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# SEMINAR

## NOW AND AT THE HOUR OF OUR DEBT: CATHOLIC DIOCESES IN BANKRUPTCY

*Professor Marie T. Reilly, Esq.*

### I. Introduction

The child sexual abuse crisis is a multifaceted challenge for the Church. The scandal has significantly and negatively affected the Church's moral authority.[1] It has alienated Catholics. In a 2019 Pew Research Center study, Catholics in the United States said they have cut back on Mass attendance (27%) and reduced contributions to their parishes (26%) in response to reports of Catholic clergy sexual abuse.[2] The

1 See Paul Elie, "The Reinvention of the Catholic Church," *The Atlantic*, Dec. 11, 2022 (review of John T. McGreevy, *Catholicism: A Global History from the French Revolution to Pope Francis* (2022) noting that the sex abuse scandal left bishops "stripped of moral authority"), https://www.theatlantic.com/magazine/archive/2023/01/catholic-church-changes-roe-v-wade-pope-francis/672235/ (accessed on 17 Nov. 2023). The president of the United States Conference of Catholic Bishops (USCCB) described the abuse accusations against Archbishop Theodore McCarrick as "reveal[ing] a grievous moral failure within the Church." USCCB, press release "President of U.S. Bishops Conference Issues Statement on Course of Action Responding to Moral Failures on Part of Church Leaders," Aug. 1, 2018, https://www.usccb.org/news/2018/president-us-bishops-conference-issues-statement-course-action-responding-moral-failures (accessed on 17 Nov. 2023).

2 See Pew Research Center, "Americans See Catholic Clergy Sex Abuse as an Ongoing Problem," June 11, 2019, 9, https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2019/06/Pew-Resarch-Center-Sex-Abuse-Full-Report-06.11.19.pdf (accessed on 28 Nov. 2023). Among Catholics who attend Mass regularly, only 39% think that U.S. Catholic bishops have done a good job responding to reports of abuse. Ibid. at 9. The percentage of U.S. Catholics who say they belong to a parish declined 18% between 1998 and 2020. See Jeffrey M. Jones, "U.S. Church Membership Down Sharply in Past Two Decades," Gallup News, Apr. 18, 2019, https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx (accessed on 28 Nov. 2023). See also Kathy Frankovic, "How the Child Sex Abuse Scandal Impacts the Catholic Church and Catholics," YouGov, Feb. 28, 2019, https://today.yougov.com/topics/politics/articles-reports/2019/02/28/how-sex-abuse-scandal-impacts-catholic-church (accessed on 17 Nov. 2023) (noting a 2019 poll showing 50% of the public and 30% of Catholics view the Church unfavorably); James Martin, "The Virtues of Catholic Anger," *The New York Times* (op. ed.), Aug. 15, 2018, https://www.nytimes.com/2018/08/15/opinion/the-virtues-of-catholic-anger.html (accessed on 17 Nov. 2023, subscription required) (observing the anger of Catholic faithful and clergy against church leaders and encouraging a response of constructive action).

financial impact of liability for child sexual abuse is massive, although it is hard to estimate accurately. Based on data provided to the United States Conference of Catholic Bishops by Catholic organizations, amounts paid as settlements to victims and attorneys' fees were $157 million for 2022, and $4 billion from 2004 through 2022.[3]

Intense media coverage of the Catholic sex abuse story for the last two decades has fueled sustained public outrage against Catholic organizations for their failure to protect children from known abusers and their cover up of the abuse.[4] Since 2002, Catholic organizations have been the subject of at least twenty-one state and local governmental investigations.[5] The media coverage of the Pennsylvania Attorney General's investigative grand jury report in 2018 was particularly vitriolic.[6]

Sexual abuse litigation is big business. Private equity funds finance the cost of litigating sexual abuse claims in exchange for a share of the payment lawyers

3 See USCCB Secretariat of Child and Youth Protection, "2022 Annual Report on the Implementation of the Charter for the Protection of Children and Young People" July 2023, 31, https://www.usccb.org/resources/2022-annual-report-implementation-charter-protection-children-and-young-people (accessed on 28 Nov. 2023); hereafter "USCCB 2023 Implementation Report."

4 See *The New York Times* ran 225 articles on Catholic clergy sexual abuse over the course of 100 days in 2002, including 26 days on the front page. J. A. Nelson, "Sex Abuse in the American Catholic Church, and the Attempt at Redemption," *J. Comm. and Theater Ass'n. of Minn. J.* 36 (2009) 37, 38.

5 See BishopAccountability.org, "Reports of Attorneys General, Grand Juries, Individuals, Commissions, and Organizations," https://www.bishop-accountanility.org/AtAGlance/reports.htm (accessed on 17 Nov. 2023).

6 Pennsylvania Attorney General, "Pennsylvania Diocese Victims Report" (2018), downloadable from https://www.attorneygeneral.gov/wp-content/uploads/2023/05/INVESTIGATING-GRAND-JURY-REPORT-NO.-1_FINAL_May-2023_Redacted.pdf (accessed on 17 Nov. 2023). In the wake of that report, an op ed writer concluded that "[t]he Catholic church is a pedophile ring." Anthea Butler, "The grand jury report about Catholic priest abuse in Pennsylvania shows the church is a criminal syndicate," *Think*, NBC News, Aug. 15, 2018, https://www.nbcnews.com/think/opinion/grand-jury-report-about-catholic-priest-abuse-pennsylvania-shows-church-ncna900906 (accessed on 28 Nov. 2023).

ultimately obtain from defendants.[7] Litigation funders take an estimated 57% of the payments that lawyers obtain on the claims in which they have invested.[8]

