Comments

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Catholic Diocese Sexual Abuse Suits, Bankruptcy, and Property of the Bankruptcy Estate: Is the "Pot of Gold" Really Empty?

On July 6, 2004, something happened that had never previously occurred in the history of the United States of America—a Catholic diocese sought the protection of the United States Bankruptcy Court. Facing enormous potential debts from pending lawsuits, the Archdiocese of Portland, Oregon became the first diocese to file for Chapter 11 bankruptcy protection.[1] It would not be the last. In September 2004, the Diocese of Tucson, Arizona followed suit by filing its own petition for Chapter 11 protection.[2] The Diocese of Spokane, Washington announced in November 2004 that it would be the third diocese to file and made good on the promise a few weeks later.[3]

The events that led up to the Portland Archdiocese's filing foreshadowed the filing of those dioceses to come. Years of settlements stemming from alleged sexual abuse, a large number of

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1 Aviva L. Brandt, *Portland Archdiocese Files for Bankruptcy–Prelate Cites Costs of Abuse Suits, but Plaintiffs say He is Bluffing*, STAR-LEDGER (Newark, N.J.), July 7, 2004, at 3.

2 Arthur H. Rotstein, *Diocese Files for Bankruptcy; Tucson Bishop Cites Abuse Cases*, SEATTLE TIMES, Sept. 21, 2004, at A5.

3 Janet I. Tu, *Spokane Diocese Files Bankruptcy*, SEATTLE TIMES, Dec. 7, 2004, at B1.

similar cases that remained unsettled and potentially ready to go to trial, and the reluctance of insurance carriers to pay for further settlements all contributed to the bankruptcy filings. Portland Archbishop John G. Vlazny summed up the position of his archdiocese and the others that have filed for bankruptcy so far: "The pot of gold is pretty much empty right now."[4]

Attorneys for Portland-area plaintiffs who have filed suit against the Portland Archdiocese have publicly scoffed at the claim that the archdiocese is out of money. For instance, attorney David Slader stated, "[t]he archdiocese is one of the wealthiest corporations in Oregon,"[5] and claimed that the Portland Archdiocese alone owned more than $500 million in tax-assessed properties.[6] The basis for the discrepancy between Slader's view and Archbishop Vlazny's view ultimately stems from two different concepts of property ownership—one civil and the other ecclesiastical. Bankruptcy courts have recently held that Slader's view will prevail, as will be discussed below, but at the time of the historic Portland filing, the legal question was truly open and had never been ruled on.

Before framing the parameters of the bankruptcy law question, it is important to know what happens when a debtor files for bankruptcy protection in terms of the protections the federal Bankruptcy Code erects. The automatic legal consequences of a Chapter 11 filing are many. Upon filing a petition, all efforts to collect debts that have arisen before the filing of a bankruptcy petition are immediately stayed, as per 11 U.S.C. § 362. Bankruptcy's so-called "automatic stay" is powerful enough to temporarily stop pending civil lawsuits and trials, including certain sexual abuse trials against the Portland Archdiocese.[7] The automatic stay is a so-called "breathing spell," which stops creditors from financially dismantling the debtor's assets and helps to facil-

4 Laurie Goodstein, *Oregon Archdiocese Files for Bankruptcy Protection*, N.Y. TIMES, July 7, 2004, at A12. This quote is, of course, the basis for the title of this Comment.

5 Aviva L. Brandt, *Archdiocese Seeks Bankruptcy Shield*, TULSA WORLD, July 7, 2004, at A8. As for Archbishop Vlazny's press conference remarks, Slader said: "The bishop hasn't begun to touch his pot. He is lying . . . ." *Id.*

6 *Id.*

7 Goodstein, *supra* note 4 ("The plaintiff was seeking $130 million in damages [against the Portland Archdiocese] and said he was determined to have a public hearing of his case against the church. But a bankruptcy filing means that the trial is immediately suspended.").

itate an effective reorganization plan.[8]

Another automatic occurrence is the creation of a bankruptcy estate. As the Bankruptcy Code states, "[t]he commencement of a [Chapter 11] case . . . creates an estate. Such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case."[9] The bankruptcy estate is quite broad and was intended to be so.[10] Virtually all of the assets a debtor owns will become part of the debtor's bankruptcy estate. This breadth creates a problem for the dioceses that have filed for bankruptcy.

Each Catholic diocese has multiple parishes within its geographical sphere. Each parish contains various real property (which will be referred to collectively as "parish property"), such as churches, seminaries, schools, and the like. For the most part, the bishop (in the case of a diocese) or the archbishop (in the case of an archdiocese) holds the titles to such properties, as well as cash or liquid financial assets that also ostensibly belong to each parish. In addition, each diocese or archdiocese owns specific real and personal property for its own uses.

Perhaps the most important legal question surrounding the bankruptcy of a Catholic diocese is this: who owns the multitude of parish real and personal property? Given the ownership structure of parish lands, for one, the obvious answer is that the diocese owns the property. Title to property is frequently ownership of property, which should mean that parish property is part of the diocese bankruptcy estate. Yet upon deeper inspection, the legal waters begin to muddy. Catholic canon law holds that parish property belongs to the parishes themselves, not the diocese that holds the civil legal title.[11] Whichever view is legally correct will have a potentially dispositive impact in diocese bankruptcy cases.

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[8] *See* United States v. Dos Cabezas Corp., 995 F.2d 1486, 1491 (9th Cir. 1993); *In re* Amcor Funding Corp., 117 B.R. 549, 552 (D. Ariz. 1990); H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 1977 WL 9628 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.").

[9] 11 U.S.C. § 541(a)(1) (2000).

[10] *See, e.g.*, United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983) ("The House and Senate Reports on the Bankruptcy Code indicate that § 541(a)(1)'s scope is broad."); *In re* Chappel, 189 B.R. 489, 493 (B.A.P. 9th Cir. 1995) ("The legislative history of the Bankruptcy Code reveals that the concept of property of the estate is to be interpreted broadly.").

[11] *See infra* Part II.B.

Determining actual ownership is vitally important for each Chapter 11 reorganization plan a diocese files. If parish property is truly owned by individual parishes, the property will not become part of the bankruptcy estate of the diocese and will not be threatened by creditors' collection efforts against the diocese. The dioceses themselves, supported by Catholic canon law, have claimed that this is the case and that the legal outcome ought to be in accord with canon law. If parish property is legally owned by a diocese, however, the property will be part of the dioceses' bankruptcy estates because of § 541(a)'s broad mandate. If this is the case, each diocese bankruptcy estate will vastly increase in monetary size, and the amount of money available for creditors will increase proportionately.

This Comment will discuss arguments for excluding parish property from the bankruptcy estate of a diocese when the diocese[12] files for bankruptcy or, alternatively, to what extent such property should be part of a diocese's bankruptcy estate. The dioceses' position that parish property should be excluded from a diocese's estate appears to be on weak legal ground. This result follows from the current civil law status of parish properties, which are held in the name of each diocese. Consequently, the legal claim that parish property should be excluded from the bankruptcy estate of a diocese will likely be unavailing. This result is largely due to insufficient use of the asset-shielding structures offered by civil law, such as incorporation.

Part I will trace the recent events leading up to each bankruptcy filing to date, beginning with the Boston Archdiocese's financial problems. This examination will underscore the present and future need for settled bankruptcy law as it pertains to diocese and parish property. Part II will look at the relevant provisions of the Bankruptcy Code, discuss the workings of the bankruptcy estate, and examine the unique problems posed by the bankruptcy filing of a diocese. This Part will also examine the structure of Catholic canon law as it pertains to the ownership of parish property and the arguments based on canon law that parish property should be excluded from a diocese's bankruptcy estate. Part III will discuss probable bankruptcy outcomes

[12] Though there are other legal entities that might find themselves in a similar position as a bankruptcy petitioner, this Comment will be limited only to questions surrounding diocese bankruptcies. Catholic canon law is unique and might therefore allow for a different outcome than the laws of another faith, and as such, other faiths are outside the scope of this Comment.

for those dioceses that have already filed for bankruptcy. This Part will illustrate why keeping parish property out of the bankruptcy estate of each diocese will prove to be a difficult proposition. Part IV will discuss the possibility of applying canon law directly to the bankruptcy cases. As will become apparent, Supreme Court jurisprudence probably forecloses, or at least severely hinders, the direct application of canon law in disputes involving church law and third parties. Part V will discuss proactive measures that the dioceses that are already in bankruptcy court could have taken in years past. Finally, Part VI will discuss the preliminary outcomes of the three American dioceses that have filed for bankruptcy. Civil law will allow for protection of parish property should a diocese and its parishes take proactive steps, like separate parish incorporation. Ultimately, not taking these steps will have a negative impact on unincorporated parishes within dioceses struggling with the financial impact of sexual abuse suits.

I

Lawsuits, Settlements, and Unprecedented Bankruptcy Petitions

A. The Boston Archdiocese Avoids Bankruptcy

A discussion of financial pressures leading dioceses to bankruptcy should begin with the Boston Archdiocese primarily because recent diocesan financial problems related to bankruptcy began in Boston in early 2002.[13] In December 2002, the now-infamous Cardinal Bernard Law[14] took the then-unprecedented step of asking for and receiving permission from his archdiocese's financial council to file for bankruptcy if needed.[15] Prior to 2002, the archdiocese had settled abuse claims by eighty-six

[13] Peter Wong, *Portland, Boston: A Tale of Two Endings*, STATESMAN JOURNAL (Salem, Or.), July 11, 2004, at 1A.

[14] Cardinal Bernard Law led the Boston Archdiocese during this period, and records have surfaced showing that Law knew that certain abuses were occurring under his leadership. Peter Gelzinis, *Betrayed by His church, a Man Meets a Sad and Lonely Ending*, BOSTON HERALD, Dec. 23, 2004, at 22. Rather than exposing abusers, Law reportedly attempted to cover abuse by exiling abusers from the archdiocese. *Id.*

[15] Tom Mashberg & Robin Washington, *Church Bankruptcy Option OK'd*, BOSTON HERALD, Dec. 5, 2002, at 1. Seeking approval from the finance committee seems to be one of the most important preliminary steps a diocese must take before filing for bankruptcy. *Id. See also* CODE OF CANON LAW, 1983 CODE c.1280 ("Every juridical person [including dioceses and parishes] is to have its own finance

claimants for a reported $10 million.[16] At the time press coverage intensified, the archdiocese reportedly faced $90 million in potential liability to settle 450 lawsuits, and insurers were balking at the prospect of paying for further settlements.[17] Things began to look grim for the archdiocese, and speculation swirled that the last legal option available might be filing for bankruptcy.[18]

Eventually, the Boston Archdiocese avoided bankruptcy by reaching a settlement agreement with a large pool of claimants for approximately $85 million, which was financed by selling a forty-three-acre tract of land owned by the archdiocese itself to Boston College for a reported $99.4 million.[19] This tract also contained the archbishop's former residence.[20] In what some consider to be a related move, the archdiocese has begun implementing a plan of parish and parochial school closures in the Boston area, which, coupled with the sale of those parish's assets, is ultimately expected to net out to the closure of sixty-five parishes.[21] The archdiocese claimed that these closures were planned before the settlement, but a few vocal parishioners were skeptical because the closures and sales occurred so close to the settlement.[22] This set of parish closures and asset sales will be revisited later in this Comment in the discussion of canon law's

committee, or at least two counsellors, who are to assist in the performance of the administrator's duties . . . .").

In published reports, there seems to be some dispute as to whether the approval of the Vatican itself is needed. *See* Mashberg & Washington, *supra*. *But see* Alan Gustafson, *Portland Archdiocese Files for Bankruptcy*, STATESMAN JOURNAL (Salem, Or.), July 7, 2004, at 1A ("[Portland Archbishop John G.] Vlazny consulted with the Catholic Church hierarchy before filing for bankruptcy. Church officials declined to say whether ultimate approval came from the Vatican. Communications between the Portland Archdiocese and the Vatican are confidential matters . . . .").

16 Wong, *supra* note 13.

17 Mashberg & Washington, *supra* note 15.

18 Jim Barnett & Jeff Kosseff, *Boston Archdiocese, Wary of Precedent, Cools to Bankruptcy*, OREGONIAN (Portland, Or.), July 20, 2004, at A1.

