RECENT DEVELOPMENTS IN THE LAW 2015

BANKRUPTCY & RECEIVERSHIP DEVELOPMENTS

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RECENT BANKRUPTCY CASE LAW

SUPREME COURT OF THE UNITED STATES

- **Baker Botts LLP v. ASARCO, LLC, --- U.S. ---, 135 S.Ct. 2158, 192 L.Ed.2d 208 (2015)**

  - Determines that costs of defending a fee application from challenge are not compensable by a bankruptcy estate.

  - May encourage strategic fee application objections since the cost of responding will be borne by the applicant.

  - Background:

    - ASARCO, the debtor, hired several law firms to assist it in its chapter 11 proceedings.

    - By any measure, the chapter 11 case was extraordinarily successful and ASARCO emerged with all creditors, paid in full, a full resolution of environmental liabilities and $1.9 billion cash on hand.

    - Two of the debtor's law firms sought a combined $120 million in fees plus an enhancement of $4.1 million for exceptional performance and the reorganized debtor objected.

    - The bankruptcy court awarded the fees sought plus an additional $5 million for time spent litigating over the fee applications. The district court affirmed the award.

    - The Fifth Circuit reversed holding that 11 U.S.C. § 330 does not authorize compensation for costs incurred in defending a fee application.

  - Supreme Court affirmed the Fifth Circuit holding that costs incurred in defending fee application would not fit within section 330's authorization for payment of "reasonable compensation for actual, necessary services."

    - The American rule requires each litigant to pay its own fees absent contractual or statutory provision to the contrary.

    - Fees incurred in defending a fee application are incurred for the benefit of the professional/applicant, not for the debtor to which the underlying services were provided.

    - The language of 11 U.S.C. § 330 does not explicitly override the American Rule.

- Given that any party in interest may object to a fee application, there is a risk that normally adversarial parties (committees and/or debtors) will object to fee application for strategic reasons. However, the Court said that predictions about how this rule would operate in practice were not a sufficient basis to depart from the ordinary application of the American rule.

- **Bank of America, N.A. v. Caulkett, --- U.S. ---, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015)**

  - A chapter 7 debtor cannot void a junior mortgage lien when the debt secured by a senior mortgage lien exceeds the value of the property encumbered.

  - Preserves one of the distinctions between chapter 13 and chapter 7 cases that serves as a substantial incentive to file for relief under chapter 13.

  - Background:

    - In consolidated cases under consideration, chapter 7 debtors owned properties encumbered by two mortgages. The balance of each first mortgage exceeded the value of each property such that the second mortgages were unsupported by any value of the property, i.e. they were wholly unsecured.

    - Debtors each moved to "strip-off" the second mortgages under 11 U.S.C. § 506(d) which allows debtors to void liens to the extent that the lien secures a claims "that is not an allowed secured claim.

    - 11 U.S.C. § 506(a) provides that a claim is only a secured claim to the value of the creditor's interest in the debtor's interest in the collateral. In other words, if the value of the debtor's interest in property does not exceed the balance of a first mortgage, then the second mortgage is not a "secured claim."

    - The Court had previously held in Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed. 903 (1992), that a chapter 7 debtor could not bifurcate a partially secured claim into a secured and unsecured claim based upon the value of the collateral.

    - Dewsnup court interpreted the phrase "allowed secured claim" in 11 U.S.C. § 506(d) to mean a claim secured by a lien without regard to 11 U.S.C. § 506(a) that indicates a claim is only secured to the extent there is value in the collateral to support the lien.

  - The Court noted that Dewsnup had been the subject of criticism, but that the debtors had not asked the court to overrule it.

- The Court also acknowledged that its decision results in the term "secured claim" having two different meanings within the same section of the Bankruptcy Code.
  - In 11 U.S.C. § 506(a), whether a claim is secured depends upon whether there is value in the collateral to support the lien.
  - In 11 U.S.C. § 506(d), whether a claim is secured depends upon whether there is a lien in existence.

