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SURVEY ISSUE

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SURVEY: HOW RECENT KENTUCKY COURTS ARE APPLYING THE RETALIATION CLAIM IN EMPLOYMENT CASES

Stephen Richey+ and Faith C. Isenhath*

I. INTRODUCTION

In recent years, there have been a growing number of retaliation claims brought in employment discrimination cases.1 Retaliation has increased steadily from 26.6% to 37.9% of the Equal Employment Opportunity Commission (EEOC) suits filed since the year 2000, making the claim second only to female sex discrimination complaints.2 This survey begins by discussing how the Kentucky retaliation statute is construed in relation to the Title VII analysis applied in federal courts, an issue which was recently definitively resolved by the Kentucky Supreme Court. The survey then examines the standard analysis by discussing each of the required elements in proving a retaliation claim in Kentucky. Furthermore, the article provides practitioners with pointers regarding retaliation from the employee’s and the employer’s perspective. Overall, the survey is designed to familiarize practitioners with an overview of the most recent cases on retaliation and how Kentucky courts apply the law.

II. ANALYSIS

A. Kentucky Revised Statute § 344.280 Mirrors Title VII.

Federal law is particularly relevant to the analysis of unlawful retaliation because the “purpose of the Kentucky Civil Rights Act is 'to provide for execution within the state of the policies embodied in the federal Civil Rights

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2. Id.
Act of 1964 as amended. In Brooks v. Lexington-Fayette Urban County Housing Authority, the Kentucky Supreme Court determined “there are no meaningful distinctions between” the “discriminate in any manner” standard in K.R.S. § 344.280(1) and the “discriminate against” standard in 42 U.S.C. § 2000e-3. Appellant, Sandra Brooks (Brooks) argued that the Kentucky Civil Rights Act’s (KCRA) definition of discrimination in K.R.S. § 344.010(5) gives a broader category of claims that are actionable under Kentucky law than the federal law provides.

However, the Brooks court interpreted unlawful retaliation under KCRA consistent with interpreting unlawful retaliation under federal law, reasoning doing so

(1) is consistent with the KCRA’s stated purpose . . . ; (2) promotes predictability in the law; (3) discourages forum shopping; and (4) attempts to strike an appropriate balance between an employer’s legitimate interests in conducting its business with minimal governmental interference and its employees’ legitimate interests in being treated with dignity and respect on the basis of merit and individual achievement.

Therefore, the Brooks court definitively decided that Kentucky courts should interpret retaliation claims under the KCRA the same as Title VII retaliation claims.

B. Kentucky Adopts McDonnell Douglas Burden Shifting approach.

Kentucky courts apply the burden shifting formula established by the United States Supreme Court in McDonnell Douglas Corp v. Green. A plaintiff must first establish a prima facie case of retaliation by meeting each of the four prongs
required under Kentucky law. If the plaintiff meets these elements then the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for the employee’s rejection. If the employer meets this burden, then the plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reasons given by the defendant were a pretext for discrimination, and not the true reasons. These are the necessary steps Kentucky courts follow in determining whether a plaintiff has proved his or her retaliation claim.

1. Elements for a Plaintiff to establish a *prima facie* case for retaliation.

   K.R.S. § 344.280 provides:

   It shall be unlawful practice for a person or for two (2) or more persons to conspire: (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; or . . . (5) To coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right granted or protected by KRS 344.360, 344.367, 344.370, 344.380, or 344.680.

   Kentucky case law has laid out four elements a plaintiff must meet to prove a *prima facie* case for retaliation. In *Brooks*, the Supreme Court of Kentucky required the plaintiff to prove:

   (1) [T]hat plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

   a. Plaintiff engaged in a protected activity.

   The first element of a *prima facie* case in retaliation is the plaintiff must have engaged in a protected activity. More specifically, because Kentucky courts apply the same analysis as Title VII, the plaintiff must have engaged in a protected activity under Title VII or KCRA. In order to satisfy the first prong,

10. *Greenwell*, 2005 Ky. App. LEXIS 79, at *15. The *prima facie* elements for retaliation are laid out under section (B)(1) of this article.
11. *Id.*
12. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
the plaintiff must have either opposed an employer’s practice that is prohibited by Title VII, or participated in either filing a charge, testifying, or assisting in any manner in an investigation, proceeding, or hearing under Title VII.\textsuperscript{18}

Those requirements are referred to as the “opposition clause” and “participation clause” under the first prong in retaliation cases.\textsuperscript{19} The “opposition clause covers a broader range of activities than the participation clause, . . .” but the “employee’s activities must be reasonable and the employee must have a good faith belief . . .” that the employer’s conduct was discriminatory.\textsuperscript{20} The participation clause covers slightly fewer activities, but the underlying discrimination charge does not need to be valid nor is there a reasonableness standard.\textsuperscript{21} Recently, Kentucky courts have illustrated the application of the first prong.

Lisa Driggers (Driggers), appealed from the United States District Court for the Western District of Kentucky’s denial of her motion to alter or amend the court’s summary judgment order against her.\textsuperscript{22} Driggers was a member of the City of Owensboro Police Department, and on December 15, 1999, she filed her first employment discrimination complaint to the City’s EEO Officer alleging gender discrimination.\textsuperscript{23} During the investigation of Driggers’ first complaint, on February 4, 2000, she filed three additional complaints alleging gender discrimination and retaliation, and on March 14, 2000, she supplemented her retaliation complaint.\textsuperscript{24}

In Driggers, the court found that the appellant met the first element of a \textit{prima facie} case for retaliation in Kentucky.\textsuperscript{25} The court looked, in relevant part, to the KCRA to determine that Driggers engaged in a protected activity when she filed the four EEO complaints and orally complained to her Captain about the police department singling her out.\textsuperscript{26} The court stated that Driggers met the first prong of a \textit{prima facie} case because her “complaints were protected ‘opposition’ to what [she] believed to be sex discrimination in the [p]olice [d]epartment.”\textsuperscript{27} However, the appellant could not meet the other two elements and therefore could not establish a \textit{prima facie} case of retaliation.\textsuperscript{28}
Likewise, in Greenwell v. Unified Food Service Purchasing Co-op., the appellant proved that she had engaged in a protected activity, thereby meeting the first prong of a *prima facie* case of retaliation.\(^{29}\) The president (Taylor) at the appellant’s company resigned from the company and filed a reverse discrimination charge under the KRCA, in which Greenwell testified favorably for him at the unemployment hearing in October 2002.\(^{30}\) The appellant was also subpoenaed to testify at the December 2002 trial in Taylor’s discrimination case, but the case settled before going to trial.\(^{31}\) Shortly after the case was dismissed, the appellee gave Greenwell a memorandum reprimanding her for disclosing confidential information in the Taylor case, and then a week later, took away her managerial duties.\(^{32}\)

In response, Greenwell filed a complaint in February 2003 alleging retaliation under the KRCA, which proceeded to trial on January 20, 2004.\(^{33}\) The appellee argued that Greenwell had not engaged in a protected activity because she only testified under K.R.S. Chapter 341 unemployment hearing, not Chapter 344, and the circuit court agreed, thereby granting a directed verdict in its favor pursuant to Civil Rule 50.01.\(^{34}\) Greenwell specifically argued on appeal that she met the first requirement of retaliation under the participation clause because she was subpoenaed to testify in Taylor’s K.R.S. Chapter 344 reverse discrimination action and her testimony from the unemployment hearing was included in that record by joint oral stipulation.\(^{35}\)

The court noted that the protections of the participation clause extend to persons who have participated in any manner in Title VII proceedings.\(^{36}\) The court stated that although Taylor’s case settled prior to trial, the parties had entered into an oral stipulation to include the transcript of Taylor’s unemployment hearing, which included appellant’s testimony.\(^{37}\) The court, by construing the participation clause broadly, held that the inclusion of the unemployment hearing transcript in the record of the KRS Chapter 344 proceeding, along with the appellant’s being under subpoena to testify during trial, was sufficient to establish that she had engaged in a protected activity.\(^{38}\)

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30. *Id.* at *3-4.
31. *Id.* at *4.
32. *Id.* at *4-6.
33. *Id.* at *6-7.
35. *Id.* at *17-18.
36. *Id.* at *17 (citing Johnson v. University of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000)).
38. *Id.* at *17-18.
b. Defendant knew of the protected activity.

The second prong of a plaintiff’s prima facie case is that the defendant must have known of the protected activity in which the plaintiff engaged. This element is specifically required in Kentucky cases, whereas, it is not a separate element in the Title VII retaliation provisions and several other jurisdictions make this element a part of the causation requirement. The element requires that the ultimate decision maker regarding the plaintiff’s employment knows that the plaintiff engaged in the protected activity.

In Allen v. Ingersoll-Rand Co., the plaintiff, Brenda Allen (hereinafter “Allen”), failed to prove that her defendant employer, Ingersoll-Rand Company (hereinafter “Ingersoll-Rand”), knew of the protected activity, and therefore could not establish a prima facie case of retaliation. Allen alleged that Ingersoll-Rand violated the KCRA when it retaliated against her after she complained of employment discrimination by refusing to cross-train her, followed by terminating her and ultimately failing to rehire her. Allen first “complained in 1985 that she was doing the same work as the male buyers but that she did not have the same title or salary[,]” but the court found that Allen presented no evidence that her supervisor, Morse, who made the decision to terminate her, knew of this complaint.

Allen also testified that she subsequently informed her other supervisor, Williams, that she was being discriminated against, and the court also found that there was no evidence that Williams was involved in the decision to terminate her, in the decision not to rehire her, or that he communicated her complaints to the ultimate decision-maker. Furthermore, Allen maintained that she complained to the company supervisor and manager of accounting about the discrimination, however the court determined there was no indication that these people were meaningfully involved in any employment decisions relating to Allen. In addition, Allen pointed to evidence in the record that she complained of discrimination to her supervisors, Williams and Patterson, when she was not placed on a special team to cross-train, but the court again confirmed that Allen

43. Id. at *33-34.
44. Id. at *31-32.
45. Id. at *33-34.
46. Id. at *34-35.
failed to show that those specific supervisors were involved in the decision to terminate her.\textsuperscript{48}

Finally, Allen insisted that she later complained about discrimination to the Human Resources Manager, Fair, when she applied for rehiring, but the court stated she failed to establish that Fair was responsible for making the hiring decisions.\textsuperscript{49} The court concluded that because Allen could not show that her complaints were addressed to the ultimate decision-maker regarding her employment, she failed to prove that Ingersoll-Rand knew of the protected activity.\textsuperscript{50}

In \textit{Lewis v. Quaker Chemical Corporation}\textsuperscript{51}, the United States Court of Appeals for the Sixth Circuit came to a different outcome, and concluded there was sufficient evidence to support the jury’s verdict that the plaintiff engaged in a protected activity known to the defendant.\textsuperscript{52} John Lewis, (hereinafter “Lewis”) brought an age and disability discrimination and retaliation suit against Quaker Chemical Corporation (hereinafter “Quaker”) after Quaker terminated him for allegedly threatening an age and disability lawsuit against it.\textsuperscript{53} Lewis received a jury verdict in his favor on the disability-based retaliation claim, in which Quaker appealed, and Lewis also cross-appealed the district court’s grant of summary judgment on his age retaliation claim.\textsuperscript{54}

Quaker argued that Lewis “did not engage in protected activity by merely making vague threats of litigation.”\textsuperscript{55} Quaker also asserted that “Lewis never asked for [an] accommodation for his disability and never complained about age or disability discrimination in his letters, but instead merely discussed potential litigation[—]that could have been either contractual or discrimination-based . . .”\textsuperscript{56} The court stated that Lewis’ supervisor knew he had consulted counsel concerning an age or disability suit and admitted she sought to avoid litigation or conflict by meeting with him.\textsuperscript{57} The court also found that Lewis established that his other supervisor knew of his complaints, and that Quaker was fully aware of

\begin{itemize}
  \item \textsuperscript{48} \textit{Id.} at *35-36.
  \item \textsuperscript{49} \textit{Id.} at *36.
  \item \textsuperscript{50} \textit{Id.} at *36-37; \textit{But see} Greenwell, 2005 Ky. App. LEXIS 79, at *17-18 (holding that the employer knew about the plaintiff’s testimony in favor of a former employee at his unemployment hearing and about the inclusion of the hearing transcript in the former employee’s reverse discrimination action, and therefore knew about her protected activity).
  \item \textsuperscript{52} \textit{Id.} at *23.
  \item \textsuperscript{53} \textit{Id.} at *1-2.
  \item \textsuperscript{54} \textit{Id.} at *2.
  \item \textsuperscript{55} \textit{Id.} at *22.
  \item \textsuperscript{56} Lewis, 2000 U.S. App. LEXIS 22321, at*22.
  \item \textsuperscript{57} \textit{Id.} at *22-23 (citing Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312-13 (6th Cir. 1989) (stating that “retaliation is prohibited when an employee has opposed a violation of the discrimination act, but that a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice”)).
\end{itemize}
Lewis’ potential discrimination suit. 58 The court concluded that Quaker’s reaction to Lewis’ potential legal action by sending him to visit with his superiors provides sufficient evidence that he engaged in a protected activity. 59

c. Defendant took an employment action adverse to the plaintiff.

The determination of what constitutes an adverse employment action varies among the circuit and state courts, and therefore is a controversial element in retaliation. 60 The United States Court of Appeals for the Sixth Circuit adopts “[t]he threshold ‘actionable employment’ standard [that] requires [an] adverse employment action to be materially adverse or cause a materially adverse change in the terms and conditions of employment.” 61 This standard “must constitute more than a mere disruption, inconvenience, or minor alteration in responsibilities, it could include a less distinguished job title, significantly diminished responsibilities, or other negative actions . . . that significantly affect one’s employment.” 62

When the retaliatory conduct is in the form of harassment, the Sixth Circuit uses a test that determines “whether the retaliatory harassment is severe and pervasive enough to constitute a materially adverse change in the employee’s conditions . . . .” 63 The test “has both an objective and subjective component” that “requires the adverse conduct to be ‘severe or pervasive enough to create a workplace environment that a reasonable person would find [objectively] hostile or abusive[,]’” and “the victim [must] actually ‘regard that environment as hostile or abusive.’” 64 To establish that the employer’s retaliatory conduct is severe or pervasive, the employee must prove by a totality of the circumstances standard that the workplace was so saturated with discrimination or conduct that is filled with intimidation, insult, and ridicule, that the employee’s employment conditions were altered. 65

59. Id. Note that the court grouped the first two elements of a prima facie case into one heading titled, “protected activity,” however, it significantly focused on whether the employer was aware of the plaintiff’s complaints, which is why this case is discussed under the second prima facie element in the survey, and not the first element. Id.
60. Scott Rosenberg & Jeffrey Lipman, Survey: Developing a Consistent Standard for Evaluating a Retaliation Case under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation, 53 Drake L. Rev. 359, 362-63 (2005). There is currently a split among the circuit courts with three different standards defining this element as either: an “adverse employment action,” a ‘material adverse employment action,’ or an ‘ultimate employment decisions . . . .” Id. at 363. This element is confusing “because one circuit’s adverse standard may be the same as another circuit’s ultimate standard[,]” and “two circuits that use the ‘materially adverse’ [standard] may be referring to completely different conduct . . . .” Id. at 364.
62. Id. at 378.
63. Rosenberg & Lipman, supra note 60, at 378.
64. Id. at 378-79 (quoting Broska v. Henderson, 70 Fed. Appx. 262 (6th Cir. 2003)).
65. Rosenberg & Lipman, supra note 60, at 379.
In Kentucky cases, the Brooks court, like the Sixth Circuit, established that the “plaintiff must identify a materially adverse change in the terms and conditions of his [or her] employment to state a claim for retaliation . . . .”\textsuperscript{66} The court held a materially adverse change “must be more disruptive than a mere inconvenience or an alteration of job responsibilities,” and a termination, a demotion, a decrease in wage or salary, a significantly diminished material responsibility, or other instances might indicate a materially adverse change.\textsuperscript{67} There are several cases from the Sixth Circuit and Kentucky state courts that describe the application of this element further.

The Housing Authority, in Brooks v. Lexington-Fayette Urban County Housing Authority\textsuperscript{68} argued that Brooks had insufficient facts to support her retaliation claim.\textsuperscript{69} Specifically, the Housing Authority argued that Brooks failed to prove the adverse-action element of her retaliation case, and that the Kentucky Court of Appeals erred by finding that Brooks proved retaliation.\textsuperscript{70} The court construed the element along with Title VII, requiring a plaintiff to “identify a materially adverse change in the terms and conditions of his employment . . . .”\textsuperscript{71}

Brooks argued that she met this element when her supervisor singled her out from the other employees and required her to ask permission from her supervisor every time she left her desk, whether to check a file, or use the bathroom.\textsuperscript{72} The court found this restriction “was objectively and subjectively humiliating” because this change in her duties “subjected her to greater supervisory scrutiny, carried an imputed diminished level of trust, and marked an objective decrease in prestige.”\textsuperscript{73} The court concluded that Brooks proved a material modification in her duties and loss of prestige, and therefore her claim was sufficient to withstand a motion for a directed verdict.\textsuperscript{74}

\textsuperscript{66.} Brooks, 132 S.W.3d at 802 (quoting Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir. 1999)).

\textsuperscript{67.} Id. (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)).

\textsuperscript{68.} 132 S.W.3d 790 (Ky. 2004).

\textsuperscript{69.} Brooks, 132 S.W.3d at 803.

\textsuperscript{70.} Id.

\textsuperscript{71.} Id. at 802 (quoting Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir. 1999) stating, A materially adverse change in the terms and conditions of employment, must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other instances that might be unique to a particular situation. Id. (quoting Crady v. Liberty Nat’l Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)).

\textsuperscript{72.} Brooks, 132 S.W.3d at 804.

\textsuperscript{73.} Id.

\textsuperscript{74.} Id. See also Greenwell, 2005 Ky. App. LEXIS 79, at *19-20 (holding there was at least sufficient evidence for the plaintiff to defeat a motion for directed verdict when she received a
The United States District Court for the Western District of Kentucky used the same line of reasoning, only finding for the defendant-employers on the adverse employment element. In Thompson v. Kosair Children’s Hospital, the plaintiff, Laura Thompson (Thompson) sued her employer, Kosair Children’s Hospital, for violating the KCRA. Thompson claimed her supervisors and co-workers retaliated against her by acting “‘uncivil, rude, and cool’ toward her after she filed [an] EEOC complaint” alleging age discrimination. However, the court ruled that Thompson’s co-workers could not be attributed to Kosair because there was “no evidence that [its] management had knowledge of this behavior, and the alleged conduct was never reported or complained about to management.”

Thompson also alleged that Kosair’s management failed to cross-train her as retaliation for her complaint, but the court found there was only a delay in her cross-training which did not constitute an adverse employment action. In addition, Thompson claimed that her assignment to the operating room was an adverse action because she was less likely to receive breaks at this location. The court decided that “[r]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims[,]” and the court noted that “when Thompson was assigned to non-operating room duties, she complained and demanded to return to the Operating Room.”

Furthermore, Thompson argued that Kosair constructively discharged her, which constituted an adverse employment action, by condoning and encouraging her co-workers to act hostile toward her. In order to maintain an action for constructive discharge, the court stated that “Thompson must show that ‘working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’” The court held that “[i]t [was] undisputed that Kosair management tried to dissuade [her] from quitting[,]” and that “Thompson [had] no support for the allegation that

memorandum regarding inappropriate behavior, her managerial duties were withdrawn a week later in an e-mail announcement to the entire company, and when she did not receive a promotion). However, the Greenwell court noted that “[w]hether the evidence is sufficient to establish any adverse employment action is best left to the jury to decide.”