19 *Id.* There have been minor discrepancies in the published reports of the exact dollar amounts and acres of land involved in this sale. One article placed the acreage at forty-six acres and the dollar amount at $107 million. *See* Joseph A. Reaves, *Boston Archdiocese Escapes Bankruptcy*, ARIZ. REPUBLIC (Phoenix), June 17, 2004, at B6.

20 Ellyn Ferguson, *Portland Archdiocese May Not Be the Last to File for Bankruptcy*, GANNET NEWS SERVICES, July 8, 2004.

21 Barnett & Kosseff, *supra* note 18.

22 *Id.* ("'Obviously they're selling off all these buildings to pay for something—and that's all from that settlement, the abuse cases,' said Glen Hannington, an area lawyer who represents parents of children at St. Peter's, a school slated for closure.").

effect on implied trust agreements.[23] While the land sold to Boston College consisted of real estate owned entirely by the archdiocese, the closure of parishes and reported assets sales could potentially be in conflict with canon law and might open other dioceses to harmful legal arguments.[24]

Though the financial impact on the Boston Archdiocese was obviously hefty and those closely involved in the abuse and its cover-up have paid a high personal price,[25] "an end to [the Boston Archdiocese's] costly claims might be in sight."[26] Even some of the plaintiffs who opted out of the large settlement have recently settled their causes of action.[27] As such, there is reason to believe the Boston Archdiocese can avoid bankruptcy. The same cannot be said for the Portland Archdiocese.

B. The Portland Archdiocese Files for Bankruptcy

By February 2004, it was becoming clear that the Portland

23 *See infra* Part III.A.2.

24 *See infra* Part III.A.2.

25 Cardinal Bernard Law, who was largely the focal point of the abuse scandal in its early days, resigned from his post as Boston Archbishop some ten months before the $85 million settlement was negotiated by his successor, Archbishop Sean P. O'Malley. Reaves, *supra* note 19.

Cardinal Law's infamy has only grown since his resignation. A stage play based on several depositions given by Law entitled "Sin: A Cardinal Deposed" was slated to run at Wellesley College in May 2004. Heather Allen & Stephanie Vosk, *Play Based on Cardinal Law's Testimony Due at Wellesley in May*, BOSTON GLOBE, March 19, 2004, at B6. The Showtime cable network has cast actor Christopher Plummer as Cardinal Law in a made-for-cable movie called "Our Fathers." Tom Jicha, *Showtime Drama Unforgettably Dramatizes Church Abuse Scandal*, SOUTH FLORIDA SUN-SENTINEL (Ft Lauderdale), May 21, 2005, at 1D.

After Law's resignation, he was appointed by the Pope to the position of Archpriest of St. Mary Major Basilica—a move that has angered and disappointed vocal critics. *See* Henry Leo Bolduc, *Why a Promotion for Cardinal Law?*, ROANOKE TIMES & WORLD NEWS, June 27, 2004, at 3; Philip M. Neis, *Church Rewards Disgrace*, CAPITAL TIMES & WISCONSIN STATE JOURNAL (Madison), July 10, 2004, at A10.

A few notable former Boston priests, like Paul Shanley and John Geoghan, have faced criminal charges in connection with abuse. Wong, *supra* note 13. Geoghan was convicted and sentenced to 10 years in prison. *Id.* Geoghan's example should prove ominous for other alleged clergy abusers now on trial, as Geoghan was murdered in prison last year while serving his sentence. *Id. See also* Gary V. Murray, *Insanity Plea Planned in Geoghan Slaying*, WORCESTER TELEGRAM & GAZETTE, Sept. 2, 2004, at B7 (noting that Geoghan's alleged killer was serving a life sentence for the murder of a gay man in 1988).

26 Wong, *supra* note 13.

27 *Id.* ("A few claims might go to trial, although four who dropped out of the big 2003 settlement ended up accepting a separate offer from the church of $1.4 million this year.").

Archdiocese was in financial trouble. Archbishop John G. Vlazny issued a press release that detailed the scope of Portland-area sexual abuse lawsuits.[28] The number of suits and dollar figures involved was daunting. Over a period of fifty-three years beginning in 1950 and ending in 2003, the archdiocese had paid out $53 million in settlements—$26 million in church funds, $27 million from private insurance carriers.[29] Surprisingly, "[m]ost of the total amount paid in settlements has been paid [between 2000 and 2004]."[30] Forty-eight claims were still pending "alleging acts that occurred from 18 to 40 years [before 2004]."[31]

Archbishop Vlazny vowed in his press release to fight vigorously, but his archdiocese's financial resources were obviously being strained by the settlement process. The three main sources of funds the archdiocese had been using to settle claims were rapidly depleting.[32] Whether the press release was an attempt to raise funds or to ease the minds of parishioners, it placed the financial difficulties of the archdiocese into the public domain and was a harbinger of things to come. The number of claims would increase as would the dollar amounts associated with them.

In May 2004, the archdiocese began sounding the alarm that the financial breaking point was approaching. At that time, fifty-four claims were pending, and eight were scheduled for trial.[33] The plaintiffs' lawyers stated their belief that the archdiocese was nowhere near bankruptcy, citing what it claimed at the time to be in excess of $300 million in land holdings and "untold millions in cash and investments."[34] Under civil law, virtually all of the holdings of the 124 Portland-area parishes were in the name of Archbishop Vlazny—"a fact that makes [the Portland Archdio-

[28] Press Release, Archdiocese of Portland in Oregon, Archbishop Releases Local Data on Misconduct Cases (Feb. 21, 2004), *available at* http://www.archdpdx.org/news2004/feb04/stats-report.html.

[29] *Id.* The claims included allegations made by 181 individuals against thirty-seven priests, with seventy-six of the allegations being made against the same two priests. *Id.* The archdiocese also mentioned that it was seeking more money from insurers for claims already paid. *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* These three sources were 1) private insurance coverage; 2) an archdiocesan insurance fund, which had been exhausted and was "operating in the red"; and 3) other archdiocesan funds not held in charitable trust. *Id.*

[33] Steve Woodward, *Archdiocese Says Money for Victims Running Out*, OREGONIAN (Portland), May 23, 2004, at A1.

[34] *Id.*

cese] very rich."[35] Archbishop Vlazny, however, claimed that under canon law, he merely held these lands in trust for the parish and its parishioners. He held firm to this position as the discrepancy between canon law and civil law pushed the archdiocese into federal bankruptcy court.

On July 6, 2004, Archbishop Vlazny issued another press release stating that the Portland Archdiocese would be the first diocese in the nation to file for bankruptcy.[36] Two cases set to go to trial that day carried large potential liability. One plaintiff sought over $25 million in compensatory and punitive damages, another a staggering $130 million.[37] The number of claimants had also grown. Archbishop Vlazny felt that since the archdiocese had 60 other claims pending, he could not "in justice and prudence pay the demands of these two plaintiffs."[38] Archbishop Vlazny had consulted his financial council regarding the decision, and the council had apparently approved of the filing.[39] It is safe to say that the council's decision was made easier by the insurance coverers' refusal to pay for further settlements.[40]

Comparisons between the Boston and Portland Archdioceses were inevitable.[41] One obvious difference between the two archdioceses could explain why one filed for bankruptcy and the other did not—Portland's Archdiocese did not have a $100 million parcel of real property immediately at its disposal. Furthermore, the Portland Archdiocese faced a tremendous amount of potential debt burden should its contingent liabilities come to

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35 *Id.*

36 Press Release, Archdiocese of Portland in Oregon (July 6, 2004) (on file with author), *available at* http://www.bishop-accountability.org/bankrupt/2004-07-06-Vlazny-Letter.htm [hereinafter July 6 Letter].

37 *Id.* Both of these suits involve "the late Rev. Maurice Grammond, who was accused of molesting more than 50 boys in the 1980s. Grammond died in 2002." Brandt, *supra* note 1. Reverend Grammond did little to help his legacy before his death but almost assuredly bolstered the case against himself and his archdiocese with one extremely callous remark. Grammond is widely quoted as making the following comment in a 2002 deposition regarding sexual abuse he was alleged to have committed: "I'd say these children abused me. They'd dive in my lap to get sexual excitement." *Id.*

38 July 6 Letter, *supra* note 36.

39 *Id.*

40 Sarah Linn, *Archbishop: Settlements Weren't Paid; Insurance Refused to Pay More Victims*, COLUMBIAN (Vancouver, Wash.), Aug. 7, 2004, at C9 ("Litigation is pending against the insurers, which Vlazny said ceased paying most of the claims starting in February 2001.").

41 *See, e.g.,* Wong, *supra* note 13.

fruition.[42]

The Portland Archdiocese's bankruptcy filing, furthermore, claimed assets of just $19 million, with real estate comprising only $10 million.[43] However, if parish property were included in this calculation, which the Portland Archdiocese did not include in its filing, the value of its tax-assessed land could jump to $500 million or higher, as estimated by lawyers representing alleged abuse victims.[44] It should therefore be apparent that determining the actual size of the Portland Archdiocese's bankruptcy estate will influence the bankruptcy steps to follow.

C. The Tucson Diocese Files for Bankruptcy

Speculation abounded that Portland would not be the last diocese to file.[45] The speculation was correct. The Diocese of Tucson had been considering bankruptcy even before the filing in Portland[46] and followed through by filing for Chapter 11 protection in late September 2004.[47] The Tucson Diocese's financial condition appeared to be in worse straits than Portland's. "According to its financial statement, the [Tucson D]iocese had $4.65 million in long-term debt and a $7 million deficit in unrestricted net assets as of June 30[, 2004]."[48] As with Portland, however, the Tucson Diocese did not include parish assets in its bankruptcy filing and, further, did not include them in its reorganization plan.[49] Unlike Portland, the Tucson Diocese filed its

42 *Id.*

43 Steve Woodward, *Archdiocese Values Land at $10 Million*, OREGONIAN (Portland), July 31, 2004, at C1.

44 *Id.*

45 Ellyn Ferguson, *Portland Case Could Have Domino Effect*, STATESMAN JOURNAL (Salem, Or.), July 8, 2004, at A1 (noting, in particular, the financial vulnerability of the Tucson Diocese).

46 *See generally* Disclosure Statement Regarding Plan of Reorganization, *In re* The Diocese of Tucson, No. 4-04-04721 (D. Ariz. Sept. 20, 2004) [hereinafter Disclosure Statement]; *see also Tucson Diocese Considers Bankruptcy,* BANKR. CT. DECISIONS, June 29, 2004, at 2 ("The diocese is certainly not the first to talk of filing for bankruptcy in light of sexual abuse lawsuits. Most recently, the Boston Archdiocese considered bankruptcy, but as of yet, no diocese has filed."). The diocese had nineteen sexual abuse lawsuits outstanding, and its insurers had paid over $20 million in settlements. *Id.*

47 Rotstein, *supra* note 2.

48 *Id.*

49 Michael Clancy, *Tucson Diocese Faces Liquidation*, ARIZ. REPUBLIC (Phoenix), Nov. 7, 2004, at B1. *See also* Disclosure Statement, *supra* note 46, at 21 ("The Parish Real Property is not included as property of the Estate of the Diocese nor is it considered for purposes of the Plan.").

Chapter 11 reorganization plan on the same day as its bankruptcy petition—a move some felt would lead to a quicker settlement of the case.[50]

The size of the Tucson Diocese's bankruptcy estate is certainly in dispute. The diocese listed some "$16.6 million in assets in its bankruptcy estate, which did not include parishes."[51] An Arizona newspaper tabulated all of the real estate holdings of the parishes and the diocese, which are held in the name of Bishop Gerald Kicanas, and estimated that the diocese's 335 parcels of land alone were worth "a total full cash value of $46.1 million. The assessed full cash value is often but not always lower than a property's market value."[52] As shown above, the diocese itself has very few unencumbered assets. As such, determining the size of the bankruptcy estate makes for a drastic difference in the type of reorganization plan that the bankruptcy court would be able to approve.

D. The Spokane Diocese Files for Bankruptcy

On November 6, 2004, the Diocese of Spokane, Washington announced that talks to settle twenty-eight sexual abuse claims against it had failed.[53] A major factor listed by Bishop William Skylstad for the breaking off of the talks, as was the case in Portland, was the refusal of insurance companies to pay for further settlements.[54]

Less than one week later, the diocese announced that it would

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50 Teya Vity, *Bankruptcy Filing Breaks New Legal Ground*, TUCSON CITIZEN, Sept. 21, 2004, at A2 ("[The simultaneous filing of a bankruptcy petition and reorganization plan] becomes the framework for a settlement[.]" (quoting University of Arizona James E. Rogers College of Law professor Jean Braucher)).

