; prejudice to parties adverse to party seeking remand; the convenience of the proposed remand forum; the State Court's ability to handle the matter including the applicability of state law; considerations of comity between courts; the likelihood of inconsistent results. And the expertise of the court to which the case would be remanded. Suit by shareholder alleging that directors of bankruptcy company attempted to wrongfully "squeeze him out" would be equitably remanded as action presented no possibility of dual litigation in both bankruptcy court and State Court and no risk of inconsistent holdings. Impact on bankruptcy estate would be minimal as only exposure of Debtor is potential obligation to indemnify directors which turns on whether plaintiff can prevail in the first instance and whether the defendants acted with bad faith, all of which can economically be resolved by State Court, and any indemnification recovery would be unsecured claim to be paid a minimal distribution. Plaintiff had right to jury trial that could not be conducted by bankruptcy court. Case was in early stages such that remand presented no risk of prejudice to defendant. All actins giving rise to cause of action arose in Michigan and only connection to bankruptcy court was happenstance that Debtor filed bankruptcy in Delaware. Action is based entirely on state law and State Court could competently address issues. Comity dictated remand as federal court will be hesitant to act where State Court issues substantially predominate. Action remanded to State Court.

(6448) *Cohen v. Schonsheck,* 2014 WL 1153728 (E.D. Mi. 2014) – Equitable remand takes into consideration many of the same factors as permissive abstention. Court can consider any equitable grounds in considering whether remand is appropriate, including (1) duplicative and uneconomical use of judicial resources in two forums; (2) prejudice to the involuntarily removed parties; (3) forum non conveniens; (4) the State Court's ability to handle a suit involving questions of state law; (5) comity considerations; (6) lessened possibility of an inconsistent result; and (7) the expertise of the court in which the matter was originally pending. Equitable remand appropriate where matters were entirely state law based; State Court has been handling case for two years prior to removal; State Court had ability to handle matters; and remand posed no impediment to administration of bankruptcy case as bankruptcy had already been dismissed.

(6449) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.,* Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Even if grounds do not support abstention, court can equitably remand case to State Court where leaving case in bankruptcy court would be duplicative and uneconomical use of judicial resources in two forums. Substantial overlap of facts and background of litigation involving core and non-core proceedings so overlap that to retain the core claims would produce entirely duplicative and uneconomical use if resources.

12.64 Appellate Review

(6450) *Yaldo v. Homeward Residential, Inc.,* 2015 WL 4636627 (6th Cir. 2015) – District Court Order remanding eviction proceeding to State Court based on lack of jurisdiction is non-appealable order. Notice of removal was untimely in first instance.

(6451) *Timco, LLC v. T and M Sales Agency, Inc.,* 2013 WL 150105 (6th Cir. 2013) - Mandatory abstention provision of 28 USC Section 1334 precludes appellate review of Order remanding case to State Court. Action was based on state law, action was non-core proceeding, no basis existed for federal jurisdiction other than pending bankruptcy case, and action could be timely adjudicated in State Court of competent jurisdiction.

(6452) *Auto Owners Insurance v. Rossi,* 444 BR 170 (6th Cir. BAP 2011) – Order remanding case to State Court from which it was removed is not appealable order pursuant to 28 USC Section 1447(d). Whether Bankruptcy Court correctly stated that it lacked subject matter jurisdiction as basis for remand, Order of Remand was not reviewable to determine whether Bankruptcy Court's conclusion of jurisdiction was correct.

12.65 Sanctions – Frivolous Removal

(6453) *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.

H. Standing to Prosecute

12.66 Generally

(6454) *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 Credit 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.

(6455) *Lloyd's Acceptance Corp. v. Carroll Property Management LLC,* 2018 WL 3132621(W.D. Tn. 2018) - Standing is constitutional requirement under Article III requires that plaintiff suffered an injury in fact; that is fairly traceable to defendant's conduct; likely to be redressed by favorable decision. Injury must be "concrete" such that injury actually exists; and "particularized, as affecting plaintiff personal and individual way. Complaint sufficiently alleged standing did not allege any causal connection between plaintiff's injury and certain defendants' alleged conduct and specifically did not which monetary loss. However, as to defendant action may misrepresentations, complaint alleged concrete and particularized injury fairly traceable to defendants.

(6456) *Bowling v. Ryder Logistics, Inc.,* 2018 WL 1157549 (E.D. Ky. 2018) - Upon filing of bankruptcy petition, all pre-petition causes of action become property of estate and only Bankruptcy Trustee has standing to pursue recovery. Later closing of case did not result in abandonment of cause of action where Debtor did not disclose existence of cause of action. Section 554 provides for abandonment at closing of case of scheduled assets; or if Trustee affirmatively abandons claim by giving notice of proposed abandonment. Although Trustee may not have shown interest in pursuing claim once Trustee discovered claim, that does not constitute abandonment. Dismissal of bankruptcy case does not restore Debtor's ability to prosecute case as dismissal does not render prior bankruptcy proceeding void *ab initio.* Cause of action remained property of bankruptcy estate. Debtor had no standing to pursue recovery. Case dismissed for lack of subject matter jurisdiction.

(6457) *Meyer v. Timothy E. Baxter & Associates, PC,* 2018 WL 1858182 (E.D. Mi. 2018) – Standing requires prosecution of action by real party in interest. Upon filing of bankruptcy petition, Debtor's property including existing causes of action becomes property of bankruptcy estate. Debtor thereafter has no standing to pursue causes of action as only Bankruptcy Trustee is empowered to do so. If Debtor claims cause of action as exempt and no party objects, exemption re-vests cause of action in Debtor and cause of action is no longer property of estate. Debtor had standing to prosecute action where Debtor listed cause of action in bankruptcy schedules, claimed cause of action as exempt and no party objected. Fact that Bankruptcy Court Order closing case was not entered until after commencement of this case did not affect Debtor's standing.

(6458) *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.

(6459) *Duraj v. PNC Bank, NA,* 2017 WL 5508380 (N.D. Ohio 2017) – Standing requires injury in fact that is traceable to defendant's conduct and can be remedied by favorable decision. Injury must be concrete, particularized, actual and imminent but does not have to be tangible. Bare procedural violation divorced form concrete harm is not sufficient for standing. Complaint alleging that Defendants obtained Plaintiff's Credit Reports in violation of FCRA resulting in invasion of privacy causing emotional harm and stress sufficient to constitute injury for purposes of standing. While Plaintiff did not allege any adverse effect on Plaintiff's credit report or any economic loss, one purpose of FCRA is to prevent invasions of privacy and invasion of privacy is recognized at common l as having an actual negative effect on plaintiff. Invasion of privacy is beyond bare procedural violation for purposes of standing under Article III.

(6460) *McDermott v. Kerr,* 2017 WL 3880875 (Bankr. N.D. Ohio 2017) – Pre-petition causes of action, whether meritorious or not, belong to Bankruptcy Estate. Filing of Bankruptcy case divest Debtor of right to purse causes of action and vests right solely in Trustee for benefit of estate.

(6461) *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.

(6462) *Jones v. University of Phoenix,* 2017 WL 3334020 (E.D. Mi. 2017) – Debtor permitted to amend complaint to add Bankruptcy Trustee as

party plaintiff for cause of action that arose pre-petition where Debtor initially commenced litigation Debtor's own name without joining Trustee. Although Debtor may have lacked standing to institute litigation in first instance as claim belonged to estate, Debtor not prevented by judicial estoppel form adding Trustee who would have standing to pursue claim.

(6463) *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.

(6464) *Ukrainian Future Credit Union v. Garak,* 2017 WL 2992479 (Bankr. E.D. Mi. 2017) – Debtor lacks standing to assert counterclaims in adversary proceeding where Debtor did list those counterclaims in bankruptcy schedules. Causes of action are property of bankruptcy estate and can be brought only by Chapter 7 Trustee unless abandoned or claimed exempt and exemption allowed. Debtors' amendment to claim counterclaims as exempt did not permit Debtors to pursue counterclaims where 30 day objection period had not expired. Debtors' continued prosecution of counterclaims violates stay requiring dismissal of counterclaims from adversary proceeding without prejudice to Debtors' right to reassert if causes of action cease to be property of estate.

(6465) *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.

(6466) *Wilson v. Primesource Health Care of Ohio*, 2017 WL 2869341 (N.D. Ohio 2017) - On filing bankruptcy, all claims and causes of action in favor of Debtor that accrued before bankruptcy petition becomes property of estate. Absent Trustee abandoning claims, only Trustee has standing to pursue prebankruptcy claims.

(6467) *Geary v. Green Tree Servicing,* 2017 WL 2608691 (S.D. Ohio 2017) - 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 waving rights to dispute or seek validation of debts.

(6468) *Nowakowski v. Bank of America, NA,* Case No. 17-1305 (N.D. Ill. 2017) – Chapter 13 Debtor and the Chapter 13 Trustee have concurrent standing to prosecute prepetition claims which are property of estate. However, Debtor could not bring lawsuit for his own benefit unless Debtor claimed cause of action as exempt and Debtor's right to exempt that asset was subject to final determination.

(6469) *In re Dinoto*, 2016 WL 7655140 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.

(6470) *In re Clements Manufacturing Liquidation Company,* 2016 WL 6155907 (Bankr. E.D. Mi. 2016) - Chapter 7 Trustee may not assign avoidance claims as part of settlement of action brought under Section 544. Trustee does not become "creditor" by virtue of Section 544, but has rights and powers of a judicial lien creditor. Avoidance action against creditor is not interest that can be assigned to third party as third party would not have any such status under section 544. Right to bring action to section 544 does not mean that fraudulent transfer action actually transfers property to the Debtor in possession. Instead, section 544 simply enables Debtor in possession or Trustee to carry out Trustee related duties. Court would not approve proposed settlement of adversary proceeding where one term of settlement required Trustee to assign to adversary defendants the right to pursue recovery of fraudulent transfers under Section 544 and Section 548.

(6471) *Dietrich v. JPMorgan Chase Bank,* 2017 WL 57240 (E.D. Mi. 2017) - Standing to bring action under Article III requires that plaintiff shall an injury in fact that is concrete and particularized and actual or imminent; injury must be fairly traceable to challenge the action of defendant; and it is likely that injury will be redressed by favorable decision. Plaintiff lacks standing to challenge foreclosure mortgage a condominium unit that was owned solely by Plaintiff's son. Plaintiff was not owner of property and was not party to mortgage. Mere occupants or tenants in the property lack standing to challenge foreclosure.

(6472) *McCray v. Wells Fargo Bank, N.A.,* Case No. 14-03445 (D. Md. 2015), *aff'd,* Case No. 16-1415 (4th Cir. 2016) - Cause of action arising from prepetition contract is property of bankruptcy estate. Debtor lacks standing to pursue recovery based on alleged violations of state and federal consumer protection statutes. Only chapter 7 Trustee has standing to pursue recovery on causes of action for claims arising from prepetition contract.

(6473) *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.

(6474) *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.

(6475) *Wolfe v. American Family Insurance,* 2016 WL 6986707 (W.D. Mo. 2016) – On filing of bankruptcy, pre-petition cause of action vests in and becomes property of estate and only Trustee has standing to prosecute case unless estate abandons interest. Court lacked jurisdiction to consider action brought by Debtor based on pre-petition conduct as Debtor lacked standing to maintain action in first instance.

(6476) *Banfield v. Gentry,* 2016 WL 4061248 (E.D. Mi. 2016) – Standing is jurisdictional requirement and requires that party be directly and adversely affected by any order of the Court. Complaint filed in Bankruptcy Court raising issues regarding existence and administration of trust of which Debtor was beneficiary raised issues which would directly and adversely affect Successor Trustee of Trust sufficient to support Trustee's standing to participate in bankruptcy proceedings.

(6477) *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.

(6478) *Wall v. Michigan Rental,* 2016 WL 3418539 (E.D. Mi. 2016) – Constitutional standing to bring a suit in federal court requires injury in fact. Plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. To be "concrete," alleged harm need not be tangible, and it may stem from a statutory violation if plaintiff confronted a risk of real harm beyond a mere statutory violation. Plaintiff failed to demonstrate any actual harm from defendant's violation of Michigan Landlord-Tenant Act. Although Act requires landlord to advise tenant of location of account where security deposit will be held, plaintiff did not suffer any actual harm when landlord placed deposit initially in named bank but later moved funds to a different bank without advising tenant. All funds were correctly accounted for and applied and tenant did not suffer any harm or damage from landlord's failure to notify tenant of new bank account.

(6479) *Enoch-Combs v. Steinour,* 2016 WL 2990934 (N.D. Ohio 2016) – Standing must be based on violation of plaintiff's own legal rights and interests, and cannot rest on claims based on legal rights or interests of third parties. Plaintiff's allegation that bank incorrectly removed funds from accounts of third parties did not allege any injury to plaintiff. Although seizures may have been related to plaintiff's unpaid taxes, none of the property seized belonged to plaintiff and third party account holders were not parties to the suit.

(6480) *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.

(6481) *Watson v. Cartee,* 2016 WL 1084764 (6th Cir. 2016) – Party lacks standing to raise causes of action that are personal to other parties to suit. Property owner attempted to contest validity of mortgage by raising arguments that mortgage was subordinate to mortgage held by other lender. Other lender did not raise issues and did not contest that first mortgage holder had priority over second mortgage and second mortgage only sought to recover any surplus proceeds after sale. While foreclosure sale may have been invalid had second mortgagee contested priority of first mortgage, that did not give property owner right to raise that issue where second mortgage declined to do so.

(6482) *Schwab Industries, LLC v. Huntington National Bank,* 2015 WL 5561347 (Bankr. N.D. Ohio 2015) – Plaintiff in adversary proceeding must demonstrate both prudential and constitutional standing. Constitutional standing requires that Debtor has suffered an injury in fact to a legally protected interest that is concrete, particularized, actual and imminent; there must be causal connection between injury and conduct complained of; and it must be likely, rather than speculative, that injury would be redressed by successful resolution of action. Prudential standing addresses judicially self-imposed limits on exercise of federal jurisdiction. Corporation, as survivor of Chapter 11 proceeding lacked standing to bring action where plan as confirmed vested causes of action in Liquidating Trust. Further, action against bankruptcy counsel for malpractice is vested in corporation and became property of Liquidating Trust, and principal's re-purchase of stock of surviving Debtor did not restore claims to either the surviving company or the stockholder personally.

(6483) *Joseph and David Johnsman Ltd. v. Egbert,* 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Standing requires that plaintiff has suffered an actual injury in fact as a result of the alleged actions of defendant, and that injury can be redressable by favorable decision. Injury-in-fact requirement is "hard floor" of Article III and cannot be removed by statute. Court could not determine on summary judgment whether

Debtor sufficiently demonstrated that sale of assets post-petition in violation of Section 549 produced any actual damage to Debtor as Debtor voluntarily entered into transaction and Debtor failed to demonstrate that price received was disproportionate to value of assets sold. Although Debtor alleged that property was worth far more than sale price, Debtor did not introduce evidence of value of assets as of the date of the sale, resulting in genuine issue of material fact. Potential grant of lien in favor of defendant as alleged good faith transferee under Section 550 did not deprive Debtor of standing where defendant did not introduce evidence of any improvements to the property transferred by Debtor.

(6484) *Stevenson v. Ocwen Loan Servicing, LLC,* 2015 WL 2083513 (E.D. Mi. 2015) – Upon filing for bankruptcy, Debtor loses standing to pursue any legal or equitable claims as claims become property of estate and can be pursued only by Trustee unless claims are abandoned by Trustee. Fact that litigation is brought against creditor who, as creditor, would share in proceeds pro rata with other claims does not create conflict of interest for Chapter 7 Trustee as Trustee does not represent affected creditor.

(6485) *Hadley v. Chrysler Group, LLC,* 2014 WL 988962 (E.D. Mi. 2014) – Constitutional standing requires invasion of legally protected interest that is concrete and particularized and not merely speculative or conjectural, and is actual or fairly imminent, and bears a causal connection to the conduct complained of and can be redressed by favorable decision. Plaintiffs in class action suit failed to demonstrate sufficient injury based on alleged failure of Defendant to perform gratuitous promise to repair vehicles, where Defendant has not withdrawn its promise or otherwise failed to perform repairs. Plaintiffs vague allegations of "diminished value", expenses and costs of diagnosis of problem, and expenses of obtaining alternate transportation were not sufficient. As to costs of diagnosis, Defendant has already publicly announced cause of issue well before Plaintiffs paid for any "diagnosis" and any costs of diagnosis were not attributable to Defendant's alleged delay in repairing vehicle, and Defendant nonetheless agreed to reimburse those costs rendering that issue moot. Bald assertions of other "damages" were too vague and unsupported to sustain standing.

(6486) *Schwab v. Oscar,* 2014 WL 232113 (Bankr. N.D. Ohio 2014), *aff'd,* 517 BR 72 (6th Cir. BAP 2014) – Alleged cause of action for malpractice by Debtor's bankruptcy counsel constituted property of estate over which Trustee had exclusive standing unless Trustee abandoned cause of action. Plaintiff filed suit against Defendant and Trustee, claiming that suit was attempt to either force the Trustee to bring action or to force Trustee to assign cause of action to plaintiff. Standing must be determined when complaint is filed. Complaint indicated on its face that as of date of filing, only Trustee had standing to bring action.

(6487) *Crone-Schierloh v. Hammock,* 2014 WL 321973 (S.D. Ohio 2014) – Constitutional standing requires that plaintiff have suffered injury in fact that is concrete and particularized or actual and imminent, rather than hypothetical or conjectural; that the challenged conduct be causally connected to the injury; and a favorable court decision would provide redress or remedy. Constitutional standing is different standard than statutory standing. Statute granted ERISA plan participants standing to bring action against Plan managers. However, where plan participants could not demonstrate any specific injury, plaintiffs lacked constitutional standing, such that Federal Court lacked jurisdiction and case must be dismissed.

(6488) *Wilhoite v. SunTrust Bank,* 2014 WL 505171 (Bankr. M.D. Tn. 2014) – Upon commencement of case, all pre-petition causes of action become property of estate. Debtor lacks standing to pursue pre-petition cause of action absent abandonment by Trustee.

(6489) *Tyler v. DH Capital Management, Inc.,* 2013 WL 5942072 (6th Cir. 2013) – All pre-petition causes of action become property of estate upon filing, and only the trustee has standing to pursue actions post-petition. Cause of action for alleged violation of Fair Debt Collection Practices Act was pre-petition claim where crux of argument was that creditor violated FDCPA by filing suit against Debtor. Suit was filed before bankruptcy commenced, although Debtor was not served with the complaint until post-petition All elements of cause of action occurred prior to commencement of bankruptcy, such that claim constituted pre-petition cause of action. Debtor lacked standing to pursue recovery.

(6490) *Epps v. United States,* 2013 WL 4096001 (W.D. Tn. 2013) – Commencement of bankruptcy case creates an estate which includes all causes of action that Debtor had as of the date of commencement. In Chapter 7, Bankruptcy Trustee is sole party with standing to pursue causes of action. In Chapter 13, Debtor retains standing to pursue claims that are property of the estate.

(6491) *Northedge v. Beckett,* Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Debtor has at least colorable standing in Chapter 13 to pursue action based on avoiding powers under Section 544. To extent Debtor seeks relief under Section 522(h) to preserve exemption rights, Debtor has standing as Section 522(h) specifically authorizes Debtor to pursue avoidance to extent necessary to preserve exemptions.

(6492) *Rugiero v. Flagstar Bank, FSB,* 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Owner of property lacks standing to prosecute action for alleged violation of Michigan foreclosure laws regarding mediation where violation, if any, occurred prior to commencement of bankruptcy case. Upon filing of bankruptcy, action became property of estate and only trustee could thereafter maintain action. Owner is also precluded from challenging foreclosure once redemption has expired. Upon expiration of redemption, title vests absolutely in the purchaser at the sale and there is no basis for a court to alter that outcome. To extent owner has any remedy, that is limited to either contesting sale before redemption expires, or holding over after redemption and contesting foreclosure sale as part of summary proceedings for possession. Only exception is where mortgagor makes strong showing of fraud or irregularity. Fraud requires false statements by lender. Defect under Section 600.3205 requires proof that failure to comply with statutory foreclosure laws resulted in prejudice to owner, such that owner would have been in better position to preserve interest in property had lender not failed to comply with statute. Allegation that Debtor does not recall receiving notice of foreclosure sale does not rise to level of either fraud or prejudice. Debtor did not present any facts that would entitle him to render the foreclosure sale voidable. Debtor admittedly was aware that a foreclosure sale of his home was going to occur and he was not misled into believing that one might not occur and, there is no evidence that he made any effort convert the summary proceedings to a judicial foreclosure or to redeem the property after the foreclosure sale, but prior to expiration of the redemption period. Debtor had the advice of counsel, at least during the summary eviction proceedings, such that there was no basis for the Federal Court to disturb foreclosure process.

(6493) *CSX Transportation, Inc. v. Denardo,* 2013 WL 1213067 (E.D. Mi. 2013) – Upon filing for bankruptcy, all pre-petition causes of action held

by Debtor become property of estate and may only be prosecuted by the Trustee. Undisclosed assets are not administered and are not deemed abandoned at closing of case, but remain property of the estate even after the case is closed. Plaintiff, allegedly harmed by pre-petition fraudulent transfers, lacked standing to prosecute actions after Debtor filed bankruptcy petition. Chapter 11 case closed without confirmation of plan could be re-opened to administer undisclosed causes of action for alleged pre-petition fraudulent transfers. If Bankruptcy Court concludes that re-opening is not warranted or that, after re-opening, trustee abandons causes of action, then Plaintiff, as party allegedly injured by transfer, would have standing to prosecute fraudulent transfer actions.

(6494) *Kentucky Automotive Center of Grayson, LLC v. Nissan north America Inc.,* 2013 WL 663574 (E.D. Ky. 2013) – Standing requires that the plaintiff has suffered an injury in fact which is traceable to the acts or omissions of the defendant and which is redressable. If asserting a statutory cause of action, plaintiff must also demonstrate that plaintiff is a member of the group of persons intended to be protected by the statute. Plaintiff must also be asserting own legal rights as opposed to the rights to third persons. Plaintiff lacked standing to contest bankruptcy sale where plaintiff did not make a bid at the sale. Unsuccessful third party's bid did not constitute an injury to plaintiff's bidding rights or sale procedures. Plaintiff also failed to demonstrate standing under Kentucky Motor Vehicle Sales Act as Act applies only to dealerships, new motor vehicle dealers, manufacturers, distributors, factory branches, and factory representatives. Plaintiff did not fit into any statutory category as plaintiff was merely unsuccessful potential purchaser of dealership who claimed that manufacturer unreasonably refused to consent to sale. Although the potential seller would fall within statute, plaintiff could not assert rights held by third party.

(6495) *Duran v. Mortgage Electronic Registration Systems, Inc.,* 2013 WL 444450 (N.D. Ohio 2013) – Article III standing requires that plaintiff demonstrate that conduct of which plaintiff complains causes an injury in fact that a favorable judgment would redress. The injury must be concrete and particularized, and the harm must be actual or imminent, not conjectural or hypothetical. "Prudential standing" is separate requirement that plaintiff assert only his on legal rights or interests and prohibits actions that are based on legal rights or interests of third parties or that are generalized grievances best resolved in the legislative branch. Debtor lacks standing to contest alleged validity of mortgage assignment. Debtor was not party to mortgage assignment in question and validity or invalidity of assignment did not impact or alter Debtor's obligation to pay.

(6496) *Auday v. Wet Seal Retail, Inc.,* 2012 WL 5259002 (6th Cir. 2012), *appeal after remand*, 2013 WL 2457717 (E.D. Tn. 2013) – Pre-petition cause of action arising out of alleged pre-petition age discrimination is property of estate that can be prosecuted only by, and in the name of, the Trustee, unless the trustee abandons the cause of action. Debtor failed to schedule cause of action and failed to later amend schedules to disclose cause of action. Although Trustee became aware of cause of action before discharge entered, entry of discharge did not abandon cause of action or allow Debtor to purse action in her own name. Final Judgment entered in favor of Debtor must be vacated as Debtor lacked standing to pursue action in her own name. Action remanded to District court to either allow amendment of complaint to substitute trustee as plaintiff or to dismiss without prejudice. On remand, District Court concluded that Debtor lacked standing to pursue action for legal or equitable relief, and that actions belonged solely to the Trustee. Court could not permit joinder of trustee, as trustee is sole party in interest, requiring substitution of Trustee for Debtor.

(6497) *Van Sickle v. Fifth Third Bankcorp,* 2012 WL 3230430 (E.D. Mi. 2012) – Causes of action that accrued before plaintiff filed for bankruptcy are property of bankruptcy estate. Debtor lacks standing to prosecute actions in his own name. Complaint dismissed pursuant to Rule 17(a)(1) as plaintiff was not real party in interest.

(6498) *Mitrano v. US,* 2011 WL 4459102 (Bankr. E.D. Va. 2011*)* – Debtor lacks authority to pursue avoidance action under Section 544. Avoidance power is granted only to Trustee. Powers of Debtors are enumerated in Section 1303 and trustee's avoidance powers are not included in that list.

(6499) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.,* 463 BR 47 (Bankr. S.D. Ohio 2011) - Although Debtor's causes of action become estate property upon filing a Chapter 13 bankruptcy petition, Chapter 13 Debtors have standing to bring claims in their own name on behalf of the bankruptcy estate. Debtor has more power over estate assets and a better ability to pursue lawsuits than a Chapter 13 trustee.

(6500) *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc.,* Case No. 10-4182 (10th Cir. 2011) – Owner of property allegedly the subject of a wrongful foreclosure action has standing to contest enforceability of mortgage even where owner was not maker of note or signor of mortgage and lacked any privity with lender. Allowing foreclosure action to proceed created risk of direct injury to property owner sufficient for purposes of standing.

(6501) *Borders v. King.,* 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

(6502) *Rankin v. Lavan,* Case No. 09-1087 (6th Cir. 2011) – Debtor's undisclosed claim of ownership of real property was not disclosed in bankruptcy schedules, became property of estate on filing of case. Absent abandonment, only the Trustee has standing to pursue claims based on failed purchase and sale of real estate where all elements of action arose prior to commencement of case. Adversary proceeding prosecuted by Debtor post-petition properly dismissed as Debtors lacked standing to pursue action.

(6503) *Lincoln Electric Company v. Manahan,* 2011 WL 3516201 (N.D. Ohio 2011) – Causes of action for alleged fraudulent transfers by Debtor constitute property of estate. Actions are not individual as to any creditor but constitute actions which benefit creditor body as a whole.

(6504) *Famatiga v. Mortgage Electronic Registration Systems, Inc.,* 2011 WL 3320480 (E.D. Mi. 2011) – Borrower has standing to challenge foreclosure as long as action is brought before expiration of redemption period. Complaint contesting foreclosure sale filed 7 days before sale date timely filed. Subsequent expiration of redemption does not render action moot.

(6505) *In re Ferrette,* 2011 WL 940409 (E.D. Mi. 2011) – Adversary proceeding challenging validity of foreclosure sale dismissed were sale

occurred prior to commencement of bankruptcy case. After the property had been sold at the sheriff's sale, Debtor lost his opportunity to obtain any relief from the bankruptcy court to void the sale or extend the redemption period.

(6506) *Lessl v. CitiMortgage, Inc.,* 2011 WL 4351673 (E.D. Mi. 2011) – Owner may hold over after foreclosure sale by advertisement and contest validity of sale in summary proceeding for possession. However, Court will not overturn foreclosure sale absent strong showing of fraud or irregularity.

(6507) *Nett v. Wells Fargo Home Mortgage, Inc.,* 2011 WL 1519166 (E.D. Mi. 2011) – Owner retains standing to contest validity of foreclosure sale even after redemption period has run. Owner can challenge foreclosure validity as part of summary eviction proceedings or as part of separate proceeding.

