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# Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict between Catholic Dioceses and Sex-Abuse Claimants

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## Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict Between Catholic Dioceses and Sex-Abuse Claimants

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## INTRODUCTION

In January 2002, the *Boston Globe* reported the story of Father John J. Geoghan of the Catholic Archdiocese of Boston, calling public attention to what is now often called the “Catholic sex abuse scandal.”<sup>1</sup> The *Globe* revealed that 130 had people accused Geoghan of sexually abusing them as children.<sup>2</sup> The story focused public scrutiny squarely on the archdiocese itself by reporting that it had known about Geoghan’s abuse of children and had responded to the problem by moving the priest from one parish to another.<sup>3</sup> The Boston scandal actually can be traced back to 2001, when the *Boston Globe* successfully intervened in a civil lawsuit brought by alleged victims against Geoghan and also prevailed in having the court open previously sealed records recounting the archdiocese’s past supervision of the priest.<sup>4</sup> In that same year, the U.S. Conference of Catholic Bishops reported a peak number of 3,300 people who came forward with sex-abuse allegations against priests nationwide.<sup>5</sup> In 2004, the most recent year reported by the bishops’ conference, more than 1,000 people reported abuse, and the Catholic Church spent \$157 million on legal settlements and other costs related to the reports of abuse.<sup>6</sup> The 2004 figures brought the total numbers from 1950–2004 to 11,750 alleged victims, 5,148 accused priests, and \$840 million in abuse-related expenses.<sup>7</sup> In particular, the financial costs associated with the scandal have prompted three Catholic dioceses to file for bankruptcy.

In July 2004, the Archdiocese of Portland, Oregon, filed a Chapter 11 bankruptcy petition, citing its desire to resolve

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1. Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1. For a compilation of the *Boston Globe*’s reporting on the sex-abuse scandal from 2002 to present, see also *Spotlight Investigation: Abuse in the Catholic Church*, BOSTON GLOBE, <http://www.boston.com/globe/spotlight/abuse> (last visited Nov. 10, 2005).

2. Carroll et al., *supra* note 1.

3. *See id.*

4. *See* Leary v. Geoghan, Nos. 99-0371, 99-1109, 2001 WL 1902393, at \*8–9 (Mass. Super. Ct. Nov. 26, 2001).

5. Alan Cooperman, *Last Year, 1,000 Told of Abuse by Priests*, WASH. POST, Feb. 20, 2005, at A1.

6. *Id.* The patterns within the 2004 statistics were representative of those found in a major study of church sex-abuse from 1950–2002. *Id.* Among the alleged victims, about eighty percent were male, the majority reported that they were abused between the ages of ten and fourteen, and most reported that they were abused in the 1960s and 1970s. *Id.*

7. *Id.* But Cooperman cautions that “[i]nterpretation of the statistics [is] also complicated by a lack of data for 2003. That is because the . . . study compiled statistics for each year from 1950 to 2002. Then the bishops voted to update the study annually beginning in 2004.” *Id.*

outstanding claims against it stemming from alleged sexual abuse by priests employed by the archdiocese.<sup>8</sup> As the bankruptcy judge presiding over the case noted, the archdiocese's stated reasons for filing were "to resolve, fairly, finally and in a global fashion, the sexual abuse claims asserted against it."<sup>9</sup> It was the first Catholic diocese to file for bankruptcy and one of only a few religious organizations to ever file.<sup>10</sup>

In its Chapter 11 petition, the Portland archdiocese reported assets of \$50 million or less.<sup>11</sup> This amount excluded parish assets even though most parish property is held by the archbishop of the archdiocese under Oregon's state corporate law.<sup>12</sup> The petition was filed the same week that several of the civil trials against the archdiocese were set to start, drawing criticism from alleged sex-abuse victims that the filing was a tactic to delay and even reduce the

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8. Ashbel S. Green & Steve Woodward, *Filing for Bankruptcy Halts Priest Abuse Trial*, OREGONIAN (Portland), July 7, 2004, at A1, available at 2004 WLNR 17920114. See generally 11 U.S.C.A. §§ 1101–1174 (Supp. V 2005) (governing Chapter 11 bankruptcy filings, generally known as the reorganization chapter of the bankruptcy code). The Bankruptcy Code was amended in 2005. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Throughout this Comment, citations to the Code will be to Supplement V of the 2005 *United States Code Annotated* so that the most current version of the Code is cited. However, the revisions enacted by BAPCPA only affect cases filed on or after October 17, 2005. BAPCPA § 501(a), 119 Stat. at 216 (providing that "this Act and the amendments made by this Act shall take effect 180 days after [April 20, 2005]"). Thus, the Portland, Tucson, and Spokane cases discussed in this Comment are not affected by these revisions. See *id.* § 1501(b)(1), 119 Stat. at 216 (providing that "the amendments made by this Act shall not apply with respect to cases commenced . . . before the effective date"). Generally speaking, the revisions to the Code do not appear to have a major impact on the issues discussed in this Comment, even for cases that may be filed after BAPCPA's effective date. The revisions that may have an impact will be noted and briefly discussed.

9. *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) 54, at 246 (Bankr. D. Or. Jan. 10, 2005).

10. See Green & Woodward, *supra* note 8. For a sampling of cases involving churches or religious groups that have filed for bankruptcy, see generally *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294 (9th Cir. 1997), addressing a debtor religious organization's challenge to the Internal Revenue Service's revocation of its tax-exempt status; *All Denominational New Church v. Pelofsky (In re All Denominational New Church)*, 268 B.R. 536 (B.A.P. 8th Cir. 2001), dismissing a church's Chapter 11 case based on its inability to implement a plan and on its failure to file monthly operating reports; *In re Beulah Church of God in Christ Jesus, Inc.*, 316 B.R. 41 (Bankr. S.D.N.Y. 2004), determining that a bulk, preconfirmation sale of a debtor church's assets was exempt from local transfer tax; *Mother African Union Methodist Church v. Conference of African Union First Colored Methodist Protestant Church (In re Conference of African Union First Colored Methodist Protestant Church)*, 184 B.R. 207 (Bankr. D. Del. 1995), dismissing a Chapter 7 case filed by an association of churches.

11. Green & Woodward, *supra* note 8.

12. *Id.*; see also OR. REV. STAT. § 65.067 (1997) (defining a corporation sole).

amount of money the archdiocese would have to pay.<sup>13</sup> Parishes of the archdiocese attempted to protect their assets from being included in the archdiocese's bankruptcy estate by organizing a parish's committee.<sup>14</sup> The bankruptcy judge approved the appointment of a future claims representative to represent the interests of not-yet-matured tort claims against the church.<sup>15</sup>

In September 2004, the Catholic Diocese of Tucson, Arizona, also filed a Chapter 11 petition.<sup>16</sup> Although it was the second to file,<sup>17</sup> the Tucson diocese was the first to emerge from the bankruptcy process when its reorganization plan was confirmed on July 11, 2005.<sup>18</sup> The plan calls for an initial payment of \$10 million to forty-five victims and five relatives of victims.<sup>19</sup> The plan also sets up a fund in the amount of \$22.2 million for future claimants.<sup>20</sup> Apparently, the Tucson case avoided having the diocese-parish property issue decided by the court by striking a compromise in the plan: the parishes will contribute \$2 million to the future claimant fund.<sup>21</sup>

Finally, on December 6, 2004, the Diocese of Spokane, Washington, filed for Chapter 11.<sup>22</sup> In its petition, the diocese excluded parish assets, listing its assets as totaling \$11 million and claiming liabilities of \$81 million—\$76 million of which it attributed to sex-abuse lawsuits.<sup>23</sup> Among its reasons for filing were “hop[es that] the court will help provide a clearer picture of its financial liability in mounting sex-abuse lawsuits and goad its reluctant insurers into paying some of the claims.”<sup>24</sup>

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13. See Green & Woodward, *supra* note 8.

14. Nancy Haught & Steve Woodward, *Parishes Attempt To Shield Assets from Seizure in Bankruptcy of Archdiocese*, OREGONIAN (Portland), Sept. 9, 2004, at B1, 2004 WLNR 17933844.

15. *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) 54, at 244 (Bankr. D. Or. Jan. 10, 2005). In this unpublished memorandum opinion, the bankruptcy judge presiding over the Portland case explained the basis of her November 19, 2004, order approving a future claims representative.

16. Michael Clancy, *Diocese Motions Granted*, ARIZ. REPUBLIC (Phoenix), Sept. 29, 2004, at 3B, available at 2004 WLNR 18607757.

17. Michael Clancy, *Diocese Files for Bankruptcy*, ARIZ. REPUBLIC (Phoenix), Sept. 21, 2004, at 1A, available at 2004 WLNR 16360981.

18. Sheryl Kornman, *Diocese To Pay \$10M Upfront as Plan OK'd*, TUCSON CITIZEN, July 12, 2005, at 1A, available at 2005 WLNR 10963613.

19. *Id.*

20. *Id.*

21. See *id.*

22. Janet I. Tu, *Spokane Diocese Files Bankruptcy*, SEATTLE TIMES, Dec. 7, 2004, at B1, available at 2004 WLNR 13444129.

23. *Id.*

24. *Id.*

These three filings, as well as other recent developments, signal that other dioceses might follow suit and file Chapter 11 bankruptcy petitions.<sup>25</sup> The filings of these religious organizations raise myriad issues, the most important of which concerns which assets will become property of the bankruptcy estate in each case.<sup>26</sup> While nothing in the federal Bankruptcy Code (“the Code”) necessarily precludes a church or religious organization from filing for bankruptcy, certain provisions in the Code suggest that such filings were not originally contemplated.<sup>27</sup> It is difficult to anticipate how the Code will accommodate these bankruptcies—if at all.

The bankruptcy judge’s decision concerning what property is included in each diocese’s bankruptcy estate<sup>28</sup> also determines the minimum distribution to which the sex-abuse claimants are entitled.<sup>29</sup>

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25. Other developments that are interesting in light of these filings include stories of several dioceses in California transferring title of various properties to parishes in an alleged effort to shield those assets from any judgments resulting from sex-abuse suits against the dioceses. Jean Guccione, *Dioceses Accused of Moving Assets To Avoid Paying Sex-Abuse Claims*, L.A. TIMES, Aug. 18, 2004, at B6. Plaintiffs in these California cases claim this was done strategically, days before a new state law went into effect permitting past abuse victims to bring actions against the dioceses. *Id.* The Boston archdiocese is in such financial trouble that it is planning to close many parishes. Laura Crimaldi, *Archdiocese Seeing Red as Parishes Set To Close*, BOSTON HERALD, Feb. 18, 2005, at 30, available at 2005 WLNR 2352532. Interestingly, in 2003, experts speculated that the Boston archdiocese might be the first to file Chapter 11. Michael Paulson, *O’Malley Plans Aggressive Cuts, Vows To Decide Church Closings as Early as June*, BOSTON GLOBE, Dec. 17, 2003, at A1 (discussing how the archdiocese prevented bankruptcy by borrowing money and consolidating parishes). That did not turn out to be the case, but the speculation led to some interesting legal scholarship. See generally David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181 (2003) (discussing the possibility of an archdiocese or church filing for bankruptcy).

26. See Skeel, *supra* note 25, at 1188–92 (discussing the effect of bankruptcy on an archdiocese’s assets).

27. See 11 U.S.C.A. § 101(13) (Supp. V 2005) (defining “debtor” for the purposes of the Code as a “person or municipality concerning which a case under this title has been commenced”). Under the Code, a “person” includes a corporation; each diocese is designated as a corporation. *Id.* § 101(41); see, e.g., OR. REV. STAT. § 65.067(i) (1997) (describing the corporate form for religious organizations). These provisions clearly do not preclude a church from filing for bankruptcy. However, § 1104 of the Code, which allows the court to appoint a trustee where the court finds “cause,” including “fraud, dishonesty, incompetence, or gross mismanagement,” would involve the court appointing a trustee to take over operation of the church from the bishop. 11 U.S.C.A. § 1104(a)(1). As will be discussed in Part III, *infra*, such an appointment would be so problematic that it seems unlikely that Congress ever really thought about the possibility of it being used in the context of church operations.

28. See generally 11 U.S.C.A. § 541 (defining “property of the estate”).

29. *Id.* § 1141; see also *id.* § 1129(a)(7)(A)(ii) (requiring that debtors under Chapter 11 must pay their creditors at least what creditors would have received in a Chapter 7 liquidation, where all eligible assets are sold to pay off creditors). This determination has been made in the Spokane case. See discussion of this case *infra* Parts III and IV.

In this sense, the diocesan bankruptcies are like almost any other bankruptcy: the major battles are about how much property will be distributed and, in turn, what each creditor will get. The diocesan bankruptcies have a special complexity—like that of the mass torts bankruptcies of the 1980s to today.<sup>30</sup> However, the diocesan bankruptcies are even more unique than the mass torts cases, because the dioceses have chosen bankruptcy as a new forum for their latest defensive battle in an ongoing conflict between the dioceses and sex-abuse claimants allegedly harmed by the dioceses' priests. For example, in Portland, the archbishop insists that "under Canon law, the centuries-old law that governs the Catholic Church, he does not have the authority to tap trusts that have been bequeathed to the church . . . [a]nd parish property—which includes churches and parish donations—does not belong to the archdiocese."<sup>31</sup> On the other side, the claimants argue that "under civil law, the archdiocese itself—not the parishes—is the owner of record of at least \$300 million in property."<sup>32</sup> These positions, taken by the archdiocese and claimants in Portland highlight that the diocesan bankruptcies are not just about reordering finances and limiting liability but, instead, are about two different bodies of law. This conflict between civil and canon law makes these cases unique among even the most unusual bankruptcy cases. This conflict implicates the First Amendment, particularly with the issue of whether to apply civil law or canon law in determining what property will become part of the diocesan bankruptcy estate.

This Comment discusses issues that have been raised or are likely to be raised in the diocesan bankruptcies, especially the diocese-parish property issue at the heart of this conflict. In its discussion, this Comment notes the relative advantages and disadvantages to the dioceses and the sex-abuse claimants in their positions as opponents. Part I discusses the general applicability of Chapter 11 and its policies as background for the larger discussion of the respective positions of the dioceses as debtors and the sex-abuse claimants as creditors. Part I concludes by discussing how the mass torts bankruptcies demonstrate how flexible and equitable the Chapter 11 process is. Part II examines the motion to dismiss the church's bankruptcy case for lack of good faith and its viability as a litigation tool for the sex-abuse claimants. Part III focuses on the relevant definitions of

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30. See generally Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Mass Torts Liability*, 148 U. PA. L. REV. 2045 (2000) (giving background on mass torts cases and discussing the bankruptcy process's accommodation of these cases).