78. Id. at *12.
79. Id.
80. Id. at *12-13.
81. Id. at *13.
83. Id. at *13-14.
management had any part in the alleged hostility of her co-workers." 85
Furthermore, the court held that any hostility from her co-workers probably resulted from her originally naming them as defendants to her lawsuit. 86
Ultimately, the court found significant that she had never been terminated, demoted, or given reduced compensation, and therefore did not suffer an adverse employment action. 87 The court concluded that Thompson’s unsupported accusations did not create a genuine issue of material fact regarding her retaliation claim and therefore granted Kosair’s motion for summary judgment. 88

Similarly in Frazier v. Ford Motor Co. 89, the district court granted the defendant’s motion for summary judgment because the plaintiffs failed to establish they suffered adverse employment actions. 90 The court stated that “[n]ot every action taken by an employer or supervisor, even if distasteful[,] . . . constitutes an ‘adverse employment action[,]’” and that such an action must be “‘tangible’ or ‘materially adverse.’” 91 The court “defined [a] tangible employment action as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits[,]” which “‘requires an official act of the enterprise, a company act.’” 92

The court provided the standard for an action “to be tangible (and therefore actionable) must significantly alter the circumstances of the [p]laintiffs’ employment . . . [,]” and must prove more than a “‘bruised ego’ . . . .” 93 The court found that plaintiff Roberts did not offer any evidence that he was prevented from receiving overtime, and there was also nothing in the record showing that he suffered a decrease in pay or benefits. 94 The court concluded that because neither of the plaintiffs had suffered a decrease in job status, salary, benefits, or a significant alteration in their responsibilities, they therefore failed to meet the adverse employment standard for retaliation. 95

The United States Court of Appeals for the Sixth Circuit also analyzed the adverse employment standard for a retaliation claim in Akers v. Alvey. 96

86. Id.
87. Id. at *12.
88. Id. at *14.
91. Id. at *7.
92. Id. (quoting Burlington Ind., Inc. v. Ellerth, 524 U.S. 742, 761-62 (1998)).
94. Id.
95. Id. at *9. See also Driggers v. City of Owensboro, 110 Fed. Appx. 499, 510 (6th Cir. 2004) (finding that the plaintiff had not suffered an adverse employment action because she could not prove she suffered a constructive discharge or that any of her negative experiences were enough to meet the materially adverse threshold).
plaintiff, Cindy Akers, (Akers) claimed three employment actions that she suffered were materially adverse: (1) transferring her to a different office, (2) retaliatory harassment by her supervisor, “Alvey[,] in the form of increased criticism, withholding her mail, ignoring her, and encouraging her coworkers to ostracize her, which resulted in her ‘social death’ within the office, . . .” and (3) her employer, the Kentucky Cabinet for Families and Children, (the Cabinet), refusing to rehire her after a negative recommendation by Alvey. The court first addressed her transfer and found that Akers had not suffered a decrease in pay, her duties were not significantly different, and the transfer reduced her commute from home by 60 miles per day, and therefore was not materially adverse.98

For the next allegation, the court stated that “‘severe or pervasive supervisor harassment’ following a sexual-harassment complaint can constitute retaliation for purposes of a Title VII action.”99 The court articulated the standard saying the “harassment must be ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”100 The “‘test has both an objective and subjective component: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as hostile or abusive.’”101

The Cabinet responded by arguing that it removed Alvey as Akers’ supervisor immediately after the decision to investigate her complaint, and that any harassment after her complaint was not sufficiently severe or pervasive enough to support a retaliation claim.102 The court agreed that Akers could prove no more than simple teasing or offhand comments and that the alleged retaliation

97. Id. at 498. The survey will address Akers’ third argument under section (B)(2) of the article.
98. Id.
99. Id. (quoting Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000) (modifying the standard of a prima facie case of Title VII retaliation under the third prong by adding that either the defendant “took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor . . .” (emphasis in original). The Morris court noted that an employer has an opportunity to prove an affirmative defense to severe or pervasive retaliatory harassment by a supervisor just as it did for severe or pervasive sexual harassment by a supervisor. Morris, 201 F.3d at 792-93. Morris adopted the Supreme Court’s standard from hostile work environment cases:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview . . . ‘[S]imple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’ Id. at 790 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).
100. Akers, 338 F.3d at 498 (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993)).
102. Id.
was during two weeks when the Cabinet was diligently investigating Akers’ complaint, and the Cabinet had circulated a memorandum stating retaliation would not be tolerated.\footnote{103} Ultimately, the court ruled that there was not sufficient evidence for a jury to find that Alvey’s alleged harassment met the severe or pervasive standard, and therefore the district court did not err in granting summary judgment for Akers’ retaliation claim.\footnote{104}

On December 5, 2005, the Supreme Court of the United States granted\textit{certiorari} to decide what constitutes an adverse employment action for Title VII by reviewing a Sixth Circuit decision, \textit{White v. Burlington N. & Santa Fe Ry. Co.}\footnote{105} Sheila White (White) sued her employer Burlington Northern & Santa Fe Railway Company (Burlington) alleging sex discrimination and retaliation in violation of Title VII, and the jury found in favor of Burlington on the sex discrimination and in favor of White for her retaliation claim.\footnote{106} Burlington appealed to the Sixth Circuit for the denial of its motion for judgment as a matter of law, specifically arguing that White’s transfer and suspension without pay did not constitute an adverse employment action.\footnote{107}

Burlington hired White in June of 1997 as the only woman to work in its Maintenance of Way department where she operated a forklift at the Tennessee Yard.\footnote{108} Soon after, on September 16, 1997, White complained to her supervisor, Brown, and other company officials about sexual harassment from her immediate supervisor, Joiner.\footnote{109} On September 26, 1997, Brown met with White to inform her that after the company’s investigation, it disciplined Joiner by suspending him for ten days and ordering him to attend a training session on sexual harassment.\footnote{110} Brown also informed White that the company needed to remove her from the forklift position to a standard track laborer position because of her coworkers’ complaints.\footnote{111} White’s benefits were the same in her new position.

\footnote{103. \textit{Id.} at 498-99 (citing Morris, 201 F.3d at 793). The court distinguishes \textit{Morris} and finds that the supervisor’s behavior in that case was much more severe and pervasive that in \textit{Akers}. In \textit{Morris}, the supervisor called the plaintiff over thirty times in order to harass her, sat outside her office staring into her window, threw nails on her home driveway a few different occasions, and therefore met the severe and pervasive standard.

104. \textit{Akers}, 338 F.3d at 499. \textit{See also Frazier}, 2001 U.S. Dist. LEXIS 19586, at *10 (finding the plaintiffs’ claims that there were instances of chastisement for missing telephone duty could not prove more than evidence of a “‘bruised ego’” and was not conduct severe or pervasive enough to have materially altered their employment. The court stated that a plaintiff “must show that ‘the workplace is permeated with discrimination, intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.’” (citing Ceckitti v. City of Columbus, No. 00-3423, 2001 U.S. App. LEXIS 16026, at *6-7 (6th Cir. July 12, 2001) (quoting \textit{v. Forklift Sys. Inc.}, 510 U.S. 17, 21 (1993))).

105. \textit{White}, 364 F.3d at 791.

106. \textit{Id.}

107. \textit{Id.} at 795.

108. \textit{Id.} at 792.

109. \textit{Id.}

110. \textit{Id.}

111. \textit{White}, 364 F.3d at 792-93.
position, however, the job was more difficult and “dirtier” than the forklift position.\footnote{112}

Thereafter, White filed a charge with the EEOC on October 10, 1997 alleging sex discrimination and retaliation.\footnote{113} On December 4, 1997, she filed a second charge alleging that Brown placed her under surveillance and checked her daily activities.\footnote{114} Brown received the charge in the mail on December 8, 1997.\footnote{115} On December 11, 1997, shortly after Brown received the charge, Brown concluded that White had been insubordinate and ordered her supervisor on the project to remove her from service immediately.\footnote{116} Burlington suspended White without pay for thirty-seven days, but ultimately reinstated her on January 16, 1998, with back-pay, after it conducted an investigation and held a hearing.\footnote{117} The relevant issue the Sixth Circuit addressed was whether this constituted an adverse employment action.\footnote{118}

The court explained that the seminal case in the Sixth Circuit for defining an adverse employment action was \textit{Kocsis v. Multi-Care Management Inc.},\footnote{119} which held that a “plaintiff claiming employment discrimination must show she suffered ‘a materially adverse change in the terms of her employment[,]’” and a “‘mere inconvenience or an alteration of job responsibilities’ or a ‘bruised ego’ is not enough to constitute an adverse employment action.”\footnote{120} Moreover, \textit{Kocsis} held that “[a] reassignment without salary or work hour changes . . . may be an adverse employment action if it constitutes a demotion evidenced by ‘a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.’”\footnote{121} Furthermore, \textit{Kocsis} recognized that “it is impossible to list every possible employment action that falls into the definition of adverse employment action and a court must consider ‘indices that might be unique to a particular situation.’”\footnote{122}

The court rejected White and the EEOC’s request that it adopt a new definition of adverse employment action and reaffirmed its definition that “developed in cases such as \textit{Kocsis} and its progeny.”\footnote{123} The court reasoned that its definition accomplishes the purpose of Title VII’s anti-retaliation provision, to ensure that no person would be deterred from exercising his rights by the threat of discriminatory retaliation, while the definition “appropriately
counterbalance[es] the need to prevent lawsuits based on trivialities." In addition, the court claimed its definition “has the benefit of applying equally to all Title VII discrimination claims, not only to retaliation claims.”

In applying this definition to White’s suspension without pay, the court rejected the ultimate employment decision standard, which was “that Title VII only applies to ‘ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating.’” The court reasoned that this standard “is contrary to the plain language of Title VII, which provides that an employer must not ‘discriminate against’ an employee . . .” and that literally means “‘any kind of adverse action.’” Also, the court stated that the standard contravened Title VII’s purpose to make persons whole for injuries suffered on account of unlawful employment discrimination, because “Congress has declared that part of making a Title VII plaintiff whole is compensating her for interest on the back pay, attorney’s fees, and emotional suffering.” The court concluded “that a thirty-seven day suspension without pay constitute[ed] an adverse employment action regardless of whether the suspension is followed by a reinstatement with back pay.”

Lastly, the court applied its definition of adverse employment action to White’s job transfer from forklift operator to standard track laborer. The court stated that even though both jobs paid the same, the new position was “more arduous and dirtier[,]” and there was a reduction of prestige because the forklift position required more qualifications. Ultimately, the court found that “the reassignment was a demotion evidenced by ‘indices . . . unique to [the] particular situation.’” Therefore, the court affirmed that White proved she suffered an adverse employment action. Even though this case began in Tennessee and not Kentucky, it is important for the survey because it defines what constitutes an adverse employment action in the Sixth Circuit, and the Supreme Court will soon unify the standard from this case.

124. Id. at 799.
125. Id.
126. Id. at 800 (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).
127. White, 364 F.3d at 801-02 (quoting Mattei v. Mattei, 126 F.3d 794, 805 (6th Cir. 1997)) (emphasis in original).
128. White, 364 F.3d at 802.
129. Id. at 791.
130. Id. at 803.
131. Id.
132. Id. (citing Kocsis v. Multi-Care Mgmt, Inc., 97 F.3d 876, 886 (6th Cir. 1996)) (ellipses and parenthetical in original).
133. White, 364 F.3d at 791.
d. Evidence of a causal connection between the protected activity and adverse employment action.

The fourth element in a *prima facie* case of retaliation is the plaintiff must show evidence of a causal connection between the protected activity and the adverse employment action. The Sixth Circuit requires “the plaintiff [to] produce sufficient evidence from which one could draw an inference that the employer would not have taken the adverse action against the plaintiff had the plaintiff not engaged . . .” in a protected activity. “A mere temporal relationship between the protected activity and the retaliatory conduct is generally . . . insufficient proof of causation[,] however, ‘if the temporal proximity is very close’” along with other factors, it may be enough to prove this element. Kentucky courts analyze this prong almost identically, and the *Brooks* court establishes a two-prong test for causation. The Kentucky Supreme Court also determined that absent direct evidence of causation, a *prima facie* case may be established through circumstantial evidence. The survey outlines both Kentucky cases and Sixth Circuit cases regarding the causation element.

In order for a plaintiff to establish the fourth prong of a *prima facie* case of retaliation, he or she must show there was a causal connection between the protected activity and the adverse employment action. In *Brooks*, the Housing Authority argued that Brooks failed to prove the causal connection element of her case. The court determined that absent direct evidence of a causal connection, a *prima facie* case “must be established through circumstantial evidence[,]” which “is ‘evidence sufficient to raise the inference that [the] activity was the likely reason for the adverse action.’” The court explained “this requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action.”

The court stated that “the change in Brooks’ duties requiring her to ask for permission for any and all absences from her desk occurred very close in time with a scheduled visit by the Human Rights Commission officer assigned to investigate Brooks’ discrimination complaint.” Furthermore, there was

137. *Id.* at 379-80 (quoting Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001)).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* (citing Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000)).
143. *Brooks*, 132 S.W.3d at 804.
144. *Id.*
additional evidence that Brooks’ supervisor reduced her break time immediately after her supervisor was served with her federal discrimination and retaliation complaint.\textsuperscript{145} The court concluded that there was sufficient evidence to prove a causal connection to survive a motion for directed verdict on Brook’s retaliation claim.\textsuperscript{146}

Similarly, the United States Court of Appeals for the Sixth Circuit, in \textit{Lewis v. Quaker Chem. Corp.} \textsuperscript{147}, found there was “sufficient evidence . . . to sustain the plaintiff’s theory of a causal connection between the protected activity and termination.”\textsuperscript{148} In \textit{Lewis}, the defendant, Quaker, argued that the amount of time that passed between Lewis’ meeting with his supervisor, Cavanaugh, and his dismissal, mitigates against establishing a causal connection, and “that because Lewis’s (sic) low sales performance pre-dated his alleged protected activity, there [was] no causal connection between his termination and his discrimination complaints.”\textsuperscript{149} Moreover, Quaker contended that the court had previously “held as a matter of law that the passage of three or four months between protected activity the adverse employment precludes a plaintiff’s retaliation claim.”\textsuperscript{150}

The court rejected this argument, but clarified that it previously “held that a plaintiff fails to sustain a \textit{prima facie} case of retaliation when the only material difference between her pre-and post-protected activity treatment was an increase in the number of rules violations the employee received prior to discharge.”\textsuperscript{151} The court pointed to a more recent holding in \textit{Workman v. Frito-Lay, Inc.} \textsuperscript{152} where the court determined “that the district court properly dismissed the plaintiff’s retaliation claim [because] the treatment based on the plaintiff’s disability was the same before and after her EEOC complaint was filed.”\textsuperscript{153} The court noted however, “that ‘the proximity in time between protected activity and adverse employment action may give rise to an inference of causal connection.’”\textsuperscript{154} The court ruled that it has required some direct evidence of causation “when the treatment prior to the protected activity and after the

\textsuperscript{145. Id.  
146. Id. See also Greenwell, 2005 Ky. App. LEXIS 79, *20-21 (using the two-prong circumstantial evidence test from \textit{Brooks}, the court found that Greenwell’s circumstantial evidence was sufficient because of the close temporal proximity of the dismissal of Taylor’s reverse discrimination case to the January 23, 2003 memorandum and the e-mail stripping her managerial duties, and therefore she established the causal connection prong of the \textit{prima facie} case of retaliation).  
148. Id. at *27.  
149. Id. at *24.  
150. Id.  
151. Id. (referring to Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)).  
152. 165 F.3d 460 (6th Cir. 1999).  
protected activity are essentially the same[,]" but the court has not “applied a per se time limitation between the protected activity and the adverse action.”

The court pointed to the evidence that Cavanaugh, Lewis’ supervisor, resented Lewis’ discrimination claims because he viewed them as “smoke screens” to protect his poor performance, and therefore Cavanaugh directly told Lewis to stop complaining about discrimination. Furthermore, the court found that when another supervisor, O’Connor, visited Lewis to accommodate his concerns, it showed that Quaker realized the potential threat of litigation by Lewis. The court concluded that “[t]he length of time between Lewis’s (sic) protected activity and the adverse employment action[, his termination,] does not prohibit a causal connection finding under the evidence, . . .” and therefore Lewis proved the fourth prong of a prima facie case of retaliation.

In Barlow v. Triden Construction Supply, Inc., a federal district court ruled “that temporal proximity, alone, cannot suffice to establish a causal connection between the two events[,]” and there must be additional evidence in support for a retaliation claim. The plaintiff, Woodrow Barlow, argued a temporal proximity between the date he engaged in a protected activity and the date he was terminated established causation. The defendant, Triden Construction Supply, Inc. (hereinafter Triden), contended that it terminated Barlow after he missed fourteen days of work, approximately six months after he filed his EEOC complaint.

The court stated there is no established benchmark duration, but the approach is to analyze temporal proximity in addition to other evidence, and here, Barlow failed to provide any additional evidence. Barlow claimed he presented additional evidence by pointing to complaints he made to his supervisor, Kolb, of discriminatory behavior in Triden’s workplace. The court

156. Id. at *26.
157. Id. at *26-27. See also Heady v. United States Enrichment Corp., 146 Fed. Appx. 766, 770 (6th Cir. 2005). (finding that the plaintiff had established a causal connection between the exercise of her FMLA-protected rights and her discharge because she was discharged on the same day she requested additional FMLA leave). The Heady court stated that “[p]roximity in time between a request for FMLA-protected leave and discharge may provide sufficient evidence of a causal connection for purposes of establishing a prima facie case of retaliation.” Id.
161. Id. at *17.
163. Id. (citing to Harrison v. Metro Gov’t of Nashville, 80 F.3d 1107, 1119 (6th Cir. 1996)). In Harrison, the court determined that even though one year and three months had passed between the plaintiff’s EEOC filing and his termination, that evidence coupled with evidence that showed “three employees feared retaliation because they testified at [plaintiff’s] hearing, and that [plaintiff’s supervisor] made repeated comments that suggested he would not hesitate to run employees out of his department[,]” convinced the court that there was causation. Id.
disagreed stating that Barlow made “no substantiation of . . . his claims, no specification of the subject matter of his complaints, and no indication of the dates on which he lodged his complaints.”

Therefore, the court concluded that Barlow could not prove causation.

2. Burden shifts to employer to articulate some legitimate, nondiscriminatory reason for the employment action.

After a plaintiff proves a prima facie case of retaliation, the burden shifts back to the defendant to provide a legitimate, nondiscriminatory reason for its action against the plaintiff. A few recent Kentucky cases illustrate this principle.

“Once a plaintiff establishes a prima facie case of retaliation, ‘the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’” In Akers v. Alvey, the court assumed arguendo that the Akers had proved a prima facie case of retaliation and shifted the burden to the Cabinet to provide its reason for not rehiring Akers to a different position four months after her resignation. The Cabinet argued that its decision not to rehire her was based on poor reviews from her coworkers and other supervisors, and that her past supervisor who was a party to the suit, Alvey, had no input that was material to the Cabinet’s decision. The court concluded that the Cabinet had articulated a legitimate, nondiscriminatory reason for its decision, and because Akers had not shown this reason was pretextual, she could not prove her retaliation claim.

Likewise, in Heady v. United States Enrichment Corp., the plaintiff proved a prima facie case of retaliation under the Family Medical Leave Act (“FMLA”), and the burden then shifted to the employer to articulate a legitimate, non-discriminatory basis for the plaintiff’s termination. The defendant provided evidence that its reduction-in-workforce plan coupled with its determination that the plaintiff was the lowest rated employee of the three office

165. Id. at *19-20.
166. Id. at *20; See also Allen, 1997 U.S. Dist. LEXIS 9765, at *35-36 (finding that only impermissible speculation would allow a jury to find a causal nexus between plaintiff’s complaint and the decision not to hire her, and the court stated that her first complaint in 1985 was too remote to her termination in 1994, and therefore the plaintiff failed to prove a prima facie case of retaliation).
168. Id.
169. 338 F.3d 491 (6th Cir. 2003).
170. Akers, 338 F.3d at 499.
171. Id.
172. Id.
managers was its reason for the plaintiff’s termination. The defendant supported its belief that the plaintiff was “the lowest-rated manager with particularized facts that were before it when the decision was made.” The court determined that because “[t]he individuals who reviewed [the plaintiff had] conducted an evaluation that considered multiple competencies, explained their low ratings, and gave specific reasons to support the low ratings[,]” it therefore provided a legitimate reason for the plaintiff’s discharge.

3. Plaintiff must then prove that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

After the defendant proves a legitimate reason for its actions, the plaintiff must then prove the defendant’s reasons were not its true reasons but were a pretext for discrimination. The courts view the evidence in a light most favorable to the plaintiff in deciding whether the defendant’s reasons were false. However, the plaintiff must introduce additional evidence of retaliation, and cannot simply rely on his or her *prima facie* evidence. The survey discusses the application of this element with a few cases.

In *Heady*, the court stated that the plaintiff could establish that the defendant’s “reasons for discharge were pretextual by showing the reasons given have no basis in fact, did not motivate the discharge, or were insufficient to warrant the discharge.” The court also noted that the plaintiff may meet her burden by showing that the defendant’s reasons were not credible. The court determined that temporal proximity was not sufficient by itself to establish an employer’s discharge was pretext, and the plaintiff “must provide further evidence that creates a genuine issue of material fact regarding the truth of [the employer’s] . . . reasons for [the] discharge.”