Almost all tort claims for child sexual abuse against Catholic organizations allege abuse that occurred decades ago. The generally applicable limitations period to bring a civil action for compensation has long expired.[9] Statutory and common law reforms regarding the limitations defense to tort claims for child sexual abuse opened the way for plaintiffs to recover damages for abuse that they claim occurred decades earlier.[10] Twenty-five states, the District of Columbia, and three U.S. territories have enacted laws that invalidate the statute of limitations defense for lawsuits by adults seeking compensation for sexual abuse they allegedly experienced as children. The legislation, known as claim revival laws or lookback window laws eliminate the statute of limitations defense against claims

7 See Samir D. Parikh, "Opaque Capital and Mass Tort Financing," *Yale L. Forum*, Oct. 31, 2023, https://www.yalelawjournal.org/forum/opaque-capital-and-mass-tort-financing (accessed on 28 Nov. 2023); Matthew Goldstein and Jessica Silver-Greenberg, "Hedge Funds Look to Profit from Personal-Injury Suits," *The New York Times*, June 25, 2018, https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html (accessed on 29 Nov. 2023, subscription required); "What is Litigation Funding & How Does it Work for Attorneys in 2023," *Attorney at Law Magazine*, March 21, 2023, https://attorneyatlawmagazine.com/legal-vendors/litigation-funding/what-is-litigation-funding (accessed on 28 Nov. 2023). Litigation funding has raised ethical concerns about the lawyer's fidelity to the client and control over the case. See Maya Steinitz, "The Litigation Finance Contract," *Wm. & Mary L. Rev.* 54 (2012) 455, 457 (the big concern is control—that funders are looking over lawyers' shoulders providing input that the lawyers don't necessarily welcome or agree with—interfering with how lawyers are doing their jobs).

8 See Thomas Holzheu, et al, "U.S. litigation funding and social inflation: The rising costs of legal liability," Swiss Re Institute (Dec. 9, 2021) 13, https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html (accessed on 29 Nov. 2023).

9 See Timothy D. Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Cambridge, MA: Harvard University Press, 2008) 185 (estimating that between 80-90% of child sexual abuse claims filed in the U.S. are time barred under the statutory limitations periods that generally apply to tort claims).

10 See generally Marie T. Reilly, "Retribution Against Catholic Dioceses by Revival: The Evolution and Legacy of the New York Child Victims Act," *Alb. L. Rev.* 84 (2022) 735.

for child sexual abuse filed within a certain time period following enactment.[11] This legislative development has resulted in a flood of claims against Catholic organizations. When nine states enacted claim revival legislation in 2019, the average annual number of sexual abuse claims against Catholic dioceses tripled relative to the annual average over the prior five years.[12] New York enacted claim revival legislation in 2019, and subsequently six of the eight dioceses in New York filed for bankruptcy.[13] On April 11, 2023, Maryland enacted the Maryland Child Victims Act, which revives time-barred child sexual abuse claims with a damage cap of $1.5 million per claim against a private organization and $800,000 per claim against a local government.[14] The Archdiocese of Baltimore filed for bankruptcy on September 29, 2023, two days before the Maryland legislation

11 See Child USA, "The Relative Success of Civil SOL Window and Revival Statutes State-by-State," June 2017, https://childusa.org/wpcontent/uploads/2020/03/child_relative success_june2017_final.pdf [https://perma.cc/HM76972J] (accessed on 29 Nov. 2023) (reporting the number of lawsuits filed after revival window legislation opened in six states and Guam before nine states enacted revival window legislation in 2019); Associated Press, "New Wave of sexual-abuse lawsuits could cost Catholic Church more than $4 billion," MarketWatch, Dec. 2, 2019, https://www.marketwatch.com/story/new-wave-of-sexual-abuse-lawsuits-could-cost-catholicchurch-over-4-billion-2019-12-02 [https://perma.cc/W3JV-EYRM] (accessed on 29 Nov. 2023) (estimating more than 5,000 new sexual abuse lawsuits cases in response to extension or suspension of statute of limitations); Associated Press, "Clergy sex abuse allegations triple, U.S. Catholic bishops report," *Los Angeles Times*, June 26, 2020, https://www.latimes.com/world-nation/story/2020-06-25/clergy-sex-abuse-allegations-tripleus-roman-catholic-bishops-report [https://perma.cc/XV6U-3RG9] (accessed on 29 Nov. 2023) (reporting that in the 2018-2019 audit year there were 4,434 sex abuse allegations against clergy).

12 Arizona, Arkansas, California (twice), Colorado, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, West Virginia, District of Columbia, Northern Mariana Islands, Guam. Child USA, *Statutes of Limitation by Jurisdiction*, https://childusa.org/2023sol/ (accessed on 29 Nov. 2023). U.S. Catholic organizations have lobbied in opposition to limitations reform. See Scott Malone, "The Catholic Church is fighting to block bills that would extend the statute of limitations for reporting sex abuse," *Business Insider*, Sept. 10, 2015, https://www.businessinsider.com/r-as-pope-visit-nears-us-sex-victims-say-church-remains-obstacle-to-justice-2015-9 (accessed on 29 Nov. 2023); George Joseph, "U.S. Catholic Church has spent millions fighting clergy sex abuse accountability," *The Guardian*, May 12, 2016, https://www.theguardian.com/us-news/2016/may/12/catholic-church-fights-clergy-child-sex-abuse-measures (accessed on 29 Nov. 2023).

13 See Marie T. Reilly, "B: Outcomes of Cases," in "Catholic Dioceses in Bankruptcy," *Penn State Law* eLibrary, June 3, 2019, appendix B, https://elibrary.law.psu.edu/bankruptcy/36/ (accessed on 29 Nov. 2023).

14 See S.B. 686, Gen. Assemb., Reg. Sess. (Md. 2023).

became effective.[15] Since 2004, in response to mission-threatening tort liability to child sexual abuse claimants, thirty-seven U.S. Catholic religious organizations have filed for relief in bankruptcy court. Twenty-four cases have concluded. Thirteen cases are pending.[16] More cases are likely.