31. Green & Woodward, *supra* note 8.

32. *Id.*

diocesan property found in the Code, state law, and church canon law and how each definition plays to the relative advantage of the dioceses and sex-abuse claimants. Part IV discusses First Amendment case law and its implications for the dioceses and their parishioners, including sex-abuse claimants. Ultimately, this Comment concludes that the bankruptcy process is equipped to address the complexities of a diocesan bankruptcy.<sup>33</sup>

## I. CHAPTER 11 OF THE BANKRUPTCY CODE

### A. *Dioceses as Debtors, Sex-Abuse Claimants as Creditors*

The dioceses in Portland, Tucson, and Spokane were able to file Chapter 11 bankruptcy because any “person” can file.<sup>34</sup> Under the Code, “person” includes a corporation.<sup>35</sup> Dioceses and other religious organizations are organized as special types of corporations under the laws of their respective states.<sup>36</sup> Sex-abuse claimants are considered creditors under the Code, because a creditor includes any “entity that has a claim against the debtor that arose at the time of or before” the filing of the bankruptcy petition.<sup>37</sup> “Claim” is broadly defined by the Code to include any “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”<sup>38</sup> For the sex-abuse claimants, creditor status will be given to any person who files a claim based on abuse that occurred before the debtor filed for bankruptcy, or “pre-petition.”<sup>39</sup> Again, because of the broad definition of “claim,” sex-abuse claimants will be creditors regardless of whether their claims against the diocese

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33. What this Comment does not fully address is whether the law *should* solve this problem for the dioceses.

34. See § 109(d) (providing that “a person that may be a debtor under chapter 7 . . . may be a debtor under chapter 11”); see also *id.* § 109(b)(1)–(3) (setting out the eligibility requirements for Chapter 7, which exclude from eligibility certain insurance companies, banks, and other financial institutions).

35. *Id.* § 101(41) (defining “person” to include an “individual, partnership, and corporation”).

36. See, e.g., ARIZ. REV. STAT. ANN. §§ 10-11901 to -11908 (2004) (describing the corporate form for religious organizations); OR. REV. STAT. § 65.067(1) (1997) (same); WASH. REV. CODE § 24.12.010 (2002) (same). The relevance of the special corporate form under state law is discussed in Part III.B, *infra*.

37. 11 U.S.C.A. § 101(10)(A).

38. *Id.* § 101(5)(A).

39. See *id.* § 101(10), (42).



were settled pre-petition, pending at the time of petition, or filed post-petition.<sup>40</sup>

### B. Policies of Chapter 11

The primary policy objectives of the Bankruptcy Code are: (1) to give the financially troubled debtor an opportunity for a fresh start and (2) to pay creditors in an orderly and equitable manner.<sup>41</sup> Although these two policy objectives may sometimes seem in conflict with each other, the goal of the bankruptcy process generally is to achieve both goals to the greatest extent possible—balancing each as the Code or equity requires.<sup>42</sup>

Chapter 11 is the reorganization chapter of the Code.<sup>43</sup> It permits the debtor to propose a plan under which the debtor can reorganize its business or financial affairs or effect an orderly liquidation of its property.<sup>44</sup> The Chapter 11 process is therefore distinct from the Chapter 7 liquidation process wherein the debtor liquidates all assets to pay off creditors.<sup>45</sup> For the business or corporate debtor, Chapter 7 liquidation results in the cessation of operations and for the individual, the selling of all non-exempt assets.<sup>46</sup> Though the provisions of Chapter 11 are primarily geared

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40. See *id.* § 101(5), (10), (42).

41. In *Grogan v. Garner*, 498 U.S. 279 (1991), the United States Supreme Court observed:

This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” But in the same breath that we have invoked this “fresh start” policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the “honest but unfortunate debtor.”

*Id.* at 286–87 (citation omitted) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

42. See *id.*

43. See §§ 1101–1174 (listing the title of chapter 11 as “Reorganization.”); see also *id.* § 1121(a) (stating “[t]he debtor may file a plan”). This “plan,” if later confirmed by the court under § 1129, has the effect of “vest[ing] all of the property of the estate in the debtor.” *Id.* § 1141(b). This means that all property remains in the control of the debtor for the purposes of completing the plan according to the provisions of the reorganization plan. *Id.*

44. See *id.* § 1123 (specifying the contents of the reorganization plan); *id.* § 1129 (stating the requirements for confirmation of the reorganizational plan to be confirmed); *id.* § 1141 (describing the effect of plan confirmation).

45. See *id.* § 726 (outlining the distribution process for property of the estate).

46. *Id.*; see also *id.* § 522 (allowing exemptions for certain kinds of property).

towards business debtors, entities not engaged in business also qualify for relief under Chapter 11.<sup>47</sup>

A key policy preference under Chapter 11 of the Code is for the debtor to be able to continue to operate and then reorganize its business rather than liquidating.<sup>48</sup> The rationale behind this policy is that continued operation may enable the debtor to preserve a “going concern value of the business” that is greater than the liquidation value.<sup>49</sup> Other things of value preserved by reorganization may include employee jobs and community tax bases.<sup>50</sup> Though the dioceses do not operate businesses in the general sense, they do operate churches, schools, and other charities, which the Chapter 11 petition permits them to continue operating.<sup>51</sup> Thus, filing for bankruptcy allows the dioceses to continue operating while the details of a plan to pay off their creditors, the largest group of which is sex-abuse claimants, can be formulated.<sup>52</sup> In contrast, outside of bankruptcy, the dioceses could continue operating only to the extent their financial solvency allowed, given all the costs of litigation.<sup>53</sup>

In pursuit of this policy objective that permits the debtor to continue operating, the Code is written to encourage debtors to file Chapter 11 while reorganization is still possible—as opposed to being in a position where liquidation is the only option—and gives such debtors certain incentives for filing.<sup>54</sup> First, the Code presumes that the debtor’s business will continue to operate.<sup>55</sup> Second, the debtor

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47. See *Toibb v. Radloff*, 501 U.S. 157, 166 (1991); see also § 109 (stating who may be a debtor).

48. 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (Lawrence P. King et al. eds., 15th ed., rev. 2005).

49. *Id.*

50. *Id.*

51. See Michael Clancy, *Tucson Diocese Faces Liquidation*, ARIZ. REPUBLIC (Phoenix), Nov. 7, 2004, at 1B, available at 2004 WLNR 15250822; Green & Woodward, *supra* note 8.

52. See Green & Woodward, *supra* note 8 (explaining how the sex-abuse lawsuits were the reason the Portland archdiocese filed and how filing allows them to continue operating while formulating a reorganization plan).

53. See, e.g., *id.* (explaining the Portland archdiocese’s position that they “could not risk a huge verdict”); Steve Woodward, *Judge Wary of Legal Fees Confronting Archdiocese*, OREGONIAN (Portland), Feb. 22, 2005, at A1, available at 2005 WLNR 2909815 (discussing the Portland bankruptcy judge’s concern over accumulating legal fees in the archdiocese’s Chapter 11 case).

54. See 7 COLLIER, *supra* note 48, ¶ 1100.01 (giving an overview of Chapter 11 policies).

55. See 11 U.S.C.A. § 1108 (Supp. V. 2005) (authorizing operation of the debtor’s business unless the court orders otherwise).

remains “in possession” of its business.<sup>56</sup> This means that the debtor in possession (the “DIP”) will retain control of the business during the entire bankruptcy process unless it can be shown that a trustee should be appointed because the DIP has mismanaged the business or there are other circumstances constituting “cause” for such an appointment.<sup>57</sup> Where the court orders appointment of a trustee, the debtor’s creditors elect a “disinterested person” to serve as the trustee.<sup>58</sup> The trustee, instead of the DIP, then operates the business.<sup>59</sup> But appointment of a trustee is the exception, not the rule.<sup>60</sup> In most bankruptcy cases, the DIP operates the business and is vested generally with the rights, powers, and duties that an appointed trustee would have.<sup>61</sup> This means that whenever “trustee” is mentioned in Chapter 11, the DIP has the same powers.<sup>62</sup> This includes giving the DIP considerable control over plan negotiations.<sup>63</sup> This position of control works to the advantage of the dioceses by allowing them the first opportunity to propose a plan to settle the sex-abuse claims—the significance of which is discussed in Part III.A, *infra*.

### C. *Protection and Control of the Diocesan Assets as Property of the Estate and by Operation of the Automatic Stay*

Not only does the debtor usually maintain control of its operations, the debtor’s property is also protected for the duration of the bankruptcy proceeding. Once a Chapter 11 petition is filed, an

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56. See *id.* § 1101 (defining “debtor in possession” (“DIP”)); *id.* § 1107(a) (providing the DIP with most of the powers and duties of a “trustee” under Chapter 11); *id.* § 1108 (authorizing the trustee—and by extension the DIP because of the rights and powers granted to the DIP under § 1107—to operate the debtor’s business).

57. See *id.* § 1104(a). Note that § 1104(a) refers to “gross mismanagement of the affairs of the debtor by *current* management, either before or after the commencement of the case.” *Id.* § 1104(a)(1) (emphasis added). This at least implies that the sex-abuse claimants could argue for appointment of a trustee on the basis of mismanagement if the same leadership were in place at the time of their alleged injuries and mismanaged the handling of employment matters related to priests. However, as is discussed in Part IV.B, *infra*, appointment of a trustee seems especially unlikely given the First Amendment implications of a court-appointed individual controlling the day-to-day operations of the dioceses.

58. *Id.* § 1104(b).

59. *Id.* § 1108.

60. See 7 COLLIER, *supra* note 48, ¶ 1100.01 (noting Chapter 11’s presumption “that the debtor will remain in possession . . . unless it can be established that cause exists for appointment of a trustee”).

61. § 1107(a).

62. *Id.*

63. See *id.* § 1121.

estate is created that includes virtually all of the debtor's property.<sup>64</sup> Section 541 of the Code defines what becomes "property of the estate."<sup>65</sup> This places all property of the estate under the jurisdiction and protection of the bankruptcy court. This is a double-edged sword for the dioceses, because although their assets are protected from state court litigation and possible depletion as each of those cases is decided, the bankruptcy court will also get to decide which assets are available for distribution. The difficulties that loom in deciding what property comprises the diocesan bankruptcy estates are discussed in more detail in Part III.B, *infra*.

The primary protection of the diocesan assets is provided by an automatic stay of any actions to collect on pre-petition claims or to otherwise interfere with property of the estate.<sup>66</sup> The stay automatically became effective the day the dioceses filed their petitions.<sup>67</sup> The stay is broad in scope, applying to all lawsuits pending against the dioceses arising from alleged pre-petition sex-abuse.<sup>68</sup> The stay helps the dioceses by putting all litigation against them on hold, primarily protecting them from the ongoing costs of litigation while they try to formulate a plan that will deal with their debt in a manageable way. This protection of the dioceses comes at the expense of the sex-abuse claimants, because their causes of action are either paused while in progress or delayed from starting.<sup>69</sup> Further, any sex-abuse claimants that obtained judgments against the dioceses before the dioceses filed their petitions are stayed from collecting on those judgments.<sup>70</sup> This moves the sex-abuse claimants from the offensive position of pursuing their claims against the dioceses to the defensive position of waiting for the bankruptcy

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64. See *id.* § 541(a) ("The commencement of a case under . . . this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held . . .").

65. See *id.* § 541(a)(1) (including as property of the estate, "all legal or equitable interests of the debtor in property as of the commencement of the case," subject to a few exceptions provided elsewhere in § 541).

66. See *id.* § 362.

67. See *id.* § 362(a) (noting that "a petition filed under . . . this title . . . operates as a stay, applicable to all entities").

68. See *id.* § 362(a)(1) (applying the automatic stay to "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or *could have been* commenced" before debtor's filing of the petition) (emphasis added).

69. See *id.*

70. See *id.* § 362(a)(2) (applying the automatic stay to "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case").

process to play out, including responding to the dioceses' proposed plans of reorganization.

*D. The Dioceses' Exclusive Right to Propose an Initial Plan of Reorganization*

The debtor's primary offensive leverage in the planning process lies in its exclusive right to propose a plan.<sup>71</sup> During the debtor's "period of exclusivity," other parties in interest cannot propose competing plans.<sup>72</sup> This "period of exclusivity" is cut off, permitting other parties in interests to file plans, only if one of three conditions is met: (1) the court appoints a trustee in the case; (2) the debtor fails to file a plan within 120 days of the initial bankruptcy petition; or (3) the debtor files a plan but that plan is not accepted within 180 days of the initial bankruptcy petition "by each class of claims or interests that is impaired under the plan."<sup>73</sup> Put another way, as long as no trustee is appointed in the case the debtor has 120 days from the start of the case to file a plan and 180 days from the start of the case to gain acceptance of the plan.<sup>74</sup> The court may shorten or lengthen—and frequently does<sup>75</sup>—either the 120-day or the 180-day time limit "for cause" if requested to do so by any party in interest.<sup>76</sup> For the dioceses, this means that they have the first opportunity to propose a plan that will pay their sex-abuse claimant creditors. This puts the sex-abuse claimants in the defensive position of waiting for the dioceses to propose a plan and then responding to it, instead of being

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71. See *id.* § 1121(b).

72. See *id.* (stating that "*only the debtor* may file a plan until after 120 days after the [date of filing]") (emphasis added).

73. See *id.* § 1121(c) (providing that "[a]ny party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan *if and only if*" one of the three conditions is met) (emphasis added).

74. See *id.*

75. Courts have found "cause" to extend for a variety of reasons. See, e.g., *Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp.* (*In re Henry Mayo Newhall Mem'l Hosp.*), 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002) (complexity of case); *In re Cent. Jersey Airport Servs.*, 282 B.R. 176, 181 (Bankr. D.N.J. 2002) (debtor's probable success in formulating a plan); *In re Pub. Serv. Co. of N.H.*, 88 B.R. 521, 532 (Bankr. D.N.H. 1988) (diligent efforts of debtor).

76. § 1121(d)(1). For cases filed on or after BAPCPA's effective date, October 17, 2005, see *supra* note 8, the court's ability to extend these periods is limited by the revised language of § 1121(d), which now limits the extension of the 120-day period and the 180-day period to not more than eighteen months and not more than twenty months after the debtor files a Chapter 11 petition, respectively, § 1121(d)(2)(A)–(B). This revision presumably gives the debtor less flexibility in terms of a timeframe for proposing a plan and getting it confirmed. Thus, this revision would seem to weigh in favor of sex-abuse claimants in post-BAPCPA cases.

able to propose a plan of their own from the start. The debtor's period of exclusivity is a good example of how the bankruptcy process permits a formerly reactive party to become a proactive party by virtue of becoming a debtor under the Code. The dioceses transitioned from reactive defendants in tort litigation to proactive debtors while the sex-abuse claimants lost much of the proactive power normally afforded to plaintiffs in such litigation.

