NOTE

"LEAP OF FAITH" INTO BANKRUPTCY: AN EXAMINATION OF THE ISSUES SURROUNDING THE VALUATION OF A CATHOLIC DIOCESE'S BANKRUPTCY ESTATE

INTRODUCTION

The Bankruptcy Code[1] (the "Code") was enacted in order to promote neutral governmental interests such as granting debtors a fresh start, advancing public and private interests by facilitating the economic flow, protecting creditor's rights, and administering the collective efforts of the Code.[2] Chapter 11 of the Code allows debtors to restructure their businesses, pay back a percentage of unsecured debt, and continue operating.[3] Although the Code does contemplate filings by a wide variety of entities,[4] not-for-profit corporations' filings have been few and far between.[5] Even more unusual is a not-for-profit religious entity seeking the protection of the Bankruptcy Court. Given the inevitable clash between bankruptcy's goals and

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[1] 11 U.S.C. §§ 101–1330 (2000). All section references are to the Bankruptcy Code.

[2] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (indicating purpose of Code to relieve debtor from indebtedness); *see also* Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 550 (1993) (explaining Code embraces fresh start policy where debtor discharges debt and starts anew); *see e.g.*, Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (stressing purpose of Bankruptcy to relieve debtor from weight of existing debt and have new beginning).

[3] *See* 11 U.S.C. § 1101–1174 (2000) (illustrating chapter 11 allows debtor to reorganize by confirming plan with court and paying back percentage of unsecured debt); *see also* H.R. REP. NO. 95-595, at 220 (1977) (indicating goal of chapter 11 is to continue debtor as going concern by restructuring finances while continuing to operate its business); N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 550 (1984) (stating purpose of chapter 11 is "to enable a debtor to restructure his business so as to be able to continue operating.").

[4] *See* Hon. Leif M. Clark, *Chapter 11—Does One Size Fit All?*, 4 AM. BANKR. INST. L. REV. 167, 168 (1996) ("the Code permits corporations, partnerships, and individuals to file for chapter 11 relief, but excludes insurance companies and banks."); *see e.g., In re* Joliet-Will County Cmty. Action Agency, 847 F.2d 430, 432 (7th Cir. 1988) (finding community service organization was not precluded from seeking protection in bankruptcy); *In re* Greene County Hospital, 59 B.R. 388, 389 (Bankr. S.D. Miss. 1986) (qualifying hospital as organization able to seek bankruptcy law protection). *But see In re* Lutz, 82 B.R. 699, 702 (Bankr. M.D. Pa. 1988) (construing governmental units as precluded from applying bankruptcy laws).

[5] *See* Gary W. Marsh, Angelyn M. Wright & Joelle J. Phillips, *Intensive Care: Application of the Absolute Priority Rule to Non-Profit Health Care Entities*, AM. BANKR. INST. J., Feb. 1998, at 18 ("The rise in the number of entities with non-profit status is a relatively recent phenomenon, and, not surprisingly, the case law is relatively undeveloped."); *see e.g.*, Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. L.J. 361, 405 (2003) (describing Arizona Baptist Foundation's filing one of largest non-profit bankruptcies in history). *But see* Pam Belluck & Adam Liptak, *For Boston Archdiocese, Bankruptcy Would Have Drawbacks*, N.Y. TIMES, Dec. 3, 2002, at A28 (quoting Jay L. Westbrook, an expert in bankruptcy law at the University of Texas, for proposition nonprofit filing for bankruptcy is not unusual).

methods and religious institutions' constitutional rights and practices, the Bankruptcy Court and bankruptcy scholars are destined to enter un-chartered territory.[6]

In dealing with a religious, not-for-profit debtor, the Bankruptcy Court must consider how religion might alter the application of the Code. In response to a wave of sexual abuse allegations filed against the Catholic Church,[7] dioceses around the country have asserted that chapter 11 reorganization will serve as a forum in which to compensate victims while also carrying out the mission of the Church.[8] At the same time the Church argues that the First Amendment of the Constitution[9] must be respected in order to protect itself against Governmental interference and to exempt itself from the full application of the Code as we know it.[10] Despite a showing of unwavering confidence in their positions, dioceses

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[6] *See* Roundtable Discussion, *Religious Organizations Filing for Bankruptcy*, 13 AM. BANKR. INST. L. REV. 25 (2005) [hereinafter Roundtable] (documenting panel of civil and Canon law experts speaking of important First Amendment and statutory issues surrounding rash of Catholic Church bankruptcies); Belluck & Liptak, *supra* note 5, at A28 (quoting Jay L. Westbrook "For the Archdiocese of Boston to [file for protection of bankruptcy] would be stunning."); Brian K. O'Neel, *A Dangerous Precedent?*, October 2004, *at* http://www.cwnews.com/news/viewstory.cfm?recnum=33162 (last visited Oct. 25, 2005) ("It shocked experts in the bankruptcy field, because this was the first time in U.S. history—and possibly world history—that a religious entity of such size had filed for debtor protection."); *Tucson Bankruptcy Dilemma*, RELIGION & ETHICS NEWSWEEKLY, August 20, 2004, *at* http://www.pbs.org/wnet/religionandethics/week751/ news.html (last visited Oct. 25, 2005) (quoting Thomas Zlaket, outside counsel in case of Archdiocese of Tucson, "[t]his is an issue that has never been decided in the history of his country. We're talking about a legal issue that is a first in 200 years of legal history, and it is certainly a first for the Catholic Church in America . . . .").

[7] *See* Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re* Catholic Bishop of Spokane), 329 B.R. 304, 310 (Bankr. E.D. Wash. 2005) ("The bankruptcy reorganization was caused by numerous tort claims brought by victims of clergy sex abuse."); *see, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 414 (2d Cir. 1999) (explaining plaintiff claims clergyman sexually assaulted him as minor); Doe v. Norwich Roman Catholic Diocesan Corp., 309 F.Supp.2d 247, 249 (D. Conn. 2004) (seeking recovery for sexual abuse by Roman Catholic priest when plaintiff was fifteen years old).

[8] *See Bishops Announcement to the Laity, Religious, and Clergy of the Diocese of Tucson*, Sept. 20, 2004, *at* www.diocesetucson.org/chapter11dot1.html (indicating Church's need for neutral forum to compensate victims while also carrying out mission and ministry of Church) (last visited Sept. 20, 2005); Bishop William S. Skystad, *Diocese of Spokane Press Statement*, Nov. 10, 2004, *at* http://www.dioceseofspokane.org/BW_2004/press111004.htm (last visited Oct. 25, 2005) ("Chapter 11 Reorganization will provide a fair, just, and equitable mechanism for the payment of valid claims against the Catholic Diocese of Spokane, while allowing us to maintain the historic mission of the Catholic Church in Eastern Washington.").

[9] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[10] *See* 144 Cong. Rec. H3999 (1998) (arguing exempting Church from Bankruptcy Code as we know it will allow Church to continue its free-exercise of religion but will also support Code's policies of vigorously protecting non-profit debtors, encouraging religious organizations to file for bankruptcy, and encouraging them to reorganize under chapter 11 so their creditors may be fully compensated); H. WAYNE HOUSE, CHRISTIAN MINISTRIES AND THE LAW 45 (Baker Book House 1992) (indicating interpretation of First Amendment has helped protect Church from Governmental interference).

nationwide may have recently discovered that their constitutional claims will not offer them the protection they seek.[11]

The dioceses of Tucson, Arizona, Portland, Oregon and Spokane, Washington have been the first three dioceses to file for chapter 11 protection. These regrettable filings[12] were necessitated by the overwhelming number of sexual abuse claims filed against parish priests.[13] Since the Tucson diocese filed, parties in that case agreed to a reorganization plan that will make $22.2 million available to settle sex-abuse claims.[14] The Portland, Oregon case has been decided on some issues, but not on others.[15] Most importantly, on August 26, 2005, a federal bankruptcy judge in Spokane ruled in favor of tort claimants and against the diocese of Spokane.[16] These

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[11] *See In re* Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005) (finding in favor of tort claimants and against Diocese of Spokane); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 417 (2d Cir. 1999) (holding in District Court "First Amendment precluded reliance on religious doctrine."); *see also* Jeffrey R. Anderson et al., *The First Amendment: Churches Seeking Sanctuary for the Sins of the Fathers*, 31 FORDHAM URB. L.J. 617, 618 (2004) (arguing church's reliance on First Amendment perverts the Constitution).

[12] *See* Claire Luna, *Healing Signs in O.C. Abuse Ordeal*, L.A. TIMES, Sept. 6, 2004, at B1 (discussing Catholic diocese settlement for $100 million, which could lead to bankruptcy, resulting in shame); Fred Naffziger, *A New Chapter*, AMERICA MAGAZINE, Oct. 21, 2002, *at* http://www.americamagazine.org/gettext.cfm?articletypeid=1& textID=2553&issueID=408&search=1 (last visited Oct. 25, 2005) (indicating there is institutional shame associated with Catholic diocese filing bankruptcy in response to sexual abuse scandal).

[13] *See* Reverend John G. Vlazny, *Letter from the Office of the Archbishop of Portland, Oregon*, July 6, 2004, *at* http://www.bishop-accountability.org/bankrupt/2004-07-06-Vlazny-Letter.htm (last visited Oct. 25, 2005) (explaining in last four years, diocese of Portland has settled more than 100 claims of sexual abuse, paid over $21 million in one year, and was abandoned by all major insurers); Skystad, *supra* note 8 ("We have identified approximately 125 potential claimants who believe they were victimized by priests serving in Eastern Washington."); *see, e.g.*, Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1208 (2004) ("10,677 children suffered child abuse at the hands of 4,392 members of the clergy within the Church between 1950 and 2002."); Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 950–51 (2003) (citing over 500 clergy sexual misconduct cases in almost all fifty states and several foreign countries where victims deserve $300,000 in compensation).

[14] *See* Sheryl Kornman, *Diocese to pay $10M Upfront as Plan OK'd*, TUCSON CITIZEN, July 12, 2005, at 1A (outlining $22.2 million settlement plan money as $2 million will come from parishes, $14.8 million from insurers, $5.58 from properties sold and $5 million to be set aside for unknown claimants); Matt Miller, *Tucson Diocese to Exit Ch. 11*, THE DAILY DEAL/THE DEAL, July 13, 2005 (noting diocese gained support from insurers who will provide $15 million of $22.2 million settlement); Janet I. Tu & Jonathan Martin, *Spokane Churches Can Be Sold To Pay Debt, Judge Rules*, THE SEATTLE TIMES, Aug. 27, 2005, at A1 ("Parishes are paying $2 million into that fund; the diocese's insurance companies about $14 million; and the diocese itself remaining amount.").

[15] *See* Tu & Martin, *supra* note 14, at A1 ("[The] question of whether the diocese owns parish property has not been decided"); Steve Woodward, *Vatican Rules on Parish Assets*, THE OREGONIAN, Aug. 17, 2005, at B1 (acknowledging dispute over Western Oregon's parish property is being fought in bankruptcy court in class-action lawsuit to determine ownership).

[16] *In re* Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005); *see also* Marie Szaniszlo, *Judge: Church owns assets, not parishes*, THE BOSTON HERALD, Aug. 28, 2005, at 009 (noting bankruptcy judge rejected diocese's contention assets of parishes belong to parishioners and not diocese); Sam Verhovek & Jean Guccione, *Spokane Judge Lifts Diocese's Bankruptcy Shield; Churches and other assets may be liquidated to settle abuse claims. An appeal is expected*, LOS ANGELES TIMES, Aug. 27, 2005, at A26

dioceses have become the stalking horses for many others, and the *Spokane* decision will likely force the dioceses that are contemplating chapter 11 protection to think twice.[17] Among the most controversial issues are (a) whether the dioceses are filing in good faith, (b) whether a court appointed trustee may be appointed for a religious entity, and (c) whether parish assets should be included in the estate of the diocese debtor.

Good faith has been held to exist where a chapter 11 petition "serves a valid reorganizational purpose" and has failed to exist where a filing is made "merely to obtain tactical litigation advantages. "[18] Sexual abuse victims could question whether the dioceses' filings are made in good faith. The dioceses appear to have little debt other than potential tort liability, a fact which supports the contention that there is no reorganizational purpose but instead, a motivation to consolidate and dispose of numerous, expensive lawsuits.[19] The line between a reorganizational purpose and tactical advantage, however, is a blurred one. Courts have permitted solvent corporations facing mass tort liability suits to file for bankruptcy[20] despite concerns that the filings were being used strategically to force global settlements.[21] Due to this precedent, there is a likelihood that "good faith" will not be a

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(discussing bankruptcy judge's ruling parishes and parochial schools could be liquidated to pay victims of sex-abuse); Steve Woodard, *Diocese plaintiffs win ruling on assets*, THE OREGONIAN, Aug. 27, 2005, at A1 ("Spokane bankruptcy judge made 32 Eastern Washington parishes available to pay off clergy sexual-abuse claims.").

[17] *See* Verhovek & Guccione, *supra* note 16, at A26 (realizing decision in Spokane will undercut Church's claims that assets do not belong to dioceses); *see also* Michael Levenson, *Judge: Diocese's Assets to Pay Sex-Abuse Victims; Wash. Ruling May have Local Effect*, BOSTON GLOBE, Aug. 29, 2005, at B5 (suggesting parishes across country could see increase in claims being brought if assets are not separated between parish and diocese).

[18] *See* Fraternal Composite Servs., Inc. v. Karczewski, 315 B.R. 253, 257 (Bankr. N.D.N.Y. 2004) (recognizing courts find bad faith in filing when there is no reason to reorganize or rehabilitate and it was only attempt to avoid litigating issues in state court); David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1187 (2003) (suggesting good faith will be determined only if chapter 11 petition has reorganizational purpose); *see e.g., In re* SGL Carbon Corp., 200 F.3d 154, 163, 165 (3d. Cir. 1999) (discussing concern SGL Carbon was filing solely to avoid antitrust exposure and had no other financial concerns).

[19] *See, e.g., In re* St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 583 (B.A.P. 9th Cir. 1995) (pointing to bankruptcy court's finding purpose in filing petition was not to effectuate reorganization, but was litigation tactic). *But see In re SGL Carbon Corp.*, 200 F.3d at 164–166 (3d Cir. 1999) (observing courts have allowed companies to file for bankruptcy when faced with pending litigation posed threat to companies' viability).

[20] *See* Skeel, Jr., *supra* note 18, at 1181–82 (indicating bankruptcy courts have been used to settle mass tort litigation in areas such as asbestos, contraceptive devices, silicon breast implants, and steel industry); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2050 (1998) ("The use of bankruptcy to protect a business whose viability is threatened by mass tort liability is not foreign to these underlying goals of the Bankruptcy Code."). *See generally* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1722 (1998) (questioning whether mass future claims proposals have anything to do with bankruptcy or are tactics to "shoehorn" mass tort litigation into settlement).

[21] *See* Naffziger, *supra* note 12 ("A number of solvent corporations facing mass tort liability suits . . . have sought chapter 11 reorganization as a tactic to force a global settlement of all the litigation."); Skeel, Jr., *supra* note 18, at 1187 (noting courts have permitted companies to file for bankruptcies in several prominent cases despite concerns filing was strategic in nature).

determinative issue in these kinds of cases, but, instead, complex constitutional issues, not typically found in mass tort cases, will predominate.[22]

Although section 1108 of the Code provides that the Court may appoint a trustee who may then operate the debtor's business,[23] a trustee is generally not appointed in a chapter 11 case. Rather, the debtor remains in possession and performs the duties of the trustee.[24] Section 1104(a) further provides that a trustee should only be appointed for cause, which includes fraud, dishonesty, incompetence, or gross mismanagement of the debtor's affairs by current management, or if in the best interests of the creditors and the estate.[25] The need for a trustee in the context of a Church filing may be supported by the fact that dioceses engage in "creative" accounting methods.[26] The trustee in such a case would, in effect, step into the shoes of the diocese leader, the Bishop, and assure that the Church appropriately conducts its financial affairs during the bankruptcy proceedings. Because the role of a trustee is, by its very nature, intrusive, there is a serious question as to whether the appointment of a trustee would interfere with the Church's religious freedoms.[27] If a Court determines that the appointment of a

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[22] *See* Skeel, Jr., *supra* note 18, at 1183, 1187 (suggesting good faith will not be issue); Roundtable, *supra* note 6, at 31 (comparing Church cases to mass-tort litigation and questioning whether case should be dismissed on good faith grounds); *see also* Greg Z. Zipes, *After* Achem *and* Ahearn: *The Rise of Bankruptcy over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*, 1998 DET. C. L. REV. 7, 36 (1998) ("Parties seeking to settle nationwide class actions must consider that the Supreme Court has not decided this and other constitutional issues in the mass tort context.").

[23] 11 U.S.C. § 1108 (2000); *see also In re* Airlift Intern, Inc., 18 B.R. 787, 788 (Bankr. S.D. Fla. 1982) (emphasizing trustee is not required to continue to conduct business); *In re* Thrifty Liquors, Inc., 26 B.R. 26, 28 (Bankr. D. Mass. 1982) (concluding use of "may" in section 1108 implies trustee is not required to operate business); Panel Discussion, *Judge's Role in Insolvency Proceedings: The View from the Bench; The View from the Bar*, 10 AM. BANKR. INST. L. REV. 523, 523 n.46 (2002) (noting under statute, trustee may operate debtor's business, unless court directs otherwise).

[24] 11 U.S.C. § 1107 (2000) (stating debtor shall have all rights and shall perform all functions and duties specified); *see also In re* Hawaii Dimensions, Inc., 47 B.R. 425, 426–27 (Bankr. D. Haw. 1984) (explaining company in question, as debtor-in-possession, has all rights and duties of trustee in chapter 11 case); Sabre Farms v. Bergendahl, 42 B.R. 649, 650 (Bankr. D. Or. 1984) ("11 U.S.C. § 1107 establishes debtor-in-possession has rights, powers, and duties of trustee in bankruptcy.").

[25] 11 U.S.C. § 1104(a) (2000) (providing trustee will be appointed for cause or if in best interests of creditors or others involved); *see also* Paula D. Hunt, *Bankruptcy Examiners Under Section 1104(b): Appointment and Role in Complex Chapter 11 Reorganizations of Failed LBOs*, 70 WASH. U. L.Q. 821, 822 n.9 (1992) (noting Code permits court to appoint trustee after commencement of proceedings only if its in best interests of creditors or if "cause" exists).

[26] *See* Naffziger, *supra* note 12 (indicating need for trustee may be spurred by fact that dioceses engage in "creative" accounting methods); Dominic Rushe, *US Catholic church considers going bust over abuse claims*, SUNDAY TIMES (London), Oct. 13, 2002 (referring to Naffziger's position that "creative" accounting may be uncovered during diocese's bankruptcy proceedings).

[27] *See* Skeel, Jr., *supra* note 20, at 1193 (pointing out possibility of bankruptcy court ousting archbishop); *see also* Naffziger, *supra* note 12 (suggesting process of overseeing financial activities of church will be severely intrusive since bishop is used to unquestioned religious authority); Jack Siegel, *Catholic Diocese of Tucson Files Plan of Bankruptcy Reorganization*, CHARITY GOVERNANCE, Sept. 22, 2004, *at* http://charitygovernance.blogs.com/ charity_governance/2004/09/catholic_dioces.html (last visited Oct. 25,

trustee is appropriate, the Church will claim that such action is prohibited by the First Amendment's No Establishment Clause[28] and Free Exercise Clause[29] in conjunction with the Religious Freedom Restoration Act (hereinafter "RFRA").[30]

When a bankruptcy petition is filed by a debtor, an estate is created that encompasses all of the debtor's property.[31] Section 1106(a)(1) further commands the debtor to remain accountable for all property the estate receives.[32] The issue of what constitutes "property" is therefore essential to the success of the bankruptcy process.[33] The dioceses have expressed confidence in the position that parish assets cannot and will not be included in the dioceses' bankruptcy estates.[34] However, in August of 2005, the judge in the *Spokane* case held that churches and schools in the

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2005) (questioning whether appointment of trustee would create clash between Vatican's power to appoint bishops and bankruptcy court's power to name debtor in possession).

[28] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *see also In re* Gates Cmty. Chapel of Rochester, Inc., 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997) (arguing appointment of trustee would violate Establishment Clause).

[29] *See* U.S. CONST. amend. I ("Congress shall make no law respecting . . . the free exercise [of religion] . . . .").

[30] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000) (invalidating laws of general application if they "substantially burden a person's exercise of religion," unless application of burden on religion is in furtherance of compelling governmental interest and is least restrictive means of furthering interest).

[31] *See* 11 U.S.C. § 541(a) (2000) (espousing creation of estate when bankruptcy petition is filed); *see also In re* Catholic Bishop of Spokane, 329 B.R. 304, 309–10 (Bankr. E.D. Wash. 2005) ("This controversy arises under 11 U.S.C. § 541 which is the section of the Bankruptcy Code which defines property of the bankruptcy estate."); Smith v. Kennedy (*In re* Smith), 235 F.3d 472, 477–78 (9th Cir. 2000) (explaining Code distinguishes between property of estate under 11 U.S.C. § 541 and property of debtor which is acquired after filing bankruptcy).

[32] 11 U.S.C. § 1106(a)*(*1) (2000) (commanding debtor to perform duties of trustee specified in section 704(2), which states trustee "shall be accountable for all property received."); *see e.g.*, *In re* March, 995 F.2d 32, 34 (4th Cir. 1993) (indicating debtor-in-possession acts as trustee for creditors); *In re* Grabill Corp., 113 B.R. 966, 970 (Bankr. N.D. Ill. 1990) (stating debtor-in-possession has almost all duties of trustee).

[33] *See In re Catholic Bishop of Spokane*, 329 B.R. at 311 ("The real property in dispute consists of churches, schools, cemeteries and other parcels. The personal property in dispute consists of bank accounts, investments, furniture, vehicles, etc."); *see also* David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1188–89 (2003) ("To the extent the churches and schools were Archdiocese property—an issue about which there has been some dispute—their value would need to be taken into account in the Archdiocese's negotiations with its creditors"); Ed Langlois, *In Bankruptcy Case, Key Questions Center on Archdiocese's Status as Trustee*, CATHOLIC SENTINEL, July 30, 2004, *at* http://www.sentinel.org/articles/2004-30/12958.html (last visited Oct. 25, 2005) (questioning whether Catholic parishes and schools and their holdings can be counted when court tallies archdiocese's assets has risen to top).