Catholic organizations' use of bankruptcy to manage potential liability to thousands of plaintiffs for child sexual abuse has revealed the profound impact of bankruptcy law on the life of the Church. Canon law governs the relationships *among* juridic persons[17] and their respective responsibilities within the Church hierarchy. Secular tort law establishes Catholic organizations' *external* duty of care and liability to persons who claim to have been sexually abused as children. Secular law governing creditors and debtors frames this liability unemotionally as debt and recognizes abused persons as creditors. The President of the United States Conference of Catholic Bishops recently stated that U.S. bishops have endeavored to "do what is right—be accountable for the hurt and pain caused by the abuse, make amends so that abuse would not happen again, and strive to make for right relationships by publicly offering statements of sorrow and responsibility for allowing such horror to happen in the first place."[18] Notwithstanding the benevolent sentiment expressed in this statement, a debtor obtains "accountability and amends" for its liability to creditors by payment in exchange for a release of liability.

This presentation explains the law that governs a Catholic organization's liability to a person who was sexually abused as a child by an actor within that organization's control. It explains how sexual abuse claimants become creditors with enforcement rights against the organization and its property. When the number of claimants exceeds the organization's practical and financial capacity to manage on a case-by-case basis—the so-called "mass tort" problem—the potential liability puts the organization's mission and existence in peril. Bankruptcy is an attractive option through which to negotiate a comprehensive and final resolution of that liability while preserving sufficient resources to survive.

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15 See Ruth Graham, "Baltimore Archdiocese, Bracing for More Abuse Claims, Files for Bankruptcy," *The New York Times*, Sept. 29, 2023, https://www.nytimes.com/2023/09/29/us/baltimore-archdiocese-sex-abuse-bankruptcy.html (accessed on 29 Nov. 2023, subscription required).

16 See Marie T. Reilly, "Catholic Dioceses in Bankruptcy," *Penn State Law* e-Library, https://elibrary.law.psu.edu/bankruptcy/105 (accessed on 29 Nov. 2023) (compiling information about the cases).

17 See 1983 Code of Canon Law c. 116 § 1 (aggregates of persons or things established by competent ecclesiastical authority to act in the name of the Church and in accordance with law to fulfill their assigned task for the public good).

18 USCCB 2023 Implementation Report, Preface by Archbishop Timothy P. Broglio, at v.

## II. Child Sexual Abuse as Debt Problem

### A. Liability and Persons Liable

Sexual abuse of a child is particularly horrifying because of the unique confluence of the taboo nature of the abuse, the debilitating shame it can cause the victim, and the victim's status as a vulnerable child.[19] It is even more egregious when the abuser is a Catholic cleric who abuses clerical status to gain access to a vulnerable child, and the Catholic organization responsible for the abuser fails to protect the children in its care.

Legal culpability for harm caused by sexual abuse of child falls into two categories: criminal and civil. Criminal acts are offenses against the state which the state prosecutes through the criminal justice system. Adjudicated criminal culpability is called "guilt." In contrast, harm causing conduct may give rise to civil liability. The civil liability litigation system recognizes an injured person's private entitlement to compensation from persons whose behavior was at least a proximate cause of their injury. Law defines and distinguishes among types of legally culpable wrongdoing based on the wrongdoer's state of mind—negligent, reckless, or intentional.[20] To establish liability and a right to compensation, a plaintiff must establish that the wrongdoer a) failed to exercise reasonable care; b) in breach of a duty of care to the person seeking compensation; c) that proximately results in injury to that person.[21]

Multiple persons can contribute to an injury, and more than one person can be liable. In the case of sexual abuse of a child, obviously the perpetrator of abuse is the direct cause of the injury. Sexual abuse of a child is both a crime and the basis for a civil action against the perpetrator for intentional wrongdoing. Even if the plaintiff can establish the abuser's liability, the perpetrator likely cannot discharge that liability by payment of damages because intentional wrongdoers tend to be "judgment proof," meaning they tend to be uninsured and impecunious.

The injured person's strategy in a situation like this is to try to establish the liability of another actor as a contributing cause of his injury, ideally one who has

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19 See Korinna McRobert, "Childhood Sexual Abuse (CSA): moving past the taboo and into the postcolonial," *Society Register* vol. 6, no. 2 (Mar. 15, 2022), https://pressto.amu.edu.pl/index.php/sr/article/view/29275 (accessed on 29 Nov. 2023).

20 See generally Richard A. Epstein, "Intentional Harms," *J. Leg. Stud.* 4 (1975) 391, 391 (noting that throughout legal history intentional wrongdoing is distinct from unintentional wrongdoing). In some circumstances a defendant is "strictly" liable without regard to its state of mind. See *Restatement (Third) Torts*: Products Liability §§ 1, 2 (Am. L. Inst. 1998).

21 See, e.g., H. Gerald Chapin, *Handbook on the Law of Torts* § 105, at 501 (1917).

insurance or other assets to pay damages. Persons who claim to have been sexually abused as children typically seek to establish liability and recover damages against an organization, like a Catholic diocese or religious order, who they claim is culpable along with the perpetrator for their injury.