Chapter 11 provides considerable opportunity for the debtor to control the process of reorganization, but it also provides protection to creditors. Groups of creditors are represented by committees, which may be formed by court order.<sup>77</sup> The sex-abuse claimants in both the Portland and the Tucson cases have had committees appointed to represent their interests.<sup>78</sup> As discussed in Part II.B, *infra*, the sex-abuse claimants may be able to get the dioceses' cases dismissed if they can show that the dioceses filed in bad faith or that there is little possibility that the debtor will propose a feasible plan.<sup>79</sup> They also have the ability to move for the appointment of a trustee or an examiner if there is evidence of fraud or that the debtor is not equipped to manage the reorganization.<sup>80</sup>

The sex-abuse claimants, as creditors, are also protected in the plan process because, if the debtor's period of exclusivity expires, creditors may propose their own plans.<sup>81</sup> Generally speaking, any plan proposed, whether by debtor or creditors, must treat all creditors fairly and must pay creditors at least what they would have received in a Chapter 7 liquidation in order to be confirmed by the court.<sup>82</sup> This means that should the dioceses fail to propose a plan before the expiration of their exclusivity period, creditors, including the sex-abuse claimants, can propose competing plans. However, these

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77. Section 1102(a)(1). Creditor committees are appointed by the United States trustee, pursuant to court order. *Id.* The United States trustee is different from the "trustee" that may be appointed under § 1104. See, e.g., *id.* § 1105 (providing that the United States trustee may request termination of the trustee's appointment).

78. See *Church Bankruptcy Raises Questions: Whose Assets Are These?*, 43 Bankr. Ct. Dec. (LRP) 14, at A3 (Sept. 21, 2004) [hereinafter *Church Bankruptcy Questions*] (noting the sex-abuse claimants in Portland are represented by the Official Committee of the Abuse Plaintiffs); Sheryl Kornman, *Parish Property Debate May Extend Bankruptcy Case*, TUCSON CITIZEN, July 9, 2005, at 2A, available at 2005 WLNR 10838363 (noting the tort claimants committee's role in determining the tiered structure of damages as part of the Tucson Chapter 11 case).

79. See § 1112(b).

80. *Id.* § 1104(a).

81. See *id.* § 1121(c) (providing that creditors may propose if the debtor does not propose a plan or if the debtor's plan is not accepted within the 180 day period).

82. See *id.* § 1129(a)-(b). Plan confirmation is discussed in more detail, *infra* notes 230-36 and accompanying text.

periods of exclusivity are often extended by the court, as exemplified by the Portland case where the judge has granted extensions, stretching to over a year after the diocese filed its petition.<sup>83</sup>

*E. Chapter 11 as an Equitable Process as Illustrated by the Analogous Mass Torts Bankruptcy Cases*

In addition to understanding the roles of debtor and creditor outlined in Chapter 11 and the respective advantages and protections the Code gives them, it is important to remember that “[t]he hallmark of chapter 11 is flexibility.”<sup>84</sup> The DIP is given significant discretion in operating its business.<sup>85</sup> The process of negotiating the plan is designed to result in the consensual acceptance of a plan under which the debtor and majority of creditors have agreed as to the amounts of payment and the general future operations of the business.<sup>86</sup> A successful Chapter 11 process for the dioceses would culminate in the confirmation of a plan under which they pay the claims of the present sex-abuse claimants and move forward with even future sex-abuse claims handled by the process set up by the bankruptcy court.<sup>87</sup> The

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83. Steve Woodward, *Church Gains Time in Bankruptcy*, OREGONIAN (Portland), May 25, 2005, at C11, available at 2005 WLNR 8324517 (noting that the original deadline for the diocese to file its plan was November 3, 2004, which was extended to June 1, 2005, which was extended to November 15, 2005).

84. 7 COLLIER, *supra* note 48, ¶ 1100.01.

85. See §§ 363, 365.

86. 7 COLLIER, *supra* note 48, ¶ 1100.01. Although the process is designed to result in consensual confirmation of the plan by all creditors, there is a nonconsensual alternative called the cramdown method, which is discussed in more detail in Part III.A, *infra*.

87. See *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) 54 (Bankr. D. Or. Jan. 10, 2005), where Bankruptcy Judge Elizabeth Perris noted the Portland archdiocese’s own reasons for filing for Chapter 11:

Debtor’s representatives and counsel have stated on numerous occasions in this court, that debtor’s purpose in filing a chapter 11 petition was to resolve, fairly, finally and in a global fashion, the sexual abuse claims asserted against it . . . . The appointment of a [Future Claims Representative] to represent the interests of those persons who know they were subjected to abuse but who have not discovered the resulting injury or the causal connection between the injury and the abuse will effectuate debtor’s stated goal and will assure equitable treatment of future as well as present claimants.

*Id.* at 246 (footnote omitted).

It is true, given their opposing view points, that what is a success for the diocese will not necessarily be a success for the sex-abuse claimants. As discussed in Part I.B, *supra*, one of the primary goals of the process is to give the debtor a “fresh start.” Therefore, success under Chapter 11 often is measured by the relative success of the debtor’s reorganization. However, the Code also provides the creditor protections discussed in Part I.D, *supra*.

treatment of future claimants may be one of the most problematic issues in the diocesan bankruptcies.

It is in response to the future claimant issue that the bankruptcy court likely will demonstrate its flexible, equitable jurisdiction. To some extent, the courts in the dioceses' cases have already looked to a particular group of analogous cases—the mass torts bankruptcies of the 1980s through today—to help them address the future claimant issue. A “mass tort” has been described as “a harmful act or series of acts by a company, such as the production of a defective product, that results in injuries to numerous victims—sometimes numbering into the thousands or hundreds of thousands.”<sup>88</sup> Starting in the 1980s, several companies facing mass tort liability sought protection of the federal bankruptcy laws, as one commentator noted, because of “[t]he practical inability to provide each tort victim with traditional, individualized adjudication under the usual rules of litigation” while still preserving the viability of their businesses.<sup>89</sup> The mass torts bankruptcy cases were first filed by asbestos manufacturers, including Manville,<sup>90</sup> Celotex Corp.,<sup>91</sup> Eagle-Picher Industries,<sup>92</sup> and Keene Corp.,<sup>93</sup> each of which faced thousands of personal injury claims.

1. Asbestos Bankruptcies: The Future Claimant as Introduced by  
*In re Johns-Manville Corp.*

The concept of a “future claimant” was thoroughly developed in *In re Johns-Manville Corp.*<sup>94</sup> The *Johns-Manville* court defined “future asbestos claimants” as “all persons and entities who, on or before [the date the Chapter 11 petition was filed], came into contact with asbestos or asbestos-containing products mined, fabricated, manufactured, supplied or sold by Manville and who have not yet filed claims against Manville for personal injuries or property damage.”<sup>95</sup> As to the personal injury claimants, the court noted that they “may be unaware of their entitlement to recourse against

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88. Resnick, *supra* note 30, at 2045.

89. *Id.* at 2045–46.

90. See *In re Johns-Manville Corp.*, 36 B.R. 743, 745 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

91. See *Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.)*, 124 F.3d 619, 622 (4th Cir. 1997).

92. See *In re Eagle-Picher Indus.*, 197 B.R. 260, 263–64 (Bankr. S.D. Ohio 1996).

93. See *In re Keene Corp.*, 208 B.R. 112, 113 (Bankr. S.D.N.Y. 1997).

94. 36 B.R. 743 (Bankr. S.D.N.Y. 1984).

95. *Id.* at 744–45.



Manville due to the latency period of many years characterizing manifestation of all asbestos related diseases.”<sup>96</sup>

The *Johns-Manville* court ultimately approved the appointment of a legal representative for these future claimants.<sup>97</sup> In reaching this conclusion, the court noted that the broad language of § 1109(b) of the Code “ma[de] clear that any ‘party in interest’ may appear and be heard in a Chapter 11 case.”<sup>98</sup> Because of the elasticity of the term “party in interest,” the court concluded that “[f]uture claimants are undeniably parties in interest to these reorganization proceedings.”<sup>99</sup> The *Johns-Manville* court emphasized the important role the future claimants played in the bankruptcy when it stated:

[F]uture claimants are indeed the central focus of the entire reorganization. Any plan not dealing with their interests precludes a meaningful and effective reorganization . . . . Any meaningful plan will either provide funding for future claimants directly or provide for the continuation of some form of responsive, ongoing entity post-confirmation, from which to glean assets with which to pay them.<sup>100</sup>

In addition to finding that the future asbestos claimants fit within the broad definition of “parties in interest” under § 1109(b), the *Johns-Manville* court also supported its appointment of a future claimant representative with case law holding that “mere exposure to asbestos triggers insurance coverage.”<sup>101</sup> Insurance coverage was relevant because one of the major issues in the litigation surrounding the Manville bankruptcy concerned the “appropriate trigger” for insurance companies to pay out under Manville’s liability insurance policies.<sup>102</sup> The court reasoned that “if exposure triggers a sufficient

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96. *Id.* at 745.

97. *Id.* at 759.

98. *Id.* at 747. The Code in pertinent part states: “a party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under [Chapter 11].” 11 U.S.C.A. § 1109(b) (Supp. V 2005). The *Johns-Manville* court found that the listing of parties in interest in § 1109(b) was illustrative and “not meant to exclude other types of interested parties from the purview of that section.” 36 B.R. at 747–48.

99. *In re Johns-Manville Corp.*, 36 B.R. at 749.

100. *Id.*

101. *Id.* (citing *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981); *Porter v. Am. Optical Co.*, 641 F.2d 1128 (5th Cir. 1981); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980)).

102. *See id.* at 750. The court further explained that Manville’s approximately twenty-five insurance companies, which underwrote approximately 100 policies, “have by and large refused to provide defense and indemnity to Manville in asbestos cases. Manville

interest on the part of future claimants to warrant insurance coverage, then this same exposure should *a fortiori* justify a declaration that they are parties in interest to be impacted by these proceedings.”<sup>103</sup>

A third basis on which the *Johns-Manville* court based its appointment of a future claimants’ representative was the equitable powers of the bankruptcy court.<sup>104</sup> Specifically, the court cited the “pervasive equitable powers” given to bankruptcy courts under § 105(a) of the Code.<sup>105</sup> Section 105(a) states:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.<sup>106</sup>

The *Johns-Manville* court explained that its equitable powers under § 105(a) “specifically . . . enable[d] it to respond to extraordinary problems” presented in Chapter 11 cases as long as its response was consistent with the chapter’s statutory goals.<sup>107</sup>

The court further determined that it was consistent with equitable principles to respond to the “extraordinary problem” of future claimants by appointing a legal representative who would represent them during the remainder of the Manville reorganization.<sup>108</sup> The court supported this final determination by citing analogous appointments made in earlier cases of a trustee to represent the interests of unborn descendants in a quiet title action<sup>109</sup> and a special committee to represent present and future tort

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asserts that its inability to look to at least \$600 million in insurance coverage is a major factor in its decision to seek Chapter 11 relief.” *Id.* (citation omitted).

103. *Id.*

104. *Id.* at 757.

105. *Id.* The court also cited 28 U.S.C. § 1481 as supporting its broad equitable powers. *Id.* However, § 1481 was rendered “ineffective” by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”). See Pub. L. No. 98-353, § 113, 98 Stat. 333, 343 (1984); see also John T. Strasburger, *The ABC’s of Admiralty and Bankruptcy in Concert or Conflict*, 21 J. MAR. L. & COM. 273, 275 & n.7 (1990) (describing the uncertainty over whether § 1481 was rendered ineffective, omitted, or repealed by BAFJA).

106. 11 U.S.C.A. § 105(a) (Supp. V 2005).

107. *In re Johns-Manville Corp.*, 36 B.R. at 757.

108. *Id.* at 758.

109. *Id.* (citing *Gunnell v. Palmer*, 18 N.E.2d 202, 204 (Ill. 1938)).

claimants in a railroad receivership case.<sup>110</sup> In its appointment of a future claimants' representative, the *Johns-Manville* court set an important precedent for other mass torts cases. Other courts have followed *Johns-Manville* in asbestos-related bankruptcy cases by appointing representatives for claimants who had been injured by asbestos though the injury had not yet manifested itself.<sup>111</sup> Further, the Code now expressly authorizes the court to appoint future claims representatives in asbestos bankruptcy cases.<sup>112</sup>

## 2. Other Mass Torts Bankruptcies and Different Treatment of Future Claims

Asbestos is not the only product leading to bankruptcy in the mass torts context. A.H. Robins, the manufacturer of the Dalkon Shield intrauterine device filed for Chapter 11 bankruptcy at a time when it had already settled 9,238 claims for approximately \$530 million and still had approximately 5,000 suits pending against it.<sup>113</sup> Similarly, Dow Corning, a manufacturer of silicone breast implants, faced approximately 440,000 potential claimants, including approximately 19,000 individual actions and forty-five possible class actions, at the time it filed for Chapter 11.<sup>114</sup>

Similar to the Manville reorganization, the A.H. Robins reorganization utilized a special representative for future claimants.<sup>115</sup> In contrast, Dow Corning's bankruptcy judge opted not to appoint a future claimants' representative.<sup>116</sup> The *Dow Corning* court reasoned that because Dow Corning knew who had received its implants, it also knew, at the time it filed for bankruptcy, the total group of potential claimants that might be injured by its product and file suit.<sup>117</sup> Thus, the court concluded that "[a]ll who have received a breast implant are cognizable of this fact."<sup>118</sup> The court noted, by contrast, claims arising

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110. *Id.* (citing F.C. Underhay, *Torts Claims in Receivership and Reorganization*, 22 IOWA L. REV. 60, 77-80 (1936)).

111. *See, e.g., In re Amatek Corp.*, 755 F.2d 1034, 1035 (3d Cir. 1985) (holding that a future claims representative should be appointed); *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 476 (Bankr. N.D. Ill. 1986) (same); *In re UNR Indus.*, 46 B.R. 671, 676 (Bankr. N.D. Ill. 1985) (same).

112. 11 U.S.C.A. § 524(g)(4)(B)(iii) (Supp. V 2005).

113. *In re A.H. Robins Co.*, 89 B.R. 555, 557 (Bankr. E.D. Va. 1988).

114. *In re Dow Corning Corp.*, 211 B.R. 545, 552-53 (Bankr. E.D. Mich. 1997).

115. *See In re A.H. Robins Co.*, 880 F.2d 694, 699 (4th Cir. 1989) (describing A.H. Robins' reorganization plan, specifically noting the Future Claimant's Representative's participation in the claims estimation procedure).

116. *In re Dow Corning Corp.*, 211 B.R. at 598-99 n.55.

117. *See id.*

118. *Id.*

from the asbestos-related injuries were unknowable in number and duration.<sup>119</sup> The *Dow Corning* court's conclusion demonstrates that although the bankruptcy court has broad equitable jurisdiction to handle special issues like future claims, the court must determine if the specifics of the case before it require a particular equitable remedy. Put another way, although the appointment of a future claims representative may be equitable in one mass tort case, it may not be in another.