[34] *See In re Catholic Bishop of Spokane*, 329 B.R. at 310 ("The debtor contends that, with certain exceptions, the individual parishes, schools, cemeteries and other members of the diocesan family own the real and personal property. It argues those assets do not constitute property of the estate and are not available for repayment of creditors."); *see also* Stephanie Innes, *Bankruptcy Won't Touch Most Assets, Diocese Says*, ARIZONA DAILY STAR, July 11, 2004, *at* www.dailystar.com/dailystar/relatedarticles/29618.php (last visited Oct. 25, 2005) (noting Tucson expects parishes to continue operating no matter what happens with bankruptcy proceedings); Skystad, *supra* note 8 ("We expect that the parishes and schools of the Spokane Diocese will continue to operate as usual."); Vlazny, *supra* note 13 ("[Seeking protection of bankruptcy] should allow the Archdiocese and our parishes and schools to operate in normal fashion while difficult financial issues are resolved.").

Catholic Diocese of Spokane are owned by the diocese and can be sold to pay settlements to sex-abuse victims.[35] This note explores to what extent the Church's Canon Law and the Constitution of the United States work in favor of the dioceses' position and to what extent Civil Law and the Code put the assets of the Catholic Church at risk and threaten the Church's very existence.

I. THE CHURCH'S CORPORATE STRUCTURE

"The Roman Catholic Church, with some 64 million members and thousands of affiliated operations, is the largest and most influential non-government organization in the U.S."[36] Although we often think of the Catholic Church as a monolithic entity, it is in fact a decentralized organization with thousands of legally and financially separate entities.[37] Understanding how the Catholic Church is structured and how the different branches of the Church interact with each other is essential to the determination of how Catholic dioceses will fare in bankruptcy.

"The Roman Catholic Church is a prototypical example of a hierarchical church."[38] At the top of the United States Church's hierarchy is the Holy See, consisting of the Pope and the land he controls, Vatican City.[39] The Pope's primary

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[35] *See In re Catholic Bishop of Spokane*, 329 B.R. at 333 (("The disputed real property constitutes property of the estate."); *see also* Nicholas K. Geranios, *Judge Says all Assets are Fair Game for Priest-Abuse Suit*, PHILA. INQ., Aug. 28, 2005, at A8 ("A federal bankruptcy judge has ruled that all the parish churches, parochial schools, and other property of the Catholic Diocese of Spokane can be liquidated to pay victims of clergy sexual abuse.").

[36] William C. Symonds, *The Economic Strain on the Church*, BUSINESS WEEK, April 15, 2002, at 34; *see also* Dale Van Atta, *This Isn't the Old AARP*, LOS ANGELES TIMES, Nov. 24, 2003, *at* B11 (indicating AARP is second largest membership organization in United States after Catholic Church); Laurie Goodstein, *Conservative Churches Grew Fastest in 1990's; Report Says*, THE NEW YORK TIMES, Sept. 18, 2002, at A22 (mentioning Catholic Church is nation's largest church); Jerry L. Van Marter, *PC(USA) 9th-largest U.S. church, NCC yearbook says*, PCUSA NEWS, March 16, 2004, *at* http://www.wfn.org/2004/03/msg00140.html (last visited Oct. 25, 2005) ("The three largest U.S. churches are the Roman Catholic Church (66.4 million members), the Southern Baptist Convention (16.2 million) and the United Methodist Church (8.3 million).").

[37] *See* Symonds, *supra* note 36 ("But the Church is not a unified corporation: It is a decentralized organization with thousands of legally and financially separate entities."); *see also* Charles M. Sennott, *Money Concerns Said Not Utmost Drain on Rome Called No Issue*, BOSTON GLOBE, April 22, 2002, at A13 ("The church is very centralized in its ruling hierarchy, but very decentralized when it comes to its finances . . . ."); Jack Siegel, *Catholic Diocese of Tucson Files Plan of Bankruptcy Reorganization*, September 22, 2004, *at* http://charitygovernance.blogs.com/ charity_governance/2004/09/catholic_dioces.html (last visited Oct. 25, 2005) (indicating Catholic Church is configured using series of "parent-subsidiary" relationships).

[38] *In re* Catholic Bishop of Spokane, 329 B.R. 304, 323 (Bankr. E.D. Wash. 2005) (citing Watson v. Jones, 80 U.S. 679, 722–23 (1871) for proposition hierarchical church is one in which various bodies in church have similar faith and doctrines subject to common governing ecclesiastical head); *see also* Ari L. Goldman, *Newark Clerics Battle Over Role of Women*, THE NEW YORK TIMES, Jan. 31, 1991, at B1 (indicating Catholic Church is largely hierarchical, taking orders from top down); Don Wycliff, *The Editorial Notebook; The Librarian Priest*, THE NEW YORK TIMES, March 21, 1989, at A24 (referring to hierachical nature of Catholic Church).

[39] *See* Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1837 (1996) (stating Holy See is "supreme organ of government" of Roman Catholic Church);

functions are to appoint bishops who run the United States Church and to set policies, including the establishment of rules on who may become a priest.[40] Vatican City is a sovereign state and as such, is beyond the reach of United States law.[41] The Papal Nuncio, the U.S. Conference of Catholic Bishops, and the Cardinals are three important liaisons between the Pope and the Church as it operates on a national level.[42] The Papal Nuncio is essentially the Papal representative to the United States, the U.S. Conference of Catholic Bishops speaks for the United States Church on policy matters such as abortion and welfare, and the Cardinals elect the Pope.[43] On a national level, the Church consists of many dioceses and parishes.[44] It is the dioceses and parishes that the bankruptcy estate's valuation relies on.

The dioceses make up the key administrative unit of the Church as everything from ordinations of priests to education is run at this level.[45] The dioceses are comprised of a number of parishes that are either under the control of a bishop, or, in certain important dioceses called "archdioceses, by archbishops.[46] Each diocese is

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Paul Lewis, *At the U.N. Activists Vie With Vatican Over Abortion*, THE NEW YORK TIMES, April 4, 1999, at 1-4 (indicating Holy See is "the government of both the Roman Catholic Church and the Vatican City.").

[40] *See generally* Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. INT'L L. REV 629, 671–72 (1997) (stating Pope delegates certain powers to Pontifical Commission); Symonds, *supra* note 36, at 36 (discussing Pope's responsibilities); Don A. Schanche, *Pope Lectures the Rebellious Dutch; Liberal Church, Resentful Jews a Challenge on 26th Trip*, LOS ANGELES TIMES, May 12, 1985, at 1-5 (referring to Pope's power to appoint bishops).

[41] *See* Abdullah, *supra* note 39, at 1856 (indicating Italy declared Holy See had "full ownership, exclusive and absolute power, and sovereign jurisdiction over the Vatican" and recognized sovereignty of Holy See in international sphere); Grant, *supra* note 40, at 671 (stating State of Vatican City comprises smallest entity to claim statehood); Symonds, *supra* note 36, at 36 (noting sovereignty of Vatican City).

[42] *See* Rev. John J. Coughlin, O.F.M., *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 991–92 (2003) (asserting Holy See has power to revise policies approved by United States Bishops). *See generally*, Symonds, *supra* note 36, at 36 (discussing structure of Catholic Church).

[43] *See* Laurie Goodstein, *Pope Has Gained the Insight to Address Abuse, Aides Say*, THE NEW YORK TIMES, April 23, 2005, at A1 (indicating papal nuncio is Vatican's representative in Washington); David D. Kirkpatrick & Sheryl Gay Stolberg, *Frist is Drawing Criticism from Some Church Leaders*, THE NEW YORK TIMES, April 22, 2005, at A18 ("The United States Conference of Catholic Bishops is distributing millions of postcards around the country for parishioners to send their senators asking them not to insist that nominees uphold abortion rights."); Associated Press, *Pope John Paul II; 1920-2005*, CHICAGO TRIBUNE, April 3, 2005, at 11 ("For the moment 117 cardinals are eligible to vote in a conclave to elect Pope John Paul II's successor . . . .").

[44] *See generally* Symonds, *supra* note 36, at 37 (discussing generally structure of Catholic Church).

[45] *See* Rev. John J. Coughlin, O.F.M., *supra* note 42, at 994 (setting forth proper function of bishops, their responsibility to teach, sanctify, and exercise ministry of governance); H. Lillian Omand, *School Choice Legislation: A Supply-Side Market Effects Analysis*, 20 J.L. & POL. 77, 113 (2004) (indicating dioceses have education departments which create systems similar to public school districts but with thinner bureaucracy). *See generally*, Symonds, *supra* note 36, at 36 (providing responsibilities of dioceses).

[46] *See, e.g.*, Elane Gale, *O.C. Religion; A Kinder, Gentler Church?; More Forgiving Old Catholic Faith Grows in O.C.*, LOS ANGELES TIMES, Sept. 11, 1999, at B2 (referring to some 600 families attending parishes that are part of Old Catholic diocese); Lynn Smith, *Learning from Santa Margarita; Experts Watch High-Tech Catholic School; Critics Say Money Should Have Been Used Elsewhere*, LOS ANGELES TIMES, Oct. 9, 1988, at M2-1 (quoting director of development for diocese, Gary Pellegrini: "'We're a diocese made

a separate legal entity but typically, several dioceses are attached to an archdiocese.[47] Directly beneath the diocese is the parish. The United States has approximately twenty thousand parishes, each consisting of a church and school under the direction of a priest.[48] Each individual parish depends heavily on its members' weekly donations for its major source of funding.[49] In all three bankruptcy cases that have been filed thus far, hundreds of people are claiming they were sexually abused by numerous parish priests. These tort claimants allege the dioceses had a duty to supervise the clergy to prevent such conduct and that that duty was breached, giving rise to damages.[50] The tort claimants argue that, because the parishes fall under the control of the dioceses in the Church's hierarchy, parish assets are in fact assets of the dioceses. The dioceses disagree, arguing that their corporate structure and Church Canon Law make parish assets unreachable in bankruptcy.[51]

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up of parishes and we help each other . . . . We're one church, one faith and we have to help each other . . . .'").

[47] *See In re* Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005) (citing Watson v. Jones, 80 U.S. 679, 722–23 (1871), for proposition hierarchical church is one in which various bodies in church have similar faith and doctrines subject to common governing ecclesiastical head).

[48] *See* Bruce Buursma, *Changing Church Faces Future with Uncertainty and Hope*, CHICAGO TRIBUNE, Sept. 9, 1987, at 1 (discussing diminishing number of active priests serving nearly 20,000 parishes in U.S.); *see also* Peter Slevin, *For the Catholic Laity in U.S., a Spirit of Change; Expanding Roles Will Test New Pope*, THE WASHINGTON POST, May 1, 2005, at A1 (indicating priests exercise complete control, in many parishes, over finances and conduct much of parish's business); Steve Woodward, *Judge Widens Church Assets Case to All Parishoners*, THE OREGONIAN, July 23, 2005, at A1 (making reference to defendant class of 124 parishes, including their schools and missions).

[49] *See* John Flink, *Bingo Remains a Winning Game; Religious and Social Groups Still Cash in Despite a Rise in Legalized Gambling*, CHICAGO TRIBUNE, Jan. 8, 1999, at 1 (citing Catholic Archdiocese of Chicago director of development, Ray Coughlin: "Many parishes have raised the receipts from the offering plate simply by reminding parishioners that it's up to them to support their own parishes—neither the archdiocese nor Rome can provide everything."). *See generally* Leanne Larmondin, *Digital Donations Reduce Budget Woes*, The Anglican Church of Canada Website, Dec. 19, 2001 *at* http://www.anglican.ca/news/news.php?newsItem=2001-12-19_ll.news (last visited Oct. 25, 2005) ("Nearly any parish treasurer will say that finances are a constant challenge since they depend so much on giving, which fluctuates.").

[50] *See e.g.*, Martinelli v. Bridgeport Roman Catholic Diocese, 10 F.Supp. 2d 138 (D. Conn. 1998) (reviewing action against diocese for child sexual abuse by priest); Doe v. Hartz, 970 F.Supp. 1375 (N.D. Iowa 1997) (examining parishioner's action against priest, bishop, diocese, and church for violation of Violence Against Women Act); Isely v. Capuchin Province, 880 F.Supp. 1138 (E.D. Mich. 1995) (analyzing action against priests who allegedly sexually abused student); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) , *cert. denied*, 511 U.S. 1137 (1994) (discussing action against Episcopal dioceses and bishop for injuries sustained by parishioner as result of her sexual relations with priest); Malicki v. Doe, 814 So.2d 347 (Fla. 2002) (rendering opinion regarding parishioners' claims against church and archdiocese for negligent hiring and supervision in connection with alleged sexual assaults by priest).

[51] *See In re* Catholic Bishop of Spokane, 329 B.R. 304, 321 (Bankr. E.D. Wash. 2005) (explaining Debtor's position interest in property is determined by ecclesiastical law which always provides ownership in individual juridic entity). *See generally* Guillermo Garcia-Montufar & Elvira Martinez Coco, *Antecedents, Perspectives, and Projections of a Legal Project About Religious Liberty in Peru*, 1999 B.Y.U. L. REV. 503, 518 (1999) (defining Church's power to acquire and dispose of goods).

Dioceses in the United States are established as one of two corporate forms: a corporation aggregate or a corporation sole.[52] The dioceses of Portland, Spokane and Tucson are all corporation soles.[53] The corporation sole was developed in England for the express purpose of passing the use of church property to successive generations at the parish level in order to prevent the monarch from seizing church properties upon the death of the bishop.[54] Without the corporation sole, England's feudal law would ensure that title to the Bishop's legally unoccupied property (that property where there is no surviving heir) would revert to the feudal lord.[55] Since its creation, corporation soles have been recognized by statute or common law in most states.[56]

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[52] *See* Reid v. Barry, 112 So. 846, 859 (Fla. 1927) (citing Blackstone Commentaries and Kent commentaries for proposition corporations are divided into aggregate and sole); Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 36 (2002) ("Blackstone divided corporations first into aggregate and sole."); Reka P. Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX. REV. 71, 71 n.1 (1991) (stating church can be incorporated as corporation aggregate or corporation sole).

[53] *See* OR. REV. STAT. §65.067 (2003) ("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."); *In re Catholic Bishop of Spokane*, 329 B.R. at 325 (indicating Diocese of Spokane debtor is corporation sole as provided in R.C.W. 24.12); *The Catholic Diocese—Collision of Church and State?* (2005), *at* http://macdonaldlawsf.lawoffice.com/collision_of_church.shtml (last visited Oct. 25, 2005) ("Under Arizona law, the Bishop of the Diocese of Tucson is a corporation sole.").

[54] *The Catholic Diocese—Collision of Church and State?*, *supra* note 53 ("Developed in England for the express purpose of passing legal and use of church property to successive generations at the parish level in order to prevent the monarch from seizing church properties upon death of the bishop."); *see also In re Catholic Bishop of Spokane*, 329 B.R. at 327 ("History confirms that the general purpose of such statutes was to provide a device by which a religious organization could hold and acquire property as a separate perpetual legal entity."). *See generally* Barry, 112 So. at 852 ("The use of the word "heirs" in the granting clause of deeds originated in feudal times when there was a real reason for using it . . . .").

[55] *See* David V. DeRosa, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIPIAC PROB. L.J. 153, 156 (1997) ("Feudal England adopted the concept of escheat in order to insure that title to legally unoccupied property would revert to feudal lord."); Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 585 at n. 58 (1994) ("The tenancies of mesne lords regularly terminated as a result of causes such as escheat (reversion to the lord for lack of a surviving heir)."); *see also,* Mark. E. Kaplan, *Wills/Constitutional Law—Florida's Supreme Court Strikes the State's Mortmain Statute as Unconstitutional*—Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 63 (Fla. 1990), 18 FLA. ST. U. L. REV. 897, 898 (1991) ("As with many other property concepts, the original mortmain statutes arose in feudal England. They were created, in part, to resolve an increasing tension between the Crown, through its feudal overlords and the Church.").

[56] *See* Gamaliel Ministries, *One Corporation with Sole*, *at* http://www.hiscovenantministries.org/scripture/corp_ sole.htm (last visited Oct. 25, 2005):

> There are functioning Corporation Sole in over half of the states and there are explicit statutes in seventeen states that describe Corporation Sole. Some states specifically recognize Corporation Sole but do not permit statutes to be written regarding them because of the first amendment prohibition against a government making laws respecting an establishment of Religion or prohibiting the free exercise thereof.

Corporation soles are just what their names suggest: one person corporations providing for a succession of office holders with no board of directors, no shares, no bylaws and no other officers.[57] California's statute recognizing the corporation sole reads: a "corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof."[58] Oregon's statute is to the same effect and reads that "[s]uch 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."[59] Arizona also permits the formation of a corporation sole for the purpose of acquiring, holding and disposing of the property of scientific research institutions maintained solely for pure research without expectation of pecuniary gain or profit.[60]

In the three pending cases, the dioceses sought protection in Bankruptcy Court as a result of a large number of lawsuits brought by creditors (tort claimants) seeking monetary damages as a result of sexual abuse by parish priests. The dioceses were not being sued on the theory of respondeat superior. Under the doctrine of respondeat superior, an employer is liable for its employees or agents' torts committed within the scope of their duties.[61] The plaintiff must show two elements are present in order to establish respondeat superior in the context of a religious institution: (1) "the person who committed the tort must be found to be the

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Id; *see also,* Patty Gerstenblith, *Associational Structures of Religious Organizations,* 1995 BYU L. REV. 439, 456–57 (1995) ("Twenty-six states permit some form of the corporation sole. Twelve states have explicit corporation sole statutes which permit religious groups to organize as a corporation sole . . . . An additional three states have statutes which appear to allow some form of the corporation sole . . . ."); James O'Hara, *The Modern Corporation Sole*, 93 DICK. L. REV. 23, 36 (1988) ("Seventeen states explicitly recognize the corporation sole under statutory law, often in a special section for nonprofit corporations or in a section on religious societies. At least eight other jurisdictions have at least one corporation sole created under special or private charter . . . .").

[57] *See In re* Catholic Bishop of Spokane, 329 B.R. 304, 325 (Bankr. E.D. Wash. 2005) ("Unlike other not-for-profit corporations, a corporate sole does not have members or officers or a board of directors."); Gerstenblith, *supra* note 56, at 459 ("Perhaps the most distinctive area of functioning for a corporation sole is the manner of providing vacancy in and succession to the corporation sole office."); Sr. Mary Judith O'Brien, R.S.M, *Instructions for Parochial Temporal Administration,* 41 CATH. LAW. 113, 133 (2001) ("A corporation-sole's form of ownership typically proposed the diocesan bishop as the sole administrator.").

[58] CAL. CORP. CODE §10002 (Deering 1994).

[59] OR. REV. STAT. § 65.067 (2003).

[60] ARIZ. REV. STAT. ANN. § 10-421 (1993).

[61] *See* Mark E. Chopko, *Stating Claims Against Religious Institutions*, B.C. L. REV. 1089, 1108 (2003) ("Under the doctrine of respondeat superior an employer or master is liable for the torts committed by employees or agents within the scope of their duties."); *see also* Fearing v. Bucher, 977 P.2d 1163, 1165 (Ore. 1998) (noting doctrine of respondeat superior places liability on employer for employee's torts, including intentional torts, if employee was acting within scope of employment."); Chesterman v. Barmon, 753 P.2d 404, 406 (Ore. 1988) ("Under the doctrine of respondeat superior, an employer is liable for an employee's torts when the employee acts within the scope of employment.").

agent, employee, or servant in a relationship with the religious organization" and (2) "the activity in question must be determined to be within the scope of duties the person was to perform, or a foreseeable consequence of that person's normal activities in the task."[62] Almost every court has held that a sexual assault is not part of the expected duties of a priest or within the foreseeable consequences of a priest's normal activities.[63] Instead, the dioceses were proper defendants under the negligence theories of negligent hiring, retention, supervision and the breach of a fiduciary duty.[64]

II. THE CHURCH'S POSITION

The Church recognizes that the bishops, as the sole owners of the corporation soles, hold title in their capacity to all the parish and school properties within the diocese. However, this does not mean that a bishop "owns" the parish and school properties, or that the diocese owns parish or school property.[65] Under Canon Law, the parishes and schools are juridic persons which own their own property.[66] In other words, the diocese, the parish, the schools and all other Church entities are each separate and distinct. The fact that legal title rests in the hands of the bishop as a corporation sole does not change the Canonical ownership as ordained by the Catholic Church.[67]

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[62] Chopko, *supra* note 61, at 1108.

[63] *See* Chopko, *supra* note 61, at 1113 (citing *Jeffrey Scott E. v. Central Baptist Church* for majority rule that religious organizations are not liable for sexual assaults under doctrine of respondeat superior because such actions are not only unforeseeable, but they violate very things held sacred by church); *see, e.g.*, Dausch v. Ryske, 52 F.3d 1425, 1428 (7th Cir. 1994) (holding church defendants could not be held vicariously liable for actions of pastor, Ryske, since sexual relations involved in counseling session were outside scope of his employment); *Bucher*, 977 P.2d at 1166 (holding pastor's sexual assaults on plaintiff were clearly outside scope of his employment).

[64] *See* Chopko, *supra* note 61, at 1114 (indicating claims for negligent hiring, retention and supervision depend for success on existence of antecedent knowledge in possession of religious superiors who were in position to prevent sexual misconduct from occurring); Symonds, *supra* note 36 (suggesting church is so integrated hierarchy actually helped fuel crisis by dealing with abusive priests in-house, often reassigning them to new parishes); *Id.* (stating "[a]lthough each diocese is a separate legal entity, abusive priests shuffled from parish to parish may extend the trail of liability.").

[65] *See* Innes, *supra* note 34 (citing diocese of Tucson's spokesman who said parishes may be owned by diocese on tax rolls, but in reality belongs to community and cannot be labeled with dollar amount); Barry W. Taylor, *Diversion of Church Funds to Personal Use: State, Federal and Private Sanctions*, 73 J. CRIM. L. & CRIMINOLOGY 1204, 1205 at n.2 (1982) (noting under common law Catholic bishops are not considered owners of church assets but rather administrators).

[66] 1983 CODE c.1256 (stating parish is separate entity from Diocese, parish owns its own properties, and Diocese, and other parts of church's organization have no right to claim any of the parish's assets); *see* David F. Menz et al.., *FDIC/Cash Management*, 35 CATH. LAW. 243, 251 (1991) (comparing "juridic person" in Canon Law to corporation in civil law); JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW (REVISED) (Paulist Press 2004) (listing parishes and dioceses as examples of juridic persons).