- **Wellness Int'l Network, Ltd. V. Sharif, --- U.S. ---, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015)**
  - The Court held that parties can implicitly consent to a bankruptcy court deciding issues that are otherwise outside its constitutional powers.
  - A continuation of the Supreme Court's clarification of Stern v. Marshall, 564 U.S. ---, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) which held that bankruptcy courts could not enter final judgment with respect to a state law counterclaim raised in the context of dispute over a proof of claim filed in the bankruptcy of Anna Nicole Smith.
  - Background:
    - Judgment creditor filed an action against a debtor seeking to have his discharge denied and seeking a declaration that the assets of a trust for which the debtor acted as trustee were actually assets of the debtor.
    - After a number of discovery abuses, the bankruptcy court entered a default judgment against the debtor.
    - The debtor appealed arguing, among other things, that the bankruptcy court lacked constitutional authority to enter final judgment against him because it was not an Article III court.
  - Court rejects the debtor's argument noting that precedents have long allowed parties to consent to adjudication of matters by non-Article III judges.
  - "[A]llowing bankruptcy litigants to waive the right to Article III adjudication of Stern claims does not usurp the constitutional perogatives of Article III courts."
  - The consent to adjudication of Stern claims by non-Article III judges need not be express consent. Rather, the consent must only be knowing and voluntary.
  - In a dissenting opinion by Justice Roberts and joined by Justices Scalia and Thomas, the minority questions why the majority decided the issue of implied consent to adjudication by a non-Article III judge. The minority thought that the

nature of the claim itself, a determination of what is included within the bankruptcy estate, was sufficiently connected to the bankruptcy to allow for final adjudication by a bankruptcy court irrespective of whether the parties had consented.

- **<u>Harris v. Viegelahn</u>, --- U.S. ---, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015)**

  - The Court decides that a chapter 13 debtor's postpetition income, held by a chapter 13 trustee, must be returned to the debtor upon conversion of his case to a chapter 7.

  - The decision resolved a split between the Third and Fifth Circuits.

  - Background:

    - The debtor filed a chapter 13 petition and obtained confirmation of a plan that required him to make continuing payments to his mortgage holder and monthly payments from his employment in the form of a wage withholding.

    - The debtor fell behind on his mortgage after confirmation and the bank obtained relief from stay and foreclosed upon the debtor's residence.

    - The wage withholding continued and approximately $5,000 accumulated in the chapter 13 trustee's account.

    - The debtor converted his case to a chapter 7 proceeding and ten days later the chapter 13 trustee disbursed the funds she held to pay debtor's counsel and to unsecured creditors on account of their claims.

    - The debtor sought an order requiring the trustee refund the disbursed funds.

    - The bankruptcy court ordered a refund and the district court affirmed. The Fifth Circuit reversed holding that the claims of unsecured creditors were entitled to payment before the accumulated wages should be refunded to the debtor.

  - The Court began it analysis with a description of the critical distinction between chapters 7 and 13:

    - "Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." This clean break results in a debtor retaining his postpetition wages in a chapter 7 case.

        - "Chapter 13 works differently. A wholly voluntary alternative to Chapter 7, Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debtors over a three- to five-year period." As a result of the repayment plan requirement, a chapter 13 debtor's postpetition income becomes property of his bankruptcy estate.

    - Next, the Court explained that 11 U.S.C. § 348 generally excludes a chapter 13 debtor's postpetition earnings from property of a chapter 7 estate created upon conversion of a case.

        - Pursuant to 11 U.S.C. § 348(f)(1)(A), property of a chapter 7 estate created by conversion of a chapter 13 case consists of the property of the chapter 13 estate upon the petition date, i.e. without postpetition earnings.

        - 11 U.S.C. § 348(f)(2) provides that a chapter 7 estate will include all property of a chapter 13 estate as of the date of conversion if the debtor converted the case in bad faith.

    - If postpetition earnings are excluded from a post-conversion chapter 7 estate, then the displaced chapter 13 trustee has no grounds to disburse them to anyone but the debtor.

    - Conversion of a case from chapter 13 immediately terminates the service of the chapter 13 trustee.

- **Bullard v. Blue Hills Bank, --- U.S. ---, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015)**

    - The Court held that denial of confirmation of a proposed chapter 13 plan is not an immediately appealable final order.

    - The result of the case is that debtors must either propose a plan they do not want, or await dismissal of their case, before they can appeal denial of confirmation of their preferred plan.