### 3. The Relevance of the Mass Torts Bankruptcies to the Diocesan Bankruptcies

To some extent the judges in both Portland and Tucson have followed the *Johns-Manville* mass torts model and decided that equity requires the appointment of a future claims representative for claimants who have not yet filed claims.<sup>120</sup> In the Portland case, the bankruptcy court expressly noted that the appointment of a representative for future claims in its case was consistent with that taken in *In re Johns-Manville Corp.*<sup>121</sup> Particularly important to the Portland court was the similarity of a long latency period between the occurrence of abuse—like exposure to asbestos—and manifestation of injury resulting from that abuse.<sup>122</sup> The court noted that “[t]he evidence in this case is that, when childhood sexual abuse causes an injury, the injury may not be manifest for many years.”<sup>123</sup>

While the Portland court noted similarities between its case and *Johns-Manville*, it distinguished its case from *In re Dow Corning Corp.*<sup>124</sup> In the Portland case, the debtor archdiocese cited *Dow Corning* to support its argument that such a representative “[was] not necessary to represent the interests of those potential claimants who know they have been subjected to abuse, but have not yet manifested an injury.”<sup>125</sup> In rejecting this argument and distinguishing *Dow Corning*, the Portland court noted first that injuries resulting from childhood sexual abuse were more cognitive and psychological in nature, possibly preventing an injured person from recognizing the

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119. See *id.*; *In re Johns-Manville Corp.*, 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984).

120. *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) 54, at 244 (Bankr. D. Or. Jan. 10, 2005) (explaining the appointment of the future claims representative in the Portland case, while noting the same type of appointment in the Tucson case).

121. *Id.* at 245 (citing *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984)).

122. *Id.*

123. *Id.* (citation omitted).

124. *Id.* at 245–46.

125. *Id.* at 245.

injury itself or identifying the causal connection between an injury and the abuse.<sup>126</sup> The court observed that the injuries at issue in *Dow Corning*—those resulting from exposure to silicone breast implants—were simply “not of this type.”<sup>127</sup> Second, the Portland court noted that the committee representing present claimants in the Portland case, the Tort Claimants Committee, “[did] not take the position that all those exposed to childhood sexual abuse have been damaged in a legal sense, or purport to represent the interests of such persons.”<sup>128</sup> The Portland court contrasted this position with that taken by an analogous committee in *Dow Corning*, which posited that anyone who had received a breast implant had already suffered an injury and thus all claimants were present claimants.<sup>129</sup> The Portland court concluded that, given the nature of the abuse and the possibility of a latency period between the abuse and manifestation of injury, appointment of a future claims representative was appropriate.<sup>130</sup>

Although the Portland court looked to mass torts cases to determine if appointment of a future claims representative was appropriate, it looked to another source of law to determine the scope of this representation: state law.<sup>131</sup> Noting that federal law—specifically § 101(5) of the Code—determines when a bankruptcy claim arises, the court pointed out that it is state law that determines if any claim exists in the first place.<sup>132</sup> The court noted that under the

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126. *Id.* at 245–46.

127. *Id.* at 246.

128. *Id.*

129. *Id.* (citing *In re Dow Corning Corp.*, 211 B.R. 545, 598 n.55 (Bankr. E.D. Mich. 1997)).

130. *Id.*

131. *Id.* at 245 (citing OR. REV. STAT. § 12.117(1) (1997)).

132. *Id.* at 244 (citing *In re Hassanally*, 208 B.R. 46, 50 (B.A.P. 9th Cir. 1997)); *see also* 11 U.S.C.A. § 101(10) (Supp. V 2005) (defining claim as “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured”). The Oregon Revised Statutes define the scope of the relevant child abuse claim:

[A]n action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is under 18 years of age shall be commenced not more than six years after that person attains 18 years of age, or if the injured person has not discovered the injury or the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the injury or the causal connection between the injury and the child abuse, not more than three years from the date the injured person discovers or in the exercise of reasonable care should have discovered the injury or the causal connection between the child abuse and the injury, whichever period is longer.

OR. REV. STAT. § 12.117(1).

relevant Oregon statute victims of childhood sexual abuse were given an extended period of time to assert claims—up to three years after a person exercising reasonable care discovers the abuse or the causal connection between abuse and injury<sup>133</sup>—thus recognizing the possibility of a long latency period between abuse and manifestation of injury.<sup>134</sup> Further, the court noted that Oregon case law recognized that such a latency period could last for decades.<sup>135</sup> Based on the statute and case law, the Portland court concluded that the future claims representative would represent the following parties:

(1) minors; (2) those with repressed memory; and (3) those persons who know they were subjected to sexual contact as children but who have “not discovered the [resulting] injury or the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the injury or the causal connection between the injury and the child abuse.”<sup>136</sup>

The Portland court pointed out that this scope of representation excluded claimants who knew of their abuse and injury but simply declined to come forward out of embarrassment, shame, or other reluctance.<sup>137</sup> By contrast, the court noted, the Tucson court had not placed any such restriction on its future claims representative.<sup>138</sup>

Thus, the Portland court’s use of the equitable jurisdiction afforded by the Code, as supported by precedent from analogous and distinguishable mass torts bankruptcy cases, and its use of state statutory and case law to craft a future claims representative appropriate for the Archdiocese of Portland’s Chapter 11 case demonstrates the ultimate flexibility of the bankruptcy process. The advantage of this flexibility is that the court has wide discretion to craft solutions for the unique problems presented by the particular case before it. In the Portland case, this solution resulted in the appointment of a future claims representative specifically tailored for that case.

Provided the diocesan bankruptcy courts continue to recognize the future sex-abuse claimants as at least partly analogous to other

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133. OR. REV. STAT. § 12.117(1).

134. See *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) at 246 (citing OR. REV. STAT. § 12.117(1)).

135. *Id.* (citing P.H. v. F.C., 873 P.2d 465 (Or. App. 1994)).

136. *Id.* (quoting OR. REV. STAT. § 12.117(1)).

137. *Id.*

138. *Id.* at 245.

mass torts future claimants, the courts may fashion other remedies after those provided in the mass torts bankruptcies, such as formation of a trust to fund future claims.<sup>139</sup> This has already been done in some fashion in the Tucson case where the confirmed plan established a trust fund to pay future claims.<sup>140</sup> The Code provides a trust mechanism in § 524(g), but this mechanism is rather complex and only applies to asbestos-related injury cases.<sup>141</sup> However, again, a bankruptcy court could use its general power under § 105(a) to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”<sup>142</sup>—as illustrated in the Tucson case. In addition to the trust, which handles the funding aspect, if the diocesan cases follow the mass torts cases, there likely will be a claims processing mechanism to determine the merits of future claims.<sup>143</sup>

It is difficult at this point to gauge how closely the bankruptcy courts handling the diocesan bankruptcies will follow the mass torts cases as models, but it certainly appears that the mass torts bankruptcies have been useful to some extent and should be useful going forward in the Portland and Spokane cases and any other Catholic diocese cases that may result from the sex-abuse scandal. However, the utility of the mass torts cases as models for the diocesan bankruptcies also includes learning from their mistakes. For example, despite efforts to provide adequate representation for future claimants, the process set up for payment of future claims in the Manville asbestos case ultimately resulted in future claimants being paid far less than expected—largely because the number of claims greatly exceeded expectations.<sup>144</sup> Again, it seems too early in the diocesan bankruptcy history to delve too deeply into the full extent of the analogy between these cases and the mass torts bankruptcies. However, there are some obvious parallels, as noted in this Part, and it seems likely that the bankruptcy courts handling the cases will look to the mass torts cases for guidance—both as to what will work and what probably will not work.<sup>145</sup>

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139. See 11 U.S.C.A. § 524(g)(2)(B) (Supp. V 2005).

140. Kornman, *supra* note 18.

141. § 524(g)(2)(B) (setting out the requirements of the trust, including to pay asbestos related personal and property injuries).

142. *Id.* § 105(a).

143. *Id.* § 1141 (permitting the court to discharge the debtor for debts handled by the plan process).

144. See Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1444–51 (2004) (giving an overview of the Manville bankruptcy and its shortcomings regarding the representation of future claims).

145. Again, normative concerns are beyond the scope of this Comment. There certainly are some to note—especially in the mass torts bankruptcy context. For further,

## II. THE GOOD FAITH TEST AS A TOOL FOR THE SEX-ABUSE CLAIMANTS AND AN OBSTACLE FOR THE DIOCESES

### A. *Comparing Two Approaches to the Good Faith Test: In re Johns-Manville Corp. and In re SGL Carbon Corp.*

Long before successful emergence from bankruptcy, the dioceses face the possible challenge of a claimant's motion to dismiss its case for "cause."<sup>146</sup> A court can hear any such motion filed by a "party in interest."<sup>147</sup> In the diocesan bankruptcy cases, sex-abuse claimants could file this motion alleging that the diocese debtor did not file in "good faith."<sup>148</sup> If the sex-abuse claimants were to prevail, it would take the dispute out of the bankruptcy court and return it to nonbankruptcy civil litigation.

The Code does not explicitly list lack of good faith as grounds for dismissal of a debtor's case, but many courts have held that there is at least an implied good faith requirement for filing.<sup>149</sup> What the "good faith" requirement entails depends on the court deciding the case. Two cases, illustrating different approaches to the requirement, are helpful in understanding how the good faith requirement might be applied in the diocesan bankruptcy cases. The first case, *In re Johns-*

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thoughtful analysis on the normative question of whether bankruptcy is the appropriate "vehicle" for resolving the problems unique to mass torts cases, see generally Resnick, *supra* note 30 (arguing that bankruptcy is an appropriate framework for dealing with mass tort liability); S. Elizabeth Gibson, *A Response to Professor Resnick: Will this Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095 (2000) (noting advantages of using bankruptcy to address mass tort liability but also discussing concerns about the same).

146. § 1112(b)(1).

147. *See id.*

148. Though this tool has not been used by the sex-abuse claimants in the Portland, Tucson, or Spokane cases, it does not mean that it is not a viable option. However, the fact that it has not been used may point to all parties' desire to resolve the sex-abuse crisis, even in a forum like the bankruptcy court where the dioceses are the focus of attention.

149. *See id.* § 1112(b)(4)(A)–(P) (listing sixteen situations that might constitute "cause" but not including "lack of good faith"). *But see In re SGL Carbon Corp.*, 200 F.3d 154, 160–61 (3d Cir. 1999) (noting that the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits "have held that the absence of good faith constitutes 'cause' to dismiss a Chapter 11 petition"); *id.* at 161 (noting that the First, Second, and Fourth Circuits "have concluded that Chapter 11 imposes a general good faith requirement under which petitions can be dismissed for bad faith"). The cases cited in this note, which found good faith relevant to dismissal under § 1112 of the Code, were applying a section that was revised by BAPCPA. *See* 11 U.S.C. § 1112(b)(1)–(10) (2000) (amended 2005); *see also supra* note 8 (noting the enactment of BAPCPA and its effective date of October 17, 2005). Section 1112(b) listed ten situations, instead of sixteen, that could constitute "cause." *See* § 1112(b). However, "good faith" was not included in the earlier version of § 1112, either.



*Manville Corp.*,<sup>150</sup> involved an asbestos manufacturer, Manville, which filed for Chapter 11 bankruptcy in the wake of approximately 16,000 asbestos-related injury civil suits pending against it.<sup>151</sup> Manville admitted that the lawsuits were the sole factor necessitating its Chapter 11 filing.<sup>152</sup> At issue in the case was the propriety of Manville's filing for bankruptcy.<sup>153</sup> The Committee of Asbestos-Related Litigants and/or Creditors, as well as three of Manville's co-defendants, filed motions to dismiss the Chapter 11 case under § 1112(b), requesting dismissal "for cause"—specifically for lack of good faith.<sup>154</sup>

The Bankruptcy Court for the Southern District of New York denied the motion to dismiss Manville's case.<sup>155</sup> The court found that the good faith test was not a hard and fast requirement but, rather, was to be applied considering the totality of the circumstances in each case.<sup>156</sup> The court emphasized that "the essential fact" of the case was that "as of [its filing date] Manville [was] a real company with real debt, real creditors and a compelling need to reorganize in order to meet [those] obligations."<sup>157</sup> Further, the court noted that the Code did not require the debtor to be insolvent in order to file a voluntary bankruptcy petition.<sup>158</sup> In fact, the court noted that debtors facing challenges such as Manville should be encouraged to seek the solutions offered by the bankruptcy court before their situations became more critical.<sup>159</sup>

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150. 36 B.R. 727 (Bankr. S.D.N.Y. 1984). Note that this case is different from *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), which dealt with appointment of a future claims representative and was discussed in Part I.E, *supra*. The *Johns-Manville* case discussed in this Part deals only with the good faith test. However, both cases were part of the Manville bankruptcy reorganization.

151. *In re Johns-Manville Corp.*, 36 B.R. at 729.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 743.

156. See *id.* at 733 (noting that "for cause" under § 1112(b) is determined using the wide discretion of the court on a case-by-case consideration of the specific circumstances involved).

157. *Id.* at 730.

158. *Id.* at 731-32. The court noted that the only point at which the Code required insolvency for voluntary petitioners was in § 109(c)(3), which requires that municipality debtors be insolvent. *Id.*

159. See *id.* at 736. The court found that the legislative history behind the Code suggests that bankruptcy should not be thought of as a last resort for financially troubled debtors but as an encouraged resort. *Id.* It noted that this encouraged resort to bankruptcy "not only comports with the elimination of an insolvency requirement, but also is a corollary of the key aim of Chapter 11 of the Code, that of avoidance of liquidation." *Id.*

Another important distinction the *Johns-Manville* court made was that the determination of the propriety of filing and the determination of the propriety of plan confirmation are separate and distinct.<sup>160</sup> It pointed out that good faith is only an express requirement for plan confirmation and not necessarily for filing a petition, stating:

In determining whether to dismiss under [§] 1112(b), a court is not necessarily required to consider whether the debtor has filed in "good faith" because that is not a specified predicate under the Code for filing. Rather, according to [§] 1129(a)(3), good faith emerges as a requirement for the confirmation of a plan.<sup>161</sup>

In applying its flexible good faith standard to the facts of the *Manville* bankruptcy case, the court concluded that the case should not be dismissed, finding "that these petitions were filed only after [the debtor] undertook lengthy, careful and detailed analysis" and that there was a "slow and deliberate process of data commissioning and review and 'soul-searching' antedating the filing."<sup>162</sup> The court also pointed out the practical effect of dismissal in this case: no one would benefit except those that won "the race to the courthouse."<sup>163</sup> The court reminded the tort claimants and the other parties who had moved to dismiss the filing that because a "Chapter 11 filing creates a bankruptcy estate . . . for the benefit not simply of the debtor, but rather also for the benefit of all of the debtor's creditors and equity holders[,] . . . the intense focus on the debtor's motives in filing is misplaced."<sup>164</sup> Ultimately, the *Johns-Manville* court favored a flexible approach to the good faith filing inquiry, declaring its "belief that there is no strict and absolute 'good faith' predicate to filing a Chapter 11 petition."<sup>165</sup> In the court's view, the issue of good faith in the filing context had more to do with the bankruptcy court's jurisdictional integrity than the debtor's integrity.<sup>166</sup> The proper

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160. *Id.* at 734 ("The essential determination here is the propriety of the filing, and whether 'cause' exists to vitiate it, not the confirmability of a particular plan. If *Manville* is unable to effectuate a particular plan, that is not tantamount to finding that no plan can be effectuated.").