51 Stephanie Innes, *Kicanas Outlines Financial Resources*, ARIZ. DAILY STAR (Tucson), Nov. 10, 2004, at B1. This number conflicts with the earlier $7 million deficit listed above. Rotstein, *supra* note 2. The discrepancy is explained in Innes, *infra* note 52.

52 Stephanie Innes, *Bankruptcy Won't Touch Most Assets, Diocese Says*, ARIZ. DAILY STAR (Tucson), July 11, 2004, at A1. The article went on to list the county with the most valuable property (Pima County, $29.9 million) as well as the most expensive individual piece of property (Our Mother of Sorrows Catholic Church, $3.97 million). *Id.*

53 Nicholas K. Geranios, *Failed Talks May Mean Bankruptcy for Spokane Diocese; Sex Abuse Victims Asking for Millions*, COLUMBIAN (Vancouver, Wash.), Nov. 6, 2004, at C3. Each of the twenty-eight suits involved alleged sexual abuse by former priest Patrick O'Donnell, who was removed from the priesthood in 1986. *Id.*

54 *Id.* ("Insurance companies were not willing to pay the demands of the victims, which totaled millions of dollars, Skylstad said. Lawyers for the victims also sought additional millions from the diocese, which it could not pay, Skylstad said.").

be the third diocese to file for bankruptcy.[55] At the time of the announcement, Bishop Skylstad noted that the Spokane Diocese, though it had fewer claims against it than the Portland Archdiocese and was much smaller than the Tucson Diocese, had previously settled five or six claims for around $300,000 and had spent in excess of $1 million in attorney's fees and $440,600 in public relations expenses.[56]

After the announcement, the Spokane Diocese made good on its promise to file for bankruptcy on December 6, 2004.[57] Reports indicated that liabilities from suits against the diocese could total as much as $76 million and that its total liabilities could reach an overwhelming $81 million.[58] The diocese listed only $11 million in assets,[59] leaving out the assets of its parishes. The Spokane Diocese, therefore, is in the same legal position as those in Portland and Tucson. Settling the question of the size of the bankruptcy estate will be crucial.[60]

E. The Need for Bankruptcy Precedent

Some commentators have expressed surprise at the rate of diocese bankruptcies in the wake of Portland's historic filing.[61] If recent financial troubles plaguing Catholic dioceses are any indication, however, Portland, Tucson, and Spokane will not be the last dioceses to file for bankruptcy protection. Financial problems surrounding alleged sexual abuse are not unique to these three dioceses.

For example, the Diocese of Orange County, California announced that it had reached a settlement agreement with alleged sexual abuse victims for a remarkable and then-record $100 million, a figure that far surpassed the Boston Archdiocese's earlier

55 *See* Virginia de Leon, *Bankruptcy for Diocese; Filing to Stop Sex Abuse Suits Won't Close Schools*, SPOKESMAN-REVIEW (Spokane, Wash.), Nov. 11, 2004, at A1.

56 *Id.*

57 Tu, *supra* note 3.

58 *Id.*

59 *Id.*

60 *Id. See also* Virginia de Leon, *Fate of Parishes may Rest with Courts,* SPOKESMAN-REVIEW (Spokane, Wash.), Dec. 5, 2004, at A1; John Stucke, *Diocese Steps into Uncharted Territory; Interplay of Church, Secular Laws Will Complicate Bankruptcy Case*, SPOKESMAN-REVIEW (Spokane, Wash.), Dec. 5, 2004, at A1.

61 Johnathan Martin & Janet I. Tu, *Catholic Diocese of Spokane to File for Bankruptcy; Church Faces Claims of Sexual Abuse*, SEATTLE TIMES, Nov. 11, 2004, at A1 ("'I thought the bishops would sit back and see how smoothly Portland's went before they also went into bankruptcy,' said Fred Naffziger, professor of business law at Indiana University, South Bend.").

$85 million settlement.[62] A comparison of this settlement to the Boston Archdiocese settlement reveals how much larger the Orange County settlement truly is. The pool of claimants in Boston consisted of 552 individuals, whereas the pool of Orange County claimants consisted of only eighty-seven people, which meant that the average amount received per Orange County claimant was $1.1 million.[63]

Orange County's settlement, if its precedent is repeated in the larger Los Angeles Archdiocese, could create much greater financial liability. Los Angeles's Archdiocese is currently attempting to settle 544 molestation claims, which some have suggested could lead to a final liability figure of $500 million or more.[64] Some have even predicted that the figure for the Los Angeles Archdiocese could far exceed $1 billion before all claims are settled.[65]

As large as the Orange County settlement was, the Diocese of Covington, Ohio recently reached an even higher settlement amount of $120 million.[66] Indeed, the financial situation brought on by abuse suits is reaching critical points in several dioceses. The Dioceses of Davenport, Iowa[67] and the aforementioned Covington, Ohio[68] have publicly contemplated bankruptcy. According to reports, nearly 11,000 people have sued Catholic dioceses since 1950 for alleged sexual abuse.[69] One wonders how long the dioceses' financial resources for settlements will hold. Even large settlements like those in Boston, Orange County, and Covington do not, and likely cannot, cover every potential victim, as demonstrated by the fact that new sexual abuse suits are still being filed against the Boston Archdiocese.[70]

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62 William Lobdell & Jean Guccione, *Abuse Claims Settlement; Diocese's Deal Raises the Bar Across the U.S.*, SEATTLE TIMES, Dec. 4, 2004, at A1.

63 *Id.*

64 *Id.*

65 Jean Guccione, *$1.5 Billion for L.A. Priest Abuses? Molestation Cases Attorney Predicts Staggering Total for Legal Claims*, L.A. TIMES, Aug. 30, 2004, at A4. This article preceded the Orange County settlement.

66 Paul A. Long, *Diocese Settles Abuse Case for $120M*, CINCINNATI POST, June 4, 2005, at A1.

67 *Davenport May Go Bankrupt*, NATIONAL CATH. REP., Oct. 15, 2004, at 3.

68 Paul A. Long, *Diocese Won't Rule Out Chap. 11*, CINCINNATI POST, July 8, 2004, at A1.

69 Deborah Zabarenko, *Sex-Scandal Could Bankrupt U.S. Churches: Nearly 11,000 Alleged Victims: Catholic Dioceses Facing Multimillion-Dollar Lawsuit Settlements*, NATIONAL POST, Dec. 29, 2004, at A19.

70 *10 New Lawsuits Filed for Sex Abuse*, PROVIDENCE J., Jan. 6, 2005, at A3.

The true depth of the cases against dioceses will likely not be known for some time. Even if the recent trend of diocese bankruptcy filings does not continue (which seems improbable), those that have filed to date will be intimately affected by the answer to the question of parish asset ownership. As such, certainty of outcome in bankruptcy law, as much as is possible, will become increasingly important. While bankruptcy is only one solution to financial difficulty, the bankruptcy system must be able to function quickly, efficiently, and effectively for the benefit of debtors and creditors alike. Therefore, it is incumbent on the bankruptcy courts to set precedents when the opportunity arises as it has in the current archdiocese cases. Before the nature of the precedent to be set is clear, one must understand the nature of the bankruptcy principles involved. The results reached in the initial bankruptcy court rulings are in accord with the analysis of this Comment and will probably remain so unless a higher federal court decides to weigh in on the issue.

II

The Bankruptcy Estate and Canon Law

A. The Concept of the Bankruptcy Estate

As mentioned above, the filing of a petition for bankruptcy has several automatic effects. The most important effect for the purposes of this Comment is the creation of a bankruptcy estate consisting of all legal and equitable interests of the debtor in property at the time of the filing.[71] Determining what property or interests belong in an individual debtor's bankruptcy estate is not typically a dispositive issue. One can often state with a fair degree of certainty what legal and equitable interests belong to the debtor at the time of filing. Yet the diocese bankruptcy filings present novel bankruptcy estate issues brought on by the dioceses' unique positions.

The monetary size of a diocese's bankruptcy estate will be crucial to the outcome of a Chapter 11 case because of the relationship between Chapter 11 and Chapter 7 of the Bankruptcy Code. Under Chapter 7, or liquidation bankruptcy, all legal and equitable interests of the debtor are brought together by a trustee in bankruptcy, these assets form the debtor's estate, as per 11

[71] 11 U.S.C. § 541 (2000).

U.S.C. § 541(a),[72] and the trustee sells the assets and distributes the proceeds to creditors.[73] Though it is not possible to convert a diocese's Chapter 11 case into a Chapter 7 liquidation case involuntarily,[74] the amount of money each creditor would have received if a bankruptcy petition had been filed under Chapter 7 is of vital importance to the approval of a Chapter 11 reorganization plan.

Chapter 11, or reorganization bankruptcy, is fundamentally different from Chapter 7. A Chapter 11 debtor reorganizes its debt and proposes to pay its creditors over a number of years, but it retains at least some control over the assets of the debtor's estate and keeps its business functioning.[75] A debtor that retains possession of its assets assumes the role of an estate trustee and retains "all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under [Chapter 11]."[76] A Chapter 11 debtor proposes a plan of reorganization, which ultimately must be approved by a bankruptcy court before it can take effect.[77] As 11 U.S.C. § 1129 states, creditors of a Chapter 11 debtor must either accept the plan of reorganization proposed by the debtor[78] or,

> With respect to each impaired class of claims or interests[,] . . . each holder of a claim or interest of such class . . . will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is *not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such a date* . . . .[79]

This is what is known as the "best interests test," and if it is not satisfied, a bankruptcy court cannot confirm a Chapter 11 plan.[80]

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72 *See supra* note 10 and accompanying text; 11 U.S.C. § 541(a).

73 ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 205 (4th ed. 2001).

74 *See* 11 U.S.C. § 1112(c) ("The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a . . . corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion."). A diocese's incorporation as a "corporation sole" would almost surely place it in the category of corporations that cannot be involuntarily converted, namely, a corporation that is not "moneyed."

75 WARREN & WESTBROOK, *supra* note 73, at 507-09.

76 11 U.S.C. § 1107(a).

77 *Id.* §§ 1121, 1129.

78 *Id.* § 1129(a)(7)(A)(i).

79 *Id.* § 1129(a)(7)(A)(ii) (emphasis added).

80 Matt Miller, *The Church and Chapter 11*, DAILY DEAL, Aug. 9, 2004. Miller writes:

Creditors of a diocese, therefore, must be paid as much as they would have been paid under a Chapter 7 liquidation unless they agree to be paid less.

Consequently, § 541(a), which determines the contents of a debtor's bankruptcy estate, combined with a hypothetical calculation of what creditors would receive under a Chapter 7 liquidation, determines the outer limits of the case in Chapter 11 and, consequently, the liability of a diocese under Chapter 11. Accordingly, calculating the size of a diocese's estate is likely the most crucial factor in determining a diocese's long-term liability under its reorganization. Given the wide divergence of the size of a diocese's bankruptcy estate when the estate includes parish property as opposed to when it does not, the outcome of this question could have the biggest possible impact in diocese bankruptcy cases.

It seems undisputed that each individual bishop or archbishop is the actual title holder of all parish lands and perhaps more parish property as well.[81] The bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement of the case."[82] How, then, could such parish property fail to be part of a diocese's bankruptcy estate?

B. Canon Law on Parish Property Ownership and the Implications for the Bankruptcy Estate

The basis for the answer offered by each diocese lies within Catholic canon law, which is the Roman Catholic Church's code of religious laws. In the sense that canon law is a code, a somewhat self-contained and self-referential system of rules that purport to govern,[83] the Code of Canon Law is structurally similar to

> In any reorganization plan, including a nonprofit, creditors should expect to receive an amount at least equal to what they would have gotten if an estate was liquidated. This is known as the "best interests test." "If they don't, a Chapter 11 can't confirm," says Andrea Coles-Bjerre, a law professor and authority on bankruptcy at the University of Oregon[ ] School of Law.

81 The dioceses themselves do not deny that the bishop of each diocese holds the title to parish property. *See, e.g.*, Disclosure Statement, s*upra* note 46, at 19 ("Accordingly, mere legal title to the Parish Real Property which is owned by the Parishes is *in the name of the Diocese (or the Bishop).*") (emphasis added).

82 11 U.S.C. § 541 (2000).