[67] *In re* Catholic Bishop of Spokane, 329 B.R. 304, 321 (Bankr. E.D. Wash 2005) (establishing debtor's argument should Court examine canon law of Roman Catholic Church, court would discover other members of diocesan family are equitable owners of property with debtor holding only bare legal title); *see* Lawrence

Although the bishops do hold parish assets in legal title, the dioceses argue that the bishops and parishes have formed a trust relationship where the bishop is simply holding the parish assets for the parishes' benefit.[68] According to the Second Restatement of Trusts, a resulting trust arises when the intent of all of the parties in a transaction is for there to be a trust-like relationship where the party obtaining legal title has no equitable interest in the property in question, but is merely holding it for the benefit of a third party.[69]

> A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired.[70]

Arizona state law has in fact recognized that the bishop holds legal title to the parish and school properties in a resulting trust.[71] Furthermore, the resulting trust

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E. Singer, *Realigning Catholic Health Care: Bridging Legal and Church Control in a Consolidating Market*, 72 TUL. L. REV. 159, 218 (1997) (stating under Canon 1254, only reason religious institute may hold real property is to support religious institute itself or to perform ministerial or charitable works); THE CODE OF CANON LAW: A TEXT AND COMMENTARY (James A. Coriden et al. eds., 1985) (asserting Canon Law seeks to ensure Church's freedom to hold real property not subject to interference from civil governments).

[68] *See In re Catholic Bishop of Spokane*, 329 B.R. at 310 ("The diocese has no equitable beneficial or proprietary interest in this property but, in some cases, holds mere legal title."); Kendysh v. Holy Spirit B.A.O.C., 683 F. Supp. 1501, 1512 (E.D. Mich. 1987) (holding one party may hold legal title while entitling another to use and possess property); Thomas J. Fadoul, Jr., *Church Real Estate Issues*, 36 CATH. LAW. 57, 58 (1995) (stating diocese may take legal title in name of bishop who then holds title for ultimate benefit of parish, a separate body owning equitable title); Innes, *supra* note 34 (citing Reverend Van Wagner, vicar general for Arizona dioceses, for proposition properties are held in trust for parishes and this trust relationship is 107 years old).

[69] RESTATEMENT (SECOND) OF TRUSTS § 404 (1959) ("A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of."); *see, e.g.*, Fleet National Bank v. Valente (*In re* Valente), 360 F.3d 256, 263 (1st Cir. 2004) (applying Restatement (Second) of Trusts definition of resulting trust to debtor-father who fraudulently transferred legal title to son). *But see* Weston v. Stuckert, 329 F.2d 681, 682 (1st Cir. 1964) (construing that no resulting trust resulted from father who conveyed land to son with respect to father's sister).

[70] Lezinsky v. Mason Malt Whiskey Distillery Co., 196 P. 884, 890 (1921).

[71] *See* Nitrini v. Feinbaum, 501 P.2d 576, 580 (Ariz. Ct. App. 1972) (stating resulting trust can arise out of inference title holder of property may not have intended to have beneficial interest); The Wheel of Life Found., Inc. v. Ladwig, 489 P.2d 1225, 1228 (Ariz. Ct. App. 1972) (holding resulting trust arose out of individual paying portion price for land for benefit of charitable corporation); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 73 (4th ed. 1987) (stating interest of property settler in resulting trust is equitable rather than legal).

concept under Arizona law has been approved by an Arizona bankruptcy court in the case of *In re Pauley and McDonald, Inc.*[72] In that case, the Court noted that

> a resulting trust ar[ises] out of the intended ownership rights and property, whereas a constructive trust [is] a remedy to correct a wrong . . . . A resulting trust is a trust implied by operation of law to enforce the inferred intent of the parties to establish a trust. A transaction that has failed to carry out the parties' intent becomes a resulting trust, and a resulting trust cannot be part of debtor's estate.[73]

Canon 1256 makes it very clear that the intent of the Catholic Church, including both the dioceses and the parishes, is to have parishes and schools maintain separate juridic existences, as those entities are decreed to be separate juridic persons.[74] Canon Law also allows juridic persons to own their own property.[75] The main thrust of the Church's argument is that if legal title has to remain in the bishop because of his status as a corporation sole, then the bishop holds the legal title in trust for the benefit of the canonically approved and recognized juridic persons, namely, the parishes and schools. The Church in the *Spokane* case has argued, and others will also argue, that the corporation sole itself is, by nature, a form of a trust.[76] In fact, Washington's corporation sole statute specifically authorizes the Bishop to hold property in trust for church entities.[77] Nevada statutes on the corporation sole also

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[72] 215 B.R. 37, 48–49 (Bankr. D. Ariz. 1996).

[73] *Id.* (quoting *In re* Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. BAP, 1994)).

[74] 1983 CODE c.1256 (stating parish is separate entity from Diocese and as such, owns its own properties); *see* THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, THE CANON LAW LETTER AND SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW (1995) (pointing to fact property acquired by parish belongs exclusively to parish, not diocese, even where parochial property is vested in diocesan trust); THE CODE OF CANON LAW: A TEXT AND COMMENTARY (James A. Coriden et al. eds., 1985) (noting ecclesiastical juridic persons can possess and have equitable interest in property without having dominium in any full sense).

[75] 1983 CODE c.1256 (stating "[u]nder the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridical person which has lawfully acquired them."); 1983 CODE c.515.3 (stating parishes are juridical persons); *see* Bernard C. Hughes, *Canon Law Issues of Sponsorship, Governance Control and Alienation As They Relate to Catholic Church Entities in the United States: A Diocesan Attorney's Perspective*, 51 CATH. LAW. 19, 20 (2001) (reporting Canon Law provides religious institutes, parishes, and dioceses to have right to own property as one of their attributes as juridic persons).

[76] *See, e.g.*, 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 51 (perm. ed., rev. vol. 1999) (stressing although corporation sole may deal with assets in same manner as natural person, it does so only for purposes of trust); Brent Johnson, *The Corporation Sole, at* http://www.freedomradio.us/ article49.htm (last visited Oct. 25, 2005) ("The corporation sole is structured as a special trust.").

[77] WASH. REV. CODE ANN. § 24.12.040 (2005) (providing Washington statute on existing corporations sole); *In re* Catholic Bishop of Spokane, 329 B.R. 304, 325 (Bankr. E.D. Wash. 2005) (indicating R.C.W.24.12.040 specifically authorizes Bishop to hold property in trust, making Bishop trustee with no equitable interest in trust res); *See generally* Olympic Fed. Sav. & Loan Ass'n v. Regan, 648 F.2d 1218,

stipulate that the property is held "in trust" for the membership of the organization.[78] Further, the Oklahoma statutes describing corporation soles are found in that state's trust successor provisions.[79]

The decision whether the dioceses hold parish properties in trust could be determinative of the treatment such property will receive under the Code. Section 541(d) provides that property of the bankruptcy estate does not include "property in which the debtor holds only legal title and not an equitable interest."[80] If the courts agree with the dioceses in that they are merely holding property in trust for the parishes, then it is possible the property cannot be included in the estate.[81] On the other hand, if the courts do not find that a valid legal trust exists, the property in dispute may in fact be included in the dioceses' bankruptcy estates.

III. THE TORT CLAIMANTS' POSITION

The Tort Claimant Committee's Memorandum In Support of Motion for Partial Summary Judgment filed in the Portland case sets forth a very different position.[82] Tort claimants as well as attorneys and scholars were surprised when the three dioceses filed for bankruptcy and included relatively few assets in their bankruptcy

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1221 (9th Cir. 1981) (holding trustor treated as holder of title even though legal title may have been conveyed to lender).

[78] *See* NEV. REV. STAT. §§ 84.002–84.150 (2004); Gamaliel Ministries, *supra* note 56 ("The Nevada statutes on Corporation Sole stipulate that the property is held 'in trust' for the membership of the organization.").

[79] *See* Gamaliel Ministries, *supra* note 56 (declaring "In fact, the Oklahoma statutes describing Corporation Sole are found in that state's trust successor provisions, with a waiver of the 'rule against perpetuities'").

[80] *See* 11 U.S.C. § 541(d) (2000):

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) (1) or (2) 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.

Id.

[81] *See* H.R. Rep. No. 595 (1978) (indicating Congressional concern exists that funds which debtor holds in constructive trust for another should not be parceled out among creditors); Golden Mortgage Fund # 14 v. Kennedy (*In re* Golden Triangle Capital), 171 B.R. 79, 82 (B.A.P. 9th Cir. 1994) ("A transaction that has failed to carry out the parties' intent becomes a resulting trust, and a resulting trust cannot be part of the debtor's estate."); Langlois, *supra* note 33 (citing Richard Hagedorn, professor at Willamette University College of Law in Salem, for position property held in trust for others cannot be understood as being owned by debtor).

[82] *See Tort Claimant Committee's Memorandum In Support of Motion for Partial Summary Judgment* (Adversary Proceeding 04-03292, Docket No. 29, filed 11/12/04) (on file with author) (outlining argument parish assets should be included in diocese's bankruptcy estate); *see also* Innes, *supra* note 34 (suggesting parishes should be included in diocese holdings because diocese is listed as owner in public records).

estates.[83] In fact, the tort claimants in Portland pointed out that the schedules of assets filed by the Portland Archdiocese list only fifteen properties owned by the Archdiocese while listing over six hundred properties it holds for others.[84] Tort claimants argue, however, that the Archdiocese has no support for its assertion since it is listed as the owner in official title records.[85]

Official records do not only show that the Archdiocese holds fee title to each parcel, but they also show that the deeds to all of these properties are duly and properly recorded in the counties where the properties are located.[86] None of the deeds name anyone other than the debtor as record title holder.[87] Furthermore, the Archdiocese of Portland itself has consistently taken the position before other courts that it is the owner of all of the properties.[88] The tort claimants' memorandum cites specifically to several cases involving tax and employment issues where the Archdiocese represented itself as the owner of all properties.[89] The Diocese of Spokane has also previously successfully argued that the parishes do not own real

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[83] *See, e.g.*, Eli Sanders, *Catholics Puzzle Over a Bankruptcy Filing*, THE NEW YORK TIMES, July 8, 2004, at A17 (noting Archdiocese of Oregon claimed it had no more than $50 million in assets while Portland lawyer said figure is closer to half-billion dollars); Siegel, *supra* note 37 (indicating Tucson Diocese proposed placing $3.2 million in settlement fund but left between $43 and $50 million of parish property outside of bankruptcy estate); Sam Verhovek & Jean Guccione, *Judge rules assets can be used to settle abuse claims*, CHICAGO TRIBUNE, Aug. 28, 2005, at C12 (pointing to Diocese of Spokane's argument it only had control over $10 million in real estate where lawyers for victims said diocese's assets really exceeded $80 million).

[84] *See* Siegel, *supra* note 37; Marie Beaudette, *Churches Weigh Going Bankrupt to Escape Lawsuits*, THE RECORDER, July 28, 2004, at 3 (Stating total assets claimed by archdiocese "excludes donations held in trust and money and property owned by its 124 parishes."); Helen Jung & Ashbel S. Green, *Portland Archdiocese Filing Bears High Price*, THE OREGONIAN, July 18, 2004, at A1 ("Church officials said in court papers last week that archdiocese assets are worth between $10 million and $50 million, while plaintiffs' attorneys say the church could be worth $500 million."); Peter Wong, *Portland, Boston: A Tale of Two Endings*, STATESMAN JOURNAL, July 11, 2004, at 1A (quoting Daniel Gotti, a Salem lawyer who represents seven of top 20 plaintiffs declaring "From our research, we think they have $500 million.").

[85] *See* Innes, *supra* note 34 (indicating parishes are listed as diocese property on public tax rolls and diocese is listed as owner of parishes in public records); *see also* Virginia de Leon, *Suits Costly for Diocese*, SPOKESMAN REVIEW, July 8, 2004, at 1 ("Property records show that the diocese owns land assessed at $32.5 million in Spokane County, plus other parcels across its 13-county territory."); O'Neel, *supra* note 6 (illustrating legal records in Oregon show archdiocese as only corporation holding title to parish properties).

[86] *See generally In re* Catholic Bishop of Spokane, 329 B.R. 304, 320 (Bankr. E.D. Wash. 2005).

[87] *Id.* ("It is not disputed that the legal titleholder named in the deeds for the Disputed Real Property is 'Catholic Bishop of Spokane'").

[88] *Tort Claimant Committee's Memorandum In Support of Motion for Partial Summary Judgment* (Adversary Proceeding 04-03292, Docket No. 29, filed 11/12/04) (on file with author); *see, e.g.*, Deborah Zabarenko, *After Scandal, Fiscal Troubles Deepen for U.S. Catholic Church*, Dec. 2004, *at* http://www.bouclier.org/article/4165.html (last visited Oct. 25, 2005) (quoting Charles Zech, economics professor at Villanova University who monitors church finances, for proposition "[i]f you start telling parishioners they own church property, they're going to insist on all kinds of things that the bishops aren't prepared to give them: the right to hire their own pastor, the right to dispose of property . . . far more than they currently have.").

[89] *See Tort Claimant Committee's Memorandum In Support of Motion for Partial Summary Judgment* (Adversary Proceeding 04-03292, Docket No. 29, filed 11/12/04) (on file with author) (noting archdiocese repeatedly claimed it "owns" and "controls" its parishes and schools).

property.[90] In the *Spokane* decision, Judge Williams employed the doctrine of judicial estoppel for the proposition that "[a] litigant cannot posit a legal or factual position and convince a court of the correctness of that position and then in a later case posit the contrary legal position even though the later case involves a different opponent."[91]

Besides looking to record title to prove that dioceses themselves own the property in question, tort claimants will also argue the Church's resulting trust argument is without merit for two reasons. First, in order to establish that a trust exists, there must be a trustee and a beneficiary.[92] The tort claimants posit that the dioceses are "unitary entities" that include parishes and schools and therefore, no legally recognizable identity exists for whom properties may be held in trust.[93] According to the claimants, parishes are merely unincorporated divisions of the diocese that cannot hold separate interest to property.[94] Furthermore, the diocese cannot look to Canon Law to support its claim that the parishes are separate entities

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[90] *In re Catholic Bishop of Spokane*, 329 B.R. at 319–20 (citing *Munns v. Martin*, 930 P.2d 318 (1997), where Bishop of Spokane claimed ownership in school building and explicitly rejected a group of parish's ownership of said school, and citing *Miller v. Catholic Bishop of Spokane*, 123 Wn.App. 1020 (Wash. App. Div. 3 2004), where plaintiff suffered injury due to fall in parish hall and "'sued the owner of the property, the Catholic Bishop of Spokane, for damages . . . .'").

[91] *In re Catholic Bishop of Spokane*, 329 B.R. at 319 ("To put the concept in the vernacular, a party 'cannot argue out of both sides of its mouth.'"); *see also* Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) ("The doctrine of judicial estoppel . . . is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process."); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) (explaining under judicial estoppel, party who "has successfully and unequivocally asserted a position in a prior proceeding" is "estopped from asserting an inconsistent position in a subsequent proceeding").

[92] *See In re Catholic Bishop of Spokane*, 329 B.R. at 328 (discussing trusts as consisting of trustee and beneficiary); C. Scott Pryor, *Rock, Scissors, Paper: ERISA, the Bankruptcy Code and State Exemption Laws for Individual Retirement Accounts*, 77 AM. BANKR. L.J. 65, 80 (2003) (noting trust requires, among other things, trustee and beneficiary); BLACK'S LAW DICTIONARY (1546) (8th ed. 2004) (defining trust as property interest held by trustee at request of settlor for benefit of beneficiary); RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959) (stating elements of complete trust includes trustee, beneficiary, and trust property).

[93] *See In re Catholic Bishop of Spokane*, 329 B.R. at 330 (indicating creditor's committee complaint "alleges that the debtor controls and manages the other members of the diocesan family to such an extent that they lack the authority and independence of action necessary to constitute a separate legal entity."); Ashbel S. Green, *Religious Aspects Complicate Bankruptcy*, THE OREGONIAN, July 8, 2004, *at* http://www.oregonlive.com/special/priest/index.ssf?/special/oregonian/priest/040708.html (last visited Oct. 25, 2005) (stating plaintiffs' attorneys have described the archdioceses and its parishes as one big corporation); O'Neel, *supra* note 6 ("Parishes are simply geographic divisions of an archdiocese. It would be like Wal-Mart saying their San Francisco store is a separate entity from their Portland store.").

[94] *See In re Catholic Bishop of Spokane*, 329 B.R. at 330 ("The Committee argues that unincorporated associations, such as the parishes, have no legal existence."); *Tort Claimant Committee's Memorandum In Support of Motion for Partial Summary Judgment* (Adversary Proceeding 04-03292, Docket No. 29, filed 11/12/04) (arguing because parishes have no independent existence, they "cannot have legal or beneficial interests" in property). *See generally* United States of America v. ITT Blackburn Co, 824 F.2d 628, 631 (8th Cir. 1987) ("[A]n unincorporated division cannot be sued or indicted, as it is not a legal entity."); Caines v. Prudential Insurance Co., 168 N.Y.S.2d 813, 814 (N.Y. Sup. Ct. 1957) (explaining unincorporated associations are not considered separate legal entities from persons who compose them).

("juridic persons"), First Amendment notwithstanding.[95] When religious institutions adopt certain legal structures, such as the diocese's structure as a corporation sole, "it is incumbent upon the civil court . . . to apply to those structures the secular law that governs them."[96] Because the Church is an organization in the United States, civil law must apply to it. According to Justice Williams in the *Spokane* case, "[n]o civil court reported decision has been cited for the proposition that those who have monetary claims against a religious organization and are engaged in a dispute with the religious organization regarding those claims are bound by the internal laws of that religious organization."[97] Had these particular dioceses and parishes intended to enter into a trust-like relationship, they could have done so by separately incorporating the parishes, as others in the country already have.[98]

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[95] *See In re Catholic Bishop of Spokane*, 329 B.R. at 325 (explaining application of statutes and common law, rather than ecclesiastical law, is not in violation of freedom of religion); Marie Beaudette, *Churches Weigh Going Bankrupt to Escape Suits*, LEGAL TIMES, July 28, 2004, *at* www.law.com/jsp/article.jsp?id=1090180184373 (last visited Oct. 25, 2005) (quoting attorney for plaintiffs in the Portland case that "Canon law is an internal corporate policy book . . . [i]f it's inconsistent with the law, it goes in the garbage can."); O'Neel, *supra* note 6 (citing plaintiff attorney who believes carrying out provisions of Church law into civil court would be ludicrous); Peter Kershaw, *Corporation Sole Myths* (2004), *at* http://hushmoney.org/corporation-sole_myths.htm (last visited Oct. 25, 2005):

> For corporation sole peddlers to claim that a corporation sole is not subject to the civil law and those statutes which authorize its formation in the first place, and to claim that a corporation sole is only subject to its own bylaws, demonstrates only a remarkable degree of ignorance (and for some, even a cavalier arrogance) about civil law.

Id.

[96] Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1250 (9th Cir. 1999) (explaining incumbency of civil court to apply state and federal legal structures adopted by corporation); *see* Jung & Green, *supra* note 84 (indicating bankruptcy judge typically turns to state law); Kershaw, *supra* note 95 (indicating evidence clearly shows corporation sole, as it is known in North America, is civil law entity, and subject to civil law jurisdiction) (2004); O'Neel, *supra* note 6 (suggesting secular court is not likely to accept canonical view parishes are held in trust by archdiocese since contention runs counter to normal provisions of state law); Ed Langlois, *Civil, Church Law May Come in Conflict in Church's Bankruptcy Filing, at* http://www.catholicnews.com/data/stories/ cns/0404046.htm (citing professor of corporate law at University of Pennsylvania, David Skeel, for idea that bankruptcy courts normally defer to "the technical corporate structure"). *See generally* Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a* Religious Mandate, 45 DEPAUL L. REV. 493, 526 (1996) ("[I]t is well established that a court 'may apply objective, well-established principles of secular law . . . which do not entail a consideration of doctrinal matters.'") (quoting *In re* Marriage of Kenneth I. Goldman and Annette C. Goldman, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990)).

[97] *In re Catholic Bishop of Spokane*, 329 B.R. at 321.

[98] *See* Virginia Culver, *Catholic Churches Start to Own Buildings, Land*, THE DENVER POST, May 27, 2002, *at* http://www.geocities.com/corporatesole/catholiccorpcease.html (last visited Oct. 25, 2005) (indicating five churches in Denver Archdiocese incorporated in January); *see also* Reverend Edward L. Buelt & Charles Goldbert, *Cannon Law & Civil Law Interface: Diocesan Corporations*, 36 CATHOLIC LAW. 69, 76 n.51 (1995) ("A corporation sole was the common law device that enabled the Church to hold property in its own name, and which is still used as a form for incorporated dioceses."); *cf.* Jill S. Manny, *Governance Issues for Non-Profit Religious Organizations*, 40 CATHOLIC LAW. 1, 1 (2000) (commenting on popularity of parishes and diocese separately incorporating to limit individual liability).

Second, a resulting trust is not formed because the bishop and the dioceses have an equitable interest in the property in question. According to the Second Restatement of Trusts, a resulting trust is one where the party obtaining legal title has no equitable interest in the property in question, but is merely holding it for the benefit of a third party.[99] There is an argument that if the trustee asserts so much authority over the property in question, the trustee may become the de facto owner.[100] In reality, bishops control entire dioceses including all of the parishes as one large organization with no real separation between the two tiers.[101] The funds are mixed between all the parishes and the money and activities are controlled as the bishop sees fit.[102] It must be noted, however, that it is normal protocol for a trustee to assert some authority over property.[103] How much authority a bishop

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[99] RESTATEMENT (SECOND) OF TRUSTS § 404. The Restatement provides:

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.

Id.; *see also* Chambersburg Trust Co. v. Eichelberger, 588 A.2d 549, 551 (Pa. Super. Ct. 1991) (resulting trusts arises "when one individual . . . holds property in trust for another . . . without holding a beneficial interest therein" with intent to return the property); Aragon v. Rio Costilla Cooperative Livestock Ass'n, 812 P.2d 1300, 1303 (Ariz. 1991) (noting holder of resulting trust is not entitled to beneficial interest therein).

[100] Langlois, *supra* note 33 ("The counter-argument may be that if you assert so much authority over the property you may become the de facto owner."). *See generally* Elayne Betensky, *Trustee CERCLA Liability: An Undefined Standard*, 13 UCLA J. ENVTL. L. & POL'Y 87, 109 (1994/1995) ("[T]rustees should not be liable unless they had *de facto* ownership of the site—that is, control such that an objective third party would have believed that the trustee had possessory rights."); Melissa A. McGonigal, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 NW. U. L. REV. 992, 1035 (1992) (suggesting lessee with total control over property is de facto owner).