One strategy to establish the co-liability of an organization for the intentional wrongdoing of another is by doctrine that recognizes the "vicarious" liability of a principal for torts committed by an agent. An employer is vicariously liable for harm its employee causes while acting as an agent on behalf of the employer within the scope of employment. This vicarious liability arises due to the employment relationship and without regard to the culpability of the employer's conduct.[22] The scope of employment is an important limit on the employer's vicarious liability. Catholic employers have generally escaped vicarious liability for harm caused by an employee who sexually abuses a child on grounds that sexual abuse of children is outside the employee's scope of employment.[23]

Sexual abuse plaintiffs have successfully advanced an alternative theory of liability against Catholic organizations based on their own negligence. An actor is co-liable for harm a third party causes to persons to whom the actor owes a duty of care when the actor was on notice of the risk of that harm and failed to use reasonable care to prevent it.[24]

In general, a Catholic organization has a duty to protect persons from abuse based on its legal authority over the abuser, or its legal authority over an

22 See *Restatement (Third) of Agency* § 7.07 (Am. L. Inst. 2006). An employee's conduct is within the scope of employment if it is the kind the employee is employed to perform, occurs within the authorized time and space limits of employment, and furthers the employer's business, even if the employer has expressly prohibited it. E.g., Baker ex re. Hall Brake Supply, Inc. v. Stewart Title & Tr. of Phoenix, Inc., 5 P. 3d 249 (Ariz. App. 2000).

23 See, e.g., Doe v. Liberatore, 478 F. Supp. 2d 742 (M.D. Pa. 2007) (diocese was not vicariously liable for priest's abuse of child because "the acts of sexual abuse perpetrated by [the priest] were both outrageous and certainly not actuated by any purpose of serving the [diocese]"); Doe v. Roman Catholic Church of Diocese of Phoenix, 2023 Ariz. App. Unpub. LEXIS 275 (June 29, 2023) (holding that a diocese is not vicariously liable for a priest employee's sexual abuse of a child because that conduct is outside the scope of a priest's employment); Bernie v. Catholic Diocese of Sioux Falls, 2012 S.D. LEXIS 103 at *9-10 (same). But see Fearing v. Bucher, 328 Ore. 367 (Or. 1999) (holding that a diocese could be vicariously liable for a priest's sexual abuse of a child if acts within the priest's scope of employment "resulted in" the acts which led to the injury).

24 See *Restatement (Third) of Torts*: Liability for Physical and Emotional Harm § 19 (Am. L. Inst. 2010). E.g., Doe v. Diocese of Rockville Ctr., 2020 N.Y. Misc. LEXIS 1964 at *21 (Nassau Cty. Sup. Ct. May 11, 2020).

organization that in turn had legal authority over the abuser.[25] The requisite legal authority arises from the organization's actual control via an employment or other agency relationship.[26] Once the plaintiff establishes the organization's duty of care to him, the plaintiff must show that the organization breached that duty by its negligence.[27] An organization is negligent if it placed its employee or agent in a position to cause *foreseeable* harm to the plaintiff that it likely could have prevented.[28]

To establish a Catholic diocese's negligence in connection with an employee's sexual abuse of a child generally requires evidence that the diocese knew or should have known *before* the abuse to the plaintiff occurred that its employee had a propensity to sexually abuse children.[29] The evidence must show that the diocese had advance notice of the employee's propensity for sexual abuse of children. Notice after the alleged abuse occurred, or notice before the abuse of an employee's propensity for other misconduct, for example sexual misconduct with adults, is not sufficient.[30] Moreover, another party's notice of the abuser's propensity for child sexual abuse does not establish the diocese's notice unless the

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25 See, e.g., In re Roman Cath. Diocese of Rockville Ctr., 651 B.R. 399, 414 (Bankr. S.D. N.Y. 2023) (terming the two bases of duty the "abuser control theory" and the "institution control theory"). See generally *Restatement (Third) of Torts*: Phys. and Emot. Harm § 7a, b (Am. L. Inst. 2010) (stating that, subject to exceptions, "an actor has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm").

26 See, e.g., In re Roman Cath. Diocese of Rockville Ctr., 651 B.R. at 414.

27 See *Restatement (Third) of Torts*: Phys. & Emot. Harm § 3 (Am. L. Inst. 2023) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

28 See, e.g., Detone v. Bullit Courier Serv., Inc., 140 A.D. 2d 278, 279 (N.Y. Sup. Ct. App. Div. 1988).

29 See, e.g., Doe v. Alsaud, 12 F. Supp. 3d 674, 680 (S.D. N.Y. 2014) ("New York courts have held in employee sexual misconduct cases that an employer is only liable for negligent supervision or retention if it is aware of specific prior acts or allegations against the employee"): In re Roman Catholic Diocese of Rockville Ctr., 2023 Bankr. LEXIS 1799 (Bankr. S. D. N.Y. July 19, 2023); Doe v. Roman Catholic Church of the Diocese of Phoenix, 2023 Ariz. App. LEXIS 275 at *10-12 (June 29, 2023); Murray v. Nazareth Reg'l High Sch., 2022 U. S. Dist. LEXIS 139708 at *9 (E. D. N.Y. Aug. 5, 2022); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D. 2d 159, 161 (N.Y. App. 1997). See generally *Restatement (Third) of Torts*: Liability for Physical and Emotional Harm § 302B19 (Am. L. Inst. 2010) (an actor is liable for negligent supervision" where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct. The conduct of a defendant can lack reasonable care insofar as it *foreseeably* combines with or permits the improper conduct of the plaintiff or a third party.") (Italics supplied).

30 Doe v. Alsaud, 12 F. Supp. 3d at 681.

party with notice is the diocese's agent.[31] That a diocese had notice of sexual abuse of children by clerics in general, or of sexual abuse of children by an employee or agent other than the particular employee the plaintiff names as his abuser, is not sufficient.[32] There is no independent tort of "covering up" a diocese's general knowledge of the potential risk of harm to children by sexually abusive employees.[33]

The evidentiary burden on a plaintiff to show a diocese's negligence for sexual abuse of a child committed by an employee is high. Claims revival legislation removes only the organization's statute of limitations defense. It does not change the plaintiff's burden to prove the elements of liability or affect any other defenses to liability.[34]

On the other hand, a diocese has no special status to protect it from liability for its negligence. It cannot assert its status as a religious organization as a defense.[35] The First Amendment prevents a court from applying religious doctrine to resolve an essentially religious dispute.[36] For at least the last two decades, courts have declined to recognize a First Amendment defense for religious organizations in negligence actions based on employee wrongdoing. Whether a

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31 Jonathan A. v. Board of Educ. of City of N.Y., 779 N.Y.S. 2d 3, 5-6 (N.Y. Sup. Ct. App. Div. 2004).