83 Others have defined the term "code" as a system composed of "statutes, cases, and from customs . . . and additions as are deemed by the codifiers necessary to harmonize and perfect the existing system. In fact, in making a code, new laws may be added and old laws repealed in order to constitute a complete system." BLACK'S

other codes, such as the federal Bankruptcy Code itself.[84] The Code of Canon Law is the Catholic "Church's fundamental legislative document[,] . . . [which] must be regarded as the essential instrument for the preservation of right order, both in individual and social life and in the Church's zeal."[85] Each diocese is "governed by and adheres to Canon Law,"[86] and each archbishop or bishop is required by canon law to so adhere.[87]

Canon law seems to hold that parish property belongs to parishes, regardless of the civil status of the property, because of the ontological status of parishes under canon law. Parishes are described under canon law accordingly:

> A parish is a certain community of Christ's faithful stably established within a particular Church, whose pastoral care, under the authority of the diocesan Bishop, is entrusted to a parish priest as its proper pastor.
>
> The diocesan Bishop alone can establish, suppress or alter parishes. He is not to establish, suppress or notably alter them unless he has consulted the council of priests.
>
> A lawfully established parish has juridical personality by virtue of the law itself.[88]

Thus, a bishop establishes parishes and places each parish under the leadership of a local pastor. A bishop can suppress or alter his parishes, but he cannot do so solely at his discretion, and a lawfully created parish has the status of "juridical per-

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LAW DICTIONARY 250 (7th ed. 1999) (citing WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 18-19 (3d ed. 1914)).

84 One feature of a legal code is internal cross-references. The Code of Canon Law is rife with examples of these. *See, e.g.*, CODE OF CANON LAW, 1983 CODE c.35 ("Within the limits of his or her competence, one who has executive power can issue a singular administrative act . . . *without prejudice to can. 76 §1*.") (emphasis added); *id.* c.144, § 2 ("The same norm applies to the faculties mentioned in *cann. 883, 966, and 1111 § 1*.") (emphasis added).

85 CODE OF CANON LAW, 1983 CODE APOSTOLIC CONSTITUTION at xiii.

86 Disclosure Statement, *supra* note 46, at 19.

87 CODE OF CANON LAW, 1983 CODE c.386, §1:

> The diocesan Bishop is bound to teach and illustrate to the faithful the truths of faith which are to be believed and applied to behaviour. . . . He is alsoon the homily and catechetical instruction, are faithfully observed, so that the whole of [C]hristian teaching is transmitted to all.

See also id. § 1 ("Christ's faithful, conscious of their own responsibility, are bound to sho to ensure that the provisions of the canons on the ministry of the word, especially w [C]hristian obedience to what the sacred Pastors, who represent Christ, declare as teachers of the faith and prescribe as rulers of the Church.").

88 *Id.* c.515, §§ 1-3.

sonhood"[89] in the eyes of canon law. As such, individual parishes exist as juridical persons—separate legal persons—with their own "legal status [under canon law] as 'juridic[al] persons.'"[90] A juridical person can be seen, essentially, as a fictitious person created by and recognized under canon law.

The notion of fictional personhood should immediately bring to mind a prominent type of fictional legal person under civil law, namely, a corporation. "A corporation is a legal entity with an identity or personality separate and distinct from that of its owners or shareholders and must be thought of without reference to the members who compose it."[91] When speaking of the nature of a corporation, one will often invoke concepts similar to those used to describe juridical persons.[92] For the purposes of canon law, therefore, one can understand the nature of a parish by analogy. To some extent, parishes are corporations created under canon law.

With an understanding of a parish's status as a juridical person and all that the status entails, it becomes clearer why canon law dictates that the property each parish acquires belongs to that parish. Canon law states that "[u]nder the supreme authority of the Roman Pontiff, ownership of goods[93] belongs to that juridical

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[89] *Id.* c.115, § 1 ("Juridical persons in the Church are either aggregates of persons or aggregates of things.").

[90] Nancy Haught, *The Church and Bankruptcy: An Expert View*, OREGONIAN (Portland), July 31, 2004, at B1.

[91] 18 AM. JUR. 2D *Corporations* § 2 (2005) (internal citations omitted).

[92] For example, on the issue of the lifespan of a juridical person and a corporation, *compare* CODE OF CANON LAW, 1983 CODE c.120, § 1 ("A juridical person is by its nature perpetual. It ceases to exist, however, if it is lawfully suppressed by the competent authority, or if it has been inactive for a hundred years.") *with* 18 AM. JUR. 2D *Corporations* § 75 ("A corporation the charter of which does not limit its existence to a definite period of time continues, as a general rule, in legal contemplation for the time prescribed by a general statute . . . or until it has been dissolved by some prescribed method. A corporation has perpetual existence.").

[93] In using the term "goods," canon law seems to use the term to cover almost anything that can be reduced to ownership. For example, the code refers to "[i]mmovable goods [land and buildings], precious moveable goods, rights and legal claims, whether personal or real, which belong to the Apostolic See, are prescribed after a period of one hundred years." CODE OF CANON LAW, 1983 CODE c.1270. Elsewhere, the code states that "[a]nyone who receives goods in trust for pious causes . . . must inform the Ordinary about the trust, as well as about the goods in question, both moveable and immovable, and about any obligations attached to them." *Id.* c.1302 § 1. Consequently, as a term, "goods" is best understood in the way that "property" is often understood. "Property" as a term must be qualified by terms such as "real" or "personal" before one can understand what kind of property is being discussed.

person which has lawfully acquired them."[94] Thus, any and all property acquired by a parish belongs to that parish, not to the diocese.

One can synthesize this information to arrive at the dioceses' canon law conclusion. A diocese is the organization that creates and oversees the parishes, but after their creation, parishes are separate legal persons. When a parish acquires property, such property belongs to the parish, not to the diocese. Therefore, the diocese has no more right to parish property than any other person or entity. Consequently, the canon law argument would conclude, true parish property is not part of a diocese's bankruptcy estate since "the Diocese does not have any equitable, beneficial or proprietary interest in the Parish Real Property."[95]

In addition to parish real property held in its name, the Diocese of Tucson argued that the same rationale should apply to parish funds overseen by the Diocese:

> In addition, just as a trustee of a trust acquires bare legal title to the assets under the trustee's management and control, so does the Diocese have bare legal title. However, just as a trustee of a trust does not acquire any beneficial or equitable interest in the property subject to the trust except as explicitly provided in the Trust or applicable law, the Diocese has no beneficial or equitable interest in the Restricted Funds and the Unrestricted Deposits except to the extent that the Diocese has also placed unrestricted and restricted assets in the fund.[96]

Furthermore, once a parish receives parishioner donations, canon law would support the argument that such funds should be excluded from the bankruptcy estate of the diocese, as well. "Unless the contrary is clear, offerings made to Superiors or administrators of any ecclesiastical juridical person, even a private one, are presumed to have been made to the juridical person itself."[97]

Thus, a strong canon law argument can be made that the property of individual parishes, both real and personal, does not belong in a diocese's bankruptcy estate. Were canon law dispositive in bankruptcy, a diocese's estate would almost certainly consist of the property that a diocese owns independently of its parishes and nothing else. The ultimate effect canon law is

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[94] *Id.* c.1256.
[95] Disclosure Statement, *supra* note 46, at 19.
[96] *Id.* at 21.
[97] CODE OF CANON LAW, 1983 CODE c.1267, § 1.

given in bankruptcy remains to be seen, though preliminary results indicate canon law will receive virtually no direct effect. Nevertheless, canon law, while perhaps not controlling legal precedent, will lend credence to at least two civil law arguments that could help to shield parish property from the bankruptcy estate of a diocese. Neither argument, however, seems promising.

III

Sorting Out the Bankruptcy Arguments

After examining canon law, it seems that there are two independent civil law arguments invited by canon law's framework as to why parish property is not diocese estate property. These arguments have at least some merit under existing civil law and do not require an explicit call for canon law to apply in place of federal or state law. The first argument is that parish property is held by each diocese in a series of enforceable legal trusts. If a trust has civil law effect, then only the right to hold the trust comes into the bankruptcy estate, not the trust res itself. The second argument is that parishes are separate corporate persons under civil law, and it is only civil law's failure to recognize the true nature of the property ownership that would lead one to believe otherwise. Each of these arguments will be examined in turn. In so doing, it will become clear why the success of either is dubious or, at the least, uncertain and untested. An argument based on enforceable trusts will have some legal merit but could ultimately prove prohibitively costly.

A. Parish Property Held Only in Trust by the Diocese

Each of the dioceses that have filed for bankruptcy to date have stated, in one way or another, that the parish property it holds is not actually owned by the diocese but rather is held in trust for the parishes.[98] This puts the onus on a diocese to forward the reasons for the existence of the trust relationships if they indeed exist.

[98] *See* Gustafson, *supra* note 15 (quoting (Portland's) Archbishop Vlazny: "'Under canon law, parish assets belong to the parish,' he said. 'I have no authority to seize parish property.'"); Innes, *supra* note 52 ("'By canon law, the bishop, and therefore the diocese, does not own these properties,' the Rev. Van Wagner . . . said Friday . . . . 'The parish owns the property. The properties are held in trust for each of the parishes listed and the parishioners of those parishes.'"). It seems fairly certain that the crux of the canon law argument is found in the declaration of Canon 1256. *See supra* note 96 and accompanying text.

The Tucson Diocese explained that it holds parish properties in the name of the diocese because of civil law's failure to recognize the status that canon law confers on parishes. Since its parishes are not incorporated separately under civil law, the Tucson Diocese stated that the best way to understand the civil law status of its parishes is to think of them as "unincorporated association[s]."[99] Unincorporated associations are incapable of holding title to real property in Arizona.[100] As such, titles to land were given to the bishop to be held in trust for the parishes. We may safely presume that the reasons why other dioceses have avoided incorporating their parishes are substantially similar and that virtually all parishes of those dioceses that have filed for bankruptcy are not separately incorporated entities.

There must be reasons why individual parishes are not separate corporations. Perhaps separate incorporation was viewed as redundant or unnecessary because of the structure of canon law.[101] But the fact remains that titles to land and ownership of certain parish funds are, within the eyes of civil law, held by the dioceses that have filed for bankruptcy. Therefore, there is scant reason to exclude such property from a diocese's bankruptcy estate. If parish property is held by a diocese in a series of legally recognized trusts, however, it will likely be safe from creditors.

1. *Bankruptcy Law on Trusts Held by the Debtor*

Section 541(a)(1) of the Bankruptcy Code defines the bankruptcy estate, and while its definition is certainly broad, it is not without exception. Indeed, § 541(d) contains language that could be directly applicable to a diocese bankruptcy case:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.[102]

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99 Disclosure Statement, *supra* note 46, at 19.

100 *Id.*

101 The Tucson Diocese's plan of reorganization underscores this interpretation. The plan defines "parish real property" as property "for which the Diocese holds bare legal title[,] . . . no beneficial or other proprietary interest[,] . . . [and] which is part of the temporal goods of the Parish as a juridic[al] person under Canon Law." Debtor's Plan of Reorganization at 14, *In re* The Diocese of Tucson, No. 4-04-04721 (D. Ariz. Sept. 20, 2004).

102 11 U.S.C. § 541(d) (2000).

Thus, § 541(d) excludes the beneficial interest of a trust from a trustee's bankruptcy estate. Interestingly, § 541(d)'s language is quite similar to the basic description of a legal trust.[103] Cases interpreting § 541(d) have stated that it may be interpreted to apply only to "express or resulting trusts created by the *intent* of the parties."[104] Consequently, if a diocese can show an express or implied trust created by the intent of itself and its parishes, § 541(d) will dictate that only the legal title to parish property will become part of the estate, not beneficial title to the property itself nor the right to dispose of it.[105]

Another exclusion to § 541(a)'s broad bankruptcy estate definition, 11 U.S.C. § 541(b)(1), has been held to exclude property held in trust from the estate of the debtor outright.[106] Section 541(b)(1) states, in relevant part, that property of the estate "does not include . . . any power that the debtor may exercise solely for the benefit of an entity other than the debtor . . . .".[107] Depending on a bankruptcy court's inclination, an argument based on either §§ 541(b) or (d) could successfully keep property held in trust out of a diocese's bankruptcy estate. Therefore, if a diocese can establish that a genuine legal trust relationship exists between itself and its parishes, then the equitable rights to parish property would not be included in the diocese's estate, only bare

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103 *Cf.* 76 AM. JUR. 2D *Trusts* § 253 (2004) ("A TRUSTEE is vested with a LEGAL, as distinguished from an EQUITABLE, estate, which LEGAL estate EQUITY recognizes but compels to be used by the TRUSTEE in accordance with the TERMS of the TRUST and for the BENEFIT of all BENEFICIARIES, present and future.").