    - Background:

        - The debtor proposed what has come to be known as a Bullard plan in which he proposed to bifurcate the claim of a mortgage holder into secured and unsecured claims. The secured portion would be paid over a term that far exceeded the five year term of the plan and the unsecured portion would receive a dividend along with other unsecured claims.

        - The bankruptcy court denied confirmation. The BAP determined that it lacked jurisdiction to consider the debtor's appeal because the order denying confirmation was not final as long as the debtor remained free to

propose alternative plans. The First Circuit similarly determined that the order denying confirmation was not final and appealable.

    - The debtor argued that an order granting or denying confirmation finally resolves the question of confirmation as to that plan.

    - The bank argued that until the entire plan process was finally determined, there was no final appealable order.

  - The court began its analysis by noting that the concept of finality is complicated in the bankruptcy context as many discrete controversies (that would ordinarily be stand alone lawsuits) are decided even though the bankruptcy case proceeds.

  - The Court determined that only plan confirmation or dismissal alters the status quo and fixes the rights of the parties in such a way as to render an order concerning a proposed plan appealable.

  - In the absence of confirmation or dismissal, the parties rights are unaffected, the automatic stay remains in place, and the trustee continues to collect interim payments pending confirmation of a plan.

  - The practical effect should be of substantial concern to debtors. Often plans are proposed where the only disputed issue is a single unsettled question of law. In order to have that issue decided on appeal, a debtor would have to allow his case to be dismissed, appeal the dismissal and obtain a stay pending appeal of the dismissal order (or else lose the protections of the automatic stay).

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

- **Sauer Inc. v. Lawson (In re Lawson), 791 F.3d 214 (1st Cir. 2015)**

  - Court holds that 11 U.S.C. § 523(a)(2)(A)'s "actual fraud" exception to discharge is not limited to fraudulent misrepresentations. It can include the debtor's liability for knowingly receiving an actually fraudulent transfer.

  - Background:

    - Prepetition, a creditor obtained an $80,000 judgment against the debtor on account of her receipt of an actually fraudulent transfer, i.e. a transfer made with the intent to hinder, delay or defraud a creditor.

    - Through a shell entity, the transfer was essentially made from a judgment debtor father to his daughter.

    - The transferee filed a chapter 13 petition and the creditor timely filed an adversary proceeding to except its prepetition judgment from discharge.

    - The Bankruptcy Court dismissed the adversary proceeding on the basis that actual fraud under 11 U.S.C. § 523(a)(2)(A) required an affirmative misrepresentation which had not been alleged by the creditor.

    - The creditor took a direct appeal of the Bankruptcy Court's dismissal to the First Circuit.

  - The panel rejected the notion that Supreme Court and First Circuit precedents required misrepresentation as an element of actual fraud.

  - The court noted that 11 U.S.C. § 523(a)(2)(A) applies to debts incurred both through "actual fraud" and "false representation" thereby implying that actual fraud could encompass more than misrepresentation.

  - The court made clear that in order for a debt resulting from receipt of a fraudulent transfer to be excepted from discharge, the debtor must have some culpability or knowledge. It is not sufficient for the debtor to have passively received a fraudulent transfer.

- **Charbono v. Sumski (In re Charbono), 790 F.3d 80 (1st Cir. 2015)**

  - Court holds that Bankruptcy Court has inherent authority to sanction parties for noncompliance with court orders.

  - Background:

    - The debtor filed a chapter 13 petition and a plan that included a standard provision requiring the debtor to timely file all tax returns during the case and to provide a copy of filed returns to the trustee within seven days of filing.

    - When the debtor failed to provide a tax return in response to the trustee's reminder, the trustee filed a motion seeking dismissal of the debtor's case or alternatively imposition of a $200 sanction.

    - Unbeknownst to the debtor or trustee, the debtor's wife had timely sought an extension to file their tax return.

    - When the trustee's motion was heard, the debtor argued that he had purged his non-compliance with the plan by producing the timely filed extension request. The trustee, however, continued to press for sanctions.

        - The Bankruptcy Court halved the requested sanction and ordered the debtor to pay $100. The debtor appealed to the District Court which upheld the sanction.