(6508) *IRS v. Hayes,* 2011 WL 2490945 (E.D. Mi. 2011) – Debtor has standing to bring adversary against IRS to determine amount of tax debt and to recover potential overpayment. Debtor has "clear interest" in issues relating to the scope of the discharge. Tax debts were admittedly non-dischargeable, so amount of tax debt directly impacted the discharge. Fact that any money recovered as overpayments would be property of estate and would be distributed to creditors did not deprive Debtor of standing as outcome is "clearly related" to the administration of the estate.

(6509) *JGR Associates, LLC v. Brown,* 2011 WL 9153 (Bankr. E.D. Mi. 2011) – "Standing" for purposes of adversary proceeding requires "Article III" Standing, which requires that the action directly affect a right or the pecuniary interest of the plaintiff. Standing also requires "prudential" standing, which requires that only the "real party in interest" bring the adversary. A person with Article III standing may still lack prudential standing. Defendant's claim that plaintiff was not real party in interest must be timely raised or will be waived. Defendant's assertion that plaintiff was not real party in interest, not made until first day of trial, was untimely.

(6510) *Morris v. Paine,* 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Court can dismiss action where complaint fails to assert a private right of action, as complaint fails to state a cause of action pursuant to Rule 12(b)(6).

(6511) *Harker v. Countrywide Homes, Inc.,* 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor's note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the Debtors' bankruptcy estates and that it is the holder of notes or mortgages on real estate of the Debtors on the date of Debtors' bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

(6512) *Spradlin v. Baker,* 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Creditor has standing to pursue recovery under Section 547 where funds that would be recovered would not be exempt and would be available for distribution to creditors.

(6513) *Moses v. Howard University Hospital,* Case No. 08-7087 (D.C. Cir. 2010) – The trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. The commencement of Chapter 7 bankruptcy extinguishes a Debtor's legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. An outstanding legal claim that is abandoned by the trustee reverts back to the original Debtor-plaintiff. Whatever interest passed to the trustee when Debtor filed for Chapter 7 bankruptcy was extinguished when Trustee abandoned the cause of action in this case. At that point, the Debtor re-acquired standing to prosecute the action as if the bankruptcy had never been filed.

(6514) *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.

(6515) *Kirschner v. KPMG, LLP.,* 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for Debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of Debtor company against third parties for injuries incurred by the misconduct of Debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporation's interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.

(6516) *Gilchrist v. Bank of America*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) - Adversary proceeding commenced by Debtor while case pending

under Chapter 13 becomes property of estate upon conversion to Chapter 7. Debtors did not claim any exemption in the causes of action and the Chapter 7 trustee has not abandoned the causes of action. Only the Chapter 7 trustee may prosecute the claim(s), and Debtors' continuing prosecution of these claims would violate the automatic stay.

(6517) *Casden v. Burns,* 2009 WL 103620 (6th Cir. 2009) - Shareholder lacked standing to pursue action against former officers and directors of corporation for breach of fiduciary duty where approval of corporation's Chapter 11 plan cancelled corporate stock and extinguished shareholder's right to bring derivative claims. Purported deprivation of shareholder rights does not convert a derivative claim into a direct claim. The incidental loss of shareholder rights does not constitute an injury that is distinct from the harm suffered by all shareholders. Alleged loss of shareholder rights would not give rise to a direct individual action.

(6518) *Brennan v. Slone,* 2008 WL 4569946 (6th Cir. 2008) - Chapter 7 Trustee had standing to pursue fraudulent transfer against transferee where property transferred was subject to a security interest in favor of third party and as part of transfer the secured party released the security interest. Trustee's efforts to recover fraudulently transferred assets was not action taken merely to enforce the rights of one creditor (in which case the Trustee would lack standing) but was effort to preserve rights of estate and of creditors as a whole. If property transferred was over-encumbered such that any recovery would benefit only the secured creditor then the Trustee would lack standing as the recovery, if any, would benefit only the secured creditor. But where the secured creditor voluntarily released the security interest at the time of the transfer, any property recovered would be for benefit of estate and creditors.

(6519) *Wuliger v. Manufacturers Live Insurance Company,* 567 F.3d 787 (6th Cir. 2009) - Constitutional requirements for standing require plaintiff to show: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. Plaintiff must also satisfy three prudential standing requirements: (1) plaintiff must assert his own legal rights and interests, without resting claim on rights or interests of third parties; (2) claim must not be generalized grievance shared by large class of citizens; and (3) in statutory cases, plaintiff's claim must fall within zone of interests regulated by statute in question.

12.67 Derivative Standing

(6520) *Church Joint Venture, LP v. Blasingame,* 2018 WL 2711204 (6th Cir. BAP 2018) – Creditor cannot assert derivative standing on behalf of Trustee where Trustee did not have standing in first instance. Earlier in case, Trustee and Creditor reached settlement of avoidance action with Creditor acquiring the Trustee's right to bring adversary proceedings or recover property and avoid transfers. Creditor filed adversary proceeding to avoid transfers which Bankruptcy Court dismissed for lack of jurisdiction, as proceeding did not "arise in" or "arise under" Bankruptcy Code and did not "relate to" Bankruptcy case where any recovery would inure solely to benefit of creditor and would not enhance or augment bankruptcy estate. Creditor later filed 2nd action contesting validity of transfers to self-styled trust, asserting standing both in creditors own name and as derivative of Trustees standing. To extent Creditor asserted standing in own name, avoidance action was not within Court's jurisdiction. Creditor's assertion of derivative Standing failed because Trustee had previously sold all of the Trustee's interests in the litigation to creditor and, therefore, Trustee did not have standing to bring claim in his own right. Creditor cannot assert derivative standing where Trustee does not have authority to bring action in first instance.

(6521) *Parrish v. Lincoln National Bank,* 2018 WL 2175926 (Bankr. W.D. Ky. 2018) – Debtor lacks standing to bring action under Section 547. Court would not grant motion for derivative standing where complaint indicated that action was futile. Complaint alleged that lender who held fully secured lien on automobile received preference when Lender after Debtor defaulted withdrew funds form Debtor's account paid off vehicle. Lender promptly released lien on vehicle. Lender did not receive more than Lender would have received in Chapter 7 as lender's lien was fully secured and lender would have been entitled to full payment in Chapter 7.

(6522) *New Products Corp. v. Tibble,* 2017 WL 4216081 (W.D. Mi. 2017) – Party seeking to assert Derivative Standing must make demand on trustee to act; trustee declined to act; colorable claim exists that would benefit estate; and trustee's inaction was abuse of discretion. Plaintiff lacked derivative standing where plaintiff did not make demand on trustee to act that was refused by trustee.

(6523) *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.

(6524) *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.

(6525) *Hyundai Translead, Inc. v. Johnson Truck & Trailer Repair, Inc.,* 555 F.3d 231 (6th Cir. 2009) - Bankruptcy Code permits the Court to grant derivative standing to creditors to pursue avoidance claims on behalf of the Estate where the Chapter 7 Trustee declines to do so. Section 544's reference to authorizing the trustee to pursue avoidance actions does not limit the Court's equitable or statutory ability to permit creditors to act in place and stead of the Trustee where that is in the best interests of the estate. Derivative standing is equally available in Chapter 7 and Chapter 11 cases. To support derivative standing, party moving for derivative standing must show that: (1) a demand was made on the trustee (or Debtor-in-possession) to act, (2) the trustee (or Debtor-in-possession) declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's (or Debtor-in-possession's) inaction was an abuse of discretion.

(6526) *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.

(6527) *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.

12.68 Ratification

(6528) *Automotive Finance Corp. v. Leonard,* 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – For purposes of Section 523(a)(2), (4) or (6), party with standing is creditor to whom debt is owed. Real party in interest is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit. Legend on promissory note that stated that obligation had been sold to AFC Funding Corp. raised question as to whether American Funding Corp. had standing. However, where plaintiff lacks standing, Court should not dismiss action until real party in interest has opportunity to either join or ratify action. Party can "ratify" action by unequivocal statement authorizing the continued prosecution and stating that the party agrees to be bound by results. Affidavits filed by AFC Funding sufficient to stating that AFC was the servicer and specifically authorized action to be brought by Automotive Finance Corp. and agreed to be bound by result.

12.69 Intervention - Mandatory

(6529) *United Methodist Publishing House, Inc. v. Family Christian, LLC,* 2015 WL 2061780 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 24 allows a party to intervene as a matter of right if granted by federal statute, or if the party claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest unless its interest is already adequately protected by other parties. In considering motion to intervene, court will consider timeliness of motion; moving party's substantial interests; impairment of the movant's ability to protect its interest absent intervention; and adequate representation by other parties. Interest must be "significantly protectable" meaning that the interest must be direct and substantial. Unsecured creditor's committee had sufficient interest in litigation regarding competing claims to ownership of assets used and possessed by Debtor to give rise to substantial interest of committee on behalf of all unsecured creditors. However. Committee had ability to protect interests without intervention, by monitoring adversary proceeding and through committee's close relationship with Debtor. Further, any proposed compromise would be subject to court approval giving the committee yet another opportunity to protect its interests. Committee also has right to request permission to file adversary briefs at appropriate times and stages of case. If committee later discovers that defenses are being impaired or claims compromised, committee can seek derivative standing or request appointment of trustee. Committee also could not demonstrate potential for inadequate representation. Where the party seeking intervention shares the same ultimate objective as a party to the suit, there is a presumption of adequate representation. Absent proof that the representing party is in collusion with opposing party, that representative is actually pursuing interest that is adverse to proposed intervenor, or that the representative is failing to fulfill duty, party cannot sustain burden of showing inadequate representation. While relationship between Debtor and potential purchaser created a possibility of an adverse interest, no evidence indicated the actual existence of any collusion or assertion of adverse position.

(6530) *Matthews v. Educational Credit Management Corp.,* 2011 WL 836925 (E.D. Ky. 2011), *aff'd* 2013 WL 791520 (6th Cir. 2013) – Assignee of guarantor of student loan debt had sufficient interest to support intervention in action to determine dischargeability under Section 523. Intervenor demonstrated timely request to intervene; guarantor had substantial legal interest in case; applicant's ability to protect interests would be impaired if intervention was denied; and applicant's interests were not otherwise adequately represented. Primary lender's status as defendant in case did not provide adequate representation of guarantor who held distinct interests, particularly where primary lender defaulted by failing to respond to adversary complaint.

(6531) *Bailey v. White,* 2009 WL 928595 (6th Cir. 2009) – Federal Rule of Civil Procedure 24(a) requires party seeking to intervene to demonstrate (1) application is timely; (2) applicant must have substantial legal interest in the subject matter of the action; (3) applicant's ability to protect that interest must be impaired if intervention is not granted; and (4) parties already present in the action do not adequately represent applicant's interest. District Court properly denied motion to intervene as untimely where action had been pending for 17 months including litigation over preliminary injunction, class certification and discovery. Proposed intervenors knew about their interests in the case before the complaint was filed and had adequate opportunity to participate in fairness hearing and review documents voluntarily produced by the parties. Court will consider 5 factors in determining whether request for intervention is timely: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

12.70 Intervention – Permissive

(6532) *Town of Chester, New York v. Laroe Estates, Inc.,* 2017 WL 2407473 (2017) - Party who seeks to intervene to seek relief which is different than relief sought by other plaintiffs must demonstrate independent Article III standing including injury in fact that is fairly traceable to the challenged conduct of defendant and likely to be redressed by favorable judicial decision. Separate relief includes cases in which plaintiff and proposed intervenor seek separate money judgments in their own names.

(6533) *United Methodist Publishing House, Inc. v. Family Christian, LLC,* Case No. 15-80062 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 24 allows permissive intervention where party has a conditional right to intervene by federal statute, or where the party has a claim or defense that shares common questions of law or fact with the main case. Court must exercise discretion by considering whether intervention will unduly delay or prejudice the adjudication of the claims between the existing parties. Court will not allow intervention by unsecured creditor committee where intervention would lead to increased costs and duplication of effort, and committee can object to any

proposed compromise. Committee sought to assert same defenses as were already being asserted by Debtors and intervention could prejudice rights of plaintiff by forcing plaintiff to incur additional costs by having to respond to pleading and discovery requests from both Debtor and committee who share same defenses.

12.71 Substitution of Parties

(6534) *Bell v. Sammy Bereznac & Co.,* 2017 WL 6276467 (M.D. Tn. 2017) – On filing for relief under Chapter 7, all pre-petition causes of action become property of bankruptcy estate and right to pursue causes of action vest solely in trustee, such that debtor has no standing to pursue recovery. Trustee would be substituted for Debtor in litigation pending prior to commencement of case.

12.72 Joinder and Severance

(6535) *Jones v. University of Phoenix,* 2017 WL 3334020 (E.D. Mi. 2017) – Debtor permitted to amend complaint to add Bankruptcy Trustee as party plaintiff for cause of action that arose pre-petition where Debtor initially commenced litigation Debtor's own name without joining Trustee. Although Debtor may have lacked standing to institute litigation in first instance as claim belonged to estate, Debtor not prevented by judicial estoppel form adding Trustee who would have standing to pursue claim.

(6536) *Underwood v. Selent,* Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Joinder of party is appropriate where adding party will not deprive court of jurisdiction and either (i) absent joinder, court cannot afford complete relief; or (ii) person claims an interest in subject matter of action such that disposition in absence of person will either impair or impede person's ability to protect interest, or would leave an existing party subject to double or multiple or otherwise inconsistent obligations. Joinder of third parties in litigation between Debtor and Defendant concerning ownership of real property where parties to be joined claimed ownership interests in same property and court could not determine Debtor's actual ownership interest in property unless additional parties were joined to the action.

(6537) *White Family Companies, Inc. v. PNC Bank,* 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Joinder requires that party to litigation bring all causes of action that arise out of same facts and transactions in single action. However, joiner requires fully mature cause of action at time underlying litigation was filed. Where defendant's right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant's later action against third party, predicated on same transaction and same facts, was not barred by party's failure to join action in first action.

(6538) *Auday v. Wet Seal Retail, Inc.,* 2013 WL 2457717 (E.D. Tn. 2013) – Rule 17 allows substitution of trustee for Debtor unless parties fail to substitute trustee for Debtor in reasonable time. Once Trustee substitutes in, action proceeds as if it had originally been commenced by real party in interest, where trustee, having been substituted, ratifies the original filing by the Debtor. Ratification requires Trustee to authorize continuation of action and agree to be bound by results. Trustee did not ratify action where Trustee did not take any action to prosecute action but directed Debtor to pursue the action on her own. Trustee's affidavit stating that trustee was aware of the prosecution did not amount to ratification as affidavit neither asserted control over action nor agreed to be bound by outcome. Rule 25 allows for substitution of party where party, during pendency of action, obtains assignment or transfer of the litigation. Action was transferred by Debtor to Trustee upon filing of bankruptcy case regardless of whether action had been commenced pre-petition. Trustee would be substituted in as if action had been brought by trustee in first instance. Where original action was commenced within statute of limitations, trustee as substituted party can maintain action as if trustee was party in first instance and brought action within statute of limitations period.

(6539) *Sequatchie Mountain Creditors v. Detweiler,* 2012 WL 4120386 (N.D. Ohio 2011) –Amendment of complaint should be permitted where justice requires. Court must consider whether there has been undue delay; lack of notice to opposing party; bad faith by moving party; repeated failure to cure deficiencies in prior amendments; and a futility of amendments; with notice and substantial prejudice being critical factors. Amendment to complaint to add parties as additional plaintiffs is permitted if (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. Opposing party did not demonstrate prejudice merely because case had been pending for 21 months, where opposing party had already conducted discovery into possible causes of action by as-of-then persons who were not plaintiffs. Although confusion regarding proper plaintiffs was result of poor drafting by plaintiff, that alone did not present prejudice. Discovery had not closed and there would be substantial overlapping testimony were all of the plaintiffs purchased lots in the same real estate development. Court's desire to move cases on docket did not warrant denial of amendment, although court could limit discovery to avoid unnecessary delays in light of 21 month delay by plaintiff in naming proper parties.

(6540) *Smith-Boughan. Inc., v. Sun Bank,* 2009 WL 2901521 (Bankr. N.D. Ohio 2009) – Joinder of parties is appropriate where Plaintiff's causes of action arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the Court. Court has discretion to sever properly joined parties for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. Severance is not favored and will not be granted where the risks of prejudice and confusion are outweighed by other factors including the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources. Action by Plaintiff for breach of construction contract against Defendant-Contractor was substantially related to Plaintiff's claims against Bank that was holding retainage to be paid under the contract. If proceeds are severed, Bank could assert Plaintiff's failure to complete construction as a defense to the "retainage" action, thereby requiring Plaintiff to try the contract issues twice. Duplicate trials would be inefficient and expensive as the contract issues will involve fact-intensive, complex construction litigation which the court believes would impose a tremendous burden on both Plaintiff and its witnesses if litigated in two separate forums and would create a meaningful risk of inconsistent adjudications.

12.73 Class Actions

(6541) *In re Beiter,* 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Court has discretion to apply class action procedures in contested matters. Class-

action status is not limited to adversary proceedings.

(6542) *Gaynor v. Miller,* 2018 WL 3751606 (E.D. Tn. 2018) – Class Action status is governed by Federal Rule of Civil Procedure 23. Rule 23(a) requires (1) class is so numerous that joinder of all members is impracticable; (2) questions of law or fact are common to class; (3) claims or defenses of representative parties are typical of claims or defenses class; and (4) representative parties will fairly and adequately protect interests of class. Once requirements of Rule 23(a) are met, class representative must then fulfill requirements of Rule 23(b)(3), by showing that questions of law or fact common to class members predominate over questions affecting only individual members and that class action is superior to other available methods for fairly and efficiently adjudicating controversy based on (A) class members' interest in individually controlling prosecution or defense; (B) existence or nature of litigation concerning controversy already begun by or against class members; (C) desirability or undesirability of concentrating litigation in particular forum; and (D) likely difficulties in managing class action. Finally, plaintiff must show existence of ascertainable class by providing class definition that is sufficiently definite to make it administratively feasible for Court to determine whether particular individual is member of proposed class.

(6543) *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.

(6544) *Drozdowski 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 is in the scope of that agreement; (3) if federal statutory claims are involved, did Congress intended 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.

(6545) *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.

(6546) *Campos v. Bluestem Brands, Inc.,* Case No. 15-629 (D. Or. 2016) – Class action suit for alleged violation of discharge injunction was subject to arbitration provision in credit agreements. Although action brought by Debtor solely may not be subject to arbitration as action would be core proceeding and arbitration would be inconsistent with underlying provisions and purposes of Code. However, action brought as class action is admission that claim is not integral to bankruptcy.

(6547) *Forson v. Nationstar Mortgage, LLC,* 2016 WL 2727973 (Bankr. S.D. Ohio 2016) – Sole remedy for alleged violation of discharge injunction is through contempt proceedings. Section 524 does not create independent private cause of action. Power of court is limited to effort to enforce court's own order. Complaint that sought to certify class action against lender for violation of discharge injunction that defined class as all Debtors in bankruptcy proceedings anywhere in United States did not support jurisdiction as class would include Debtors who received discharges other than in the Southern District of Ohio. Court lacked jurisdiction to enforce orders of other courts through contempt proceedings. Court did allow certification of all Debtors who received discharges in the Southern District of Ohio.

(6548) *Kilbourne v. CitiMortgage, Inc.,* 2015 WL 12513459 (Bankr. S.D. Ohio 2015) – 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.

(6549) *In re Biery,* 2015 WL 8608804, 543 BR 267 (Bankr. E.D. Ky. 2015) – Class certification appropriate to address creditor's alleged contempt for violation of discharge injunction. Motion for class certification demonstrated that the class is so numerous that joinder of all members was impracticable, where motion sought to certify one class consisting of 87 members and a separate class of 169 members, based on number of Debtors who, after discharge, received either a Billing Statement or an Informational Statement. Class members had sufficient number of questions of law or fact common to the class and that are central to the validity of the claims of class members and is capable of class wide resolution. Billing Statements and Informational Statements sent to Debtors contained identical language and whether statements violated discharge injunction was based on language in statements themselves. There were no Debtor-specific factual issues that had to be resolved. However, putative class members who received only Informational Statements lacked commonality as statements received were materially different from Debtor to Debtor, and there was no *per se* violation of the discharge injunction as each notice had to be evaluated on a one-by-one basis.

(6550) *In re Biery,* 2014 WL 1431947 (Bankr. E.D. Ky. 2014) – Rule 9014 allows court to apply class action rule in Rule 7023 to motion for contempt for violation of discharge order. Class procedures were superior to individual actions as class procedures enhance likelihood that each potential class member's contempt claims will be adjudicated and any systemic violation of discharges by defendants would be identified. Discharge orders are the cornerstone of bankruptcy and alleged violations implicate the integrity and core function of the bankruptcy court. Unless matters are allowed to proceed as class action, court may never find out whether defendants are systemically violating discharge order or fashion effective remedy if violations are systemically occurring. While amount of damages that each class member may suffer are individualized, the underlying harm resulting from defendants alleged systemic sending of demand letters to discharged Debtors raises identical legal questions as to liability.

(6551) *Bent v. ABMD, Ltd.,* 2010 WL 4780776 (Bankr. S.D. Ohio 2010) – Bankruptcy Court can certify class where proponent establishes (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Proponent must also certify that action complies with Rule 23(b). Key elements to defining a class include: (1) specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way, and (2) facilitating a court's ability to ascertain its membership in some objective manner. Class of plaintiffs defined as those working for Defendant within specific time frame sufficiently definite. 293 total affected class members met the "numerous" requirement. Alleged mass layoffs in violation of WARN act constituted sufficient commonality and resulted in class representatives having claims that are typical of all members of the class. Class representatives qualified to act as none had any interest that was adverse to the interests of the class itself. The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

(6552) *Wilborn v. Wells Fargo Bank, N.A.,* Case No. 09-20415 (5th Cir. 2010) – Bankruptcy Court can certify class action under 28 USC Section 157 and 1334, where class certification otherwise complies with Federal Rule 23. Rule 23(b)(3) requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Court must assess how the matter will be tried on the merits, by identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Court must determine whether proposed classes are sufficiently cohesive to warrant adjudication by representation in light of the relevant claims, defenses, facts, and substantive law presented in the case. Plaintiffs' complaint is based on the claim that for each named plaintiff and each unnamed class member Wells Fargo impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court, as purportedly required by Title 11 and the Federal Rules of Bankruptcy Procedure failed to demonstrate required predominance or superiority, particularly with respect to damages. Court also concluded that there was a substantial split between the Bankruptcy Courts as to whether a secured creditor is required to obtain approval under Section 506 and Rule 2016 before assessing contractually allowed fees. Although all members of the putative class were Debtors in bankruptcy, the cases of the individual named plaintiffs varied from Debtor to Debtor and illustrated the many underlying circumstances of the charges that would need to be considered. The circumstances surrounding the charging of fees require an individual assessment of the claims. The bankruptcy court cannot require Wells Fargo to simply disgorge all fees that were not previously approved because it is evident that there has been a wide "array of charges tailored" to each individual Debtor. The differing circumstances of the Debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. The rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo.

12.74 Exhausting of Administrative Remedies – State Law

(6553) *In re Circuit City Stores, Inc.,* Case No. 15-3477 (Bankr. E.D. Va. 2016) – Failure to exhaust state law administrative proceeding does not deprive Bankruptcy Court of jurisdiction over adversary proceeding. State law cannot divest federal court of otherwise existing subject matter jurisdiction.

12.75 Exhausting of Administrative Remedies – Actions Against United States

(6554) *In re Thal,* Case No. 09-12434 (Bankr. S.D. Fl. 2018) – Unpaid post-petition interest on pre-petition tax claims is discharged as part of Section 1328 "super discharge". Debtor's Plan proposed to pay IRS priority claim in full. IRS filed priority claim for balance due as of petition date and Debtor paid that claim in full during Chapter 13 case. After discharge, IRS levied against Debtor's Social Security to

recover unpaid post-petition interest and Debtor sought sanctions for violation of discharge injunction. While taxes themselves would not have been dischargeable, Section 1322(a)(2) requires only that debtor pay all priority tax debt in full in deferred cash payments. Section 1322 does not require deferred cash payments to include interest or have present value as of date of confirmation equaling total amount of priority claim Chapter 13 provides unique ability to pay tax liability without penalties and interest normally associated with tax debt. IRS willfully violated discharge injunction. Court ordered IRS to return all funds taken from debtor post discharge but could not award damages or attorney fees unless debtor exhausted administrative remedies under 26 USC Sections 7430 and 7433; and Court lacks jurisdiction to award punitive damages as waiver of sovereign immunity under Section 106 specifically excludes punitive damages

(6555) *Woodcox v. U.S.,* 2018 WL 1832972 (W.D. Ky. 2018) – Federal Tort Claims Act is exclusive vehicle to bring action against United States sounding in tort. Tort claim against United States barred unless claim is presented in writing to appropriate Federal agency within two years after claim accrues or unless action is begun within six months after date of mailing of notice of final denial the claim by agency. Federal law controls when claim accrues under FTCA. Equitable tolling allows federal court to toll statute of limitations when litigant's failure to meet legally-mandated deadline unavoidably arose from circumstances beyond litigant's control." Equitable Tolling is sparingly used in actions against United States, and is based on (1) plaintiff's lack of notice of filing requirement; (2) plaintiff's lack of constructive knowledge of filing requirement; (3) plaintiff's diligence in pursuing rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of particular legal requirement. Action barred where more than 3 years passed between accrual of cause of action and filing suit. Plaintiff knew or should have known of issues based on rulings of Bankruptcy Court in related action more than 2 years before filing claim and diligent research would have revealed potential claim within applicable statute of limitations.

(6556) *In re Circuit City Stores, Inc.,* Case No. 15-3477 (Bankr. E.D. Va. 2016) – Failure to exhaust federal administrative remedies is affirmative defense and does not deprive Bankruptcy Court of subject matter jurisdiction over dispute.

(6557) *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.

(6558) *Pomerenke v. Bird,* 2014 WL 4920932 (8th Cir. 2014) – 28 USC §7422 prohibits any action to recover taxes alleged to have been erroneously or illegally assessed or collected until the party exhausts administrative remedies. Complaint by Debtor claiming that IRS garnished wages for payment of discharged tax liabilities dismissed where plaintiff did not exhaust administrative remedies.

(6559) *In re Ballard,* 502 BR 311 (Bankr. S.D. Ohio 2013) – Alleged failure to exhaust administrative remedies is not jurisdictional defect. Failure of taxpayer to seek recourse against US using administrative remedies does not deprive court of jurisdiction, but may preclude plaintiff from recovering in court action until administrative remedies are exhausted.

I. Commencement

12.76 Technical Requirements

(6560) *Casab v. Grand Sky Enterprise Co., Ltd,* 2015 WL 753365 (E.D. Mi. 2015) – Adversary proceeding is commenced when complaint is filed with clerk. Inadvertent omission of counsel's phone number, otherwise required by ECF guidelines, did not constitute defect in complaint or warrant dismissal of action.

12.77 Filing Fee – Failure to Pay

(6561) *Szold v. Guy,* Case No. 15-4603 (Bankr. E.D. Mi. 2015) – Adversary dismissed where plaintiff failed to pay filing fee by date established in Order of Court.

12.78 Filing Fee – Waiver

(6562) *Hill v. Goering,* 2018 WL 3970908 (S.D. Ohio 2018) – After Court authorizes plaintiff to proceed *in forma pauperis,* Court must then review complaint to determine whether complaint should be dismissed as frivolous, malicious, failing to state cause of action on which relief may be granted or seeking monetary relief from defendant was immune from such relief. If Court believes that complaint as frivolous or malicious, Court may sua sponte dismiss complaint. Counts of complaint that sought relief against the same defendants against whom plaintiff had previously filed litigation dismissed as abuse and malicious where Debtor's prior lawsuit, also filed in forma pauperis, was dismissed by Court sua sponte, as merely repeating pending or previously litigated claims is considered abuse of and malicious use of judicial process. Complaint against Hamilton County Sheriff and City of Cincinnati did not state claim for relief as County and City are not vicariously liable for actions of employees unless misconduct giving rise to injury was result of implementation of policies, statements, regulations, decisions or customs promulgated by City of County respectively and Complaint contained no such allegations.