104 *See, e.g.*, *In re* Commercial Fin. Serv., Inc., 268 B.R. 579, 598 (Bankr. N.D. Okla. 2001).

105 The legal burden of establishing the existence of a trust is almost certainly on the party that argues for the trust. *See In re* San Diego Realty Exch., Inc., 132 B.R. 424, 428 (Bankr. S.D. Cal. 1991) ("The party alleging that property is held in trust . . . has the burden of showing the trust relationship.").

106 *Id.* (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.10 (1983)); *see also* 11. U.S.C. § 541(b)(1) ("Property of the estate does not include—any power the debtor may exercise solely for the benefit of an entity other than the debtor . . . ."). Presumably, the power of a trustee to hold the legal title of the trust qualifies as "any power" under § 541(b)(1) and thereby places such property out of the estate entirely. The Supreme Court in *Whiting Pools* was rather curt in its discussion of § 541(b) but stated: "We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition." *Whiting Pools*, 462 U.S. at 205 n.10. Though the Court cited only § 541(b), it is safe to presume that they were referring to § 541(b)(1), as it is the only subsection that refers to trust-like structures.

107 11 U.S.C. § 541(b)(1).

legal title.[108]

Bankruptcy courts freely recognize that when a debtor holds property in trust for the benefit of a third party, the beneficial interests of the trust are excluded from a debtor's bankruptcy estate.[109] A trust can be either express[110] or implied.[111] Since the question of whether there is an enforceable trust is a state law question[112] and there have been diocese filings in three states to date, beginning in Oregon, this Comment will look first at the law of Oregon to determine whether the Archdiocese of Portland has valid trust claims under state law, then briefly examine relevant laws in both Arizona and Washington. The dioceses might successfully argue that parish property is held in implied trusts, but the results are anything but certain. The general problems exposed in the following section on Oregon trust law—problems

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108 The "bare legal title" argument, though, seems stronger under § 541(d). Bare legal title would come into the estate of the diocese and nothing else. One could make the argument, however, that if § 541(b) were used, perhaps even bare legal title would be excluded from the estate. If holding the legal title to a parcel of land or bank account is a mere power exercised for the benefit of another, then § 541(b) would exclude such a holding entirely. The functional difference between the two approaches might be nonexistent, however, in that parish property would not be part of the bankruptcy estate under either approach.

109 This is often described as a bedrock principle of bankruptcy. Indeed, commentators have noted that "[i]t is a fundamental rule that the estate succeeds only to the title and rights in the property that the debtor possessed . . . . Therefore, when a debtor is in possession of property impressed with an express, constructive, resulting or statutory trust whose validity is recognized under the terms of the Code, the estate will generally hold such property subject to the outstanding interest of the beneficiaries. The assets held in trust will thus normally not be available to the debtor or the debtor's creditors." 5 COLLIER ON BANKRUPTCY 541.11 (15th ed. rev., Lawrence P. King et al. eds., 1996). The Supreme Court is in full accord with this proposition. *See Whiting Pools*, 462 U.S. at 205 n.10 ("Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition.").

110 RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (2004) ("When the term 'trust' is used in this Restatement without any qualifying adjective or description, it denotes . . . an express trust rather than a resulting or constructive trust."); *see also* Lozano v. Summit Prairie Cattlemens Ass'n, 963 P.2d 92, 95 (Or. Ct. App. 1998) ("An express trust is one in which the circumstances show that the grantor of the property intended to create a trust.").

111 *In re* Hixon, 295 B.R. 866, 871 (B.A.P. 8th Cir. 2003) ("An implied trust is a legal remedy available where no express agreement exists.").

112 *See* Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); *see also In re* San Diego Realty, 132 B.R. 424, 428 (Bankr. S.D. Cal. 1991) ("Whether a trust has been created is generally determined under state law.").

of intent, proof, and the large task of establishing the existence of multiple trusts—will remain constant for each diocese.

2. *Oregon Trust Law*

Trusts are generally recognized under Oregon Law in two forms: express and implied. "Express trusts are intentionally created by a direct and positive act of the settlor by some writing, deed, will, or declaration."[113] It should be clear at the outset that no express trusts exist between the Archdiocese of Portland and its parishes. If such trusts existed, it goes without saying that the Portland Archdiocese would simply point to the trusts' existence, and that would be the end of the matter under §§ 541(b) or (d).

As such, any potential trusts between the Portland Archdiocese and its parishes would almost certainly be implied trusts, of which there are two varieties. The first variety is the constructive trust, which "'arises where a conveyance is induced on the agreement of a fiduciary or confident to hold in trust for a recoveyance or other purpose . . . and where the agreement is breached . . . .'"[114] Constructive trusts are more remedies than true "trusts" per se and generally arise in response to equitable concerns.[115] Clearly, there is no need of a constructive trust remedy between the Portland Archdiocese and its parishes. There has been no breach of agreement asserted between the Portland Archdiocese and any of its parishes and no violation of a duty owed,[116] much less the need for equitable remedy between diocese and parish.

The second type of implied trust is known as a resulting trust, which is proven under Oregon law thusly:

> A resulting trust is not established by virtue of any expressed agreement or contract. Rather it arises under the doctrine of presumed intent that the party who furnished the purchase price of a parcel of land contemplated that such property would inure to his own benefit and *not that of the record title holder* and that the title was taken in the name of another for

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[113] Shipe v. Hillman, 292 P.2d 123, 126 (Or. 1955).

[114] *Id.* at 127 (quoting 54 AM. JUR. *Trusts*, § 233).

[115] 76 AM. JUR. 2d *Trusts* § 168 (2006) ("A 'constructive trust' is an implied trust arising by operation of law to satisfy the demands of justice or to prevent a failure of justice. . . . A constructive trust arises when equity so demands; it is an equitable remedy imposed by the courts.").

[116] *See* Hollen v. Fitzwater, 865 P.2d 1298, 1300 (Or. Ct. App. 1993) (noting that an important element of a constructive trust is "a violation of a duty imposed by [a preexisting fiduciary] relationship").

some incidental purpose.[117]

Clear, unequivocal, and convincing evidence is required to prove the intent to create a resulting trust, but such evidence can be inferred entirely from circumstantial evidence, including the conduct of the parties.[118] The party seeking to establish the existence of a resulting trust bears this evidentiary burden.[119] Oregon's concept of a resulting trust seems to be in accord with the Restatement (Third) of Trusts: "Where the owner of property makes a donative transfer and manifests an intention that the transferee is to hold the property in trust but the intended trust fails in whole or in part . . . the transferee holds the trust estate . . . for the transferor or the transferor's successors in interest . . . ."[120]

Although Oregon's statute of frauds seems to require that trust agreements regarding real property be in writing,[121] "resulting trusts are an exception to the requirements of the statute of frauds."[122]

Consequently, if it could be established by clear, unequivocal, and convincing evidence for each parish within the Archdiocese of Portland that the parish paid for the property (as a private landowner generally would); contemplated that the property would inure to the parish's benefit, not the archdiocese's; and that title was taken by the archdiocese for some incidental purpose (perhaps the parish is unincorporated and incapable of

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117 Certified Mortgage Co. v. Shepherd, 838 P.2d 1082, 1085 (Or. Ct. App. 1992) (citing Hurlbutt v. Hurlbutt, 585 P.2d 724, 726 (1978)).

118 *Id.* at 1086.

119 Shipe v. Hillman, 292 P.2d 123, 127 (Or. 1955).

120 RESTATEMENT (THIRD) OF TRUSTS § 8 (2004). There are two exceptions in § 8 that should be mentioned but seem inapplicable to the cases at hand. The rest of § 8 states that a resulting trust is not created if either "(a) the transferor manifested an intention that a resulting trust should not arise, or (b) the trust fails for illegality and the policy against permitting unjust enrichment of a transferee is outweighed by the policy against giving relief to one who has entered into an illegal transaction." Section 8(a) would not come into play since the "transferor" in a diocese case would be a parish that was trying to keep its assets. Section 8(b) seems inapplicable, too. While it may be argued that the bankruptcy cases were brought on by "illegal actions," namely, alleged sexual abuse, and that the parishes and the diocese should not be granted relief because of this, the alleged illegal actions are entirely unrelated to the creation of any trusts.

121 OR. REV. STAT. § 93.020(1) (2003).

122 *In re* Wilder, 42 B.R. 6, 8 (Bankr. D. Or. 1984). *See also* OR. REV. STAT. § 93.020(2) (2003) ("This section does not . . . prevent a trust from arising or being extinguished by implication or operation of law, nor to affect the power of a court to compel the specific performance of an agreement in relation to such property.").

owning land), such parish property might possibly be held in a resulting trust by the Portland Archdiocese. Bankruptcy courts seated in Oregon have had no trouble recognizing Oregon's concept of resulting trusts.[123] Thus, it is entirely possible that Oregon law could recognize that individual parish property is not part of the Portland Archdiocese's bankruptcy estate.

Canon law's framework could help to support an inference about the intent of the parties involved. Recall that under canon law, property that has been acquired by a parish belongs to the parish.[124] It is quite possible that the unincorporated parishes in the Portland area wholly intended the Portland Archdiocese to hold title to property the parishes themselves were unable to hold.

At this point, counterarguments might arise. One could argue, citing the example of the Boston Archdiocese's $100 million property sale and closure of individual parishes, that canon law does not support the trust argument forwarded above.[125] Alternatively, one might argue that dioceses across the country only follow canon law when it is convenient and will close or sell off parishes when necessary. Thus, canon law should lack persuasive force in this case because it is impossible to determine with certainty what canon law actually means. Certainly, the Boston Archdiocese was aware of canon law yet still closed some of its parishes. The Portland Archdiocese would have good responses for this argument.

First, the only property the Boston Archdiocese sold to fund its settlement was property actually owned by the diocese itself, not any particular parish.[126] As such, an argument based on this property sale alone is not harmful to the claim that parish property is held in trust. In a larger sense, however, the actions of the Boston Archdiocese can hardly be said to impute liability on the Portland Archdiocese directly. Portland's leadership was entirely unconnected to the land transfer in question.

123 *In re* Wilder, 42 B.R. at 8.

> Oregon courts of equity have long recognized that when one acquires property as the agent of another upon a confidence that he will hold it for the other's benefit a trust will be implied. A resulting trust occurs when, although no violation of trust or fraud is involved, the circumstances indicate an intent of the parties that title in one be held for the benefit of another.

Id. (citing Belton v. Buesing, 402 P.2d 98 (Or. 1965)).

124 CODE OF CANON LAW, 1983 CODE c.1256.

125 *See supra* notes 18-24 and accompanying text.

126 *See* Barnett & Kosseff, *supra* note 18.

Second, and perhaps more important, the arguments that either the Boston Archdiocese was not following canon law when it ordered parish closings or assets sales or that canon law is not what the Portland Archdiocese might claim it is would likely also be of no avail to detractors. According to published reports, the Boston Archdiocese is closing and selling off parishes.[127] The same objection noted above, that the Portland and Boston Archdioceses are independent entities, still applies; even if Boston's Archdiocese did violate canon law, such a violation is unconnected to Portland's Archdiocese.

Stronger still is the argument that canon law is not violated by such action. Canon 515 section 2 gives a bishop the sole authority to "establish, suppress or alter parishes. He is not to establish, suppress or notably alter them unless he has consulted the council of priests."[128] An argument could be made that closing parishes and selling assets as it becomes necessary to do so is within the meaning of "alter parishes" in Canon 515 section 2. Whether this is the correct interpretation is a question that could be resolved by an internal church tribunal. If such a determination were made by a Catholic ecclesiastical tribunal, civil courts would likely be bound to accept the meaning of such a determination. The Supreme Court stated in *Serbian Eastern Orthodox Diocese v. Milivojevich* that "the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal . . . but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."[129] Thus, the actions of the Boston Archdiocese might not have a dispositive influence on the Portland Archdiocese's bankruptcy.

Consequently, the Portland Archdiocese could have a successful argument that parish property is not part of its bankruptcy estate but is rather held in constructive trusts. The negative aspects of this strategy, however, have not yet been discussed.