[101] *See* Symonds, *supra* note 36 (indicating relationship between churches, dioceses and Vatican is symbiotic in parishes support dioceses' operations, which then both funnel money to other parishes and up hierarchy to Vatican); *see also* Michael D. Belsley, *The Vatican Merger Defense—Should Two Catholic Hospitals Seeking to Merge be Considered a Single Entity for Purposes of Antitrust Merger Analysis?*, 90 NW. U.L. REV. 720, 751 (1996) ("the bishop has effective day-to-day oversight and control of institutions in his dioceses"); Timothy Liam Epstein, *Surviving Exemption: Should the Church Exemption to ERISA Still Be in Effect?*, 11 ELDER L.J. 395, 419 n.178 (2003) (noting many dioceses operate as corporation sole, permitting bishops total control of their diocese' real estate, stocks and assets with no limits to their power); Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193, 213 (Fall 2002) ("[B]ishops, archbishops, and other high-level Church authorities maintain both an interest in, and often full control of individual dioceses and the Church institution itself.").

[102] *See* Megan M. Cooper, *Dusting Off the Old Play Book: How the Supreme Court Disregarded the* Blum *Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 35 CREIGHTON L. REV. 913, 933 n.226 (2002) (indicating allocation of Rhode Island's Catholic elementary schools' funds are controlled by Bishop of Providence and his representatives); Symonds, *supra* note 36 (noting bishops have "almost free rein over funds and virtually no supervision"); *cf.* Manny, *supra* note 98, at 15 (noting board of diocese and each parish consist of bishop and diocesan administrator).

[103] *See* Langlois, *supra* note 33 ("Even if the archdiocese has historically asserted authority over the property—by passing chop on land sales and building, for example—that is normal protocol for trustees.");

exercises over the property and whether it rises to the level of ownership may be a question of fact for the court. The Court in the *Spokane* case did not attempt to resolve the nature and extent of the debtor's interest in the property in question.[104]

The tort claimants argue, in the contrary, that even if the Church were correct, and the properties were held in a resulting trust for the parishes, that the "strong arm clause" of the Code would apply. The strong arm clause, section 544(a)(3), provides as follows:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.[105]

Courts have split as to the proper interpretation of 544(a)(3).[106] The majority of courts give "the trustee in bankruptcy the status of a "bona fide purchaser" of real property, whether the trustee is attempting to avoid an unperfected security interest or a constructive trust claim."[107] The minority of courts, however, hold that a trustee holds the status of "bona fide purchaser" of real property only with regard to unperfected security interests given by the debtor.[108] Therefore, according to the minority view, the trustee does not have the power to avoid a constructive trust claim.

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see also City of Phoenix, Arizona v. Garbage Services Co., 827 F. Supp 600, 605 (D. Ariz. 1993) (noting trustee can have control over trust property). *See generally* BLACK'S LAW DICTIONARY (8th ed. 2004) (describing trustee as person who holds property interest).

[104] *See In re* Catholic Bishop of Spokane, 329 B.R. 304, 315 (Bankr. E.D. Wash. 2005) (noting Bankruptcy Court has exclusive jurisdiction to determine parameters of court, but neglecting to make determination on extent of debtor's interest in this case).

[105] 11 U.S.C. § 544(a*) (*3) (2000).

[106] *See* Gregg C. Gumbert, *The Trustee as a Bona Fide Purchaser of Real Property in Bankruptcy: Making Sense of Section 544(a)(3)*, 15 BANK. DEV. J. 121, 125 (1998) (remarking there are two different interpretations for section 544(a) (3)).

[107] *See* Gumbert, *supra* note 106, at 125; Belisle v. Plunkett, 877 F.2d 512, 516 (7th Cir. 1989) (holding majority opinion section 544(a) (3) creates bona fide purchaser in Trustee for value).

[108] *See* Gumbert, *supra* note 106, at 129 (summarizing minority of courts have taken view section 544(a) (3) only makes trustee Bona Fide purchaser with respect to unperfected interests*; see also* Vineyard v. McKenzie, 752 F.2d 1009, 1012 (5th Cir 1985) (noting trustee is bona fide purchaser only with respect to unperfected security interests or transfers); *In re* Mills Concepts Corp. 123 B.R. 938, 948 (Bankr. D. Mass. 1991) (stating minority belief statute only gives trustee right to avoid unperfected real estate transfers made by debtor).

The creditors in this case have a very strong argument to make since the majority of jurisdictions will probably hold in their favor. In the case of *Belisle v. Plunkett*, the debtor organized a group of partners for the purpose of acquiring a leasehold in real property.[109] Even though the debtor in that case used partnership funds, he both closed on the property and recorded the assignment of the leasehold in his own name.[110] Under most states' laws, the buyer in good faith of real property can obtain a position superior to that of the rightful owner if the owner neglected to record his interest in the filing system.[111] Section 544(a)(3) gives the trustee the same sort of position.[112] Because the debtor neglected to record the partnerships' interest, the judge in *Plunkett* ruled for the trustee and allowed the trustee to take against the constructive trust claim of the debtor's partners.[113] Like in *Plunkett*, the tort claimant creditors in this case can argue the bankruptcy trustee, put in the place of bona fide purchaser, would have rights superior to those of the parishes since the parishes do not have recorded title. This would leave the parishes with no other option than to intervene as creditors and try and reclaim the assets through the bankruptcy proceeding.[114]

The act of recording in real estate law serves the function of providing constructive notice of one's interest in a parcel of land.[115] But failing to record does

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[109] *Plunkett*, 877 F.2d at 513 (noting debtor signed the contract in his own name, but then formed five partnerships to raise money needed for acquisition); *accord* Gumbert, *supra* note 106, at 126 (confirming debtor, Plunkett, gathered group of partners to acquire leasehold).

[110] *Plunkett*, 877 F.2d at 513 (noting despite using partnership funds, debtor closed deal in own name); *see* Gumbert, *supra* note 107, at 126 (analyzing debtor's actions of closing deal in his own name without consent of his partners even though he had used partnership funds). *Contra In re* Belba, 226 B.R. 738, 740 (Bankr. D. Mass. 1998) (contemplating situation where partnership was formed by three men and all three of them agreed to place property in one member's name).

[111] *See Plunkett*, 877 F.2d at 514 (endorsing idea bona fide purchaser can take ahead of person who failed to record their entitlement). *See generally In re* Cohoes Industrial, 105 B.R. 243, 244 (Bankr. S.D.N.Y. 1989) (holding if recording requirement is not satisfied, then it does not give notice to public party claims leasehold interest).

[112] *See* 11 U.S.C. § 544 (a) (3) (2000); *Plunkett*, 877 F.2d at 514 (indicating section 544(a) (3) allows for bona fide purchaser to take ahead of person who neglected to record title first); *see also In re* Seaway Express Corp., 105 B.R. 28, 32 (B.A.P. 9th Cir. 1989) (holding under section 544(a) (3), appellant could have maintained equitable interest in property if he had recorded it).

[113] *See Plunkett*, 877 F.2d at 515 ("[T]he buyer in good faith of *real* property can obtain a position superior to that of the rightful owner . . . . Section 544(a)(3) gives the trustee the same sort of position."); *see also In re Belba*, 226 B.R. at 741 (indicating bona fide purchaser of debtor's interest would take interest over unrecorded deed). *See generally In re* Seaway Express Corp., 105 B.R. 28 (1989) (ruling in favor of trustee because bank did not possess valid interest since it failed to record interest in real property).

[114] *See In re* Catholic Bishop of Spokane, 329 B.R. 304, 330 (Bankr. E.D. Wash. 2005) (setting forth possibility parishes might be considered separate legal entities from church). *See generally Plunkett*, 877 F.2d at 514 (illustrating stockholders had right to intervene); Papuchis v. Bresnahan, 129 U.S. App. D.C. 250 (D.C. Cir. 1968) (asserting stockholders might have had right to intervene to oppose bankruptcy petition).

[115] *See* Rowley v. U.S., 76 F.3d 796, 800 (6th Cir. 1996) (indicating purpose of recording lien is to place public on notice of lien); Metro. Nat'l Bank v. U.S., 901 F.2d 1297 (5th Cir. 1990) (indicating primary purpose of recording is to impart constructive notice); Cheatham v. Carter County, 363 F.2d 582, 585 (6th Cir. 1966) ("The purpose of recording and registering deeds is to give the world constructive notice of transfers.").

not necessarily mean that a bona fide purchaser is without any notice of another's interest in property. "Constructive notice" has been defined as notice imputed to a person not having actual notice.[116] "Actual notice" can either be express (including direct information) or implied (including notice inferred from a person's means of knowledge, which it was his duty to use and which he did not use).[117] The Church may attempt to argue that the enforcement of the strong arm clause is inappropriate since a corporation sole is itself, a form of a trust, a fact that would give a bona fide purchaser notice that there is some outside interest in the property.[118] While courts have consistently found it irrelevant whether a trustee, acting as a bona fide purchaser, has actual knowledge of other interests in the property, constructive knowledge of such interests may defeat a strong arm argument.[119] "[I]t has long

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[116] Sapp v. Warner, 141 So. 124, *aff'd* on rehearing, 143 So. 648 (Fla. 1932) (stating constructive notice would put prudential man on inquiry); *see, e.g.*, Smith v. FDIC, 61 F.3d 1552, 1558 (11th Cir. 1995) (holding party was not on constructive notice because nothing was recorded in recording office); *In re* Minton, 27 B.R. 385, 388 (Bankr. S.D.N.Y. 1983) (asserting "bona fide purchaser" had constructive notice because propert y owner was recorded in recording office).

[117] *See* Rinehart v. Phelps, 7 So.2d 783, 786 (Fla. 1942) (quoting Cooper v. Flesner, 103 P. 1016, 1020 (Okla. 1909)):

> 'Actual notice' is . . . of two kinds: (1) Express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use, or, as it is sometimes called, 'implied actual notice.'

Id.; BLACK'S LAW DICTIONARY (8th ed. 2004) (defining actual notice as "such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry.").

[118] *See In re Catholic Bishop of Spokane*, 329 B.R. at 327 ("The evidence of an express trust in this particular controversy consists of the Articles of Incorporation of the Catholic Bishop of Spokane, a corporation sole."); Hunt v. Divine, 1865 WL 2796, at *5 (Ill. 1865):

> [A] rector of a parish, a bishop of a church, a mayor of a city, a president of a college, a king, pope, etc., exist as corporations sole, by virtue only of the trust they sustain toward a great aggregation of persons. Such a thing as a corporation sole, where no public trust is implied, but merely to conduct a private business, has, we think, never existed.

Id.

[119] *See* Belisle v. Plunkett, 877 F.2d 512, 514 n.2 (7th Cir. 1989):

> § 544(a) specifies that the trustee shall be treated as a person without *actual* notice, if any purchaser from the debtor would have had *constructive* notice of the claim—that is, would have been charged with realizing the implications of the obvious, even though they did not set off alarms at the time—then the trustee loses.

Id.; *In re* Aumiller, 168 B.R. 811, 818 (Bankr. D.C. 1994) ("Actual notice is not relevant in the context of section 544(a) as the trustee assumes the role of a bona fide purchaser or judgment creditor without actual knowledge."); *In re* Costell, 75 B.R. 348, 352 (Bankr. N.D. Ohio 1987) ("Constructive notice can defeat the Trustee's status as a bona fide purchaser without 'knowledge', while actual notice cannot change the Trustee's § 544(a) "strong arm" powers.").

been recognized that where there is constructive notice effective as to the world of an interest in property, such as by physical possession of the property, no hypothetical bona fide purchaser could acquire rights superior to the rights that would have been learned upon reasonable inquiry, and consequently such constructive notice defeats the strong arm clause of section 544(a)(3)."[120] Whether the dioceses' status as corporation soles create constructive notice for bankruptcy trustees is an issue of fact for the Courts and will determine precedence between parishes and trustees over disputed property.

IV. WHAT WOULD CHANGE IF THE DIOCESES IN QUESTION WERE CORPORATION AGGREGATES?

Aggregate corporations are different from corporation soles in that they have boards of directors, officers, bylaws, and they issue shares.[121] In the case of the Catholic Church, aggregate corporations would exist if each individual parish within a diocese became a separately incorporated entity. Such separately incorporated parishes already exist.[122] As separate entities, each parish would either be able to take legal title to property on public records or would be in a better situation to argue that the parishes are in fact beneficiaries in a resulting trust relationship with the diocese. Incorporating the parishes might make the tort claimants' arguments that the bankruptcy estate should include parish assets much more difficult to make. The tort claimants would no longer be able to argue that parishes cannot be beneficiaries in a trust relationship or even that the strong arm clause could apply. Both of those arguments would be dependent on the diocese being the title holder of the properties in question. If a diocese that holds within it separately incorporated parishes files for bankruptcy in the future, as the dioceses of Tucson, Spokane and Portland have done, tort claimants might need to convince the court to use the doctrine of substantive consolidation in order to reach parish assets.

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[120] LR Partners L.L.C. v. Steiner (*In re* Steiner), 251 B.R. 137, 142 (Bankr. D. Ariz. 2000).

[121] *See* James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 641 n.124 (1985) ("Aggregate corporations consist of many persons united together into one society. Sole corporations consist of one person, typically a clergyman, who was incorporated by law in order to give him some legal capacity and advantage, particularly that of perpetuity."); Gamaliel Ministries, *supra* note 56 ("Aggregate corporations have boards of directors, officers, issue shares, and have bylaws. A Corporation Sole consists of one incorporated office and provides for a succession of office holders, with no board of directors, no shares, no bylaws, and no other officers."); *see also* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 382 n.78 (1985) ("Aggregate corporations included universities, guilds, and boroughs. Sole corporations included the king, archbishops, bishops, and certain other clerics.").

[122] *See* Matthews v. Adams, 520 So.2d 334 (Fla. Dist. Ct. App. 1988) (exemplifying incorporated church); Culver, *supra* note 98 ("A decades-long policy of the bishop owning all Catholic property may be coming to end in the Denver Archdiocese as churches begin to incorporate and own their own building and land."); Kershaw, *supra* note 96 ("If a church organizes as a corporation, such as a non-profit corporation (and indeed many do), it's no longer, in the eyes of the law, a church. It's a corporation.").

Substantive consolidation is a distinct doctrine that derives from the earlier body of "corporate disregard" law called "piercing the corporate veil."[123] Piercing the corporate veil is usually employed by a third party where abuse of the corporate form has resulted in a wrong or fraud requiring the intervention of a court of equity.[124] A traditional veil-piercing claim involves a creditor of a corporation seeking access to the assets of a corporate shareholder or director to satisfy a corporate debt.[125] While piercing allows the creditor of one entity to recover its claim from a related entity, substantive consolidation actually pools the assets and liabilities of related entities.[126]

Even though substantive consolidation was not expressly provided for in the Code, Bankruptcy Rule 1015 gives the Court the power, by virtue of its general equitable power, to issue those orders necessary to effectuate the provisions of the Code.[127] In fact, the United States Supreme Court has only alluded to the concept of

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[123] Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381, 386–87 (1998) (noting substantive consolidation shares common history with doctrine of corporate disregard called piercing corporate veil); Peter J. Lahny IV, *Asset Securitization: A Discussion of the Traditional Bankruptcy Attacks and an Analysis of the Next Potential Attack, Substantive Consolidation*, 9 AM. BANKR. INST. L. REV. 815, 863 (2001) ("The doctrine of substantive consolidation evolved from the earlier common law doctrine[] of . . . piercing the corporate veil."); J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 AM. BANKR. INST. L. REV. 427, 428 (2000) ("The origins of substantive consolidation are found in 'piercing the corporate veil' cases.").

[124] *See* Valley Fin., Inc. v. U.S., 629 F.2d 162, 172 (D.C. Cir. 1980) (indicating piercing corporate veil is equitable remedy used to curb injustices resulting from improper use of corporate entity); Morris v. N.Y. State Dep't of Taxation & Fin., 623 N.E.2d 1157, 1160 (N.Y. 1993) ("The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation."); Hando v. PPG Indus., Inc., 771 P.2d 956, 960 (Mont. 1989) ("Piercing the corporate veil is an equitable remedy used to curb injustices resulting from the improper use of a corporate entity.").

[125] *See* C.F. Trust. Inc. v. First Flight Ltd. P'ship, 306 F.3d 126, 134 (4th Cir. 2002) ("In a traditional veil-piercing case, a creditor of a corporation seeks to reach the assets of a corporate shareholder or director to satisfy a corporate debt"); Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L 33, 34 (1990) ("A court's decision to disregard [a corporate entity] usually arises in the context of attempts by corporate contract or tort creditors to pierce the corporate entity to reach shareholder assets . . . ."); Emily A. Lackey, *Piercing the Veil of Limited Liability in the Non-Corporate Setting*, 55 ARK. L. REV. 553, 561 (2002) (discussing piercing veil is used to reach assets of corporate shareholder).

[126] *See* Jonathan Hightower, *The Consolidation of the Consolidations in Bankruptcy*, 38 GA. L. REV. 459, 470 (2000) ("When a court orders substantive consolidation of a case, the debtors' assets or future income stream, or both, is combined into one pool to be available to creditors."); Kors, *supra* note 123, at 387 ("Unlike consolidation, which pools the assets and liabilities of related entities, piercing allows the creditor of one entity to recover its claim from a related entity."); Lahny, *supra* note 123, at 822 ("Substantive consolidation is an equitable remedy that allows the bankruptcy court to pool the assets and liabilities of two separate but affiliated entities and treat them as though they were the assets of a single bankruptcy debtor.").

[127] FED. R. BANKR. P. 1015 (2005); *see* Kors, *supra* note 123, at 382–83 ("Despite its profound effects, substantive consolidation is not authorized (or even mentioned) in the Bankruptcy Code or the Bankruptcy Rules and is entirely a creature of case law."); Christopher J. Predko, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy*, 41 WAYNE L. REV. 1741, 1744 (1995) ("The general notion of combining two estates to more efficiently satisfy creditors' claims is alluded

substantive consolidation in one, 1941, case.[128] The purpose of substantive consolidation is to pierce the corporate veil and, in effect, merge the estates of two or more legally distinct, albeit affiliated, entities into a single debtor with a common pool of assets so that creditors' claims may be fulfilled through the bankruptcy process.[129] In the most common substantive consolidation case, two or more debtors, each with its own estate and body of creditors, become a single debtor with a common fund of assets.[130] Consolidating numerous debtors' estates with one another has a significant affect on the substantive rights of all creditors involved in the bankruptcy process.[131] Creditors of the less solvent entities will generally benefit from the higher asset-to-liability ratio of the consolidated entity, while creditors of the wealthier entities will suffer reduced recoveries.[132]

In applying the traditional veil-piercing test or substantive consolidation, the general rule is that the court should use its discretion but presume the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.[133] "Courts have generally [done just that; they have] heeded the . .

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to in section 1015 of the Federal Bankruptcy Rules, but section 1015 does not authorize combining the debtors' assets.").

[128] *See* Sampsell v. Imperial Paper Corp., 313 U.S. 215 (1941) (granting approval to equitable power to substantively consolidate two estates).

[129] *See In re* Genesis Health Ventures, Inc., 402 F.3d 416, 423 (3d Cir. 2005) ("Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities. . . . The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor."); *In re* N.S. Garrott & Sons, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986) (indicating substantive consolidation means assets and liabilities of two estates are combined, creating, in effect, one debtor); Kors, *supra* note 123, at 124 (describing substantive consolidation as effective merger of two or more legally distinct, albeit affiliated, entities into single debtor with common pool of assets and common body of liabilities).

[130] *See* Kors, *supra* note 123, at 381 (indicating assets and liabilities of each entity are pooled and creditors of separate entities become creditors of consolidated entity); *see also In re* Cooper, 147 B.R. 678, 682 (Bankr. D.N.J. 1992) (explaining "[t]he purpose of joint administration is to make case administration easier and less expensive than in separate cases without affecting the substantive rights of creditors"); Gill v. Sierra Pacific Constr., Inc. (*In re* Parkway Calabasas), 89 B.R. 832, 836–37 (Bankr. D. Cal 1988) (reiterating fact substantive consolidation merges separate entities).

[131] *See In re* Coles, 14 B.R. 5, 6 (Bankr. E.D. Pa. 1981) (emphasizing substantive consolidation has great impact on creditors); *see also,* Chemical Bank New York Trust Co. v. Kheel, 369 F.2d 845, 47 (2d Cir. 1966) (stating "power to consolidate should be used sparingly" so not to "threaten" "net assets for all the creditors"); *see, e.g., In re* Flora Mir Candy Corp., 432 F.2d 1060, 1063 (2d Cir. 1970) (illustrating how consolidation could have "wiped out" all creditors assets).

[132] *See* Kors, *supra* note 123, at 410 (noting how impact of substantive consolidation is different for creditors based on their debtors' financial conditions). *See generally In re* Baker & Getty Fin. Serv., Inc., 78 B.R. 139, 141–42 (Bankr. D. Ohio 1987) (commenting on importance of using caution when consolidating); *In re* Nite Lite Inns, 17 B.R. 367, 371 (Bankr. S.D. Ca. 1982) (detailing danger consolidation poses for creditors).

[133] *See* Alexander v. Compton (*In re* Bonham), 229 F.3d 750, 771 (9th Cir. 2000) ("[T]he cautionary principles which apply to orders of substantive consolidation must be considered with particular care before a court orders *nunc pro tunc* consolidation: the power should be sparingly used and must be tailored to meet the needs of each particular case."); People *ex rel.* Scott v. Pintozzi, 50 Ill. 2d 115, 128–29 (Ill. 1971) (noting equitable remedy of piercing corporate veil will only be applied when failure to use it would promote an injustice); *see, e.g.*, Cheatle v. Rudd's Swimming Pool Supply Co., 360 S.E.2d 828, 831 (Va. 1987)

. warnings regarding implications of substantive consolidation and have used the doctrine sparingly."[134] However, more recently, bankruptcy courts have begun to extend the use of substantive consolidation to cases involving non-debtor entities.[135] In such a case, the Court's order of substantive consolidation would result in the assets and liabilities of an entity that has not even declared bankruptcy being combined with the assets and liabilities of an insolvent debtor entity already involved in bankruptcy litigation.[136]

While some bankruptcy courts have granted the consolidation of a non-debtor's estate with a debtor's estate,[137] other bankruptcy courts have declined, under any circumstance, to order consolidation in such cases.[138] In the case of *In re Crabtree*, for example, the court granted the consolidation of a non-debtor corporation's assets with those of an individual debtor based on the finding that the non-debtor corporation was the alter-ego of the individual debtor and that the "intermingling of their financial affairs makes it proper and necessary to treat them as one."[139] Like in *In re Crabtree*, the creditors' argument in this case is that substantive consolidation between the dioceses (debtors) and parishes (non-debtors) is proper because the

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(indicating Virginia courts do not lightly disregard corporate veil and opine piercing corporate veil is "extraordinary" remedy, permitted only in exceptional circumstances when "necessary to promote justice.").