32 See, e.g., In re Roman Catholic Diocese of Rockville Ctr., 651 B.R. 146, 167 (Bankr. S. D. N.Y. 2023); Murray v. Nazareth Reg'l High Sch., 579 F. Supp. 3d, 390 (E. D. N.Y. 2021) (dismissing complaint because allegations that the abuser had been transferred and the diocese was on notice that bishops used transfers to cover up clergy sexual abuse was insufficient to plead notice to the diocese of the employee's propensity for sexual abuse of children).

33 See, e.g., Murray v. Nazareth Reg'l High Sch. 579 F. Supp. 383, 389 (E.D. N.Y. 2021) (generalized allegations of the Church's "scandalous history of covering up sexual abuse" is insufficient to show a diocese's negligent supervision of a priest).

34 See generally Marie T. Reilly, "Retribution Against Catholic Dioceses by Revival: The Evolution and Legacy of the New York Child Victims Act Claims Revival Window," *Alb. L. Rev*. 84 (2022) 735 (discussing the statute of limitations defense in child sexual abuse cases).

35 The church autonomy doctrine derives from the First Amendment prohibition against "law respecting an establishment of religion or free exercise thereof….." U.S. Const. amend. I. See Malicki v. Doe, 814 So. 2d 347, 353 (Fla. 2002) (recognizing church autonomy doctrine as a corollary application of the First Amendment). The doctrine has also been called the "religious autonomy" doctrine" and the "ecclesiastical abstention doctrine." See Archdiocese of Miami, Inc. v Mangorri, 954 So. 2d 640, 641 (Fla. 3d DCA 2007).

36 See Serbian E. Orth. Diocese v. Milivojevich, 426 U. S. 696, 708-09 (1976). See generally Scott C. Idleman, "Tort Liability, Religious Entities, and the Decline of Constitutional Protection," *Ind. L.J.* 75 (2000) 291, 225.

religious organization failed to act with reasonable care to those to whom it owed a duty of care is unrelated to religious doctrine.[37]

B. Creditors' Rights Against the Debtor and Its Property

To understand what happens to the debtor and its creditors in a bankruptcy case, consider creditors' rights outside of bankruptcy in the civil liability litigation system. Plaintiffs assert claims as lawsuits. Courts determine whether the alleged wrongdoers are liable and if so the compensation to which the plaintiff is entitled by trial of the evidence. The plaintiff bears the burden of proof of all the elements of his claim by a preponderance of the evidence (more likely than not). If the plaintiff carries this burden, the court enters a judgment in his favor. The judgment establishes the defendant's liability and states the damages the defendant owes. After all appeals are exhausted, if the defendant does not pay the judgment voluntarily, the plaintiff can execute the judgment by recourse to the debtor's property.[38]

Procedural law governing execution of a judgment against the debtor's property varies among the states. Generally, the plaintiff obtains an order authorizing the sheriff or other executive branch officer to locate the debtor's property and seize it. The next step is a public auction sale to the highest bidder and application of the proceeds to pay the executing creditor's judgment.[39] A creditor may execute a judgment only against *the debtor's* interests in property. When a Catholic organization faces massive liability and the accompanying threat

37 See Malicki v. Doe, 814 So. 2d at 347-59 (discussing split of authority as to whether the doctrine bars a tort claim against a religious institution and joining the majority in declining to do so in a suit against a church for injury caused by sexual assault based on the church's alleged negligent hiring and supervision of a cleric); but see, Doe v. Marianist Province of the United States, 620 S.W. 3d 73, 77 (Mo. 2021) (holding that the question of a church's negligence in ordaining, hiring, assigning, supervising a priest involves interpretation of religious doctrine and constitutes impermissible entanglement between church and state under the First Amendment); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D. 2d 159, 165 (N.Y. App. Div. 1997).

38 See, e.g., *Fed. R. Civ. P.* 69(a) (describing process for execution of a judgment of a federal court for the payment of money to be by writ of execution).

39 See, e.g., N.Y. State Unified Courts System, "How Do I Collect on a Judgment?" https://ww2.nycourts.gov/courts/6jd/tompkins/ithaca/webpageJudgement.shtml (accessed on 30 Nov. 2023).

of loss of property to sexual abuse creditors, exactly who "the debtor" is and what that debtor's property interests are becomes critically important.[40]

Catholic archdioceses and dioceses in the United States are not organized identically. They have chosen their respective organizational forms among those available under secular law of their state. These forms include corporation sole, religious non-profit corporation, general non-profit corporation, charitable trust, or unincorporated association.[41]

In a diocese organized as corporation sole, the person holding the office of bishop is the exclusive legal agent for the corporation sole.[42] The corporation sole form centralizes both title and control over property in the bishop.[43] It is consistent with canon law that reposes supervisory authority over property (direct and indirect) in the bishop. It is, however, inconsistent with canon law that recognizes parishes and other entities as juridical persons capable of acquiring and holding their own property distinct from the diocese.[44] Juridical persons affiliated with a corporation sole diocese typically are not incorporated under secular law, and do not hold legal title to the property that canon law attributes to them as juridical persons.[45]

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40 See, e.g., Tort Claimants Comm. v. Roman Catholic Archbishop, 335 B.R. 842, 861 (Bankr. D. Or. 2005) (holding that treating as property formally titled in the diocese as corporation sole as property of the debtor notwithstanding that canon law attributed it to parishes within the diocese would not violate the First Amendment because secular law governing corporate form and attribution of title to property does not impose a substantial burden on exercise of religion).