(6563) *Bright v. Wilson,* 2018 WL 3543049 (E.D. Tn. 2018) – Before approving waiver of filing fee, Court must determine whether complaint states cause of action on which relief may be granted. Grant of *in forma pauperis* status at outset of case does not prevent Court from later concluding that claim does not state cause of action and that filing fee should not have been waived. 28 USC Section 1915€(2) provides that if Court determines at any time that plaintiff proceeding *in forma pauperis* fails to state claim on which relief may be granted, Court shelves this case. Although Court initially approved in forma pauperis status, Court later determined that complaint seeking relief under 42 USC

Section 1983 and under Americans With Disabilities Act did not state cause of action and there was no independent basis for federal Court to assert jurisdiction over remaining State Law claims. Case dismissed without prejudice.

(6564) *Moore v. Council,* 2018 WL 3150677 (E.D. Ky. 2018) – *In forma pauperis* status requires affidavit stating that Plaintiff is unable to pay filing fees while still providing for necessities of life. Motion granted where Plaintiff's affidavit reflected on cash, no bank account, and sole asset is automobile worth $1,000.00.

(6565) *Clair v. Bank of America,* 2016 WL 3911441 (W.D. Tn. 2016) – In considering request to waive filing fee under *in forma pauperis* doctrine, Court must consider whether complaint, an any portion, (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief. While pro se complaints are held to lower legal standard than formal pleadings drafted by lawyers and are liberally construed, complaint must contain sufficient facts to demonstrate that some claim exists and does not require or allow court to "manufacture" claim for plaintiff. To extent that complaint alleged standing of others or attempted to assert legal rights and interest of third parties, complaint failed to state cause of action as plaintiff, acting pro se, could only advance her own interests. Claims ostensibly brought "on behalf of" the United States Department of Treasury, the Department of Housing and Urban Development and Money Management International dismissed for lack of standing. RICO counts failed to state cause of action where all fraudulent schemes alleged by plaintiff occurred more than 4 years prior to commencement of action ad are barred by statute of limitations. Complaint also failed to allege any pattern of racketing 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.

(6566) *Dietrich v. Patti,* 2016 WL 3682957 (E.D. Mi. 2016) – 28 USC Section 1915 allows person meeting "pauper status" to file complaint without paying filing fee. However, 28 USC Section 1915(e)(2)(B) requires Court to then review complaint and dismiss the case if Court is satisfied that action if frivolous, malicious, fails to state claim on which relief can be granted, or seeks monetary relief from defendant who is immune for monetary damage awards. Complaint under Civil Rights Act, 42 USC Section 1928, was frivolous as defendant was private attorney representing private party in bankruptcy proceeding. Civil Rights claims can be brought only against government employees or those acting under color of state law. Private attorney is not acting under color of stat law merely by acting as attorney in legal proceeding. Action under Civil Rights Act was frivolous and dismissed. Remaining claims were all based entirely on state law causes of action. Court lacked diversity jurisdiction as complaint alleged that plaintiff and defendant were both citizens of Michigan. Without pending Federal cause of action or basis for diversity jurisdiction, court lacked jurisdiction over remaining causes of actions allowing case to be dismissed.

(6567) *Rogers v. United States Bankruptcy Court,* 2016 WL 3549484 (E.D. Mi. 2016) – 28 USC Section 1915 allows court to permit commencement of civil action without payment of fees if applicant submits an affidavit demonstrating that he or she is unable to pay the fees or give security for payment of fees. Plaintiff's affidavit which provides that he is not employed, receives no income, and has no savings or checking account; and has debts totaling $65,000 sufficient to allow Court to waive filing fees. Plaintiff's Application to Proceed without Prepayment of Fees or Costs. 28 USC Section 1915 requires in any case where the filing fee is waived that the Court, dismiss the complaint if it is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. Complaint sought to contest validity of Bankruptcy Court Order that barred Plaintiff from acting as a Bankruptcy Petition Preparer. District Court lacks authority to review or disturb bankruptcy Court Order other than through appeal of that order. Plaintiff previously appealed Bankruptcy Court Order to District Court and Order was affirmed. Plaintiff failed to state cause of action in this collateral attack on validity of bankruptcy court judgment.

(6568) *Wells Fargo Bank, NA v. Smith,* 2016 WL 1271028 (E.D. Ky. 2016) – Court could not determine whether defendant qualified for waiver of fee in connection with removal where defendants was married but financial disclosure failed to list income of defendant's spouse. Based on prior bankruptcy filing, it appeared that spouse had ample income to allow defendant to pay required removal fee.

(6569) *Rowan v. U.S. Bankruptcy Court,* 2016 WL 1181790 (W.D. Tn. 2016) – 28 USC Section 1914 prohibits inmate bringing a civil action from being excused from payment of filing fee. Inmate must either pay filing fee in full or provide for partial filing fee with remainder paid in installments. However, under 28 USC Section 1915, prisoner must pay filing fee in full and cannot provide for deferred fee if prisoner has on three prior occasions brought action that was dismissed as frivolous, malicious or fails to state claim. Complaint can be either factually or legally frivolous if, accepting all well plead allegations as true, complaint fails to state cause of action. Complaint failed to state any facts that would constitute wrongdoing by any of the named defendants,

(6570) *Fernanders v. Daughtrey,* 2016 WL 612759-8 (E.D. Mi. 2016) – 28 USC Section 1915(e)(2) allows court to waive filing fee and allow plaintiff to proceed *in forma pauperis* where plaintiff demonstrates that plaintiff lacks sufficient resources to pay filing fee. Even with showing of poverty, court can deny *in forma pauperis* filing where action is frivolous or malicious; fails to state claim on which relief can be granted; or seeks monetary relief against defendant who is immune from such relief. Complaint was frivolous where complaint named as defendants the Judges of the 6th Circuit who ruled against plaintiff in earlier appeal, and asked District Court to Order Circuit Court to withdraw mandate and correct alleged legal and factual errors in opinion. Complaint failed to state cause of action and sought relief against Judges who are immune for personal liability for exercising judicial functions.

(6571) *Hart v. Wood,* 2015 WL 4276272 (W.D. Tn. 2015) – Court can deny request for *in forma pauperis* filing of complaint where complaint is frivolous, fails to state cause of action, or seeks monetary relief against party who is immune from that relief. Complaint alleged causes of action based on FDCPA and RESPA that were, on the face of the complaint, time barred. Complaint also 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.

(6572) *Wheeler v. Law Offices of John D. Clunk Co., LPA,* 2015 WL 1880415 (N.D. Ohio 2015) – Plaintiff's request to waive filing fee denied and case dismissed where plaintiff failed to demonstrate an inability to pay the filing fee. Court will not lightly grant request for *in forma pauperis* status. Plaintiff's application failed to disclose all assets and income information; indicated that plaintiff paid rent but failed to

disclose to whom rent was paid or for what, as plaintiff resided in property at issue in case; Debtor owned multiple corporations that were not disclosed; and although plaintiff contends he was not able to pay the filing fee, he did pay the $400 fee to remove the case from State Court to federal court with no explanation as to why plaintiff was able to pay removal fee but could not pay filing fee.

(6573) *Smith v. LeGare,* 2013 WL 5417212 (Bankr. N.D. Ohio 2013) – Court lacks authority under 28 USC Section 1930 to waive a filing fee for a creditor to commence an adversary proceeding.

(6574) *Brown v. Orlans Associates, PC,* 2013 WL 1506016 (E.D. Mi. 2013) – 28 USC Section 1915(a) permits court to waive filing fee by person who submits an affidavit that discloses all assets and states that the person is unable to pay the fees or give security for payment of the fees. If a motion to proceed without payment of fees and is accompanied by a facially sufficient affidavit, court should allow complaint to be filed.

12.79 Filing Fee – Refund of

(6575) *Bruce v. Great Britain,* 2018 WL 2172785 (E.D. Tn. 2018) – Judicial Conference policy prohibits refund of fees unless fees are collected without authority or as result of administrative error by clerk. Debtor entitled to refund of fees paid after court approved filing *in forma pauperis.* Acceptance of payment along with Application for *in forma pauperis* status constituted administrative oversight by clerk.

(6576) *In re White,* 2018 WL 1887327 (Bankr. W.D. Mi. 2018) – Court ordered refund of fling fee paid by debtor to reopen case. Judicial Conference Fee Compendium provides that debtor is not to be charged to reopen case if purpose is to determine scope of discharge. Further, Curt t outset of case entered order relieving Debtor from payment of filing fee and all subsequent fees. Clerk erroneously collected fee when Debtor filed Motion to Reopen to add omitted creditors.

(6577) *Trbovich v. KeyBank, NA,* 2016 WL 6879268 (Bankr. N.D. Ohio 2016) – Bankruptcy Fees under 28 USC Section 1930 generally require payment of filing to commence adversary, but guidelines specifically except Debtor from having to pay a flinging fee to commence and adversary. Debtors filed adversary proceeding under Section 523(a)(8) and paid filing fee, when they were not required to do so. To grant refund of fee, moving party must show that fee either was collected without authority or due to clerk's administrative error. Fee was not result of administrate error where Debtors paid the filing fee in response to electronic filing process rather than checking box to indicate that fee was not required, constituting error by Debtors and not error by clerk of court. Payment of fee was not technically without authority as statute and rules do not make it unlawful for clerk to collect fee, only that Debtor can take appropriate action to avoid fee that is not due. Court Ordered refund of fee in this case but noted that court may not grant refunds in future where the refund is the result of an error by Debtors or counsel in filing the adversary via ECF in the first instance.

(6578) *Lofton v. Roll,* 2016 WL 1179245 (Bankr. N.D. Ohio 2016) – Filing fee paid in error when Debtor filed adversary proceeding can be refunded. Refund of filing fee permitted only when fees were collected without authority or due to administrative error by clerk's office. Debtor paid filing fee to commence adversary although Bankruptcy Court Miscellaneous Fee Schedule states that Debtor is not to be charged filing fee. Fee was collected in violation of provision that a fee "must not be charged" was without authority for Clerk to collect in first instance, warranting refund of filing fee.

(6579) *In re Henkel,* 2015 WL 5684118 (Bankr. N.D. Ohio 2015) – Filing fee for motion for relief from stay is set by Judicial Conference. Courts are allowed to waive fees in accordance with Judicial Conference policy but cannot refund fees paid upon filing even if the fee is paid in error unless the clerk accepted the fee without authority. Fee was not collected without authority where creditor filed Motion for Relief From Stay, notwithstanding that Motion was filed in error and was entirely unnecessary as case had already been discharged and close, and there was no stay in effect at time.

(6580) *Richmond v. National Collegiate Student Loan Trust 2007-2,* 2015 WL 5333812 (Bankr. N.D. Ohio 2015) – Debtor who paid filing fee to institute adversary where Debtor was not required to pay filing fee not automatically entitled to refund of erroneously paid fee. Fee will be refunded only if fee was collected without authority or if the fee was collected due to administrative error on part of clerk. There was no administrative error by clerk's acceptance of tendered payment. However, clerk lacked authority to accept fee where Miscellaneous Fee Schedule states that "This fee must not be charged if … the Debtor is the plaintiff". Provision speaks directly to lack of authority of clerk to charge or collect filing fee for adversary proceeding, such that fees must be refunded on request of Debtor.

(6581) *In re Raypholtz,* 2015 WL 2375394 (Bankr. N.D. Ohio 2015) – Court has authority to waive filing fees in accordance with Judicial Conference policy. However, if fee is paid erroneously, neither fee statute nor Judicial Conference requires fee to be refunded unless fees are collected without authority or due to administrative error by clerk. Governmental creditor paid fee to file motion for relief from stay when creditor was otherwise exempt from paying fee. Although creditor erred in paying fee, there was no administrative error by clerk in collecting fees. Judicial Conference Miscellaneous Fee Schedule states that federal agencies should not be charged fees. Clerk collected fee without authority to do so. Fess should not have been charged, and fact that fee was paid inadvertently did not change that fact, and fees must be refunded to Federal agency on request.

12.80 Generally – Time For

(6582) *In re Stough,* 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing Debtor to enjoy finality and certainty of relief. Failure to provide creditor notice of proceeding, however, can excuse late filed complaint as failure to provide notice constitutes failure of fundamental due process. Complaint untimely where not filed within 60 days and where creditor did not seek extension of deadline before deadline expired. Minor error in creditor address will not constitute failure of notice or from basis to excuse untimely filing of adversary if it appears likely that creditor received notice notwithstanding error. Creditor received appropriate notice of proceedings where, although matrix contained typographical error in address, where address was off by one digit. Creditor was large Hospital and it appears likely that the Hospital would have received the notice. Evidence indicated that notice had not been returned to noticing center, and

it is likely that Post Office would have known and recognized the minor error in the address and delivered the notice.

(6583) *Alfes v. Educational Credit Management Corp*., 2011 WL 3795107 (Bankr. E.D. Mi.) *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Amended complaint dates back to date of initial complaint as long as claim arises out of same transaction, conduct or occurrence. Although amended complaint added new theory of liability, it was premised on the same facts and Debtor had full notice of the allegations based on the initial complaint. Debtor was unable to demonstrate any prejudice by allowing amended complaint filed only one day after filing of initial complaint, before Debtor took any action in response.

(6584) *In re Rutherford,* 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.

(6585) *Probuild Company, LLC. v. Doria,* Case No. 10-11914 (E.D. Mi. 2010) – Rules 4007 and 9006 govern time for filing adversary complaint objecting to dischargeability of debt. Where 60-day deadline to file adversary falls on weekend or legal holiday, deadline to file adversary is extended to first business day thereafter.

12.81 Extension of Time – Granted

(6586) *In re Hole,* 2018 WL 1162536 (Bankr. W.D. Ky. 2018) - Rule 4007 requires adversary complaint to be filed within 60 days after first date set for meeting of creditors. Rule allows deadline to be extended on motion of party in interest prior to expiration of prior deadline. However, time limits of Rule 4007 are not jurisdictional but is deadline subject to waiver, estoppel and equitable tolling. In considering Motion for extension filed one day after expiration of deadline, Court would consider whether creditor lacked actual notice of filing requirement; whether creditor lacked constructive knowledge of filing requirement; whether creditor acted diligently; whether extending deadline would prejudiced defendant; and whether plaintiff acted reasonably in remaining ignorant of notice requirement. Creditor acknowledged that it had notice of filing deadline but asserted that it was unable to timely file adversary where Debtor failed to produce documents requested by creditor in Chapter 7 Trustee until only 4 days before expiration of deadline. Creditors acted with diligence and pursuing claims and actively pursued discovery of information needed for claims. Debtor did not claim prejudice by late filing and Court could find no prejudice where filing was only one day beyond deadline. Counsel's alleged difficulty in navigating the courts ECF filing system, standing alone, is not basis to allow late filing but other factors in case warrant extension under courts equitable authority under Section 105.

(6587) *Woodcox v. U.S.,* 2018 WL 1832972 (W.D. Ky. 2018) – Federal Tort Claims Act is exclusive vehicle to bring action against United States sounding in tort. Tort claim against United States barred unless claim is presented in writing to appropriate Federal agency within two years after claim accrues or unless action is begun within six months after date of mailing of notice of final denial the claim by agency. Federal law controls when claim accrues under FTCA. Equitable tolling allows federal court to toll statute of limitations when litigant's failure to meet legally-mandated deadline unavoidably arose from circumstances beyond litigant's control." Equitable Tolling is sparingly used in actions against United States, and is based on (1) plaintiff's lack of notice of filing requirement; (2) plaintiff's lack of constructive knowledge of filing requirement; (3) plaintiff's diligence in pursuing rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of particular legal requirement. Action barred where more than 3 years passed between accrual of cause of action and filing suit. Plaintiff knew or should have known of issues based on rulings of Bankruptcy Court in related action more than 2 years before filing claim and diligent research would have revealed potential claim within applicable statute of limitations.

(6588) *Tow v. Bulman,* Case No. 15-3179 (Bankr. S.D. Tx. 2017) - 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 fax 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 it plaintiff failed to exercise full extent of discovery rights were 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.

(6589) *Mitchell v. Taylor,* 2016 WL 4191121 (M.D. Tn. 2016) – Equitable tolling of statute of limitations is determined on a case-by-case basis and is to be narrowly applied. Parties who rely on equitable tolling through fraudulent concealment have burden of demonstrating applicability. Plaintiff must plead and prove that "1) the defendant concealed the underlying conduct, 2) the plaintiff was prevented from discovering the cause of action by that concealment, and 3) the plaintiff exercised due diligence to discover the cause of action. Alleged material facts in 2007 which plaintiff claims defendant concealed starting in 2007 were easily discoverable through due diligence at or near time of event. Fact that plaintiff allegedly did not actually discover facts until 2013 did not bring action within tolling exception to limitations period.

(6590) *In re McKenzie,* 2012 WL 4742708 (E.D. Tn. 2012) – Equitable tolling provides that statute of limitations will not bar claim if plaintiff, despite diligent efforts, did not discover injury until after limitations period expired. Courts will consider (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. Court can consider any other factors that court deems appropriate, but must apply doctrine sparingly. Court equitably tolled statue notwithstanding evidence that the Trustee was extremely experienced and could not feign ignorance of notice and filing requirements; and could have exercised greater diligence. Trustee mistakenly believed creditor's only collateral was real estate despite schedules indicating Debtor owned a number of interests and ran a

variety of businesses. Trustee failed to act upon email that included several attachments relevant to the matters at hand. Court concluded that notwithstanding Trustee's lack of diligence, alleged transfer at issue was not disclosed in schedules and schedules were not amended to disclose until 2 weeks after statute of limitations expired; and other actions of creditor were misleading and created false impressions. While creditor may not have had affirmative duty to disclose certain facts, creditor had ample opportunity to correct misimpressions and misunderstandings that led to Trustee's initial decision not to pursue action until after statute had expired.

12.82 Extension of Time – Denied

(6591) *In re Stough,* 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing Debtor to enjoy finality and certainty of relief. However, time limit is not jurisdictional and court can extend deadline where Debtor's dilatory behavior caused delay in filing adversary. Equitable tolling applies where Plaintiff (1) lacks actual notice of filing requirement; (2) lacks constructive knowledge of filing requirement; (3) has been diligent in pursuing one's rights; (4) demonstrates that late filing did not prejudice the defendant; and (5) demonstrates that conduct in remaining ignorant of the notice requirement was excusable. Court would not equitably toll time where creditor received actual notice of deadlines in Notice of Commencement, even if, because of creditor's internal processes, the notice was not delivered to the proper person. Creditor did act diligently to protect rights after creditor became aware of bankruptcy and Debtor would not have been prejudiced if the deadline were extended. However, creditor did not act reasonably in remaining ignorant of deadline. Creditor, plus three of its agents, were all scheduled and all received the Notice of Commencement. There was no reasonable basis for creditor to have remained ignorant for so long a duration.

(6592) *Cummings v. Ehrhart,* Adv. No. 12-3101 (Bankr. E.D. Mi. 2012) – Deadline for filing is not jurisdictional. In considering whether to extend deadline, court must consider lack of actual notice of filing requirements; lack of constructive notice of filing requirements; diligence in pursuing one's rights; absence of prejudice to defendant; and reasonableness of plaintiff's remaining ignorant of notice requirements. Plaintiff did not produce any evidence that defendant delayed or contributed to the delay in plaintiff's filing of adversary. No evidence that defendant led plaintiff to believe that an extension of time would be agreed or that there were any communications between attorneys. Plaintiff failed to file motion to extend time before expiration of deadline and in fact waited unto more than a month after expiration of deadline. Plaintiffs were not sufficiently diligent in pursuing rights before expiration of deadline. Although defendant did not show any prejudice, defendant did have expectation of entry of discharge after deadline for filing actions expired.

(6593) *JP Morgan Chase, NA v. Harris,* Case No. 10-6706 (Bankr. E.D. Mi. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. Plaintiff failed to demonstrate cause to extend time to file Adversary proceeding where parties previously stipulated to one extension of time to a date specific and creditor did not file adversary proceeding until one day after expiration of agreed upon extension. Equitable tolling requires (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing creditor's rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of filing requirement. Parties were aware of and had discussions about looming deadline but did not have any agreement about further extensions. Plaintiff had ample notice of deadline and opportunity to act either by filing complaint or by filing motion seeking additional extension. Failure to file based on counsel's calendar error is not "excusable neglect" that would from basis to extend time to file adversary complaint.

(6594) *In re McConkey,* 2011 WL 1436431 (Bankr. D. Md. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. In order to establish equitable tolling, Plaintiff must show that failure to file a complaint within the time provided was the result of (1) extraordinary circumstances, (2) beyond Plaintiff's control or external to Plaintiff's own conduct, (3) that prevented Plaintiff from filing on time. Errors of counsel that prevent timely filing are neither extraordinary or external. Complaint was not timely filed because Plaintiff's counsel was unfamiliar with the Rules and so was not aware of need to file the complaint within 60 days. Creditor's Motion for Relief From Stay filed to permit State Court litigation to proceed did not constitute Motion for Extension of Time to file adversary proceeding where the motion did not allege that Plaintiff was attempting to have debt declared non-dischargeable.

(6595) *Guillen v. Wilson,* Adv. No. 06-4608 (Bankr. E.D. Mi. 2009) - Creditor's Motion for Extension of Time to file documents in connection with an adversary proceeding objecting to the dischargeability of certain debts denied as moot as the adversary proceeding had been dismissed before the Motion was filed.

12.83 Ripeness

(6596) *Tompkins v. Vollbert,* 2017 WL 3704545 (Bankr. E.D. Tn. 2017) – Jurisdiction of Federal Court is limited by Article III to "cases or controversies". Action must not ender advisory opinions and can hear and adjudicate only matters that are ripe. To determine ripeness, Court must consider whether issues are fit for judicial decision (whether there is a present case or controversy between the parties; and whether there is sufficient risk of suffering immediate hardship to warrant prompt adjudication or whether withholding judicial decision would work undue hardship on parties. Both prongs must be satisfied for action to be ripe. Creditors' adversary proceeding to establish amount of claims in Chapter 11 was not ripe where Creditors had filed proofs of claim and Debtor had not objected to those claims, although Debtor's Chapter 11 Plan listed the debts at lower amounts than that claims. Creditors' adversary proceeding was attempt to preemptively overcome objections to claims that had not yet been filed and that may never be filed. To extent Creditors disagree with treatment in Plan, Creditors have right to object to confirmation but Debtor had withdrawn Plan leaving even an objection to confirmation not ripe. To extent that Creditors sought determination of whether Debtor held claims against Creditors, action was not ripe because while Debtor had stated that he had claims, he had not yet asserted any claims against Creditors and any possible claims by Debtor were merely theoretical.

(6597) *Bowers v. United States,* 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Ripeness prevents court from prematurely adjudicating disputes or

becoming involved in abstract disputes. Case must present real, present controversy between parties having adverse legal interests, and that is definite and concrete, not hypothetical or abstract. If there is no present case or controversy, action is not constitutionally ripe and court lacks subject matter jurisdiction as there is no live "case or controversy". Complaint that sought determination that IRS claim for unpaid taxes not ripe where IRS admitted in response to complaint that limitations period had run. As the parties agreed on the outcome, there was no live case or controversy. Count of complaint that sought to determine dischargeability of tax debt was not ripe as Debtors had filed plan that proposed full payment of the taxes and if Debtors complete plan there will be nothing left to discharge, but if they fail to complete plan Debtors would not receive discharge. Accordingly, there was no need for court to determine dischargeability. Count of complaint that sought determination of dischargeability of tax penalties not ripe as IRS conceded that penalties accrued more than three years pre-petition and are dischargeable, presenting no dispute for court to determine.

(6598) *In re Gourlay,* 2013 WL 4414827 (E.D. Mi. 2013) – Court will not rule on matters that are not ripe or that seek strictly advisory opinion. Motion for order clarifying that debts may be subject to non-dischargeability action under Section 523 sought advisory opinion where party had not actually commenced any adversary proceeding. Motion sought opinion of court as to what may happen in an as-yet unfiled action.

(6599) *Erikson v. Internal Revenue Service,* 2013 WL 2035875 (Bankr. E.D. Mi. 2013) – Action does not present any justiciable controversy unless action demonstrates concrete and particularized injury that is actual or imminent, as opposed to conjectural or hypothetical; a fairly traceable causal connection between injury and alleged conduct; and likelihood that injury would be redressed by favorable decision. Court lacks jurisdiction to rule in action that is not ripe or in which plaintiff lacks standing. Action brought by Debtor against IRS for declaratory relief regarding dischargeability of taxes was not ripe for adjudication. Debtors filed for Chapter 7 and included non-priority taxes in scheduled debts. Debtors then received a discharge. Debtors brought adversary seeking order that tax debts be discharged. Parties agreed that taxes were unsecured and non-priority such that only possible exception would be Section 523(a)(1)(C), that returns were fraudulent or that Debtors made willful attempt to evade taxes. IRS responded that it has no present intent to bring a claim against Debtors for fraudulent returns, nor did IRS have any information that would warrant an investigation. Debtors' adversary sought to deal with what was only a remote possibility that IRS may, at some point in the future, conduct an investigation and that that following that investigation. IRS may at some point commence enforcement activity. Plaintiff did not allege any injury in fact and as IRS had not begun enforcement actions, any possible harm was remote and hypothetical. Further, if IRS commenced action in future, Debtors would be allowed to raise discharge as bar to those proceedings.

(6600) *Winget v. JP Morgan Chase Bank,* 537 F.3d 565 (6th Cir. 2008) – Guarantors action against lender for alleged violation of asset purchase agreement was not ripe for adjudication where no actions have yet been brought to enforce the Guarantee Documents. Any attempt to bring a claim before the lender attempts to repossess the collateral is premature as it rests upon contingent future events that may not occur as anticipated or at all.

J. Service of Process

12.84 Deadline for Service

(6601) *Meyer v. Timothy E. Baxter & Associates, PC,* 2018 WL 1858182 (E.D. Mi. 2018) – Federal Rule of Civil Procedure 4(m) requires service to be completed within 90 days after complaint has filed. If plaintiff shows good cause for failure, Court must extend time for service for appropriate. Plaintiff's inability to obtain service within time set forth in Rule 4 did not mandate dismissal of case where record indicated plaintiff had made extensive good faith efforts to affect proper service, plaintiff had substantially complied with service rules, defendant was undertaking significant efforts to evade service; and defendant could not demonstrate lack of notice or any prejudice other than inherent prejudice and having to defend lawsuit. Court deemed notice to defendant to be sufficient and that defendant has been served as required.

(6602) *Zadeh v. Nelson,* 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – Rule 7004 requires service of summons within 7 days of issuance. If service is made by mail, then summons and complaint must be deposited in US Mail within 7 days. Plaintiff failed to timely serve complaint and summons where plaintiff waited 27 days to mail summons and complaint to Debtor, requiring dismissal of adversary proceeding.

(6603) *Estate of Gower v. Parker,* 2016 WL 5763973 (Bankr. W.D. Ky. 2016) – Summons and complaint must be served on Debtor or Debtor's attorney within 7 days of issuance. Motion to Dismiss denied where attorney unquestionably received copy of complaint, summons and scheduling order even though plaintiff did not mail those to attorney, where attorney received them through ECF process.FI summons is not served on Debtor within 7 days, remedy is for plaintiff to obtain new summons and serve that. After Motion to Dismiss filed, plaintiff obtained new summons and properly served Debtor within time permitted rendering Motion to Dismiss moot.