The court found that the plaintiff in *Heady* did not provide reasons why her termination was pretext for unlawful discrimination. The court stated that the plaintiff did not show that she was more qualified than the other two managers who remained in their positions. The plaintiff only pointed to evidence that she had worked longer than one of the other managers, however the court found

175. *Id.*
176. *Id.*
177. *Id.*
184. *Id.* at 771.
185. *Id.*
this insufficient.\textsuperscript{186} Therefore, because the plaintiff failed to show she was more qualified, she could not meet her required burden.\textsuperscript{187}

The United States Court of Appeals for the Sixth Circuit had a different result in \textit{Lewis v. Quaker Chem. Corp.}\textsuperscript{188} In \textit{Lewis}, the defendant, Quaker, rebutted Lewis’ \textit{prima facie} case claiming he was eliminated based on his low sales performance.\textsuperscript{189} Lewis argued that he presented evidence that one of his supervisors, Domsic, urged his other supervisor, Cavanaugh, in 1996 to keep him, but that Cavanaugh terminated him in 1997.\textsuperscript{190} Moreover, Lewis showed that Quaker retained another salesman with lower sales than Lewis and reorganized him into a different region.\textsuperscript{191}

The court ruled that “[t]he plaintiff’s rebuttal evidence must allow a rational factfinder to conclude that [the] employer’s proffered explanation for its actions were false.”\textsuperscript{192} The court found that viewed in light most favorable to Lewis, the jury could have disbelieved Quaker’s proffered reasons for terminating Lewis.\textsuperscript{193} The court determined that the length of time that Quaker allowed Lewis to remain working even with low sales, and its different treatment of a similar salesman several years prior to Lewis’ discharge, coupled with Cavanaugh’s oral and written commands to stop threatening litigation, was sufficient evidence to support the jury’s verdict.\textsuperscript{194} Therefore, the court concluded that the district court properly denied Quaker’s motion for judgment as a matter of law.\textsuperscript{195}

C. \textit{Whether KRCA Permits Liability for Individuals.}

Even though retaliation claims under KRCA are construed according to Title VII, KCRA differs by permitting individual liability.\textsuperscript{196} The \textit{Morris} case establishes that the Kentucky retaliation statute permits individual liability for KCRA violations.\textsuperscript{197}

The plaintiff, Judy Morris (hereinafter “Morris:"), in \textit{Morris v. Oldham County Fiscal Court}\textsuperscript{198}, appealed from the district court’s grant of summary judgment for the defendants, Oldham County Kentucky Fiscal Court, her former supervisor, Brent Likins (Likins), and Judge John Black (Black).\textsuperscript{199} The court

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{186} \textit{Id.}
\item\textsuperscript{187} \textit{Id.}
\item\textsuperscript{188} \textit{Lewis, 2000 U.S. App. LEXIS 22321, at *28-29.}
\item\textsuperscript{189} \textit{Id. at *28.}
\item\textsuperscript{190} \textit{Id. at *27-28.}
\item\textsuperscript{191} \textit{Id. at *28.} Lewis argued that his low sales stemmed from a poorly allocated region and not from his performance.
\item\textsuperscript{192} \textit{Id. at *28.}
\item\textsuperscript{193} \textit{Lewis, 2000 U.S. App. LEXIS 22321 at *28-29.}
\item\textsuperscript{194} \textit{Id. at *29.}
\item\textsuperscript{195} \textit{Id. at *30.}
\item\textsuperscript{196} \textit{Morris v. Oldham County Fiscal Court, 201 F.3d 784, 793-94 (6th Cir. 2000).}
\item\textsuperscript{197} \textit{Id. at 794.}
\item\textsuperscript{198} \textit{201 F.3d 784 (6th Cir. 2000).}
\item\textsuperscript{199} \textit{Morris, 201 F.3d at 786.}
\end{itemize}
\end{footnotesize}
reversed the summary judgment of Morris’s Title VII and KCRA retaliation claims against the County because it found that a reasonable juror could conclude that Likins behavior constituted severe or pervasive retaliatory harassment. The district court granted summary judgment for Black and Likins because it held that individuals could not be held liable under the KCRA. Morris argued that K.R.S. § 344.280 permits liability against individuals because it states, “It shall be unlawful practice for a person, or for two (2) or more persons to conspire . . . [t]o retaliate . . . .”

Earlier, the court held that an individual employee/supervisor who was not an “employer” could not be personally liable under K.R.S. Chapter 344 “because the KCRA ‘mirrors Title VII,’” however the court stated this statement “does not apply to retaliation claims brought under” K.R.S. § 344.280. The court determined that K.R.S. § 344.280 does not “mirror” . . . the analogous retaliation provision in Title VII,” 42 U.S.C. § 2000e-3(a), “which forbids retaliation by ‘an employer.” The court concluded that “[t]he Kentucky retaliation statute plainly permits the imposition of liability on individuals” and therefore reversed the district court’s grant of summary judgment for Likins.

D. Whether the KCRA has an Extraterritorial Application.

Kentucky courts have also resolved the issue of whether or not the KCRA could apply to a plaintiff when his or her retaliation injuries occurred outside of Kentucky. The court in Ferrer applied analysis from the Kentucky Supreme Court in Union Underwear Co. v. Barnhart and ruled that the KCRA does not apply to injuries that occurred outside of the state of Kentucky.

In Ferrer v. MedaSTAT USA, the plaintiff, Deborah Ferrer, (Ferrer), sued her former employer, MedaSTAT USA, (MedaSTAT), and her former supervisors, for retaliating against her in violation of the KCRA for reporting sexual harassment by another MedaSTAT employee, Brian Woolsey (Woolsey), while they were on a business meeting in Florida. The district court granted summary judgment for the defendants because the court found the Kentucky
Supreme Court’s holding in *Union Underwear Co. v. Barnhart* prohibited Ferrer’s claim as an improper extraterritorial application of the KCRA. The issue the court decided was whether the KCRA could apply to Ferrer when her injuries occurred, outside Kentucky’s borders, in Florida. *Barnhart* stated:

The extraterritorial application of one state’s legislation to prevent age-based discrimination [prohibited by the same statutory provision, Ky. Rev. Stat. Ann. § 344.040, that prohibits sexual harassment] upon the employment practices of another state could result in competing jurisdictions and difficult choice of law questions, all of which would delay rather than expedite the disposition of age-based discrimination cases. Such a result would be contrary to one of the ADEA’s primary purposes, which is the expeditious disposition of cases . . . . We conclude by noting that the decision by a state to provide additional protection against age-based discrimination in employment is a policy decision of that state . . . [it] should be done with great prudence and caution out of respect for the sovereignty of other states.

The court in *Ferrer* believed that the *Barnhart* analysis suggested that the Kentucky Supreme Court made a policy decision, not to apply the KCRA to employment situations that might create conflicts with the laws of other states. The court noted that it particularly suggested “the KCRA is inapplicable to injuries that occur outside of Kentucky’s borders, regardless of whether the action causing the relevant injury takes place within Kentucky.” Relying on the *Barnhart* decision, the court concluded that “the KCRA does not provide Ferrer with a remedy for any retaliation she suffered in Florida.”

E. Kentucky Does Not Recognize a Common Law Cause of Action for Retaliatory Failure to Hire.

Homer Baker (Baker), appealed the circuit court’s order granting the Campbell County Board of Education’s (Board) motion to dismiss his claim that the Board refused to hire him in retaliation for successfully suing the Board in federal court. In April of 2000, the Board terminated Baker as a bus driver, and at his post-termination hearing, the Board’s Superintendent Roger Brady (Brady) served as the hearing officer after having signed Baker’s letter of dismissal. Baker then successfully sued the Board for violating his procedural

212. 50 S.W. 3d 188 (Ky. 2001).
217. Id. (emphasis in original).
218. Id.
220. Id. at *2, *4.
due process rights, and before the Sixth Circuit ruled on the Board’s appeal, the parties made a settlement agreement whereby Baker received $60,000 in exchange for waiving his right to reinstatement as a bus driver.221

During the pendancy of the federal case, the Principal of A.J. Jolly Elementary School, Ann Painter, offered Baker a position as a part-time physical education teacher, however Superintendent Brady rejected the offer.222 Baker then sued the Board for wrongfully refusing to hire him because of his federal lawsuit and claimed “that ‘such retaliation [was] contrary to well-defined public policy embodied in, . . . the First Amendment to the United States Constitution and by Section 1 and Section 14 of the Constitution of the Commonwealth of Kentucky.’”223 Because Baker’s complaint did not reference any statutes creating such a cause of action, he was left to argue that the retaliatory refusal to hire was prohibited by the public policy of the Kentucky Constitution.224 The court noted that “[a] retaliatory refusal to hire could, theoretically, be encompassed by 42 U.S.C. § 1983, . . . [b]ut in Kentucky, the statute of limitations for filing a § 1983 claim was one year, . . .” and had already passed, and therefore the court did not decide on the issue.225

The court used wrongful discharge cases as a guide to resolving the public policy arguments and stated that “[e]mployment in Kentucky is generally at-will . . .” and therefore “‘an employer may discharge [an] at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.’”226 The court analogized that “an employer should be able to refuse to hire an employee for any cause not specifically prohibited by applicable state or federal authorities[,] . . . [b]ut the Kentucky Supreme Court has recognized narrow public-policy-based exceptions to the at-will employment doctrine.”227 The Kentucky Supreme Court established limitations on the employment-at-will doctrine, and the court decided that Baker’s proposed cause of action could not meet those criteria.228

221. Id. at *3.
222. Id. at *4.
223. Id.
225. Id. at *8 n.17.
226. Id. at *10 (quoting Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983)).
227. Id.
228. Id. at *10-11 (citing Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985)). The limitations are:

1) The discharge [or, presumably, failure to hire] must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
2) That policy must be evidenced by a constitutional or statutory provision.
3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Id.
The court stated that “[t]he Kentucky Supreme Court has already rejected a claim of wrongful discharge based on . . . “229 Section 1 and 14 of the Kentucky Constitution. Moreover, the court found that Baker did not cite to any authority from Kentucky “showing that any public policy involving retaliatory failure to hire exists . . . .”230 In addition, the court observed that “the existence of an established relationship between an employer and an employee creates certain expectations of conduct and trust that simply do not exist between an employer and a job applicant[,]” and therefore “public policy would afford more protections to an employee than to a prospective employee.”231 The court therefore held that there was no cause of action for retaliatory failure to hire in Kentucky.232

III. GUIDELINES FOR PRACTITIONERS233

The survey is designed to inform practitioners of the most recent Kentucky cases and how the courts are applying retaliation claims. This section provides information for practitioners from the employee’s perspective and from the employer’s perspective regarding retaliation claims. This information gives some brief insight for practitioners on how to handle a retaliation claim from either point of view.

A. From the Employee’s Perspective

Prohibitions against retaliation provide an employee, who is experiencing discrimination or harassment in the workplace, an opportunity to end the inappropriate treatment.234 Virtually every employer today has a policy and procedure for investigating and resolving complaints of discrimination.235 The aggrieved employee should avail him or herself of these procedures. If front line supervisors will not resolve the matter, recourse to the human resources department or upper management will often provide a more adequate response. If this fails, then filing a charge with the federal Equal Employment Opportunity Commission, the Kentucky Civil Rights Commission or seeking the assistance of

229. Baker, 2005 Ky. App. LEXIS 231, at *11-12 (citing Grzyb, 700 S.W. 2d at 402 and Boykins v. Hous. Auth. of Louisville, 842 S.W.2d 527, 530 (Ky. 1992)).
231. Id.
232. Id. at *13. The court stated that having found no common law cause of action, it would therefore decline to decide any ancillary issues, such as whether Baker had met the prima facie elements of a retaliation claim.
233. The guidelines for practitioners are suggestions made by the authors to a practicing attorney regarding the proper application of retaliation claims. Unless otherwise noted, the authors developed these pointers through discussion with other labor and employment lawyers and their own practical experiences in dealing with retaliation claims.
counsel may be necessary. The anti-retaliation provision of KRS § 344.280 and federal law provide protection both for the employee challenging discrimination and for coworkers who lend support. 236

For plaintiff's counsel, the anti-retaliation statutes provide a powerful tool for civil rights enforcement. 237 In most instances when an employee has experienced workplace discrimination or retaliation, he or she will have levied some objection to the treatment. 238 Such complaints, even informal ones, may form the basis for a retaliation claim. 239 While the underlying discrimination claim can complex, difficult or even meritless, the related retaliation claim may be easier to establish. 240

B. From the Employer's Perspective

Dealing with an employee who has filed an internal or external complaint alleging discrimination presents an extremely difficult challenge for an employer. 241 Any adverse action taken by the employer in response can create liability for retaliation, even if the initial complaint was without merit. 242 The following precautions will afford some protection from retaliation claims.

The first line of defense to address retaliation is the employer's employment policies. 243 Virtually all employers have policies addressing equal employment opportunity, workplace discrimination and harassment, often contained in an employee handbook. 244 These policies should address not only sexual harassment, but also harassment based on age, religion, disability and other protected categories. 245 Each policy should delineate a procedure for employees to report alleged violations. 246 The policy should also assure the employee that his or her complaint will be thoroughly investigated and that appropriate action will be taken if the complaint is found to be meritorious. 247 Finally, and most importantly for purposes of this discussion, the policy should assure employees

236. See KY. REV. STAT. ANN. §344.280 (West 2005).
238. See generally MARK A. ROTHSTEIN et al., EMPLOYMENT LAW §2.11 (3d ed. 2004).
239. Id.
240. Id.
244. See generally NATIONAL BUSINESS INSTITUTE, FUNDAMENTAL ISSUES IN KENTUCKY HUMAN RESOURCES LAW 102-03 (2001).
245. Id. at 105-108, NATIONAL BUSINESS INSTITUTE, EMPLOYEE HANDBOOKS IN KENTUCKY: DRAFTING AND ENFORCING SOUND PROCEDURES AND POLICIES 81-84 (2003).
247. Id. at 60-69.
that they will not be retaliated against for reporting violations or participating in
the investigation of such reports.\textsuperscript{248} 

Hand in hand with such a statement of a policy, the employer must institute a
procedure for fairly evaluating all allegations of workplace discrimination.\textsuperscript{249}
This means actually having in place management personnel who are trained to
conduct impartial investigations in a timely fashion and who have the authority
to take appropriate remedial action, if necessary.\textsuperscript{250} Of course, some retaliation
claims arise from a genuine intent to punish the employee for protected activity.
Others are, however, just as likely to result from untrained managers responding
in inept fashion to a situation for which they are wholly unprepared. Enlightened human resource practices and supervisors trained to identify and
respond to employee complaints of discrimination are the best antidote for
retaliation claims. Proactive instructions on the part of management can prevent
retaliatory reactions on the part of supervisors and co-workers. Additionally,
management efforts to conduct an impartial investigation, including instructions
to personnel to refrain from retaliation, have been recognized by Kentucky
courts as evidence that the employer acted in good faith and without retaliatory
intent.\textsuperscript{251}

The potential for retaliation claims underscores the importance of careful
documentation of the basis for every workplace disciplinary action.\textsuperscript{252} Kentucky
courts will readily reject a retaliation claim, when the employer can establish a
legitimate non-discriminatory reason for the adverse action taken.\textsuperscript{253} Likewise,
the inability to demonstrate a solid basis for disciplinary action, coupled with
temporal proximity to the protected activity will create a strong retaliation
claim.\textsuperscript{254}

IV. CONCLUSION

This survey reviewed the four elements of a \textit{prima facie} case for retaliation,
and how the courts apply each of the elements. Furthermore, the survey
discusses the burden-shifting framework, and how courts construe the KCRA
using the same principle as Title VII. In addition, the survey provides
practitioners with pointers from both the employee’s and employer’s
perspectives. It is essential for practitioners to be aware of potential retaliation

\begin{itemize}
\item \textsuperscript{248} Id. at 59.
\item \textsuperscript{249} Id. at 95.
\item \textsuperscript{250} Id. at 61-64.
\item \textsuperscript{251} Akers v. Alvey, 338 F.3d 491, 499 (6th Cir. 2003).
\item \textsuperscript{252} See generally THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 157 (2001).
\end{itemize}
claims. As noted above, retaliation claims are second only to sexual harassment claims with respect to claims made to the EEOC. As the survey indicates, Kentucky and the Sixth Circuit cases arising from Kentucky have established a standard for applying retaliation claims. A standard which will continue to evolve as the case law develops.

This Article surveys several business torts in the Commonwealth of Kentucky. Unlike traditional intentional torts, e.g. assault, battery and trespass, which afford relief for harm to person or property, business torts provide entities relief for harm to more intangible assets such as a company’s financial well being, trade secrets and contractual relationships. This Article provides an in depth look at three common business torts -- intentional interference with contract, intentional interference with business relations and fraud -- and focuses on the interplay between these claims and fundamental contract law.

Section I addresses Kentucky’s two claims for tortious interference: tortious interference with contractual relations and tortious interference with business relations. Kentucky courts rely almost exclusively upon the Restatement (Second) of Torts in its treatment of these distinct torts. Generally, Kentucky courts require the following elements for these claims: (1) the existence of a valid contract, business relationship or business expectancy; (2) the defendant’s knowledge of the same; (3) an intentional act of interference that causes the breach of that contract or inhibits a prospective contract; and (4) an improper motive or lack of justification for the interference. Section I highlights several cases and the Restatement provisions that address the oft-litigated issue of whether such interference is improper or justified.

Section II addresses Kentucky’s approach to common law fraud. To recover for intentional fraudulent misrepresentation, a claimant must prove that: (1) the defendant made a material misrepresentation; (2) the misrepresentation was false; (3) the defendant knew the statement was false when he made it, or made it recklessly without any knowledge as to its truth; (4) the defendant made the statement with the intention of inducing plaintiff to act in reliance upon it; (5) the plaintiff acted in reliance upon the misrepresentation; and (6) the plaintiff suffered injury. Section II analyzes the two most important elements of

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intentional fraud in Kentucky jurisprudence, materiality and intent to deceive. Section II also considers instances where a party’s concealment or nondisclosure of material facts or negligent misrepresentation constitutes actionable fraud.

I. TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS

In Brooks v. Patterson,\(^4\) the Kentucky Court of Appeals recognized a “new and distinct tort” -- defined quite broadly as “tortious interference.” Kentucky courts now recognize two distinct “interference” torts: (1) intentional interference with contractual relations and (2) intentional interference with business relations.\(^5\) Both claims provide businesses and individuals with relief against third parties who wrongfully interfere with their business affairs.\(^6\)

The single difference between claims for intentional interference with contractual relations and intentional interference with business relations is obvious -- the former requires a fixed contractual obligation, while the latter involves a mere expectation of business relations, such as a prospective contract.\(^7\) While slightly different, both claims require courts to balance conflicting interests of restoring injured parties and holding tortfeasors accountable versus promoting free enterprise.\(^8\)

A. Interference with Contractual Relations

The tort of intentional interference with contractual relations dates back to the English case of Lumley v. Gye.\(^9\) In Lumley, a theatre owner, Lumley, hired an individual named Wagner to perform in a series of shows.\(^10\) Following Wagner’s execution of the contract but prior to the first scheduled performance, a third party, Gye, by no illegal measure, induced Wagner to breach and abandon his contract with Lumley.\(^11\)

Lumley filed suit against Wagner for breach of contract and against Gye for inducing this breach.\(^12\) In its determination of whether a third party bears liability for inducing another’s breach of contract, the Lumley court provided the following oft-quoted statement:

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4. 29 S.W.2d 26, 28 (Ky. 1930).
5. See Brooks v. Patterson, 29 S.W.2d 26 (Ky. 1930) (establishing the tort of intentional interference with contractual relations in Kentucky) and United Constr. Workers v. New Burnside Veneer Co., 274 S.W.2d 787 (Ky. 1954) (establishing the tort of intentional interference with business relations in Kentucky).
6. See Brooks, 29 S.W.2d at 28-29.
7. See Dobbs, supra note 1, § 445, at 1257-58; § 447, at 1264; §448, at 1269-70. See also JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 19.02, at 413-14 (2d ed. 2000).
10. Id.
11. Id.
12. Id.
[I]t must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master’s service … commits a wrongful act for which he is responsible at law.13

Following *Lumley*, American jurisdictions slowly began to recognize claims for intentional interference with contract and business relations.14  Kentucky courts, however, did not greet *Lumley* with such sweeping approval.15  In fact, Kentucky precedent did not recognize intentional interference with contractual relations until *Brooks v. Patterson*16 in 1930. In this case, the Kentucky Supreme Court held:

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\text{[T]hat no action … lies against an intermeddler who, though maliciously or without a legitimate interest to serve or justifiable cause, induces a person to breach his contract with another, unless the stranger to the contract has employed unlawful means, such as fraud, deceit or coercion, and special damage is sustained as a direct and proximate result.}^{17}
\]

The *Brooks* court limited the *Lumley* holding, confining recovery of damages to “cases involving interference in contractual relations between master and servant, and where a person by coercion or deception has been procured against his will or contrary to his purposes to breach a contract.”18  This required claimants to show that the interfering party’s conduct amounted to duress or fraud.19

Several decades after *Brooks*, the Kentucky Supreme Court eliminated the “coercion or deception” and “master-servant” requirements for the tort of

13. *Id.* at 752-53.
15. Compare Chambers v. Baldwin, 15 S.W. 57 (Ky. 1891), and Boulier v. Macauley, 15 S.W. 60 (Ky. 1891) (both rejecting the holding in the English case *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853) which established the tort of intentional interference with contractual relations). The *Chambers* court held:

\[
\text{[F]or competition in every branch of business being not only lawful, but necessary and proper, no person should, or can upon principle, be made liable in damage for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other.}^{18}
\]

16. 29 S.W.2d 26 (Ky. 1930).
17. *Id.* at 29 (emphasis added).
18. *Id.* at 28.
interference with contract. Kentucky courts joined the majority, holding that, “An action will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification.”