A large drawback for the Portland Archdiocese that might prove prohibitive is the necessarily factual nature of a resulting trust and the time and energy needed to prove that one exists. Even if a bankruptcy court were willing to accept the possibility that parish property is held in a large series of resulting trusts,

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127 *See supra* notes 20-21 and accompanying text.
128 Code of Canon Law, 1983 Code c.515, § 2.
129 Serbian E. Orthodox v. Milivojevich, 426 U.S. 696, 708 (1976).

determining *which* parish property is *actually* held in trust is bound to be costly and time-consuming. A bankruptcy judge would almost certainly have to look at each parish individually and examine each piece of property or account that is allegedly held in trust by the archdiocese. Only then would the judge be able to come close to a determination that the property is truly held in a constructive trust. When one realizes that the Portland Archdiocese alone oversees 124 parishes,[130] the resulting trust approach offers anything but a quick and overarching decision. Furthermore, case-by-case examinations carry the very real possibility that some parish property will be protected under trust and some will not. Parish property that is not under trust will be vulnerable to creditors.

Moreover, even employing a resulting trust argument assumes that the parishes and the diocese truly intended a civil trust relationship,[131] which is anything but a given. Resulting trusts require that there have been an actual transfer from the parish to the diocese establishing the trust at the time of the property's acquisition as well as the intent to so transfer. Whether such intent was present or such a transfer has ever occurred is uncertain. Such factual questions would have to be answered in a parish-by-parish, transaction-by-transaction inquiry. Furthermore, if a bishop could decide to "alter" a parish out of existence, one wonders if such a trust is only an illusion under civil law.

There is every incentive for the Portland Archdiocese to seek a more comprehensive bankruptcy solution, one that would lead to more uniform results and easier-to-apply precedent. Determining the true intent of the parties involved in a trust relationship after the fact is a slippery, fact-intensive inquiry. A legal theory that could subvert such litigation is preferable. Yet if no other "magic bullet" solution arises that would keep parish property

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130 Woodward, *supra* note 33.

131 Intent is important as to whether there is a resulting trust:

> A resulting trust generally arises when the parties have used ambiguous language which the court construes as showing a trust intent, or where the parties have expressed no intent to create a trust by words, but have performed acts from which the court infers that a trust was intended. Such a trust attempts to give a vague or incomplete agreement substance that was originally intended by the parties.

76 AM. JUR. 2D *Trusts* § 138 (2005) (citations omitted). A diocese, no doubt, could seek to prove this intent by references to canon law and adherence to canon law's dictates. If the circumstances so warrant, however, intent in resulting trusts is often presumed. *Id.*

out of the diocese bankruptcy estate, the Portland Archdiocese should be prepared to find itself knee-deep in the factual question of intent if it seeks to keep parish property out of its bankruptcy estate.[132] The existence of an overarching solution, however, is uncertain.

3. Arizona Trust Law

Arizona law also recognizes resulting trusts. The state's highest court has said that "when property is purchased in the name of one person with money furnished by another, a resulting trust arises in favor of the person furnishing the purchase money,"[133] and it has cited with approval the earlier Restatement (Second) of Trusts, which in substance is quite similar to the Restatement (Third) of Trusts.[134]

Furthermore, Arizona's statute of frauds is also susceptible to a successful resulting trust claim, such that there is no absolute

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132 The Portland Archdiocese has already begun this factual inquiry. The inquiry will begin with arguments that the parishes are separate entities that have their own legal existence separate of the archdiocese. Steve Woodward, *Archdiocese Will Argue Assets are Parish-Specific*, OREGONIAN (Portland), Jan. 30, 2005, at B1. "The parishes have undertaken 'an unprecedented factual inquiry' into their histories, Douglas Pahl, an attorney for a group of 67 parishes, told Bankruptcy Judge Elizabeth Perris at a Dec. 28 hearing." *Id.* The archdiocese will use ten parishes as "test cases" to determine the validity of their separate existences. *Id.* I believe that this inquiry will do two things: First, it will establish the separate existences of the parishes in question, and this existence will probably be akin to the notion of an unincorporated association. Second, it will lay the groundwork for resulting trust arguments. There will be a great deal of factual overlap between the questions of separate existence on the one hand and the establishment of resulting trusts on the other. These test cases seem to indicate that the archdiocese will ultimately try to argue that parish property is held in resulting trusts. "A court hearing [on the issue of the parishes' existence] is scheduled for May 9[, 2005]." *Id.*

133 Toth v. Toth, 946 P.2d 900, 902 (Ariz. 1997).

134 RESTATEMENT (SECOND) OF TRUSTS § 440 (1959) ("Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in §§ 441, 442 and 444."). The exceptions cited are nearly identical to those mentioned in the Restatement (Third) of Trusts:

> As to the circumstances manifesting an intention that no resulting trust should arise although the purchase price is paid by one person and title is taken in the name of another, see § 441. As to the effect of a purchase in the name of a relative, see § 442. As to the situation where the purchase is made in order to accomplish an illegal purpose, see § 444.

RESTATEMENT (SECOND) OF TRUSTS § 440 cmt. a (1959). For the language and discussion of the relevant portion of the Restatement (Third) of Trusts, see *supra* note 120 and accompanying text.

requirement that a trust agreement be in writing.[135] Consequently, if the Tucson Diocese sought to claim that its parishes' assets were held in resulting trusts, it might succeed entirely, succeed partially, or fail, but the inquiry would be, in all likelihood, extended and costly for the same reasons that apply to the Portland Archdiocese. All of the general problems with this strategy mentioned earlier still hold true.

4. *Washington Trust Law*

Washington state law seems to be largely in accord with both Oregon and Arizona law on the question of resulting trusts.[136] Washington, however, has slightly different language in a particular statute that pertains to property held in trusts by religious organizations. The statute in question, *Washington Revised Code* section 24.12.030, deals with the succession of bishops or other presiding elders who make up the membership of a church organized as a corporation under state law.[137] This statute expressly provides that property held in trust by a religious corporation shall continue to be held in trust, regardless of the succession of a new church leader.[138]

There is virtually no case law interpreting this statute,[139] but even in the worst-case scenario for the Spokane Diocese, it seems unlikely that the issue of church leader succession and the resulting effect on trust property should influence whether a resulting trust exists. As such, a bankruptcy court seated in Washington could easily come to the same answer that the bankruptcy courts in Arizona and Oregon could in terms of the existence of a series

135 Gabitzsch v. Cole, 386 P.2d 23, 26 (Ariz. 1963) ("A trust created by operation of law is not within the Statute of Frauds." (citing Collins v. Collins, 52 P.2d 1169 (Ariz. 1935))).

136 Bucsko v. O'Farrell, 12 P.2d 405, 405 (Wash. 1932) ("If the unwritten contract were one to transfer an interest in the land to be acquired, it would be within the statute of frauds and unenforceable unless the respondent could establish a resulting trust, growing out of the use of his money in making the purchase . . . .").

137 "*Provided*, [a]ll property held in such official capacity . . . shall be in trust for the use, purpose, benefit and behoof of his religious denomination, society or church." WASH. REV. CODE. § 24.12.030 (West 1994). When a new bishop takes over, "it shall be sufficient to file with the secretary of state the original or a copy of his commission . . . ." *Id.*

138 *Id.*

139 The only case mentioned in association with this statute seems to precede the enactment of the statute itself. *See* Wilkeson v. Rector of St. Luke's Parish, 29 P.2d 748 (Wash. 1934).

of resulting trusts. Yet again, this argument is nowhere near an optimal solution.

5. *Conclusion on Trusts*

It is at least possible, if not likely, that a great deal of individual parish property, whether liquid funds or real estate, could be found to be held in valid trusts under the state laws of Oregon, Arizona, and Washington. Yet the resulting litigation that would be required to prove each and every resulting trust would be extensive, if not prohibitive. The results could be excellent, mixed, or negative for the dioceses. A resulting trust argument, therefore, would be best used as a last resort. If the dioceses get to the point where this argument is the only option left, the prudent move might be to renew settlement discussions. There is, however, at least one other legal argument suggested by canon law's structure.

B. *Parishes as Corporations*

Each of the three dioceses that have filed for bankruptcy is recognized under state law as "corporations sole" with a bishop or archbishop as the sole member of the corporation.[140] It seems clear that parishes are not incorporated separately. If they were, the property of the estate question would be somewhat academic and uninteresting. Barring a successful corporate veil-piercing argument, parish assets would be safe, and only the assets of the diocese itself and the parish where the alleged abuse took place would be vulnerable. The status of parishes under canon law as juridical persons invites a comparison with civil incorporation law[141] and could lead one to wonder if civil law would recognize

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[140] *See* OR. REV. STAT. § 65.067 (2003):

> (1) Any individual may, in conformity with the constitution, canons, rules, regulations and disciplines of any church or religious denomination, form a corporation hereunder to be a corporation sole. Such corporation shall be a form of religious corporation and will differ from other such corporations organized hereunder only in that it shall have no board of directors, need not have officers and shall be managed by a single director who shall be the individual constituting the corporation and its incorporator or the successor of the incorporator.
>
> (2) The name of such corporation shall be the same as the office within the church or religious denomination held by the incorporator, and shall be followed by the words "and successors, a corporation sole."

See also ARIZ. REV. STAT. ANN. § 10-11901 (2004); WASH. REV. CODE § 24.12.010 (2004).

[141] *See supra* note 88 and accompanying text.

the separate corporate existence of individual parishes. While the answer appears to be no, the rationale behind this answer is worth briefly exploring.

1. General Requirements for Corporate Status Without Filing

Generally speaking, unless a corporation is created under "the governing statutory provisions, an organization or association has no legal existence as a corporation . . . . However, a bona fide attempt to organize a corporation under a valid existing statute authorizing the creation of a corporation . . . will result in the creation of a de facto corporation . . . ."[142] Thus, corporate status is possible without filing the appropriate articles of incorporation with the state of residence. The requirements of de facto corporate status are the existence of a valid incorporation statute;[143] a bona fide, good faith attempt to incorporate;[144] and a failure to comply with the particular state requirements[145] (though some jurisdictions have allowed an organization not to file incorporations papers at all),[146] as well as other nominal requirements. Thus, it seems as if individual parishes could theoretically have claims of actual corporate status.

Yet such status is all but impossible. First, it does not appear that any dioceses have actually attempted to incorporate separately. Perhaps this is due to the general feeling that canon law determined their individual statuses, but this is merely speculative. Second, if one were to go down the list of elements of de facto corporations, one would likely find that parishes do not meet the required elements. Third, and most important for the dioceses that have filed for bankruptcy to date, in certain states that have adopted the Model Business Corporations Act, courts have held that the adoption of the Act abolished the doctrine of de facto corporate status entirely.[147] Among the states that have appeared to rule this way are Oregon[148] and Arizona.[149]

The doctrine of corporation by estoppel, which is somewhat

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142 18A AM. JUR. 2D *Corporations* § 188 (2004).
143 *Id.* § 194.
144 *Id.* § 195.
145 *Id.* § 196.
146 *Id.* § 197.
147 *Id.* § 191.
148 *See* Sherwood & Roberts-Oregon, Inc. v. Alexander, 525 P.2d 135, 138 (Or. 1974).
149 *See* Booker Custom Packing Co. v. Sallomi, 716 P.2d 1061, 1063 (Ariz. Ct. App. 1986).

related to de facto corporate status, will also be unavailing. Corporation by estoppel arises when individuals deal with a business organization as if it were a corporation and are thereafter estopped from denying its corporate existence.[150] "A corporation by estoppel may result from the parties' agreement or conduct that estops them from later denying the corporation's existence."[151] Alleged tort victims, however, can hardly be said to have dealt with a parish as if it were a corporation. Even more generally, the initial interaction between a tortfeasor and a victim occurs on the date of the tort itself. It would seem unlikely that a corporation by estoppel would even be possible in a tort case other than by agreement. Thus, it seems highly unlikely that a tort victim would be estopped from asserting such a claim under the corporation by estoppel doctrine. Consequently, the doctrine has no application in the instant cases.

C. Summary

Any civilly recognized corporate status that might have been invited by canon law's structure is illusory. Likewise, parishes will be unable to claim that they are separate corporate entities. Barring a legal ruling that canon law governs the matter entirely, the argument that parishes should be recognized as corporations would have fleeting legal consequence.