    - On appeal, the debtor argued that the bankruptcy court effectively imposed a fine for criminal contempt which was:

        - Beyond the jurisdictional powers of the bankruptcy courts; and

        - Procedurally improper.

    - The First Circuit rejected each of these arguments. First, the court noted that bankruptcy courts have long been understood to have the inherent power to force submission to their lawful mandates. Second, the court determined that this sanction was imposed pursuant to that inherent power and not as a penalty for willful contempt.

    - Court also rejected debtor's arguments concerning due process and the appropriateness of the sanction.

        - The debtor had ample notice that the trustee was seeking imposition of a sanction. The debtor objected and was heard with respect to the trustees request.

        - The transcript of the hearing before the Bankruptcy Court indicates that the judge considered the debtor's dire straits in reducing the amount of the sanction from the trustee's $200 request.

- **<u>Fahey v. Mass. Dep't of Revenue (In re Fahey)</u>, 779 F.3d 1 (1st Cir. 2015).**

    - A divided panel of the First Circuit held that an untimely filed state tax return was not a "return" such that the unpaid taxes reflected in such return were nondischargeable.

    - The majority's holding was essentially this, "a return filed after the due date is a return not filed as required."

    - The case marks a substantial shift from pre-2005 bankruptcy law and will severely hamper some debtors' efforts to discharge tax obligations.

    - Factual Background:

        - Four consolidated cases involving debtors who failed to timely file their Massachusetts tax returns.

        - More than two years prior to filing chapter 7 petitions, the debtors filed their missing returns, albeit after the deadline for the filings.

        - The debtors did not pay the taxes calculated on those returns and each later filed chapter 7 petitions.

    - Legal Background:

        - 11 U.S.C. § 523(a)(1) provides in part, "(a) A discharge under section 727 [i.e. a chapter 7 discharge]…does not discharge an individual debtor from any debt--(1) for a tax or a customs duty--…(B) with respect to which a return, or equivalent report or notice, if required--(i) was not filed or given; or (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition[.]

        - Prior to the 2005 amendments to the Bankruptcy Code contained in BAPCPA this provision was generally interpreted to mean that taxes reflected in late filed returns could be discharged if the return was filed more than two years preceding the petition date (and were otherwise dischargeable).

        - BAPCPA included a so-called "hanging paragraph", i.e. a mis-numbered paragraph, that defined "return." 11 U.S.C. § 523(a)(*). The definition provided, in part, "[f]or the purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."

    - The majority framed the question this way: "So the question now presented is a question of statutory interpretation: Is a Massachusetts tax return filed after the due date for such returns a "return" as defined in section 523(a)(*) so that the tax due under that return remains dischargeable?"

    - The answer depends upon whether Massachusetts' filing deadline is an "applicable filing requirement." Because the answer is plainly yes, the majority concluded that taxes reflected in late filed returns are non-dischargeable.

    - The conclusion comports with decisions of the Fifth and Tenth Circuits and dicta from a dissent filed in a case before the Seventh Circuit.

    - In a dissenting opinion, Judge Thompson argues that the majority interprets the hanging paragraph phrase "applicable filing requirements" too rigidly.

        - Massachusetts accepts late filed returns and will rely upon them for calculating a tax.

        - The majority should not lightly presume such a drastic departure from pre-BAPCPA practice if there is any question as to Congressional intent as to late filed returns.

    - Decision could upset the expectations of thousands of debtors who believed that they had discharged their tax liabilities reflected on late filed returns.

    - Since the taxing authorities need not take any action to prevent the discharge of nondischargeable taxes, there is a potential that they will now seek to collect taxes that everyone had assumed were discharged based upon pre-2005 practice.

- **<u>Barraford v. T&N Ltd.</u>, 778 F.3d 258 (1st Cir. 2015)**

    - Court holds that confirmed chapter 11 plan provisions allowing asbestos suits to proceed was an order terminating the automatic stay so that the applicable statutes of limitation with respect to the asbestos claims began to run again.

    - Background:

        - Asbestos manufacturer filed chapter 11 petition and obtained confirmation of a plan that did not discharge asbestos liabilities, but channeled the claims of asbestos creditors to a post confirmation trust.