[134] Christopher J. Predko, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy*, 41 WAYNE L. REV. 1741, 1753 (1995); *see, e.g.*, *In re* Meridian Place, N.W. Inc., 15 B.R. 89, 89 (Bankr. D.C. 1981) (illustrating example of when bankruptcy court granted substantive consolidation). *See generally*, Stephen J. Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207, 208 (1990) (reiterating case law on substantive consolidation is very limited).

[135] Predko, *supra* note 134, at 1753; *see, e.g.*, *In re* Gainesville P-H Properties, 106 B.R. 304, 305 (Bankr. M.D. Fla. 1989) (consolidating debtor's assets of limited partnership and corporation). *But see*, Reider v. FDIC (*In re* Reider), 31 F.3d 1102, 1104 (11th Cir. 1994) (denying consolidation of assets of spousal debtors).

[136] Predko, *supra* note 134, at 1753. *See generally* Morse Operations, Inc. v. Robins Le-Cocq, Inc. (*In re* Lease-A-Fleet), 141 B.R. 869, 874 (Bankr. E.D. Pa. 1992) (stating some courts "have refused to allow the consolidation of a non-debtor with a debtor's case, even at the request of the debtor").

[137] Predko, *supra* note 134, at 1754 (citing Sampsell v. Imperial Paper Corp., as example that courts may consolidate assets of non-debtor with assets of debtor); *In re* Crabtree, 39 B.R. 718, 726 (Bankr. E.D. Tenn. 1984) (holding consolidation of non-debtor and debtor's assets proper based on instrumentality/alter ego rationale); *In re* Tureaud, 45 B.R. 658, 59 (Bankr. N.D. Okla. 1985) (granting substantive consolidation of individual debtor and several non-debtor corporations on basis non-debtor entities were dominated and controlled by individual debtor and were "the alter ego of the debtor"); *In re* Munford, Inc., 115 B.R. 390, 398 (Bankr. N.D. Ga. 1990) (allowing substantive consolidation of non-debtor corporation and debtor corporation because creditors relied on corporate entities as single unit).

[138] *See In re* Catholic Bishop of Spokane, 329 B.R. 304, 312 (Bankr. E.D. Wash. 2005) ("Even though a non-debtor entity may have a legal existence separate from the debtor, that does not necessarily defeat substantive consolidation."); *In re* Alpha & Omega Realty, Inc., 36 B.R. 416, 417 (Bankr. D. Idaho 1984) (holding bankruptcy court's jurisdiction would not be extended to non-debtor entities under Code because to do so would deny such entities due process); *see also In re* DRW Property Co. 82, 54 B.R. 489, 97 (Bankr. N.D. Tex. 1985) (refusing to consolidate debtors' and non-debtors' estates because Court was "unaware of any statutory or common law authority to substantively consolidate debtor and non-debtor partnerships."); *In re* Lease-A-Fleet, 131 B.R. 945, 947 (Bankr. E.D. Pa. 1991) (disaffirming substantive consolidation between debtor and non-debtor because such consolidations pose many conceptual problems).

[139] *In re* Crabtree, 39 B.R. 718, 23 (Bankr. E.D. Tenn. 1984) (exemplifying situation where Court consolidated non-debtor's assets with debtor's assets).

parishes are the mere alter-egos of the dioceses. "If a true alter-ego situation exists, the action would actually be nothing more than appending a bankruptcy case to attach a pool of assets that should have been included since the commencement of the bankruptcy case."[140]

The tort claimants in the *Spokane* case have recently alleged that "the affairs of the Diocese and the other defendants which are members of the diocesan family are so entangled that no allocation of assets is possible, that collectively they are a single economic unit, and that substantive consolidation of the Diocese and the defendants [parishes] would benefit all creditors."[141] In order to determine whether the court has a basis upon which to consolidate the estates of the debtor dioceses and non-debtor parishes, it is necessary to look at the various tests the courts have used in both piercing the corporate veil cases and substantive consolidation cases. Despite the fact that piercing the corporate veil and substantive consolidation are recognized as two distinct doctrines, courts employ nearly identical standards for the two since they are both justified by an "alter ego" or "instrumentality" relationship between the entities involved.[142] An overview of piercing the corporate veil precedent allows us to better understand how substantive consolidation developed. Because the decision to either pierce or consolidate stems from an equitable power, the courts use numerous standards that are susceptible to broad variations in application, making it virtually impossible to predict when piercing will occur or when related entities will be consolidated.[143]

It is helpful to look at the dioceses and parishes under corporate case law dealing with parent-subsidiary relationships. In the usual piercing the corporate veil case dealing with parents and subsidiaries, a subsidiary will incur liabilities and creditors will attempt to look to the parent corporation's assets. These cases dealing with the dioceses and parishes are a bit different because the creditors, the tort claimants, are looking to include what would be the subsidiary's assets, namely, the parish assets. This novel kind of piercing has been referred to as "reverse piercing of the corporate veil" and uses the same factors that are used in a traditional piercing the corporate veil case.[144]

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[140] Predko, *supra* note 134, at 1763–64.

[141] *In re Catholic Bishop of Spokane*, 329 B.R. at 311.

[142] *See id.*; *In re* Standard Brands Paint Co., 154 B.R. 563, 567 (Bankr. C.D. Cal. 1993) ("[W]hen the doctrine of substantive consideration was first evolving the courts applied a test almost identical to the test for alter ego and/or piercing the corporate veil."); *see, e.g.*, Simon v. Brentwood Tavern, LLC (*In re* Brentwood Golf Club, LLC), 329 B.R. 802, 808 (Bankr. E.D. Mich. 2005) (holding "the treatment of Debtor and Tavern as one entity can also be achieved by finding that Tavern is the alter-ego of Debtor").

[143] Kors, *supra* note 123, at 384 (asserting decision to consolidate certain entities is indeterminable due to varying court standards across jurisdictions); Hightower, *supra* note 126, at 472 (pointing to consolidation's equitable nature as reason for difficulty in determining its application). *See generally* NORTON BANKRUPTCY LAW AND PRACTICE § 20:4 (2d ed. 1994) (discussing equitable nature of consolidation and varying standards applied by courts leading to case by case determination of when to pierce corporate veil).

[144] *See In re* Mid-West Metal Products, Inc. v. Simpson, 13 B.R. 562 (Bankr. D. Kans. 1981) (holding reverse piercing applicable as equitable doctrine to hold subsidiaries by applying similar factors as in

The law has established that in order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff must first show the existence of a parent/subsidiary relationship.[145] In order to establish that a parent/subsidiary relationship exists, the parent, by definition, must be able to exert control over a subsidiary based on its ownership.[146] This raises the question of whether the Church's status as a not-for-profit organization can affect the diocese and bishop's "ownership" of the parishes. It can be argued that because not-for-profit corporations have no shareholders, there is no true "owner."[147] This is problematic because establishing ownership is essential to making out a case that the corporate veil should be pierced.[148] However, piercing the corporate veil has been said to be essentially equitable in character[149] and "completely disregards [the] statutory network creating and supporting corporate structures."[150] In fact, equitable remedies look to the substance of a matter rather than to strict form.[151] In other words, the

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traditional piercing cases with relaxed requirement of control); Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 322–23 (Bankr. S.D.N.Y. 1999) (recognizing reverse piercing as equitable doctrine applying similar test as in traditional piercing cases). *See generally In re* Guyana Dev. Corp., 168 B.R. 892, 908 (Bankr. S.D. Tex. 1994) (qualifying application of reverse piercing to hold subsidiaries liable for parents).

[145] *See* Seasword v. Hilti, Inc., 537 N.W.2d 221, 224 (Mich. 1995) (stating plaintiff must first establish parent-subsidiary relationship to begin claim for reverse piercing). *See generally In re* Vecco Construction Industries, Inc., 4 B.R. 407 (Bankr. E.D. Va. 1980) (establishing parent-subsidiary relationship to allow consolidation of corporate entities); *Sec. Investor Prot. Corp.*, 234 B.R. at 322 (describing different court approaches to veil piercing involving identifying parent-subsidiary relationship).

[146] *See* Maki v. Copper Range Co, 328 N.W.2d 430, 433 (Mich. App. 1982) (concluding parent must have complete control of subsidiary not just majority stock ownership); *see also* Kors, *supra* note 123, at 399 (addressing consideration by courts of separate corporate entities as alter egos based on high degree of control); Lucia Ann Silecchia, *Pinning the Blame & Piercing the Corporate Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 164 (1998) (analyzing court decision to determine level of parent company's control must be extraordinary).

[147] *See* Macaluso v. Jenkins, 420 N.E.2d 251, 255 (Ill. App. 1981) (arguing there cannot be ownership in case of nonprofit corporation and lack of ownership means the requirements for piercing corporate veil do not exist); Jeff Kosseff, *Archdiocese on Unchartered Path*, THE OREGONIAN, July 12, 2004, *at* http://www.bishop-accountability.org/bankrupt/2004-07-12-Kosseff-ArchdioceseOnUnchart ed.htm (last visited Oct. 25, 2005) (citing G. Ray Warner, law professor and bankruptcy expert at St. John's University School of Law, for proposition nonprofits have no true owner). *But see* 18 AM. JUR. 2D *Corporations* § 50 (2004) (confirming application of veil piercing to not-for-profit corporations).

[148] *See Macaluso*, 420 N.E.2d at 255 (acknowledging challenge of lack of ownership in piercing corporate veil of not-for-profit companies). *But see In re Guyana*, 168 B.R. at 908 (following court decision of ownership not required where control established); NORTON BANKRUPTCY LAW AND PRACTICE § 20:4 (2d ed. 1994) (emphasizing ownership unnecessary in determining veil piercing applicability).

[149] *See* Stap v. Chicago Aces Tennis Team, Inc., 379 N.E. 2d 1298, 1301 (Ill. App. 1978) (reiterating equitable nature of veil piercing doctrine); *Sec. Investor Prot. Corp.*, 234 B.R. at 322 (characterizing piercing corporate veil doctrine as one in equity); *In re* Limited Gaming of America, Inc., 228 B.R. 275, 286 (Bankr. N.D. Okla. 1998) (identifying equitable power in courts' application of veil piercing doctrine).

[150] Ronald J. Broida, *The History of the Development of the Remedy of "Piercing the Corporate Veil,"* 65 ILL. B.J. 522, 523 (1977); *see Stap*, 379 N.E.2d at 1301 (noting disregard of corporate entity in application of veil piercing doctrine); 18 AM. JUR. 2D *Corporations* § 47 (2004) (indicating disregard of corporate entity when applying doctrine of piercing corporate veil).

[151] *See* People *ex rel.* Scott v. Pintozzi, 277 N.E.2d 844, 853 (Ill. 1971) (underscoring equity's focus on substance over form); *Macaluso* 420 N.E.2d at 255 (basing decision of equitable remedy on substance rather

fact that the remedy is equitable in nature allows courts to look to the substance of the organizations, and their decisions are not dictated by the statutory framework under which the corporation was formed and operated.[152]

Courts have used the equitable remedy of piercing the corporate veil in cases where the corporations involved are not-for-profits.[153] While it may seem impossible for a person to exercise ownership over a non-stock, not-for-profit corporation, a person can be held personally liable under the alter ego theory if the evidence shows that the person controlling the corporation did in fact exercise control, even though there was no stock ownership.[154] The equitable nature of the remedy therefore alters the first requirement for piercing the corporate veil for not-for-profit entities from having to show that the parent, by definition, can exert control over a subsidiary based on its ownership to having to show that the parent can and did exercise control over the subsidiary.

In a usual case of piercing the corporate veil, after the parent/subsidiary relationship is established, the plaintiff must show facts justifying the piercing of the corporate veil.[155] For a not-for-profit organization, the facts justifying the piercing of the corporate veil in fact prove the first element, that of the existence of a parent/subsidiary relationship. In the case of the Catholic Church, the court would have to look at the underlying relationship between the dioceses and the parishes in order to establish that the bishop exercises enough control over the parishes so as to both find the existence of a parent/subsidiary relationship and to overcome the presumption against piercing the corporate veil.

In attempting to justify piercing of the corporate veil, many courts have held that two requirements must be met: first, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual or

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than form); People *ex rel.* Brown v. Ill. State Troopers Lodge No. 41, 286 N.E.2d 524, 526 (Ill. App. 1972) (recapping use of substance over form in determining applicability of veil piercing doctrine).

[152] *See* Barineau v. Barineau, 662 So. 2d 1008, 1009 (Fla. App. 1 Dist. 1995) (citing Fletcher Cyclopedia of Corporation Law § 41.75); *Macaluso*, 420 N.E.2d at 255 (using substance in equitable determination). *See generally* 18 AM. JUR. 2d *Corporations* § 47 (2004) (explaining doctrine of equity allows focus on substance over form).

[153] *See Macaluso*, 420 N.E.2d at 255 (holding I.P.A.'s status as not-for-profit corporation in and of itself should not bar court from applying equitable remedy of piercing the corporate veil); *Ill. State Troopers Lodge No. 41*, 286 N.E.2d at 526 (piercing corporate veil of nonprofit corporation in order to avoid evasion of statutory duty imposed by State); *Barineau*, 662 So. 2d at 1009 (citing Fletcher Cyclopedia of Corporation Law § 41.75) (indicating mere fact corporation involved is nonprofit corporation does not by itself preclude court from applying equitable remedy of piercing corporate veil). *See generally* 18 AM. JUR. 2d *Corporations* § 50 (2004) (dealing with applicability of piercing corporate veil to not-for-profit organizations).

[154] *See* Maki v. Copper Range Co, 328 N.W.2d 430, 433 (Mich. App. 1982) (highlighting parent corporation must have complete control of subsidiary regardless of stock ownership); *see also* Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 322 (Bankr. S.D.N.Y. 1999) (stressing important role of control as determinative standard).

[155] *See* Seasword v. Hilti, Inc, 537 N.W.2d 221, 224 (Mich. 1995) (requiring plaintiff to justify piercing corporate veil as second step); *Sec. Investor. Prot. Corp.*, 234 B.R. at 322 (affirming requirement of facts justifying corporate veil piercing); *see also* 18 AM. JUR. 2d *Corporations* § 47 (2004) (summarizing facts justifying piercing corporate veil).

another corporation no longer exist; and second, circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.[156] Other courts have used the "alter ago" theory to describe entities that have such unity of interests and ownership that their separateness should be disregarded.[157] Neither the similarity of names between corporations nor the fact that a single individual is the active chief executive officer of both corporations will per se pierce the corporate veil if each corporation truly maintains a separate and distinct corporate existence.[158] Factors which may justify piercing the corporate veil include undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, including the commingling of funds, use of the corporate form to perpetrate a fraud and the defendant's treatment of corporate assets as his own.[159]

In the case of substantive consolidation, courts use precedent from piercing the corporate veil cases and add some purely bankruptcy concerns to their inquiry.[160]

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[156] Gallagher v. Reconco Builders, Inc., 415 N.E.2d 560, 563–64 (Ill. App. Ct. 1980); Melko v. Dionisio, 580 N.E.2d 586, 594 (Ill. App. Ct. 1991) (stating party seeking to disregard corporate entity based on alter ego theory "must show that (1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity."); *see also* Wheeling-Pittsburgh Steel Corp. v. Intersteel, Inc., 758 F.Supp. 1054, 1057 (W.D. Pa.1990) (indicating court will pierce corporate veil when there is showing of injustice after establishment "that the dominant shareholder or the controlling corporation wholly ignored the separate status of a corporation and so dominated and controlled its affairs that its separate existence was a mere sham.").

[157] *See, e.g.*, Pan Pac. Sash & Door Co v. Greendale Park, Inc., 333 P.2d 802, 806 (Cal. Ct. App. 1958) (finding sufficient evidence to warrant conclusion each corporation was but instrumentality of other in prosecution of single venture).

[158] *See* U.S. v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985) ("[O]ur cases are clear that one-hundred percent ownership and identity of directors and officials are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil."); Botwinick v. Credit Exch., Inc., 213 A.2d 349, 353–54 (Pa. 1965) (holding because subsidiary corporation was not mere instrumentality of parent corporation and carefully maintained separate corporate existence, subsidiary was not alter ego of parent company, even though same person was president of both corporations); *see also* Technograph Printed Circuits, Ltd. v. Epso Inc., 224 F.Supp. 260, 263 (E.D. Pa. 1963) (establishing general rule separate corporations will not be regarded as single entity even where one has practical control over other through stock ownership).

[159] *See In re* Bowen Transports, Inc., 551 F. 2d 171, 179 (7th Cir. 1977) (indicating defendant's maintaining adequate corporate records and complying with corporate formalities is factor for court to look out in determining whether veil should be pierced); Berlinger's Inc. v. Beef's Finest, Inc., 372 N.E.2d 1043, 1048 (Ill. App. Ct. 1978) (noting under-capitalization should be considered before piercing corporate veil); Stap v. Chicago Aces Tennis Team, Inc, 379 N.E.2d 1298, 1302 (Ill. App. Ct. 1978) (listing among several other factors considered before disregarding corporate existence is whether corporation was adequately capitalized); Wikelund Wholesale Co. v. Tile World Factory Tile Warehouse, 372 N.E.2d 1022, 1032 (Ill. App. Ct. 1978) (stating factor for court to look at in determining whether veil should be pierced is whether there is commingling of funds and assets); Finazzo v. Mid-States Finance Co., 211 N.E.2d 290, 298 (Ill. App. Ct. 1965) (indicating factor in determining whether to pierce corporate veil is whether defendant treats assets of corporate as his own).

[160] *See In re* Reider, 31 F.3d 1102, 1105 (11th Cir. 1994) (describing how early decisions in corporate context applied pierce corporate veil test in determining whether to order substantive consolidation); *In re* Alico Mining, Inc., 278 B.R. 586, 588–89 (Bankr. M.D. Fla. 2002) (summarizing bankruptcy concepts

The Second Circuit, for example, looks to (1) whether creditors dealt with the entities as a single economic unit or (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.[161] The Eleventh Circuit has applied a detailed balancing test where the proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm and an objecting creditor must show (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation. Other decisions have applied a more generalized balancing test that weighs the benefits of consolidation against its potential harm.[162]

Even still, other Bankruptcy Courts compare the facts of a particular case to a checklist of factors, some identical to those in piercing cases, to determine if consolidation is appropriate.[163] Such factors include (1) the presence or absence of consolidated financial statements; (2) the unity of interests and ownership between various corporate entities; (3) the existence of cross-claimants of guarantees on loans to other debtors; (4) the degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) the existence of transfers of assets without formal observance of corporate formalities; (6) the commingling of assets and business functions; and (7) the profitability of consolidation at a single physical location.[164]

"Given the influence and power possessed by a bishop, the creditors will certainly explore in the bankruptcy proceedings whether these church entities are separate in name only, or truly operate as independent bodies."[165] The fact that parishes separately incorporate does not necessarily mean that there will be a huge impact on the parish's daily life.[166] For example, the bishop would still technically be the president of each parish board and would appoint priests to the churches they serve.[167] These duties may or may not constitute a substantial intermingling of corporate and personal affairs between the dioceses and parishes. The parish would

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courts consider when determining whether to order substantive consolidation); Kors, *supra* note 123, at 401–02 (citing *In re* Vecco Constr. Indus., Inc., 4 B.R. 407, 412 (Bankr. E.D. Va. 1980), in which court's analysis included purely bankruptcy concepts).

[161] *See, e.g., In re* Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518 (2d Cir. 1988).

[162] Kors, *supra* note 123, at 385; *see In re* Auto-Train Corp., Inc., 810 F.2d 270, 277 (D.C. Cir. 1987) (requiring benefits be greater than harm before court enters consolidation order *nunc pro tunc*); *In re* GC Cos., Inc., 298 B.R. 226, 232 (Bankr. D. Del. 2003) (affirming Bankruptcy Court's application of balancing test weighing parties' interests and equities).

[163] Kors, *supra* note 123, at 385; *see Jon-T Chemicals, Inc.*, 768 F.2d at 694 ("Resolution of the alter ego issue is heavily fact-specific . . . ."); *In re* Nutri/System of Fla. Assocs., 178 B.R. 645, 654 (Bankr. E.D. Pa. 1995) (listing factors to be considered when deciding whether to pierce corporate veil).

[164] *See generally* FED. R. BANKR. P. 1015 (2005); *In re* Lease-A-Fleet, Inc., 141 B.R. 869, 871–72 (Bankr. E.D. Pa. 1992); Holywell Corp. v. Bank of New York, 59 B.R. 340, 347 (Bankr. S.D. Fla. 1986).

[165] *See* Naffziger, *supra* note 12.

[166] *See* Culver, *supra* note 98 ("The ownership change won't have much impact on the day-to-day life of the parish, said Greg Kail . . . .").

[167] *See id.* ("A bishop is technically president of each parish board, and bishops still appoint priests to the churches they serve.").

also still need to get the diocese's approval for large construction or remodeling projects.[168] Furthermore, there may be evidence that the parishes and dioceses, as well as other church entities, commingle their funds. In fact, the relationship between the parishes, dioceses and the Vatican is said to be symbiotic in that parishes support dioceses' operations, which then funnel money to other parishes and up the hierarchy to the Vatican.[169] Even if the parishes incorporate, they would still have to pay a percentage of their yearly offertory over to the dioceses.[170] The portion they must pay over is called the cathedracticum, and ranges from 5.2 to 7.5 percent, depending on how wealthy the parish is.[171] It is clear that the bishops and dioceses do exercise control over the parishes, but whether that control is enough to pierce the corporate veil and intertwine the dioceses and parishes so closely as to consolidate their estates will be a factual determination for the court.