Returning to the ultimate question of what property belongs in a diocese's bankruptcy estate, there is some chance of sheltering parish assets, but working within the framework of the Bankruptcy Code will make for an uphill battle. The resulting trust argument could possibly shelter a great deal of parish assets, but it would cost a large amount in time and litigation, and the ultimate outcome would still be uncertain for each parish. Any attempt to claim separate corporate status for the individual parishes seems impossible.

IV

Applying Canon Law as Controlling Precedent

Each diocese that has filed for bankruptcy claims that parish assets belong to the parishes, not the diocese. Stating in a bankruptcy petition that property is held in the name of the debtor

[150] 18A Am. Jur. 2d *Corporations* § 209 (2004).
[151] *Id.*

actually grants the debtor no equitable ownership in the property absent a valid trust agreement because the Code of Canon Law's provisions implicitly, if not explicitly, assume that canon law is relevant as a body of governing law that must be given deference by a bankruptcy court.[152] The question then arises: would it be possible for a bankruptcy court to defer directly to canon law to solve the question of parish property ownership? The idea is certainly novel but, perhaps, not impossible. After all, as experts have noted, the difference between civil law's and canon law's conceptions of property ownership is rather definitional in nature—amounting to a "conflicting notion of ownership."[153] If one form of ownership, canon law ownership, carried civil law effect, or if civil courts deferred directly to canon law on questions of property ownership, parish assets would be free from a diocese's bankruptcy estate.

Applying canon law would be controversial, but controversy alone does not preclude a legal outcome. Applying canon law as the controlling legal rule could be the type of overarching "magic bullet" legal theory that would exclude all parish property at once. Current case law, however, seems to preclude canon law's direct application and will likewise preclude civil courts from giving canon law dispositive deference.

A. *Court Rulings*

A search for bankruptcy cases in which canon or religious laws are dispositive, or even considered to be dispositive, reveals little precedent. In the cases that do arise, bankruptcy courts seem loathe to discuss canon law at all. For example, in *In re Carmel of St. Joseph of Santa Ynez*, a bankruptcy appellate panel reviewed a case concerning, in part, an implied promise based on canon law.[154] The panel made clear that its ruling was in no way based on canon law: "We are not saying that there was an implied agreement based on Canon law. Furthermore, we are not

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152 *See* Debtor's Plan of Reorganization at 48-49, *In re* The Diocese of Tucson, No. 4-04-04721 (D. Ariz. Sept. 20, 2004) ("Upon completion of the incorporation an establishment of the corporate existence of each such Parish, the Diocese, as part of the Plan, will convey legal title to the Parish Real Property *to each Parish that is the owner of such Parish Property*.") (emphasis added). The implication from this sentence is that the parishes themselves must own the property to be transferred, regardless of the status under civil law.

153 Haught, *supra* note 90.

154 *In re* Carmel of St. Joseph of Santa Ynez, 237 B.R. 155, 159 (B.A.P. 9th Cir. 1999).

saying that Canon law would ever be controlling law."[155] After reviewing Supreme Court precedent on canon law, it should become clear that the *Carmel of St. Joseph* panel's reluctance to apply canon law or to base a decision on it is well founded.

The Supreme Court has held that civil courts should not interfere with or overturn properly determined decisions regarding the application of church laws in instances of internal church dispute. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Illinois Supreme Court struck down a church's defrocking of a priest as well as its plan to split a diocese into three new dioceses because the court, in interpreting the religious law governing the church, decided that the defrocking and reorganization were improper under the church's law despite an earlier adjudication by the church's ecclesiastical court to the contrary.[156]

The United States Supreme Court reversed, stating that the Illinois court had impermissibly rejected the ecclesiastical court's judgment that the church's actions had been proper under church law.[157] The foundation for this decision was the Court's pronouncement that "the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal . . . but must accept such decisions as binding on them, in their application to the religious issues of doctrine or policy before them."[158] "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government,"[159] and once a church tribunal is established and rules on an issue of internal dispute, "the Constitution requires that civil courts accept their decisions as binding upon them."[160] Internal church disputes, therefore, are within the sole purview of church jurisdiction. Ecclesiastical courts are free to decide such issues, and civil courts may not reverse these decisions without running afoul of the Constitution.

One should immediately recognize two reasons why *Serbian Eastern Orthodox Diocese* would not help those Catholic dioceses that have filed for bankruptcy to date. First, in *Serbian Eastern Orthodox Diocese*, the Illinois Supreme Court had

155 *Id.* at 159 n.3.
156 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976).
157 *Id.* at 708.
158 *Id.* at 709.
159 *Id.* at 724.
160 *Id.* at 725.

looked too deeply into church decisions and had thusly meddled too deeply in church affairs. No Catholic diocese that has filed for bankruptcy has cited to a decision by an internal church body stating that parish property is not owned by a diocese. As such, there is no ecclesiastical court decision with which a civil court could meddle.

Second, and more important, a subsequent decision by then-Justice Rehnquist recognized that while internal disputes decided under church law are entitled to deference, a decision on third-party disputes involving mainly secular concerns will not be accepted so readily. In *General Council on Finance and Administration of the Methodist Church v. California Superior Court, County of San Diego*,[161] Justice Rehnquist, acting singly as circuit justice, denied a motion to stay a California state court case in which a church wanted to petition the United States Supreme Court for certiorari. In so doing, Justice Rehnquist rejected an expansive reading of *Serbian Eastern Orthodox Diocese*.

While a civil court is extremely limited in how deeply it may look into "matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes[,] . . . [the Supreme] Court never has suggested that those constraints similarly apply outside the context of such intraorganization[al] disputes."[162] The rationale underlying *Serbian Eastern Orthodox Diocese* was that courts would become "entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. . . . Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged."[163] Following this pronouncement, at least one court has held that *General Council* stands for the proposition that "limits on the court's power are confined to intra-church disputes" alone.[164] There is no indication that the current United States Supreme Court would not rule in the same way Chief Justice Rehnquist did in deciding the motion presented in *General Council*.

Other courts have arrived at similar decisions in determining which disputes are and which disputes are not internal church

161 439 U.S. 1355 (1978).
162 *Id.* at 1372.
163 *Id.* at 1373 (citation omitted).
164 Konkle v. Henson, 672 N.E.2d 450, 455 n.6 (Ill. App. Ct. 1996).

disputes, holding, for example, that normal tort claims are not prohibited by the First Amendment.[165] Any other ruling might potentially immunize church organizations entirely from tort liability. Even though lower court rulings do not carry the full force of Supreme Court precedent, the logic of such cases is hard to dispute. It seems apparent, therefore, that while internal church disputes may be decided by church or canon laws, the introduction of a third-party legal dispute would be fairly certain to strip canon law of dispositive force.

While church bankruptcy cases have elements common to internal church disputes, in light of *General Council*, it would be extremely unlikely that civil courts would defer to a nonexistent Catholic court determination of parish property ownership. Consequently, unless the Supreme Court should take up the opportunity to announce a new direction in its judicial philosophy as it pertains to the interplay of church and civil laws, it is unlikely that Catholic canon law will decide the outcome of the bankruptcy cases.

B. Conclusion

The direct application of canon law to a bankruptcy case is the least likely legal outcome of any discussed in this Comment. If the lack of an ecclesiastical court decision does not halt such an application, First Amendment concerns probably would.

V

Express Trust Agreements and Individual Parish Incorporation: The Paths Not Taken

Regardless of the outcomes of the cases currently in the bankruptcy court, there are measures that other dioceses might take to ensure that canon law's structure is recognized under civil law. It should be noted, however, that the following arguments will be

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165 *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 320-21 (Colo. 1993). The court stated that:

> Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution. The Supreme Court has not granted churches broad immunity against being sued in civil courts. Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record.

(citations omitted).

of little use to those dioceses that have already filed for bankruptcy. The bankruptcy estate is comprised of all legal or equitable interests of the debtor at the commencement of the bankruptcy case.[166] Any measures taken to secure the independent legal status of the parishes after filing a petition for bankruptcy or that sought to make express trust provisions indicating the true nature of parish property would almost certainly be too late to affect the outcome of those dioceses already in bankruptcy. The failure to take advantage of the structures and devices offered by civil law is likely to severely hamper efforts by dioceses to keep parish property out of their bankruptcy estates. Thus, what follows in this Part is merely general advice for the multitude of remaining dioceses that they should not let the same fate befall them.

A. Express Trust Agreements

As discussed earlier, none of the dioceses seem able to appeal to any existing express trust agreements,[167] thereby necessitating resulting trust arguments. Other dioceses should strongly consider executing express trust agreements with their parishes, which could solidify in civil law the ownership status recognized by canon law. While there is certain to be a great deal of state law variation on the creation of trusts, the terms required, and the like, the basic trust instrument is fairly simple.[168] Aside from the sheer volume of parish properties, setting up express trust agreements between a diocese and its parishes should be possible and would certainly be preferable to litigation in a bankruptcy court. The obvious ramifications of valid trust agreements would be, as discussed above, that beneficial ownership of the property held in trust would not become part of the bankruptcy estate of a diocese.[169]

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166 11 U.S.C. 541(a)(1) (2000).

167 *See* discussion *supra* Part III.A.2.

168 *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (2004) ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.").

169 *See supra* Part III.A.1.

B. Separate Incorporation and Transfer of Legal Title of Parish Assets to Individual Parishes

Perhaps the most promising solution for the protection of parish assets is separate incorporation of each parish combined with the transfer of parish assets to each newly created entity. Had the parishes within the Portland, Tucson, and Spokane dioceses been separate corporate entities at the time each filed for bankruptcy, it is quite likely that this Comment would have been written on a nonexistent issue. Those parishes that were unconnected to alleged abuse would likely not have been liable in the first place absent some extremely novel corporate veil-piercing argument,[170] and their collective properties, real and personal, would not have become part of the bankruptcy estate of the diocese.

The Tucson Diocese believes so strongly in this course of action that its bankruptcy reorganization plan declares that it will incorporate all of its parishes separately and transfer all parish assets to them as part of its reorganization plan.[171] Each parish will presumably be incorporated as a separate nonprofit corporation, and all property belonging to a parish will be transferred to

[170] Generally speaking, "piercing a corporate veil," or disregarding corporate status, is a rare legal occurrence, which is often determined on a case-by-case basis. 18 AM. JUR. 2D *Corporations* § 47 (2004). It is frequently stated that corporate status is a privilege and that piercing the veil is invoked as an equitable concept when that privilege is abused. Factors that might justify piercing are varied but often include undercapitalization of a corporation dominated by a shareholder or parent corporation, fraud, or the like. *Id.* § 54. Piercing a parish's veil in a suit against a diocese would be novel on many fronts. First, a plaintiff would have to attempt to pierce the veil between a parent and a subsidiary corporation in order to get at the assets of the subsidiary, not the other way around. Second, were parishes incorporated, they would almost certainly be incorporated as nonprofit entities. Whether piercing the veil of a nonprofit corporation is even a coherent theory, much less an applicable theory, is uncertain.

[171] Debtor's Plan of Reorganization at 48-49, *In re* The Diocese of Tucson, No. 4-04-04721 (D. Ariz. 2004). The plan states:

> Prior to the Effective Date, but after the Confirmation Date, each Parish will be separately incorporated as an Arizona non-profit corporation. Upon completion of the incorporation and establishment of the corporate existence of each such Parish, the Diocese, as part of the Plan, will convey legal title to the Parish Real Property to each Parish that is the owner of such Parish Property.

Id. For the sake of confirming a point that has been made on multiple occasions in this Comment, this language again clearly displays the diocese's position that parish property is the property of the parishes and that it is civil law's failure to recognize this fact that leads to difficulty.

the new legally incorporated entity.[172] Once again, though, § 541(a) will likely make the issue of whether parishes have subsequently reincorporated moot since the estate is created upon filing a bankruptcy petition. The Tucson Diocese might have attempted to capitalize on an opportunity it had already missed, at least insofar as keeping parish assets out of its estate calculation is concerned. As will be discussed in Part VI.A, The Tucson Diocese's Chapter 11 plan has been confirmed. As such, its missed opportunity is of less consequence at this time.