        - The trust was intended to bring claims against the debtor for the purpose of obtaining available insurance proceeds and distributing those proceeds to the asbestos claimants.

        - The debtor's plan was confirmed in 2007.

        - Trust commenced a suit in 2011 based upon a claim that had accrued approximately 10 years earlier. Under state law, the claims would have become time barred in 2005 but for the debtor's bankruptcy filing.

        - Pursuant to 11 U.S.C. § 108(c) unexpired statutes of limitation are extended to the later of the normal expiration date or thirty days after notice of termination of the automatic stay has been given.

    - The court determined that the asbestos claims were time barred.

    - The court reasoned that the confirmation of the plan terminated the automatic stay with respect to the asbestos claims because the trust was allowed, as of the effective date of the plan, to pursue the asbestos claims assigned to it.

- **<u>United States v. Colon Ledee</u>, 772 F.3d 21 (1st Cir. 2015)**
  - A debtor's settlement agreement with a bankruptcy trustee concerning undisclosed assets, and amendment of bankruptcy schedules to disclose such assets, did not estop government from subsequent criminal prosecution related to fraudulent conduct.
  - Background:
    - Debtor transferred real estate to an entity controlled by he and his sister (who acted as his bankruptcy attorney) and then leased the property back.
    - Did not disclose transfer or ownership of the property in his bankruptcy schedules.
    - Falsely testified at his meeting of creditors that the shareholders of the entity were unrelated to him and lived in Chicago.
    - Trustee subsequently uncovers fraud and reaches settlement whereby property would be sold to satisfy creditors' claims.
    - Subsequent to the settlement, the debtor and his sister are prosecuted pursuant to 18 U.S.C. § 152(1) and (7)
      - 18 U.S.C. § 152(1) allows for imposition of fine and imprisonment for up to five years for "knowingly and fraudulently conceal[ing] from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor."
      - 18 U.S.C. § 152(7) allows for the same punishment against any person who "in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation."
    - The debtor and his sister were both convicted and sentenced to several years of imprisonment.
    - The debtor argued that his eventual disclosure of the transferred property barred his later prosecution.
  - The court characterized the debtors argument as one of estoppel and analyzed the application of equitable and judicial estoppel under the circumstances.

        - The prosecution was not equitably estopped from proceeding because in accepting the debtor's amended schedules the Bankruptcy Court did not excuse the debtor's misconduct.

        - The elements of judicial estoppel, i.e. identity of the parties, conflicting positions under oath, were simply not applicable under the circumstances.

            - A chapter 7 trustee and federal prosecutor are distinct parties with distinct agendas.

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

- **<u>Gray v. Tacason (In re Tacason)</u>, BAP No. NH 15-0003, 2015 Bankr. LEXIS 3334 (BAP 1st Cir. Sep. 25, 2015)**

    - State court's prepetition contempt finding was determinative of the issues in a creditor's complaint, pursuant to 11 U.S.C. § 523(a)(6), to except a debt from discharge as arising out of willful and malicious injury to another.

    - Background:

        - Prepetition the debtor and creditor were engaged in litigation concerning their operation and ownership of a close corporation.

        - The allegations of waste and breach of fiduciary duty were settled by way of an agreement concerning division of property and the debtor's agreement to pay $50,000 to the creditor.

        - Following a breach of the settlement terms the creditor filed another action in state court and obtained orders intended to effectuate the prior settlement.

        - The debtor failed to comply with those orders and the state court adjudged her in contempt.

        - Following a hearing on damages, the state court awarded damages on account of the contempt in the amount of $252,000

        - The debtor filed a chapter 7 petition ad the creditor sued to prevent the discharge of the $252,000 contempt award.

        - The bankruptcy court granted summary judgment in favor of the creditor finding that the contempt judgment was determinative of the elements in an action under 11 U.S.C. § 523(a)(6)

            - the creditor suffered an injury;
            - the injury was the result of the debtor's actions;
            - the debtor intended to cause the injury or there was a substantial certainty the injury would result from the debtor's act; and
            - the debtor had no just cause or excuse for the action resulting in injury.

    - Court noted that federal courts look to the state law of issue preclusion in order to determine the preclusive effect of a state court judgment.