V. 11 U.S.C. § 541 AND THE ESTABLISHMENT CLAUSE

Even if the court is to come down in favor of the tort claimants on the corporate law and trust law issues (and find in the case of the corporate sole, that no trust relationship between the dioceses and parishes exists, and, in the case of the corporate aggregate, that the dioceses and parishes operate so interdependently that the corporate veil should be pierced), the Church will argue that parish assets still may not be included in the dioceses' bankruptcy estates due to constitutional protections. The Church's first constitutional claim is that including parish assets as part of the debtor's (diocese's) bankruptcy estate violates the Establishment Clause of the First Amendment. The Establishment Clause states in clear language that "Congress shall make no law respecting an establishment of religion."[172] The Establishment Clause creates a wall of separation between Church and State which allows religious organizations to be independent from the State.[173]

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[168] *See id*., at B2 (indicating large construction or remodeling projects would have to win approval of archbishop); Virginia Culver, *Priests May Get Retirement Home Church Considers Land Near Cemetery*, THE DENVER POST, Sept. 14, 2000, at B5 (demonstrating archbishop approving project for retirement home); Jean Torkelson, *Mission: Hispanic Catholics' Go-To Place Denver Archdiocese Pledges Completion*, THE ROCKY MOUNTAIN NEWS, July 12, 2005, at 23A (highlighting archbishop pledge to new renovations).

[169] *See* Symonds, *supra* note 36 (describing financial web of Catholic Church).

[170] Culver, *supra* note 98 ("Churches will still have to pay a percentage of their yearly offertory to the archdiocese."); *see also* Virginia de Leon, *Church Step Closer to Reality Donation May Help Complete Construction*, THE SPOKESMAN-REVIEW, Dec. 11, 2004, at 1A (expressing positive effect of offertories on diocese filed for bankruptcy).

[171] *See, e.g.*, McAuliffe v. Russian Greek Catholic Church of Saint John the Baptist, 36 A.2d 53, 57 (Conn. 1944) (referring to cathedraticum as assessment made on each local Catholic church for expenses of diocese); Saint John Chrysostom Greek Catholic Church v. Elko, 259 A.2d 419, 423 (Pa. 1969) (defining cathedraticum as payment made for support of bishop).

[172] U.S. CONST. amend I.

[173] Cutter v. Wilkinson, 125 S. Ct. 2113, 2120 (2005) (indicating Establishment Clause commands separation of Church and State); Widmar v. Vincent, 454 U.S. 263, 275 (1981) (referring to separation of

Section 541 provides that, as a general rule, all property interests of a bankrupt debtor must be turned over to the trustee in bankruptcy in order to establish an estate for the benefit of creditors.[174] According to that section, a bankruptcy estate is defined as an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case."[175] Sexual abuse victims claim that bishops in fact hold legal title to parish assets and therefore, that parish assets should be included in the debtor's estate and subject to distribution. The diocese, however, argues that section 541 of the Code constitutes a Government-made law that violates the separation between church and state that the Constitution's Establishment Clause created.[176]

In 1971, the Supreme Court case of *Lemon v. Kurtzman* established a three-prong test for evaluating statutes that do not aid in education[177] under the Establishment Clause: (1) whether the statute has a secular purpose; (2) whether the principal or primary effect of the statute advances or inhibits religion; and (3) whether the statute creates an excessive entanglement between government and religion.[178] Although a challenger to a statute only need show that one prong of the *Lemon* test was not fulfilled,[179] the Seventh Circuit has deemed the third entanglement prong the essence of the Establishment Clause inquiry.[180]

A. The Church's Position

In analyzing the third prong of the test, the *Lemon* court looked to "the character and purposes of the institutions that are affected, the nature of the government intrusion, and the resulting relationship between the government and

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Church and State which is ensured under Establishment Clause); Board of Educ. v. Allen, 392 U.S. 236, 266 (1968) (indicating principle of separation of Church and State is inherent in Establishment Clause).

[174] *See* 11 U.S.C. § 541(a) (1) (2000).

[175] *Id.*

[176] *See* Reynolds v. United States, 98 U.S. 145, 164 (noting Thomas Jefferson's explanation Establishment Clause was intended to "erect a wall of separation between Church and State"); McGowan v. Maryland, 366 U.S. 420, 460 (1961) (highlighting long struggle to establish separation of church and state); Gillette v. U.S., 401 U.S 437, 449 (1971) (suggesting purpose of Establishment Clause was to keep Sovereign from actively involving itself in religious activity and to ensure governmental neutrality); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (expanding purpose of Establishment Clause as "a wall of separation between Church and State.").

[177] Lemon v. Kurtzman, 403 U.S. 602 (1971); *see, e.g.,* Cutter v. Wilkinson, 349 F.3d 257, 262–63 (6th Cir. 2003) (applying three-prong Lemon test to statute not related to education). *Compare* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (applying three-prong *Lemon* test to statute not aiding in education), *with* Zelman v. Simmons-Harris, 536 U.S. 639, 649, 652 (2002) (applying alternative test to statute providing assistance to parents for children's education).

[178] *See Lemon*, 403 U.S. 602.

[179] *See* Agostini v. Felton, 521 U.S. 203, 234 (1997) (indicating statute violates Establishment Clause if any of three Lemon prongs is not satisfied).

[180] *See* Grutka v. Barbour, 549 F.2d 5, 8 (7th Cir. 1977) (deeming essence of First Amendment inquiry is entanglement prong). *But see Agostini*, 521 U.S. at 233 (diminishing strength of third-prong of test by combining it with second-prong). The test becomes whether the statute (1) has a secular legislative purpose and (2) causes an entanglement that has the effect of advancing or inhibiting religion. *Id.*

religious institution."[181] According to the Church, if parish assets are held to be included in the bankruptcy estate of the diocese, the institution affected is the Church itself.[182] In *Lemon*, the court found excessive entanglement where the institution affected was a parochial school because it was located next to parish churches where students would have convenient access to religious exercise. In these cases, the Church is an organization that provides physical space for religious exercise, religious instruction and activity; its involvement in religious activity exceeds that of a parochial school.[183]

The nature of the government's intrusion into religious affairs under section 541 makes the entanglement between church and state even more devastating. If the Church is forced to abide by the rules of the Bankruptcy Code just as any other organization filing would, local churches and schools could shut down with virtually no warning to parishioners, Catholic cemeteries could be acquired by the government and turned into non-secular property or even a different religion's property, etc. Parishes and their parishioners who in effect raise all their own money and donate money despite their financial circumstances may be punished for the acts of a discrete group of priests. Furthermore, forcing dioceses to include parish assets in their bankruptcy estate will undermine Congress' intent in promulgating chapter 11 because it will force the Church's dioceses to abandon bankruptcy reorganization, discourage other religious institutions from filing for bankruptcy, and fail to maximize potential returns to the Church's creditors.[184]

The Church has an equally compelling argument that section 541 does not fulfill the second prong of the *Lemon* test: whether the statute has a primary effect that inhibits religion.[185] The application of a statute has a primary effect of inhibiting religion when the government itself inhibits religion through its own activities and influence.[186] The seizure of all parish assets would lead to the liquidation of many parishes in the affected diocese, and therefore inhibit religion

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[181] *Lemon*, 403 U.S. at 615.

[182] *See id*. at 612–13, 614, 615, 620.

[183] *See id.* at 615–16.

[184] *See generally* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527–28 (1984) (explaining Bankruptcy Court's duty of focusing on chapter 11's ultimate goal and fundamental purpose of reorganization); United States v. Whiting Pools, 462 U.S. 198, 203–04 (1983) ("By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners.").

[185] *See Lemon*, 403 U.S. at 615.

[186] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233–34 (1997) (asserting fulfillment of two standards, (i) program's requirement of administrative cooperation between Board and parochial schools, and (ii) program's ability to increase dangers of "political divisiveness," was not sufficient to create an "excessive" entanglement under First Amendment). *But see* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336–37 (1987) ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.").

through the government's own activities and influence.[187] Furthermore, the Bankruptcy Court would not only be allowing assets that were purchased directly by local parishioners to be used toward paying off tort claims for which they were not responsible, but it is also would be sending a clear message that parishioners cannot safely donate to their local churches. If parishioners come to realize that their contributions can be used for unintended purposes parishioners may stop donating and tithing all together. As the mission of the Church focuses on charity and religious education, the Church's ability to carry out religious programs that make the exercise of religion possible will be greatly impaired without an inflow of parishioners' donations.

B. The Tort Claimants' Position

The Church's tort claimants will argue that the seizure of parish assets does not violate the Establishment Clause because the Bankruptcy Code has a secular purpose which does not advance nor inhibit religion, and does not create excessive entanglement between religion and the government. In carrying out its purpose, the Supreme Court has stated that the Establishment Clause does "not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[188] The tort claimants will contend that all three prongs of the *Lemon* test are satisfied.

The Bankruptcy Code was enacted in order to grant debtors a fresh start, advance public and private interests by facilitating the economic flow, protect creditor's rights, and administer the collective efforts of the Code.[189] More specifically, the purpose of section 541 is to create a bankruptcy estate that includes "property," as it is broadly defined.[190] Once the estate is created, "[p]roperty

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[187] *See Amos*, 483 U.S. at 337 ("For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."); Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260, 262–63 (1988) (citing *Amos*, 483 U.S. 327):

> The government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the 'significant burden on a religious organization' caused by forcing it to defend its beliefs and practices in extended free exercise litigation before 'a judge [who may] not understand its religious tenets and sense of mission.'

Id.

[188] *See Lemon*, 403 U.S. at 614.

[189] *See supra* note 2.

[190] *See* 28 U.S.C. § 1334(e) (2000) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"); 5 COLLIER ON BANKRUPTCY ¶ 541.01 (15th ed., rev. 2002) ("Congress' intent to define property of the estate in the broadest possible sense is evident from the language of the statute, which initially defines the scope of estate property to be all legal or

belonging to the estate is protected from the piecemeal reach of creditors by the automatic stay of section 362" and the process of repaying creditors may begin.[191] The purpose of this provision is arguably entirely secular. Neither the text of section 541 nor its legislative history suggests it was intended to cause any burden on sectarian institutions.

The statute is not only facially neutral, but also neutral in effect as it neither advances nor inhibits religion. The primary effect of section 541 is to promote "the effectuation of the fundamental purposes of the Bankruptcy Code: the breathing room given to a debtor that attempts to make a fresh start, and the equality of distribution of assets among similarly situated creditors, according to the priorities set forth within the Code."[192] Section 541 applies to all entities, religious and secular. It cannot be said that section 541 will inhibit religion because the gathering of all parish assets into a common fund does not suggest the parishes will ultimately lose even a substantial percentage of that property.

Lastly, under the third prong of the *Lemon* test, there is little entanglement between government and religion when parish assets are deemed to be included in a diocese debtor's estate. The important part of the third prong of the *Lemon* test is the requirement that the entanglement be "excessive." There is a significant difference between the government involving itself in the affairs of religious organizations as such and the religious organizations qua commercial entities.[193] When the religious debtor voluntarily files chapter 11, it propels itself into the commercial realm and any effect on the advancement or inhibition on religion can be said to be both incidental and unavoidable. The Supreme Court has stated that

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equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held."); Burgess v. Sikes (*In re* Burgess), 392 F.3d 782, 785 (5th Cir. 2004) (indicating Supreme Court has recognized section 541 is to be read broadly).

[191] 5 COLLIER ON BANKRUPTCY ¶ 541.01 (15th ed., rev. 2005) ("It is from this central core of estate property that the debtor's creditors will be paid."); *see In re* Betzold, 316 B.R. 906, 914 (Bankr. N.D. Ill. 2004):

> The purpose of the automatic stay is to prevent certain creditors from gaining a preference for their claims against the debtors; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.

Id.; Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 9 (1998) ("The dual purposes of the automatic stay are to: (1) halt the creditors' proverbial race to the courthouse, in favor of the Code's overriding preference for creditor equality; and (2) provide the debtor a temporary "breathing spell" in which the debtor can attempt to reorganize.").

[192] 5 COLLIER ON BANKRUPTCY ¶ 541.01 (15th ed., rev. 2005).

[193] *See* Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290, 305–06 (1985); *see, e.g.,* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979) (finding parochial school is religious organization rather than commercial entity, therefore should not be subject to government entanglement); Meek v. Pittenger, 421 U.S. 349, 366 (1975) (" . . . direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion.").

"routine regulatory interaction which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body, and no 'detailed monitoring' . . . between secular and religious bodies . . . does not of itself violate the non-entanglement command."[194] Because these three Catholic dioceses voluntarily filed for the protection of the Bankruptcy Court, and because neither the Bankruptcy Code nor the Bankruptcy Court distinguishes between religious and non-religious debtors, section 541 does not result in excessive entanglement between government and religion.

VI. 11 U.S.C. § 541—THE FREE EXERCISE CLAUSE AND RFRA

The Church's second constitutional claim is that including parish assets as part of the diocese's bankruptcy estate violates the Free Exercise Clause of the First Amendment.[195] The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[196] The free exercise of religion means, most importantly, the right to believe and profess whatever religious doctrine one desires.[197] This right includes the ability to participate in religious activities without impermissible governmental interference, even where one's conduct is in tension with a law of general application.[198]

The landmark case of *Employment Division v. Smith* revealingly held that laws of general application—laws that do not target religious groups or practices—require neither heightened scrutiny nor religious exemptions.[199] The strict compelling interest test was reserved for laws specifically designed to suppress any religious activity.[200] Under normal rational basis review, religious groups were very

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[194] Hernandez v. Commissioner, 490 U.S. 680, 696–97 (1989).

[195] *In re* Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005) (explaining debtor's position any application by Court of state, civil or federal bankruptcy law rather than canon law would interfere in free exercises of religion).

[196] U.S. CONST. amend. I.

[197] *See* Employment Div., Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).

[198] *See* City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) ("[Free Exercise Clause] is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible government interference, even when such conduct interferes with a neutral, generally applicable law."); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) (indicating framers of Bill of Rights intended Free Exercise Clause to prevent abridgement of fundamental religious autonomy); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (invalidating mandatory school attendance law when applied to refusal by Amish parents to send their children to school).

[199] *See Smith*, 494 U.S. at 872 (holding laws which incidentally burden religion are constitutional as long as they do not single out religious behavior for punishment, discriminate amongst religions, or are motivated by desire to interfere with religion).

[200] *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 533 (1993) (stating laws targeting religious beliefs are not neutral, therefore not permissible); *see also Flores*, 521 U.S. at 529 ("Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest."); *see, e.g.* Sherbert v. Verner 374 U.S. 398, 402 (1963) (suggesting governmental regulations designed to inhibit

rarely exempted from laws of general applicability.[201] The Court, both before and after *Smith*, has analyzed neutral laws using only rational basis review while analyzing laws actually targeting religious beliefs using strict scrutiny.[202] Legal writers have also pointed to *Smith* as the correct standard because the judiciary is unsuited to decide when religious claimants are entitled to exemptions from neutral laws.[203]

Congress enacted the RFRA to completely protect the exercise of religious practice from substantial burdens imposed by neutral laws.[204] In other words, the RFRA was written and passed with the purpose of negating the effects of the *Smith* decision and restoring strict scrutiny to neutral laws for free exercise clause analysis.[205] RFRA sets forth a three-part test in order to determine whether a specific law impinges on one's free exercise rights: 1) if the law equals a substantial burden on one's free exercise rights, that individual need not comply unless the law is 2) justified by a compelling government interest that is 3) the least restrictive means.[206] The burden of proof lies initially with the debtor to prove the law substantially burdens its religious rights and then shifts to the Government to prove there was a compelling interest for the law, and finally, shifts back to the debtor to

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religious observation is strictly prohibited by Free Exercise Clause, however religious beliefs are not unconditionally shielded from legislation).

[201] *See, e.g., Smith*, 494 U.S. at 872; U.S. v. Lee, 455 U.S. 252, 258–61 (1982) (employing rational basis review in determining religious employer was not exempt from Social Security legislation); *Flores*, 521 U.S. at 529 (holding laws having substantive effect on religion valid as long as they do not target religious beliefs or practices).

[202] *See Flores*, 521 U.S. at 529 (implying non-neutral laws are subject to strict scrutiny standard). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICY 1215 (2d ed. 2002) (discussing cases since *Smith* which have upheld neutral laws of general applicability).

[203] *See* Joanna C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 12 (1995); *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–48 (1992) (arguing historical evidence supports *Smith* holding); *Flores*, 521 U.S. at 529 ("[Smith] prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices.").

[204] *See* 42 U.S.C. § 2000bb(b) (2000) (stating RFRA was enacted to ensure its application in every instance where free exercise of religion is substantially burdened by government); Christians v. Crystal Evangelical Free Church *(In re* Young), 141 F.3d 854, 859 (8th Cir. 1998) (acknowledging Congress enacted RFRA in order "to protect religious liberties as fully as possible from encroachment by all government actors."); S. Rep. No. 103-111, at 3 (1993) (providing one of purposes of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1968), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercises is burdened[.]"); Douglas Laylock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 209 (1994) (indicating RFRA was enacted in response to *Smith*'s broad rule "neutral and generally applicable laws can be applied to suppress religious practices, and that states need have no reason for refusing exemptions for the free exercise of religion" even if law has incidental effects on religion).

[205] *See* Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 (2005) (indicating RFRA was legislative response to *Smith*); Tenn. v. Lane, 124 S. Ct. 1978, 1986 (2005) (noting Congress enacted RFRA "in direct response" to *Smith*); Shelly Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Users*, 69 MO. L. REV. 663, 663 (2004) (analyzing Congress' reaction to *Smith* and enactment of RFRA).

[206] *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000) (invalidating laws of general application if they "substantially burden a person's exercise of religion," unless application of burden on religion is in furtherance of compelling governmental interest and is least restrictive means of furthering interest).

suggest less restrictive means that could have been employed instead of the law at issue.[207]

A. The Church's Position

The Church will first need to be prepared to defend the constitutionality of the RFRA as it is applied to section 541 of the Code. Although the Court has held that the RFRA is unconstitutional as applied to state and local laws, RFRA remains constitutional when applied to the Code because the courts must presume that the other portions of the statute remain in effect unless there is legislative history suggesting the contrary.[208] In this case, there is nothing in the legislative history to suggest that Congress did not intend RFRA's state applicability to be entirely severable from its federal applicability.[209] Furthermore, applying RFRA to federal laws violates neither the separation of powers nor the Establishment Clause of the First Amendment.[210]

Separation of Powers violations occur when Congress enacts a statute without constitutionally granted power to do so.[211] RFRA is unconstitutional and violates

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[207] *See* Shelton v. Tucker, 364 U.S. 479, 487–90 (1960) (indicating advocate must exhibit alternative methods of regulation would contest such abuses without infringing First Amendment rights); U.S. v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (stating debtor must prove by preponderance of evidence government has substantially burdened his free exercise of religion and interference is more than inconvenience); Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996) (stating if government meets its burden, debtor has burden to "demonstrate what, if any, less restrictive means remain unexplored."); Diaz v. Collins, 114 F.3d 69, 71–2 (5th Cir. 1995) (indicating if debtor satisfies burden, burden of proof shifts to government to prove challenged regulation furthers compelling government interest in least restrictive manner).

[208] *See Flores*, 521 U.S. at 536 (invalidating RFRA as applied to state law); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 859 (1998) (recognizing where Supreme Court strikes down one part of statute, other parts remain valid "unless it is evidence that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." (quoting INS v Chadha, 462 U.S. 919, 931–32 (1983)) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)); Edward J.W. Belnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1426 (1998) (pointing to severability as validating part of invalidated statute).

[209] *See In re Young*, 141 F.3d at 859 (acknowledging absence of legislative history suggesting Congress would have declined to protect religious liberties from federal interference because it was unable to protect those liberties from state interference). *See generally* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*. 1 U. PA. J. CONST. L. 1, 15–17 (1998) (providing legislative history of RFRA); Edward C. Lyons, *In Cognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469, 530 n. 236 (2005) (discussing continuing debate over application of RFRA to federal statutes and regulations).

[210] *See, e.g., Flores*, 521 U.S. at 517–19, 529, 533, 536 (1997) (holding applying RFRA to federal law does not violate separation of powers or Establishment Clause); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832–33 (9th Cir. 1999) (discussing valid application of RFRA to federal law); *In re Young*, 141 F.3d at 858–63 (finding Congress has authority to enact RFRA because it violates neither separation of powers nor Establishment Clause).

[211] *See* Fitzgerald v. Magic Valley Evangelical Free Church Inc. (*In re* Hodge), 220 B.R. 386, 397–98 (D. Idaho 1998) (stressing validity of act if enacted under enumerated powers); Laura E. Little, *Envy and*

the separation of powers principle when it is applied to state law because it exceeds Congress' enforcement powers under Section Five of the Fourteenth Amendment.[212] RFRA does not present the same separation of powers issue when applied to federal law because Congress has a constitutional basis independent of Section Five of the Fourteenth Amendment.[213] Article One, Section Eight of the Constitution provides Congress with exclusive authority to enact uniform laws on the subject of bankruptcies.[214] Case law has suggested that Congress has the plenary power to qualify and amend things over which it controls through its enumerated powers and, as such, may qualify and amend a specific application of the Code through RFRA.[215] Congress also has an enumerated power through the Necessary and Proper Clause of the Constitution[216] to formulate and adopt measures it deems necessary to carry out its other mandates in the Constitution.

Establishment Clause violations occur when a law does not have a secular purpose, has a primary effect of advancing or inhibiting religion, and creates an excessive entanglement between church and state.[217] RFRA arguably has a secular

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Jealousy: A Study of Separation of Powers and Judicial Review, 52 HASTINGS L.J. 47, 48–55 (2000) (providing overview of separation of powers); Gregory P. Mangarian, *How to Apply the Religious Freedom Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1924 (2001) (acknowledging Congress needs enumerated powers to pass legislation).

[212] *See Flores*, 521 U.S. at 536 (holding Congress did not have constitutional basis under section 5 of Fourteenth Amendment to apply RFRA to states); Aaron Keesler, *Religious Land-Use and the Fourteenth Amendment's Enforcement of the Clause: How the FMLA Paved the Way to the RLUIPA's Constitutionality*, 3 AVE MARIA L. REV. 315, 325–26 (2005) (providing overview and historical interpretation of section 5 powers); Michael Paisner, *Boerne Supremacy: Congressional Response to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 549 (2005) (stressing Congress violated section 5 and invaded province of judicial branch by violating state sovereignty and redefining rights).

[213] *See, e.g., Sutton*, 192 F.3d at 832–34 (finding RFRA constitutional as applied to federal law); *In re Young*, 141 F.3d at 858–59 (holding Fourteenth Amendment only applicable to states and finding Congressional authority in Article I); *Fitzgerald*, 220 B.R. at 397–98 (upholding legislation if Congress has authority "as an objective matter" to enact it).