Kentucky courts now cite Section 766 of the Restatement (Second) of Torts as the basic framework for interference with contract claims. Section 766 provides:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Essentially, a claimant must prove the following elements to prevail on an interference with contract claim: (1) the existence of a contract; (2) defendant’s knowledge of this contract; (3) that defendant intended to cause the breach of this contract; (4) that defendant caused the breach of this contract or prevented it from coming into being; (5) that this breach caused claimant to suffer damages; and (6) the defendant had no privilege or justification to excuse its conduct.

The most often -- and typically the only -- elements that are litigated in interference with contract claims are intent and justification. Interference with contract developed in the field of intentional torts, thus the interferer’s conduct must be intentional for the claimant to prevail. As provided in Section 766C of the Restatement (Second) of Torts, a section specifically adopted by the Kentucky Supreme Court in *NCAA v. Hornung*, jurisdictions generally do not

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27. RESTATEMENT (SECOND) OF TORTS § 766(C) provides:

One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor’s negligently
(a) causing a third person not to perform a contract with the other, or
(b) interfering with the other’s performance of his contract or making the performance more expensive or burdensome, or
(c) interfering with the other’s acquiring a contractual relation with a third person.
28. 754 S.W.2d 855 (Ky. 1988).
recognize a cause of action for negligent interference with contract or prospective contract because the interferer’s harm is “too remote for negligence liability and the [interferer’s] conduct is not the proximate cause.” 29 A litigant, therefore, must present evidence of intent to prevail on this claim.

The United States Court of Appeals for the Sixth Circuit recognized an exception to this intent requirement in Byers v. Toyota Motor Manufacturing, Kentucky, Inc. 30 In Byers, a former patient sued Charter Ridge Behavioral Health System for negligence when a hospital employee failed to notify the patient’s employer of his hospitalization, which ultimately led to the employee’s termination. 31 The Charter Ridge employee offered and agreed to provide such notification, but failed to do so. 32 The patient sued Charter Ridge for negligence. 33 However, the United States District Court for the Eastern District of Kentucky characterized the patient’s claim as one of intentional interference with contractual relations, and dismissed the claim for lack of intent. 34

Citing comment (e) of Section 766(c) of the Restatement (Second) Torts, the United States Court of Appeals for the Sixth Circuit reversed. 35 Comment (e) provides an exception to the intent requirement where “the alleged intermeddler also has some other relationship with a separate and independent duty to a plaintiff,” and “[b]reach of such a duty proximately causing a foreseeable injury essentially constitutes simple negligence.” 36 The Sixth Circuit held that, by offering and agreeing to inform the patient’s employer of his hospitalization and failing to do so, the employee created a duty, the breach of which proximately caused the patient’s foreseeable termination. 37 The court held that this conduct fell within the recognized exception to the intent requirement under Comment (e) of Section 766(c). 38

In addition to intent, a claimant must prove that the third party’s interference is improper. 39 This element requires a two-step analysis for both tortious interference claims. 40 First, the aggrieved party must present evidence that the interference is improper to survive dismissal and proceed to the trier of fact. 41 Then, if the interference is deemed improper, “the party whose interference is alleged to have been improper may escape liability by showing that he acted in

29. Restatement (Second) of Torts § 766(C) (internal quotations omitted).
30. 172 F.3d 47 (6th Cir. 1999).
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id., 172 F.3d at 47.
37. Id.
38. Id.
40. Id.
41. Id.
good faith to assert a legally protected interest of his own.” Accordingly, once an aggrieved party proves the interference is improper, the burden shifts to the interfering party to establish a defense for the interference.

Section 767 of the Restatement (Second) of Torts establishes a laundry list of factors for the trier of fact to consider when determining if interference is improper. Section 767 states:

In determining whether an actor’s conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

a. the nature of the actor’s conduct,
b. the actor’s motive,
c. the interests of the other with which the actor’s conduct interferes,
d. the interests sought to be advanced by the actor,
e. the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
f. the proximity or remoteness of the actor’s conduct to the interference and
g. the relations between the parties.

Kentucky courts give significant weight to the defendant’s motive or purpose when balancing these factors. A trier of fact shall infer a malicious motive if the defendant lacks proof or justification. Kentucky courts have recognized that one’s interference with contract is justified and thus immune from liability under this body of tort law if he or she acts in good faith, by appropriate means, to protect a legitimate interest that may otherwise be impaired or destroyed by the performance of the contract. Therefore, lawful competition, where exercised in good faith, usually prevails over claims for intentional interference with contract.

42. National Collegiate Athletic Association, 754 S.W.2d at 858.
43. Id.
44. Id. at 857.
47. Id.
48. NCAA v. Hornung, 754 S.W.2d at 857 citing Section 773 of the Restatement (Second) of Torts.
49. As of the date of the publication of this Article, one Kentucky case, AMC of Louisville, Inc. v. Cincinnati Milacron, Inc., 2000 WL 33975582 (W.D. Ky.), recognized Section 768 of the RESTATEMENT (SECOND) OF TORTS, which is commonly known as the “competitor’s privilege.” This Section provides:

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other’s relation if
The U.S. District Court for the Western District of Kentucky considered whether a former employee's interference with his employer's existing contracts constituted privileged competition in *Walt Peabody Advertising Service v. Pecora.* In *Pecora,* the plaintiff, Walt Peabody Advertising, entered into contracts with bowling alleys across the nation whereby they agreed to provide bowling score sheets to the bowling alleys free-of-charge in consideration for placing advertisements on the sheets. Eighteen of these bowling alleys were in Louisville, Kentucky. Walt Peabody Advertising hired Rocco Pecora to serve as Regional Manager, with the primary duty of negotiating agreements in the Louisville area.

Pecora eventually resigned from the company and joined his brother's advertising agency, Action Advertising Associates, Inc. In this new position, Pecora began to solicit the bowling alleys he serviced while with Walt Peabody Advertising. Pecora told at least one of the bowling alley owners that their agreement with Walt Peabody Advertising was no longer in effect and they could hire Pecora. This statement was not true.

Walt Peabody Advertising sued Pecora for intentional interference with contractual relationships and moved for a preliminary injunction. In granting the preliminary injunction, the court held that Pecora "acted with the express purpose of taking away from the plaintiff its contractual customers." Pecora's interference did not constitute good faith competition, as he deceived the customers into believing they were free of any obligation to Walt Peabody Advertising so he could retain their business.

Similarly, the Kentucky Court of Appeals did not dismiss the interferer's conduct as privileged or justified in *Bourbon County Joint Planning Commission*

(a) the relation concerns a matter involved in the competition between the actor and the other and
(b) the actor does not employ wrongful means and
(c) his action does not create or continue an unlawful restraint of trade and
(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

51. *Id.* at 329.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
57. *Id.* at 329.
58. *Id.*
59. *Id.*
v. Simpson. 60 In Simpson, the plaintiff, Harry Laytart, entered an agreement to sell a portion of his farm located in Bourbon County, Kentucky to Woodford and Bonnie Wilson. 61 The Wilsons wanted to buy five acres of the farm for residential purposes. 62 To avoid having to obtain a zone change from agricultural to residential, Laytart petitioned the Bourbon County Joint Planning Commission for an opinion declaring that the sale was not a subdivision of land but merely a “division of land for agricultural purposes.” 63

The Planning Commission ruled in Laytart’s favor, but a group of nearby agricultural landowners appealed the decision to the Bourbon Circuit Court. 64 The circuit court remanded the case to the Planning Commission for a full evidentiary hearing on the issue of whether the sale did not constitute a “subdivision” of land, as Laytart proffered. 65 However, prior to the order to remand, the Wilsons demanded that Laytart release them from their contract to purchase the land, and Laytart complied. 66

Laytart filed counterclaims against the petitioning property owners for abuse of process and interference with contract. 67 The Kentucky Court of Appeals stated the general proposition that an aggrieved party must show that an intentional interference is improper to recover. 68 Per NCAA v. Hornung, the party must show malice “but only in the sense of lack of justification for the interference,” 69 and it is a defense if the interferer acted in good faith to protect a personal interest. 70

The protesting landowners filed a Motion to Dismiss claiming their conduct was privileged by statute. 71 The Kentucky Court of Appeals recognized that, “The burden of proof is on Laytart, and it is a difficult one: the appellees are entitled to attend planning commission hearings, and ‘injured or aggrieved’ persons have a right of appeal from adverse decisions of that body.” 72 However, although KRS 100.347 affords such a right of appeal, the court held, “we do not think that the grant of a statutory privilege automatically exempts those who use

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60. 799 S.W.2d 42 (Ky. Ct. App. 1990).
61. Id. at 44.
62. Id.
63. Id.
64. Id.
65. Bourbon County Joint Planning Comm’n, 799 S.W.2d at 44.
66. Id.
67. Id.
68. Id. at 45.
69. Id. (citing National Collegiate Athletic Ass’n v. Hornung, 754 S.W.2d 855, 859 (Ky. 1988)).
70. Id. (citing RESTATEMENT (SECOND) OF TORTS § 773 (1977)).
71. Bourbon County Joint Planning Comm’n, 799 S.W. at 44.
72. Id. at 46.
B. Interference with Business Relations

Jurisdictions generally afford less protection to interference with business relations claims than interference with contract, but protect business relations nonetheless. This was not always the case in the Commonwealth of Kentucky, though.

Similar to its treatment of interference with contractual relations, Kentucky courts initially refused to recognize the tort of intentional interference with business relations. After *Lumley*, Kentucky courts had several opportunities to recognize the tort, the first of which arose in the case of *Gott v. Berea College*. In *Gott*, the appellant, a restaurateur in Berea, challenged Berea College's rule prohibiting students from entering Berea restaurants not owned or managed by the college. The appellant claimed that, among other things, the rule unfairly interfered with his business. With respect to this claim, the Kentucky Court of Appeals held:

> But, even if it might be conceded that the rule was an unreasonable one, still appellant Gott is in no position to complain. He was not a student, nor is it shown that he had any children as students in the college. The rule was directed to and intended to control only the student body. For the purposes of this case the school … [was] well within [its] powers when they direct their students what to eat and where they may go to get it …

In 1954, the Kentucky Court of Appeals departed from this harsh approach and recognized a claim for intentional interference with business relations in *United Const. Workers v. New Burnside Veneer Co.* Kentucky courts have now joined the majority and rely primarily upon the Restatement (Second) of Torts for interference with business relations claims. In *NCAA v. Hornung*, the Kentucky Supreme Court adopted Section 766B of the Restatement (Second) of Torts. Section 766B provides:

> One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject

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73. *Id.*
74. *Id.*
76. 161 S.W. 204 (Ky. 1913).
77. *Id.* at 205.
78. *Id.*
79. *Id.* at 207.
82. *Id.*
to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
b) preventing the other from acquiring or continuing the prospective relation.83

A claimant must establish the following elements to recover for intentional interference with business relations: (1) the existence of a valid business relationship or expectancy; (2) defendant's knowledge of that relationship or expectancy; (3) defendant's intentional act of interference with that relationship or expectancy; (4) an improper motive; (5) causation; and (6) special damages.84 Kentucky courts primarily focus on the “improper” element in interference with business relations claims, and rely on the factors set forth in Section 767 of the Restatement (Second) of Torts for guidance.85

In Cullen v. South East Coal Co.,86 for example, the main issue was whether a company’s interference with a physician’s practice was improper or privileged.87 The physician, Dr. Cullen, owned a practice in Whitesburg, Kentucky.88 The majority of Dr. Cullen’s practice was comprised of employees of the company, South East Coal.89 South East Coal provided employees and their family full health care coverage.90

In 1977, Dr. Cullen treated an employee’s family for lice and forwarded the bill to the company for payment.91 Dr. Cullen, however, mistakenly included a charge for the care of the father, who he did not examine or treat.92 A representative of South East Coal called Dr. Cullen to discuss this error and a heated exchange ensued.93 In response, the South East Coal representative issued a memo to all employees stating, “Effective November 5, 1977, Dr. Robert Cullen ... will be removed from the list of approved doctors and clinics to serve our employees under our health benefits card. No bills will be accepted from Dr. Cullen after this date.”94 This memo, which was signed by the Vice President of South East Coal, decimated Dr. Cullen’s patient consuls from 30 to

85. Id.
86. 685 S.W.2d 187 (Ky. Ct. App. 1983).
87. Id. at 188.
88. Id.
89. See id. at 189.
90. Id. at 188.
91. Id. at 189.
92. South East Coal Co., 685 S.W.2d at 189.
93. Id.
94. Id.
40 per day to 15 to 20 per day. This forced Dr. Cullen to close his Eastern Kentucky clinic.

Dr. Cullen sued South East Coal for improperly interfering with his business and prospective contractual relations. The court focused on whether South East Coal’s conduct constituted improper interference, as contemplated in Section 766(B) of the Restatement (Second) of Torts. The court concluded that South East Coal intentionally sent the memorandum to its employees for one purpose -- to interfere with Dr. Cullen’s practice. Yet, this interference was justified, as South East Coal maintained a significant interest in ensuring that physicians and health care providers did not abuse its 100% subsidized health plan. Accordingly, South East Coal issued this memorandum with the intent of providing reasonable self-projection, not to serve some malicious agenda.

The Kentucky Court of Appeals also considered whether a party’s interference with business relations was improper in Eastern Kentucky Resources v. Arnett. In Eastern Kentucky Resources, an environmental group, called The Magoffin Countians for a Better Environment, sued the Magoffin Fiscal Court and its Judge Executive, Charles Allen. The environmental group claimed that Allen, in his official capacity, filed a solid waste management plan with Kentucky’s Natural Resources and Environmental Cabinet without submitting the plan to the Fiscal Court as required by state statute.

Eastern Kentucky Resources filed a counterclaim for intentional interference with business relations against The Magoffin Countians for a Better Environment. Eastern Kentucky Resources argued that the environmental group was formed:

[F]or the sole purpose of interfering in an unlawful manner with the business relationship of [Eastern Kentucky Resources], and that the interference will deprive the Magoffin Fiscal Court of the sum of approximately $1,000,000 to $3,000,000 for the cost of closing its present landfill and the loss of royalties in excess of $9,000,000 in the first ten years of the operation of the proposed landfill under the approved Magoffin County Solid Waste Plan.

95. Id.
96. Id.
97. Id. at 188.
98. South East Coal Co., 685 S.W.2d at 189.
99. Id. at 190.
100. Id.
101. Id.
102. 892 S.W.2d 617 (Ky. Ct. App. 1995).
103. Id.
104. Id.
105. Id.
106. Eastern Ky. Res., 892 S.W.2d at 618 (internal quotations omitted).
Citing Section 767 of the Restatement (Second) of Torts, the court held that the environmental group’s actions were not without justification. The environmental group had a legitimate interest “as citizens that their county government adhere to mandated procedures.” Accordingly, Eastern Kentucky Resources could not prove malice, as defined in NCAA v. Horning.

A more recent opinion from the Kentucky Court of Appeals, Musselman Bros., Inc. v. Dial-Huff & Associates, Inc., also considered whether interference with business relations was improper or justified. The plaintiff, Dial Huff Associates, was a real estate brokerage firm that dealt primarily with the sale of hotels and motels. A private investor, H.B. Terry, contacted Dial Huff about a hotel in Lexington, Kentucky. Terry held a first lien on the hotel and sought Dial Huff’s assistance in finding prospective buyers in the event the owner defaulted.

The owner of the hotel eventually defaulted, and Terry notified Dial Huff to begin soliciting prospective buyers. One month later, the defendant contacted one of Dial Huff’s sales agents requesting information regarding the Lexington hotel. The sales agent sent a forty-page profile on the Lexington hotel to the defendant's headquarters. Over the course of the following five weeks, Dial Huff’s sales agent and defendant had multiple conversations regarding the Lexington hotel, yet the defendant ended the negotiations stating it had “no interest at this time.”

Later that month, Dial Huff’s sales agent sent an offer from a third party to purchase the motel for $2,500,000 dollars, which would have provided Dial Huff with $115,000 in commissions. Terry, however, explained to the plaintiff that he was about to sell the property to someone else. Dial Huff informed Terry that they had six prospective purchasers for the motel, one of which was the defendant. Terry's son sent a certified letter to the plaintiff advising that the defendant was the purchaser of the motel and enclosed therewith a letter from the defendant stating, “[i]t and its president ‘have not and were not contacted by

107. Id. at 619.
108. Id.
109. Id.
111. Id.
112. Id. at 838-839.
113. Id.
114. Id. at 839.
115. Id.
116. Musselman Bros., Inc., 826 S.W.2d at 839.
117. Id.
118. Id.
119. Id.
120. Id.
Based on this representation, Terry refused to pay a commission to Dial Huff.122

Dial Huff sued the defendant for intentional interference with a prospective contractual relationship, claiming the defendant’s letter interfered with its business relationship and expected commission.123 The defendant argued, among other things, that there was insufficient evidence to establish that the interference was malicious or without justification.124 The court determined that a jury might discern two inferences from the facts: (1) the defendant acted only from an unfortunate misunderstanding, as opposed to some malicious or unjustified reason, or (2) the defendant intentionally deceived Terry as to its dealings with the plaintiff in order to avoid paying a commission on the purchase price.125 The Kentucky Court of Appeals found the latter scenario to be the more likely of the two and upheld the trial court’s $50,000 verdict.126

II. FRAUDULENT MISREPRESENTATION

The commercial tort of fraud affords businesses relief for deception by customers, competitors and employees.127 In Kentucky, common law fraud can take three different forms: (1) fraud by intentional misrepresentation of material facts, (2) fraud by concealment or nondisclosure of material facts and 3) fraud by negligent misrepresentation of material facts.