    - By its very nature, contempt must be willful. That fact combined with the specific findings of injury and causation contained within the state court's contempt judgment made the contempt judgment determinative of the issues raised in the creditors § 523(a)(6) complaint.

- **<u>DiRuzzo v. Boyajian (In re DiRuzzo)</u>, 527 B.R. 800 (BAP 1st Cir. 2015)**

    - A confirmation order providing that the claim of a stripped off secured creditor would be allowed as an unsecured claim entitled the creditor to distributions under a chapter 13 plan despite the creditor's failure to timely file a proof of claim and subsequent disallowance of a late filed claim.

    - Background:

        - A debtor's proposed chapter 13 plan was confirmed. It provided that the claim of the holder of a second mortgage that was stripped off as wholly unsecured would "be allowed as an unsecured claim."

        - The secured creditor filed a proof of claim following confirmation to which the trustee objected. The claim was disallowed as untimely.

        - Notwithstanding, the trustee made distributions to the creditor throughout the life of the plan. Upon noticing that the distributions had been made the trustee sought to recover the distributions since the creditor had not filed a proof of claim.

    - The BAP held that the confirmation order's provision stating that the claim of the secured creditor would be allowed as an unsecured claim resulted in the creditors claim being allowed despite the untimeliness of the proof of claim and the subsequent disallowance of the claim as being untimely filed.

- The decision highlights the importance of confirmation orders. Confirmation orders are considered *res judicata* of all issues that could have been addressed in the context of bankruptcy proceedings. Confirmation of a plan can result in outcomes that are otherwise proscribed by the Bankruptcy Code and rules.

- **<u>Efron v. Candelario (In re Efron)</u>, 529 B.R. 396 (BAP 1st Cir. 2015)**

  - A bankruptcy court did not abuse its discretion in abstaining from and dismissing a chapter 11 proceeding that was "essentially a two party dispute between two bitter ex-spouses, who have engaged in over thirteen years of battle regarding the division of their community property."

  - Background:

    - Debtor/ex-husband was ordered to pay his ex-wife $50,000 per month in maintenance payments.

    - He failed to make any of the payments voluntarily and an execution issued against him.

    - Years of bitter litigation occurred concerning the division of marital assets.

    - The debtor had proposed a chapter 11 plan that would pay all creditors in full, but had not remained current with respect to his domestic support obligations as required for confirmation of a chapter 11 plan pursuant to 11 U.S.C. § 1129(a)(14).

  - The panel noted that 11 U.S.C. § 305 permits abstention from an entire bankruptcy proceeding, as opposed to discrete disputes within a bankruptcy, if the interests of the debtor and creditors would be better served by dismissal.

  - The particular facts of each case will determine whether abstention is appropriate:

    - Debtor had proposed to pay creditors in full indicating that he was not in need of reorganization.

    - The debtor's creditors were having to wait to be paid while the debtor continued the bitter dispute with his ex-wife.

    - No true bankruptcy purpose was being achieved and the bankruptcy was essentially on hold while a judicial determination was being made with respect to what assets actually would belong to the ex-husband's bankruptcy estate.

        - The parties' rights would be unaffected by dismissal.

- **<u>Belser v. Nationstar Mortg., LLC (In re Belser)</u>, 534 B.R. 228 (BAP 1st Cir. 2015)**
    - A secured creditor that failed to timely file a proof of claim had standing to object to confirmation of the debtor's proposed chapter 13 plan, and to have its objection treated as an informal proof of claim.
        - While the case law does not always state the elements of an informal proof of claim consistently, they are generally stated as a document:
            - filed with the bankruptcy court before the claims bar date that becomes part of the record;
            - states the existence and nature of the debt;
            - states the amount of the claim; and
            - evidences the creditor's intent to hold the debtor liable.
            - Some court add an equitable component to the analysis.
    - A bankruptcy court has discretion to allow a creditor to file an amendment to a timely claim filed on its behalf by a debtor.
        - Such an amendment cannot be a "superseding" claim. The distinction lies in the nature of the claim being asserted.
        - An amended claim cannot assert a new right to payment of which the debtor was not fairly put on notice.
    - Background:
        - A secured creditor filed a timely objection to confirmation of a debtor's proposed chapter 13 plan because it understated the amount of the mortgage arrearage owed to the creditor.
        - While the objection to confirmation was on file, the claims bar date (pursuant to Fed. R. Bankr. P. 3002, 90 days from the date first set for the meeting of creditors) expired.
        - So that he could cure his mortgage arrearage through the plan (as opposed to dedicating his income to increase the dividend to unsecured creditors), the debtor filed a proof of claim on the secured creditor's behalf using the same allegedly understated arrearage figure set forth in the plan.
        - After the claims bar date creditor filed a proof of claim setting forth its higher arrearage figure to which the debtor objected.