161. *Id.* at 735.

162. *Id.* at 734.

163. *Id.* at 740.

164. *Id.* at 737.

165. *See id.* at 737-38.

166. *Id.* at 737.

inquiry under this view was whether the debtor, by filing, was abusing the jurisdiction of the bankruptcy court.<sup>167</sup>

However, there have been cases in which the debtor's case was dismissed for lack of good faith. In one such case, *In re SGL Carbon Corp.*,<sup>168</sup> the Court of Appeals for the Third Circuit purported to take a broader view than the *Johns-Manville* court as to what constitutes a lack of good faith in the Chapter 11 filing context.<sup>169</sup> From the outset of the case, the court framed the issue as whether it would adopt a good faith requirement for Chapter 11 filings.<sup>170</sup> After answering this question in the affirmative, the Third Circuit described the good faith test as a "fact intensive analysis."<sup>171</sup> The debtor in this case, SGL Carbon, was a company that, after the United States Department of Justice started investigating it for price-fixing, was named as a defendant in numerous civil class action antitrust suits.<sup>172</sup> Citing its estimated \$240 million in liabilities from the criminal and civil penalties, SGL Carbon filed a Chapter 11 petition.<sup>173</sup>

Along with its petition, SGL Carbon proposed a reorganization plan under which only the civil antitrust suit claimant creditors would receive less than full payment of debt.<sup>174</sup> At the same time that the company announced its filing, the company's chairman was describing the company as financially healthy to security analysts and emphasizing its Chapter 11 petition as "innovative" and "creative."<sup>175</sup> Further, the court noted, the company's vice president testified in his

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167. *Id.* Although the court rejected a "strict and absolute requirement," it did note examples of bankruptcy filings that would undermine the jurisdictional integrity of the court, including

where a reorganized debtor never operated legitimately or was formed for the sole purpose of filing[,] . . . where there has been a change in legal form prior to the filing from an ineligible entity to one able to file under this Chapter in order to avoid a foreclosure sale[,] . . . where the debtor filed to forestall tax liability without any need for reorganization of debt.

*Id.* at 738.

168. 200 F.3d 154 (3d Cir. 1999).

169. *See id.* at 168 (noting the *Johns-Manville* court had a narrow view as to what constitutes a lack of good faith).

170. *Id.* at 156.

171. *Id.* The Third Circuit's conception of the test as "fact intensive" raises some questions as to whether its approach was really that different from the *Johns-Manville* court's approach, which described its own "concept of good faith [as] an elastic one which can be read into the statute on a limited *ad hoc* basis." *In re Johns-Manville Corp.*, 36 B.R. at 737 (citation omitted).

172. *In re SGL Carbon Corp.*, 200 F.3d at 156–57.

173. *Id.* at 157.

174. *Id.*

175. *Id.* at 158.

deposition that he believed filing Chapter 11 would change its bargaining position with plaintiffs in the civil antitrust suits by putting pressure on them to settle.<sup>176</sup> These facts did not reflect well on SGL Carbon's good faith in the eyes of the Third Circuit.

Declaring that "Chapter 11 bankruptcy petitions are subject to dismissal under . . . § 1112(b) unless filed in good faith,"<sup>177</sup> the court engaged in the "requisite fact intensive inquiry [which] requires determining where [the debtor's] petition falls along the spectrum ranging from the clearly acceptable to the patently abusive."<sup>178</sup> The court also looked at whether SGL Carbon's petition "serv[ed] a valid reorganizational purpose."<sup>179</sup> SGL Carbon cited the *Johns-Manville* case<sup>180</sup> in arguing that the good faith standard was a flexible one.<sup>181</sup> The Third Circuit rejected this argument largely by distinguishing *Johns-Manville* on its facts.<sup>182</sup> The court pointed out that Manville, at the time of its filing, was facing significantly greater financial difficulties and that it already had many judgments entered against it and many more still pending.<sup>183</sup> Also important to the court's analysis was the distinguishable nature of the lawsuits against Manville.<sup>184</sup> The *SGL Carbon* court noted that Manville, at the time of its case, faced suits of an unknown number for the next twenty to thirty years while SGL Carbon "face[d] a known and finite number of suits."<sup>185</sup> One similarity the Third Circuit noted between the two cases was the *Johns-Manville* court's perception that the Manville tort claimants were using the motion to dismiss for tactical purposes and its own perception that SGL Carbon was using the bankruptcy process to gain a tactical advantage over the plaintiffs in civil suits against it.<sup>186</sup>

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176. *Id.*

177. *Id.* at 160. The court noted that the list of situations constituting "cause" in § 1112(b)(1)–(10) is not exhaustive. *Id.* After BAPCPA, *see supra* note 8, the list of situations that might constitute "cause" for dismissal now includes sixteen situations, but the language introducing the list is similar to that introducing the list analyzed by the *SGL Carbon* court, thus it seems likely that courts will continue to construe it as not exhaustive. *See* 11 U.S.C.A. § 1112(b)(4) (Supp. V 2005) (providing that for the purposes of subsection 1112(b), "the term 'cause' includes" the sixteen situations listed).

178. *In re SGL Carbon Corp.*, 200 F.3d at 162.

179. *Id.* at 165.

180. 36 B.R. 727 (Bankr. S.D.N.Y. 1984).

181. *See In re SGL Carbon Corp.*, 200 F.3d at 164.

182. *See id.*

183. *Id.*

184. *Id.* at 169.

185. *Id.*

186. *See id.* ("In denying the creditors' motion to dismiss, the [*Johns-Manville*] court stated it would 'bear in mind the strategical motivations underlying [creditors'] pursuit of

All of these findings led the Third Circuit to conclude that SGL Carbon's filing "lack[ed] a valid reorganizational purpose and consequently lack[ed] good faith making it subject to dismissal 'for cause' under . . . § 1112(b)."<sup>187</sup> The court observed that while "the Bankruptcy Code presents an inviting safe harbor[,] . . . this lure creates the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system."<sup>188</sup>

So, like the *Johns-Manville* court, the *SGL Carbon* court was concerned with the integrity of the bankruptcy process. The latter court may have been more willing to read a good faith requirement into the language of § 1112(b), but the former court used the good faith inquiry with a similar objective in mind: to prohibit debtors from abusing the Chapter 11 process.

### *B. Applying the Good Faith Test to the Diocesan Bankruptcies*

At some point the good faith inquiry may be at issue in the Portland, Spokane, or any other Chapter 11 diocesan bankruptcies<sup>189</sup> stemming from the sex-abuse scandal. The Portland and Spokane cases are in the Ninth Circuit, which, like the Third Circuit in *SGL Carbon*, has held that lack of good faith in filing constitutes "cause" for dismissal under § 1112(b).<sup>190</sup> This suggests that a court reviewing

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these motions at this time' . . .") (second alteration in original) (quoting *In re Johns-Manville*, 36 B.R. 727, 731 (Bankr. S.D.N.Y. 1984)).

187. *Id.*

188. *Id.*

189. As noted previously, *supra* note 8, the Portland, Tucson, and Spokane cases fall under the version of the Code that was in force at the time the *Johns-Manville* and *SGL Carbon* cases were decided, because they were filed before October 17, 2005, the effective date of BAPCPA, which revised the Bankruptcy Code. For any cases filed after October 17, 2005, the revisions of § 1112(b) apply. One revision that may make it harder for a party in interest to get a Chapter 11 debtor's case dismissed is the revised language of § 1112(b). It says that dismissal "shall not be granted absent unusual circumstances . . . if the debtor or another party in interest objects and establishes that": (1) it is reasonably likely that a plan will be confirmed in the timeframe prescribed by the Code; and (2) the grounds for dismissal include an act or omission by the debtor for which there is a reasonable justification and that can be cured within a reasonable time prescribed by the court. 11 U.S.C.A. § 1112(b)(2) (Supp. V 2005). This language, which seems to permit an added defense for the debtor, was not present in the pre-BAPCPA version of § 1112. See 11 U.S.C. § 1112(b) (2000) (amended 2005). Thus, the BAPCPA revisions seem to provide an advantage for debtors who can establish this defense. However, the revisions also contain a longer list of situations that constitute "cause," see 11 U.S.C.A. § 1112(b)(4) (Supp. V 2005), which might make it easier for a party moving for dismissal to prevail. Note that "good faith" is listed in neither version, see *supra* note 149, so it appears that case law like *Johns-Manville* and *SGL Carbon*, which read the "good faith" inquiry into § 1112, will remain relevant even to cases filed after October 17, 2005.

190. See *Marsch v. Marsch* (*In re Marsch*), 36 F.3d 825, 828 (9th Cir. 1994).

those two lines of precedent would follow more closely the *SGL Carbon* approach than it would follow the *Johns-Manville* approach.<sup>191</sup> Even though there are differences in the approaches taken in *Johns-Manville* and *SGL Carbon*, a good faith inquiry under either would be fact intensive.<sup>192</sup> Any court likely will give due weight to the specifics of each case, including the financial status of the diocese in question, the number and dollar amount of claims pending against the diocese, the nature of the claims, and any corporate reorganization or shifting of assets that predated the filing. Applying these factors briefly to the diocesan bankruptcies currently pending gives a sense of the relative strengths and weaknesses of an argument supporting a motion to dismiss a diocesan bankruptcy petition for lack of good faith.

First, the financial status of the debtors would be more heavily scrutinized if a court took an *SGL Carbon* approach, and such a court would take note of the fact that neither the Portland nor Spokane diocese had much debt other than the potential debt that will result from settling the sex-abuse claims.<sup>193</sup> But lack of insolvency will not be enough to render financial status fatal.<sup>194</sup> The amount of the potential debt and its impact on the future operations of the diocese will weigh in favor of a court concluding that the dioceses face real financial difficulty. A court would likely conclude that the bankruptcy filing serves “a valid reorganizational purpose,” and thus, the continued operation of the debtor as a result of the financial reorganization is worth the hardship the debtor’s creditors face

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191. As discussed *supra* notes 165–67 and accompanying text, the *Johns-Manville* court refused to find good faith as a hard and fast requirement. By contrast, the *SGL Carbon* court found lack of good faith could constitute “cause” for dismissal under § 1112(b). See *supra* notes 177–78 and accompanying text.

192. The *Johns-Manville* court noted that bankruptcy courts have wide discretion to choose, on a case-by-case consideration of the specific circumstances involved, whether to imply a good faith requirement in the “for cause” determination under § 1112(b). See *In re Johns-Manville Corp.*, 36 B.R. 727, 733 (Bankr. S.D.N.Y. 1984). Similarly, the *SGL Carbon* court described the good faith test as a “fact intensive analysis.” 200 F.3d at 156.

193. The *SGL Carbon* court did seem to place more weight on the debtor’s financial status than did the *Johns-Manville* court, which went out of its way to assert that solvency was not dispositive to the good faith analysis. Compare *In re Johns-Manville Corp.*, 36 B.R. at 732–33 (stating that insolvency is not required for a Chapter 11 filing), with *In re SGL Carbon Corp.*, 200 F.3d at 164 (noting debtor’s lack of financial troubles other than the antitrust lawsuits pending against it).

194. See 11 U.S.C.A. § 109(b), (d) (Supp. V 2005) (containing no insolvency requirement for voluntary debtors under Chapter 11).

because the debtor filed for bankruptcy.<sup>195</sup> However, depending on the facts before it, a court could find that the dioceses' "aims lie outside those of the Bankruptcy Code" if it finds the dioceses moved the cases to bankruptcy court merely as a way to gain a tactical advantage in unsuccessful negotiations with sex-abuse claimants.<sup>196</sup>

Second, the number of claims is a weak spot in the good faith analysis for the dioceses. In the Spokane case, the diocese filed after failing to reach settlements in twenty-eight pending claims with thirty claims yet to be litigated.<sup>197</sup> At the time of its filing, the Portland archdiocese had spent more than \$53 million in settling 130 claims with sixty suits remaining unsettled.<sup>198</sup> The claims are fewer in number than those in the *Johns-Manville* case, which had approximately 16,000 claims pending at filing<sup>199</sup> and smaller in dollar amount than those in the *SGL Carbon* case, involving around \$240 million.<sup>200</sup> Given that a number of dioceses have successfully settled claims outside the bankruptcy process, a court could also question why these dioceses need the bankruptcy process to settle their claims.<sup>201</sup> Failure to reach settlements as other dioceses have could cause a court to question whether the bankruptcy petitions in

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195. The *SGL Carbon* court specifically found that SGL Carbon's petition should be dismissed because it lacked this "valid reorganizational purpose." 200 F.3d at 169. The court explained the necessity of the requirement of a "reorganizational purpose":

Chapter 11 vests [the debtor] with considerable powers—the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc.—that can impose significant hardship on particular creditors. When financially troubled debtors seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside those of the Bankruptcy Code.

*Id.* at 165–66.

196. *See id.* at 166; *see also infra* note 202 and accompanying text (noting that SGL Carbon's use of bankruptcy to gain tactical advantage factored into the Third Circuit's decision to dismiss the case for lack of good faith).

197. *Spokane Diocese Files Chapter 11*, 43 Bankr. Ct. Dec. (LRP) 25, at 7 (Dec. 21, 2004) [hereinafter *Spokane Diocese Files*].

198. Green & Woodward, *supra* note 8.

199. *See In re Johns-Manville Corp.*, 36 B.R. 727, 729 (Bankr. S.D.N.Y. 1984).

200. *See In re SGL Carbon Corp.*, 200 F.3d at 157.

201. *See* Cathy Lynn Grossman, *Biggest Clergy Abuse Settlement Announced*, USA TODAY, Jan. 5, 2005, at 3A (listing the top ten dioceses in settlement costs, including Boston at \$120.6 million; Orange, California, at \$104.7 million; Portland at \$53 million; Dallas at \$47.7 million; Chicago at \$38.8 million; Bridgeport, Connecticut, at \$37.7 million; Santa Fe at \$31.1 million; Louisville at \$29 million; Lafayette, Louisiana, at \$26 million; and Manchester, New Hampshire, at \$20.3 million). The Portland archdiocese's inclusion on this list would probably make the issue of other dioceses settling outside of bankruptcy less relevant to its bankruptcy petition since it has already settled some claims outside of bankruptcy.

Portland and Spokane were filed simply to gain tactical advantage over the sex-abuse claimants.<sup>202</sup> The filing of the Chapter 11 petition stayed all pending law suits against the dioceses.<sup>203</sup> If the dioceses can move successfully through the bankruptcy process, sex-abuse claimants will effectively be forced to settle, since any confirmed plan will be the only way through which their claims can be paid.<sup>204</sup> However, the fact that the Tucson diocese was able to emerge from Chapter 11 by successfully negotiating and having its plan confirmed<sup>205</sup> may make it easier for Portland and Spokane to justify their motives for filing. Both could point to the Tucson case as supporting bankruptcy as a legitimate method of dispute resolution—rather than a vehicle for limiting liability.