(6604) *Casab v. Grand Sky Enterprise Co., Ltd.,* 2015 WL 753365 (E.D. Mi. 2015), *aff'd,* Case No. 15-1378 (6th Cir. 2016) – Rule 4, incorporated through Bankruptcy Rule 7004, requires service within 120 days after complaint is filed, failing which the case can be dismissed after notice to plaintiff, Court must extend deadline to achieve service on showing by plaintiff of good cause, and has discretion to extend time even absent showing of good cause. Court can extend deadline even after initial time to serve has expired. Appellant failed to demonstrate any abuse of discretion where court extended deadline and defendant could not show prejudice as defendant was fully aware of commencement of case from the outset.

(6605) *MERV Properties, LLC v. Friedlander,* 2015 WL 2097811 (Bankr. E.D. Ky. 2015) – Rule 7004 provides that if service is not effectuated within 120 days of filing of complaint, action must be dismissed as to un-served defendant, or extend time for service on showing of good cause. Good cause requires showing of reason why service was not obtained within time permitted. Good cause requires proof that plaintiff made reasonable and diligent effort to obtain service. Plaintiff did not make reasonable effort where plaintiff mailed summons to defendant at address that defendant had not used for at least 3 years before the attempted service. Plaintiff sent summons to defendant by certified mail return receipt requested, and never received the signed receipt which should have alerted plaintiff to possible defect in service, yet plaintiff did not take any steps to inquire of validity of service. Even in absence of showing of good cause, court has discretion to allow additional time for service, where whether a significant extension of time would be required; whether extension would prejudice defendant other than

inherent prejudice in having to defend suit; whether defendant has actual notice of action; whether dismissal without prejudice would substantially prejudice plaintiff as action would be time-barred; and whether plaintiff made good faith effort at service. Court declined to extend time where it had been 230 days since case filed yet no proper service had been obtained; defendant has no knowledge of lawsuit until well after time for service had expired and after date set by court for completion of discovery; and discovery had completed, motions for summary judgment filed and case set for trial.

(6606) *Degirolamo v. Primary Colors Design Corp.,* 2013 WL 6092447 (Bankr. N.D. Ohio 2013) – Federal Rule 4, incorporated by reference in Federal Rule of Bankruptcy Procedure 7004, requires service of complaint within 120 days of commencement of case. If service is not accomplished in that time, court can either dismiss action without prejudice or grant plaintiff additional time. Plaintiff failed to demonstrate good cause to extend time where, after filing case, plaintiff made no efforts at all to serve defendant. Inaction, even as to unnamed, unknown defendant, is not good cause. Absent showing of good cause, court can in is discretion extend time, based on length of time that extension would require; any prejudice beyond mere pendency of lawsuit that would be suffered by defendant; whether defendant has actual notice of action; whether dismissal would substantially prejudice plaintiff; and whether plaintiff made good faith efforts to attempt service. Dismissal would substantially prejudice plaintiff as statute of limitations has now expired, such that dismissal would prevent refiling of case. However, plaintiff still had not identified defendant and had waited almost 2 years before filing action and even beginning to attempt to discover names of possible defendants. Plaintiff now had that information and could proceed to expeditiously serve defendants. Court would grant short extension to December 31, 2013 for service to be accomplished.

(6607) *Spirit SPE Portfolio 2007-1 LLC v. Paxos,* 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires service to be complete within 120 days of filing the complaint. If Plaintiff can establish good cause, Court must extend time for service. Plaintiff failed to show good cause where Plaintiff served Debtor but failed to serve Debtor's counsel as required by Rule 7004. Court has discretion to extend time even in absence of good cause, where required extension is of short duration; extension is not prejudicial to defendant; defendant had actual notice so lawsuit; dismissal without prejudice would substantially prejudice plaintiff as lawsuit would be time barred; and plaintiff made good faith efforts at proper service. Requested extension was just 8 days. Debtor had actual notice of lawsuit and filed both motion for extension of time to file responsive pleading and motion to quash service. Plaintiff's action would be barred by statute of limitations, such that dismissal would effectively be with prejudice; and Debtor failed to demonstrate any actual prejudice. Court prefers to resolve matters on merits and plaintiff could cure any defect in service by immediately serving copy of complaint on Debtor's attorney.

12.85 Rules 7004 and 5003

(6608) *Langeland v. Tru Die Cast Corp.,* 2018 WL 910143 (Bankr. W.D. Mi. 2018) – Proper service is essential to establishing court jurisdiction. Service on Corporate defendant can be made by US mail addressed to Registered Agent. Initial return of service did not indicate anyone who was served. Amended Proof of Service typed in "Bruce Lehmann" but did not indicate the date on which Mr. Lehmann was served and Mr. Lehmann was not defendant. Secretary of State records listed Corporate Registered Agent as Bruno Lehmann, not Bruce Lehmann. Given history of errors in proof of service, typographical error that resulted in Summons being mailed to Bruce, not Bruno., could not be overlooked where it was unclear whether Bruce was same person as Bruno or whether Bruce even existed. Motion for Default Judgment denied and Court sua sponte vacated Clerk's default as Defendant, having never been served, had no duty to respond and could not be in default.

(6609) *In re Roby,* 2017 WL 112519 (Bankr. N.D. Ohio 2017) - Motion to reconsider order avoiding liens that impaired exemptions granted where motion to avoid liens was not properly served rendering order avoiding liens void for lack of jurisdiction. Motion to Avoid Liens is contested matter that must be served according to Rule 7004, which allows service by first class mail on a governmental organization as prescribed by state law. Ohio state law requires that any service on the state or any department must be made by serving the officer responsible for administration of the department. Service of the motion on a Postcard Office box in Columbus did not qualify, as motion was not served on tax Commissioner or Attorney General and was not served at address used by tax Commissioner or Attorney General. Proper service is not "inconsequential factor" and rule 7004 require strict compliance. Even if state treasurer department may actually have received motions, actual receipt does not eliminate need for proper service.

(6610) *MERV Properties, LLC v. Friedlander,* 2015 WL 2097811 (Bankr. E.D. Ky. 2015) – Rule 7004 allows personal service by mail addressed to defendant's home or principal place of business. Absent effective service, court lacks jurisdiction unless defendant has taken action to voluntarily submit himself to court jurisdiction. Summons and complaint addressed to business address for business in which defendant has been managing member insufficient where business ceased operating in 2011 and dissolved in 2012. Address used was neither residence nor principal place of business of defendant. Fact that defendant may have used address at some point in the past does not make that address perpetually available for service.

(6611) *In re Slayton,* 509 BR 90 (Bankr. E.D. Mi. 2014) – 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.

(6612) *Smith v. Vista Hills Partners, LLC,* 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Rule 7004 allows service of process on business by mailing addressed to an officer, managing or general agent, or any other agent authorized by appointment or law to receive service. Debtor's mailing of complaint to Corporation, without specifying any particular officer or agent to receive service, did not comply with Rule 7004. Court lacked jurisdiction over defendant to enter relief. Rule 7004 also allows service as authorized by state law. Ohio state law allows service on LLC by serving agent authorized by appointment or law to receive service; or by serving the company at its usual place of business, or by serving a member or manager; and allows service to occur by Certified Mail or commercial carrier that utilizes deliver requiring a signed

receipt. Debtor mailed summons and complaint to defendant by ordinary first class mail, which was not sufficient. Default judgment denied where there was no evidence of proper service.

(6613) *Crow v. Ocwen Loan Servicing, LLC,* 2013 WL 4668558 (Bankr. N.D. Ohio 2013) – Service on corporate entity can be accomplished by mailing a copy of the summons and complaint to the attention of an officer, managing or general agent, or other agent authorized by appointment of law to receive service. Service was sufficient where certificate of service indicated that plaintiff mailed the required documents by certified mail to the Defendant and also mailed copies by certified mail to two individually named members of the Board of Directors at the address of the corporate headquarters. Addressing mailing to a specific named person constitutes mailing "to the attention of" as required by Rule 7004; and members of board of directors would be assumed to be agents to accept service of process.

(6614) *Pixler v. Huff,* 2013 WL 3423530 (W.D. Ky. 2013) – Absent defendant's consent to waive service, Plaintiff must serve defendant following formal procedure for service of process. Record indicated that Plaintiff never obtained summons directed to defendant signed by clerk and bearing court seal.

(6615) *Jahn v. Clayton,* 2012 WL 112940 (Bankr. E.D. Tn. 2012) – Court can deny entry of default where evidence indicates that Debtor did not receive summons or complaint. Service on Debtor by mailing to address shown on petition is sufficient service even if it was substantially likely that Debtor did not reside there as Debtor's chapter 13 plan surrendered the property more than 2 years earlier. Debtor had continuing duty to advise court of current address. Any failure to maintain current address on record of court is fault of Debtor that does not defeat propriety of service.

(6616) *American Home Mortgage Servicing, Inc. v. Johnson,* 2011 WL 2115652 (E.D. Ky. 2011) – Rule 7004 governs services of process in adversary proceedings. It permits service by first class mail upon a corporation by mailing a copy of the summons and complaint to the attention of an officer or any other agent authorized by appointment or by law to receive service of process. Request for Notices filed in main Bankruptcy Case stating that notice should be directed to an appointed agent for service of process does not supersede Rule 7004. Summons addressed to Corporate President at correct corporate address constitutes proper service even if person served and address used differed from that in the Request for Notice.

(6617) *PNC Mortgage v. Rhiel,* 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of "Officer, Managing or General Agent" without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.

(6618) *LaBankoff v. GMAC Mortgage. LLC.,* Case No. 09-1294 (9th Cir. BAP 2010) – Service on an attorney for a party is not sufficient service in an adversary proceeding. Rule 7004(b)(3) requires service by mail to the attention of an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service. Without proof that the attorney has been designated as agent to accept process, service on the attorney is not sufficient. The party effectuating service bears the burden of proof that the person served is authorized to accept service. Attorney can become an implied agent for service where the attorney repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority, based on extensive involvement in the underlying bankruptcy proceeding coupled with evidence that the Attorney previously had been served with papers in the bankruptcy proceeding on behalf of the client without objection and the party's acknowledgement that the attorney acts as general counsel and is regularly and routinely consulted on bankruptcy matters. Attorney whose only connection with bankruptcy case was filing of Notice of appearance 18 days before the alleged service evidenced no intent of the client to appoint the attorney as an agent for service.

(6619) *Sims v. US Bank Home Mortgage*, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but did not specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

(6620) *Steed v. Buckalew,* 2009 WL 3493597 (Bankr. E.D. Tn. 2009) –Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail.

(6621) *Deutsche Bank National Trust Company v. Rogan,* 2009 WL 3415462 (E.D. Ky. 2009) –Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor's Proof of Claim which listed "Bankruptcy Department" as agent for receipt of all notices regarding Bankruptcy Case constituted "appointment" for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

12.86 Service on Debtor – Rule 7004(g)

(6622) *Stone v. Minix,* 2018 WL 3689181 (Bankr. E.D. Ky. 2018) – Rule 7004 requires service on Debtor by mail to Debtor's last known address and to Debtor's counsel. Service on Debtor alone not sufficient. Court vacated Default against Debtor in adversary proceeding where Plaintiff mailed complaint and summons to Debtor but did not send copy to Debtor's attorney. Fact that attorney withdrew shortly after Plaintiff commenced adversary did not excuse service in first instance. However, Court would not dismiss adversary for lack of service where Debtor admitted that he received copy of complaint and summons as service met minimum standards for due process and Debtor was not prejudiced by lack of service on attorney.

(6623) *IRS v. Hayes,* 2011 WL 2490945 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 4(e) governs service within the United States, and

allows service by delivery to the individual's dwelling or usual place of abode. Debtor's temporary employment outside of the United States did not alter status of Debtor's home in Michigan as his "usual place of abode". Debtor's wife was someone of suitable age who resided at the same premises; Debtor listed the property as his residence in his Chapter 7 bankruptcy schedules; and Debtor claimed an exemption under U.S.C. § 522(d)(1), for the property.

(6624) *Spirit SPE Portfolis 2007-1 LLC v. Paxos,* 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires that if the Debtor is represented by an attorney, service must also be made on the attorney.

(6625) *French v. Williams,* 2014 WL 1017604 (Bankr. N.D. Ohio 2014) – Service of Order on Debtor by mail to Debtor's address on file with Court was sufficient even though mail was returned undeliverable. Service by mail is not ineffective or invalidated where mail is not received because Debtor fails to apprise court of correct address. Debtor is required by Rule 4002 to file with court notice of change or address. Debtor cannot avoid consequences of failing to appear where failure resulted from Debtor's violation of Rule 4002.

(6626) *Casab v. Grand Sky Enterprise Co., Ltd.,* Case No. 15-1378 (6th Cir. 2016) – Rule 7004 allows service on Debtor by US Mail sent to Debtor's address. Service was effective where Debtor admitted receipt of the summons and complaint and Plaintiff filed Certificate of Service stating that reissued summons was mailed to Debtor's correct address. Although Debtor alleged that he had moved to Ohio, Debtor failed to present any evidence that he changed his address.

12.87 Governmental Units – Rule 7004(b)(4) and (5)

(6627) *In re Nicholaus,* 2018 WL 799152 (Bankr. N.D. Iowa 2018) - Rule 7004 requires service on the Internal Revenue Service by mail to the IRS designated address, the United States Attorney for the district in which the matter is pending, and by mail on the Attorney General of the United States. Debtor served IRS at the address listed in the Proof of Claim but did not mail to designated address, Civil Process Clerk or US AG. Service was not sufficient for the Court to acquire personal jurisdiction over the IRS, even though the IRS admitted that it actually received the Objection.

(6628) *Spidle v. Hogan,* 2013 WL 1504053 (M.D. Tn. 2013) – Complaint against United States for actions taken in official capacity must be served by (i) delivering a copy of the summons and of the complaint to the United States Attorney for the district where the action is brought; or sending a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; and sending a copy of each by registered or certified mail to the Attorney General of the United States in Washington, DC; and if the action challenges an order of a non-party agency or officer of the United States, sending a copy of each by registered or certified mail to the agency or officer. Plaintiff failed to demonstrate proper service where Plaintiff only served the named defendant by US Mail but did not even attempt service on US Attorney or on the Attorney General. If Plaintiff intended to sue government official or agency, then service must be accomplished by serving the United States and also the named officer. Plaintiff allegedly served the named individual but did not serve the United States. Action dismissed for failure to achieve proper service within time permitted.

(6629) *Markley v. Department of Treasury, Internal Revenue Service,* 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Rule 5003(e) requires service on governmental agency at specified address. Notice mailed to IRS at address other than address required in Rule 5003(e) is ineffective to constitute "notice" of proceeding.

12.88 Insured Depository Institution – Rule 7004(h)

(6630) *In re Drobney,* 583 BR 700 (Bankr. W.D. Mi. 2018) – "Federally Insured Depository Institution" must be served as specified in Rule 7004(h). The term "insured depository institution" includes FDIC insured institutions as defined in section 3(c)(2) of the Federal Deposit Insurance Act; and Credit Union insured by FCUA. Rule 7004 requires service by certified mail directed to named officer of institution; or attorney for Institution where attorney has already appeared in case on behalf of Creditor. . First class mail is not sufficient and service on Institution's attorney is not sufficient unless attorney has previously 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 and did not specify corporate officer; and second attempt was by ordinary mail to attorney in Southfield who may not have been officer of creditor and who had not appeared on behalf of Creditor in action. Court would adjust Debtor-attorney's compensation to account for costs that were unnecessarily increased as result of defective service.

(6631) *Citizens Bank v. DeCena,* Case No. 16-1918 (E.D. N.Y. 2016) – Rule 7004(h)(1) requires service on Federally Insured Depository Institution by certified mail addressed to officer of institution unless institution has appeared in case through attorney, in which case service can be made on the attorney by first class mail. Summons and complaint served on institution by First Class mail was insufficient to constitute service. Lender had no obligation to respond to complaint that had not been properly served. Default Judgment entered against Bank must be set aside as court lacked personal jurisdiction over institution at time default judgment entered rendering judgment void as matter of law.

(6632) *Frates v. Wells Fargo Bank, NA,* Case no. 13-1366 (9th Cir. BAP 2014) – Service of Motion to Avoid Judicial Lien complied with requirements of Federal Rule 7004. Debtor mailed Motion to Bank's CEO by certified mail at proper address and also mailed copy to person who signed proof of claim on behalf of creditor. Debtor did not serve attorney for creditor where attorney had not appeared in bankruptcy case, although attorney did represent creditor in State Court litigation. State Court representation is not authorization to accept service and does not constitute appearance by attorney in case for purposes of Rule 7004.

(6633) *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).

12.89 Service Address

(6634) *Moyer v. Denham,* 2017 WL 1102848 (Bankr. W.D. Mi. 2017) - Section 727(a)(6) allows Court to deny or revoke discharge where Debtor refuses to obey lawful order. "Refusal" requires more than just a failure to comply and requires willful conduct which amounts to civil contempt. Party objecting to discharge must demonstrate that Debtor received Order in question and failed to comply with terms. At that point, Debtor bears burden of explaining noncompliance. Debtor received Court Order requiring Debtor to turnover tax refund and Debtor failed to do so. Debtor did not appear at the hearing or provide any evidence to explain noncompliance. Although Court was reluctant to vacate discharge and revive $130,000 in scheduled debts over failure to remit $1736 in nonexempt tax refunds, 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.

12.90 Alternate Service

(6635) *Glenn v. Nasscond, Inc.,* 2016 WL 612755 (E.D. Mi. 2016) – Federal Rule 4(e) requires service in a manner consistent with state law. In Michigan, upon a showing that service of process cannot reasonably be made as provided in Court rule 2.105, the court may permit service in any other manner reasonably calculated to give defendant actual notice and opportunity to be heard. Plaintiff made sufficient showing that prior attempts at personal service were not successful. The address to which service was addressed was personal residence surrounded by gate and fence and process server was unable to gain access. Certified mail sent to address was unclaimed on one occasion and refused on a second attempt. Plaintiff permitted to attempt service by First Class mail to three separate addresses that appeared for defendant in either the underlying documents or the public records of New York State, where defendant resided and service was to be effected.

12.91 Failure to Serve

(6636) *Real Good Technologies, LLC v. Victory Solutions, LLC,* 2018 WL 1621163 (N.D. Ohio 2018) – 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.

(6637) *In re Roby,* 2017 WL 112519 (Bankr. N.D. Ohio 2017) - Motion to reconsider order avoiding liens that impaired exemptions granted where motion to avoid liens was not properly served rendering order avoiding liens void for lack of jurisdiction. Motion to Avoid Liens is contested matter that must be served according to Rule 7004, which allows service by first class mail on a governmental organization as prescribed by state law. Ohio state law requires that any service on the state or any department must be made by serving the officer responsible for administration of the department. Service of the motion on a Postcard Office box in Columbus did not qualify, as motion was not served on tax Commissioner or Attorney General and was not served at address used by tax Commissioner or Attorney General. Proper service is not "inconsequential factor" and rule 7004 require strict compliance. Even if state treasurer department may actually have received motions, actual receipt does not eliminate need for proper service.

(6638) *Szold v. Guy,* Case No. 15-4603 (Bankr. E.D. Mi. 2015) – Plaintiff's failure to serve the complaint and summons by deadline established by Rule 7004 dismissed after Court entered order allowing plaintiff an additional 7 days to obtain service and plaintiff still failed to serve defendants.

(6639) *Crehan v. Maiden Lane, LLC,* 2014 WL 467568 (W.D. Mi. 2014) – Case dismissed as to un-served defendants where Plaintiff failed to obtain service in more than 9 months since commencement of action. Plaintiff's statement that he was "too busy with other matters" to attend to service of process did not excuse compliance with Federal Rule 4.

(6640) *LaBankoff v. GMAC Mortgage. LLC.,* Case No. 09-1294 (9th Cir. BAP 2010) – Court disregarded Supplemental Certificate of Service and concluded that defendant had not been properly served where the Court record reflected that Plaintiff had never filed the "Supplemental Certificate" and Plaintiff's own Motion for Default referenced earlier date on which proper service had not been made and failed to reference alleged later, proper service.

(6641) *Galloway v. Reis,* Case No. DT 09-10374 (Bankr. W.D. Mich. 2010) – Personal service of Summons and complaint on defendant ineffective where personal service occurred 39 days after summons issued. Rule 7004(e) required service within 10 (now 14) days after issuance of summons. After expiration of time to serve, Summons became stale and could not confer personal jurisdiction. Service of summons by mail ineffective where Plaintiff timely mailed summons to Defendant but failed to mail a copy to Debtor's counsel as required by Rule 7004(g). Service by mail does not require proof of receipt by Debtor, but does require mailing to Debtor and, if represented by counsel, to Debtor's counsel. Service of process is means by which Court acquires personal jurisdiction – Court must insist on strict compliance with service requirements.

(6642) *Greenhill v. Beneficial Michigan, Inc.,* Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed where Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and offered no excuse or explanation for failure.

(6643) *Simon v. ASIMCO Technologies, Inc.,* Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Federal Rule of Civil Procedure, incorporated through Bankruptcy Rule 7012, allows for service of an adversary proceeding complaint on corporation by first class mail addressed to the attention of an officer, managing or general agent, or other agent authorized by appointment or applicable law to receive service. Service properly made on person identified on defendant's website as "CEO" notwithstanding assertion by defendant that party had resigned as CEO prior to the date on which service was made. However, certificate of service failed to show service on individual defendant – court lacked jurisdiction over individual defendant.

12.92 State Law Requirements

(6644) *Hubbard . Nationwide Lending Corp.,* 2018 WL 3631971 (E.D. Mi. 2018) - Michigan law governing service on private corporations requires personal service of summons and complaint on director, Trustee or person in charge of office or business establishment and registered mail to principal office of corporation; or by serving summons and complaint on last presiding officer, president, cashier, secretary or treasurer of corporation that has ceased doing business. If corporation's term of existence has expired, service may be made by sending summons and complaint by registered mail to corporation and to Michigan Bureau of Commercial Services if corporation has otherwise failed to appoint and maintain resident agent. Officers and agents of corporation cannot be served by US mail. Court can allow "substitute service" with prior approval of the Court. Plaintiff did not comply with service requirements where plaintiff mailed a copy of complaint to defendant Corporation at corporations last known address and received notice that certified letter was not deliverable as addressed. Court did not acquire jurisdiction over unserved defendant.

K. Parties

12.93 Necessary and Indispensable Parties

(6645) *Reed v. Nathan,* Case No. 16-2685 (6th Cir. 2017) – Rule 19 requires joinder of indispensable parties, defined as parties without whom court cannot afford complete relief or who claim interest in subject of the action. State Attorney General is not indispensable party in action against non-profit corporation. Michigan Compiled Laws Section 14.251, 14.254 and 450.2301 require joinder of Attorney General only when action is against charitable trust. Defendant was non-profit corporation but not charitable trust. Further, corporation had not been dissolved and Plaintiff was not seeking dissolution, and Section 450.2301 does not address turnover actions or actions to recover specific items of property from non-profit corporation.

(6646) *Still v. Hopkins,* 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Rule 7019 defines "required party" as one who is subject to service of process; whose joinder will not deprive court of subject matter jurisdiction; and that either in absence of party, court cannot accord complete relief, or that the person claims an interest in the action and disposing of action in absence of party may as a practical matter impede or impair the person's ability to protect their interest or leaves an existing party subject to double or inconsistent obligations. A person or entity is only indispensable, within the meaning of Rule 19, if (1) it is necessary, (2) its joinder *cannot* be effected, and (3) the court determines that it will *dismiss the pending case* rather than proceed in the case without the absentee. In normal case, where Debtor has completely divested himself of any interest in property that is subject of the action, Debtor is not necessary party as Debtor has no interest in the outcome of the matter. Trustee sought to set aside transfer of property owned by Debtor, which granted fee title to Debtor's children but retained a life estate for Debtor. Debtor's life estate constituted an interest in the real property that is the subject of the action and is so situated that disposing of the adversary may impair or impede Debtor's ability to protect that interest. Resolution of adversary involves Debtor's claim of exemption and court cannot accord complete relief among parties absent Debtor's joinder. Court can join Debtor without raising issues of subject matter jurisdiction. However, Debtor did not have interest in property that would be impaired by outcome of adversary where Debtor's interest was limited to the monetary value of $12,500, and no particular right to actually use or possess the specific property. If trustee prevails in adversary and sells property, Debtor will receive $12,500 and will have opportunity to protect Debtor's interest at that point. Debtor is not indispensable party to adversary to avoid transfer as fraudulent.

(6647) *Lyon v. Rappaport,* 2011 WL 652744 (6th Cir. BAP 2011) – Sixth Circuit has three-step analysis to determine whether a case should proceed in the absence of a particular party. Court must first determine whether person is necessary to the action. If so, the court must determine whether the party is within the Court's jurisdiction. Finally, the court must determine whether equity and good conscience would permit case to proceed or whether the missing party is indispensable. Case should be dismissed only if party is indispensable and is beyond the jurisdiction of the court or cannot be joined without destroying subject matter jurisdiction. Party was not indispensable where full relief would be afforded among the parties without the joinder of the additional party . Defendant's potential liability for fraudulent transfers was independent of any potential liability of any third party not joined in the suit as defendant was individually responsible for any damages the plaintiff may recover. However, omitted party was necessary and could be joined without destroying court's jurisdiction. Proper course of action is not to dismiss case, but to order joinder of necessary party.

12.94 FDIC as Receiver

(6648) *Brandt v. FDIC,* Case No. 11-2215 (Bankr. E.D. Ill. 2016) – FDIC stands in shoes of failed financial institution for purposes of administering the assets of the failed bank. Complaint seeking to recover allegedly fraudulent transfers to bank by Debtor barred by *D'Oench Duhme* and 12 USC Section 1823(e). FDIC cannot be liable for secret side agreements or any unrecorded or secret agreement not contained in records of bank. Scope of "agreements" that cannot be enforced is broad and includes not only misrepresentations but also omissions, promises to perform, and fraudulent misrepresentations or warranties; and includes schemes and arrangements including outright misrepresentations and misleading half-truths. The only relevant question is whether the agreement or representation is contained in the books and records of the institution. Trustee's attempt to recover funds based on alleged fraudulent scheme between Debtor and equipment financing company that resulted in loans from bank and subsequent repayments. Entire cause of action was predicated on secret agreement between equipment seller/lessee and equipment buyer/lessor to falsify sale-leaseback transactions included secret agreement between seller and buyer to falsify records and obtain financing for nonexistent transactions, agreements that were not disclosed in records of bank. Fact that bank was not party to fraudulent scheme did not limit FDICs defense as alleged scheme was being asserted to diminish or defeat FDIC's right, title and interest in the funds now sought to be recovered by Trustee. Scheme was one by which the institution itself was likely to be misled and were not in writing, executed by bank, or approved by board of directors of bank.

(6649) *Shirk v. JPMorgan Chase Bank, N.A.,* (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA)

claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.

(6650) *Jahn v. Bedford Consulting Group, LLC.,* 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

12.95 Identity of Plaintiffs

(6651) *Sequatchie Mountain Creditors v. Detweiler,* 2011 WL 3471519 (Bankr. N.D. Ohio 2011) – Caption of Complaint that named various individuals "known as the Sequatchie Mountain Creditors" joined only named individuals as plaintiffs and did not join members of the Sequatchie Mountain Creditor group that were not specifically named. Federal Rule of Civil Procedure 10(a), made applicable through Federal Rule of Bankruptcy Procedure 7010, requires title of complaint to name all parties with specificity.

12.96 Substitution of Parties

(6652) *GMAC Mortgage, LLC v. McKeever,* 2016 WL 3090330 (6th Cir. 2016) – Rule 17 provides that action will not be dismissed for failure to name the real party in interest unless, after an objection, reasonable time is provided to allow real party in interest to join action or to be substituted into action. Mortgage servicer who initially brought action had sufficient interest in action when case was commenced to support complaint. As such. Servicer had standing to file motion to substitute lender as real party in interest in response to defendant's objection under Rule 17.