        - The creditor argued that it was entitled to amend its informal proof of claim as set forth in the pre-bar date objection to confirmation or that it could amend the timely proof of claim filed by the debtor.

        - The debtor argued that an objection to confirmation cannot act as an informal proof of claim.

- **<u>Harrington v. Simmons (In re Simmons)</u>, 525 B.R. 543 (BAP 1st Cir. 2015)**

    - A debtor's discharge is properly denied where he fails to maintain records of his financial history such that an intelligent inquiry cannot be made into the debtor's financial transactions.

    - Background:

        - Debtor owned 27 rental properties prior to commencing a chapter 7 bankruptcy.

        - During the course of the bankruptcy the United States Trustee made requests for documentary information concerning the income and expenses associated with the debtor's real estate holdings. However, he could not produce any meaningful records

        - The UST filed a complaint objecting to the debtor's discharge pursuant to 11 U.S.C. § 727(a)(3) under which a debtor's discharge may be denied if he "has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]"

        - In light of the paltry information retained by the debtor, the UST moved for summary judgment on his claims.

        - The debtor objected to the motion for summary judgment arguing that he was justified in not keeping the records sought due to the fact that his properties were managed by others (who he could not identify with any clarity) and that he had only taken title to the properties when he was duped by business associated.

    - The panel was unpersuaded by the debtor's justifications and quoted the Bankruptcy Court's decision in affirming summary judgment: "[The debtor's] choice to act as Charlie McCarthy to Mr. Kunz's Edgar Bergen no more justifies his inability to account for the operation of the real estate he owned and the losses

he claims to have incurred than would it excuse his failure to comply with the municipal health and safety codes imposed upon him as a landlord."

- The panel indicated that the decision may have been different had the debtor presented specific facts concerning his property managers' failure to account for rents and expenses or his business associates' interference with his ability to keep records.

- **<u>Witkowski v. Knight (In re Witkowski)</u>, 523 B.R. 291 (Bankr. D.R.I. 2014)**
  - A creditor did not violate the automatic stay by continuing a foreclosure sale upon the debtor's commencement of her fourth bankruptcy to forestall foreclosure and advertising the rescheduled sale.
  - Background:
    - After three years of defaults, a mortgagee commenced foreclosure proceedings against the residence of the debtor and her husband.
    - Between the debtor and her husband, the borrowers filed five consecutive bankruptcy cases to forestall the foreclosure sale.
    - In the last of these bankruptcy cases, the mortgagee rescheduled the foreclosure sale and advertised the continued sale while the bankruptcy case was pending.
    - The debtor filed a motion seeking sanctions for violation for the automatic stay.
  - The creditor argued:
    - That the automatic stay expired thirty days after the debtor's bankruptcy case was filed pursuant to 11 U.S.C. § 362(c)(3)(A) because she had been a debtor in another case that was dismissed within the prior year.
      - That portion of section 362 provides: "(3) [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease **shall terminate with respect to the debtor** on the 30th day after the filing of the later case; (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may

extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]" (Emphasis added).

        - That the continuation of the foreclosure sale was not harassing towards the debtor and was the least expensive alternative the creditor could pursue under the circumstances.

    - With respect to the debtor's first argument, the panel held that the stay did not terminate with respect to the residence to be foreclosed because under 11 U.S.C. § 362(c)(3)(A) the stay only terminated with respect to acts against the debtor or property of the debtor. The stay had not terminated with respect to property of the estate.
    - The BAP agreed with the overwhelming majority of courts that hold that continuing a foreclosure sale in accordance with state law does not violate the automatic stay.