Third, the nature of the claims against the dioceses weighs in favor of them in the good faith analysis in that sex-abuse claims are factually similar to the claims in *Johns-Manville*. Like the asbestos injury claims, a certain number of the claims will be unknowable at the time each diocese goes through bankruptcy, because some victims are not yet aware of their injuries even though the abuse happened pre-petition.<sup>206</sup> If each diocese continues to pay out claims outside of bankruptcy, then there is a chance that in the future their ability to pay will diminish, making them effectively judgment-proof for claimants filing later in time. The Archbishop of Portland, in announcing the filing of his archdiocese's Chapter 11 petition, stated that "the pot of gold is pretty much empty."<sup>207</sup> Although it can be argued that imposing a solution on future claimants—who do not even know that they are injured yet—is not in good faith, the diocese can make the argument that if they do not seek bankruptcy protection they risk a less desirable solution for future claimants.

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202. SGL Carbon's case was dismissed because, among other things, the court found it was using the bankruptcy process to gain a tactical advantage over plaintiffs who had filed antitrust suits against it. See *In re SGL Carbon Corp.*, 200 F.3d at 169.

203. 11 U.S.C.A. § 362(a)(1) (Supp. V 2005).

204. See *id.* § 1141(d)(1)(A) (stating that confirmation of the debtor's Chapter 11 plan "discharges the debtor of any debt that arose before the date of such confirmation" unless provided for otherwise in the plan).

205. See Kornman, *supra* note 18.

206. As Judge Perris, who is presiding over the Portland bankruptcy, notes, "[t]he possibility of a long latency period before which injury becomes manifest is an important factual similarity between this case and the asbestos cases." *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) 54, at 245 (Bankr. D. Or. Jan. 10, 2005). Judge Perris further explained that "the very nature of the tortious conduct alleged in this case can result in cognitive and psychological injuries, making the injured person incapable of recognizing that he or she has been injured or of identifying the causal connection between the abuse and the injury." *Id.* at 245-46.

207. Green & Woodward, *supra* note 8.



Because of this complicated aspect of the claims, a court would not be likely to find that the diocese filed bankruptcy to dodge the claims, because the cases are already addressing future claims.<sup>208</sup>

Fourth, there have been no reports of significant pre-petition corporate restructuring in any of the dioceses, but this would not necessarily weigh in the dioceses' favor. Though the Portland and Spokane dioceses have not changed their corporate structures per se,<sup>209</sup> they have constructed legal arguments attempting to make certain assets to which they technically hold legal title untouchable. For example, the Spokane diocese argued that eighty-one churches, sixteen schools, one high school, and seventy-nine other properties should not be included in its bankruptcy estate because those assets belonged to the parishes.<sup>210</sup> However, this position contradicts the position taken by dioceses like the Archdiocese of Boston, which, outside the bankruptcy context, have asserted their rights to sell parish assets to pay out settlement claims to sex-abuse victims.<sup>211</sup> The Archdiocese of Boston argues this position because it, like the Spokane diocese, controls many aspects of parish operations.<sup>212</sup> Sex-abuse claimants could raise the argument that the dioceses are engaging in constructive corporate restructuring and, in doing so, are shielding assets they could not protect outside the bankruptcy context. Again, if the sex-abuse claimants were to prevail on this shielding assets argument it would further support their contentions that the dioceses' aims lie outside the Code and, by extension, lack a reorganizational purpose. Further, the sex-abuse claimants could argue that using the bankruptcy process to shield assets "patently abus[es]"<sup>213</sup> the court's jurisdiction.

The good faith determination ultimately depends so heavily on the facts of the case and the discretion of the presiding judge that prevailing on a motion to dismiss would be difficult for the sex-abuse claimants notwithstanding strong arguments in support thereof. The

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208. See *In re Roman Catholic Archbishop of Portland*, 44 Bankr. Ct. Dec. (LRP) at 245–46 (explaining the Portland bankruptcy judge's reasons for appointing a future claims representative and noting that the same has been done in the Tucson case).

209. There are other dioceses undergoing what can be arguably labeled corporate restructuring. There were reports of \$30 million being transferred within the diocese of San Diego, California. Guccione, *supra* note 25. Also reported were the formation of new corporations within the Diocese of Orange County, California, and the separate incorporation of each parish in Baker, Oregon. *Id.*

210. See Nicholas K. Geranios, *Spokane Diocese Says Victims Can't Seek Parish Assets*, SEATTLE TIMES, May 28, 2005, at B2, available at 2005 WLNR 8512215.

211. See Crimaldi, *supra* note 25.

212. See *id.*

213. See *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999).

bankruptcy court's jurisdiction is equitable, and a judge may decide to simply let the case survive the motion and use other opportunities to balance the equities in the case.<sup>214</sup> For example, good faith can be analyzed at a later point in the process if necessary—specifically at plan confirmation.<sup>215</sup> At that point, if a court found that the solution proposed in the diocese's plan was not in good faith, then it could refuse to extend the diocese's exclusive right to file a plan and could allow other parties in interest, including the claimants' committee, to propose a plan.<sup>216</sup> If a court is unable to confirm a plan, the case most likely will be dismissed.<sup>217</sup> In the meantime, all parties in interest have the opportunity to work out a solution that is fair not only to the dioceses, the present sex-abuse claimants, and any other creditors, but also is fair to any future claimants who have not yet become aware of their injuries.<sup>218</sup> Further, to the extent that the sex-abuse claimants' motion relies on a shielding assets argument, the bankruptcy judge can render that argument moot, because it is ultimately the judge, guided by the Code, who decides what assets are available to pay the sex-abuse victims.

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214. The Third Circuit in *SGL Carbon* asserted that, for Chapter 11 petitioners, "[t]he 'good faith' requirement has strong roots in equity." 200 F.3d at 161; *see also* *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (per curiam) (noting that bankruptcy jurisdiction is equitable jurisdiction); *In re Nancant, Inc.*, 8 B.R. 1005, 1006 (Bankr. D. Mass. 1981) ("The court will be able to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases. [What constitutes cause for dismissal under § 1112(b)] is subject to judicial discretion under the circumstances of each case."). *But see* *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (asserting that the good faith standard "furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy").

215. As the *Johns-Manville* court pointed out, § 1129(a)(3) of the Code requires that the debtor's plan be proposed in good faith in order for it to be confirmed. *In re Johns-Manville Corp.*, 36 B.R. 727, 735 (Bankr. S.D.N.Y. 1984).

216. 11 U.S.C.A. § 1129(a)(3) (Supp. V 2005).

217. *See id.* § 1112(b)(4)(J) (permitting a court to dismiss a case for "cause" including "failure to . . . confirm a plan").

218. To the extent that the sex-abuse claims against the dioceses are seen as analogous to the asbestos-related injuries, the words of the *Johns-Manville* court are instructive: "[i]t is undeniable that these proceedings will result in a delivery system for [debtor's] tort claimants, whether in the present questionably efficient tort system, a newly-created claims-estimation facility, or another form." 36 B.R. at 742.

Indeed, when a religious organization files for bankruptcy, the phrase "good faith" is imbued with extra meaning. Consider that there is also a moral argument from the dioceses' point of view: during an extended process the dioceses themselves might come to the conclusion that they should dismiss their cases. One commentator has observed that although the dioceses need to have a workable solution to the sex-abuse claims to ensure continued ministry, their "principal objective must be to minister to those who have been abused—the victims." Skeel, *supra* note 25, at 1197–98.

### III. PROPERTY OF THE ESTATE: THE DIOCESE-PARISH PROPERTY ISSUE

#### A. *Diocesan Property Under the Bankruptcy Code*

Assuming that the good faith requirement, however construed, is met, the most challenging phase of the bankruptcy case will be deciding which assets become property of the estate.<sup>219</sup> It is this phase in which two areas of law, state corporate law and church canon law, in addition to the Code, are most relevant. Again, the determination as to what constitutes property of the estate is crucial because it determines the minimum distribution available to the sex-abuse claimants and other creditors.<sup>220</sup>

The Bankruptcy Code is the starting point. Under § 541(a)(1), “property of the estate” is defined as “all legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>221</sup> Any property of the estate is protected from creditors upon filing of a bankruptcy petition, which operates as an automatic stay.<sup>222</sup> The automatic stay is “applicable to all entities,” preventing the start or continuation of most legal proceedings against the debtor for which the claims at issue arose before the filing of the petition.<sup>223</sup> The automatic stay applies not only to most legal proceedings against the debtor, but also to enforcement of pre-petition judgments and to various other “acts,” including, but not limited to, an act to take possession of property and an act to collect a claim that arose pre-petition.<sup>224</sup> This means all lawsuits against the dioceses were automatically stayed at the moment they filed their petition. Additionally, any claimant who settled or won a claim against a diocese pre-petition was prevented from collecting on that settlement or judgment.<sup>225</sup> In a Chapter 11 case the stay remains in effect until the debtor is granted a discharge.<sup>226</sup> Discharge does not occur in a

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219. See § 541 (outlining the process of analyzing property of the estate).

220. See *id.* §§ 1141, 1129(a)(7).

221. *Id.* § 541(a)(1).

222. *Id.* § 362.

223. *Id.* § 362(a), (a)(1).

224. *Id.* § 362(a)(2), (3).

225. This is an example of how the Bankruptcy Code aims to treat all creditors equitably. Here, those claimants who already resolved their claims with the dioceses would not be in a better position than those who had claims still pending or even those who had claims and had not filed them for an acceptable reason.

226. § 362(c)(2). But prior to the ending of the stay, a party in interest may request relief from the stay “for cause” and if cause is shown the court may terminate, annul, modify, or condition the stay. *Id.* § 362(d)(1).

Chapter 11 case until after the reorganization plan is confirmed.<sup>227</sup> The debtor has 120 days after filing for Chapter 11 to file a plan and 180 days after filing to have the plan approved by each class of claimants before other parties in interest, including claimant committees, can file an alternate plan.<sup>228</sup> This 120-day period of exclusivity can be extended by the court.<sup>229</sup> In order for any plans to be confirmed they must be accepted by each class of claimants<sup>230</sup> or confirmed by the court pursuant to the "cramdown" provisions of § 1129(b).<sup>231</sup> The term "cramdown" is jargon used by practitioners and judges to refer to confirmation of a plan notwithstanding its rejection by certain creditors.<sup>232</sup> The court may confirm the plan under the cramdown provisions if it has been accepted by at least one impaired class,<sup>233</sup> does not discriminate unfairly,<sup>234</sup> and is fair and equitable.<sup>235</sup> The process of plan proposal, acceptance, and confirmation takes a lot of time. For the sex-abuse claimants in the diocesan bankruptcies this process delays any chance they have to sue the dioceses and, in the event a plan is confirmed (whether by consensus or cramdown), eliminates any recourse for them outside the provisions of the plan.<sup>236</sup>

The automatic stay protects the property of the estate so that it may be kept intact in order to pay creditors in an equitable manner while funding the debtor's reorganization. So, while the debtor gets a breathing spell as a result of the automatic stay, the debtor also loses considerable control over its own property. The bankruptcy court has jurisdiction over property of the estate while the case is before the

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227. *Id.* § 524(g)(1)(A).

228. *Id.* § 1121(c).

229. *Id.* § 1121(d)(1) (providing, in pertinent part, "[o]n request of a party in interest . . . and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period"); *see also* cases cited *supra* note 75 (illustrating how courts have found cause for a variety of reasons). *But see supra* note 76 (noting BAPCPA's addition of § 1121(d)(2) which limits the time period for these extensions).

230. § 1129(a)(8).

231. *Id.* § 1129(b).

232. *See* ELIZABETH WARREN & JAY ALEXANDER WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 843 (4th ed. 2001) ("If all classes accept the plan, then it is consensual and there is no need to cram down.").

233. § 1129(a)(10), (b)(1). Generally speaking, a class is impaired unless it is completely protected by the plan—i.e., the class is not being deprived of any of its nonbankruptcy rights. *See id.* § 1124(d) (providing that classes must maintain legal, equitable, or contractual rights).

234. *Id.* § 1129(b)(1).

235. *Id.* § 1129(b)(1); *see also id.* § 1129(b)(2) (stating the requirements a plan must meet to be found "fair and equitable").

236. *Id.* § 1141(d)(1)(A).

court.<sup>237</sup> Once in bankruptcy, a debtor must get court approval to “use, sell, or lease” any property unless it is doing so in “the ordinary course of business.”<sup>238</sup>

At any point in the case a court may also appoint a trustee “for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . . [or] . . . if such appointment is in the interests of creditors . . . and other interests of the estate.”<sup>239</sup> This power of the court suggests that the drafters of the Code may never have fully contemplated that religious organizations like the diocese would file for bankruptcy because such an appointment seems highly unlikely; it would be tantamount to government takeover of a diocese, which has obvious First Amendment implications.<sup>240</sup>

There are certain provisions that also work well to safeguard sex-abuse claimants’ interests in the diocesan bankruptcy. Any reorganization plan filed by the debtor would have to be approved by each class of claimants<sup>241</sup> or confirmed according to the cramdown provisions.<sup>242</sup> In the former situation the class of sex-abuse claimants gets to vote directly for the plan, and in the latter the claimants have the right to argue about the fairness and equity of the plan with

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237. 28 U.S.C.A. § 1334(e)(1) (Supp. V 2005) (giving the court “exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of the case”).

238. 11 U.S.C.A. § 363(b)(1) (Supp. V 2005).

239. *Id.* § 1104(a)(1)–(2).

240. This would presumably burden the free exercise of religion, thus violating the Free Exercise Clause of the First Amendment. *See* U.S. CONST. amend. I. *But see* S. REP. NO. 95-989, at 32 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5818 (noting that § 303 of the Code exempts “[e]leemosynary institutions, such as churches, schools, and charitable organizations and foundations” from having involuntary petitions filed against them). This seems to suggest that the possibility of a church bankruptcy was contemplated (and rejected)—at least in the involuntary context.

Another instance in which it does not appear that the bankruptcy filing of a religious entity was fully contemplated is where, under Federal Rule of Bankruptcy Procedure 2004, creditors and other parties in interest have the right to examine the debtor, its assets, and its officers. FED. R. BANKR. P. 2004. In the diocesan bankruptcy context, creditors, claimants, and parishes will be able to force the diocese to open its books. This could be problematic from the dioceses’ perspectives because they generally are not subject to much external financial oversight. In fact, churches (unlike secular, tax-exempt nonprofits) do not have to file federal income tax returns in order to substantiate or maintain their tax-exempt status. *See* 26 C.F.R. § 1.508-1(a)(3)(i)(a) (2001). However, because the dioceses filed their cases with the bankruptcy court, they would have trouble arguing that its rules of discovery should not apply to them. Under this rule of discovery, the claimants would have much greater access to examine the dioceses’ financial records than they would outside bankruptcy.

241. 11 U.S.C.A. § 1129(a)(8).