L. Pleadings

12.97 Calculation of Deadlines – Generally

(6653) *Kim v. U.S. Department of Education,* Adv. No. 10-80774 (Bankr. W.D. Mi. 2012) – Debtors failure to serve initial summons did not create any obligation of defendant to respond. Defendant's failure to respond within 30 days of service of original complaint could not support entry of default. Suit against US DOE is suit against US or an agency or officer thereof, with the defendant having 35 days to respond. Amended Summons served December 22 and US filed answer on January 26, exactly 35 days after service. Answer was timely, precluding entry of default.

(6654) *Allstate Insurance Company v. Harris,* Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Rule 9006 provides for additional three days in calculating deadline to respond, and applies whether the pleading was served by mail or electronically through Court's ECF system. Court Order required service of answer within 14 days of service of amended complaint. Amended complaint filed and served on June 1. Allowing 14 days produces deadline of June 15, plus three additional days extends deadline to June 18. Answer filed on June 18 was timely under Rule 9006.

12.98 Complaint

(6655) *Bennett v. Lindsey,* Case No. 17-50746 (5th Cir. 2018) – Complaint to except discharge under Section 523(a)(2) must plead fraud with particularity. Complaint that alleged that Debtor, a building contractor, signed a false affidavit swearing that all subcontractors had been paid did not state a cause of action where complaint did not allege that builder new affidavit was false or that builder intended at homeowner to rely on affidavit. Conclusory allegations do not meet heightened pleading requirements under Rule 9. Complaint must layout who, what, when, where and how of alleged fraud. Complaint should, at least, have listed subcontractors who were not paid, amounts remaining to be owed, and liens filed against home. Court did not commit error by refusing to allow amended complaint or plaintiff did not request leave to file amended complaint and plaintiff did not describe substantive allegations he would add to complaint.

(6656) *Ball v. United Cumberland Bank,* 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Complaint must contain sufficient factual matter, accepted as true, to state claim to that is plausible on its face. Claim has facial plausibility when plaintiff pleads factual content that allows Court to draw reasonable inference that defendant is liable for misconduct alleged. Plausibility is not a probability requirement, but is more than sheer possibility that defendant acted unlawfully. Complaint that pleads facts that are merely consistent with defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. Court considering motion to dismiss can identify pleadings that are no more than conclusions and are not entitled to assumption of truth. Court should identify well-pled factual allegations and should assume their veracity and then determine whether they plausibly give rise to relief. Pleading that offers labels and conclusions or formulaic recitation of elements of cause of action or tenders naked assertions without supporting facts fails to state cause of action. Complaint failed to state cause of action contesting Bank's offset of Debtor's bank account where, after bankruptcy case was dismissed and before case was reinstated, Bank setoff against Debtor's account. Bank had contractual right of setoff and could exercise that right while the case was dismissed without violating stay. As of reinstatement of case, funds were no longer in Debtor's account and were not property of estate. Complaint did not plead cause of action to avoid transfer and bring funds back into estate, but only sought relief under Section 522 and Section 542. Section 522 did not apply because Debtor did not claim funds as exempt and, as result of setoff, funds were not property of estate and were not subject to exemption. Section 542 applies only to turnover of property of estate, and funds were not property of estate. Complaint dismissed without leave to amend where Court dismissed initial complaint and Court specifically warned Plaintiff that it would have one chance to amend to fix issues, and Plaintiff filed two additional amended complaints, neither of which addressed defects in initial complaint, and Plaintiff did not file Motion for Leave to file another Amended Complaint. Justice did not require another opportunity to amend where Initial Complaint and the Amended Complaints were poorly drafted and contained obvious mistakes. Allowing another chance to amend is unduly prejudicial to the Bank. Further, any amendment would be futile. Contractual setoff is not a judicial or quasi-judicial

process that would violate 42 U.S.C. § 407 and Bank had contractual right of setoff exercised by the Bank at a time when there was no bankruptcy proceeding.

(6657) *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.

(6658) *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.

(6659) *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.

(6660) *Spradlin v. Pryor Cashman, PC,* 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Complaint to recover "constructively fraudulent" transfer under section 548(a)(1)(B)(ii) requires transfer of property of the Debtor within two years before the date of the filing of the petition where Debtor received less than reasonably equivalent value and either was insolvent on the date of the transfer or became insolvent as a result of the transfer. Complaint alleging "constructive fraud" is not subject to strict pleading requirements of Rule 9(b), but complaint must still identify transfers to be avoided including dates of transfers, name of transferor, and name of transferee. Payments by Corporation to defendant were for reasonably equivalent value where defendant held judgment against Corporation and payments were reduction of balance owed. Debtor is "insolvent" for purposes of constructive fraudulent transfer or liabilities exceed assets as of date of transfer. Allegations that Corporation was insolvent in 2010 through 2011 were insufficient to establish that Corporation was insolvent when Corporation made transfers in March, 2013, nearly 2 years later.

(6661) *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".

(6662) *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.

(6663) *Mason v. Pichler,* Case No. 12-3348 (Bankr. E.D. Mi. 2017) - Federal Rule of Civil Procedure 9, made applicable by Federal Rule of Bankruptcy Procedure 7009, requires allegations of fraud or mistake be stated with particularity. Although initial pleadings were broad, subsequent pleadings and arguments of counsel pinpointed time, date, identity of actions, and statements made sufficiently narrowing issues and making all parties aware of what was contested.

(6664) *McGinness v. Select Portfolio Services,* 2016 WL 5403576 (Bankr. E.D. Tn. 2016) – Adversary proceeding contesting validity of foreclosure sale dismissed where complaint did not allege any facts to draw any inference that defendants were liable for misconduct or that defendants

even committed any misconduct. Conclusory statement that foreclosure sale was illegitimate was mere legal conclusion and complaint contained no factual allegations for purposes of Rule 12 and *Iqbal*. Court is not required to accept as true bare legal conclusions and complaint otherwise bereft of facts fails to state claim on which relief can be granted.

(6665) *Enoch- Combs v. Steinour,* 2016 WL 2990934 (N.D. Ohio 2016) – *Pro se* plaintiff's complaint failed to contain sufficient facts to support cause of action. Complaint alleged only that she owes money for delinquent taxes and that IRS may have levied plaintiff's bank accounts causing bank to allegedly wrongfully withdraw funds from accounts. Complaint made reference to "Consumer Protection Act", Truth in Lending Act, Civil Rights Act, and Federal Deposit Insurance Act but did not allege any facts that would, if assumed to be true, constitute violation of any of these provisions where complaint failed to identify *which* federal consumer protection act was referenced; Truth in Lending applies only to lending situations and there was nothing alleged that would amount to loan between bank and plaintiff; Civil Right Act applies only to Federal and State actors and CEO of Bank is not state or federal actor; and FDIC act does not create any private right of action.

(6666) *West v. Home Savings & Loan,* 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Complaint must contain short and plain statement showing plaintiff is entitled to relief and must contain sufficient facts to state claim that is plausible on its face. Labels and conclusions and formulaic recitation of elements of cause of action are not sufficient. Claim has facial plausibility when plaintiff pleads factual content that allows court to draw reasonable inference that defendant is liable for the misconduct alleged. Complaint must state more than a sheer possibility that defendant acted unlawfully. Where well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, complaint fails to show that pleader is entitled to relief. Complaint that is jumble of allegations and mélange of statutory citations is stated caused of action where court could glean sufficient facts to indicate that Debtor received a discharge under Chapter 7 and was now bringing suit against creditor for violation of discharge injunction. However, complaint did not state viable legal theory as there is no private right of action for damages for violation of discharge injunction. Remedy lies in contempt proceedings, not separate lawsuit for damages.

(6667) *Vogt v. Hastings,* 2014 WL 2212159 (Bankr. N.D. Ohio 2014) – Letter to court construed as complaint under Section 523(a)(2) failed to state cause of action. Fraud must be pled with specificity. Letter asserted date that loan was made and amount of loan, but did not allege any facts that would establish fraud. Statements that Debtor made "no real effort to repay" and Debtor was an "able bodied man who conned me out of my savings" were not sufficient to establish anything more than breach of contract.

(6668) *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; of if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether the Debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the Debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the Debtor; (6) Whether the Debtor absconded; (7) Whether the Debtor removed or concealed assets; (8) Whether the value of the consideration received by the Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether the Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (11) Whether the Debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the Debtor. Complaint sufficiently alleged fraud under *Twombly* standard where complaint alleged that the Plaintiff had sued the defendant prior to the date on which the defendant transferred assets to insider; that defendant transferred assets and money aggregating over $1.6 million with knowledge of the pending litigation; defendant did not receive any value in exchange for the transfer; and that defendant was insolvent at the time of the transfer. Specific factual allegations supported at least 5 "badges of fraud" sufficient to state cause of action under *Twombly* standard.

(6669) *Moyer v. Koster,* Case No. 12-80174 (Bankr. W.D. Mi. 2012) – Adversary complaint seeking to recover allegedly fraudulent transfers must do more than parrot the statutory elements for constructively fraudulent transfers. Trustee's complaint alleging numerous transfers by Debtor to third parties as part of "Ponzi scheme" sufficiently alleged Debtor's intent to hinder, delay and defraud creditors which meets the *Iqbal* and *Twombly* standard. Very nature of a Ponzi scheme allows court to infer fraudulent intent. Complaint is based on multiple transactions and ongoing artifice and deception going back many years, and it would be impossible for Trustee to enumerate every misrepresentation in the context of a Ponzi scheme. However, complaint did not state cause of action for transfers allegedly made by Debtor's "alter ego" entities because complaint referenced only transfers "from the Debtor" with no reference to any transfers allegedly made by any third party and did not state that property transferred was property of the Debtor, amounts allegedly transferred by each of the transferors, or when during the relevant "look back" period the transfers occurred.

(6670) *Sharrieff v. Huntington Bank,* 2012 WL 3253160 (W.D. Tn. 2012) – Court can summarily dismiss action where complaint fails to state cause of action or to demonstrate court's jurisdiction. Plaintiff did not file complaint to commence action. Instead, Plaintiff filed Affidavit of Negative Averment, Opportunity to Cure, and Counterclaim that contained few coherent factual allegations. Plaintiff alleged that Huntington sold the original note but failed to give credit to Plaintiff's account" and that the "note was created on my credit, and signature, and was not an asset of" Defendants. Remainder of Plaintiff's filing is unintelligible. The case caption describes Plaintiff as a Third Party Plaintiff in Admiralty, yet this is not an admiralty case. The filing contends that Defendants do not have the original note, and it refers to "Dishonor in commerce, Theft, Fraud, Conspiracy, and Racketeering and Trespassing authorized by U.S. Code Title 18." The filing avers that Plaintiff tendered a lawful payment to Huntington to settle his debt and that, by accepting the payment, Defendants have "chosen to dishonor [Plaintiff's] lawful payment and [have] refused to zero the account." Plaintiff further avers that "Lawful Money no longer is available for payment of debt in our economic system." To the extent complaint alleged violations of 18 USC Sections 241 and 242, those are criminal statutes for which no civil remedy is available. To the extent complaint attempted to state cause of action for RICO, allegations were well short of Rule 9 requirement that party must plead with particularity fraud or mistake. Allegations of complaint were insufficient to determine whether diversity jurisdiction existed and did not establish any independent basis for federal court jurisdiction given failure to state any legally cognizable federal cause of action.

(6671) *Degirolamo v. McIntosh Oil Co.,* 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularly the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of "badges of fraud" including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices. Under Ohio state law, preference action requires "(1) a sale, conveyance, transfer, mortgage, or assignment made by a Debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged "design to prefer' by alleging that sales of fuel at below market prices resulted in Debtor's inability to pay suppliers, leading to involuntary petition. Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers.

(6672) *Richardson v. Checker Acquisition Corporation,* 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to " 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' Plaintiff's obligation to provide the grounds for relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

(6673) *Lyon v. Rappaport,* Case No. 10-8059 (6th Cir. 2011) – Action to recover fraudulent transfer under Section 548 must be pled with specificity. Complaint that failed to plead factual basis for every element of cause of action would be dismissed. Mere "formulaic recitation" of elements of statute is insufficient.

(6674) *Morris v. Paine,* 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Rule 9 requires that complaint alleging fraud or mistake must state with particularity circumstances constituting fraud or mistake. Plaintiff must, at a minimum, allege the time, place and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. Debtor's complaint very generally alleged that the three Bankruptcy Judge defendants tried to play a game of "bait and switch" by constantly having a judge who was not assigned to his bankruptcy case hear a particular matter; and that the defendants conspired against him to deprive him of his property by confirming no automatic stay was in effect when his prior chapter 13 case was filed. Debtor did not plead fraudulent allegations with any specificity as to date, time, place, etc. Even if he had, claims of the judges playing "bait and switch" with him are wholly without merit. A bankruptcy judge in one judicial district is not prohibited from hearing another case in that same district. Section 362(c)(4)(A)(i) mandates that if a Debtor has had "2 or more single or joint cases ... pending within the previous year ... that were dismissed ... the stay under subsection (a) *shall not go into effect* upon the filing of the later case." Subsection ii provides that if a creditor requests an order confirming the automatic stay did not go into effect pursuant to § 362(c)(4)(A)(i), "the court *shall promptly enter an order confirming no stay is in effect.*" A Bankruptcy Judge has no discretion in issuing said order. If the Debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect. Defendants' simply did what the Bankruptcy Code dictated they must do.

(6675) *Montano-Perez v. Durrett Cheese Sales, Inc.,* 666 F. Supp. 2d 894 (M.D. Tn. 2009) - Although a complaint need not plead detailed factual allegations, those allegations must be enough to raise a right to relief above the speculative level. The factual allegations must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. Although Federal Rule of Civil Procedure 8 establishes a "liberal system of notice pleading, plaintiff's must plead more than labels and conclusions, or a formulaic recitation of the elements of a cause of action.

(6676) *D.A.N. Joint Venture, III, LP v. Shekerjian,* Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of $2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

12.99 Counterclaim

(6677) *Romero v. Samano,* 2017 WL 2110788 (N.D. Ohio 2017) – Motion to Amend to add counterclaim governed by Federal Rule of Civil Procedure 15 which allows party to amend once as a matter of right within 21 days after service if pleading is one that does not require response. Once 21 days passes party may amend only with consent of opposing party or court permission. Court will allow amendments when justice requires unless amendment would be futile. Proposed counterclaim was not ripe for adjudication where counterclaim sought declaration that plaintiff was jointly liable with Debtor regarding taxes that Debtor may have to pay in future. Debtor had not paid outstanding liabilities and until it does, complaint for contribution raises only hypothetical question or possibility that plaintiff could be jointly liable.

(6678) *Rose v. Friendly Finance Co.,* 2016 WL 98597 (S.D. Ohio 2016) – Counterclaim must meet pleading requirements to state cause of action.

Counterclaim that did nothing more than identify potential members of a class action suit did not state cause of action and would be dismissed.

12.100 Third Party Complaint

(6679) *Rathinam v. Ashok Spiritual Healing Center,* 2015 WL 4132809 (S.D. Ohio 2015) – Third party complaint appropriate only where defendant may have right to indemnity or contribution from third party for some or all claims against defendant. Third party complaint that did not state cause of action against alleged third party defendant for either indemnity or contribution dismissed.

(6680) *Swain v. Swain,* 2010 WL 2812727 (Bankr. N.D. Ohio 2010) – Defendant in adversary proceeding can file third party complaint to join non-parties where proposed third party defendant is jointly liable with main defendant or where third party defendant may have derivative liability. Third-party defendant's liability must be derivative and must flow to the third-party plaintiff; mere liability by the third-party defendant to the main plaintiff will not suffice. Third-party practice usually involves claims in the nature of contribution, indemnity, and subrogation. Third party complaint not proper merely because claims arise out of same transaction where third party liability is independent of primary action. Third party complaint dismissed where allegations, if true, would make third party defendant liable directly to the primary defendant; outcome of main action does not drive outcome of third party action; and defendant could maintain direct action against third party defendant in unrelated adversary proceeding. Plaintiff's main action was for non-dischargeability under Section 523(a)(2). Nothing in the third party complaint could leave the third party defendants secondarily liable to Debtors.

12.101 Responsive Pleadings – Deadline for Filing

(6681) *Stone v. Minix,* 2018 WL 3689181 (Bankr. E.D. Ky. 2018) – Court has discretion to extend deadline to file response to complaint even after entry of Clerk's default. Court treated pro se Debtor's late-filed answer is Motion to Vacate Default. Court vacated default where proposed Answer established cause for Court to set aside default and treated Answer as properly filed..

(6682) *McDermott v. Junk,* 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – Rule 7012 requires answer or responsive pleading be filed within 30 days of issuance of summons. Request for extension must be filed before deadline expires. Rule 9006 allows court to extend time after expiration of initial period only for excusable neglect. Debtors failed to show excusable neglect in failing to file answer or responsive pleading by expiration of allowed period.

12.102 Answer and Affirmative Defenses

(6683) *Pidcock v. Schwab,* 2017 WL 1155555 (E.D. Ohio 2017) – Pleading requirements for affirmative defenses do not require pleading with particularity as required for Complaints under Rule 9. Affirmative defenses may be pleaded in general terms and are sufficient as long as pleading is plaintiff fair notice of nature of defenses.

(6684) *Peters v. Credit Protection Assn, LP,* 2014 WL 1049913 (S.D. Ohio 2014) – Sixth Circuit does not require affirmative defenses to be subject to heightened pleading standards of *Twombly* and *Iqbal*. Affirmative defenses do not need to show that defendant is entitled to affirmative relief and may be plead in general terms as long as it gives plaintiff fair notice of defense. Affirmative defense that alleged only that plaintiff's claims are barred by doctrines of estoppel, waiver, unclean hands, and other equitable doctrines. Upon information and belief, Plaintiff's equitable claims are barred by his own action or inaction and his own conduct or misconduct sufficient to apprise plaintiff of nature of defenses. Affirmative defense that did nothing more than preserve right to amend affirmative defenses not subject to striking as any future attempt to amend to add defenses would be subject to Rule 15.

(6685) *McDermott v. Swanson,* Case No. 12-6028 (8th Cir. BAP 2012) – In action to deny discharge under Section 727(a)(3), Debtor's justification for failing to keep or maintain records is not affirmative defense that must be pled. Lack of justification is essential element of Plaintiff's case. Allegation that merely negates element of plaintiff's prima facie case is not an affirmative defense and is not waived merely because defendant does not plead that in response to the complaint.

(6686) *Gordon v. Ameriquest Mortgage Corp.,* 2011 WL 1659873 (Bankr. N.D. Ga. 2011) – Affirmative defenses must be pled with same specificity as is required of complaint itself. The Court decisions in *Iqbal* and *Twombly* are equally applicable to affirmative defenses. Affirmative defenses stated as summary conclusions with no statement of the factual basis for the defense would be stricken.

(6687) *Phillips v. Deutsche National Trust,* Case No. 09-6109 (Bankr. N.D. Ohio 2010) - Answer to complaint must be filed within 30 days unless the court sets a different time. Court can extend the time even after the time has expired if the failure to file the answer in a timely manner is caused by inadvertence, mistake, or careless, as well as by intervening circumstances beyond the party's control."). In determining whether neglect is excusable the Court should consider' all relevant circumstances including the danger of prejudice, the length of the delay, the reason for the delay, and whether the movant acted in good faith. Court would extend time to file answer where it is unlikely that the plaintiffs would be prejudiced by allowing the defendants to respond as evidenced by the plaintiffs' reluctance to prosecute their case. Further, parties were involved in settlement discussions and, at one time, believed that the case would settle.

(6688) *Hunts with Double Indoor, LLC, v. Daniel A. Peyerk Living Trust,* Case No. 10-4525 (Bankr. E.D. Mi. 2010) – Michigan Statute of Frauds prohibits promise made to creditor to pay debts owed by third party unless the promise is in writing and signed by the party agreeing to make the payments. However, Statute of Frauds does not apply where third party assured Debtor directly that third party would pay Debtor's obligations. A promise to pay the debts of another does not fall within the Statue of Frauds when the promise is made directly to the Debtor rather than to a creditor. Therefore, the oral promise made to the Debtor that third party would pay Debtor's debts is enforceable as long as the promising party received consideration for the promise.

(6689) *General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Trustee's complaint is not subject to affirmative defenses which are based on the pre-petition conduct of the Debtor. Defenses of waiver, estoppel, laches, setoff, accord and satisfaction, and negligence, all based on Debtor's pre-petition conduct did not bind the Trustee as Trustee lacked privity with the Debtor

and the defenses constitute defenses personal to the Debtor.

(6690) *Gold v. Deloitte & Touche, LLP,* 2009 WL 1738465 (E.D. Mi. 2009), *aff'd,* 2010 WL 3782187 (6th Cir. 2010) – Cause of action for professional negligence is governed by state law. Negligence requires (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. Proof of causation requires both cause in fact and legal, or proximate, cause. When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury. Where evidence indicated that nobody relied on audit report prepared by defendants, plaintiff could not maintain cause of action for professional negligence. Further, plaintiff cannot recover where defendant's alleged negligence prevented third parties from learning about, and stopping, improper transactions of which plaintiff was fully aware.

12.103 Affirmative Defense – Failure to Plead

(6691) *Bash v. Textron Financial Corp.,* 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – As a general rule, failure to plead affirmative defense results in forfeiture of that defense. Defendant may raise affirmative defense for first time in a motion for summary judgment if doing so does not result in surprise or prejudice to plaintiff. Court should consider delay between filing Answer in first instance and assertion of Affirmative Defense; f whether acts establishing defense had been known for lengthy period; and whether Plaintiff's attorneys had sufficient information to know that Defendant may assert defense.

12.104 *In Pari Delicto*

(6692) *Neblett v. Brothers,* 2018 WL 324400 (E.D. Ky. 2018) – *In pari delicto* defense damages plaintiff participating in same long as defendant and is premised on principle that Court will not lend aid to files cause of action based on immoral or illegal. Doctrine applies to Chapter 7 Trustee to same extent as if action brought by Debtor as plaintiff. Debtor's principal engaged in scheme to acquire and illegally export computer chips rendering Debtor at least as culpable as the other defendants in illegal export scheme. "Adverse Interest" exception provides that knowledge of agent is not imputed to principal where agent would not communicate fact in controversy such as where communication would prevent fraudulent scheme by agent. Exception does not apply where principal actually benefits from transaction. Financial records of Debtor indicated that Debtor substantially profited from illegal export of computer chips generating approximately $40 million in revenue which company then used to pay operating expenses.

(6693) *Gordon v. Royal Palm Real Estate Investment Fund I, LLLP,* 2018 WL 2382090 (E.D. Mi. 2018) – *In pari delicto* is equitable principle that Court will not provide recovery for person who participates in immoral or illegal act. Doctrine requires that plaintiff bear at least substantially equal responsibility for violation sought to be redressed; and preclusion of suit would not significantly interfere with effective enforcement of other laws. Plaintiff must be active, voluntary participant in unlawful activity. Receiver stands in shoes of entity or estate being represented and is subject to same defenses as could be brought against entity. Receiver acting on behalf of person convicted of Ponzi scheme not barred. Although record conclusively established that Ponzi scheme participants bore at least substantially equal responsibility for violations sought to be redressed as investments made by Ponzi scheme participants resulted from investment of proceeds of illegal Ponzi scheme activity and Ponzi scheme participants were active, voluntary participants in the underlying scheme. However, preclusion of suit would interfere with effective enforcement of federal law where permitting Ponzi scheme defendant who plainly violated federal securities law to evade liability would thwart purpose behind securities laws. Precluding action would not protect investing public where any recovery by receiver would be distributed to defrauded investors and real parties to be affected by ruling would be members of investing public.

(6694) *Bash v. Textron Financial Corp.,* 2018 WL 1069443 (Bankr. N.D. Ohio 2018) – *In pari delicto* defense establishes that where Plaintiff and Defendant are at equal fault, and is equitable defense is used to bar plaintiff's recovery when plaintiff bears at least substantially equal responsibility for underlying illegality. Trustee stands in shoes of Debtor and *in pari delicto* defense may be raised against trustee to same extent as against debtor prior to filing of bankruptcy**.** Principal is generally charged with knowledge of and conduct undertaken by agent operating within scope of employment but knowledge and conduct not imputed to principal if agent is engaged in committing independent fraudulent act on his own account, and facts to be imputed relate to fraudulent act. Acts of agents will be imputed if agents responsible for adverse conduct are officers or directors of principal and so dominated and controlled principal that principal had no separate mind, will, or existence of its own and malfeasance on their parts is attributable to principal. Even if agent exercises control over principal, conduct of agent will not be imputed to principal if innocent person inside the corporation had power to stop fraud. Principals of Debtor so dominated Debtor that no innocent person inside corporation had the power to stop fraud. *In pari delicto* prevented Trustee from prevailing in actual fraudulent transfer action as debtor's principals were at least equally responsible for fraudulent conduct complained of.

(6695) *Indian Harbor Insurance Company v. Zucker,* 2017 WL 2641085 (6th Cir. 2017) - Chapter 11 Debtor-in-possession is "mere continuation" of prepetition Debtor. Debtor-in-possession and pre-bankruptcy company are not distinct legal entities. Where prepetition Debtor could not bring cause of action against insurer, Debtor-in-possession also cannot bring action against insurer as Debtor-in-possession is subject to same restrictions as would have existed prior to commencement of bankruptcy case. Liquidating Trustee appointed consensually as part of confirmation of Chapter 11 Plan also steps into shoes of Debtor-in-possession and is not a distinct legal entity. Accordingly, voluntarily appointed Trustee also cannot bring action against insurance company where prepetition Debtor would not have been permitted to do so. Voluntarily appointed Trustee, even though appointed as part of confirmation process, is different than Court appointed Trustee who would receive right to sue on estate's behalf.

(6696) *National Credit Union Board v. Zovkic,* 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) requires that Debtor obtained money through material misrepresentation that, at time made, was known to be false or was made with gross recklessness; Debtor intended to deceive; creditor justifiably relied; and reliance was proximate cause of loss. Material omission may constitute misrepresentation, as well as any fraudulent scheme to deprive another pf property or legal right. Misrepresentation is material is material if it contains substantial inaccuracies of a type that would generally affect lender's decision. Intent requires either intent to deceive or gross recklessness and may be proven by circumstantial evidence including whether Debtor's actions were so inconsistent with self-serving statements to demonstrate

that Debtor lacked intent. Reliance must be both actual and justifiable, and creditor does not have duty to investigate to discover fraud but where facts should be apparent to one of creditor's knowledge and intelligence from cursory glance, or if creditor discovers something to serve as warning of possible deception, creditor has duty to investigate further. Where officer of lender was aware of and participated in fraudulent scheme, knowledge will be imputed to lender for purposes of defeating reliance unless principal was acting as "rogue agent", engaged in fraudulent act on own account and facts to be imputed relate to that act, such as where officer uses position to loot corporate assets for own benefit. Doctrine is limited by "sole actor" doctrine where "rogue agent" so dominated and controlled the institution such that institution had no 'separate mind", then officer is alter ego of principal and any malfeasance of officer will be imputed to institution. Conduct of Chief Operating Officer of institution imputed to institution where COO was authorized to make loans without consent of any board or other employee or officer of institution, effectively allowing COO to act as one person operation in making lending decisions including loans to Debtor.

(6697) *Rand v. Lee,* Case No. 15-1563 (Bankr. E.D. Ca. 2016) – Trustee seeking to avoid transactions under "strong arm" power of Section 544 stands in shoes of Debtor and has no better rights or powers and is subject to same defenses as Debtor would have had but for bankruptcy filing. Where Debtor actively participated in fraudulent transfers trustee or receiver cannot later bring action against recipients with whom Debtor conspired "Adverse interest exception" applies only where corporate agents act in manner adverse to interests of corporation such that action so f agents are not imputed to corporation. However, actions taken by Debtor's Board of Directors and Debtor's attorneys acting at direction of Board, fact questions exist as to whether law firm was acting beyond scope of representation of company sufficient to constitute independent party acting with interests that are adverse to Debtor.