Interestingly, separate parish incorporation might have a negative long-term effect on parishes. If abuse is alleged to occur in a parish, then, presumably, the parish itself, as a separately incorporated entity, would be sued as a co-defendant with a diocese. If a newly incorporated parish and its diocese were the only entities funding the legal defense, a single large judgment or a series of smaller judgments could easily bankrupt a parish. As a separately incorporated entity, however, a parish would be able to file for bankruptcy itself should the need arise.[173]

While it would be a lamentable state of affairs if incorporated parishes were required to file for bankruptcy because of meritorious abuse suits, the solution to the more general problem of abuse lawsuits, the alleged abuse itself, will not be found in the Bankruptcy Code. Ultimately, the most certain way for a diocese and its parishes to guarantee that the structure that canon law erects—separate parish ownership of assets—is honored under civil law is for parishes to incorporate separately. There is no legal impediment within civil or canon law standing in the way of parish incorporation.

C. Summary

The most workable and practical answers for parishes seeking to protect parish assets is to set up express trust agreements, to incorporate separately and transfer title to assets, or to use some combination of both. From a diocesan perspective, perhaps the only positive thing to emerge from the current bankruptcy cases will be greater awareness of civil law's protections on the part of dioceses and parishes.

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[172] *Id.* at 49 ("Each Parish that is separately incorporated will be operated and governed in accordance with Canon Law.").

[173] Chapter 11 protection should be available to an incorporated parish. *See* 11 U.S.C. § 109(d) (2000).

VI

Plan Confirmation and Bankruptcy Court Rulings: The Early Results

All three of the dioceses that filed for bankruptcy in 2004 have since come to some tentative resolution in their bankruptcy cases. One proceeded to a bankruptcy plan that was confirmed by a court, while the other two litigated through the bankruptcy courts with negative results.

A. Tucson Confirms its Plan

On July 11, 2005, a bankruptcy judge in Tucson, Arizona confirmed the Chapter 11 reorganization plan of the Tucson Diocese.[174] The resolution made Tucson the first of the dioceses to settle its bankruptcy case. Under the plan, a $22.2 million trust was established to compensate abuse victims, most of whom will receive between $15,000 and $600,000.[175] The fourteen most severely abused victims will share a pot of approximately $6.8 million with no individual member taking less than $200,000.[176]

In a move that underscores the problems with the applicability of the canon law arguments outlined in this Comment, the Tucson Diocese also included as part of its bankruptcy plan to incorporate all seventy-four of its parishes separately as nonprofit entities.[177] Tucson was not the first diocese to take this step, as separate parish incorporation had happened previously in Baker, Oregon; Davenport, Iowa; Lincoln, Nebraska; Milwaukee, Wisconsin; New York, New York; Providence, Rhode Island; and Stockton, California.[178] Given the initial outcomes in Portland and Spokane and the analysis laid out herein, parish incorporation is a wise move and is the only move certain to gain civil law recognition for individual parishes, which is an obvious precursor to legal property ownership.

B. Spokane and Portland Lose Bankruptcy Court Rulings

The Spokane Diocese brought several initial arguments to the

174 Susan Hines-Brigger, *Judge O.K.'s Reorganization Plan for Tucson Diocese*, St. Anthony Messenger, Sept. 1, 2005, at 2005 WLNR 14755110.

175 *Id.*

176 *Id.*

177 *Tucson Parishes Become Independent Corporations*, Sept. 10, 2005, Grand Rapids Press, at 2005 WLNR 14394420.

178 *Id.*

bankruptcy court that each relied heavily on the structure of canon law to support its propositions that parish properties were not part of its bankruptcy estate or, in the alternative, that trusts had been created for the parishes' benefit. On August 26, 2005, Bankruptcy Judge Patricia Williams ruled on these issues.[179] Judge Williams' ruling came as a blow to the diocese's position.

With respect to the application of canon law, the diocese relied on the Religious Freedom Restoration Act (RFRA) and prior case law to argue that allowing § 541 of the Bankruptcy Code to define parish property as part of the diocese's bankruptcy estate constituted an undue burden on religion under both RFRA and the First Amendment. Noting first the uniqueness and novelty of the diocese's argument[180] and also that the bankruptcy dispute was between the diocese and third parties, not internal church members,[181] Judge Williams ruled that "[a]pplication of § 541 to [the Spokane Diocese] on the same basis as its application to all other debtors does not interfere with the free exercise of religion."[182] Consequently, the application of civil, not canon, law posed no constitutional or RFRA problems.

Judge Williams then addressed the various express and implied trust issues raised by the diocese. In ruling on whether the diocese had ever created express trusts for its parishes, Judge Williams recognized that the Spokane Diocese's articles of incorporation had indeed created an express trust, but instead of creating a trust for its parishes, the Diocese had created an express trust naming itself—the Roman Catholic Church of the Diocese of Spokane in the State of Washington—as the beneficiary.[183] Thus, Judge Williams ruled that "[t]he Bishop, as trustee, holds the property in trust for the Diocese"[184] and, consequently, not in express trust for the parishes. Second, after analyzing both types of implied trusts—constructive and resulting—Judge Williams concluded that the facts did not establish the existence of an implied trust for the benefit of parishio-

[179] *In re* The Catholic Diocese of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005).

[180] *Id.* at 321 ("The proposition that the rights of creditors of religious organizations are to be determined in accordance with ecclesiastical doctrine of the religious organization is perhaps not quite as astounding as it first appears.").

[181] *Id.* at 323 ("This is a purely secular dispute between creditors and a bankruptcy debtor, albeit one which is a religious organization.").

[182] *Id.* at 325.

[183] *Id.* at 327-28.

[184] *Id.* at 328.

ners[185] nor, with respect to parish real property, was there evidence of implied trusts.[186]

This ruling was a blow to the Spokane Diocese, as it appeared to dismiss each of the diocese's canon law arguments systematically. It does not appear, however, that this ruling will be the last word. The Spokane Diocese immediately appealed to the next highest court, the United States District Court for the Eastern District of Washington.[187] In the meantime, it has proposed a Chapter 11 plan as well.[188]

On December 30, 2005, Portland Bankruptcy Judge Elizabeth Perris ruled on the Portland Archdiocese's bankruptcy estate question in much the same way that Spokane's Judge Williams did. For instance, Judge Perris stated that:

> Neutral principles of law require application of secular neutral principles, not sacred ones. The religious organization's internal law is not relevant to the dispute, unless neutral principles of civil law make it so. There is no constitutional requirement that internal church law be considered in determining a purely secular dispute.[189]

Judge Perris also cited Judge Williams' ruling with approval on this point.[190]

In ruling on the archdiocese's RFRA arguments, Judge Perris, with respect to the potential burden § 541 might place on religion, first questioned whether RFRA even applies to a simple determination statute like § 541, which merely defines estate property by reference to relevant state law.[191] Yet Judge Perris ultimately concluded that even if RFRA did apply to the § 541 estate determination, such a determination did not violate

[185] *Id.* at 330 ("No constructive or resulting trust exists for the benefit of individual parishioners.").

[186] *Id.* at 331 ("There is no evidence to support the creation of a constructive or resulting trust with regard to the Disputed Real Property."). Judge Williams, however, did rule that there were factual questions with respect to disputed personal property, namely, funds and investment accounts. *Id.* at 331-32.

[187] Matt Miller, *Spokane Ruling: Blow to Canon Law*, THE DAILY DEAL, Aug. 30, 2005, at 2005 WLNR 13602810.

[188] John Stucke, *Diocese Offers Abuse Claim Plan: Payout Fund Soars to $57.5 Million; Process Questioned*, Spokesman-Review (Spokane, Wash.), Dec. 31, 2005, *available at* 2005 WLNR 22322813.

[189] *In re* Roman Catholic Archbishop of Portland in Or., 835 B.R. 842, 854, 2005 WL 3618347 at * 6 (Bankr. D. Or. 2005).

[190] *Id.* (citing *In re* The Catholic Diocese of Spokane, 329 B.R. 304, 326 (Bankr. E.D. Wash. 2005)).

[191] *Id.* at 860.

RFRA.[192]

Finally, Judge Perris ruled that the various Portland Archdiocese parishes, save for one that had separately incorporated itself, "cannot hold title to real property. They are not separate from, but are merely a part of debtor."[193] Consequently, the civil law structure chosen by the archdiocese (i.e., keeping its parishes unincorporated) dictated that the parishes were not capable of holding real property or of being trust beneficiaries.[194] If one accepts that Judge Perris is correct about the nature of the parishes—that they are legally part of the archdiocese itself and have no independent legal existence—this conclusion is self-evident. A corporation certainly cannot hold assets in trust for another part of itself and hope to gain a shield of civil liability in the process.

C. Summary

The initial bankruptcy court rulings have been negative for the dioceses. It remains to be seen how far potential appeals will be taken or whether the Spokane and Portland Dioceses will simply follow the lead of Tucson toward a confirmed Chapter 11 plan. Given the monetary size of the Portland Archdiocese, however, if parish property is part of the archdiocese's estate, it would not be surprising if the archdiocese appealed. Judge Perris' ruling gives more bargaining power to the archdiocese's creditors in terms of securing a more favorable plan.

Conclusion

One can only hope that the underlying meritorious suits alleging sexual abuse against dioceses and individual bad actors within the church come to successful resolutions for all parties involved—for every possible reason. The financial, temporal, and monetary commitments of such legal actions are difficult to measure but are certainly taxing to all those involved.

This Comment has discussed a number of issues, including the uniqueness of a diocesan bankruptcy petition as it pertains to a diocesan bankruptcy estate, the dioceses' arguments as to why parish property should not be part of a diocesan bankruptcy estate, the relevant law surrounding bankruptcy estate questions,

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192 *Id.* at 861.
193 *Id.* at 866.
194 *Id.* at 867.

and the opportunities the dioceses had to protect parish assets successfully. Given the legal status of parish assets, the difficulty in arguing for legally recognized trusts, the virtual impossibility that parishes can be recognized as separate corporations, and the unlikely prospect of applying canon law directly in bankruptcy, it is probable that a great deal of parish property, if not all of it, will become part of the bankruptcy estates of the Archdiocese of Portland and the Diocese of Spokane.

This does not seem to be an unjust result. Corporate status is relatively simple to acquire, as dioceses themselves have discovered and acted on by availing themselves of the unique corporation sole status granted to them by state legislatures. Legal trusts are also relatively simple instruments. Either of these approaches could have shielded parish assets. The failure of dioceses to use these legal protections should serve as a lesson to other dioceses to protect the structures that they believe exist within canon law, namely, that of parishes as separate juridical persons who own property in their own right. Judge Elizabeth Perris espoused a similar position when discussing the Portland Archdiocese's canon law claims and its one separately incorporated parish:

> [The Portland Archdiocese] has chosen to organize its operations under a corporation sole. It chose to separately incorporate (or allow the separate incorporation of) St. Elizabeth Parish; it could have also chosen to incorporate the other parishes as religious corporations, by which they would gain a civil legal status and could exercise the powers granted to such corporations, including the power to hold and dispose of property and to sue and be sued. [The archdiocese] did not, however, choose to do that, and gives no reason why it could not, under state law, have separately incorporated the parishes or in some other way organized itself to protect canonical ownership rights, if any, of the schools and parishes. The existence of St. Elizabeth Parish is evidence that such incorporation is possible and acceptable.[195]

The dioceses have apparently not considered it worthwhile to take full advantage of these protections for their parishes—as can be inferred from the facts that the vast majority of parishes are not separately incorporated and that there are no express trust agreements specifically naming the parishes as beneficiaries. Furthermore, it is certainly difficult to prove a series of resulting

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195 *Id.* at 867-68.

trusts on a massive scale. It would be inequitable if parishes received legal protection in bankruptcy—protection that was always available to them—without performing the necessary steps to acquire the protection.

This is not to say that there are not sympathetic parties on both sides of the lawsuits against the dioceses. One obviously has sympathy for the victims of past sexual abuse. Certainly, it is unfortunate that a parish that had nothing to do with alleged abuse might have its assets put in jeopardy at the hands of a few extremely bad actors in another parish, especially when it seems clear that canon law would protect parish assets from the liabilities of other parishes or the diocese if canon law were to govern the civil dispute. Yet it goes without saying that foresight is far more legally effective than hindsight. Nowhere is this truer than in the context of shields of legal liability. The failure to plan adequately for future outcomes will result in financial detriment to the parishes, which will quite likely bear some of the financial brunt of the bankruptcy cases by way of the inclusion of parish property in the bankruptcy estates of their respective dioceses. Consequently, the "pot of gold" is probably not empty for those dioceses presently in bankruptcy court.