A. Intentional Fraudulent Misrepresentation

An individual or entity faces liability for intentional fraudulent misrepresentation128 where they actively misrepresent a “fact, opinion, intention or law for the purpose of inducing [another] to act or to refrain from action in reliance upon it.”129 The Restatement (Second) of Torts notes that a statement is fraudulent if the maker: “(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.”130

121. Id.
122. Id.
123. Id.
124. Musselman Bros., Inc., 826 S.W.2d at 840.
125. Id.
126. Id.
129. Restatement (Second) of Torts § 525 (1977).
130. Id.
The number of elements required for intentional fraudulent misrepresentation claims vary by jurisdiction.\textsuperscript{131} To recover for this tort in Kentucky, a claimant must prove the following six elements by clear and convincing evidence: (1) that defendant made a material misrepresentation; (2) the misrepresentation was false; (3) when the misrepresentation was made the maker knew it was false, or made it recklessly without any knowledge as to its truth; (4) the misrepresentation was made with the intention of inducing plaintiff to act or that it should be acted in reliance upon it; (5) the plaintiff acted in reliance upon the misrepresentation; and (6) plaintiff suffered injury.\textsuperscript{132} Kentucky courts primarily focus on the materiality and reliance elements in business fraud cases, as “[t]he very essence of actionable fraud or deceit is the belief in and reliance upon the statements of the party who seeks to perpetrate the fraud.”\textsuperscript{133}

Businesses have an actionable claim for fraud when a party induces its representative to sign a contract based on material misrepresentations.\textsuperscript{134} In \textit{Wilson v. Henry},\textsuperscript{135} the Kentucky Court of Appeals focused on materiality and reliance of a representation made relating to an agreement to sell a 132-acre farm.\textsuperscript{136} During the negotiations to purchase the farm, the buyer, Wilson, inquired about the amount of acreage on the farm that was suitable for tobacco farming. The seller, Henry, told Wilson there was 3.29 tobacco acres on the farm.\textsuperscript{137} Wilson, along with a real estate agent, contacted the Agricultural Stabilization Committee of Franklin County (ASC) to confirm this acreage calculations, and the ASC verified Henry’s representation.\textsuperscript{138} Five months after the closing on the farm, Wilson learned that the farm only had 2.55 acres suitable for planting and harvesting tobacco.\textsuperscript{139}

Wilson filed suit against Henry for his misrepresentation regarding the acreage.\textsuperscript{140} The court dismissed the case though, stating that actionable fraud requires a “belief in and reliance upon the statements of the party who seeks the fraud.”\textsuperscript{141} Since Wilson ultimately relied on the records of the ASC office as opposed to the statements made by Henry, he could not establish the necessary reliance element.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item[131.] See Dobbs, \textit{supra} note 1, § 470, at 1345.
\item[134.] See Kreate v. Miller, 11 S.W.2d 99 (Ky. Ct. App. 1928); Evola Realty Co. v. Scott, 206 S.W.2d 466 (Ky. 1947).
\item[135.] 340 S.W.2d 449 (Ky. Ct. App. 1960).
\item[136.] Id.
\item[137.] Id.
\item[138.] Id.
\item[139.] Id.
\item[140.] Wilson, 340 S.W.2d at 451.
\item[141.] Id. See also Clark v. Danke Medical, Inc., 64 F.Supp.2d 652, 656 (W.D.Ky. 1999).
\item[142.] Wilson, 340 S.W.2d at 451.
\end{enumerate}
\end{footnotesize}
A recent Kentucky Supreme Court case, *Hanson v. American National Bank & Trust Co.*, illustrates the balancing act courts must undertake between requiring party’s to provide complete, non-fraudulent representations versus requiring party’s to exercise ordinary care when reading and executing a contract. Hanson owned a construction company, called Hanson Construction, which used American National for its banking needs. As the company’s acting president, Hanson often dealt with an American National officer named David Chestnut. In 1985, First Kentucky National Bank acquired American National, and as part of this acquisition, First Kentucky designated a task force to analyze American National’s accounts and reclassify those considered “substandard.” Hanson Construction’s accounts fell within this description.

First Kentucky’s task force recommended that American National restructure Hanson Construction’s debts and restrict its line of credit due to the company’s poor financial condition. However, Hanson testified that he contacted Chestnut and discussed the restructuring plan, and Chestnut told him American National would continue to finance up to 20% of his company’s new construction contracts, provide a 15-year repayment period on the restructured debt and extend a $125,000 credit line. Chestnut told Hanson he could secure the entire debt with a second mortgage on the home and farm.

Hanson began to read the 100-page closing package prepared by American National's counsel at the closing of a loan, but an American National representative assured him that the documents reflected all of the parties’ “understandings.” In reliance upon this statement and Chestnut's previous representations, Hanson signed the documents without reading further. Much to his dismay, Hanson later discovered that the closing documents did not contain all of the agreed upon terms, most notably the $125,000 line of credit, the provisions regarding financing of 20% of future contracts and the 15-year repayment schedule.

American National provided Hanson Construction with a $175,000 line of credit to finance two projects in the spring of 1986. When Hanson secured two additional construction contracts later that year, though, American National denied Hanson Construction’s application for funding, prohibited Hanson from

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143. 865 S.W.2d 302 (Ky. 1993).
144. Id. at 307.
145. Id.
146. Id.
147. Id.
148. Id.
149. *Hanson*, 865 S.W.2d at 307.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
drawing additional funds on the existing line of credit and demanded payment on
the original note.\footnote{Hanson, 865 S.W.2d at 307.} This forced Hanson Construction out of business.\footnote{Id.}

Hanson sued American National for fraudulent misrepresentation, among
other things, claiming American National failed to include Chestnut’s
representations in the closing documents as American National’s agent
represented.\footnote{Id.} The Kentucky Supreme Court analyzed this claim specifically on
the issue of Hanson’s obligation to read the contract versus American National’s
obligation to present truthful representations at closing.\footnote{See id. at 306-07.} The court held, as a
general matter, that when oral representations are contrary to written language in
the contract, the law does not permit rescission of the contract by the party who
failed to read the document.\footnote{Id. at 307.}

However, the court did find that the aggrieved party might have a claim
against the person who fraudulently induced the signing of the contract.\footnote{Hanson
v. American Nat’l Bank & Trust Co., 865 S.W.2d at 307.} When
a party is induced to sign a contract without reading it, a sufficient question
exists for the trier of fact regarding the necessary degree of care.\footnote{Id.} Parties who
fail to read a contract, like Hanson, might have an actionable claim for fraud if
they exercise due care and the execution was the product of the fraudulent
misrepresentation.\footnote{Id.}

An opinion from the Kentucky Court of Appeals, \textit{Rivermont Inn, Inc. v. Bass
Hotels Resorts, Inc.},\footnote{113 S.W.3d 636 (Ky. Ct. App. 2003).} also addresses a fraudulent misrepresentation claim
relative to a contract.\footnote{113 S.W.3d 639 (Ky. Ct. App. 2003).} This suit arose from the purchase of a Holiday Inn in
Louisville, Kentucky.\footnote{Id.} The purchaser, Riverfront Inn, offered to buy the hotel
under the belief that it could continue to operate as a Holiday Inn franchise.\footnote{Id.} The franchise was not transferable, though.\footnote{Id. Therefore, Riverfront applied to
Holiday Hospitality Franchising, Inc., Holiday Inn’s parent company, for a new
franchise license.\footnote{Id.}

During the course of negotiations for the sale of the business, Riverfront
proposed a Property Improvement Plan (PIP) for the existing hotel, which would
cost an estimated $1.4 million.\footnote{Id.} Riverfront applied for a franchise and its

application came up for review on three separate occasions prior to closing. A representative of Riverfront contacted Judy Bloodworth, Holiday Hospitality Franchising’s Vice President of Franchise Administration, several days before the closing to ensure that the franchise application would be approved. Riverfront’s representative claimed that Ms. Bloodworth said “the licensing would be forthcoming and to close on the sale.” Nonetheless, Rivermont acknowledged, in writing, that Holiday Inn did not enter into oral agreements with respect to licenses or matters pertaining to the granting of a license.

Holiday Hospitality Franchising did not rule on the application prior to the date of closing. Based on Ms. Bloodworth’s representation, or “promise” by the court’s interpretation, Rivermont closed on the transaction. The following day, Holiday Hospitality Franchising granted approval of the franchise license, with the condition that Rivermont would not be included in Holiday Inn’s national network until it completed the PIP. Rivermont objected to this condition and filed suit.

The Jefferson Circuit Court granted Holiday Hospitality Franchising summary judgment in part because Rivermont failed to prove the six elements of fraud by clear and convincing evidence. The court ruled that Ms. Bloodworth’s assurance regarding the franchise was merely a prediction and “not a statement of past or present material fact.” The Kentucky Court of Appeals affirmed this judgment and further held that, as a matter of law, “a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing…”

B. Concealment and Nondisclosure

Kentucky and other states also recognize claims for fraud based on active concealment of material facts. The Restatement (Second) of Torts recognizes liability for fraudulent concealment where “one party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information.”

170. Rivermont Inn, Inc., 113 S.W.3d at 639.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id. at 640.
178. Rivermont Inn, Inc., 113 S.W.3d at 640.
179. Id.
The United States District Court for the Western District of Kentucky established Kentucky’s test for fraudulent concealment in *Scheck Mechanical Corp. v. Borden, Inc.* In *Scheck Mechanical*, a mechanical piping contractor, Scheck, filed suit against a project owner, Borden, for fraudulent concealment suffered due to material changes to the contractor’s performance. Following a competitive bidding process, Borden hired Scheck to construct the mechanical piping on an Uretahne Resole Facility at its Jefferson County plant. The contract between Borden and Scheck contained three key provisions relevant to the dispute: (1) Scheck was required to complete its portion of the project by April 15, 1996, (2) Scheck had to pay Borden liquidated damages of $2,000 per day for every day he went beyond this completion date, and (3) Borden was required to pay Scheck any cost related to additional work or from the stoppage of work.

Scheck did not complete the work until July 1996. However, Scheck filed suit against Borden, claiming that Borden “committed fraud when it represented that its work could be completed by April 15, 1996 even though they had information which would make this date unachievable.” Scheck sued for fraudulent concealment claiming that Borden failed to disclose the fact that it substituted the steel used in the precedent work with galvanized steel, which increased the schedule by four to six weeks. The district court required Scheck to prove the following elements to recover for fraudulent concealment: “(1) Borden had a duty to disclose a material fact, (2) Borden failed to disclose that fact, (3) Borden’s failure induced Scheck to act, and (4) Scheck was injured as a result.”

To prove the “duty to disclose” element, a claimant must show that the other party had superior knowledge of a material fact and the aggrieved party relied on this individual or entity to disclose the same. Scheck presented evidence that Borden decided to change the steel to galvanized steel prior to negotiating Scheck’s contract. Scheck argued that Borden failed to disclose this information despite knowing that this would prolong Scheck’s work by four to six weeks. The U.S. District Court for the Western District of Kentucky held that Borden fraudulently concealed this information to Scheck’s detriment, and

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183. *Id.* at 728.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 733.
189. *Id.* at 733-34.
190. *Id.* at 734 (quoting *Smith v. General Motors Corp.*, 979 S.W.2d 127, 129 (Ky. Ct. App. 1998)).
191. *Id.* at 733.
192. *Id.*
Scheck suffered harm in the form of funds he expended to meet the April completion date and remain on the project until July of 1996.\textsuperscript{193} Traditionally, jurisdictions treat nondisclosure differently than concealment.\textsuperscript{194} This difference lies in the fact “the bargainer is not ordinarily obliged to make affirmative revelations of known material facts.”\textsuperscript{195} Essentially, nondisclosure permits liability for “fraud by silence,” while concealment requires “active” concealment of a material fact.\textsuperscript{196} The Restatement treats nondisclosure as follows:

1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs

\textsuperscript{193.} See id.
\textsuperscript{194.} Dobbs, supra note 1, § 481 at 1375.
\textsuperscript{195.} Id.
\textsuperscript{196.} Id. at 1374-75.
of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.\textsuperscript{197}

Kentucky courts also focus on materiality and reliance in determining whether a party’s nondisclosure is actionable.\textsuperscript{198} For example, the Kentucky Supreme Court considered whether an employee’s omission regarding his past employment were material and relied upon in \textit{Crescent Grocery Co. v. Vick}.\textsuperscript{199} In \textit{Vick}, a local grocery store interviewed the defendant, Vick, for a position as a traveling salesman.\textsuperscript{200} Vick served in a similar capacity with his previous employer.\textsuperscript{201} During his interview, Vick represented that in his former position he received 40\% of all profits from the sale of goods as a form of commission, with no limitations.\textsuperscript{202} Vick, however, failed to disclose that he was accountable for 40\% of losses sustained from sales attributed to him under his previous compensation package.\textsuperscript{203} Based on this nondisclosure, the grocery store paid Vick $2,094.24 more than they otherwise would have paid him.\textsuperscript{204}

Upon learning of this discrepancy, the grocery filed suit against Vick for his nondisclosure. The court focused on the materiality of Vick’s nondisclosure and extent of the grocery's reliance upon his representations and omissions.\textsuperscript{205} The Kentucky Court of Appeals held that Vick’s nondisclosures were not material.\textsuperscript{206} Instead, the court held that Vick’s presentation constituted “trade talk,” which the grocery store could not justifiably rely upon.\textsuperscript{207} The court likened Vick’s salary “boost” to a salesman trying to induce a buyer to purchase a product at a higher price.\textsuperscript{208}

The Kentucky Supreme Court again considered liability for nondisclosure in \textit{United Parcel Service Co. v. Rickert}.\textsuperscript{209} The \textit{Rickert} case stemmed from the United Parcel Service’s decision to establish its own airline and stop using outside air cargo carriers in its parcel delivery business.\textsuperscript{210} As part of this corporate change, UPS hired 811 pilots and expressed its desire to hire additional pilots who remained with UPS’ contract carriers during the transition period.\textsuperscript{211} When UPS mentioned this plan, it failed to disclose the fact that it did

\textsuperscript{197}. Restatement (Second) of Torts § 551 (1977).
\textsuperscript{198}. See generally Crescent Grocery Co. v. Vick, 240 S.W. 388 (Ky. 1922).
\textsuperscript{199}. Id.
\textsuperscript{200}. Id.
\textsuperscript{201}. Id.
\textsuperscript{202}. Id.
\textsuperscript{203}. Id.
\textsuperscript{204}. Crescent Grocery Co., 240 S.W. at 389.
\textsuperscript{205}. See id. at 389-90.
\textsuperscript{206}. Id.
\textsuperscript{207}. Id. at 390.
\textsuperscript{208}. Id.
\textsuperscript{209}. 996 S.W.2d 464 (Ky. 1999).
\textsuperscript{210}. Id. at 467.
\textsuperscript{211}. Id.
not intend to hire every pilot that remained with a contract carrier. Rickert remained as a pilot with Orion Air, a former UPS carrier, during the transition period so he could obtain employment with UPS. Rickert claimed that he met with officials of UPS and Orion pilots and was asked to fill out a W-4 and other employment documents. Yet, once Orion ceased operations, UPS chose not to hire Rickert. Rickert was forced to settle for a less lucrative position with American Airlines.

At trial, UPS admitted that it told Orion employees that it would hire additional pilots from the former carrier, but failed to disclose that its plans did not include hiring all Orion pilots. UPS claimed that while it never intended to hire all Orion pilots, it also made no “representation to the contrary.” The Kentucky Supreme Court ruled that, “Fraud may be committed either by intentionally asserting false information or by willfully failing to disclose the truth.” The court noted that a partial truth, if deemed materially misleading, might give rise to a fraudulent misrepresentation claim if material facts are not disclosed. The court held that that UPS defrauded Rickert by intentionally failing to disclose that not all Orion pilots would be retained. Rickert justifiably relied on this omission as he did not look for employment from the time of the meeting at issue until Orion ceased operations, and he suffered harm in the form of lost seniority and benefits.

C. Negligent Misrepresentation

Most jurisdictions recognize liability for negligent misrepresentations that result in personal injury or property damage. Yet, the majority is unwilling to impose liability for strict economic harm in a fraudulent misrepresentation claim. Many courts, though, have held that a defendant may have an independent duty of reasonable care and may be liable for mere economic harm under certain circumstances.

212. Id. at 469.
213. Id. at 467.
214. Id. at 468.
215. Rickert, 996 S.W.2d at 468
216. Id.
217. Id. at 469.
218. Id.
219. Rickert, 996 S.W.2d at 469 (relying on Chamberlain v. National Life & Accident Ins. Co., 76 S.W.2d 628, 631 (Ky. 1934)).
220. Id. (relying on RESTATEMENT (SECOND) OF TORTS § 529 (1977)).
221. Id. at 469.
222. Id.
223. This is an update to 28 N. KY. L. REV. 456.
224. See Dobbs, supra note 1, § 472, at 1349.
225. See id.
226. Id.
The Kentucky Supreme Court adopted the Restatement (Second) of Torts’ approach to negligent misrepresentation in *Presnell Construction Managers, Inc. v. EH Construction, LLC.* 227 Section 552 of the Restatement (Second) of Torts treats negligent misrepresentation as follows:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. 228

However, the Restatement provision limits the liability for negligent misrepresentation, stating:

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to the loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them. 229

In *Presnell*, the owner of a commercial building, DeLor Design Group, Inc., contracted with Presnell to serve as the construction manager on a renovation project. 230 The standard American Institute of Architects contract expressly stated that the construction manager was not a “constructor.” 231 The contract further provided, “Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or the Construction Manager.” 232

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227. 134 S.W.3d 575 (Ky. 2004).
229. *Id.*
230. *Id.* at 577.
231. *Id.*
232. *Id.*
DeLor contracted with EH Construction to furnish the general trades work for the project.\textsuperscript{233} This AIA contract contained the following provision relating to the contractual relationship with the construction manager: “[n]othing contained in the Contract Documents or any agreement between the Owner and the Construction Manager or the Owner and the Design Professional creates any contractual relationship between the Construction Manager ... and the Contractor.”\textsuperscript{234} Therefore, Presnell and DeLor lacked privity of contract.

After executing the respective contracts, Presnell and EH Construction began to renovate DeLor’s building.\textsuperscript{235} Soon thereafter, EH filed a mechanics’ lien against the property in the amount of $268,218 for unpaid materials and labor.\textsuperscript{236} EH filed suit to enforce the lien and to recover for economic losses suffered as the result of Presnell’s negligent misrepresentation and negligent supervision of the project.\textsuperscript{237} Specifically, EH alleged “Presnell failed to properly stage and time the work involved for the Project and that as a result, EH was required to redo much of the work that it had already completed, due to the other contractors and subcontractors coming in and subsequently destroying work that had already been completed by [EH].”\textsuperscript{238} EH further alleged that Presnell was careless and negligent in coordinating the Project, and supplied faulty information and guidance and supervision to the contractors working on the Project.\textsuperscript{239}

The trial court dismissed EH’s claim against Presnell because Presnell only owed contractual duties to DeLor.\textsuperscript{240} The Kentucky Court of Appeals reversed, though, holding that EH had a claim for negligent misrepresentation.\textsuperscript{241} Adopting Section 552 of the Restatement (Second) of Torts, the court held that “Presnell owed [EH] independent duties ... to exercise reasonable care or competence in its supervision, collection, and distribution of information and directions that it provided to EH for guidance.”\textsuperscript{242}

In its analysis, the Presnell court relied upon an opinion from the U.S. District Court for the Eastern District of Kentucky, Ingram Industries, Inc. v. Nowicki.\textsuperscript{243} In Ingram Industries, a case that considered an accountant’s liability for loss caused by his negligent misrepresentations, the federal court adopted Section 552 for the claim of negligent misrepresentation.\textsuperscript{244} The court explained:

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Presnell Constr. Managers, Inc., 134 S.W.3d at 577.
\item \textsuperscript{235} Id. at 578.
\item \textsuperscript{236} Id. at 577.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id. at 578 (internal quotations omitted).
\item \textsuperscript{239} Id. (internal quotations omitted).
\item \textsuperscript{240} Presnell Constr. Managers, Inc., 134 S.W.3d at 578.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id. (internal quotations omitted).
\item \textsuperscript{243} 527 F. Supp. 683 (E.D. Ky. 1981).
\item \textsuperscript{244} Id.
Many courts have now recognized that under some restrictive circumstances the defendant may be under a duty of care to make his representations accurately and may be liable for a limited measure of damages to a limited group of persons if his negligent misrepresentations induce justifiable reliance to the plaintiff's loss.245

Citing *Ingram Industries*, the Kentucky Supreme Court applied Section 552 in affirming Kentucky the Court of Appeals’ decision in *Presnell*.246 The court agreed that privity is not required to maintain a tort action, ruling that the negligent misrepresentation creates an independent duty in which recovery in tort is available for economic losses.247 EH’s complaint was that Presnell “supplied faulty information and guidance” to contractors on the project.248 Presnell, thus, owed a duty not to supply false information.249

In a concurring opinion, Justice Keller clarified that the tort of negligent misrepresentation should not be barred by the economic loss rule, which provides that “economic interests are protected, if at all, by contract principles, rather than tort principles.”250 While Kentucky courts have applied the principles of the economic loss rule,251 neither the Kentucky Supreme Court nor the Kentucky Court of Appeals has expressly adopted the “economic loss rule.”252 Justice Keller’s opinion is important for Kentucky tort law as it resolves any confusion as to whether a party harmed by a negligent misrepresentation may recover for economic loss where there is no privity of contract.253

III. CONCLUSION

This Article considers just three of the many commercial torts available to Kentucky businesses. As evidenced by the cases cited herein, there is significant overlap between claims for tortious interference and fraud and fundamental contract law. Tortious interference affords businesses protection from improper interference with prospective or existing contracts. Conversely, common law fraud protects a contracting party from material misrepresentations or omissions by unscrupulous business contacts and ensures that a business may enjoy the reasonable expectations of its agreements. In short, both business torts fill a legal void that traditional torts and contract law ignore.