41 See generally Patty Gerstenblith, "Associational Structures of Religious Organizations," *BYU L. Rev.* (1995) 439.

42 See Gerstenblith, 454 (noting that as of 1995, twenty-six states permitted a religious organization to incorporate as a corporation sole). State corporation sole laws generally require that the sole agent of the corporation sole must be duly chosen and must act according to the rules of the religious organization. See Adam J. Maida and Nicholas P. Cafardi, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook* (St. Louis, MO: Catholic Health Association of the United States, 1983) 128.

43 Centralized control of property in the bishop may have a political purpose. See Baxter v. McDonnell, 49 N.E. 667, 668 (N.Y. Ct. App. 1898) (finding that the purpose of corporation sole is "to exclude the laity from that power of interference which they would have were the title vested in a [parish] corporation").

44 See 1983 Code of Canon Law cc. 1255-1256; John Beal, James Coriden & Thomas Green (eds.), *New Commentary on the Code of Canon Law* (New York/Mahwah, NJ: Paulist Press, 2000) 164.

45 *New Commentary*, note 44 at 1457 (noting that "internal ecclesiastical disputes" between bishops administrators of other juridic persons within a diocese arise "when the civil law structure, of a diocese does not mirror . . . the canonical structure, resulting in divergent views of the ownership of church-related property and the appropriate persons to administer and alienate that property").

In contrast, a diocese that is organized as a corporation typically holds legal title only to property attributed to the diocese as a canonical juridic person. Parishes and other entities affiliated with the diocese are separately incorporated and each holds title to its own property.[46] In contrast with the corporation sole organizational form, separate incorporation of diocese and parishes aligns their secular forms with the canonical distinctions among juridic persons. The problem is that separate incorporation of the diocese and the parishes under secular law presumes and requires their independence and compliance with legal formalities that do not easily accommodate the bishop's supervisory authority over pastors and parish property under canon law.

The organizational form of the debtor under secular law answers the question of who the debtor is for purposes of a creditor's right to enforce a judgment against the debtor's property. The next question is what the debtor's interests in property are under secular law. Secular law governing property interests fixates on the state of the debtor's "title" based on formal and public documentation of transfers of interests in an item of property through history, ending with the transfer of the interest to the debtor (the "chain of title").[47] It provides a complex array of rules and exceptions that rank the priority of the debtor's interest relative to that of other parties who claim a competing interest in the same item of property.[48] For example if the debtor owns a parcel of real property subject to a mortgage in favor of a lender, both the debtor and the lender hold an interest in that parcel. The law governing mortgages provides rules that govern the priority of the mortgagee's interest relative to the debtor's interest. Moreover, the debtor's ability to use the parcel may be regulated by zoning laws. Or, it may be restricted by donor-imposed covenants or historical preservation laws.

The importance of a debtor's secular organizational form and interests in property when creditors seek to enforce their judgments invites asset protection strategy by debtors to shield property from creditors. A debtor faced with impending creditor collection action has an incentive to hide it, or as a more sophisticated move, to transfer it to a cooperative, but legally distinct entity. For

46 See Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 Seton Hall L. Rev. 871, 886-890 (2019) (discussing organizational forms of Catholic dioceses that have filed for bankruptcy).

47 See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 Amer. Econ. Rev. 347 (1967) (describing the common law of property rights and proposing an economic theory of property rights); Carol M. Rose, "Possession as the Origin of Property," *U. Chi. L. Rev.* 52 (1985) 73 (exploring the origin or "first link" in the chain of title).

48 See, e.g., Paul Wangerin, "The Hierarchy of Property," *J. Bus., Entr. & the Law* 9 (2015) 153 (describing the priority rules in Article 9 of the Uniform Commercial Code).

centuries, debtors have engaged in these asset protection strategies. Since the 1500s, fraudulent transfer law has recognized creditors' right to undo or "avoid' "ertain illegitimate property transfers that deplete the debtor's property that would, but for the transfer, be available to satisfy their claims.[49] Fraudulent transfer law is more complex than this brief explanation because it is not easy to draw the line between legitimate and illegitimate transfers.

## III. The Bankruptcy Option

### A. The Purpose of Bankruptcy

The word "bankruptcy" as used in ordinary conversation has a connotation of insolvency and failure. Surprisingly, perhaps, federal bankruptcy law has a non-depressing purpose: 1) to provide an efficient alternative to the individual creditor litigation and collection action, and 2) to provide a procedure for debtors to obtain a "fresh start" through comprehensive and final forgiveness (discharge) of debt.[50]

Bankruptcy offers a solution to the inefficiency of uncoordinated individual creditor collection action.[51] In the litigation system outside of bankruptcy, the first claimant to obtain a judgment against the debtor can execute that judgment against the debtor's property. These first judgments are likely to be large reflecting the jury's outrage and desire to punish the defendant. This is the so-called "lottery effect." The entry of the first colossal judgment against the debtor will likely cause other creditors to rush in with litigation and collection, triggering a panic cascade that destroys the debtor as a going concern and reduces the assets available to pay all creditors.

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49 See, e.g., Twyne's Case, 3 Coke 806, 76 Eng. Rep. 809 (Star Chamber, 1601) (invalidating a fraudulent gift of goods under 13 Eliz. cap. 5).

50 See Thomas H. Jackson, "Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain," *Yale L. J.* 91 (1982) 857, 860-868 (arguing that bankruptcy law tends to reflect the bargain creditors would make with debtor ex ante [the "creditors' bargain"] to provide for a collective solution that reduces costs, preserves value, and improves creditors' collective recovery relative to the individualistic creditors' remedy system outside of bankruptcy); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (noting that bankruptcy law "gives to the honest but unfortunate debtor… a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt").