(6698) *Bash v. Textron Financial Corporation,* 2016 WL 4437606 (6th Cir. 2016) – *In pari delecto* is equitable defense used to bar a plaintiff's recovery when the plaintiff bears at least substantially equal responsibility for the underlying illegality. *In pari delicto* defense can bar the actions by bankruptcy trustee against third parties who participated in or facilitated wrongful conduct of the Debtor. *In pari* delecto defense may be raised against a bankruptcy trustee to the same extent it could have been raised against a Debtor prior to the filing of bankruptcy. Although actions of agents of corporation taken outside scope of authority are generally not imputed to corporation, such that corporation will be "blameless", exception does not apply if agents responsible for adverse conduct are the officers or directors of the principal and those officers or directors so dominated and controlled corporation that corporation had no separate mind, will, or existence of its own, then the officers and directors are alter egos of the principal and any malfeasance on their parts is directly attributable to the corporation. However, if corporation had at least one innocent person who had poser to stop fraud, then agent and company will not be alter egos and "sole actor" doctrine will not apply, resulting in corporation being not culpable for agent's conduct. *In pari delecto*, "sole actor" doctrine and "innocent person issues are affirmative defenses and avoidances to affirmative defenses. Complaint does not have to plead factual basis to avoid affirmative defense to survive Motion to Dismiss.

(6699) *Hagan v. Baird,* 2015 WL 24922 (6th Cir. 2015) - *In pari delicto* defense under Michigan law does not allow plaintiff to recover against defendant when plaintiff was at least as culpable as defendant and where cause of action requires wrongful intent. Trustee, as representative of Debtor's estate, takes claims subject to any defenses that could have been asserted had Debtor brought action in its own right. Proposed amended complaint alleged that defendant and her husband were the sole officers, directors, and shareholders of the Debtor; and that defendant, her husband and the Debtor conspired to transfer assets from the corporation to the defendant. Defense was not available to action for conversion as conversion under Michigan law does not require wrongful intent, only an intentional act that deprives another of property. Defense does apply to cause of action for embezzlement as embezzlement requires affirmative wrongful intent. Defense does not apply where one party to transaction was innocent of any wrongful intent and party had ability to stop transaction. Wife who was corporate officer with Husband lacked fraudulent intent in transaction in which Debtors obtained control of corporate assets ad entire transaction was engineered solely by husband and wife merely signed documents where told. As wife was in position to stop transaction and wife lacked wrongful intent, the transaction lacked the requisite mutuality of intent preventing application of defense.

(6700) *Bondi v. Bank of America,* 2011 WL 135825 (2d Cir. 2011) – *In pari delicto* defense is available as defense to action brought by Trustee to same extent it would have been available had action been brought directly by Debtor prior to commencement of bankruptcy case. Trustee's status as Trustee does not insulate Trustee from Debtor's prior conduct, and Trustee steps into shoes of Debtor in all actions and is subject to same defenses. *In pari delicto* prevents a party from suing others for a wrong in which the party itself participated.

(6701) *Unencumbered Assets Trust v. JP Morgan Chase Bank.* 2011 WL 1397813 (S.D. Ohio 2011) – *In pari delicto* defense can be raised against a bankruptcy trustee to the same extent that the defense could have been raised against the Debtor *In pari delicto* defense is available only when: (1) the plaintiff bears at least substantially equal responsibility for the wrongs he seeks to redress, and (2) preclusion of suit would not significantly interfere with the purposes of the law or harm the public interest. Substantially equal responsibility requires plaintiff to be an active, voluntary participant in the unlawful activity that is the subject of the suit. Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. Corporate Debtor was entirely controlled by principals who used corporate Debtor to perpetuate massive fraud and to loot corporate assets. Interests of corporate Debtor and principals were so closely aligned and principals exercised such high degree of control as to warrant imputation knowledge of principals to corporate Debtor. Chapter 7 Trustee could not recover damages from defendant where defendant participated in allegedly fraudulent scheme masterminded and implemented by Debtor's principals as principals, and by extension corporate Debtor, bore substantially equal responsibility for the losses.

12.105 "Wrongful Conduct Rule"

(6702) *Kravitz v. Local Exchange Carriers of Michigan, Inc.,* 2018 WL 3031101 (Bankr. W.D. Mi. 2018) – Michigan wrongful-conduct rule forecloses Trustee claims for concert of action, conspiracy, unjust enrichment or aiding and abetting where action is based, in whole or in part, on Debtor's own illegal conduct. Plaintiff's conduct must be prohibited or almost entirely prohibited under penal or criminal statute and sufficient causal nexus must exist between illegal conduct and asserted damages. Complaint did not set for sufficient facts to allow dismissal based on wrongful conduct rule where complaint did not allege that conduct amounted to violation of any criminal statute but

rather more resembled violations of FCC rules and regulations.

(6703) *Gordon v. Royal Palm Real Estate Investment Fund I, LLLP,* 2018 WL 2382090 (E.D. Mi. 2018) – Michigan has adopted wrongful-conduct rule that prohibits plaintiff from recovering damages where plaintiff's conduct is prohibited or almost entirely prohibited under penal or criminal statute and there is sufficient causal nexus between plaintiff's illegal conduct and plaintiff's asserted damages. Receiver bound by wrongful conduct rule to same extent as Ponzi scheme defendant would have been had defendant brought action. Ponzi scheme defendant's conduct constituted conduct prohibited by criminal statute. Conduct had causal nexus to alleged injuries because funds at issue were wholly derived from Ponzi scheme and plaintiff could not prove damages without referring to money derived from Ponzi scheme. Receiver's actions to recover funds transferred to Ponzi scheme barred by wrongful conduct rule.

12.106 Statute of Limitations

(6704) *Elam v. Aurora Commercial Corporation,* 2018 WL 3059625 (W.D. Tn. 2018) – 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.

(6705) *Kravitz v. Local Exchange Carriers of Michigan, Inc.,* 2018 WL 3031101 (Bankr. W.D. Mi. 2018) – Michigan Statute of Limitations for aiding and abetting breach of fiduciary duties is three years while statute of limitations for remaining claims was six years. Section 108 tolls statute of limitations for state law claims by two years from petition date as long as statutes had not run prior to petition date. Statute of limitations does not begin to run when fraudulent scheme commences, but rather when Debtor was financially harmed by fraudulent schemes which occurred within six years of commencement of case. Further, even if payments constituting unjust enrichment of defendants commenced more than six years prepetition, those payments continued virtually up until data bankruptcy petition allowing Trustee to recover any payments made during limitations. Even if earlier payments would be excluded. Actions alleging breach of fiduciary duties is governed by three-year statute of limitations running from date on which plaintiff discovered underlying breaches of fiduciary duties. Discovery occurred within three years preceding commencement of bankruptcy case.

(6706) *Wyse v. Van Dyke,* 2018 WL 2670464 (Bankr. E.D. Mi. 2018) – Statute of Limitations under Michigan's old Limited Liability Company Act is three years after cause of action accrues or two years within discovery of cause of action, whichever occurs first. However, statute of limitations can be tolled where person who is or may be liable for claim fraudulently conceals existence of claim, in which case action may be commenced at any time within two years after person who is entitled to bring action discovers or should have discovered existence of claim. Complaints sufficiently alleged that defendant fraudulently concealed claim by refusing to a provide accounting for corporate assets and funds; defendant intentionally used incorrect address for plaintiff on bankruptcy petition to prevent creditor from knowing of bankruptcy filing; defendant orally misrepresented that corporate funds were safe; defendant fraudulently represented that he was making payments on corporate loans when defendant never made any payments; defendant directed account to destroy all documents regarding business; and defendant misrepresented that property was owned by a corporation when property was actually in defendant's name. Allegations were sufficient to trigger fraudulent concealment and plaintiff wrought action within two years after discovery of that cause of action existed.

(6707) *Frank W. Kerr Company v. Sav-Mor Franchising, Inc.,* 2018 WL 1141799 (E.D. Mi. 2018) - Statute of Limitations establishes time limit for suing in civil case based on date claim accrued. Statute of Repose is statute barring any suit is brought after specify time after the defendant acted. Statute of Repose puts outer limit on right to bring action and is not related to accrual of cause of action, occurrence of injury or any discovery of injury, and operates as absolute bar for liability. Same statute may contain both Statute of Limitations and Statute of Repose. Michigan Compiled Laws Section 440.3118 provides that action on demand note must be commenced within 6 years of date of demand or, if no demand for payment is made, action is barred after 10 years. Six-year period is Statute of Limitations while 10 year limit is Statute of Repose. No payments were made on note for almost 12 years after note was made placing action to enforce note well outside statute of repose mandating dismissal of action. Action barred by Statute of Limitations can be revived by acknowledgment or promise a party to be charged. However, Statute of Repose is not subject to revival but is absolute bar on plaintiff's claim.

(6708) *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.

(6709) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Cause of action barred where court action was not brought until after statute of limitations expired. Under Kentucky law, statute began to run on date on which embezzlement was, or reasonably could have been discovered. Plaintiff admitted that embezzlement was discovered in 2010 but State Court action was not commenced until 2015. State statute of limitations for action based on Fraud is 5 years from date of discovery or on which fraud could reasonably have been discovered unless confidential relationship exists between parties in which case only actual knowledge triggers statute, as persons in confidential relationships have no duty to exercise diligence to discover fraud. In any event, statue of repose limits cause of action to one brought within 10 years of fraud regardless of lack of notice or discovery. Plaintiff need not "discover" cause of action but only facts that would demonstrate injury at hands of third party. Confidential relationship existed between corporation and Debtor, its used car manager, as Debtor was entrusted by company with authority to request and approved disbursements of funds from corporate bank accounts, and Debtor abused that by causing check to be fraudulently issued to Debtor in his own name.

(6710) *Tomlin v. Bank of New York Mellon,* 2016 WL 3574059 (E.D. Ky. 2016) – Under Kentucky law, when a cause of action arises in another state or country, statute of limitations is the *shorter* of the limitations period where the cause of action arose or the limitations period under Kentucky law. Where cause of action accrues is place where operative facts that give rise to action occur, and the place of the happening of the last of such facts which brings the cause of action into existence. Defamation action arising out of foreclosure action filed in Florida arose in Florida. Cause of action for alleged breach of contract for imposition of escrow account on otherwise non-escrowed loan arises

in state where lender made decision to impose and actually imposed, escrow account. Cause of action for fraud arises in state in which Plaintiff is located when harm allegedly occurred, as Fraud damages are personal to the party. Cause of action alleging that lender interfered with relationship between plaintiff and property insurer resulting in cancellation of insurance on property in Florida arose in Florida where the property was located.

(6711) *DeNoce v. Neff,* Case No. 14-60017 (9th Cir. 2016) – Statute of Repose cannot be extended by equitable tolling. Equitable tolling is available if time limit is statute of limitations and tolling is consistent with purpose of statute. Statute of limitations is generally a law that bars claims after specified period usually based on date injury occurred or was discovered. Statute of Limitations encourages plaintiff to pursue diligent prosecution of known claims or risk losing rights. Statute of Repose is not designed to encourage specific creditor to pursue claims, but instead to create certainty and eliminate stale claims. Statute of repose in Section 727(a)(2) does not require plaintiff to take action within any given time. If transfer occurred within one year of commencement of case, then creditor can bring action at any time during Chapter 7 case before discharge is entered. Section 727(a)(2) is not triggered by any creditor's knowledge of rights and does not give creditors an opportunity to protect those rights. Section 727(a)(2) addresses policy issues that are not the sort addressed by statute of limitations by creating finality of transactions that occurred more than one year pre-petition but not creating limitation on time to file action for transfers within one year.

(6712) *Stockwell v. Hamilton,* 2016 WL 612757 (E.D. Mi. 2016) – Statute of Limitations for alleged violation of ERISA is earlier of (a) 6 years from date of last action that constituted a breach, or (b) three years after earliest date on which plaintiff had actual knowledge of breach or violation. Actual knowledge is high bar strictly applied and requires specific knowledge of breach on which action is based, and constructive knowledge is not sufficient to shorten 6 year statute. Plaintiff became member of board of trustees of pension plan and instituted action against pension plan offices and employees for breach of fiduciary duty. Although prior members and other current members of board may have had actual knowledge of alleged breaches for more than 3 years, Plaintiff's actual knowledge is based on his knowledge and not information that would be imputed to him merely because of his position on board.

(6713) *Kelly v. PNC Bank,* 2016 WL 612480 (E.D. Mi. 2016) – Statute of limitations in action against Small Business Administration arising out of loan to plaintiff is two years from date of loan closing. Action brought more than 5 years after lending transaction barred by statute. Plaintiff's contention that his attorney did not advise him of the two year limitations period is not basis to equitably toll statute.

(6714) *R.A.M Produce Distributors, LLC v. Cipriano,* 2015 WL 3441212 (E.D. Mi. 2015) – Action against principal of corporation that purchased perishable agricultural products is action for breach of fiduciary duty owed by principal of purchaser to seller under PACA, to hold and preserve statutory trust assets for benefit of seller. Action by seller against principal is not action to collect debt as the debt runs from the purchaser corporation to the seller, and there was no personal guarantee or undertaking by principal to pay debt. Statute of Limitations is state law limitations period for actions for breach of fiduciary duty. Action against principal to except debt from discharge untimely where action not brought until after state statute of limitations expired on actions for breach of fiduciary duty, even if statute of limitations on collection of underlying debt itself has not expired.

(6715) *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.

(6716) *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.

(6717) *Young v. Countrywide Home Loans,* 2014 WL 935308 (M.D. Tn. 2014) – Statute of limitations for fraud runs from date on which defrauded party discovered, or reasonably should have discovered, allegedly fraudulent conduct. Debtor's allegations that lender falsified documents in connection with Debtor's loan application were barred by statute of limitations where Debtor and lender closed loan more than five years after closing of loan, where closing documents signed by Debtor at closing would have provided reasonable notice to Debtor of allegedly forged documents.

(6718) *Bridge v. Ocwen Federal Bank,* 2013 WL 4784292 (N.D. Ohio 2013) – Statute of limitations does not preclude foreclosure based on earlier default, where Debtor, in response to demand from lender, cured prior default, and Debtor continued to make payment on the note. After later default, lender accelerated note and demanded full payment. Foreclosure based on this latest default was brought within statute of limitations as action was brought well within 2 years of the last default and acceleration.

(6719) *Hood v. Chase Manhattan Mortgage Corp.,* 2013 WL 1629306 (E.D. Mi. 2013) – Statute of limitations for fraud runs from time claim accrues, which is date on which the wrong is committed regardless of when discovered. Alleged fraud in loan documents occurred when parties executed loan agreement, not date on which Plaintiff allegedly discovered the fraud. Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan. Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction. Home Ownership and Equity Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date. Statute of limitations for state law malpractice claim is two years from the date on which the claim arises, regardless of whether plaintiff has notice of the violation.

(6720) *USACM Liquidating Trust v. Deloitte & Touche,* Case No. 11-15626 (9th Cir. 2013) – Section 108 does not extend statute of limitations

where applicable state statute of limitations expired prior to commencement of bankruptcy case. Corporation was aware of inaccurate audits where principals of corporation were active participants in the underlying fraud that was not discovered by auditors. Knowledge of principals was imputed to corporation. As such, corporation knew or should have known of the errors in the audits on the dates the audits were prepared which was outside the state statute, Corporation's argument that it did not actually discover the errors until years later did not overcome imputation of knowledge of principals to corporation years earlier, even if the alleged errors related to the wrongful acts of the principals which the principals had every incentive to conceal.

(6721) *Fogel v. Shabat,* Case no. 12-3888 (7th Cir. 2013) – Appointment of interim trustee in case converted from Chapter 13 to Chapter 7 does not toll statute of limitations pursuant to Section 546. Statute of limitations to avoid transfers is 2 years from commencement of case. Section 546 provides for extension of deadline for one additional year if the appointment or election of "the first trustee" under Section 702 occurs before the expiration of the initial 2 year term. Debtor converted case from Chapter 13 to Chapter 7 one day short of 2 years after initial bankruptcy filing. Interim trustee was appointed on date of conversion, but permanent trustee was not appointed until 45 days later, after creditors attempted but failed to elect permanent trustee. Section 546 expressly references Section 702, which is the permanent trustee; and does not reference Section 701 regarding appointment of an interim trustee. The permanent trustee was not appointed or elected within the two year period from commencement of the case, and the statute of limitations expired on the avoidance actions.

(6722) *Allstate Insurance Company v. Harris,* 474 BR 816 (Bankr. E.D. Mi. 2012) – Statute of Limitations in action against attorney for professional malpractice expires 2 years after the claim accrues or 6 months after plaintiff discovers, or should have discovered, the malpractice, whichever is later. Claim for legal malpractice "accrues" when the attorney discontinues serving the plaintiff in a professional capacity as to the matters involved, regardless of when plaintiff actually discovers the claim. Statute of Limitations expired more than 2 years before case commenced where attorney stopped acting as Plaintiff's attorney in various State Court matters, even though plaintiffs did not know that attorney was purportedly acting on behalf of Plaintiff. Although attorney's actions gave every appearance to courts and to other parties in action that attorney represented Plaintiff, Plaintiff never in fact hired, or even met, attorney, and Plaintiff had no knowledge that attorney purportedly represented Plaintiff until more than 2 years later. Action dismissed.

(6723) *Brandt v. Weyant,* 2010 WL 3719102 (Bankr. M.D. Tn. 2010) – Provision of Servicemembers' Civil Relief Act that period of service "may not" be included in computing time is discretionary and does not mandate extension of statute of limitations in action brought by soldier. Although Plaintiff was a life-long member of the armed forces and was currently on active duty, nothing indicated that Plaintiff's status as active duty in any way precluded or inhibited Plaintiff from prosecuting action. Plaintiff failed to present sufficient evidence of hardship to warrant invocation of discretionary extension of statute of limitations.

(6724) *Torrez v. Eley,* Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff's complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.

(6725) *Gold v. Deloitte & Touche, LLP,* 2009 WL 1664583 (E.D. Mi. 2009) – Cause of action for "aiding and abetting breach of fiduciary duty" is subject to three-year statute of limitations under Michigan law because it is a common law Court claim. Claim barred by statute of limitations where bankruptcy petition filed March 28, 2003 but adversary complaint not filed until March 31, 2006.

12.107 Statute of Limitations – Section 544

(6726) *River City Resort, Inc. v. Frankenberg,* 2014 WL 3385234 (Bankr. E.D. Tn. 2014) – Statute of limitations on action to recover fraudulent transfer is the longer of the statute provided under Section 548 or the remaining limitation period under state law where Debtor seeks to recovery under Section 544 and there was actual creditor who could have pursued recovery absent bankruptcy filing. Debtor brought action under state law to recover fraudulent transfer, such that limitation period would be 4 years from date of transfer. Although action was brought outside period allowed by Section 548, action was brought under state law within 4 years of date of transfer.

12.108 Statute of Limitations – Section 108

(6727) *Cox v. Specialty Vehicle Solutions, LLC,* 2017 WL 5493160 (6th Cir. 2017) – Section 108 provides that if statute of limitations on action has not expired prior to filing of petition, statue is extended to longer of applicable non-bankruptcy law or 30 days after notice of termination of stay. Notice runs from date on which Bankruptcy Court enters Order Lifting Stay, not date on which notice is filed in non-bankruptcy action. Stay lifted on August 7 resulted in 30 day extension expiring September 6. Action filed September 11 was 35 days after entry of order lifting stay, outside extension provided in Section 108, resulting in action being dismissed as untimely.

(6728) *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.

(6729) *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.

(6730) *Bryant v. Hamilton County,* 2016 WL 1371181 (Bankr. E.D. Tn. 2016) – Section 108(b) extends time provided under applicable non-bankruptcy law within which a Debtor may cure a default or redeem property to the later of the end of the applicable period or 60 days beyond the order for relief. Extended limitations period is not limited to Trustee. Debtor can tender proper cure amount within extended period in Chapter 13 as Debtor has rights and powers of trustee as to property of estate under Section 1303. While the literal text of Section

108(b) applies only to a "trustee," in a Chapter 13 context, Section 108(b) applies to a Debtor to same extent as it would a trustee. Debtor is allowed to remain in possession of his property and retains the rights that would normally pass to a trustee in a bankruptcy filed under a different chapter.

(6731) *Estate of Ivie v. Detroit Police Officer,* 2016 WL 795899 (E.D. Mi. 2016) – Section 108 provides that if a statute of limitations for commencing an action against a Debtor expires during bankruptcy stay, limitations period is extended for 30 days after notice of termination of the stay. Plaintiff's counsel received notice that stay had been lifted in December, 2014, but failed to file suit within 30 days, leaving action barred by statute of limitations.

(6732) *Taunt v. Coenen,* 2015 WL 5635278 (Bankr. E.D. Mi. 2015) – Section 108 fixes statute of limitations on pre-petition causes of action that have not expired prior to commencement of case at later of non-bankruptcy statute of limitations period or two years after petition date.

(6733) *Johnston v. MidFirst Bank,* 2015 WL 5175147 (N.D. Ohio 2015) – 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.

(6734) *In re Szymanski*, Case no. 10-22054 (Bankr. E.D. Mi. 2015) – Section 108(c) addresses time periods for actions by non-Debtor against Debtor, and extends time for the longer of the applicable statute of limitations or 30 days after stay is lifted to file action. Section 108 does not toll statute during period of bankruptcy and if statute otherwise expires during case, action must be commenced within 30 days of termination of stay.

(6735) *USACM Liquidating Trust v. Deloitte & Touche,* Case No. 11-15626 (9th Cir. 2013) – Section 108 does not extend statute of limitations where applicable state statute of limitations expired prior to commencement of bankruptcy case. Corporation was aware of inaccurate audits where principals of corporation were active participants in the underlying fraud that was not discovered by auditors. Knowledge of principals was imputed to corporation. As such, corporation knew or should have known of the errors in the audits on the dates the audits were prepared which was outside the state statute, Corporation's argument that it did not actually discover the errors until years later did not overcome imputation of knowledge of principals to corporation years earlier, even if the alleged errors related to the wrongful acts of the principals which the principals had every incentive to conceal.

12.109 Statute of Limitations – Mortgage Foreclosure

(6736) *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.

12.110 Statute of Limitations - Tolling

(6737) *Woodcox v. U.S.,* 2018 WL 1832972 (W.D. Ky. 2018) – Federal Tort Claims Act is exclusive vehicle to bring action against United States sounding in tort. Tort claim against United States barred unless claim is presented in writing to appropriate Federal agency within two years after claim accrues or unless action is begun within six months after date of mailing of notice of final denial the claim by agency. Federal law controls when claim accrues under FTCA. Equitable tolling allows federal court to toll statute of limitations when litigant's failure to meet legally-mandated deadline unavoidably arose from circumstances beyond litigant's control." Equitable Tolling is sparingly used in actions against United States, and is based on (1) plaintiff's lack of notice of filing requirement; (2) plaintiff's lack of constructive knowledge of filing requirement; (3) plaintiff's diligence in pursuing rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of particular legal requirement. Action barred where more than 3 years passed between accrual of cause of action and filing suit. Plaintiff knew or should have known of issues based on rulings of Bankruptcy Court in related action more than 2 years before filing claim and diligent research would have revealed potential claim within applicable statute of limitations.

(6738) *Gecker v. Estate of Flynn,* Case No. 16-1075 (7th Cir. 2017) – "Adverse Domination" tolls statute of limitations against Debtor's officers and directors where Debtor would not be motivated to sue its own officers and directors. Adverse Domination does not toll statute of limitations where there is properly constituted creditors committee that could bring action on behalf of Debtor unless committee requests court approval to bring action and Court denies committee authorization to bring action. Committee did not seek court approval to bring action while case was pending in Chapter 11, such that statute of limitations ran on potential actions against officers and directors before case was converted and Chapter 7 Trustee appointed. Trustee could not use Adverse Domination to toll statute of limitations, and any action brought by Trustee is time barred.

(6739) *Tow v. Bulman,* Case No. 15-3179 (Bankr. S.D. Tx. 2017) - 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 it plaintiff failed to exercise full extent of discovery rights were 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.

(6740) *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.

(6741) *Collins v. Tennessee Department of Revenue,* 2016 WL 4224013 (W.D. Tn. 2016) – Tennessee statute imposed 6-year limitations period on collection of unpaid taxes and does not provide for tolling of that time period based on bankruptcy filing. State statute tolled limitations period for any time that an injunction prevents a party from filing a civil action which would include automatic stay. However, tolling lasts only for 30 days after expiration of stay. Taxing authority did not levy tax claims within applicable statute of limitations and did not act within 30 day window provided in Section 524. Court can hold that limitations period is equitably tolled where party is prevented, through no fault of their own, from acting. However, equity will not intervene on behalf of party who delays unreasonably in pursuing rights. State taxing authority waited unreasonably by failing to levy taxes for more than 3 years after Plan's designate time to file claims had passed.

(6742) *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.

(6743) *Antioch Company Litigation Trust v. Morgan,* 2016 WL 1161233 (6th Cir. 2016) – Legal malpractice claim against law firm that represented ESOP in leveraged buyout ran from date on which LBO closed, which was more than four years prior to commencement of action and beyond statute of limitations. Court can toll statute of limitations based on (a) adverse domination; (b) equitable tolling; or (c) equitable estoppel. Adverse domination must be recognized by applicable state law to overcome state statute of limitations. Ohio courts have not accepted adverse domination as basis to toll limitations period and language of Ohio statute does not permit expansion of time on this basis. Equitable tolling must be applied sparingly and only where litigant has diligently pursued rights but extraordinary circumstances stood in his way and prevented timely action. Allegation that company was solidly within control of Board of Directors who failed to bring action was not sufficient to toll limitation period on action that ESOP attempted to bring. Equitable estoppel requires (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) induces actual reliance which is reasonable and in good faith; and (4) which causes detriment to the relying party. Reliance must be reasonable and must actually induce plaintiff to forego right to sue. Allegations that defendant misrepresented benefits of transaction and concealed extent of risk did not involve any affirmative statement or promise to settle if plaintiff did not file suit or anything else that prevented plaintiff from timely instituting action. Statements were part of underlying cause of action but did not induce and were not intended to induce plaintiff to forgo filing suit.

(6744) *Estate of Ivie v. Detroit Police Officer,* 2016 WL 795899 (E.D. Mi. 2016) – Equitable estoppel allows court to toll statute of limitations where defendant actively prevents plaintiff from timely filing complaint. Doctrine requires plaintiff to establish that (1) Defendant's acts or representations induced Plaintiff to believe that the limitations period clause would not be enforced, (2) Plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced. Defendant's conduct must be clearly designed to induce plaintiff to refrain from bringing action. Lack of prejudice to defendant is not factor in determining whether period should be tolled. Fact that defendant had actual knowledge that plaintiff intended to file suit does not support tolling. Merely engaging in settlement discussions is not basis to toll period as ongoing settlement discussions do not rise to level of actively preventing plaintiff from timely filing suit or otherwise inducing plaintiff not to file.

(6745) *Kelly v. PNC Bank,* 2016 WL 612480 (E.D. Mi. 2016) – Statute of limitations in action against Small Business Administration arising out of loan to plaintiff is two years from date of loan closing. Action brought more than 5 years after lending transaction barred by statute. Plaintiff's contention that his attorney did not advise him of the two year limitations period is not basis to equitably toll statute. Letters sent by plaintiff to SBA attempting to "diligently pursue" rights were all sent after limitations period had expired in first instance. Equitable tolling requires that defendant took some action to prevent plaintiff from timely pursuing action. Letters sent after limitations period already expired could not constitute actions by defendant that precluded plaintiff from timely asserting rights. Alleged lack of prejudice to defendant is one element of equitable tolling, but where remaining elements of tolling are not met, lack of prejudice alone is not sufficient.

(6746) *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.