246. Id.
247. Id.
248. Id.
249. Id.
252. See *Presnell Constr. Managers, Inc.*, 134 S.W.3d at 586.
253. Id.
YOU CANNOT CHANGE 500 YEARS OF PROPERTY LAW AT 5:00 P.M. ON A FRIDAY — DOWER AS APPLIED IN KENTUCKY

Theresa M. Mohan, Esq. * and J. Aaron Byrd +

I. INTRODUCTION

Kentucky is one of only six states to retain the old common law rule of dower in statutory form.1 However, this statutory rule now applies to both wives and husbands.2 Because of the uniqueness of statutory dower provisions in Kentucky, a practitioner may encounter several dower related issues in daily practice, which could prove harmful to a client if not handled properly. As an attorney cannot change 500 years of property law at a real estate closing on a Friday evening in order to suit the clients’ needs, an attorney must acquaint themselves with the current status of dower and how it may affect a real property transaction.

The authors did not design this article to guide probate actions, 3 nor is it intended to persuade the legislature or courts to abolish dower in Kentucky.4 Rather, the authors designed this article as a practical tool to provide a practitioner tools, tips, and methods to properly serve a client by following all relevant dower rules and understanding possible dower issues when advising

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1. Arkansas, Iowa, Massachusetts, Michigan, and Ohio also retain some form of statutory dower. See Angela M. Vallario, Spousal Election: Suggested Equitable Reform for the Division of Property at Death, 52 CATH. U. L. REV. 519, 528 n.42 (2003).

2. See KY. REV. STAT. ANN. § 392.020 (LexisNexis 1999) which states

   After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third (1/3) of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half (1/2) of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to “dower” or “curtesy” shall be deemed to refer to the surviving spouse's interest created by this section.


clients in transactions involving Kentucky real property. Through examples and practice pointers, the authors provide a chronological sequence of dower issues that may arise in practice of real property transactions. This article will discuss and provide solutions for everyday issues that a practitioner may encounter including: engaged persons and their dower rights, antenuptial agreements and their affect on dower rights, real property closings, and how a mortgage or lien affects dower rights.

II. DISCUSSION

Under common law principles, a widow was entitled to receive a life estate on one-third of the lands that her husband was seised at any time in fee simple or in fee tail during the marriage. The wife’s right to dower could not be defeated by the husband conveying this property to another, even to a bona fide purchaser. Likewise, creditors of the husband could not defeat the wife’s right to dower in the property. Under common law principles, the wife was not required to have issue to obtain a dower interest.

The rational basis of dower stems from an agrarian time when the family land was the primary source of wealth for a family. The dower interest ensured that a surviving widow would have financial support after her husband’s death. At the turn of the twentieth century, common law dower began to be abolished in a majority of states.

Despite the modern trend to eliminate dower provisions, Kentucky law recognizes statutory dower in the Kentucky Revised Statute (hereinafter “KRS”) 392.020 and applies these provisions to both husbands and wives. The effect

6. Id.
7. Id.
8. Id. at 69 n.10.
9. Id. at 69.
10. Id.
11. Id.
12. KY. REV. STAT. ANN. § 392.020 (LexisNexis 1999) states
   After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third (1/3) of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half (1/2) of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to “dower” or “curtesy” shall be deemed to refer to the surviving spouse's interest created by this section.
13. Id.
of KRS 392.020 is to statutorily combine the common law rules of dower and curtesy\(^{14}\) by providing a one-half life estate of real property owned in fee at the time of death to the surviving spouse.\(^{15}\)

### A. Dower Rights of Engaged Persons

When a couple each have individual professional careers prior to the relationship, either or both may already hold property as a single person.\(^{16}\) Each party and his or her respective attorney should discuss the nature and content of their real estate holdings prior to the marriage of the parties.\(^{17}\)

*Mathias v. Martin*, 87 S.W.3d 859 (Ky. 2002). The week before Joseph and Lillian Martin were to be married, Joseph requested that Lillian sign an antenuptial agreement.\(^{18}\) The day before the wedding, Lillian informed Joseph that she would not sign the antenuptial agreement based upon the counsel of her attorney.\(^{19}\) That same day, Joseph told Lillian that he signed a trust instrument and he conveyed property he owned, Highcroft Farm, to the trust.\(^{20}\) This farm represented the majority of Joseph’s assets and Lillian did not review the trust document or the deed.\(^{21}\) Joseph and Lillian were married for twelve years where they resided on Highcroft Farm.\(^{22}\) Upon Joseph’s death, Lillian sued the trustees of the trust claiming that the antenuptial transfer of property to the trust before the marriage constituted fraud upon her dower rights.\(^{23}\)

The trial court granted Lillian summary judgment by setting aside the transfer of real and personal property to the trust.\(^{24}\) The Kentucky Court of Appeals affirmed stating that even with Lillian’s knowledge of transfer of property before marriage, such transfer is a fraud upon the dower rights unless the intended spouse gives consent.\(^{25}\) The appellate court believed that previous

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\(^{14}\) Unless otherwise stated in the text, all references to dower are meant to include both dower and curtesy rights in the statutory sense, as defined in *KY. REV. STAT. ANN.* § 392.020.

\(^{15}\) *KY. REV. STAT. ANN.* § 392.020 (LexisNexis 1999).

\(^{16}\) Throughout this article, the authors have developed examples of common situations a practicing attorney may encounter in which the attorney should discuss with their client dower and its relevant legal principles and rules. These examples are not based on any particular case or client, nor are the examples the only situations where an attorney should consider dower rules. The examples are merely practice pointers to allow a practicing attorney to appreciate how dower affects daily practice.

\(^{17}\) See generally *WILLIAM E. BURBY, REAL PROPERTY* 191 (3d ed. 1965) (providing the prerequisites for claims of dower and curtesy).

\(^{18}\) Mathias v. Martin, 87 S.W.3d 859, 860 (Ky. 2002).

\(^{19}\) *Id.*

\(^{20}\) *Id.*

\(^{21}\) *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) Mathias, 87 S.W.3d at 860-61.

\(^{25}\) *Id.* at 861.
cases modified the law on premarriage transfers of property by creating a new rule where the spouse who transfers the property commits fraud unless the intended spouse gives consent, even if the intended spouse knew of the property transfer.

On appeal to the Kentucky Supreme Court, the appellants (trustees) argued that when an intended spouse marries with the knowledge of property transferred before marriage, consent to the transfer is implied and thus there cannot be fraud. Lillian maintained the court of appeals was correct, as an intended spouse must give consent to the premarital transfer of property. The Kentucky Supreme Court reversed on review by stating that there was not any fraud present because Lillian had knowledge of the transfer of property before marriage.

In reversing, the Supreme Court reasoned that most of the later cases relied upon by the court of appeals involved the transfer of cash or its equivalent by married persons to people other than their spouses, which created an inference of fraud committed upon the spouse. Joseph’s transfer of the property occurred before the marriage and with Lillian’s knowledge, thus this case was distinguishable from precedent. 

B. Practice Pointer

Consent and knowledge are critical factors in the determination of fraud on the wife. However, a purchaser of real property does not have to fear the dower expectation of an engaged person if such an agreement is not recorded in the county where the property lies. KRS 382.080 requires the recording of an

26. See also Harris v. Rock, 799 S.W.2d 10 (Ky. 1990); Anderson v. Anderson, 583 S.W.2d 504 (Ky. Ct. App. 1979); Martin v. Martin, 138 S.W.2d 509 (Ky. 1940); Rowe v. Ratcliff, 104 S.W.2d 437 (Ky. 1937).
27. Mathias, 87 S.W.3d at 861.
28. Id.
29. Id.
30. Id. at 864.
31. Id. at 863-864.
32. Id. at 864.
33. The practice pointers are suggestions made by the authors to a practicing attorney on ways the attorney may comply with relevant dower laws while best serving the interests of their client. The authors developed these practice pointers through discussions with Kentucky real estate attorneys and their own practical experience in dealing with real estate matters in Kentucky.
34. See Anderson v. Anderson 240 S.W. 1061, 1063 (Ky. 1922) stating [A] conveyance of real estate, made by one after an agreement to marry, without consideration and without the knowledge or consent of his intended wife, is a fraud on the wife, and will be declared void to the extent that it deprives her of dower in the real estate conveyed.
35. KY. REV. STAT. ANN. § 382.080(1) (LexisNexis 2002) states No deed conveying any title to or interest in real property, or lease of oil, gas, coal or mineral right and privilege, for a longer time than five (5) years, nor any agreement in consideration of marriage, shall be good against a purchaser for a valuable consideration without notice thereof, or any creditor, unless the deed
agreement in consideration of marriage, or any interest in the real property lasting longer than five years.36

Based on the current version of KRS Chapters 382 and 392, the engaged party who believes that he or she has an expectation of interest in the real property of the other person will need to demonstrate a lack of knowledge of the encumbrance combined with evidence of a proper recording of the agreement in consideration of marriage.37 An attorney should inquire whether their client is engaged at the time of the transaction.38 Likewise, if the attorney is acting as the closing attorney, then the attorney should inquire if any of the parties are engaged at the time of the closing.39 Both the current title-holder and his fiancée or her fiancé should execute an affidavit of facts related to title so that there are no future misunderstandings based on transactions involving the subject property.40

C. The Effect of Antenuptial Agreements on Dower Rights

Antenuptial agreements or “pre-nuptial” agreements are sometimes used to address the interest of one or both parties due to pre-existing family needs or the nature of the parties’ current assets and liabilities prior to the marriage.41 A person who is asserting his or her antenuptial agreement as a bar to his or her spouse’s dower claim has the burden of demonstrating a lack of knowledge and consent.42

Lawson v. Loid, 896 S.W.2d 1 (Ky. 1995). Robert and Frances Petrie entered into an antenuptial agreement on the day of their wedding.43 This “marriage contract” provided for $1,000 settlement for any claims for dower or maintenance.44 The couple remained married for 37 years until Robert passed away.45 Frances, previously diagnosed with Alzheimer’s disease, was declared legally incompetent prior to Robert’s death.46 Frances’ guardians brought suit to renounce Robert’s will in order to take the wife’s statutory share.47

is acknowledged by the party who executes it, or is proved and lodged for record in the proper office, as prescribed by law.

36. Id.
38. See generally Burby, supra note 17, at 189-91 (giving general information on dower).
39. Id.
41. See 41 AM. JUR. 2d Husband and Wife § 118 (2005).
42. See 25 AM. JUR. 2d Dower and Curtesy § 17 (2004).
43. Lawson v. Loid, 896 S.W.2d 1, 2 (Ky. 1995).
44. Id.
45. Id.
46. Id.
47. Id.
The trial court held the antenuptial agreement valid and enforceable because Frances’ estate failed to present any evidence that Robert did not make a full disclosure of his financial condition to Frances.\textsuperscript{48} The court of appeals reversed because the trial judge applied the wrong burden of proof standard on the full disclosure question.\textsuperscript{49}

Upon review, the Kentucky Supreme Court examined who has the burden of proof on the validity and enforceability of antenuptial agreements.\textsuperscript{50} Citing precedent, the court found that antenuptial agreements in Kentucky, which are intended to take place at the death of one of the parties, are valid and favored.\textsuperscript{51} The court placed the full disclosure of assets burden of proof on the party relying on the agreement.\textsuperscript{52}

Here, Robert paid Frances $1,000 to release her rights of dower, but Robert did not release his rights of dower to Frances.\textsuperscript{53} This sum was not inequitable because based on Frances’ income and assets, Robert could expect to receive similar benefits if she died shortly after she signed the agreement.\textsuperscript{54} When the court considers the validity of antenuptial agreements, the wife must be fully informed of the value of the husband’s estate.\textsuperscript{55}

Applying this fully informed wife standard to Frances, the supreme court found she was aware of Robert’s assets before marriage.\textsuperscript{56} Therefore, the court reversed the court of appeals decision and held the antenuptial agreement where Frances released her dower rights for $1,000 to be valid.\textsuperscript{57}

D. Practice Pointer

The existence of an antenuptial agreement does not relieve the couple from the requirement that they both execute documents regarding their interest in and consent to a lien or loan involving the property.\textsuperscript{58} For example, parties to an antenuptial agreement should both sign a second or subsequent mortgage. Recorded documents, such as a mortgage with both spouses’ signatures or consent to mortgage and waiver of dower, reduce the likelihood that a title examiner will have any questions or exceptions to the state of the property.

Contracts to sell or purchase property that concern property covered by an antenuptial agreement should include a clause within the sales contract that the

\begin{itemize}
\item \textsuperscript{48}Id.
\item \textsuperscript{49}Lawson, 896 S.W.2d at 2.
\item \textsuperscript{50}Id.
\item \textsuperscript{51}Id. (citing Hardesty v. Hardesty’s Ex’r, 34 S.W.2d 442 (Ky. 1930)).
\item \textsuperscript{52}Lawson, 896 S.W.2d at 2.
\item \textsuperscript{53}Id.
\item \textsuperscript{54}Id.
\item \textsuperscript{55}Id.
\item \textsuperscript{56}Id. at 3.
\item \textsuperscript{57}Id.
\item \textsuperscript{58}See generally 15B AM. JUR. LEGAL FORMS 2d § 219:297 (2000) (providing sample forms and clauses).
\end{itemize}
spouse agrees to cooperate in executing documents related to the sale, as well as releasing any dower interest that may not have been addressed in the executed antenuptial agreement.59

An attorney handling a real estate closing or representing any party to a closing should investigate the marital status of the parties prior to completion of the closing.60 Each person to the transaction should execute an Affidavit relating to title and the contents of the Affidavit should list the marital status of the Affiant as well as the information of how title is held and whether there are any encumbrances or interest held by any other party.61

E. The Effect of Liens Placed on Real Property and Dower Rights

Even when the recorded documents clearly identify the marital status of the title-holder, the subsequent conveyance of the property should completely address the interests of all parties. Failure to provide the current marital status of the parties and the parties’ consent to the conveyance can leave open a claim for dower interests when the parties did not intend any further interest to remain.

Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942). Julia Chalk’s deceased husband, Jule Chalk, borrowed money from his son, Fred Chalk, and a bank to purchase real property.62 Jule married Julia after the death of his first wife, Fred’s mother.63 Julia sued her stepson Fred for settlement of Jule Chalk’s estate claiming her rights of dower.64 Jule placed the title to the property in Fred’s name as part of the loan agreement between Fred and Jule.65

The trial court concluded that Jule was the equitable owner of the property and Julia was entitled to dower rights of the property.66 However, Julia’s dower rights were subordinate to the bank’s mortgage lien and Fred’s possession of an equitable lien.67 This result deprived Julia of dower in the property.68 Julia appealed the trial court’s decision by arguing that Jule was not merely the equitable owner of the property, instead he was the owner of legal title.69 Julia further argued that the deed to Fred was only a mortgage on the property and this mortgage did not diminish her dower rights.70

60. See generally Burby, supra note 17, at 189-94. (providing general information on dower).
63. Id. at 536.
64. Id. at 535.
65. Id. at 536.
66. Id. at 535.
67. Id.
68. Chalk, 165 S.W.2d 535.
69. Id.
70. Id.
The issue before the court of appeals was whether Julia had a dower interest in the property when Fred held title to the property. First, the court found no evidence of fraud by Jule in having the property titled in Fred’s name. Citing KRS 392.020, the court stated a widow has dower rights of an estate for life in one-third of all real property “which the other spouse owned or anyone owned for his or her use during coverture.” Additionally, the court cited KRS 392.040, which gave a widow a dower interest in real property that her husband holds equitable title to at the time of his death.

Relying on these two statutes, the court stated that whether Jule had legal title to the property or he only held equitable title to the property subject to Fred’s lien, Julie acquired a dower interest in the property because Fred seized the property in fee simple estate for the benefit of his father, Jule. Therefore, Julia obtained a right of dower when Jule acquired the property.

Despite Julia’s right of dower, her interest was subordinate to any vendor or tax liens on the property. The court ruled that a wife’s right of dower is subordinate to a vendor’s lien. Fred held a lien on the property by right of subrogation as he advanced the money for the use and benefit of his father. Therefore, a court must deduct Fred’s loan to Jule, with interest, before calculating Julia’s dower interest.

F. Practice Pointer: One-third or One-half of the Estate?

A particular point must be made in regard to KRS 392.020 as the statute provides the surviving spouse with an “estate in fee in half of the surplus real estate’ of which the other spouse or anyone for the use of the other spouse was

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71. Id. at 536.
72. Id.
73. KY. REV. STAT. ANN. § 392.020 as enacted in 1942 stated that After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which the other spouse or any one for the use of the other spouse was seized of an estate in fee simple during the coverture, unless the survivor’s right to such dower or interest has been barred, forfeited or relinquished.
74. Chalk, 165 S.W.2d at 536.
75. Id.
76. Id. at 537.
77. Id.
78. Id. at 537-38.
79. Id. at 537. See McClure v. Harris, 51 Ky. 261, 264-65 (Ky. 1851) stating The wife’s right of dower, is subordinate to the vendor’s lien for the purchase money, because the lien is coeval with the husband’s right to the land, and he acquires his title subject to the lien. As the title and the lien originated at the same time, the husband never has any right either equitable or legal unencumbered by the lien, and the wife’s right of dower is therefore subject to the same encumbrance.
80. Chalk, 165 S.W.2d at 538.
81. Id.
‘seized’ of an estate in fee simple at the time of death.”82 The Kentucky legislature amended KRS 392.020 in 1956 to add the phrase “surplus” real estate.83 This amendment increased the surviving spouse’s dower interest to a fee interest in half the surplus of the land, as opposed to the pre-1956 life estate in one-third of the land which the deceased spouse died seized in fee.84

Interpreting the 1956 amendment, the Kentucky Court of Appeals determined in Mattingly v. Gentry85 that the surviving spouse’s dower interest was an absolute fee in half the surplus, subject to exceptions.86 The Mattingly court examined what priority a surviving spouse’s dower interest in land sold after the death of her husband held in comparison to a creditor’s claim.87 The “surplus” referred to in the statute is “what is left after payment of funeral expenses, charges of administration, and debts.”88 These exceptions reaffirmed the purpose of dower by granting the wife an inchoate dower interest that her husband or his creditors could not seize from her without her consent.89

The court concluded that the surviving spouse’s dower claim was a fee interest in half the real property the decedent died owning and the surviving spouse’s dower interest did not have priority over creditor’s claims.90 However, the court did preserve the surviving spouse’s priority of dower over most creditors’ claims “for dower claims to a life estate in one third of any real property the decedent was seized of an estate in fee simple during the marriage, but not at death.”91

82. OFFICE OF CONTINUING LEGAL EDUCATION, UNIV. OF KY. COLLEGE OF LAW, KY. REAL ESTATE LAW & PRACTICE § 2.161 (2d ed. 1996).
83. Id. at § 2.162, citing 1956 Ky. Acts, c. 117 § 2.
84. OFFICE OF CONTINUING LEGAL EDUCATION, UNIV. OF KY. COLLEGE OF LAW, supra note 82, at § 2.162.
85. 419 S.W.2d 745, 746 (Ky. 1967).
86. Id. The court noted that the exceptions to a surviving spouse receiving an absolute fee in half the surplus are:
   (1) if the widow renounces the husband's will her dower is reduced to what it was before the 1956 amendment (Ky. Rev. Stat. § 392.080); and (2) if at his death the husband was no longer seized of real estate held by him in fee simple during the marriage, and the wife had never relinquished or forfeited her inchoate dower interest, she is entitled to a one-third interest in such property for life (Ky. Rev. Stat. § 392.020).
87. Id.
88. Id. at 747.
89. Id.
90. Id. at 747; see OFFICE OF CONTINUING LEGAL EDUCATION, UNIV. OF KY. COLLEGE OF LAW, supra note 82, at § 2.162.
91. OFFICE OF CONTINUING LEGAL EDUCATION, UNIV. OF KY. COLLEGE OF LAW, supra note 82, at § 2.162.
G. The Effect of the Mortgage Lien on Dower Rights.