    - The language of the opinion seems to suggest that continuation notices could be disseminated in such a way as to harass a debtor. That would presumably violate the automatic stay.

    - The decision seems to ignore the "property securing such debt" language contained in 11 U.S.C. 362(c)(3)(A).

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND

- **Ruddick v. Read (In re Read), 14-ap-01027, 2015 Bankr. LEXIS 2270 (Bankr. D.R.I. Jul. 10, 2015)**

    - Where a debtor and her ex-husband disputed the nature of obligations in a property settlement agreement and the effect of that disagreement on the dischargeability of those obligations, the bankruptcy court would abstain so that the dispute could proceed in the family court.

    - Background:

        - Debtor/ex-wife entered into a property settlement agreement whereby a loan from the ex-husband's mother was apportioned between them equally.

        - Ex-wife subsequently filed a chapter 7 petition.

        - The ex-husband filed an action pursuant to 11 U.S.C. § 523(a)(15) to except the obligation to satisfy half of the loan from discharge.

    - The bankruptcy court noted that since the 2005 amendments to the Bankruptcy Code, and in particular the amendments to 11 U.S.C. § 523(a)(15), the bankruptcy courts are no longer in the business of adjudicating family law disputes.

    - The court noted, "Following these amendments, 'the reach of subsection (15) [is] to all domestic obligations that are not support in nature . . . . Essentially, the combination of section 523(a)(5) and 523(a)(15) excludes from discharge all marital and domestic relations obligations, whether support in nature, property division, or hold-harmless.'" (citations omitted).

    - Because the dispute concerning dischargeability would inevitably turn upon interpretation of an allegedly ambiguous property settlement agreement, the Court explained that the dispute was better suited to the expertise of the Family Court.

CHANGES IN OFFICIAL BANKRUPTCY FORMS

- The United States Judicial Conference has approved sweeping rewrites of the official bankruptcy forms.

- Copies of the official forms and accompanying commentary are available at: http://www.uscourts.gov/file/18166/download.

RECENT RECEIVERSHIP CASE LAW

- **Shine v. Moreau, 119 A.3d 1 (R.I. 2015)**

    - City Council members and Mayor were entitled to reimbursement/indemnification for attorneys' fees incurred in their unsuccessful challenge to the Fiscal Stability Act, Rhode Island's municipal receivership law.

    - Background:

        - A receiver was appointed for the City of Central Falls pursuant to Rhode Island's Fiscal Stability Act (R.I. Gen. Laws §§ 45-9-1, *et seq.*).

        - The pursuant to the Act, the receiver effectively displaced the City's elected officials.

        - The City Council retained an attorney to advise them with respect to the circumstances.

    - The receiver filed preemptive suit against the City Council and Mayor seeking declaratory and injunctive relief.

    - Separately, the City Council filed suit challenging the constitutionality of the Act.

    - The receiver sought reimbursement of his attorneys' fees from the elected officials in their personal capacities.

    - The Mayor sought indemnification for his costs and fees in defense of the receiver's action against him in accordance with the City's charter.

    - The City Council sought reimbursement of their costs and fees for challenging the constitutionality of the Act.

    - The Superior Court entered judgments against the elected officials for the receiver's costs and fees and denied their requests for indemnification and fees.

- On appeal, the Supreme Court reversed:

    - With respect to the receiver's request for fees, the Court noted that while the City Council's retention of counsel and challenge to the constitutionality of the Act may have violated the Act, the Act itself did not provide for an award of attorneys' fees if its provisions were violated.

    - With respect to the Mayor's request for indemnification pursuant to the City charter, the Court decided that the Mayor was acting within the scope of his official duties in challenging the constitutionality of the Act even if that challenge itself violated the Act.

        - Both R.I. Gen. Laws § 45-15-16 and the City's ordinance provided that the City should be responsible for the legal expenses of officials in carrying out their official duties.

        - The Court itself had difficulty in deciding that the Act was constitutional. Therefore, even though the Mayor's challenge to the Act violated the Act itself, his challenge was not without basis and was potentially necessary in discharging his official duties.

    - With respect to the City Council's attorney, the Court echoed its as to the Mayor's request for indemnification and vacated the Superior Court's judgment denying the request for fees.