(6747) *Cheatom v. Quicken Loans,* 2014 WL 4922305 (6th Cir. 2014) – Equitable estoppel to toll statute of limitations requires conduct or language amounting to representation of material fact; party to be estopped must have been aware of true facts; party to be estopped must have intended that representation be acted on or that it was reasonably likely that party to be estopped so intended; party asserting estoppel must have been unaware of true facts; and party asserting estoppel must have reasonably relied on representations. For purposes of statute of limitations, plaintiff must show that defendant took affirmative steps to prevent plaintiff from suing in time, such as by hiding evidence or promising not to plead statute of limitations and plaintiff's failure to act in time was not result of plaintiff's own lack of diligence. Plaintiff failed to show basis for equitable estoppel where plaintiff did not allege any representations by defendants or that defendants knew any statements were false, or that plaintiff relied on any representations in deciding not to commence litigation at earlier date; and plaintiff did not allege any reason why plaintiff did not know of operative facts that from basis of action before limitations period expired or that claims could not

have been discovered with exercise of reasonable diligence. Limitation period can also be extended by equitable tolling which does not require any impropriety on defendant's part but results where plaintiff, despite exercising due diligence, remains unaware of cause of action, and is based on lack of notice of requirement to file suit; lack of constructive knowledge of filing requirement; diligence in pursuing one's rights; absence of prejudice to other party; and plaintiff's reasonableness in remaining ignorant of legal requirements. Plaintiff's complaint demonstrated that plaintiff believed from inception of loan relationship that there were facts that could give rise to legal claim yet plaintiff waited 10 years before bringing suit. Plaintiff alleged only that defendant intentionally understated mortgage loan costs and then charged higher amount at the closing itself, such that plaintiff was fully aware of facts yet failed to file suit within limitations period.

(6748) *Simmons v. BAC Home Loan Servicing, LLC,* 2014 WL 3844788 (M.D. Tn. 2014) – Equitable tolling allows court to toll statute of limitations where litigant's failure to meet deadline unavoidably arose from circumstances beyond litigant's control, and depends on 1) lack of notice of the filing requirement, 2) lack of constructive knowledge of the filing requirements; 3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) plaintiff's reasonableness in remaining ignorant of the particular legal requirement. Equitable tolling based on fraudulent concealment requires proof that (1) the defendant concealed the conduct that constitutes the cause of action; (2) the defendant's concealment prevented the plaintiff from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action. Plaintiff did not allege any facts that would demonstrate that lender somehow prevented plaintiff from discovering cause of action based on alleged violation of Fair Debt Collections Practices Act. Plaintiff alleged only that defendant failed to provide information to him which is insufficient to support equitable tolling based on fraudulent concealment.

(6749) *Hood v. Chase Manhattan Mortgage Corp.,* 2013 WL 1629306 (E.D. Mi. 2013) – Statute of Limitations can be equitably tolled where defendant fraudulently conceals operative facts that are basis of cause of action notwithstanding due diligence by Plaintiff to discover facts. Plaintiff did not establish basis for equitable tolling where Plaintiff did not make any effort to obtain allegedly withheld documents until well after statute of limitations had expired.

(6750) *In re Vertrue Inc. Marketing and Sales Practices Litigation,* 2013 WL 1607295 (6th Cir. 2013) – Commencement of Class Action litigation suspends applicable statutes of limitations as to all asserted members of the class who would have been parties had the action been permitted to proceed as a class action. All members have the right to file individual claims if class certification is denied as long as those actions are commenced within the time remaining on the statute of limitations.

12.111 Statute of Limitations – FIRREA

(6751) *National Credit Union Administration Board v. Jurcevic,* 2017 WL 3442388 (6th Cir. 2017) – Action brought by liquidator of failed financial institution must be brought within later of three years from appointment of liquidator or the applicable state statute of limitations, per 12 USC Section 1784(b)(14).

12.112 Statute of Limitations – Continuing Violations

(6752) *SFX React-Operating, LLC, v. Eagle Theater Entertainment, LLC,* 2017 WL 3616562 (E.D. Mi. 2017) – "Continuing violation" results when cause of action accrues each time plaintiff is injured by act of defendants. Doctrine requires new overt act of defendant, characterized by two elements: (1) act must be new and independent act, not merely reaffirmation of prior act; and (2) it must inflict new and accumulating injury that did not exist before new overt act and not merely one that reflects or implements prior refusal to deal or acts that are unabated inertial consequence of prior act. Debtor's breach of contract did not amount to continuing violation where debtor ceased to take actions that were breaches of agreement, even though plaintiff continued to suffer loss and damages on an ongoing basis. Damages flowed from initial breach where debtor was not continuing to engage in conduct or taking any overt action to cause new or additional harm.

12.113 Statute of Repose

(6753) *Frank W. Kerr Company v. Sav-Mor Franchising, Inc.,* 2018 WL 1141799 (E.D. Mi. 2018) - Statute of Limitations establishes time limit for suing in civil case based on date claim accrued. Statute of Repose is statute barring any suit is brought after specify time after the defendant acted. Statute of Repose puts outer limit on right to bring action and is not related to accrual of cause of action, occurrence of injury or any discovery of injury, and operates as absolute bar for liability. Same statute may contain both Statute of Limitations and Statute of Repose. Michigan Compiled Laws Section 440.3118 provides that action on demand note must be commenced within 6 years of date of demand or, if no demand for payment is made, action is barred after 10 years. Six-year period is Statute of Limitations while 10 year limit is Statute of Repose. No payments were made on note for almost 12 years after note was made placing action to enforce note well outside statute of repose mandating dismissal of action. Action barred by Statute of Limitations can be revived by acknowledgment or promise a party to be charged. However, Statute of Repose is not subject to revival but is absolute bar on plaintiff's claim.

(6754) *Federal Insurance Company v. Woods,* 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Statute of Repose imposes absolute bar to actions commenced after specified time. Where statute of repose has expired, fact that statute of limitations, predicated on discovery of wrongful conduct, has not expired as discovery was within time preceding commencement of case that is included in statute of limitations allowable time.

(6755) *DeNoce v. Neff,* Case No. 14-60017 (9th Cir. 2016) – Statute of Repose cannot be extended by equitable tolling. Equitable tolling is available if time limit is statute of limitations and tolling is consistent with purpose of statute. Statute of limitations is generally a law that bars claims after specified period usually based on date injury occurred or was discovered. Statute of Limitations encourages plaintiff to pursue diligent prosecution of known claims or risk losing rights. Statute of Repose is not designed to encourage specific creditor to pursue claims, but instead to create certainty and eliminate stale claims. Statue of repose in Section 727(a)(2) does not require plaintiff to take action within any given time. If transfer occurred within one year of commencement of case, then creditor can bring action at any time during Chapter 7 case before discharge is entered. Section 727(a)(2) is not triggered by any creditor's knowledge of rights and does not

give creditors an opportunity to protect those rights. Section 727(a)(2) addresses policy issues that are not the sort addressed by statute of limitations by creating finality of transactions that occurred more than one year pre-petition but not creating limitation on time to file action for transfers within one year.

(6756) *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.

12.114 Laches

(6757) *United States Department of Agriculture v. McGregor,* 2017 WL 3032431 (W.D. Ky. 2017) – Defense of Laches is not applicable to actions brought by United States.

(6758) *Stein v. Stubbs,* Case No. 1678025 (6th Cir. BAP 2017) – Laches is not available as a defense to an action to revoke discharge under Section 727. Revocation of discharge requires violation of lawful order of court. Compliance with Court Orders is essential to effective administration of bankruptcy estate. Laches is potential equitable defense that cannot be used to circumvent the requirement that a party comply with a lawful Court Order. Further, laches does not apply where trustee brought action to revoke discharge within the specific and relatively short statute of limitations set forth in Section 727(e)(2) absent showing of extensive and undue delay. Trustees delay in this case was only six months from entry of discharge to filing of complaint to revoke discharge, well within one year time limits set out in Section 727(e). Laches also requires evidence of a lack of diligence by not seeking a delay or denial of entry of discharge in first instance. Trustee acted with high degree of diligence where trustee went to great lengths to secure tax returns in timely fashion, taking graduated steps intended to achieve desired result before ultimately filing action to revoke discharge. Trustee's decision to conclude 341 meeting and request tax return which had not yet been filed was reasonable where Debtor had not given any indication that Debtor would not cooperate in providing 2014 tax return or otherwise complying with requests of court until after discharge had already been entered.

(6759) *Grant v. Granader,* 2016 WL 5936797 (6th Cir. 2016) – Court can 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.

(6760) *In re Peake,* 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Laches requires proof that plaintiff delayed filing suit for unreasonable and inexcusable length of time from the time plaintiff knew or reasonably should have known of the claim, and the delay operated to prejudice of defendant. Further, there is "strong presumption" that the delay is not unreasonable where the statute of limitations has not lapsed. Creditor's action to declare debt non-dischargeable under Section 523(a)(5) not barred by laches. Any delay in commencement of case was result, at least in part, of Debtor's failure to schedule debt. Further, actions under Section 523(a)(5) can be brought at any time. Statute of limitations on action founded on judgment or decree is 10 years, and action was commenced less than 10 years after entry of divorce. Debtor failed to produce evidence of prejudice based on delay.

12.115 First Breach Rule

(6761) *Schubiner v. Zolman,* 2018 WL 4489454 (Bankr. E.D. Mi. 2018) – First Breach Rule provides that party who first breach is contracted cannot maintain action based on other contracting party's subsequent breach or failure to perform, where initial breach is deemed "substantial" so that non-breaching party is denied benefit which he or she reasonably expected to receive or where breach produces change in essential operative elements of contract such that performance by other party is rendered ineffective or impossible or causes complete failure of consideration or prevention of further performance. Defendant's alleged first breach was not substantial where defendant's failure to obtain life insurance policy for benefit of plaintiff did not render further performance by plaintiff ineffective or impossible and was not material because defendant could cure breach without negatively impacting plaintiff's rights.

(6762) *Phillips v. Green Tree Servicing, LLC,* 2016 WL 627903 (E.D. Mi. 2016) – First Breach Rule does not apply where alleged breach was specifically contemplated by contract and contract provided for express remedy. Borrower's action against lender not barred by First Breach Rule merely because borrower stopped making payments, where loan documents specifically provided for that contingency and stated that lender would be allowed to accelerate. Plaintiff falling behind on payments is not substantial breach for this purpose.

(6763) *Pauley v. Bank of America,* 2016 WL 213032 (E.D. Mi. 2016) – Complaint for wrongful foreclosure and failure to modify loan barred by first breach rule, where plaintiff first breached the mortgage contract by failing to make payments, and plaintiff's cause of action arose out of same contractual relationship.

(6764) *Rose v. Friendly Finance Co.,* 2016 WL 98597 (S.D. Ohio 2016) – First breach rule did not apply where borrower failed to obtain insurance, and lender force placed insurance. Borrower's complaint alleged that lender did not terminate force placed insurance when borrower provided proof of insurance not barred by first breach rule. Although borrower first breached contract by failing to ensure property, lender availed itself of contractual right to obtain insurance rather than declare default under contract. Where party avails itself of contract right short of declaring default, party cannot later rely on breach to preclude suit against it based on its own, subsequent breach.

(6765) *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.

(6766) *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.

12.116 Condition Precedent

(6767) *Schubiner v. Zolman*, 2018 WL 4489454 (Bankr. E.D. Mi. 2018) - Party cannot maintain action for breach of contract where other parties duty to perform was subject to condition precedent that did not occur. Until condition precedent occurs, other party has no duty to perform and nonperformance cannot constitute grounds for breach of contract. Antenuptial Agreement required defendant to assign life insurance policy to plaintiff and for plaintiff to then assign to defendant and "equivalent amount". Defendant did not assign insurance for benefit of plaintiff which was condition precedent to plaintiff's obligation as plaintiff could not know "equivalent amount" until defendant executed initial assignment.

12.117 Economic Loss Rule

(6768) *McNally v. Stallman,* Case No. 16-80011 (Bankr. W.D. Mi. 2018) – Economic loss rule applies where cause of action is based on breach of contract and parties had opportunity in contract to allocate risk. Economic Loss Rule has no application where conduct amounts to independent tort for fraud or breach of fiduciary duty under MBTFA. Economic Loss Rule also does not apply to actions against party other than contracting party, such as fraud or breach of fiduciary duty against Office of Corporation. Objective is to provide sufficient but not duplicate recoveries for single wrong.

(6769) *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.

12.118 Repudiation

(6770) *Moretti v. Bank of New York Mellon,* 2015 WL 1036450 (6th Cir. 2015) – Repudiation of contract requires unequivocal declaration of intent not to perform. Repudiation requires more than confusion or misunderstanding. Debtor failed to demonstrate that lender repudiated loan modification agreement where Debtor produces no evidence that lender declared an intent not to perform. At best, Debtor pointed to areas of confusion and while letters may have been less than models of clarity, they were consistent with requirements of the loan documents.

12.119 Impossibility or Impracticality of Performance

(6771) *Hemlock Semiconductor Corp. v. Kyocera Corp.,* 2016 WL 67596 (E.D. Mi. 2016) – Defense of impossibility or impracticality of performance requires proof that it is not possible to comply not merely that it would be more expensive, difficult or burdensome. Any alleged illegal acts of Chinese government may have caused market shift that increased costs of production but did not render performance impossible.

12.120 Frustration of Purpose

(6772) *Hemlock Semiconductor Corp. v. Kyocera Corp.,* 2016 WL 67596 (E.D. Mi. 2016) – Frustration of purpose results from change in circumstances that makes one party's performance virtually worthless to the other party. Party asserting defense must prove (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him. Contract for supply of raw materials was not "frustrated" by increase in costs of those materials, even if increase resulted from alleged illegal acts of Chinese government. Although performance may have been more expensive, other party had valid need for supplies and contract was designed to provide long term, stable supplies at stable price, such that seller bore risk that costs of supply would rise.

12.121 *Force Majeure* Clause

(6773) *Hemlock Semiconductor Corp. v. Kyocera Corp.,* 2016 WL 67596 (E.D. Mi. 2016) – *Force Majeure* clauses are not contract defenses but are contractually bargained for contract provisions or protections. Clause does not apply where government action does not render performance impossible but only affects profitability. Clause did not excuse supplier from obligations under contract where actions of Chinese Government increased the cost of performance but did not render that performance impossible or inconvenient.

12.122 Mutual Mistake

(6774) *Hemlock Semiconductor Corp. v. Kyocera Corp.,* 2016 WL 67596 (E.D. Mi. 2016) – Defense of mutual mistake must relate to f acts in existence at time contract was executed. Mistake must not be mere belief or prediction of future actions. Supplier failed to demonstrate "mistake" when market disruption that caused increased cost of performance was not in place when contract was made, and any alleged mistake about long term commodity prices would be mistaken expectation as to market behavior, and not a fact in existence at time agreement executed. Further, supplier, in entering into long term supply contracts, assumed risk that market conditions would change and increase costs of supply.

12.123 Illegality

(6775) *Hemlock Semiconductor Corp. v. Kyocera Corp.,* 2016 WL 67596 (E.D. Mi. 2016) – Illegality of contract as defense requires that the contract be patently illegal and that any allegedly illegal provision cannot be removed from the contract. Supply contract was not patently illegal as violation of antitrust act. Party made not allegation that contract either facially violated antitrust law or that the contract served as a mechanism to facially violate antitrust law.

12.124 Contract of Adhesion

(6776) *MetLife Securities, Inc. v. Holt,* 2016 WL 3964459 (E.D. Tn. 2016) – Arbitration clause was not "contract of adhesion". Factors include (1) whether subject of contract involves a necessity of life; (2) a contract for the excessive benefit of the offeror; (3) an economic or other advantage of the offeror; and (4) the offer of the proposed contract on a take it or leave it basis. Mere unequal bargaining power is not sufficient – party must prove both no realistic bargaining power and that party is unable to obtain desired services elsewhere without consenting to identical contract terms. Arbitration clause in agreement by which MetLife would invest client's money was not "necessity of life" such as food or shelter. There was no evidence of disparity in bargaining power or high pressure sales tactics, as client could easily have elected not to agree to the arbitration provision and seek services of competitor. Arbitration clause was open and obvious and required signature that client acknowledged and understood that arbitration was included in contract.

12.125 Vicarious Liability

(6777) *Cawood v. Seterus, Inc.,* 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Principal is liable for acts of agent within scope of agent's authority. Complaint stated cause of action against FNMA for actions of Seterus as mortgage servicer for FNMA.

12.126 Cross Claims

(6778) *Midway Motor Sales, Inc. v. Flynn,* 2009 WL 1940719 (6th Cir. BAP 2009) – Creditor's "cross-claim" in adversary proceeding was actually attempt to recover damages against Debtor for which creditor failed to file a proof of claim. Creditor cannot use cross claim to circumvent requirement of Federal Rule of Bankruptcy Procedure 3002 that a creditor timely file a claim by the claim deadline.

12.127 Motion to Dismiss

(6779) *Dettore v. JEM Real Estate Preferred Fund I, LLC,* 2016 WL 4727479 (E.D. Mi. 2016) – Rule 12(d) allows court to treat Motion to Dismiss as Motion for Summary Judgment if necessary to consider matters beyond four corners of complaint. Court must afford party against whom *sua sponte* relief may be granted 10 days' notice and opportunity to respond. Bankruptcy Court provided adequate notice and asked the parties whether the parties had any objections to treating the motion as one for summary judgment and Debtor's counsel specifically states that he had none and that it would afford Debtor's counsel an opportunity to file a supplemental brief and parties agreed to 3 week deadline for any further submissions. Debtor cannot now argue that conversion to summary judgment was improper where Debtor agreed to conversion and agreed to deadline for further submissions.

(6780) *West v. Home Savings & Loan,* 2015 WL 3962569 (Bankr. N.D. Ohio 2015) – In determining sufficiency of complaint, court must identify factual allegations and determine whether allegations, if true, state basis for relief. Fact that complaint was disjointed or contained surplus or unnecessary allegations did not mandate dismissal where court was able to determine operative facts and conclude that facts stated cause of action. 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.

(6781) *Advantage Windows, Inc. v. Dunn,* 2013 WL 1553007 (Bankr. E.D. Tn. 2013) – If four corners of complaint states cause of action, dismissal under Rule 12(b) is improper. In considering Rule 12 Motion, court must consider only the complaint and any exhibits incorporated. Defendant's motion to dismiss included additional documents not referenced in the complaint. Those additional documents would not be considered in connection with a Rule 12 motion. If documents outside the complaint are considered, the court must convert the motion to dismiss into a motion for summary judgment and give the parties a reasonable time to present all evidence in support of such a Rule 56 motion.

(6782) *Hood v. Chase Manhattan Mortgage Corp.,* 2013 WL 1629306 (E.D. Mi. 2013) – Motion to dismiss under Rule 12 is limited to matters contained within 4 corners of complaint and properly referenced exhibits. Court denied Defendant's Motion where could would have had to consider matters outside the complaint, including Plaintiff's bankruptcy file. Motion denied without prejudice to defendant filing Motion for Summary Judgment. Court can dismiss action based on statute of limitations if the defect is apparent from face of complaint.

(6783) *M-Heat v. Jost,* Adv. No. 12-4868 (Bankr. E.D. Mi. 2012) – Court would not consider grounds for motion to dismiss that are raised for first time in reply to defendant's response to the motion. It is impermissible to raise note issue for first time in reply brief as opposing party has no opportunity to respond.

(6784) *Lee-Taylor v. Martin,* 2011 WL 6032835 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12 requires that complaint fail to state cause of action on its face. Court cannot consider matters beyond 4 corners of complaint. Motion to Dismiss based on Collateral estoppel required review of documents and matters beyond 4 corners of complaint. Motion denied without prejudice to Defendant renewing Motion using proper procedure for Summary Judgment.

(6785) *Palazzola v. City of Toledo,* 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Plaintiff's failure to establish jurisdiction in Complaint is basis to dismiss adversary complaint. However, that Complaint alleges as basis for jurisdiction an inapplicable statute does not mandate dismissal where factual allegations of complaint are sufficient to demonstrate existence of jurisdiction. Action for contempt based on alleged violation of discharge injunction is clear "core" proceeding over which Court has subject matter jurisdiction. Failure to cite specific statute on which claim is based is not fatal defect where factual allegations are sufficient to apprise defendant of substance of action. Complaint for violation

of automatic stay failed to state cause of action where complaint alleged that debt was included in bankruptcy and defendant continued efforts to collect, but did not allege that defendant knew either of commencement of bankruptcy case or existence of automatic stay.

(6786) *Anthony v. Miller,* 2011 WL 3585603 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12(b)(6) for failure to state cause of action must be made either in separate pleading before a responsive pleading is filed or in the initial responsive pleading. Motion to Dismiss filed well after Defendant filed answer to complaint was untimely and must be denied, even where based on failure to plead fraud with specificity as required by Rule 9. However, Court exercised inherent authority to require pro se plaintiff to file amended complaint where "complaint" in the form of letter initially mailed to court was unfocused and request for relief was not tied to any Code provision and was unclear as to whether Plaintiff sought relief against both Debtors or only one of the two.

(6787) *Morris v. Paine,* 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Case will be dismissed where Complaint based on statutes that did not provide for private right of action. 18 USC Section 1346 (defining criminal violation for fraud), 18 USC Section 1918 (sedition) and 10 U.S.C. Section 333 (insurrection) are criminal statutes for which no private right of action exists. Action under 42 USC Section 2000d is one for discrimination in state and local government programs. Bankruptcy Judges and Trustees are not within the scope of defendants defined in Section 2000d and Debtor's prior bankruptcy filings did not constitute the receipt of federally provided financial assistance which is required under Section 2000d. Eleventh Amendment creates protection for state from Federal interference, but does not provide any independent basis for action by private individual.

(6788) *Spradlin v. Baker,* 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Rule 12(b)(6) made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), is for failure to state a claim upon which relief can be granted. Complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The complaint must possess enough heft to show that the pleader is entitled to relief. Court, in determining such a motion must presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. The purpose of a motion to dismiss is to assess the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. Court does not have to accept every allegation in the complaint as true in assessing its sufficiency nor sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual allegations. Motion to Dismiss denied where Plaintiff alleged that Defendant agreed to limit exemptions and Defendant did not counter the Plaintiff's declaration and defendant produced no other challenge to the sufficiency of the Complaint.

(6789) *Swanigam v. Northwest Airlines, Inc.,* 2010 WL 2465387 (W.D. Tn. 2010) - Motion to dismiss for failure to state a claim only tests whether a cognizable claim has been pled. Court can dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and it must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests. Complaint must provide more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Complaint must have a factual foundation, and the mere possibility that a plaintiff might later establish some set of undisclosed facts to support recovery is insufficient to survive a 12(b)(6) challenge. Court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiff. Only well-pleaded facts must be taken as true, and the court need not accept legal conclusions or unwarranted factual inferences. Where parties rely on materials outside the pleadings, Court has discretion to treat Motion as Motion for Summary Judgment under Rule 56.

(6790) *Bowen v. Mountain Commerce Bank,* 2010 WL 2430777 (Bankr. E.D. Tn. 2010) - Moving party in a Rule 12(b)(6) Motion has the burden of proving that no claim exists. Complaint is to be liberally construed, but must more than bare assertions or legal conclusions. Factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the nonmoving party but court need not accept unwarranted factual inferences. Complaint must present enough facts to state a claim to relief that is plausible on its face. Claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not a "probability requirement," but requires more than a sheer possibility that a defendant has acted unlawfully. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Complaint alleged that bank had been paid in full during Debtor's chapter 13 proceeding, leaving no debt left owing for the bank to collect and preventing finding that conduct of which Debtors complained was an attempt by the bank to collect a debt. Reporting of credit information about a Debtor or refusing to remove credit information posted about a Debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor's refusal to update the status of a debt on a credit report after a request has been made by the Debtor can result in a discharge injunction if creditor deliberately refuses to change reporting of debts from "past due or owing, charged off as bad debt" rather than "discharged in bankruptcy" notwithstanding request by Debtor to update reports. Debtor's complaint fails to state cause of action where complaint alleged only that bank failed to remove a negative reference from credit bureau without providing any details explaining the allegations and failed to contain anything more than "unadorned, the-defendant-unlawfully-harmed-me" accusations. Complaint failed to identify in any respect what the Debtor's claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to "negative reference" without providing any factual explanation or support for the allegations.

(6791) *Smith v. Bluegrass Mortgage,* 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – A complaint is subject to dismissal if it fails to allege a required element which is necessary to obtain relief sought or if a bar to relief is apparent from the face of the complaint. The court's task under Rule 12(b)(6) is then to determine the sufficiency, and not the merits, of the Complaint. To survive a motion to dismiss, complaint does not need detailed factual allegations. However, plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. Court, in determining such a motion must presume that the factual allegations

of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. Motion to dismiss is to assess the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. In considering motion to dismiss, court does not have to accept every allegation in the complaint as true in assessing its sufficiency. Allegations must be "well-pleaded" and the court need not accept sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual. Complaint objecting to Debtor's discharge would be dismissed where Complaint contained "sweeping and unwarranted averments of fact," most of which appear to be accusations of misdeeds by various non-party judges, attorneys, trustees, and other parties at whose hands the Plaintiff believes he has been wronged. Complaint did not contain any allegation sufficient to state a claim that is plausible on its face to sustain any action against this Defendant, if for no other reason that Debtor was a Corporation and would not be entitled to a discharge as a matter of law.

(6792) *Maxus Capital Group, LLC. v. Uhrich,* Case No. 09-8047 (6th Cir. BAP 2010) – In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. Dismissal is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of a claim for relief. Court is not required to accept unwarranted legal conclusions or factual allegations. Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.

(6793) *Nehasil v. Greiner,* 430 BR 446 (E.D. Mi. 2010) – Rule 12(b)(6) allows court to dismiss complaint that fails to state claim upon which relief can be granted. Court can determine whether Plaintiff is entitled to legal relief assuming every allegation in the complaint is true, and with all inferences construed most favorably to Plaintiff. Complaint must contain either direct or inferential allegations regarding all material elements of cause of action. Complaint cannot rely on mere labels or conclusions and must be more than a formulaic recitation of elements of cause of action. Complaint must contain sufficient factual allegations to state a claim that is plausible on its face. Federal Rule 9 requires fraud to be plead with particularity, although state of mind such as malice, intent and knowledge may be plead generally. Complaint that specifically referred to State Court fraud judgment is sufficient to provide Defendant with full understanding of Section 523 complaint. Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State Court judgment for fraud which required that Defendant have obtained money as a result of the fraud.

(6794) *Budzynski v. Stephens,* Case No. 10-4230 (Bankr. E.D. Mi.), *aff'd* 2010 WL 4286186 (E.D. Mi. 2010) – When addressing a motion to dismiss under rule 12, court should construe complaint in light most favorable to plaintiff, accepting all factual allegations as true. Court is not required to accept legal conclusions were unwarranted factual inferences is true. Court should determine whether complaint contains either direct or influential allegations respecting material elements of claim.

(6795) *Torrez v. Eley,* Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff's complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.

(6796) *Montano-Perez v. Durrett Cheese Sales, Inc.,* 666 F. Supp. 2d 894 (M.D. Tn. 2009) - In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." The Federal Rules of Civil Procedure require only that a plaintiff provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. It may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Challenges to the merits of a plaintiff's claim should be "dealt with through summary judgment under Rule 56. To survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level - a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely. Complaint that is nothing more than conclusions is not entitled to the assumption of truth. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

(6797) *D.A.N. Joint Venture, III, LP v. Shekerjian,* Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of $2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

(6798) *Cosby v. Baltrip,* Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Rule 12(f) allows court to strike redundant, immaterial, impertinent, or scandalous matter. Court struck allegations from complaint concerning Debtor's alleged romantic involvement that began a year after events raised in complaint and were completely unrelated to the merits of the complaint.

(6799) *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.