Executing a note means that the person accepts personal liability for the repayment of debt.\textsuperscript{92} Regardless of who executes the note, both the title-holding spouse and the spouse who holds an inchoate dower interest in the real property should execute the mortgage.\textsuperscript{93}

\textit{First Union Home Equity Bank, N.A. v. Bedford Loan and Deposit}, 111 S.W.3d 892 (Ky. Ct. App. 2003). Sharron and Tony Wheatley purchased real property where the deed only contained Sharron’s name, but the deed stated Sharron was married.\textsuperscript{94} Sharron executed a mortgage on the property to First Union Home Equity Bank, N.A., but Tony did not sign this mortgage.\textsuperscript{95} Tony and Sharron both signed the promissory note secured by the mortgage.\textsuperscript{96} A few months later, Tony and Sharron acquired another mortgage on the same property with Bedford Loan and Deposit Bank that both Tony and Sharron signed.\textsuperscript{97}

A year later, Tony and Sharron defaulted on both loans and First Union sued to collect on its note and have its mortgage adjudicated as a valid first lien on the property.\textsuperscript{98} Bedford also sued to claim that its mortgage had equal priority with the First Union mortgage because First Union never obtained a mortgage on Tony’s interest in the property.\textsuperscript{99}

The trial court held that Bedford and First Union shared equally in the proceeds of each mortgagee’s claims because First Union had mortgage priority only in Sharron’s undivided one-half interest, but Bedford had mortgage priority in Tony’s undivided one-half interest.\textsuperscript{100} Upon appeal, First Union argued that KRS 392.040(1)\textsuperscript{101} gave its purchase money interest in the property a superior claim over Bedford’s interest.\textsuperscript{102} Bedford countered that KRS 404.030(1)\textsuperscript{103}
controlled as Sharron cannot encumber Tony’s curtesy interest in the property unless Tony released his rights to curtesy in a separate document.\textsuperscript{104}

The court analyzed KRS chapters 392 and 404 and relying on precedent\textsuperscript{105} stated that dower and curtesy interests outlined in “KRS 392.040(1) for property sold to satisfy a purchase money mortgage would prevail over the language of KRS 404.030(1) requiring the signature of the other spouse in order to mortgage property subject to a dower/curtesy interest.”\textsuperscript{106} Further, because the legislature enacted KRS 392.040(1) after KRS 404.030(1), the statute enacted later is controlling when there is a conflict between the statutes.\textsuperscript{107}

Applying this standard, the court stated that the first mortgage by First Union was a purchase money mortgage and thus, Tony had no curtesy interest in it.\textsuperscript{108} Thus, First Union possessed a mortgage on the full interest of the property.\textsuperscript{109} The court also noted that because Tony did not have an interest in the property when First Union executed and foreclosed upon the mortgage, First Union would have mortgage priority.\textsuperscript{110}

The court reasoned that because dower and curtesy is an inchoate right, it “is merely an expectancy of an interest or a future interest contingent upon [Tony] surviving Sharron.”\textsuperscript{111} Thus, because Sharron was alive when foreclosure occurred, First Union had a mortgage on the full interest of the property because Tony’s interest in the property had not yet vested.\textsuperscript{112} Therefore, the appellate court reversed the trial court and held that First Union had a priority mortgage on the property.\textsuperscript{113}

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\textsuperscript{104} First Union Home Equity Bank, N.A., 111 S.W.3d at 893.
\textsuperscript{105} Id. at 894. The court relied on Faulkner v. Terrell, 287 S.W.2d 409 (Ky. 1956) and stated: “That KRS 404.010(1), which would seemingly operate as an outright bar to a surviving husband's interest in the wife's land, does not eliminate the husband's curtesy interest in the property of the wife as provided for in KRS 392.020 which states in pertinent part: After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third (1/3) of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished.”
\textsuperscript{106} First Union Home Equity Bank, N.A., 111 S.W.3d at 894.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
H. Practice Pointer

Many attorneys have experienced a client’s concern about signing a mortgage if one of the parties is not signing the note. Any person could execute a note and be held personally liable for the debt incurred. A couple who choose to limit their personal liability by listing only one spouse on the Deed (“as married”) should not defeat their goal by having both the wife and the husband execute the note. However, the couple will need to execute the mortgage to clarify that no open dower interest remains.114

As Kentucky continues to uphold dower interests, both parties must sign the mortgage, and both must sign the deed if selling the property, to address fully the interests of all parties.115 In the case of executing a mortgage where the prospective mortgagor originally obtained title either as a single person or with the designation of “married” but no identifying spouse, the current spouse needs to release his/her dower rights to the property in order for the lien to attach fully.116 The spouse can achieve this by either signing the mortgage, thereby consenting to the lien being placed upon the property, or the spouse may execute a separate document that recites his or her knowledge and consent to the lien.117

If the spouse is signing a separate document in order to consent to the lien and release the dower interest, the practitioner should take great care to make sure that the consent to the mortgage is recorded concurrently with the recording of the mortgage.118 A practitioner should use a separate consent and release of dower document with great caution, as the document does not address any other interest that the spouse may hold. If the spouses hold an undivided interest in the property through a deed or by virtue of inheritance and the spouses execute a consent to release of dower without executing the mortgage, then the dowered spouse has only consented to release his/her dower interest and not his/her entire interest.119

Conversely, a widow/widower who takes one-half interest by virtue of dower does not have the ability to encumber or convey the entire property without including the other parties who now hold an interest in the property. Any mortgage or deed that is executed and recorded that does not address the

114. See Yzenbaard, supra note 59, at § 3-6 (2d ed. 1995 & Supp. 2002) (outlining proper parties to a contract); KY. REV. STAT. ANN. § 371.010(6) (LexisNexis 2002) (stating real estate contract must be written and signed to be valid under the statute of frauds).

115. See Yzenbaard, supra note 59, at § 3-6 (2d ed. 1995 & Supp. 2002) (outlining proper parties to a contract); KY. REV. STAT. ANN. § 371.010(6) (LexisNexis 2002) (stating real estate contract must be written and signed to be valid under the statute of frauds).

116. See generally Sprankling, supra note 92 at 341-57.

117. See generally Sprankling, supra note 92 at 341-57.

118. See generally Sprankling, supra note 92 at 341-57.

interests of all the parties only encompasses that portion of the property held by those who did sign the document.\footnote{120}

A wise practitioner will look for the parties’ current marital status on the mortgage and compare the marital status of the parties to the other documents to verify if there has been a change in marital status or if the current documents require any revisions prior to execution and recording. An Affidavit relating to title again can assist or clarify the interests of the parties.\footnote{121}

I. The Effect of Forced Sale or Foreclosure of Property on Dower Rights

A dower interest remains in the subject real property if the party holding a dower interest was not a party to the foreclosure action.\footnote{122} Failure to address completely all of the interests of every party to the real property can cause countless hours of extra work for the attorney, plus potentially create title issues that will need to be addressed prior to effective transfer of all interests in the property to a subsequent purchaser.

\textit{Lurding v. Sonne}, 480 S.W.2d 173 (Ky. 1972). Madeline Lurding was Joseph Lurding’s widow who owned real property in Louisville.\footnote{123} Joseph owed federal income taxes for 1937 through 1946.\footnote{124} When Joseph failed to pay these taxes, the Commissioner of the Internal Revenue Service seized the property.\footnote{125} Dr. Irvine Sonne bought the property at public sale for $61,100, but the estimated value of the property was $75,000.\footnote{126}

After the Commissioner deducted Joseph’s taxes from the purchase price, a surplus of $36,426.54 remained.\footnote{127} Subsequent taxes reduced this amount to $21,137.14 which Joseph received by check.\footnote{128} Joseph deposited this sum in a joint checking account he held with Madeline and both parties had the right to and did draw funds from this account.\footnote{129} Upon Joseph’s death, Madeline became the sole owner of the account.\footnote{130}

Madeline sued to determine her rights of dower in the seized property.\footnote{131} The trial court held that Madeline’s dower interest in the property “was not transferred by the sale under distraint.”\footnote{132} However, the trial court believed that

\begin{footnotes}
\item[120] See generally Sprankling, supra note 92 at 341-57.
\item[122] Lurding v. Sonne, 480 S.W.2d 173, 175 (Ky. 1972).
\item[123] Id. at 174.
\item[124] Id.
\item[125] Id.
\item[126] Id.
\item[127] Id.
\item[128] Id.
\item[129] Lurding, 480 S.W.2d at 174.
\item[130] Id.
\item[131] Id.
\item[132] Id.
\end{footnotes}
Madeline “waived her dower interest in the property by accepting the proceeds from the sale.”

Madeline sought review by the Kentucky Court of Appeals to determine two issues. First, “[w]hether a wife’s dower interest was sold in a forced sale under a distraint warrant?” Second, “[i]f her rights were not sold, did she waive her right to dower interest in the property by accepting certain proceeds from the sale?”

The court of appeals agreed with the trial court’s determination that the sale under distraint did not transfer Madeline’s dower interest. The court stated that “[w]e have consistently held that a widow’s right of dower is an individual interest in her husband’s property and not a lien.”

However, the court of appeals did not believe Madeline waived her right of dower by accepting the proceeds of the sale. The court stated that at the public sale of the property, the government advertised that Joseph’s interest in the property was for sale and the deed to Dr. Sonne only conveyed Joseph’s interest. The court further stated that it is unreasonable “to believe that Dr. Sonne paid $60,000 for the property without first determining exactly what he was buying” and if Madeline’s dower rights were included in the sale price, Dr. Sonne would have had to pay a considerably higher price for the property than he paid.

Thus, it was “unrealistic to give [Dr. Sonne] [Madeline’s] dower interest in the property when it was quite clear from the proceedings that [her] interest was not being sold.” Therefore, the court of appeals reversed the trial court’s decision and held that Madeline was the sole owner of her dower interest in the property.

J. Practice Pointer

As noted in First Union and as listed in KRS 392.040, dower does not attach to land sold prior to the marriage but not conveyed before the marriage. Dower also does not attach to land sold in good faith after the marriage if the

133. Id.
134. Lurding, 480 S.W.2d at 174.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id. at 175.
140. Lurding, 480 S.W.2d at 175.
141. Id.
142. Id.
143. Id.
sale was to satisfy an encumbrance created before marriage, or to satisfy a lien for the purchase money.\textsuperscript{146}

An attorney should join all necessary parties in a judicial foreclosure action to satisfy Kentucky Civil Rule 10.01\textsuperscript{147} and to provide a subsequent purchaser with the same interests that were held by the prior owner. KRS 426.574 provides that a conveyance made in pursuance of a sale shall pass to the grantee the title of all the parties to the action or proceeding.\textsuperscript{148}

The attorney should include all parties in a judicial foreclosure action who may assert an interest in the property.\textsuperscript{149} However, it is better practice to allege in the body of the pleading whether the lien is subject to a currently inchoate claim of the potential assertion of dower interest. Likewise, an attorney who represents a creditor who may have a future claim if the spouse elects his/her dower share should also clarify in the pleadings the status of the lien as it applies to the subject real property.

K. The Effect of a Sale or Lease of Property on Dower/Curtesy Right

Sometimes one spouse has a career, such as a doctor, lawyer, or entertainer, which results in more risk and exposure to litigation. Thus, the couple may decide that the spouse who has less exposure should hold title to the asset as “married.” Likewise, one party may have a significantly weaker credit rating where the lower score would adversely impact the ability to obtain a loan or rate of interest that the couple would pay as a result of the lower credit score. Thus, the couple may choose to maximize their ability to obtain a better interest rate by having the spouse with the stronger credit score hold title to the asset as “married.”

Some single, divorced, or widowed individuals obtained their property prior to a marriage while others have held the property for so long that the person no longer remembers what their marital status was at the time of the conveyance. If both spouses do not consent and execute all the documents for the sale or lease of the real property, then there may be a dower interest remaining with the real property.

\textit{Schaengold v. Behen}, 208 S.W.2d 726 (Ky. 1948). A married woman, Mrs. Behen, entered into a contract where she agreed to lease property to Mr.

\textsuperscript{146} KY. REV. STAT. ANN. § 392.040 (LexisNexis 1999).
\textsuperscript{147} Ky. R. CIV. P. 10.01 provides that
\textsuperscript{148} KY. REV. STAT. ANN. § 426.574 (LexisNexis 2005); see OFFICE OF CONTINUING LEGAL EDUCATION, UNIV. OF KY. COLLEGE OF LAW, \textit{supra} note 82, at § 17.34.
\textsuperscript{149} Ky. R. CIV. P. 10.
Schaengold for a period of 20 years. The contract called for Mr. Schaengold to acquire Mrs. Behen’s undivided one-half interest in the property and provided that at the end of 20 years, Mr. Schaengold would have the option to purchase the property for $25,000. Mr. Schaengold executed the written lease and tendered a check for the first month’s rent payment to Mrs. Behen, but she returned the check and refused to execute the lease or to deliver possession of the property.

Mr. Schaengold sued to require Mrs. Behen to deliver possession of her one-half interest in the property and she be required to execute the lease and option contract according to the written agreement. The court admitted as evidence the proposed agreement, which bore Mr. Schaengold’s signature, but did not bear Mrs. Behen’s signature. The court stated that because the terms of the agreement were not in dispute, the only issue was whether Mrs. Behen had the right to enter into the agreement and execute the lease.

In sustaining a general demurrer for Mrs. Behen, the trial court stated that Mrs. Behen, as a married woman, was without power to enter into a contract to sell property without her husband joining her. The trial court cited KRS 404.020 as basis for this ruling. Further, the trial court believed that the 1942 amendment of KRS 404.030 did not repeal the section of KRS 404.020, which prohibited a married woman from making a contract to sell or encumber her real property unless her husband joins with her in the executory contract.

On appeal, Mr. Schaengold argued that the trial court erred by holding that Mrs. Behen could not enter into a contract for sale of property without her husband joining the contract. Before 1942, a wife could not enter into a

150. Schaengold v. Behen, 208 S.W.2d 726, 727 (Ky. 1948).
151. Id.
152. Id. at 727-28.
153. Id. at 728.
154. Id.
155. Id.
156. Schaengold, 208 S.W.2d at 728.
157. KY. REV. STAT. ANN. § 404.020 as enacted before 1942 provided a married woman may not make an executory contract to sell her property unless her husband joined in the contract.
158. Schaengold, 208 S.W.2d at 728.
159. Id.
160. Appellant Mr. Schaengold advanced three arguments at appeal. Schaengold, 208 S.W.2d at 728. He first argued error because Mrs. Behen as a married woman did not have to be joined in the contract by her husband. Id. Second, he argued that the contract at issue is a lease contract with an option to purchase the property at the end of the lease and a married woman has the right to enter such contracts. Id. Third, he argued the contract was severable and if the court decides Mrs. Behen had no right to sell, she did have a right to lease her property and the court should enforce this contract. Id. at 729.
161. Because the court of appeals reversed the lower court decision on Mr. Schaengold’s first argument, the court did not consider the remaining two arguments. Schaengold v. Behen, 208 S.W.2d at 729.
162. Id. at 728.
contract to sell her real estate without her husband joining in the contract.\textsuperscript{163} Such a contract conveyed no title, did not transfer her interest in the property, and was void.\textsuperscript{164} The Kentucky legislature in 1942 enacted an amendment now contained in KRS 404.030,\textsuperscript{165} which placed a “married woman on an equality with a married man in the conveyance of her real estate …”\textsuperscript{166}

The court of appeals examined the legislative history of KRS 404.020 and 404.030 to determine that the 1942 amendment repealed by implication the portion of KRS 404.020 that required a married woman’s husband to join in the sale of her property.\textsuperscript{167} Thus, KRS 404.030 allowed a married woman to enter into a contract to convey property without her husband joining the contract.\textsuperscript{168} Therefore, the court reversed the trial court’s decision and held that Mrs. Behen had the right to enter into the contract with Mr. Schaengold.\textsuperscript{169}

L. \textit{Practice Pointer}

Although the court in Schaengold\textsuperscript{170} held a married woman could enter into a contract to sell, convey, or encumber her property without her husband joining the contract, her husband still must release his statutory right of dower in the property either in the contract or in a separate instrument.\textsuperscript{171}

A practitioner should make several inquiries of their client’s current marital status during the closing process. The attorney should make the first inquiry at the initial meeting between the attorney and client along with a frank discussion of the potential impact of dower.\textsuperscript{172} If the attorney is representing a party at a real estate sale, the attorney should check the contract to make sure that all parties have signed and listed the marital status.\textsuperscript{173}

The loan application should provide space for the applicant to list how title and the mortgage should list the parties’ marital status, but a practitioner should not rely upon the applicants’ answer as the final statement of how the parties

\textsuperscript{163}. \textit{Id.} at 729. \textit{See} \textit{KY. REV. STAT. ANN.} § 404.020 as enacted before 1942, which provided a married woman may not make an executory contract to sell her property unless her husband joined in the contract.

\textsuperscript{164}. \textit{Schaengold}, 208 S.W.2d at 729.

\textsuperscript{165}. \textit{KY. REV. STAT. ANN.} § 404.030 as enacted in 1942 provided “[a] married woman may sell, convey or encumber any of her lands and chattels real, but such sale, conveyance or encumbrance shall not bar the husband's right to curtesy unless he joins in the instrument of sale, conveyance or encumbrance or releases his right to curtesy by separate instrument.” Currently \textit{KY. REV. STAT. ANN.} § 404.030(1) (LexisNexis 1999) provides this same right.

\textsuperscript{166}. \textit{Schaengold}, 208 S.W.2d at 729.

\textsuperscript{167}. \textit{Id.} at 729-730.

\textsuperscript{168}. \textit{Id.} at 730.

\textsuperscript{169}. \textit{Id.}

\textsuperscript{170}. \textit{Id.}

\textsuperscript{171}. \textit{See} \textit{KY. REV. STAT. ANN.} § 404.030 (LexisNexis 1999).

\textsuperscript{172}. \textit{See generally} Burby, \textit{supra} note 17, at 189-91.

\textsuperscript{173}. \textit{See} Yzenbaard, \textit{supra} note 59, at § 3-8 (for sample dower release clause); \textit{see} 15C AM. JUR. LEGAL FORMS 2D § 219:297 (2000).
wish to hold title.\textsuperscript{174} A title examiner/abstractor will need the names in all the variations of every party in order to check for liens, judgments, errant recordings, and prior listings (Mary Smith, single, f/k/a Mary Jones-Smith, married).\textsuperscript{175}

If the attorney is supervising or conducting the closing, then again the attorney should ask about the marital status while scheduling the closing and once again confirm the marital status of the parties while at the closing.\textsuperscript{176}

Non-practitioners may not be aware of the difference between “separated” and “divorced” or that the separated spouse may still have an inchoate interest in the real property.\textsuperscript{177} An attorney would be wise to review any Court Orders regarding the assets of the separated or divorced parties to verify if additional consents or waivers are required at a closing. Often the Order will provide for the consequences of failure of a party to comply with the terms of the Order. Detail and clarity in the documents will minimize confusion later, so if the Order specifies that if one party is to be responsible for and hold title to the property, then the deed should reflect both the content of the Order as well as a recitation of the location of the Order in the Court’s records.

\section*{III. Conclusion}

As one can see, dower problems or issues can arise in a number of daily real property situations in Kentucky. An unwary practitioner may significantly harm their client’s interests by not considering dower rights when discussing real property issues with engaged clients, clients entering into antenuptial agreements, clients closing on real property, and clients entering into mortgages on the property. Further, attorneys must properly inform lenders and lien holders about dower rights and the priority of liens placed on real property. Finally, an attorney who takes the proper procedures to protect or release dower rights at the beginning of a real property transaction, will ensure that the property is not unduly encumbered when the client wishes to sell. Therefore, by following the suggestions and practitioner’s tips outlined in this article, the practicing attorney will be able to adequately protect a client’s interest in the property.

\begin{flushright}
175. See generally Sprankling, supra note 92, at 393-410.
176. See generally Burby, supra note 17, at 189-91.
177. See generally Burby, supra note 17, at 193-94.
\end{flushright}
THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (BAPCPA) AND ATTORNEY SANCTIONS – A SIXTH CIRCUIT OVERVIEW AND ANALYSIS

by Henry E. Menninger, Jr.* and Thomas J. Blatz, Jr.*

I. INTRODUCTION

On March 10, 2005, the United States Senate passed The Bankruptcy Abuse Prevention and Consumer Protection Act (“the Act”).1 The House of Representatives passed the Act on April 14, 2005,2 and President George W. Bush signed the Act into law on April 20, 2005.3 Most provisions of the Act took effect on October 17, 2005, 180 days after President Bush’s signing.4 The purpose of this article is to provide a practitioner’s guide to the Act’s new rules concerning potential attorney sanctions, specifically for not conducting a “reasonable inquiry” by the attorney of the debtor-client’s financial status. This article will begin with a general discussion of the Federal Rules of Bankruptcy Procedure, Rule 9011 and a discussion of the “reasonable investigation” requirement. It will then discuss recent Sixth Circuit bankruptcy cases where the court either imposed or declined to impose sanctions on the debtor’s attorney. The article will then discuss the change in standards (mandatory versus discretionary) that the BAPCPA makes in regard to attorney sanctions and attempt to answer the somewhat vague question of what constitutes “reasonable investigation.”