[214] U.S. CONST. art. I, § 8, cl. 4. ("Congress shall have the power . . . to establish . . . uniform laws on the subject of Bankruptcies . . . ."); *see In re Young*, 141 F.3d at 860 (describing Congressional authority over bankruptcy laws under Article I).

[215] *See, e.g.*, Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832–34 (9th Cir. 1999) (interpreting *Flores* as holding RFRA invalid as to state law but not to federal law); *In re Young*, 141 F.3d at 858–59 (stating Congress used enumerated powers to applying RFRA to federal law); *Fitzgerald*, 220 B.R. at 398 (indicating RFRA amends all federal laws to provide protection for free exercise of religion).

[216] U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[217] *See* Corp. of the Presiding Church of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 335–39 (1987) (examining 42 U.S.C.S. § 2000e et seq. under three-pronged Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *In re Young*, 141 F.3d at 862:

> The Supreme Court crafted a three-part test to determine if a statute avoids a violation of the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

purpose because it was enacted to alter the normal Free Exercise Clause analysis in order to better protect religious entities by assuring that government does not pass laws that burden one's right to observe religion.[218] Further, applying RFRA to section 541 will not have a primary effect of advancing or inhibiting religion because the government itself will not be advancing religion through its own activities or influence.[219] Applying RFRA to section 541 does not violate the Establishment Clause because it does not create a special bankruptcy law that treats religious institutions more favorably than non-religious ones. By enacting RFRA, the government is merely ensuring that interference between the government and religious practices will be at a minimum level.[220] Similarly, RFRA does not create an excessive government entanglement with religion because its application would actually prohibit the government from becoming severely entangled in religion by seizing local parish property.

There is additional support that RFRA does not violate the Establishment Clause when it is compared to a substantially similar statute, the Religious Land Use and Institutionalized Persons Act (hereinafter "RLUIPA").[221] Although a Sixth Circuit decision did hold RLUIPA to be unconstitutional by reason of the Establishment Clause, its reasoning relied largely on two district court opinions that were both overruled and ultimately held RLUIPA to be constitutional.[222] Additionally, every other circuit that has addressed the constitutionality of RLUIPA has found it to be constitutional under the Establishment Clause.[223]

Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)); *see also* Magic Valley Evangelical Free Church v. Fitzgerald (*In re* Hodge), 220 B.R. 386, 399–401 (D. Idaho 1998) (subjecting RFRA to three-pronged test).

[218] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (examining Congress's motives under RFRA to offset judiciary's restrictive interpretation of Constitution's Free Exercise Clause); *c.f.* Cutter v. Wilkinson, 125 S. Ct. 2113, 2121 (2005) (holding similar statute to RFRA serves secular purpose when removing government-created burdens on private religion).

[219] *See Amos*, 483 U.S. at 337 (indicating *Lemon* test's second prong requires government itself to have "advanced religion through its own activities and influence."); Charles v. Verhagen, 348 F.3d 601, 610 (7th Cir. 2003) (reiterating proposition under *Amos* government is forced to advance religion under second prong).

[220] *See In re Young*, 141 F.3d at 862–63 (indicating RFRA does not endorse any particular religious sect but instead, protects fundamental religious exercise from non-compelling government intrusion); *see also* Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994) ("[W]e do not deny that the government allows the State to accommodate special needs by alleviating special burdens."); *Amos*, 483 U.S. at 335 ("[i]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.").

[221] 42 U.S.C. § 2000cc-1 (2000) (providing in pertinent part "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that interest.").

[222] *See* Cutter v. Wilkinson, 349 F.3d 257, 262 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004) (relying on Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003), *overruled by* Madison v. Riter, 355 F.3d 310 (4th Cir. 2003), and Kilaab Al Ghashiyah (Kahn) v. Dep't of Corrections, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *overruled by* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003)).

[223] *See* Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002).

Because RFRA is constitutional as applied to the Bankruptcy Code, a RFRA analysis may be performed and could conclude that the Code's application to a religious debtor like these dioceses is unconstitutional under the Free Exercise Clause. Section 541 of the Bankruptcy Code substantially burdens the Church and all its sub-parts' free exercise of religion. The Supreme Court in *Sherbert v. Verner*[224] held that a person's free exercise of religion is substantially burdened by a statute that requires the person to refrain from engaging in a practice important to the person's religion, or forces the person to choose between following a certain religious practice or accepting the benefits of the statute.[225] One's free exercise of religion is also said to be substantially burdened when a statute interferes with a central tenet belief of a religious doctrine.[226] When non-adherence to a religious practice is therefore necessary to receive a statute's benefit, the statute can be said to have an indirect coercive effect on the actor's free exercise of religion.[227]

The Church in these cases is substantially burdened by section 541 because the dioceses are forced between choosing the benefits of the Bankruptcy Code and maintaining their ability to practice their religion. The seizing of parish assets and including them in the dioceses' bankruptcy estates would likely force the Church out of chapter 11 reorganization and either into liquidation or out of bankruptcy altogether, thereby depriving parishioners from engaging in a practice important to their beliefs.[228] One of the central tenets of the Church under its Canon Law is that parish assets belong to the parish, and the bishop is not permitted to seize such

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[224] 374 U.S. 398 (1968).

[225] *Id. at* 403–04 (holding disqualification of unemployment benefits due to appellant's refusal to work on her day of religious observance constituted burden on her free exercise of religion).

[226] *See* Graham v. Comm'r, 822 F.2d 844, 851 (9th Cir. 1987) ("[T]he burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981)); *see also* McCroy v. Cook County Dep't of Corr., 366 F. Supp. 2d 662, 673 (N.D. Ill. 2005) ("This interference must be more than an inconvenience; the burden must be substantial."); U.S. v. Jefferson, 175 F. Supp. 2d 1123, 1129 (N.D. Ind. 2001) (holding supervised released condition substantially burdens defendant's religion because it affects central tenant). *But see* Employment Div. v. Smith, 494 U.S. 872, 886–887 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

[227] *See Thomas*, 450 U.S. at 718 ("While compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136, 141 (1987) (discussing principle of infringing on free exercise of religion); *see also* Ford v. McGinnis, 352 F.3d 582, 593–94 (2nd Cir. 2003) (determining whether government action substantially burdens religion depends upon importance of burdened practice).

[228] *See* Nicholas K. Geranios, *Ruling: Parish Assets May be Tapped to Pay for Abuse*, CORVALLIS GAZETTE-TIMES, *at* http://www.gazettetimes.com/articles/2005/09/01/news/religion/satrel01.txt (last visited Oct. 25, 2005) (quoting Spokane Bishop William Skylstad: "'We appeal this decision because we have a responsibility, not only to victims, but to the generations of parishioners . . . who have given so generously of themselves in order to build up the work of the Catholic Church in Eastern Washington,' . . . ."); Naffziger, *supra* note 12 (indicating Church is unlikely to file for chapter 7 liquidation because it desires to continue existence and provide assistance to members in search for eternal life).

property.[229] Furthermore, any governmental action that results in the closing of parishes substantially burdens the free exercise of religion since the parish itself is the primary place of religious exercise and, as such, it is the most integral part of the Church's mission.[230] It is irrelevant to the determination of whether a substantial burden exists that bankruptcy is a privilege and not a right because the free exercise of religion is the paramount consideration.[231]

After establishing the substantial burden on its free exercise of religion, the Church will argue that there is no compelling justification for section 541 of the Bankruptcy Code. The *Sherbert* court held that "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of First Amendment rights, including the free exercise of religion.[232] Compelling governmental interests have been found to exist in arenas such as providing for public education, ensuring public safety and maintaining the national security and tax systems.[233] Also, the showing of a rational relationship to a state interest will not be adequate to meet the compelling interest test.[234]

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[229] 1983 CODE c.1256 ("Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridical person which has lawfully acquired them"). *See generally* THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, THE CANON LAW LETTER AND SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW (1995) (reporting significance of canon 1256); THE CODE OF CANON LAW: A TEXT AND COMMENTARY 862–63 (James A. Coriden et al. eds., 1985) (commenting on canon 1256 and its implications).

[230] *See, e.g.*, Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574–76 (finding city could not stop homeless individuals from sleeping by invitation on church's steps); United States v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1418, 1420 (discussing "substantial burdens" and "sincerely held religious beliefs"); Magic Valley Evangelical Free Church v. Fitzgerald (*In re* Hodge), 220 B.R. 386, 391 (noting choice between religious practice or protecting church from lawsuit constitutes substantial burden on free exercise of religion).

[231] *See* Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665, 694 (1994/1995) ("Court has rejected a distinction between benefits that are provided as a right or as a government privilege within the context of the free exercise of religion"); *see also* Sherbert v. Verner, 347 U.S. 398, 404 (1963) ("[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (citing Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 390 (1950)); Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952) ("[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

[232] *Sherbert*, 374 U.S. at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see* Steven Hopkins, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139, 1145–48, 1156 (1995) (examining *Sherbert* and free exercise of religion); Michelle O'Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does it "Restore" in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 323–28 (2004) (presenting overview of free-exercise claims and *Sherbert*).

[233] *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (analyzing whether providing public education is compelling government interest); Gillette v. United States, 401 U.S. 437, 462 (1971) (discussing "Government's interest in procuring the manpower necessary for military purposes"); Hernandez v. C.I.R., 490 U.S. 680, 699–700 (1945) (acknowledging government's interest in tax system); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (stressing the state has broad authority to protect children from danger); *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 219–20 (1944) (finding government interest in maintaining national security).

[234] *See Sherbert*, 374 U.S. at 406 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice"); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("The rational

The economic aspects of the Bankruptcy Code are not compelling governmental interests and in no way can be compared to the economic survival of the nation or the physical safety of its citizens.[235] While the interests of creditors and the efficient administration of bankruptcy cases are rational and important, they are "not sufficiently grave to deserve the compelling label when balanced against a parishioner's free exercise of religion."[236] In fact, in order to find a compelling governmental interest in the bankruptcy context, a bankruptcy court held that a statute had to be vital to the maintenance of the bankruptcy system.[237] Enlarging the pot from which creditors may recover is not a compelling interest because it is not integral to the maintenance of the bankruptcy system.[238] Moreover, maintaining a balance between creditors and debtors is not a compelling interest achieved by including parish assets in the bankruptcy estate.[239] Not only is there no compelling justification for section 541 of the Code, but the Church will also argue that there are less restrictive means for accomplishing the goals of allowing the debtor to have a fresh start while at the same time, compensating creditors. For example, the government may choose to legislatively adopt an exception to section 541 for religious institutions or may create a separate section all together for religious organizations. Taking these actions would remove religious organizations from situations where they risk compromising their religious freedoms. Exempting the Church or other similarly situated debtors from section 541 would have the effect of protecting not-for-profit debtors, encouraging religious organizations to file for bankruptcy protection, and encouraging them to reorganize under chapter 11 so that

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connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice"). *See generally* Robert Hoff, *Losing Our Religion: The Constitutionality of the Religious Freedom Restoration Act Pursuant to Section 5 of the Fourteenth Amendment*, 64 BROOK. L. REV. 377, 380–82 (1998) (discussing *Sherbert* and compelling interest test).

[235] *See In re* Tessier, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) (noting interests in bankruptcy system do not "implicate the security of the United States or physical safety of its people"); *c.f. In re* Navarro, 83 B.R. 348, 353 (Bankr. E.D. Pa. 1988) (stating "administration of the bankruptcy system" and "protection of the legitimate interests of creditors" serves "compelling government interest"). *See generally*, Natalie A. Hurley, *Religious Entanglement by the Bankruptcy System—Avoidable Transfers and RFRA*, 27 U. MEM L. REV. 177, 194–95 (1996) (describing *In re Tessier* and lack of compelling governmental interest).

[236] *In re Tessier*, 190 B.R. at 405; *see Sherbert*, 374 U.S. at 406 (finding no compelling interest in limiting fraud in unemployment system when compared to the substantial burden on religious practice); Susan D. Franck, Christians v. Crystal Evangelical Free Church: *Interpreting RFRA in the Battle Among God, the Government, and the Bankruptcy Code*, 81 MINN. L. REV. 981, 991–92 (1997) (reporting government interests in administering bankruptcy system).

[237] *See* Magic Valley Evangelical Free Church v. Fitzgerald (*In re* Hodge), 220 B.R. 386, 393 (D. Idaho 1998) (holding avoidance statutes substantially burdened free exercise of religious beliefs, and although they may have a compelling government interest, they were not "least restrictive means" of furthering interest).

[238] *See id.*; Steven Hopkins, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV 1139, 1156 (1995) ("[T]he interest of creditors in recovering a few more dollars . . . is far from a compelling national interest."). *See generally* Julianne Belaga, *Now You See It, Now You Don't: The Impact of RFRA's invalidation on Religious Tithes in Bankruptcy*, 14 BANKR. DEV. J. 343, 346–51 (1998) (discussing interest of debtors and creditors in the bankruptcy system).

[239] *Fitzgerald*, 220 B.R. at 391–93.

creditors may be fairly compensated.[240] Exempting not only religious entities, but all not-for-profit debtors, from this section would mean there is no violation of the Establishment Clause. The Supreme Court has upheld the constitutionality of religious exemptions to neutral, generally applicable laws.[241] In 1998, for example, Congress added an exception to 11 U.S.C. § 548(a)(2) (2004) in order to protect debtors from burdens on their free exercise right to donate to a religious institution.[242] Likewise, RFRA should be able to create a religious exemption to section 541 by assuring that local parish assets that are used in carrying out religious missions cannot be seized to pay tort claimants.

B. The Tort Claimants' Position

Assuming that RFRA is constitutional, the tort claimants will argue that the Bankruptcy Code does not constitute a violation of the statute because it passes strict scrutiny. To demonstrate a breach of RFRA, the governmental action must substantially burden the debtor's free exercise of religion and must be without a compelling governmental interest and the least restrictive means of furthering that compelling interest.[243] None of those elements exist in this case.

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[240] *See, e.g.*, N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527–28 (1984) (explaining chapter 11 in terms of promoting successful rehabilitation of debtors and preventing misuse of economic resources); United States v. Whiting Pools, Inc., 462 U.S. 198, 203–04 (1983) (describing while chapter 11 assists troubled enterprise to operate successfully, creditors are also protected since all of debtor's property is included in estate); Bonner Mall P'ship v. U.S. BanCorp Mortgage Co. (*In re* Bonner Mall P'ship), 2 F.3d 899, 916 (9th Cir. 1993) (opining protection of creditors' interests is important under chapter 11, however debtor reorganization and maximization of estate value is primary concern).

[241] *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–40 (1987) (holding federal statute exempting religious groups from title VII's prohibition against religious discrimination in employment did not violate Establishment Clause); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 139–40 (1987) (finding disqualification of worker from receiving unemployment benefits owing to refusal to work on Sabbath unconstitutional and statute's allowance for receipt of benefits did not violate Establishment Clause); Gillette v. United States, 401 U.S. 437, 456 (1971) (concluding Military Selective Service Act, which permits, by reason of religious training, those who conscientiously object to all war not to serve, did not violate establishment clause); Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 672–73, 680 (1970) (holding New York statute exempting realty owned by organization for religious purposes, from real property tax, was constitutional exercise of power).

[242] *See* 11 U.S.C. § 548(a)(2) (2000) (establishing reasonable charitable contributions to religious organizations could no longer be avoided as fraudulent transfers); *In re* Witt, 231 B.R. 92, 98–100 (Bankr. N.D. Okla. 1999) (determining amendment of 11 U.S.C. § 548 to include charitable contributions to religious organizations was constitutional); Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (addressing potential burden on free exercise right posed by bankruptcy trustee's fraudulent transfer avoidance powers).

[243] *See* 42 U.S.C. § 2000bb-1(a)–(b)(2) (2000) (explaining Government may substantially burden person's exercise of religion if it demonstrates burden is in furtherance of compelling government interest and is least restrictive means for doing so); Watson v. Boyajian (*In re* Watson) 309 B.R. 652, 663 (B.A.P. 1st Cir. 2004) ("RFRA therefore applies strict scrutiny to federal laws that place a substantial burden on a person's free exercise of religion.").

In *In re Catholic Bishop of Spokane*, the court held that there is no substantial burden on the religious debtor where that debtor had voluntarily chosen to participate in the bankruptcy process.[244] Even without the holding in the *Spokane* case, other courts have held "[t]o exceed the 'substantial burden' threshold, government regulation must inhibit or constrain conduct or expression that manifests some central tenet of religious belief, meaningfully curtail one's ability to express adherence to one's faith, or deny reasonable opportunities to engage in those activities that are fundamental to one's religion.[245] The "incidental effects" of legal state actions which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs do not constitute substantial burdens on the exercise of religion.[246]

The inclusion of parish assets in the dioceses' bankruptcy estates does not substantially interfere with the Church's right to the free exercise of religion because section 541 does not interfere with religious beliefs and opinions but instead, may have an incidental effect of altering how Catholics practice their religion. For example, the seizure of a local parish building or local religious school may temporarily or permanently shut-down those institutions, but those who considered themselves patrons can still hold their religious beliefs and opinions and practice either in another locale, or privately. Additionally, the Court has distinguished between intra-church disputes over property, where its role may be severely circumscribed, and disputes between the Church and unrelated third-parties, where it performs its traditional role.[247]

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[244] *In re* Catholic Bishop of Spokane, 329 B.R. 304, 324 (Bankr. E.D. Wash. 2005) ("Bankruptcy debtors who voluntarily choose to participate in that statutory scheme, even those of a religious nature, should not be able to 'pick and choose' among Code sections."). A discussion of the idea that the dioceses may have waived their constitutional rights when they entered bankruptcy will be discussed in further detail in the next section of this note.

[245] Gibson v. Babbitt, 72 F. Supp. 2d. 1356, 1359 (S.D. Fla. 1999) (quoting Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)) *aff'd* 223 F. 3d. 1256 (11th Cir. 2000); Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995).

[246] *See* Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (explaining effects on religious objector's spiritual development do not inform inquiry regarding constitutionality of government actions); Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."); Reynolds v. United States, 98 U.S. 145, 166 (1878) (distinguishing between religious belief and religious practice and holding while laws may not "interfere with mere religious beliefs and opinions, they may with practices.").

[247] *In re Catholic Bishop of Spokane*, 329 B.R. at 323 (indicating this is purely secular dispute between creditors and bankruptcy debtor, albeit one which is religious organization); *see* Church of the Lukumi Bablu Aye, Inc v. City of Hialeah, 508 U.S. 520, 534, 537–38 (1993) (finding in favor of religious organization and declaring ordinance prohibiting ritual slaughter unconstitutional during dispute with city over organization's practices); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2nd Cir. 1999) ("The First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters.").

Even if section 541 is found to substantially burden the debtors in these cases, the court must weigh the burden against the government's interest.[248] RFRA does not define what it means to be a "compelling interest," but most courts do not require the interest to implicate national security or public safety.[249] In fact, courts have concluded that the administration of the bankruptcy system, including preserving the integrity of bankruptcy proceedings, preventing the abuse of the chapter 11 process, providing the debtor with a fresh start, protecting the creditors' claims, and ensuring economic viability, is a compelling government interest.[250] Allowing the debtors to circumvent section 541 would harm the integrity of bankruptcy proceedings because the diocese debtors would essentially be allowed to pick and choose which provisions would apply to them. Because section 541 dictates that all property of the debtor should be included in its bankruptcy estate, and that "property" is to be defined broadly, allowing the debtors to ignore section 541 would harm the legitimate interest of the tort claimants, which is to maximize the value of the estate.[251] If section 541 were read to exclude parish assets from the bankruptcy estate, the estate would be so under-valued that all tort claimants would collect a miniscule recovery while the dioceses would emerge relatively unscathed.

Not only does section 541 satisfy the compelling government interest requirement of RFRA, but the inclusion of parish assets in the bankruptcy estate under section 541 is also the least restrictive means of promoting the chapter 11 bankruptcy process. Were it not for section 541, debtors filing for chapter 11 protection could create their own rules and manipulate the bankruptcy process so that it works exclusively for their benefit and against the interests of creditors. If the court allowed this to happen, debtors would be unfairly favored over the legitimate interests of their creditors. Furthermore, including parish assets in the

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[248] *See In re Catholic Bishop of Spokane*, 329 B.R. at 323–24 (explaining RFRA must balance burdens on practice of religion with compelling governmental interests).

[249] *See* U.S. v. Hardman, 297 F.3d 1116, 1127 (10th Cir. 2002) (describing maintenance of tax system, protecting children's welfare, and enforcing participation in social security system are compelling government interests). *But see In re* Tessier, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) ("[C]ompelling government interests include only those pertaining to the survival of the republic or the physical safety of its citizens."). *See generally* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 885–86 (1990) (noting in free exercise context, application of "compelling interest" test is not comparable to use of test in instances of race and speech).

[250] *See In re* Navarro, 83 B.R. 348, 353 (Bankr. E.D. Pa. 1988) (finding that if strict scrutiny standard applied, administration of bankruptcy system served compelling government interest); *accord* Magic Valley Evangelical Free Church, Inc. v. L.D. Fitzgerald (*In re* Hodge), 220 B.R. 386, 392 (D. Idaho 1998) (stating since nation's "economic welfare undeniably has come to depend upon ordinary consumers making purchases on credit that are unsecured by collateral," maintenance of bankruptcy system was of government's highest order); Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239, 251–52 (Bankr. D. Kan. 1995) (holding Bankruptcy Code and section 548(a) serve compelling government interest), *aff'd* 203 B.R. 468 (D. Kan. 1996). *But see In re Tessier*, 190 B.R. at 405 (explaining government's interests in bankruptcy "are not sufficiently grave to deserve the 'compelling label.'").

[251] *See* United States v. Whiting Pools, 462 U.S. 198, 204 (1983) (arguing Congress's desire to protect secured creditors is accommodated for in section 541's broad scope of property in bankruptcy estate). *See generally* 11 U.S.C. § 541 (2000) (declaring scope and composition of bankruptcy estate).

dioceses' bankruptcy estates would likely be less of a burden on their right to free exercise of religion than summarily dismissing the cases and allowing the tort claimants to continue to pursue their actions outside of bankruptcy. The judgments in such actions could likely lead to the liquidation of the dioceses' assets. It may be unnecessary, however, to determine whether the Bankruptcy Code is consistent with RFRA because RFRA should be unconstitutional as applied to federal law since it violates the Separation of Powers principle, requires un-manageable standards and allows religious organizations to create their own law.[252]

The separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch.[253] Although Congress maintains the express constitutional power to amend its own laws, the landmark case of *Marbury v. Madison* held that it is the province of the judiciary to interpret the Constitution.[254] Further, Congress can alter the meaning of the Constitution through amendment, but may not do so through the passage of ordinary legislation.[255] "[The] RFRA effectively denies the Judiciary's authority to define the limits of its own institutional competence," thereby violating the Separation of Powers doctrine.[256] By requiring the utilization of a strict scrutiny standard for laws of general applicability, Congress' enactment of RFRA stands in direct conflict with the Judiciary's determination in *Smith*.[257]

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[252] *See, e.g.,* Browne v. United States, 22 F. Supp. 2d 309, 312 (D. Vt. 1998) (citing *In re* Gates Community Chapel of Rochester, Inc., 212 B.R. 220, 225–26 (Bankr. W.D.N.Y. 1997) (holding *City of Boerne* invalidated RFRA regardless of state or federal nature of legislation); United States v. Grant, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (questioning constitutionality of RFRA in federal realm); Adams v. C.I.R., 170 F.3d 173, 175 n.1 (3d Cir. 1999) ("Some commentators have noted that RFRA may be unconstitutional as applied to federal law.").