242. *Id.* § 1129(b).

respect to their class.<sup>243</sup> This points to one of the strengths of the bankruptcy process: it requires the debtor to work with creditors to find a workable solution for both. Though the claimants will not necessarily have their days in court, their time in the judicial process may be well spent in that they will be guaranteed payment of some sort without the expense and potential adverse outcome resulting from drawn out litigation and the possibility of a judgment-proof defendant if claimants are last in line with their claims.<sup>244</sup>

In summary, plan acceptance permits the sex-abuse claimants to participate in the process of determining how the property of the dioceses will be distributed to them. Determining what property will be subject to the provisions of the plan—the property of the estate—is a crucial determination that must be made by the bankruptcy judge, applying the provisions of the Code to the special assets owned by the dioceses. It is in this application that a judge will likely have to consider two other sources of law: church canon law and state corporate law.

#### *B. Diocesan Property Under Church Canon Law and State Corporate Law*

Church canon law is relevant to the diocese-parish property issue because it is the basis on which the dioceses argue that they merely hold the assets in trust for the parishes. In fact, the dioceses' contentions are supported by a recent ruling by the Roman Catholic Church's (the "Church") governing body, the Vatican. In that ruling, the Vatican said that the Archdiocese of Boston is not automatically entitled to the assets of parishes it has closed.<sup>245</sup> Among the diocesan cases, the bankruptcy court in the Spokane case addressed the application of canon law to the definition of property of the estate.<sup>246</sup>

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243. See *supra* note 78 and accompanying text (noting appointment of committees to represent the sex-abuse claimants).

244. The argument certainly exists that some claimants will get a smaller award than they otherwise would through litigation. However, the justice provided to individual claimants takes a second priority to the justice provided to claimants as a class in the bankruptcy context. The goal of the bankruptcy process is to treat all creditors fairly. Thus, claimants who sued the dioceses before other claimants will have no advantage as they would outside bankruptcy. Outside of bankruptcy, claimants who sued earlier faced less risk that the dioceses would not be able to pay their claims due to depletion of assets over time.

245. See Nicholas K. Geranios, *Ruling on Assets Buys Diocese*, SEATTLE TIMES, Aug. 13, 2005, at B3, available at 2005 WLNR 12775999.

246. See Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re* Catholic Bishop of Spokane), No. 05-80038-PCW, 2005 WL 2108895, at \*14-17 (Bankr. E.D. Wash. Aug. 26, 2005).

Although the court ultimately declined to apply canon law definitions of property,<sup>247</sup> it did discuss its possible application at length, focusing mainly on the First Amendment implications,<sup>248</sup> which are discussed in more detail in Part IV.B, *infra*. The judge in the Spokane case also noted that both the diocese and the claimants submitted competing interpretations of the diocese-parish relationship under canon law.<sup>249</sup> This suggests that the sex-abuse claimants take the diocese's canon law argument seriously. Thus, a brief overview of the Church's structure and law is relevant to understanding the diocesan positions in the diocese-parish property issue.

The Church is a hierarchical church, governed by its own canon law, *Codex Iuris Canonici*, last revised in 1983 (the "1983 Canon Code").<sup>250</sup> The power of the Church is divided into legislative, executive, and judicial power.<sup>251</sup> Diocesan bishops appointed by the Pope have executive power over the particular dioceses, which include subdivisions called parishes,<sup>252</sup> to which the bishops are appointed.<sup>253</sup> This executive power is "interpreted widely" and can be delegated.<sup>254</sup> Though the bishop has power over the parishes, the parishes are recognized as "juridical persons" by the Church, meaning they are "subjects of obligations and rights" under Canon law.<sup>255</sup> Among these recognized rights is property ownership.<sup>256</sup> Property acquired by juridical persons belongs to those juridical persons.<sup>257</sup> This means that, under the 1983 Canon Code, parishes own any property that they have acquired.

The 1983 Canon Code recognizes the parishes as separate legal entities from the diocese,<sup>258</sup> but state corporate law does not. Most states, including Oregon and Washington, recognize a special

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247. *See id.* at \*12–16.

248. *See id.* at \*14–16.

249. *See id.* at \*12 (noting "[t]he claimants dispute [the diocese's] interpretation of canon law and cite, again at great length, contrary provisions of the canon law").

250. 1983 CODE c.12 § 1. *See generally* John J. Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977 (2003) (discussing how the 1983 Canon Code addresses certain aspects of the Catholic sex-abuse crisis). The Church's hierarchical structure is particularly relevant to the First Amendment issues discussed in Part IV.B, *infra*.

251. 1983 CODE c.135 § 1.

252. *Id.* c.515 § 1.

253. *Id.* c.134 § 1.

254. *Id.* c.138.

255. *Id.* c.113 § 2.

256. *Id.* c.1256.

257. *Id.*

258. *Id.*; Steve Woodward, *Archdiocese Will Argue Assets Are Parish-Specific*, OREGONIAN (Portland), Jan. 30, 2005, at B01, available at 2005 WLNR 6478435.

corporate form for dioceses called the corporation sole.<sup>259</sup> Under this corporate form the bishop is incorporated in his capacity as bishop, not as an individual.<sup>260</sup> Moreover, the churches, parishes, and other entities under the bishop are not separately incorporated.<sup>261</sup> The form permits the diocese to be governed by canon law instead of the state's corporate law while still being recognized as a corporation for most legal purposes.<sup>262</sup> In contrast with most other corporate forms, there are no members or shareholders in a corporation sole.<sup>263</sup> Although the corporation sole is recognized as a corporation, one commentator has noted that there is a "strong argument . . . that the corporation sole's historical development cast[s] it in the nature of a trust, rather than a modern corporation."<sup>264</sup> State law is generally silent as to whether assets of parishes held by the bishop (i.e., assets in which title is held in his name) must be exclusively used for his benefit or that of the diocese.<sup>265</sup> In the Spokane case, the bankruptcy court determined that real property held in the bishop's name belonged to the diocese and was not held in trust for the parishes.<sup>266</sup> In making this determination, the court did not apply canon law but, rather, applied state law and the Bankruptcy Code.<sup>267</sup> This suggests that the courts will give more weight to state law than canon law. However, the Spokane diocese argued strongly that failure to apply canon law to the diocese-parish property issue burdens the free exercise of religion within the meaning of the First Amendment.<sup>268</sup> The diocese has not backed down from this position and has appealed the bankruptcy court's ruling.<sup>269</sup> This suggests that the Spokane bankruptcy court's ruling probably is not the final decision on this matter.

Although state law is silent on the duties of the bishop to the parishes, canon law is not. The bishop is required to "honor the

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259. See OR. REV. STAT. § 65.067(1) (1997); WASH. REV. CODE § 24.12.010 (2002).

260. See OR. REV. STAT. § 65.067(1); WASH. REV. CODE § 24.12.010.

261. See OR. REV. STAT. § 65.067(1); WASH. REV. CODE § 24.12.010.

262. See OR. REV. STAT. § 65.067(1); WASH. REV. CODE § 24.12.010.

263. See OR. REV. STAT. § 65.067(1); WASH. REV. CODE § 24.12.010.

264. See *Church Bankruptcy Questions*, *supra* note 78.

265. See *id.*

266. Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re* Catholic Bishop of Spokane), No. 05-80038-PCW, 2005 WL 2108895, at \*22-23 (Bankr. E.D. Wash. Aug. 26, 2005) (holding that the bishop, as a natural person, holds assets in trust for the diocese, not the parishes, thus the assets are part of the debtor diocese's estate).

267. *Id.* at \*12-16.

268. *Id.* at \*14.

269. Janet I. Tu, *Spokane Diocese Appeals Court Ruling*, SEATTLE TIMES, Sept. 7, 2005, at B7, available at 2005 WLNR 14113356.



intent of the parishioners that assets be used in their parishes.”<sup>270</sup> Canon law states that the donors who give the money to acquire the assets determine the ownership of those assets.<sup>271</sup> Where parishioners donate money to acquire certain assets, those parishioners own the assets through the parish.<sup>272</sup> Both the Portland archdiocese and the Spokane diocese take the position that assets of the parishes are held in trust for the parishes according to canon law.<sup>273</sup> This reasoning would exclude parish assets from the debtor’s estate under § 541(d) of the Code, because only the diocese’s legal title, not any equitable interest in the trust, comes into the estate. In Portland, the sex-abuse claimants committee has responded to this argument by arguing that the diocese is not separate from the parishes under state law and thus parish assets are diocesan assets.<sup>274</sup> In Spokane, the bankruptcy court has sided with the claimants by determining that any trust that exists under state law places legal title in the bishop, as a natural person, and beneficial title in the diocese, not the parishes.<sup>275</sup>

The positions of the opposing litigants are clear. The sex-abuse claimants rely on the Bankruptcy Code and state law to argue that the only legally cognizable entity is the diocese. Thus, all assets held by organizations under the dioceses belong to the dioceses. In contrast, the dioceses argue that state corporate law gives them the power to be governed by their own internal rules—which, in turn, they argue vest only limited control of parish property in the diocese. The merits of these arguments are likely to be the most difficult determination for the bankruptcy court in each diocese case.<sup>276</sup> The Spokane bankruptcy court has already made this difficult determination, ruling that real property used by the parishes is part of the diocese’s bankruptcy estate because, under state law, title to the property is held by the bishop.<sup>277</sup> In reaching this decision, the court discussed

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270. *Church Bankruptcy Questions*, *supra* note 78; see also 1983 CODE c.1284 (setting out the duties of bishops with respect to parish assets, including, to “be vigilant that no goods placed in their care in any way perish or suffer damage”).

271. 1983 CODE c.1267 § 1.

272. *Church Bankruptcy Questions*, *supra* note 78.

273. *In re Catholic Bishop of Spokane*, 2005 WL 2108895, at \*14 (describing the position of the Spokane diocese); Woodward, *supra* note 258 (describing the position of the Portland archdiocese).

274. Woodward, *supra* note 258.

275. *In re Catholic Bishop of Spokane*, 2005 WL 2108895, at \*18.

276. See Woodward, *supra* note 258 (noting the arguments on both sides of the property debate); Steve Woodward, *Archdiocese Lists Nine Parishes, One School for Test Case of Assets*, OREGONIAN (Portland), Feb. 1, 2005, at B04, available at 2005 WLNR 6478924 (noting Bankruptcy Judge Elizabeth Perris’s request that the diocese apply its argument that parish assets are held in trust to ten church properties).

277. *In re Catholic Bishop of Spokane*, 2005 WL 2108895, at \*22.

the First Amendment implications of applying state and federal law instead of canon law to determine the ownership of the real property.<sup>278</sup> Ultimately, the court decided that applying secular law did not impermissibly burden the free exercise of religion.<sup>279</sup> The Diocese of Spokane is appealing this decision, arguing, among other things, that the court did “not giv[e] . . . [canon] law sufficient weight in determining parish ownership.”<sup>280</sup> The issue of the appropriate weight to give canon law in the diocese-parish property debate implicates the First Amendment.<sup>281</sup> These implications are discussed in more detail in the next Part of this Comment.

#### IV. THE FIRST AMENDMENT IMPLICATIONS OF THE DIOCESE-PARISH PROPERTY ISSUE

##### A. *Case Law: Ecclesiastical Abstention and Neutrality*

The Spokane court discussed the application of the ecclesiastical abstention doctrine when deciding the diocese-parish issue. This doctrine mandates, in certain situations, judicial deference to decisions made by religious leaders. The doctrine finds its roots in the case of *Watson v. Jones*<sup>282</sup> where the United States Supreme Court wrote:

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned . . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.<sup>283</sup>

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278. *Id.* at \*14–17.

279. *Id.* at \*17.

280. *Tu, supra* note 269.

281. *In re Catholic Bishop of Spokane*, 2005 WL 2108895, at \*14–17.

282. 80 U.S. (13 Wall.) 679 (1871). Since *Watson*, the doctrine has evolved to draw distinctions between questions of faith and secular questions of church property and business. See *infra* notes 309–12 and accompanying text.

283. *Watson*, 80 U.S. (13 Wall.) at 728–29.

The doctrine is a product of the judicial interpretation of the First Amendment, though it is unclear if its roots are in the Establishment Clause or the Free Exercise Clause.<sup>284</sup>

A key case that highlights the Establishment Clause-Free Exercise blending found in the ecclesiastical abstention doctrine is *Serbian Eastern Orthodox Diocese v. Milivojevich*,<sup>285</sup> where the United States Supreme Court vacated the Supreme Court of Illinois's ruling that the Serbian church's defrocking of a priest was arbitrary and that it had no authority to reorganize the diocese as it did.<sup>286</sup> The church in this case was organized as a not-for-profit organization under Illinois state law.<sup>287</sup> The bishop in question had been removed for acts of defiance and violation of his oath.<sup>288</sup> There was also a basic dispute over who controlled certain assets of the church, specifically over the church's decision to create three new dioceses.<sup>289</sup> The United States Supreme Court found that the First Amendment was implicated, because the Supreme Court of Illinois had been called on to undertake "extensive" review of "decisions of the highest ecclesiastical tribunal within a church of hierarchical polity."<sup>290</sup> The United States Supreme Court found that the state court's review was improper because, in such situations, the civil court should "accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."<sup>291</sup> Though there was a property dispute involved, the Court found it to be essentially a religious dispute "which under our cases is for ecclesiastical and not civil tribunals."<sup>292</sup>

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284. See Christopher R. Farrel, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109 (2003), where the author notes:

[T]he Court has been unclear as to the precise textual source of the doctrine—i.e., whether the doctrine is a product of the Free Exercise Clause or of the Establishment Clause—because while the cases tend to cast the matter in terms of the free exercise of religion, they also make numerous references to the "entanglement" of church and state, which is a hallmark of Establishment Clause analysis.

*Id.* at 116.

285. 426 U.S. 696 (1976).

286. *Id.* at 698, 724–25.

287. *Id.* at 701.

288. *Id.* at 705.

289. *Id.* at 701.

290. *Id.* at 709.

291. *Id.* (citation omitted).

292. *Id.*

Notably, the Court rejected an exception to the ecclesiastical doctrine.<sup>293</sup> This "arbitrariness exception" from *Gonzalez v. Archbishop*<sup>294</sup> was rejected because, according to the *Milivojevich* Court, review permitted by it "must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question."<sup>295</sup> The Court concluded that because the Serbian church's higher ecclesiastical body had ruled on the questions before it, the state supreme court should have deferred to its ruling.<sup>296</sup> It held that "[w]hen [as permitted by the First Amendment,] ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them."<sup>297</sup> However, one issue the Court did not reach was "[w]hether corporate bylaws or other documents governing the individual property-holding corporations may affect any desired disposition of the Diocesan property" because that was "not a question before [it]."<sup>298</sup> In essence the Court did not decide the property question before it that would, like the present diocesan bankruptcies, implicate property definitions under state corporate law that conflict with those under church law. The *Milivojevich* Court did note that a civil court might be permitted to intervene in narrow circumstances where a church "acts in bad faith . . . for secular purposes."<sup>299</sup>

There was certainly precedent for the strong ecclesiastical abstention doctrine of *Milivojevich*.<sup>300</sup> However, Justice Rehnquist, in a dissenting opinion, read this precedent quite differently. He first noted that "the jurisdiction of [the] court was invoked by [the church

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293. *Id.* at 713.