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4. Id.
II. BACKGROUND LAW


Federal Rule of Bankruptcy Procedure 9011 (modeled after Federal Rule of Civil Procedure Rule 11)\(^5\) provides that the contents of all documents submitted to the bankruptcy court by an attorney are, in essence, true statements that are made to the best of the attorney’s “knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.”\(^6\) The Rule goes on to say that if the court determines that any representation to the court has been violated, the court may impose sanctions upon the attorneys, law firms, or parties responsible for the violation.\(^7\) The Act incorporates Rule 9011, and specifically, allows the court to impose sanctions on the debtor’s attorney, stating,

\[
\text{[t]}\text{he signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has--(i) performed a \textit{reasonable investigation} into the circumstances that gave rise to the petition, pleading, or written motion; and (ii) determined that the petition, pleading, or written motion-- (I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1) [the “means test”].}^8
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Unfortunately, the term “reasonable investigation” is not defined anywhere in the Act.\(^7\)

B. The Expansion of Rule 9011 of the Federal Rules of Bankruptcy Procedure

Section 319 of the Act states:

It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors’ attorneys have made reasonable inquiry to verify that the information contained in such documents is (1) well grounded in fact; and (2) warranted by existing

\(^{5}\) Fed. R. Bankr. P. 9011(c).
\(^{7}\) Fed. R. Bankr. P. 9011(c).
law or a good faith argument for the extension, modification, or reversal of existing law.\textsuperscript{10}

As one analysis put it, “[b]asically, this expression by Congress puts an emphasis upon the responsibility of the debtor’s attorney to verify the factual accuracy and legal basis for everything contained in bankruptcy schedules and other documents.”\textsuperscript{11} Essentially, these “sense of Congress” statements are not considered to be part of the enacted amendments to the Bankruptcy Code, however, they do serve as a guide to courts in interpreting these amendments in that they provide legislative history and evidence of Congress’s intent.\textsuperscript{12}

III. CASE SUMMARIES

A. Taylor v. United States\textsuperscript{13}

In Taylor, the government brought a motion for sanctions against the taxpayer and her attorney under Federal Rule of Civil Procedure 11.\textsuperscript{14} The taxpayer originally claimed that the government had failed to send her a notice of assessment and demand for payment to her “last known address” within sixty days of the assessment.\textsuperscript{15} The taxpayer’s attorney filed a motion for enjoining the enforcement of a federal tax lien and wage levy, and the court set a hearing date for Monday, April 26, 1993.\textsuperscript{16} The Sunday evening prior to the hearing, the taxpayer informed her attorney that she had located the assessment and the demand for payment she previously alleged she had not received.\textsuperscript{17} Upon hearing this, the taxpayer’s attorney notified the taxpayer that she would have to dismiss her case.\textsuperscript{18} He then attempted to contact the Government’s trial attorney to notify him of the change in situation.\textsuperscript{19} The attempt to contact the Government’s attorney was unsuccessful.\textsuperscript{20} The next morning, after being informed of the dismissal, the Government’s attorney filed a motion under

\textsuperscript{11} WILLIAM HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 17 (Thompson/West) (2005).
\textsuperscript{12} Id. at 21.
\textsuperscript{13} 151 F.R.D. 389 (D. Kan. 1993). (It should be noted that Taylor, is not a Sixth Circuit case and involves income tax evasion as opposed to bankruptcy. It does, however, provide an excellent overview on the imposition of sanctions for violation of Federal Rule of Civil Procedure 11. Because Federal Bankruptcy Rule 9011 is modeled after Rule 11, the court’s discussion of “reasonable inquiry” is pertinent to this analysis).
\textsuperscript{14} Id. at 391.
\textsuperscript{15} Id. at 392.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 392.
\textsuperscript{18} Id.
\textsuperscript{19} Taylor, 151 F.R.D. at 392.
\textsuperscript{20} Id.
Federal Rule of Civil Procedure seeking sanctions against the taxpayer and the attorney.

During the hearing for the imposition of sanctions, the court noted the following for Federal Rule of Civil Procedure sanctions to apply:

Under Rule 11, the signature of an attorney or party on a pleading or any other paper presented in a federal court constitutes a certification that the signer has read the pleading or paper and that, "to the best of the signer’s knowledge, information and belief, formed after reasonable inquiry" it is (1) not being interposed for any "improper purpose," (2) "well grounded in fact," and (3) "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." If there is a violation of this certification standard, Rule 11 requires the court to sanction the violator.

The court continued, discussing the "reasonable inquiry" requirement:

The "reasonable inquiry" requirement mandates that an attorney stop, think, and assure himself of the legal and factual basis of a pleading before signing and presenting it to the court. Whether a reasonable inquiry was conducted and reasonable conclusions were drawn therefrom is governed by an objective standard. Thus, an attorney’s good faith belief in the merit of factual allegations and legal claims asserted in the pleading is not sufficient to avoid Rule 11 sanctions. Rather, the attorney’s belief must be based on a reasonable inquiry and "in accord with what a reasonable, competent attorney would believe under the circumstances." The attorney may not merely argue that "a competent attorney could have made a colorable claim based on the facts and law at issue; [he] must actually present a colorable claim.” All doubts as to whether a colorable claim has been presented are resolved in favor of the attorney against whom sanctions are sought.

The court concluded its analysis of Rule 11 sanctions by stating, "[h]ence, while sanctions are clearly appropriate whenever a reasonable inquiry has or would have indicated that the legal or factual basis of a claim is untenable, when such inquiry merely reveals a likelihood of losing, a lawyer does not violate Rule 11 by maintaining the claim.”

After explaining the parameters of the Rule 11 requirements for sanctions, the court determined that the taxpayer’s attorney should not be sanctioned. The court determined (1) that the attorney conducted a reasonable factual inquiry concerning his client’s claim, specifically mentioning that the attorney was "to some degree dependent upon his client’s good faith and forthrightness in

21.  Id.
23.  Id. at 392-93 (citations omitted).
24.  Id. at 393.
disclosing pertinent facts,” and that he “should not be held responsible for [his client’s] disorganization;” and (2) that the attorney conducted a reasonable legal inquiry concerning his client’s claim, specifically mentioning that although the Government’s case (regarding the original lawsuit) was far more persuasive, “the cases cited by [taxpayer’s attorney] do state the relevant legal standards,” and that the taxpayer’s attorney “did not simply fail to research the law or completely ignore existing law in making his legal arguments, no matter how incomplete and unpersuasive those arguments may have been.” The court concluded by stating that “the court is loath to impose sanctions on an attorney who appears to have reasonably believed that the factual and legal arguments he advanced were legitimate advocacy.”

B. In re Fordu

In Fordu, the trustee of the bankruptcy estate brought an action against the debtor’s former wife “seeking to avoid and recover transfers that she received pursuant to [a separation agreement]” between her and the debtor. At the end of the bankruptcy court’s hearing, the former wife filed a motion to recover attorney fees and costs under Federal Rule of Bankruptcy Procedure 9011, alleging that the bankruptcy trustee’s attorney violated Rule 9011 by continuing prosecution of the proceeding after the bankruptcy court granted partial summary judgment in the ex-wife’s favor on the basis of its finding that her ex-husband had no property interest in the transfers. The bankruptcy court held that Rule 9011 sanctions were not proper because the trustee’s claims “were made after appropriate factual inquiry and warranted by existing law.” This decision was upheld on appeal by the Sixth Circuit’s Bankruptcy Appellate Panel (BAP).

On appeal to the Sixth Circuit Court of Appeals, the court affirmed the decision of the bankruptcy court and the BAP denying sanctions. The court first stated that the bankruptcy court’s decisions regarding imposition of sanctions are reviewed under an abuse of discretion standard, and that “[t]he test for imposing sanctions is whether the individual’s conduct was reasonable under the circumstances.” The appeals court determined that the bankruptcy
court did not abuse its discretion, noting that there was no evidence that the trustee acted in anything other than good faith in asserting his claim; they further held that the bankruptcy court’s conclusion that the trustee acted reasonably was correct. The court noted that “the Trustee made reasonable inquiry into the facts of the case before filing the complaint … and most important, the Trustee’s claim that the [disputed property was] indeed marital property is supported by existing law.” The court held “sanctions under [Rule 9011] appropriately may be awarded when an attorney advances an argument that is ‘not well grounded in fact or warranted by existing law or a good faith argument for the extension or modification … or reversal of existing law.”

C. In re MRL Residential Leasing, Inc. In MRL Residential Leasing, Inc., the debtor’s attorney was also her son. One day prior to the creditor foreclosing on the debtor’s home, the debtor quitclaimed her interest in the home to MRL Residential Leasing (MRL), a company owned by two of her sons (including the attorney in this case). That same day, MRL filed for bankruptcy under Chapter 11 and claimed that its only asset was the house valued at $200,000. MRL also listed liabilities of $139,002, of which the creditor’s mortgage interest represented $130,000. Ultimately, the bankruptcy court imposed sanctions on MRL’s attorney in the amount of $11,607, which was later amended to $4,835; these sanctions were subsequently upheld by the district court.

On appeal, the Sixth Circuit stated the following rule regarding Federal Rule of Bankruptcy Procedure 9011 sanctions:

[u]nder Bankruptcy Rule 9011, sanctions shall be imposed on the debtor and/or the attorney who signed the bankruptcy petition if, to the best of the attorney’s or debtor’s knowledge, information, and belief formed after reasonable inquiry, the petition is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Additionally, sanctions shall be imposed if the petition is “interposed for any improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation or administration of the case.” Essentially, an attorney’s conduct in filing a bankruptcy petition must

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39. Id.
40. Id.
41. Id. (emphasis added).
42. Id. (alteration in original) (citation omitted).
43. No. 96-1847, 1997 WL 453163, at *1 (6th Cir. Aug. 8, 1997).
44. Id.
45. Id. at *2.
46. Id.
47. Id.
48. Id. at *3.
be reasonable under the circumstances, and the district and bankruptcy courts have wide discretion in making a reasonableness determination.49

Regarding “bad faith,” the court stated,

in the bankruptcy context, the dismissal of a reorganization petition based on a finding of “bad faith” does not necessarily warrant sanctions if the attorney did not know or cannot reasonably be expected to have known at the time of filing that no possibility of reorganization existed. Conversely, when the attorney or the party is in the position to know that the petition is in bad faith, sanctions are appropriate.50

The court then discussed previous Sixth Circuit cases that attempted to address the elements of good faith in the bankruptcy context.51 The court specifically set out eight elements that are an indication of a bad faith filing:

(1) the debtor has one asset; (2) the pre-petition conduct of the debtor has been improper; (3) there are only a few unsecured creditors; (4) the debtor’s property has been posted for foreclosure, and the debtor has been unsuccessful in defending against foreclosure in a state court; (5) the debtor and the one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford; (6) the filing of the petition effectively allows the debtor to evade court orders; (7) the debtor has no ongoing business or employees; and (8) the lack of possibility of reorganization.52

Factor (1) was subsequently described as “new debtor syndrome and includes single-asset debtors created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors.”53

The court determined that the attorney should have known that the filing was unreasonable based upon the above eight factor test and the attorney’s previous history representing both his mother and MRL.54 The court held that MRL’s bankruptcy filing was a frivolous filing made in bad faith used to unnecessarily delay the creditor’s foreclosure of the property.55 Ultimately, the court upheld the sanctions against MRL’s attorney.56

50. Id. (citations omitted).
51. Id. at *4.
52. Id. (quoting In re Charfoos, 979 F.2d 390, 392 (6th Cir. 1992). (alteration in original)).
53. Id. (quoting In re Trident Assocs. Ltd. P’ship, 52 F.3d 127, 131 (6th Cir 1995)).
54. Id. at *5.
56. Id.
D. *In re Downs*\(^{57}\)

The debtor filed a Chapter 11 reorganization petition in 1986.\(^{58}\) This reorganization subsequently failed and the debtor filed a Chapter 7 liquidation petition in 1990.\(^{59}\) The debtor retained a new attorney in April 1991 after his original attorney was diagnosed with a brain tumor.\(^{60}\) The new attorney filed a motion to convert the Chapter 7 case to a Chapter 11 reorganization literally minutes before the bankruptcy trustee was to begin a liquidation sale that had been scheduled for six months.\(^ {61}\) The bankruptcy court denied the debtor’s motion to convert noting that the motion was filed in bad faith “solely for the purpose of delaying the sale.”\(^{62}\) On appeal, the district court remanded the case back to the bankruptcy court to determine whether the debtor could “propose a viable reorganization plan and have the ability to proceed under Chapter 11.”\(^{63}\) The district court went on to say that if it appeared that the debtor’s motion to convert was made in bad faith and that Chapter 11 was not a viable option, the debtor and/or his attorney should be sanctioned.\(^{64}\) On remand, the bankruptcy court made evidentiary findings that “no plan had been reviewed, evaluated, or formulated until well after the initial conversion motion was filed,”\(^{65}\) and that the motion was filed in “objective bad faith.”\(^{66}\) The creditor and trustee then filed a motion for sanctions under Rule 9011 on the ground that the conversion motion was filed in bad faith.\(^ {67}\) The bankruptcy court denied the motion for sanctions under Rule 9011, stating that “1) given the time constraints, [debtor’s attorney] adequately reviewed the case before he made the filing, and 2) the [m]otion was not filed in subjective bad faith.”\(^{68}\) On appeal to the Sixth Circuit, the creditor argued that sanctions should apply because “1) [debtor’s attorney] made no reasonable inquiry before filing the motion; 2) the motion was not well grounded in existing law because [the debtor] had no reasonable possibility of reorganizing under Chapter 11; and 3) [debtor’s attorney] filed the motion for the express purpose of delaying [the liquidation sale].”\(^{69}\) The creditor and the trustee also argued that sanctions were appropriate because the bankruptcy court found “objective bad faith” on the part of debtor’s attorney.\(^ {70}\) The Sixth Circuit declined to impose sanctions noting that due to the short notice and limited time

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57. 103 F.3d 472 (6th Cir. 1996).
58. *Id.* at 475.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Downs,* 103 F.3d at 476.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Downs,* 103 F.3d at 481.
70. *Id.*
period in which to research the facts of the case, the debtor’s attorney should not be sanctioned under Rule 9011. 71 In addition, regarding the finding of bad faith, the Sixth Circuit agreed with the bankruptcy court’s finding that “[a]lthough a later Judicial review of the facts proved [debtor’s attorney’s] actions were unreasonable, at the time they were carried out in a genuine, if misguided, attempt to reorganize the debtor.” 72 The Sixth Circuit went on to reject the creditor and trustee’s attempt “to use a retroactive finding of bad faith to impose Rule 9011 sanctions on [debtor’s attorney].” 73

E. In re Big Rapids Mall Assoc. 74

In this case, the debtor owned and operated a shopping center. 75 The creditor had a claim against the debtor secured by a mortgage on the property. 76 The creditor completed a foreclosure sale of the property, when the debtor filed a Chapter 11 bankruptcy petition which automatically stayed the sale of the shopping center. 77 The creditor filed its own stay motion with the bankruptcy court and after a final evidentiary hearing, the bankruptcy court determined “that: (1) the [d]ebtor was not a partnership; (2) there was no reasonable likelihood of a successful reorganization within a reasonable amount of time; and (3) the [d]ebtor filed the case in bad faith for the purpose of improperly and abusively delaying and hindering the creditor.” 78 The creditor then filed a motion for sanctions against the debtor and their attorneys under Rule 11. 79 The bankruptcy court ruled for the creditor and sanctions in the amount of $25,000 were ordered against the debtor and their attorneys. 80 The district court upheld the sanctions and the attorneys subsequently appealed to the Sixth Circuit. 81

The Sixth Circuit reversed the decisions of the lower courts regarding the sanctions to the debtor and attorneys. 82 The court found that the lower courts failed to determine whether or not the debtor’s attorneys had made a reasonable inquiry. 83 The court made the following comments regarding what constitutes a reasonable inquiry:

In determining whether an attorney had or had not conducted a reasonable inquiry, a court undoubtedly should consider a variety of

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71. Id.
72. Id.
73. Id.
74. 98 F.3d 926 (6th Cir. 1996).
75. Id. at 928.
76. Id.
77. Id.
78. Id. at 928-29.
79. Id. at 929.
80. In re Big Rapids Mall Assoc., 98 F.3d at 929.
81. Id.
82. Id. at 933.
83. Id. at 930.
pre-filing factors. In this case, for example, what information about the client’s business did the attorneys have? Was the information verified? How involved had these attorneys been in their client’s business? For how long? Were other professionals, such as accountants or bankers consulted? What independent investigation, if any, did the attorneys undertake prior to the filing? What did their clients tell them? Were they justified in believing what their clients told them? Did a time problem exist when a decision to file was made? What was the business (and legal) sophistication of the clients and their attorneys? These along with a myriad of other factual details would be crucial to have in hand before determining whether the action taken or not taken by the attorneys prior to filing the bankruptcy petition was or was not reasonable.84

The court also determined that the truthfulness (or lack thereof) of the debtor should not be considered when sanctioning the debtor’s attorneys holding that “[w]ithout any findings to support the imposition of sanctions on [debtor’s attorneys], the bankruptcy ruling [imposing sanctions] amounts to vicarious liability on the part of [the debtor’s attorneys] for the perceived unreliability of their clients’ testimony.”85 The court continued,

[a]bsent some further evidence of attorney fault, a lawyer cannot be sanctioned because a judge at some later date believes his client lacks credibility or is even lying under oath. It is surely obvious to any judge (as it is to any lawyer) that it is possible for an attorney to make an assessment of a client’s credibility in the attorney’s office which ultimately may differ substantially from the court’s assessment of the same individual under oath at trial.86

IV. ANALYSIS

A. What Constitutes “Reasonable Investigation”? Is a Higher Level of Due Diligence Required?

As mentioned above, the BAPCPA, through incorporation of Rule 9011 of the Federal Rules of Bankruptcy, requires that by signing all petitions, pleadings, or written motions submitted to the court, the attorney is certifying that she has “performed a reasonable investigation” into the circumstances that gave rise to the filing.87 “The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that

84.  Id. at 930-31.
85.  Id. at 932.
86.  In re Big Rapids Mall Assoc., 98 F.3d at 932.
the information in the schedules filed with such petition is incorrect." The "schedules" referred to contain various financial information regarding the debtor’s assets and liabilities, including constantly changing items such as checking accounts, which lead some commentators to believe that this could lead to potential liability for the debtor’s attorney who cannot possibly be able to verify this information effectively or accurately. Further, as the BAPCPA does not define what a “reasonable investigation” is, it is expected that courts will be left to define the term and to define when an attorney has “knowledge” of “incorrect” information after an “inquiry.” Whether or not the Sixth Circuit redefines the criteria of “reasonable investigation” the court listed in In re Big Rapids Mall Assoc. remains to be seen.

Clearly, however, Congress intended to raise the bar. Good practice requires diligent counsel to review at least the following records, which, with the advent and accessibility of the internet, are relatively inexpensive and easy to access: 1) local real estate land records, including tax duplicates, deeds and mortgages; 2) Uniform Commercial Code filings with the Secretary of State; 3) vehicle titles; 4) NADA and/or Kelly Blue Book valuations; 5) on-line banking printouts; 6) credit reports; 7) declaration page of homeowner’s insurance policies (including specifically scheduled items); 8) probate inventory where prior spouse deceases; 9) Domestic Relations Court property statements in the event of a recent divorce; 10) a detailed and thoughtful preparation and analysis of the “Statement of Current Monthly Income and Means Test Calculation” now required for every filing; and last, but certainly not least, 11) a detailed in-person interview with the client by his or attorney (not a secretary or paralegal) wherein the attorney actually examines his or her client about the contents of the schedules.

V. CONCLUSION

This article was designed to give the reader a broad overview of the changes attorneys may face regarding the possibility of sanctions in preparation and filing of bankruptcy schedules under BAPCPA, in light of existing Sixth Circuit precedent in construing what constitutes a “reasonable investigation” under Rule 9011 of the Federal Rules of Bankruptcy Procedure. While existing precedent under Rule 9011 seems to require a finding approximating “bad faith” before sanctions will be imposed, Congress clearly intended to “raise the bar” for attorneys practicing in the area of consumer bankruptcy, and reasonable inquiry may take on new meaning in terms of what is expected of attorneys before submitting a bankruptcy petition and its related schedules to the court. What the

90. Id.
91. In re Big Rapids Mall Assoc., 98 F.3d 926 (6th Cir. 1996).
92. A practical checklist provided by co-author, Henry E. Menninger, Jr.
courts will require may be determined on a case by case basis, but it is clear that in light of available technology, an attorney may no longer rest on the mere statements made by the Debtor during the preparation of a bankruptcy petition and related schedules.