51 See Charles Mooney, "A Normative Theory of Bankruptcy Law," *Wash. & Lee L. Rev.* 61 (2004) 931, 934 (describing and defending a normative theory of bankruptcy law as a procedure for maximizing the recovery of those with legal entitlements against the debtor under non-bankruptcy law). This theory posits that bankruptcy procedure ought to provide a solution to the 'tragedy of the commons' created by individual creditor actions that tend to externalize loss to other creditors against the same commons. See Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968) (coining the term "tragedy of the commons").

Bankruptcy imposes a collective claim resolution process on all creditors no matter where they may be in the process of asserting their claims. The norm in bankruptcy is equality of treatment among creditors with similar types of claims. Unsecured creditors such as sexual abuse claimants can expect a *pro rata* share in the debtor's assets in the bankruptcy case. Creditors negotiate a settlement of their claims collectively, without regard to how much they may have invested in pursuing their cases, or how close they may have been to obtaining a judgment outside of bankruptcy.[52] This equality norm contrasts sharply with the winner-take-all tournament of speed in the tort litigation system outside of bankruptcy.

Coordinated resolution of all liability in bankruptcy occurs under the supervision of a bankruptcy court with jurisdiction over all creditors and all the debtor's property. Bankruptcy law sublimates individual creditors' entitlements under non-bankruptcy law to protect the value of the debtor's property, preserve the debtor as a going concern, and maximize payment to creditors collectively. In theory, the total costs of incurred by all parties in a bankruptcy case are lower than the costs the parties would incur in individual litigation and judgment enforcement outside of bankruptcy.

Catholic bishops that have resorted to bankruptcy have noted the collective, egalitarian, and value-preserving features of bankruptcy to explain their decisions to use it to resolve sexual abuse claims. For example, in a letter to the faithful announcing the Archdiocese of San Francisco's bankruptcy case, Archbishop Salvatore Cordileone wrote: "We believe the bankruptcy process is the best way to provide a compassionate and equitable solution for survivors of abuse while ensuring that we continue the vital ministries to the faithful and to the communities that rely on our services and charity."[53] The Archbishop of Baltimore, in a letter to the faithful announcing that he was considering a bankruptcy filing to respond to sexual abuse claims, wrote that litigating claims outside of bankruptcy would:

> potentially lead to some very high damage awards for a very small number of victim-survivors while leaving almost nothing for the vast majority of them. The archdiocese simply does not have unlimited resources to satisfy such claims; its assets are indeed finite. . . . [In a chapter 11 bankruptcy case] the archdiocese would be required to

52 See 11 U.S.C. § 1123(a)(4) (requiring that a plan of reorganization must "provide the same treatment for each claim . . . of a particular class . . . unless the holder of a particular claim . . . agrees to a less favorable treatment. . . .").

53 Salvatore J. Cordileone, Archbishop, "Letter to the Faithful," August 21, 2023, https://sfarchdiocese.org/letter-to-the-faithful-from-archbishop-salvatore-j-cordileone-on-the-archdiocese-of-san-franciscos-filing-for-chapter-11-bankruptcy-to-facilitate-settlements-with-abuse-survivors/ (accessed on 30 Nov. 2023).

provide resources which would be used to compensate victim-survivors while at the same time ensuring our mission can continue.[54]

B. Types of Bankruptcy

Bankruptcy law offers a debtor a choice among several types of bankruptcy proceedings. In a case filed under chapter 7 of the Bankruptcy Code, the debtor's property passes by operation of law to a bankruptcy trustee. The trustee is responsible for collecting the debtor's property, selling it, and using the proceeds to pay creditors claims.[55]

In contrast, a debtor who wants to resolve its debts *without* relinquishing control of its property can choose a chapter 11 case. In this type of bankruptcy case, the debtor seeks to "reorganize" by agreeing with its creditors on a plan to pay claims while the debtor retains control of the business and retains enough property to survive. If a debtor tries but fails to confirm a plan, the case may be converted to a liquidation case under chapter 7. Alternatively, the bankruptcy court may dismiss the chapter 11 case whereupon creditors may resume pursuit of their claims in the litigation system.

C. The Estate, the Debtor in Possession, and the Creditors' Committee

At the moment a debtor begins a bankruptcy case (the petition date), all civil actions, including lawsuits for sexual abuse, that were or could have been filed against the debtor as of the petition date are enjoined by a statutory provision known as the "automatic stay."[56] The debtor's interests in property "wherever located and by whomever held" transfer automatically into an "estate."[57] At the same moment, the debtor transforms into a legally distinct entity known as the "debtor in possession."[58] The debtor in possession looks just like the debtor. Its property, managers, employees, and operations are the same as before the bankruptcy case. Unlike the debtor, which operates to maximize return on investment for its equity shareholders, or, in the case of a non-profit corporation,

54 William E. Lori, Archbishop, "A Message from Archbishop Lori: Healing and Ministry in the Archdiocese of Baltimore," Sept. 5, 2023, https://www.archbalt.org/a-message-from-archbishop-lori-healing-and-ministry-in-the-archdiocese-of-baltimore/) (accessed on 30 Nov. 2023).

55 See 11 U.S.C. § 704 (describing the duties of the trustee).

56 11 U.S.C. § 362(a)(1) (with certain exceptions, a bankruptcy petition once filed "operates as a stay applicable to all entities" against "the commencement or continuation…[an] action or proceeding against the debtor that could have been commenced before the commencement of the case under this title . . . .").

57 11 U.S.C. § 541(a)(1) (the commencement of a bankruptcy case creates "an estate" consisting, with some exceptions and including certain other property interests, of "all the debtor's legal and equitable interests in property as of the commencement of the case").