294. 280 U.S. 1 (1929).

295. *Milivojevich*, 426 U.S. at 713. The *Gonzalez* Court held that absent "fraud, collusion, or arbitrariness," the civil court should defer on purely ecclesiastical matters. *Gonzalez*, 280 U.S. at 16.

296. *Milivojevich*, 426 U.S. at 724-25.

297. *Id.* at 724.

298. *Id.*

299. *Id.* at 713.

300. See, e.g., *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.").

leadership], who sought an injunction establishing their control over property” of the church.<sup>301</sup> Further, he found:

[T]here was nothing to suggest that [the Supreme Court of Illinois’s opinion] was based upon anything but commonsense rules for deciding an intraorganizational dispute: in an organization which has provided for majority rule through certain procedures, a minority’s attempt to usurp that rule and those procedures need be given no effect by civil courts.<sup>302</sup>

Justice Rehnquist particularly highlighted *Maryland & Virginia Churches v. Sharpsburg Church*,<sup>303</sup> where the United States Supreme Court affirmed a state court’s dismissal of two actions brought by church leadership to prevent two churches from withdrawing from its association.<sup>304</sup> The state court in that case based its decision on consideration of state law, deed language, corporate charters, and the church constitution.<sup>305</sup> In Rehnquist’s view the proper application of the First Amendment in the Serbian church case did not invoke the Free Exercise Clause but, rather, the Establishment Clause.<sup>306</sup> He found nothing violative of the Free Exercise Clause in the state court’s ruling, and, on the contrary, found it to be a proper “application of neutral principles of law consistent with the decisions of this Court.”<sup>307</sup> Rehnquist warned that by rubber-stamping the decisions of the church hierarchy based on Free Exercise concerns, the majority “create[d] far more serious problems under the Establishment Clause.”<sup>308</sup>

Rehnquist’s dissent was a harbinger of things to come in the Court’s First Amendment jurisprudence. In *Jones v. Wolf*,<sup>309</sup> the Court held that states may handle church property disputes in any manner that does not require consideration of matters of church doctrine.<sup>310</sup> The Court specifically upheld the application of basic property and trust law because they were “objective, well-established

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301. *Milivojevich*, 426 U.S. at 725 (Rehnquist, J., dissenting).

302. *Id.* at 729.

303. 396 U.S. 367 (1970).

304. *Milivojevich*, 426 U.S. at 731–32 (Rehnquist, J., dissenting).

305. *Id.* at 732. Rehnquist noted that the Court in *Sharpsburg Church* “dismissed the Eldership’s contention that this judgment violated the First Amendment for want of a substantial federal question.” *Id.*

306. *Id.* at 733 (“The rule [from the Establishment Clause] . . . is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect.”).

307. *Id.* at 733–34.

308. *Id.* at 734.

309. 443 U.S. 595 (1979).

310. *Id.* at 602.

concepts.”<sup>311</sup> *Jones* implies that the Court will decide property issues before it when it can apply neutral principles without delving too deeply into church law. Since *Jones*, the Court’s Free Exercise jurisprudence has taken a decidedly “neutralist” turn, meaning the Court is willing to apply “neutral, generally applicable law” in a First Amendment case unless the case also implicates another constitutional principle.<sup>312</sup>

### B. Application to the Diocesan Bankruptcies

Though the Court has not decided an ecclesiastical abstention doctrine case since it took a more neutralist approach to the First Amendment in *Employment Division v. Smith*<sup>313</sup> and *City of Boerne v. Flores*,<sup>314</sup> the approach is helpful in understanding how the Court might analyze the property question in the diocesan bankruptcies, should the issue come before it.<sup>315</sup> As a preliminary matter, it should be noted that there is—in addition to ecclesiastical abstention—another type of abstention that can be exercised specifically by a bankruptcy court. Under § 305 of the Code, a bankruptcy court may “dismiss a case . . . or . . . suspend all proceedings in a case under this title, at any time if . . . the interests of creditors and the debtor would be better served by such dismissal or suspension.”<sup>316</sup> The plain language of the statute says that such a dismissal “is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court of the United States.”<sup>317</sup> The constitutionality of this provision has been questioned<sup>318</sup> and indeed some courts of appeal have

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311. *Id.* at 603.

312. See *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law . . .”); see also *City of Boerne v. Flores*, 521 U.S. 507, 513–14 (1997) (establishing that *Employment Division v. Smith* controls where a neutral, generally applicable law is challenged under the Free Exercise Clause, but where the law is neither neutral nor generally applicable, the state must show a “compelling interest” for burdening the free exercise of religion).

313. 494 U.S. 872 (1990).

314. 521 U.S. 507 (1997).

315. See Farrel, *supra* note 284, at 121–34 (discussing the “rise of neutrality” and its implications for the ecclesiastical abstention doctrine).

316. 11 U.S.C.A. § 305(a)(1) (Supp. V 2005).

317. *Id.* § 305(c); see also S. REP. NO. 95-989, at 35 (1978), as reprinted in 1978 U.S.C.A.N. 5787, 5821 (“A principle of the common law requires a court with jurisdiction over a particular matter to take jurisdiction. This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction.”).

318. *Farmer v. First Va. Bank*, 22 B.R. 488, 490 (Bankr. E.D. Va. 1982) (holding that subsections 305(a) and (c) are unconstitutional to the extent that they attempt to bar review of constitutional issues). But see *Chem. Bank v. Togut (In re Axona Int’l Credit & Commerce Ltd.)*, 924 F.2d 31, 36 (2d Cir. 1991) (holding that the fact that § 305 does not

reviewed abstention decisions made by bankruptcy courts under § 305.<sup>319</sup>

However, it seems unlikely that § 305 abstention will be exercised given that the Tucson plan has been confirmed,<sup>320</sup> the Portland case has begun its second year,<sup>321</sup> and the court in Spokane has squarely taken on the diocese-parish property issue.<sup>322</sup> The Spokane case gives the best preview of how the First Amendment issues may play out in the diocesan bankruptcies.

The Spokane court addressed First Amendment issues<sup>323</sup> when responding to the diocese's assertions that the Free Exercise Clause precluded the court's examination of canon law and required the court to accept the diocese's interpretation of canon law without further inquiry.<sup>324</sup> The court stated that the diocese "argue[s] that no civil court has authority to even examine the rights of [claimants] to church property as those rights are determined by internal church doctrine."<sup>325</sup>

The Spokane court responded to this argument by noting that the diocese offered no case law to support its contention that parties who have monetary claims against a religious organization are bound by the internal laws of that religious organization.<sup>326</sup> The court went on to do its own case law analysis, citing, among other cases, *Watson*, *Jones*, and *Milivojevich*.<sup>327</sup> The court cited these cases as part of a "long line of Supreme Court cases address[ing] resolution of property disputes among members of religious organization."<sup>328</sup> While

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bar review by district courts prevents the section from violating Article III of the Constitution).

319. See *Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.)*, 37 B.R. 617, 630 (N.D. Ill. 1984) (finding that appeal of abstention order is reviewable if it raises jurisdictional issues), *aff'd* 762 F.2d 542 (7th Cir. 1985); *In re Bailey's Beauticians Supply Co.*, 671 F.2d 1063, 1067 (7th Cir. 1982) (finding that the bankruptcy court's discretion under § 305 is broad and that its decision to dismiss in the best interests of the parties should only be reversed on abuse of that discretion).

320. See Kornman, *supra* note 18 (noting that the bankruptcy judge approved the diocese's Chapter 11 bankruptcy reorganization plan).

321. See Woodward, *supra* note 83 (noting the Portland bankruptcy judge's decision to extend the diocese's time to file a plan until November 15, 2005—more than sixteen months after the diocese filed its Chapter 11 petition on July 7, 2004).

322. See *Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re Catholic Bishop of Spokane)*, No. 05-80038-PCW, 2005 WL 2108895, at \*22 (Bankr. E.D. Wash. Aug. 26, 2005).

323. *Id.* at \*14-17.

324. *Id.* at \*14.

325. *Id.*

326. *Id.*

327. *Id.* at \*14-15.

328. *Id.* at \*15.

acknowledging that these cases addressed court deference to decisions made within hierarchical churches like the Roman Catholic Church, the court distinguished the diocese-parish property dispute as being a secular dispute—i.e., not an intrachurch dispute like those in *Watson*, *Jones*, *Milivojevich*, and the other cases.<sup>329</sup> The court emphasized that the case before it was “a purely secular dispute between creditors and a bankruptcy debtor, albeit one which is a religious organization.”<sup>330</sup> Further, the court noted, the intrachurch parties—the diocese and its parishioners—were on the same side of the issue, both arguing that the real property in question belonged to the parishes, not the dioceses.<sup>331</sup>

Since this dispute was not an intrachurch dispute, the Spokane court concluded that the key First Amendment question was whether the application of the Bankruptcy Code and state law resulted in a substantial burden on the diocese’s free exercise of religion.<sup>332</sup> The court noted that, as a general rule, the court itself—as a government actor—could apply facially neutral and generally applicable laws like the Code and state law even if its application placed an “incidental” burden on religion.<sup>333</sup> However, if its application placed an “undue or substantial burden” on the exercise of religion, the court would have to demonstrate that it had a compelling interest in applying the laws.<sup>334</sup> But the court noted, this “compelling interest” inquiry was only necessary if the application of the Code and state law was a substantial burden on the exercise of religion.<sup>335</sup>

The Spokane court concluded that its application of the Code and state law to determine who owned the property at issue did not place a substantial burden on the free exercise of religion.<sup>336</sup> The court pointed out that religious organizations, like the diocese, exist in a secular world.<sup>337</sup> Consequently, they engage in many secular activities—such as owning property and transacting business with secular parties.<sup>338</sup> Further, the activities giving rise to the dispute between the diocese and sex-abuse claimants—that led the diocese

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329. *Id.* at \*15–16.

330. *Id.* at \*16.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

335. *Id.*

336. *Id.* at \*17.

337. *Id.* at \*16.

338. *Id.*



into bankruptcy court—were secular at their core: alleged tortious acts of priests and the dioceses.<sup>339</sup> The court noted that the diocese's alleged liability was predicated on secular, state law—not church doctrine or religious beliefs.<sup>340</sup> The court also observed that filing for bankruptcy is a secular activity and that “[i]t is not a burden on a religious organization which voluntarily seeks the protection of the bankruptcy laws to require it to treat its creditors in the same manner as any other debtor.”<sup>341</sup> Thus, the court concluded that application of federal bankruptcy law—particularly § 541, which defines “property of the estate”—and state law did not substantially burden the free exercise of religion.<sup>342</sup>

The ultimate result of the Spokane court's ruling was that property held in title by the bishop—even if it was used and controlled by the parishes—became property of the debtor diocese's estate.<sup>343</sup> This means the property can be used to pay off claimants under the diocese's reorganization plan, thus increasing the number of assets available for that purpose. The decision is a setback for the Diocese of Spokane, which had hoped to shield those assets from becoming part of the bankruptcy estate. The diocese has appealed the decision and seems ready to stand by its argument that failure to give due weight to canon law—which defines property rights within the Roman Catholic Church—impermissibly burdens the free exercise of religion.<sup>344</sup> It will be interesting to watch what becomes of this argument and whether it will carry the day in another, higher court. What does seem clear from the Spokane case is that the thrust of the First Amendment arguments will be the Free Exercise Clause, not the Establishment Clause. However, if the diocese prevails at some point, the sex-abuse claimants may bring an Establishment Clause argument, asserting that the government—through its courts—has impermissibly favored the diocesan debtor by not applying the same law it would to secular debtors.

As a final thought, it should be noted that the dioceses' access to and potential emergence from the bankruptcy process has important—and possibly very positive—implications for the free exercise of religion. The opportunity to apply neutral principles of law to assist the dioceses and the sex-abuse claimants while achieving

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339. *Id.* at \*16–17.

340. *Id.* at \*16.

341. *Id.* at \*17.

342. *Id.*

343. *Id.* at \*22.

344. See Tu, *supra* note 269 (noting the Diocese of Spokane's decision to appeal).

both of their goals furthers the free exercise of religion. To the extent the dioceses are able to emerge from the process with their financial health intact, they will be able to continue to provide a forum for the exercise of their parishioners' faith. And to the extent the dioceses are able to actually pay something to all victims with valid claims, they may be well on their way to making amends for some of the harm with which the dioceses and their priests have been charged.

### CONCLUSION

While there are valid arguments that the sex-abuse claims should not be handled in the bankruptcy context,<sup>345</sup> the pertinent fact is that they are being handled that way, for the time being, in Portland, Tucson, and Spokane. Whether the sex-abuse claims *should* be handled in bankruptcy has not been the focus of this Comment. Rather, the focus has been on whether the bankruptcy process as it exists, in the context of the current Code and current case law, *is able* to handle this unique filing. Considering precedent, statutory language, and constitutional concerns, this Comment concludes that it can. While the Chapter 11 filings of several Catholic dioceses represent a new challenge for the Bankruptcy Code, ultimately the

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345. There are certainly arguments against the handling of sex-abuse claims in bankruptcy court. Unless relief from the automatic stay is granted, few claims will ever be litigated once the church files. See 11 U.S.C.A. § 362(d)(1) (Supp. V. 2005) (requiring the court to lift the stay if a party in interest moves to have the stay lifted and the court find "cause" to lift the stay); see also *id.* § 524(a)(2) (stating that discharge "operates as an injunction against the commencement or continuation of any action" against the debtor for debts discharged in bankruptcy). Claimants do still have the right to a jury trial because their claims are of the personal injury variety—unless they consent to another method of dispute resolution. See 28 U.S.C.A. § 157(b)(5); 28 U.S.C. § 1411 (2000). The latter is likely, especially since the sex-abuse claimants are being represented as a group and many will likely opt to handle the claims in an expedited mediation format. The only claims that will be litigated in the traditional sense are those filed post-petition arising from acts occurring post-petition. See 11 U.S.C.A. §§ 362, 524 (limiting the application of the automatic stay and discharge to claims arising before the filing of debtor's bankruptcy petition). Considering the fact that many dioceses around the country have faced similar issues and have decided to settle and pay out large sums, one could question whether the dioceses who do file are really putting forward their best effort settle outside the bankruptcy context. See *supra* notes 201–204 and accompanying text. Given all the ambiguities and potential constitutional implications that a court presiding over the cases must face, it might be better for these parties to reach settlements or litigate outside this very technical, highly intrusive process. It is not always safe to assume that settlement is the best route. For many victims and critics of the dioceses, it may be quite important for them to have their days in court. The impact of the diocesan filings are that they unilaterally foreclose that option to many plaintiffs.

Code is written broadly enough and prescribes a process that is equitable enough to meet this challenge.

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