[253] United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)); *see also* Morrison v. Olson, 487 U.S. 654, 693 (1998) ("[t]he system of separated powers and checks and balances established in the constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"(quoting Buckley v. Valeo, 424 U.S. 1 (1976)); United States v. Nixon, 418 U.S. 683, 707 (1974) (explaining allocation of governmental powers dictated by Constitution).

[254] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 863 (8th Cir. 1998) ("there is a point beyond which Congress may not go in the exercise of its powers, without intruding upon the core function of the judicial branch, thereby offending 'vital principles necessary to maintain separation of powers.'"(quoting City of Boerne v. Flores, 521 U.S. 507, 524 (1997)); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 (2003) (describing judicial review creation by Supreme Court).

[255] *See In re Young*, 141 F.3d at 859 (indicating Congress' power of amendment and duty not to pass legislation in violation of the Constitution); *see also Flores*, 521 U.S. at 529 (acknowledging lack of congressional power to alter the Constitution by legislation); Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L 1, 2 (2000) (illustrating procedures followed to amend Constitution).

[256] *In re* Tessier, 190 B.R. 396, 406 (Bankr. D. Mont. 1995) (citing Baker v. Carr, 369 U.S. 186, 215 (1962)).

[257] *See* Employment Div. v. Smith, 494 U.S. 872, 872 (1990) (rejecting claimant's argument Court should apply test from *Sherbert v. Verner*, 347 U.S. 398 (1963) which called for strict scrutiny for laws of general applicability); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993) ("[A] law that burdens religious practice need not be justified by a compelling governmental interest if

Furthermore, RFRA requires un-manageable standards because the Judiciary is not suited to determine when religious claimants ought to be exempt from neutral laws.[258] In fact, the terms used in RFRA (such as "substantial burden" and "compelling interest") are not explained or defined at all.[259] It is also unreasonable to think that a neutral law can be given strict scrutiny because it happens to have an effect on one's religious beliefs.[260] Such a methodology can easily lead to inexplicably subjective results where religious entities are entitled to special treatment[261] "To make an individual's obligation to obey [a law of general application] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense."[262]

If RFRA is determined to be unconstitutional as applied to federal law, then there should be no impediment to applying all the provisions of the Code because the Code is consistent with the Free Exercise Clause as it is explained in *Smith*. The *Smith* court held that the Free Exercise Clause is not violated when the law is not designed to prohibit a religious practice but merely has an incidental effect on religion.[263] In order to interpret a statute, the court must first look to the actual

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neutral and of general applicability."); Julia E. Pusateri, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah *and the Burdening of Free Exercise: The Solidification of the* Employment Division v. Smith *Doctrine and the Congressional Response*, 38 ST. LOUIS. U. L.J 1041, 1041–42 (1994) (describing departure from strict scrutiny standard for neutral and generally applicable laws).

[258] *See Smith*, 494 U.S. at 872 (stating judiciary lacks constitutional authority to determine whether laws substantially burden religious entity because it involves evaluating value of certain beliefs and practices of faith); Joanna C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 12 (1995) (arguing RFRA violates separation of powers); Ira C. Lupu, *Of Time and the RFRA: A Lawyer Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995).

[259] *See* 42 U.S.C. § 2000bb-1 (2000).

[260] *See Smith*, 494 U.S. at 886 n.3 (noting strict scrutiny is used for laws making classifications based on race but that "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause."); *cf. Lukumi*, 508 U.S. at 533 (defining non-neutral law as one infringing upon or restricting religious practices).

[261] *See In re Tessier*, 190 B.R. at 402 (indicating RFRA is unworkable test leading to "anomalous and impermissible outcomes."); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Why The Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 437 (1994) ("RFRA . . . privileges religiously motivated conduct."); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 229 (1995) (highlighting RFRA's special treatment of religious practices).

[262] *See Smith*, 494 U.S. at 884 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[263] *Smith*, 494 U.S. at 878 (holding Free Exercise Clause cannot be used to challenge neutral laws of general applicability); *see also* Minersville School Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940) stating:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

language of that statute.[264] Nothing in section 541 suggests that a church should be treated differently than any other debtor. In fact, section 541 is neutral on its face and applies in the same way to every debtor. Not only do the words of the statute indicate that section 541 is constitutional, but so does the fact that courts are to construe federal statutes in favor of doubt about their constitutionality.[265]

Furthermore, it is essential to recognize that the Free Exercise Clause guarantees an unrestrained freedom to believe, but not freedom to act.[266] Therefore, the freedom to hold religious beliefs and opinions is absolute, but the freedom to act, even when the action is in accord with one's religious belief, is not totally free from legislative restriction.[267] "Every use of church property, whether it is construction of a church building, using a home as a meeting place for worship, or operating church recreational facilities, is a form of religious conduct rather than religious belief."[268] The authority of a court to regulate and control church property is therefore constitutional and proper.

If RFRA is determined not to be unconstitutional as applied to federal law, it is unconstitutional as to state law and the Bankruptcy Court uses state property and

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Id.

[264] *See* Price v. Del. State Police Fed. Credit Union (*In re* Price), 370 F.3d 362, 368 (3d Cir. 2004) (requiring statutory interpretation begin with text of statute); *In re* WW Warehouse, Inc., 313 B.R. 588, 591 (Bankr. D. Del. 2004) ("In interpreting any statute, a court must begin with the text of a provision and, if its meaning is clear, end there." (internal quotations and citations omitted)); Morris v. Midway Southern Baptist Church (*In re* Newman), 203 B.R. 468, 473 (Bankr. D. Kan. 1996) ("In interpreting statutes, the court begins with the relevant language.").

[265] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 279–80, 280 n.12 (2003) (Thomas, J. concurring in part, dissenting in part) ("After all, the constitutional avoidance doctrine counsels us to adopt constructions of statutes to avoid decision of constitutional questions, not to deliberately create constitutional questions." (internal quotations omitted)), Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762 (1988) (noting federal statutes should be interpreted to avoid doubts about constitutionality). *But see* Seminole Tribe v. Fla., 517 U.S. 44, 57 n.9 (1996) ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." (internal citations omitted)).

[266] *See* Cantwell v. Conn., 310 U.S. 296, 303–04 (1940) ("[F]reedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law . . . the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."); *see also*, Lipp v. Procunier, 395 F. Supp. 871, 875 (N.D. Cal. 1975) (emphasizing double aspect of constitutional inhibition of legislation on the subject of religion); Banks v. Havener, 234 F. Supp. 27, 30 (E.D. Va. 1964) (distinguishing ability to restrict freedom to hold religious beliefs from freedom to act).

[267] *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (explaining freedom to choose religion is absolute, while freedom to act is not); United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984) ("It is well established that the absolute constitutional protection afforded freedom of religious belief does not extend without qualification to religious conduct." (internal quotations omitted)); Africa v. Anderson, 542 F. Supp. 224, 228 (E.D. Pa. 1982) (distinguishing absolute freedom of religious belief from freedom to act, which can be restricted when act conflicts with state interest).

[268] *See* H. WAYNE HOUSE, CHRISTIAN MINISTRIES AND THE LAW: WHAT CHURCH AND PARA-CHURCH LEADERS SHOULD KNOW 114 (Baker Book House 1992) (highlighting types of religious activities subject to regulation); Scott David Godshall, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV., 1562, 1564 (1984) (indicating church property subjected to regulation regarding use and development, much like private property). *But see*, James C. Harkins, IV, *Of Textbooks and Tenets:* Mozert v. Hawkins County Board of Education *and the Free Exercise of Religion*, 37 AM. U.L. REV., 985, 990 (1988) (indicating Supreme Court has extended protection from regulation to include some religious conduct as well).

corporate law. "Although the types of interests that constitute "property" are determined via a federal standard, elementary issues of whether the debtor owns a legal or equitable interest . . . remain state issues . . . ."[269] It is in fact common for bankruptcy courts to look to state law for guidance in determining what constitutes property of the bankruptcy estate.[270] In the case of *Parkinson v. Bradford Trust Co.*, the court used Virginia state law to determine whether the debtor had an interest as beneficiary in a trust.[271] Furthermore, in another case called *Butner v. United States*, the Supreme Court gave an unambiguous directive to bankruptcy courts, telling them to defer to state property law.[272] The tort claimants therefore posit that RFRA cannot and should not apply in any capacity to the cases at hand.

VII. WAIVER ARGUMENT

A. The Church's Argument

The dioceses will argue that they must be allowed to retain their First Amendment protections because no entity can be forced to forego constitutional protections as a prerequisite to obtaining a government sponsored privilege, such as the protections of the Bankruptcy Code.[273] The Supreme Court has stated that "an unconstitutional entanglement may not be excused on the ground that it is imposed only as . . . a prerequisite to receiving a valuable privilege."[274] It has further stated that "[c]ourts must indulge every reasonable presumption against waiver of fundamental constitutional rights."[275] There is a presumption against waiver in cases

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[269] Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act Of 1984*, 63 AM. BANKR. L.J. 109, 174 (1989).

[270] Honorable William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 178 (1997) ("Of course, it is common for bankruptcy courts to look for guidance to state law for determinations of what constitutes property of the estate."); *see also* Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 B.R. 67, 79 (Bankr. E.D. Va. 1985) (looking to state law to determine whether retirement plan was part of bankruptcy estate); White v. Dawson (*In re* Dawson), 52 B.R. 444, 446 (Bankr. N.D. Ala. 1984) ("[I]n determining what interests in property the debtor has at the time of the filing of her bankruptcy petition, the Court must look to state law.").

[271] *In re O'Brien*, 50 B.R. at 79.

[272] 440 U.S. 48, 55 (1979) (emphasizing benefits of using state law to determine property interests in bankruptcy courts).

[273] *See* Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1537–38 (1993) (holding government could not condition privilege of operating as church and soliciting donations on church's compliance with disclosure regulations created excessive entanglement); Rutan v. Republican Party, 497 U.S. 62, 72 (1990) (emphasizing government may not deny benefit to person on basis infringes his constitutionally protected interests), *Sherbert*, 374 U.S. at 406 (holding "to condition the availability of benefits upon [an] appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

[274] *City of Clearwater*, 2 F.3d at 1538.

[275] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999).

dealing with fundamental rights, and because "freedom of worship" is a fundamental right, the presumption works in the Church's favor in this case.[276]

The government cannot force the dioceses to include parish assets in their estates in violation of both the Establishment and Free Exercise Clauses simply because it filed for chapter 11 protection. There are two main requirements in order for waiver to be effective. First, there must be "an intentional relinquishment or abandonment of known rights or privileges."[277] Second, waiver must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."[278] Even though the dioceses intentionally filed for bankruptcy's protection under chapter 11, it did not intentionally relinquish or abandon what it sees as its constitutional rights to keep parish assets separate from the bankruptcy estate. Furthermore, when the dioceses filed for chapter 11 reorganization, the "relevant circumstance" was that there was no reason to believe parish assets would be included because Canon Law indicates parish assets are to be considered separate from the diocese. Therefore, the "likely consequence" of the dioceses filing for chapter 11 would be that parish assets would not be included. The dioceses could not "know" or "intentionally relinquish" a right when it never suspected parish assets to be included in the first place.

Section 1106 of the Code perfectly illustrates the idea that constitutional rights are not waived upon receiving a government-sponsored benefit. Even though a trustee must investigate a debtor for fraud and mismanagement, the same is not required of a debtor in possession because its counsel would be required to investigate and reveal its activities.[279] Such an investigation may result in a breach

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[276] Freedom of worship as a fundamental right finds its grounding in the First Amendment. U.S. CONST. amend. I; *see, e.g.*, West Va. State Board of Educ. v. Barnette, 319 U.S. 624, 639, 642 (1943) (holding statutorily imposed recitation of pledge of allegiance and salute to flag unconstitutional, in violation of the First Amendment); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 226 (1963) (finding "freedom of worship" is fundamental right).

[277] *Church of Scientology Flag Serv.*, 2 F.3d at 1538.

[278] Brady v. United States, 397 U.S. 742, 748 (1970); *accord* NDEP Corp. v. Handl-It Inc. (*In re* NDEP Corp.), 203 B.R. 905, 912–13 (Bankr. D. Del. 1996) ("[C]ourts should not be eager to embrace an implied waiver of constitutional rights where there is an affirmative and timely assertion of those rights."); Freytag v. C.I.R., 501 U.S. 868, 878 (1991) (holding objections to constitutional structure of statutes cannot be waived by voluntary act alone).

[279] 11 U.S.C. §§ 1106(a) (3), 1107(a) (2000); *see* Commodity Futures Trading Com. v. Weintraub, 471 U.S. 343, 353 (1985) (explaining trustee's duty under 11 U.S.C.A. § 1106(a) (3)); *see also* Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back—Something May Be Gaining on You."* 68 AM. BANKR. L.J. 155, 186 (1994):

> Section 1106(a) specifies the basic duties of a trustee in chapter 11: to account for all the property of the estate; to examine proofs to claim; to gather information regarding the estate and finances of the debtor; if necessary, to make tax filings; to file a schedule of debts if the debtor has not done so; to investigate the financial affairs of the debtor; to determine whether the business of the debtor should be continued at all and accordingly to make a report to the court; and to file a plan of reorganization. More

of the attorney-client privilege, a benefit that is protected by the Sixth Amendment.[280] Section 1106 of the Code therefore proves that a debtor does not lose its Sixth Amendment protection merely by filing for bankruptcy.[281] Just as a debtor does not lose its Sixth Amendment rights, neither should it lose its First Amendment rights.

B. The Tort Claimants' Argument

Chapter 11 section 303(a) of the Code states: "[a]n involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not moneyed, business, or a commercial corporation, that may be a debtor under the chapter which such case in commenced."[282] Although the language of that section does not specifically exempt religious organizations, the legislative history of the Bankruptcy Reform Act of 1978 states that: "[e]leemosynary institutions, such as churches, schools, and charitable organizations and foundations…are exempt from involuntary bankruptcy."[283] It is therefore clear that these three dioceses that are in chapter 11 are there because they have made the voluntary choice to file.

> generally, courts have held that the duty of the trustee is to protect and preserve the property of the estate.

Id. (internal citations removed).

[280] 11 U.S.C.S. § 1106 n.6 ("counsel is incapable of conducting such thorough and objective investigation . . . [because] this information could be used to disadvantage of officers in direct breach of attorney-client privilege." (citing *In re* Temp-Way Corp., 95 B.R. 343 (Bankr. E.D. Pa. 1989)); U.S. CONST. amend VI (indicating Sixth Amendment right to defense counsel has been extended to protection of attorney-client privilege); *see* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 654 n. 239 (2005) ("Commentators have argued that the attorney-client privilege is itself protected by the Sixth Amendment."). *But see* Camille Glasscock Dubose & Cathy O. Morris, *The Attorney as Mandatory Reporter*, 68 TEX. B.J. 208, 211 (2005) ("Although most commentators agree that the attorney-client privilege lacks constitutional protection, the Sixth Amendment's right to effective assistance of counsel has been interpreted to require confidential consultation with an attorney (limited to criminal proceedings after formal accusation).") (internal citations removed).

[281] *See In re* Rice, 224 B.R. 464, 473 (Bankr. D. Or. 1998) (finding debtor's attorney-client privilege between debtor and debtor's counsel is not extended to and cannot be waived by trustee); Ralph C. McCullough II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 COM. L.J. 1, 31 (1997) (discussing manner in which bankruptcy is used to defraud creditors). *See generally* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (holding invocation of right to attorney for specific criminal offense cannot be waived during later police-initiated interviews related to offense).

[282] 11 U.S.C. § 303(a) (2000); *see In re* Gill Enterprises, Inc., 15 B.R. 328, 331 (Bankr. D. N.J. 1981) (discussing disutility of rigid tests for section 303); *In re* McMeekin, 16 B.R. 805, 808, 809 (Bankr. D. Mass. 1982) (analyzing section 303 to determine whether right to payment held by two parties is one claim or two).

[283] *See* S. Rep. No. 95-989 at 32 (1978); *see also In re* Contemporary Mission, Inc., 44 B.R. 940, 942 n.3 (Bankr. D. Conn. 1984) (supporting church position it is exempt from involuntary bankruptcy); Strassburger v. Quinn (*In re* Grace Christian Ministries, Inc.), 287 B.R. 352, 355 (Bankr. W.D. Penn. 2002) (noting legislative history indicates "schools, churches, charitable organizations and foundations" are protected from involuntary bankruptcy by section 303(a)).

The Court in *In re Catholic Bishop of Spokane* gives resounding support to the tort claimants' waiver argument. That case insisted that "[r]eligious organizations do not exist on some ethereal plane far removed from society," and that when religious organization engage in secular activities that result in a bankruptcy filing, they must be prepared to treat their creditors in the same manner as any other debtor.[284]

The bankruptcy court in *In re Navarro* also noted that:

> [E]very person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[285]

The Supreme Court has also held time and again that if one chooses to avail itself of the benefits of something, one must also assume its burdens.[286] Therefore, although the plain language of section 303 of the Code makes it clear that churches may not be forced into chapter 11, religious debtors should not be allowed to avail themselves of the Code's protections while, at the same time, seeking to shield themselves from any negative consequences by asserting religious immunity under the Establishment Clause, the RFRA and the Free Exercise Clause. Once a religious debtor voluntarily seeks the protection of the Code, there is no indication whatsoever that the debtor is to be exempted from the provisions thereof.

CONCLUSION

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[284] *In re* Catholic Bishop of Spokane, 329 B.R. 304, 325 (Bankr. E.D. Wash. 2005) ("It is not a burden on a religious organization which voluntarily seeks the protection of the bankruptcy laws to require it to treat its creditors in the same manner as any other debtor."); *see* Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 126–27 (1939) (indicating invocation of bankruptcy court jurisdiction comes with unwithdrawable, inherent risks and disadvantages).

[285] *In re* Navarro, 83 B.R. 348, 352 (Bankr. E.D. Penn. 1988) (quoting United States v. Lee, 455 U.S. 252, 261 (1982)); *see* Educ. Credit Mgmt. Corp. v. McLeroy (*In re* McLeroy), 250 B.R. 872, 880 (Bankr. N.D. Tex. 2000) (determining religious obligation of tithing is not automatic entitlement of debtor); Waguespack v. Rodriguez, 220 B.R. 31 (Bankr. W.D. La. 1998) (disallowing tithing greater than payment to general creditors on grounds religious obligations must be balanced against purpose of Bankruptcy Code).

[286] *See Los Angeles Lumber Products Co.*, 308 U.S. at 126–27 (indicating invocation of bankruptcy court jurisdiction come with unwithdrawable, inherent risks and disadvantages of bankruptcy proceedings); *see, e.g.*, Concordia Fire Ins. Co. v. Illinois, 292 U.S. 535, 559 (1934) (indicating insurance companies had been granted new powers to cover risks must accept or reject new privilege in its entirety or not at all); U.S. v. Lee, 455 U.S. 252, 261 (1982) (rejecting argument exemption from social security for self-employed Amish should extend to anyone who employs Amish on grounds Amish who choose to work for another must also accept responsibility of paying social security).

The bankruptcy filings of the dioceses of Tucson, Portland and Spokane clearly raise a number of complicated issues. There are no clear-cut answers. These issues will certainly be discussed extensively both outside and inside the courtroom. The court will first be faced with the question of whether Church Canon Law or civil law applies. Dioceses claim that parishes are separate juridical persons under Canon Law, even if they are not incorporated under civil law. Further, the dioceses claim that as corporation soles, the bishops are merely holding parish property in trust for the benefit of the parish and its parishioners. The tort claimants, on the other hand, posit that Canon Law has no place in the civil court system. In the case where parishes are unincorporated and the diocese is a corporation sole, civil law evidences that the Church is one large organization with common ownership of property in the bishop. After the Bankruptcy Court determines whether to apply Church Canon Law or civil law and whether a trust relationship in fact exists, it will have to assess what that means in terms of including parish assets in the bankruptcy estate under section 541. The court will undoubtedly struggle with the need to respect and abide by the law of the United States while permitting the Church to live by its Canon Laws which date back to its establishment.

The court will face equally difficult issues when it addresses the constitutional questions in these three cases. The court may very well be unprepared to hold RFRA unconstitutional as applied to federal law. Likewise, it might be wary to state that upon filing for bankruptcy the Church waives all of its constitutional rights. In an effort to abide by civil law without unduly burdening the Church, the court might choose to use its equitable powers and use RFRA to reach only certain parish assets. The court could seek to distinguish between those assets which are essentially dispensable and those that are essential to the continuing viability of the church's religious mission, such as church buildings and schools.

Can the court truly achieve an equitable result? That question is difficult to answer as these cases involve multiple victims. On the one hand there are the tort claimants; some young children and some, older men and women who were abused as children. These people are clearly victims who are entitled to compensation under the law. On the other hand, innocent parishioners who did not know anything about the church misconduct may suffer the consequences. These parishioners donate a portion of their income to the Church, assuming it will fund their local parish activities. Instead, their money may be used to redress the wrongs of their religious leaders. Although the parishioners did nothing wrong, they can be likened to the corporate shareholders in the Enron or WorldCom cases. Those shareholders lost a large percentage of their investments through no fault of their own, other than the misfortune of having invested, without knowledge, in corrupt organizations. Perhaps the court will determine that it is only fair and equitable that parish assets be made available to compensate the tort claimants in a manner that will not jeopardize the viability of the Church. In looking forward, the Catholic Church should of course consider strategies to better protect its assets under the law. More importantly, however, the Church must answer a call to become more financially

transparent and to weed out the problems of misconduct once and for all. Gaining back the trust of all of the victims must become the Church's primary mission.

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