(6800) *Smith v. Bluegrass Mortgage,* 2010 WL 236279 (Bankr. E.D. Ky. 2010) – Complaint objecting to Debtor's discharge would be stricken where Debtor was a Corporation and would not be entitled to a discharge as a matter of law.

(6801) *Midway Motor Sales, Inc. v. Flynn,* 2009 WL 1940719 (6th Cir. BAP 2009) – Motion to strike affirmative defenses are disfavored as resolution requires Court to evaluate legal merits of a defense before the factual background of the case is fully developed. Court can strike affirmative defense that is legally insufficient, immaterial, impertinent or scandalous. A defense is legally insufficient if it cannot succeed under any circumstances; immaterial if it bears no essential or important relationship to the primary claim for relief; impertinent if it contains statements that do not pertain to or are unnecessary to the issues in question; and scandalous if they improperly cast a derogatory light on the opposing party. Bankruptcy trustee is not in privity with the Debtor and the alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee's fraudulent transfer claim. Court properly struck defenses that were based on alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees as those defenses attempted to impermissibly attribute to the trustee the wrongdoing of the Debtor. Defenses of accord and satisfaction and set off are not defenses to a fraudulent transfer action. Latches defense struck where trustee brought avoidance action more than one year after case commenced but within time permitted under section 546(a).

12.129 Amendments to Pleadings – Matter of Right

(6802) *Gentry-Youngblood v. MGC Mortgage, Inc.,* 2016 WL 3129190 (E.D. Tn. 2016) – Party may amend compliant as matter of right under Rule 15 within 21 days of service of either the complaint or a responsive pleading or motion. Although defendant had not filed response to complaint, more than 21 days had elapsed since service of the complaint and defendant had filed Motion to Dismiss for failure to state cause of action.

(6803) *Rathinam v. Ashok Spiritual Healing Center,* 2015 WL 4132809 (S.D. Ohio 2015) – Rule 15 permits party to amend complaint once as a matter of right within 21 days after service or 21 days of service by defendant of either responsive pleading or motion to dismiss. Amended complaint filed after expiration of time permitted in Rule 15 stricken by court.

12.130 Leave to Amend Complaint/Counterclaim

(6804) *Irwin v. O'Bryan,* 2018 WL 3973535 (W.D. Ky. 2018) – Although Court will generally liberally allow amendments to complaint, Court will deny Motion to Amend where proposed amendment would be futile. Allegations contained in proposed amended complaint conclusively established that all causes of action asserted in proposed Amended Complaint were barred by applicable Statute of Limitations such that amendment would serve no purpose.

(6805) *Hubbard v. Select Portfolio Services, Inc.,* 2018 WL 3631971 (E.D. Mi. 2018) – Court can deny Motion for leave to Amend Complaint where proposed amended complaint does not state cause of action.

(6806) *Bennett v. Lindsey,* Case No. 17-50746 (5th Cir. 2018) – Complaint to except discharge under Section 523(a)(2) must plead fraud with particularity. Complaint that alleged that Debtor, a building contractor, signed a false affidavit swearing that all subcontractors had been paid did not state a cause of action where complaint did not allege that builder new affidavit was false or that builder intended at homeowner to rely on affidavit. Conclusory allegations do not meet heightened pleading requirements under Rule 9. Complaint must layout who, what, when, where and how of alleged fraud. Complaint should, at least, have listed subcontractors who were not paid, amounts remaining to be owed, and liens filed against home. Court did not commit error by refusing to allow amended complaint or plaintiff did not request leave to file amended complaint and plaintiff did not describe substantive allegations he would add to complaint.

(6807) *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.

(6808) *Smith v. US Bank, NA,* 2018 WL 1488391 (N.D. Ohio 2018) - Rule 15 authorizes Plaintiff to amend complaint once as a matter of right within 21 days of service of the complaint, responsive pleading or motion to dismiss. After 21-day-window expires, Plaintiff may amend complaint only with leave of Court or Defendant's written consent. Leave will be freely given when justice requires and where motion states with particularity grounds for request. Bare request to leave is not proper motion under Rule 15. Court may deny request when Plaintiff barely attempts to follow amendment procedure.

(6809) *Toledo v. CSX Transportation, Inc.,* 2018 WL 1525073 (E.D. Tn. 2018) – Once 21-day right to amend expires, party may amend pleading only with leave of Court which should be freely given leave when justice requires, based on whether amendment is result of undue delay, bad faith or dilatory motive on part of the movant; movant's repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to the opposing party by virtue of allowance of the amendment; or futility of amendment. Amendment is futile when amendment

would not survive motion to dismiss, construing amendment in the light most favorable to moving party and accept all factual allegations as true and all reasonable inferences in favor of moving party. Court can deny amendment based on prejudice to opposing party and when amendment is sought at late stage of litigation, there is increased burden to show justification for failing to move earlier; or for undue delay that is intended to harass or causes ascertainable prejudice based on whether amendment "[1] requires opponent to expend significant additional resources to conduct discovery and prepare for trial; [2] significantly delay resolution of dispute; or [3] prevents plaintiff from bringing timely action in another jurisdiction. Defendant's Motion to Amend Answer to add affirmative defense of judicial estoppel filed eight months after filing original answer was not undue delay where Defendant was unaware of defense until plaintiff disclosed prior bankruptcy filing during discovery; Creditor promptly moved for summary judgment; Plaintiff did not demonstrate any prejudice resulting from delay in amending where second Defendant had previously asserted same defense and plaintiff would have to respond Court denied Defendant leave to amend. Allowing Defendant to seek the same relief as Second Defendant would not materially add to plaintiff's burden and there was no evidence of "bad faith or dilatory motive".

(6810) *Ingram v. Oasis Investments, LLC,* 2018 WL 1613780 (W.D. Ky. 2018) – Federal Rule of Civil Procedure 15 entitles party to amend pleading once as a matter of course before being served with responsive pleading; and with opposing party's written consent or leave of Court. Whether to grant request to amend is vested in discretion of Trial Court and should freely give leave when justice requires based on factors, including undue delay in filing, lack of notice to opposing party, bad faith by moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to opposing party, or futility of amendment. Amendment that sought to change responses to two paragraphs of Complaint from "deny" to "admit" granted where motion to amend filed well in advance of deadline for amended pleading set by Scheduling Order; while defendant did not offer explanation why it chose to now admit allegation previously denied, plaintiff suffered no prejudice; and amendment was filed before any depositions had occurred and will not increase costs or require remedial discovery.

(6811) *Lashuay v. Delilne,* 2018 WL 317856 (E.D. Mi. 2018) – Rule 15 allows one amendment as matter of right. Plaintiff's filing of second amended complaint without prior leave of court required second complaint to be stricken.

(6812) *Ryan v. Morris,* 2017 WL 6512215 (Bankr. W.D. Ky. 2017) – Rule 7015 allows amendments of pleadings unless opposing party would be prejudiced. Delay in seeking leave to amend, standing alone, is not prejudice. Plaintiff allowed to amend Complaint 2 weeks before trial to add Count under Section 523(a)(2)(A) where amendment did not require any additional discovery and factual basis of action under Section 523(a)(2)(A) was identical to basis for recovery under Section 523(a)(6).

(6813) *Jones v. University of Phoenix,* 2017 WL 3334020 (E.D. Mi. 2017) – Debtor permitted to amend complaint to add Bankruptcy Trustee as party plaintiff for cause of action that arose pre-petition where Debtor initially commenced litigation Debtor's own name without joining Trustee. Although Debtor may have lacked standing to institute litigation in first instance as claim belonged to estate, Debtor not prevented by judicial estoppel form adding Trustee who would have standing to pursue claim.

(6814) *Romero v. Samano,* 2017 WL 2110788 (N.D. Ohio 2017) – Motion to Amend to add counterclaim governed by Federal Rule of Civil Procedure 15 which allows party to amend once as a matter of right within 21 days after service if pleading is one that does not require response. Once 21 days passes party may amend only with consent of opposing party or court permission. Court will allow amendments when justice requires unless amendment would be futile. Proposed counterclaim was not ripe for adjudication where counterclaim sought declaration that plaintiff was jointly liable with Debtor regarding taxes that Debtor may have to pay in future. Debtor had not paid outstanding liabilities and until it does, complaint for contribution raises only hypothetical question or possibility that plaintiff could be jointly liable.

(6815) *Spradlin v. Pryor Cashman, PC,* 2017 WL 1130178 (Bankr. E.D. Ky. 2017) – Leave to amend complaint should be freely given when justice requires, Court has discretion to determine whether additional amendments would be permitted based on undue delay in filing, lack of notice to opposing party, bad faith by moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to opposing party and futility of amendment. Request to file second amended complaint denied where trustee already amended once and chose not to correct pleading deficiencies in initial complaint, did not file motion for leave to further amend the complaint, and did not offer any reason why deficiencies in initial pleading were not or could not have been addressed in previously filed amended complaint or what trustee would do in further amended pleading. Trustee did not take steps necessary to proceed with second amended complaint in good faith and there was no indication that additional amendments would not be futile.

(6816) *Patrick v. CitiMortgage, Inc.,* 2017 WL 318788 (6th Cir. 2017) – Courts generally will liberally allow plaintiff to file an Amended Complaint in adversary proceeding. However, liberal policy regarding amendments does not apply to post-judgment Motion for Leave to File Amended Complaint. Motion was not filed until more than one year after close of discovery and several months after Court filed proposed findings of fact and conclusions of law. Court did not abuse discretion in denying request to amend complaint.

(6817) *Moyer v. Rosich,* 2017 WL 33520 (Bankr. W.D. Mi. 2017) – Although leave to amend should be freely given, leave will be denied when amendment would be futile. Futility exists where proposed pleading falls outside court's jurisdiction; does not state a claim; or is subject to ironclad defense such as time barred. Whether amended pleading dates back to prior pleading depends on whether the amendment asserts claim or defense that arouse out of the same conduct, transaction or occurrence set out, or attempted to be set out, in the original pleading, such that party asserting statute of limitations defense has been placed on notice by earlier pleading that he could be called to answer to allegations raised in amended pleading. Claim based on entirely different operative facts does not provide appropriate notice and will not relate back. Initial complaint asserted that transfer of property located in Michigan from Debtor's self-styled revocable trust to Debtor and her husband was avoidable under section 544. Allegations did not "relate" to allegations in proposed amended complaint regarding sale of property in South Carolina or disposition of proceeds. Operative facts regarding sale of South Carolina property differed from those related to transfer of Michigan property from revocable trust, as allegations involved different asset, different transferee, and a different point in time. Defendants would not have been a notice of Trustee's intent to avoid sale of South Carolina property and original complaint did not implicitly seek to recover proceeds from sale of South Carolina property. Trustee had ample opportunity to investigate sale of South Carolina property prior to commencing adversary proceeding it filed adversary proceeding relating only to transfer of Michigan parcel from revocable

trust.

(6818) *Carrizo v. City of Girard, Ohio,* 2016 WL 5389299 (6th Cir. 2016) – Although Rule 15 allows leave to amend to be freely given, where court has previously issued case scheduling order, that establishes deadline for amendments, leave to amend should be granted only for good cause. "Good cause" requires proof that failure to meet original scheduling order deadline was not result of lack of diligence on part of moving party. Party could have brought actions well before expiration of scheduling date where party was fully aware of all facts and circumstances supporting causes of action. Fact that ultimate success or failure of those actions depended on outcome of other issues in case did not excuse pleading causes of action in first instance. Amendment would also prejudice defendant who, had actions been pled earlier, would have mad different decisions on whether to join other parties in seeking bifurcation of trial and decisions regarding settlement would have been better informed, and amendment would have been first time in case that Plaintiff sought damages against particular defendant.

(6819) *Lanton v. Ocwen Loan Servicing, LLC,* 2016 WL 4734674 (S.D. Ohio 2016) – While leave to amend will be freely granted, court will not permit filing amended complaint where proposed amended complaint does not state cause of action. Proposed Second Amended Complaint failed to state cause of action for incorrect credit reporting where there was no dispute that defendant did not ever report information to credit bureau, nor that plaintiff ever contacted defendant to correct inaccurate information or that defendant failed or refused to do so.

(6820) *Mitchell v. Taylor,* 2016 WL 4191121 (M.D. Tn. 2016) – While Rule 15 specifies that leave to amend should be freely given., Court is not required to grant leave where circumstances demonstrate undue delay, prejudice to non-moving party, bad faith, dilatory motive, or where proposed amendment is futile. Plaintiff's proposed amended complaint was barred by statute of limitations such that amendment would be futile. Further, request was in bad faith and would re prejudicial to defendant where Plaintiff previously filed at least three separate lawsuits against various parties based on same facts and circumstances, all of which have been dismissed by the Courts; and Plaintiff filed numerous bankruptcy petitions in effort to further delay proceedings, such that Plaintiff already had "more than enough bites at the apple".

(6821) *Lieber v. Everbank Mortgage Company,* 2016 WL 4072022 (E.D. Mi. 2016) – Rule 15 permits a party to amend its pleading once within 21 days after service or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12; otherwise a party may only with the opposing party's written consent or leave of the court. Party must act with due diligence and decision to grant or deny motion to amend is left to the sound discretion of court. Court will consider whether there has been undue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments undue prejudice to the opposing party and futility of amendment absent substantial prejudice to the opposing party and whether the matters contained in the proposed amended complaint are unrelated to claims in the original complaint. Leave to file must be sought through Motion with proposed amended pleading attached. Plaintiff's statement in response to Motion to dismiss that Plaintiff would be willing to amend complaint if Motion is granted is not sufficient "Motion" for leave to amend requiring court to strike amended complaint was filed without consent of other party or on Order of Court.

(6822) *Poole v. Federal National Mortgage Association,* 2016 WL 3085765 (W.D. Mi. 2016) – Leave to amend complaint will be freely given absent evidence of undue delay, bad faith or dilatory motive, or where proposed amendment is futile and would not survive motion to dismiss. 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. However, to extent proposed amendment sought to quiet title based on alleged defective assignment of mortgage, plaintiff lacked standing to bring that action and amendment would prove futile. Action was in early states, amendment was really clarification of earlier factual allegations, motion to amend was filed in response to motion to dismiss, no discovery has taken place, and resources expended so far were minimal, and there was no evidence that plaintiff was acting in bad faith or with dilatory motive.

(6823) *Gentry-Youngblood v. MGC Mortgage, Inc.,* 2016 WL 3129190 (E.D. Tn. 2016) – Court will freely grant leave to amend as justice requires, taking into account whether amendment is the result of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, or other factors. Motion for leave to amend denied where proposed amended complaint would be futile and prejudicial to defendants as amendment would require an entirely new round of briefing on the new complaint, all pending motions directed to sufficiency of complaint would be rendered moot, existing defendants would suffer delay while plaintiff attempted to serve new defendants to be added by amended complaint.

(6824) *Veasley v. Federal National Mortgage Association,* 2015 WL 5729537 (6th Cir. 2015) – Motion to amend complaint denied where proposed amendment, filed 2 weeks after summary judgment on initial complaint, raised same issues and legal theories that were already rejected in grant of summary judgment. Motion to amend complaint is not proper method to argue matters that were or could have been raised initially.

(6825) *Doering v. JPMorgan Chase Bank,* 2015 WL 5460702 (E.D. Mi. 2015) – Court will deny motion to amend where proposed amended complaint fails to state cause of action leaving amendment a futile act.

(6826) *Continental Casualty Co. v. Harsha,* 2015 WL 5168592 (E.D. Mi. 2015) – Decision to grant or deny motion to amend pleading is within sound discretion of the court. Amendment will not be permitted in instances of undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of amendment. Leave to amend complaint granted where complaint initially joined one defendant and after that defendant filed for bankruptcy, complaint was amended to drop that defendant. Plaintiff then timely filed motion for relief from stay in bankruptcy court and timely sought to amend complaint to re-add defendant when bankruptcy court lifted stay for that purpose. Record contained no evidence of bad faith or undue delay.

(6827) *Carpenter v. Monroe Financial Recovery Group, Inc.,* 2015 WL 4724785 (E.D. Mi. 2015) – Court will freely grant leave to amend unless amendment is result of undue delay, bad faith by the moving party, repeated failure to cure defects by previously-allowed amendments, futility of proposed amended complaint, or undue prejudice to opposing party. Amendment allowed where revisions were de minimus and offered only to clarify the scope of the claims asserted, not to raise any new legal theory or factual basis for claims presented. Fact that defendant responded to motion to amend and will have to file response to amended complaint do not amount to showing of significant prejudice, as defendant will not be required to prepare additional defense strategies or expend additional resources to defend against new claims.

(6828) *Dearborn Tree Service, Inc. v. Gray's Outdoor Services, LLC,* 2015 WL 4459331 (E.D. Mi. 2015) – Although court should freely grant request to amend complaint, right to amend is not automatic or absolute. Court must consider delay in filing, lack of notice to opposing party, bad faith by the moving party, repeated failure to cure deficiencies by prior amendments, undue prejudice to opposing parties and futility of amendment. Delay itself is not enough to deny motion to amend. Motion denied where amendment was sought very late in proceedings, plaintiff had at least 6 months' notice of facts giving rise to requested amendment yet failed to seek leave to amend, and amendment would prejudice defendant. Plaintiff filed motion for leave to amend on date set by court for filing dispositive motions and a week after defendant filed motion for summary judgment. Although plaintiff had notice of possible claim, plaintiff waited until after discovery cutoff to seek leave to amend and reopening discovery would prejudice defendant who has already filed motion for summary judgment.

(6829) *Brown v. Florida Coastal Partners,* 2015 WL 4205157 (S.D. Ohio 2015) – Court will deny Motion to Amend Complaint where proposed amended complaint fails to state cause of action on its face; or undue delay, bad faith or dilatory motive on part of plaintiff; repeated failure to cure deficiencies in previously filed amendments; or futility of amendment. Undue delay depends on factors such as length of delay, whether dispositive motions have already been granted, whether new allegations would require opponent to expend significant additional recourses to conduct discovery and prepare for trial, and whether amendment would significantly delay disposition of action. Motion to amend would cause undue delay and prejudice. Action had already been pending more than a year and proposed amendment would introduce new parties and entirely new causes of action which would require additional discovery and significantly delay resolution of action. Denial would not prejudice plaintiff as plaintiff is free to pursue new causes of action against new proposed defendants in separate litigation.

(6830) *West v. Home Savings & Loan,* 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Leave to amend complaint will be denied where proposed amended complaint fails to state viable legal theory. Complaint alleging violation of discharge injunction failed as matter of law as there is no private right of action for violation of Section 524. Proposed amended complaint, which still sought to bring suit for violation of discharge injunction continued fatal defect of seeking relief that is not available as matter of law, such that amendment would be futile.

(6831) *Landis v. Baker,* 2015 WL 1568377 (Bankr. N.D. Ohio 2015) – Rule 15 allows plaintiff to amend complaint as a matter of right within 21 days of service of complaint or within 21 days after service of Rule 12 motion. After expiration of 15 days, complaint can be amended only by leave of court. Plaintiff's amended complaint stricken where amended complaint filed after 21 days permitted by Rule 15 and plaintiff did not obtain either consent of the opposing party or leave of court, and plaintiff did not attach any proposed amended complaint that showed that the fatal pleading deficiencies in prior complaint were or could be cured. If party files amended complaint in violation of Rule 15, court does not abuse its discretion in dismissing complaint with prejudice.

(6832) *Branch v. 30th District Court,* 2015 WL 515391 (Bankr. E.D. Mi. 2015) – Court will not grant leave to amend complaint where proposed amended complaint would be subject to motion to dismiss for failure to state cause of action. Complaint seeking to declare Debtor's liability for pre-petition traffic tickets for running a red light; driving on suspended license; and no proof of insurance are excepted from discharge under 11 USC Section 523(a)(7). Debtor could not prevail as matter of law in complaint that sought to discharge those obligations.

(6833) *McCord v. Resurgent Mortgage Servicing,* 2014 WL 4109622 (W.D. Ky. 2014) – Plaintiff will be granted leave to amend complaint freely when justice requires. Motion to amend should be denied only when proffered amendment cannot withstand motion to dismiss under Rule 12(b)(6) or when amendment would otherwise be futile. Proposed amendment would be allowed where amendment added specific factual allegations necessary to survive motion to dismiss for failure to allege facts with specificity and particularity. Amendment did not add cause of action or change parties and case was in its infancy such that amendment did not prejudice any party.

(6834) *Brown v. Florida Coastal Partners, LLC,* 2014 WL 2169561 (S.D. Ohio 2014) – Leave to amend complaint will be freely given when justice requires. However, motion for leave to amend may be denied where court finds undue delay, bad faith or dilatory motive on party of moving party; repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to opposing party; or futility of amendment. Proposed amendment is futile if amendment would not withstand a motion to dismiss under Rule 12(b)(6). Proposed amendment that sought to join attorneys for mortgage servicer in action for slander of title was not futile on its face where complaint alleged that attorneys falsely represented the identity of the holders of the mortgage that was the subject of foreclosure action. While attorneys may have had valid defenses, court would not look beyond four corners of proposed amended complaint in determining whether amendment would survive Rule 12 motion.

(6835) *AFF Ohio, LLC v. Jelinger,* 2014 WL 1329554 (Bankr. N.D. Ohio 2014) – Motion to amend complaint denied where amended complaint raised entirely new theories of liability based on entirely new and different facts. Initial complaint requested dismissal of case under Section 707(b) based on Debtor's alleged "failure" of means test. Amended complaint sought to assert claim under Section 707(a), not based in any way on means test but on alleged failure to disclose assets. While leave to amend should be freely granted, discretion becomes more limited if amendment would require modification of scheduling order. In that event, court will allow amendments only for good cause, which requires consideration of whether amendment will prejudice party opposing amendment and acceptable explanation why the moving party waited for such an extended time to seek to amend after becoming aware of new or additional causes of action. Proposed amended complaint had none of the factual allegations that formed the basis of the original complaint. Allowing amendment would require new scheduling order setting new discovery deadlines and new deadlines for dispositive motions, plus a new trial date where the current scheduling order set trial to begin

in two weeks.

(6836) *Boyd v. Baird,* 2013 WL 6858456 (W.D. Mi. 2013) – Court should deny leave to amend where amended complaint would not withstand motion to dismiss under Rule 12(b)(6). Leave to amend complaint to add count for conversion against principals of Debtor corporation properly denied where Debtor and the defendant were equally culpable in the underlying transaction. *In pari delicto* defense under Michigan law does not allow plaintiff to recover against defendant when plaintiff was at least as culpable as defendant. Trustee, as representative of Debtor's estate, takes claims subject to any defenses that could have been asserted had Debtor brought action in its own right. Proposed amended complaint alleged that defendant and her husband were the sole officers, directors, and shareholders of the Debtor; and that defendant, her husband and the Debtor conspired to transfer assets from the corporation to the defendant. All actions were taken with full knowledge and consent of the Debtor and Debtor was at least equally at fault, precluding recovery.

(6837) *Embraer Aircraft Maintenance Services, Inc., v. AeroCentury Corp.,* 2013 WL 5936723 (M.D. Tn. 2013) – Leave to amend is to be freely given when justice requires, where underlying facts or circumstances relied upon by plaintiff may be proper subject of relief. Court should deny leave to amend only if the party seeking leave has engaged in undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, or futility of the amendment. Plaintiff's request to amend to add specific allegations regarding Court's personal jurisdiction over defendant, filed in response to Defendant's motion to dismiss, would be allowed. Motion to amend was filed within weeks after completion of briefing on defendant's motion to dismiss, which does not evidence any unreasonable delay. Plaintiff's failure to include specific allegations in original complaint was understandable given remaining allegations in complaint. Defendant would not be prejudiced by amendments. Fact that defendant has expended time and incurred fees and costs in drafting and filing motion to dismiss and briefs in support is not "prejudice" as amendment would not prevent defendant from fairly defending action on merits. Amendment was not futile as amendment contained specific factual allegations to support finding that defendant has purposely availed itself of the rights to transact business in Tennessee sufficient to support long arm jurisdiction.

(6838) *Hood v. Chase Manhattan Mortgage Corp.,* 2013 WL 1629306 (E.D. Mi. 2013) – Plaintiff should be granted leave to amend complaint on liberal basis. However, Rule 15 allows amendment only with opposing party's consent or with leave of court. Plaintiff did not request consent of opposing party and did not file Motion for leave to file amended complaint. However, Plaintiff included in response to Motion to Dismiss a request to be allowed to file an amended complaint. Although Plaintiff failed to comply with any procedural requirement, court would allow amendment subject to determination that amended complaint states cause of action.

(6839) *Reed v. U.S. Bancorp,* 2013 WL 1249231 (E.D. Tn. 2013) – Plaintiff may amend complaint to change the party or the naming of the party against whom a claim is asserted and that amendment will relate back to the date of the original pleading if: (1) the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, (2) the added party received notice of the suit in the 120 days following the filing of the original complaint, (3) the notice was such that the added party will not be prejudiced in maintaining a defense on the merits, and (4) the added party knew or should have known that but for a mistake of the identity of the proper party, the action would have been brought against it. Focus is not on whether Plaintiff should have known identity of correct party, but whether correct party knew or should have known that it would have been named but for an error. Amendment to add correct party is not new cause of action that precludes relation back. Amendment demonstrated that Plaintiff attempted to sue correct party, not to add a new party against whom Plaintiff would assert new claims. Corporate relationships between originally named defendant and later, corrected defendant were complex; the correct defendant was at all times aware of the claims including a determination by the EEOC of a right to sue; and once the mistake was discovered, Plaintiff acted quickly to correct the error.

(6840) *Adamovic v. Lazarevic,* 2012 WL 3778946 (Bankr. E.D. Tn. 2012) – Rule 7015, which incorporates Federal Rule 15, allows amendments of pleadings only with the consent of opposing party or with leave of court. Court should freely grant leave where justice requires.

(6841) *Haney v. Educational Credit Management Corp.,* 2012 WL 3693533 (E.D. Ky. 2012) – Plaintiff has no automatic right to amend complaint after dismissal. Court has discretion to determine whether to permit amendment and can consider undue delay in filing motion. Motion to amend denied where at the time the original complaint was filed, Debtor was in full possession of relevant facts and could have raised issues earlier in the proceeding.

(6842) *Shapiro v. Harajli,* 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Court can deny request to file amended complaint where doing so would prejudice defendant; or where filing an amended complaint would be futile. Trustee did not unduly delay in requesting leave to file amended complaint where assertion of new claim would not require defendant to expend significant additional resources to conduct discovery and prepare for trial and would not significantly delay the resolution of the action. However, Plaintiff failed to identify in request for leave to amend any particular claim that Plaintiff would add and, based on Court's earlier ruling on Summary Judgment, it did not appear that Plaintiff could plead any facts or cause of action that would support a meritorious cause of action against defendant.

(6843) *Richardson v. Checker Acquisition Corporation,* 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Request for leave to file Amended Complaint must be requested in written motion unless made during a hearing. The requirement for a written motion in Rule 7(b)(1) and Bankruptcy Rule 9013 serves two functions, a record-making function and a notice function. The record-making function permits the court and the parties to determine what occurred. The notice function permits the opposing party and the court to prepare adequately. Rule 7(b)(1) assures that parties will know of contentions and requests in a litigation and will have the opportunity to oppose—or at least address—such views and demands. Oral argument on previously filed Motion to Dismiss is not the type of hearing where an Oral motion to amend is proper. On proper request, plaintiff should be given at least one chance to amend the complaint before dismissal with prejudice, but Court is not required to permit amendment where proposed amendment would be futile. Plaintiffs alleged delay in requesting leave to amend, resulting in two hearings rather than just one, would not be basis to deny Motion to Amend. However, Court could award defendant attorney fees and costs incurred in attending second, avoidable, hearing.

(6844) *Stevens v. Citizens Tri-County Bank,* 2011 WL 6812807 (Bankr. E.D. Tn. 2011) – Court denied Motion to Amend Complaint where proposed