58 11 U.S.C. § 1101(1).

for advancement of its mission, the debtor in possession is a fiduciary for creditors.[59] The debtor in possession may use or sell property and operate during the bankruptcy case, but the Bankruptcy Code limits its freedom considerably. For example, to use or dispose of property other than in the ordinary course of business, the debtor in possession must either obtain creditors' prior consent or court approval after a hearing at which creditors may object.[60]

Unsecured creditors are represented collectively in a chapter 11 case by a committee typically known as the Official Creditors' Committee.[61] In diocesan bankruptcy cases, sexual abuse claimants dominate the diocese's unsecured creditors by both number of claims and amount and typically these claimants comprise the committee. Lawyers who represent groups of sexual abuse claimants vie to have their clients appointed to the committee, and committee members' lawyers vie among themselves for leadership of the committee. The committee represents all sexual abuse creditors. It hires its own lawyers and other professionals.[62] The debtor in possession pays the fees of the committee's professionals, subject to bankruptcy court review.[63] The responsibility of the debtor to pay the committee's professional fees amplifies the already powerful incentive of the debtor to streamline negotiation with the committee and to provide it with the information it needs to evaluate the debtor's financial situation and reach agreement on the terms of a plan support the debtor's proposed plan expeditiously.

D. Property Issues in Bankruptcy

Bankruptcy law permits creditors to challenge the debtor's assertion as to what is or is not the debtor's property. It also provides creditors with the power to avoid as so-called fraudulent transfers otherwise valid pre-bankruptcy, outbound transfers of the debtor's property to third parties that, but for the transfer, would have been available to pay creditors.

Creditors in Catholic diocesan bankruptcy cases have challenged the diocese's attribution of property among the diocese and its parishes, cemeteries, schools, foundations and other affiliate entities within the diocese. They have also

59 See 11 U.S.C. § 1107(a); see, e.g., Commodity Futures Trading Comm'n v. Weintraub, 471 U. S. 343, 355 (1985) (debtor in possession owes the same fiduciary duty to creditors as a trustee in a chapter 7 case). The debtor in possession has the same statutory powers and responsibilities to creditors as a trustee does in a chapter 7 liquidation case. 11 U.S.C. § 323(a).

60 See, e.g., 11 U.S.C. § 363(a)-(p).

61 See 11 U.S.C. §§ 1102, 1103(a).

62 See 11 U.S.C. § 1103(a).

63 See 11 U.S.C. § 328(a).

challenged pre-bankruptcy transfers of diocesan property by asserting transfer avoiding powers in bankruptcy to recover property from affiliates who received it.

For example, in the Archdiocese of Milwaukee case, the Official Creditors' Committee challenged the archdiocese's pre-petition transfer of $55 million to an entity known as the Cemetery Trust whose purpose was to provide for maintenance of archdiocesan cemetery property. The committee contended that the transfer was avoidable under bankruptcy law and that the Cemetery Trust should return the $55 million to the debtor's estate. [64] The archbishop responded that the committee's exercise of the avoiding power infringed on the archbishop's First Amendment right to free exercise of religion, namely, the archbishop's canonical obligation to maintain the cemetery as a consecrated Catholic burial place.[65]

The Seventh Circuit rejected the archdiocese's religious liberty argument. The archdiocese appealed to the Supreme Court, but before the Court could hear the case, the committee and the debtor agreed to a joint plan of reorganization in the bankruptcy case and the archdiocese withdrew its appeal. The committee's challenge to the Cemetery Trust transfer was successful as a strategy to leverage a more favorable payout for sexual abuse creditors. The plan the debtor offered the committee after the committee's victory in the Seventh Circuit paid creditors five times more than the previous plan.[66]

In the Archdiocese of Santa Fe case, the committee similarly challenged certain of the archdiocese's pre-petition property transfers and objected to the debtor's assertion that it held title to certain property subject to a trust in favor of parishes.[67] The bankruptcy court held that the challenge did not implicate the archdiocese's right to free expression of religion and was not the type of intra-church dispute that implicates the church autonomy doctrine.[68] It allowed the

64 See Listecki v. Official Comm. of Unsecured Creditors, 780 F. 3d 731, 895-96 (7th Cir. 2015).

65 Listecki v. Official Comm. of Unsecured Creditors, 895-96. See also 1983 Code of Canon Law c. 1267 §3 (offerings given by the faithful for a particular purpose may be applied only for that purpose).

66 See Annysa Johnson, "Archdiocese of Milwaukee Settles Sexual Abuse Claims for $21 Million," *J. Sentinel*, August 4, 2015, https://archive.jsonline.com/news/religion/archdiocese-settles-sexual-abuse-claims-for-21-million-b99542352z1-320651132.html/) (accessed on 30 Nov. 2023).

67 In re Roman Catholic Church of the Archdiocese of Santa Fe, 621 B. R. 502, 504 (Bankr. N.M. 2020). At about the same time, the archdiocese created a similar trust structure to hold title to financial assets and transferred about $25 million into it. Id. On the petition date, the corpus of the financial assets trust was $36.7 million. Id.

68 See ibid. at 509-12.

committee to proceed with its challenges, noting that the litigation over the archdiocese's property "will be very expensive and time consuming."[69] It cautioned both parties that, unless settled, litigation would consume millions of dollars for fees and costs, money that "could have paid valid abuse claims."[70] The archdiocese settled with the committee and confirmed a plan in 2022 without a litigated resolution of the property disputes.

In the St. Paul and Minneapolis case, the committee contended that although the archdiocese and parishes were separately incorporated under Minnesota law with title to their own property, parishes property should be treated in the bankruptcy case as though it were the archdiocese's. The committee argued that the archbishop's canonical supervisory authority over parishes justified disregard of the secular legal distinction between the archdiocese and parishes.[71] The bankruptcy court and the 8th Circuit on appeal rejected the committee's argument on grounds that disregard of the legal separateness of the parishes and the archdiocese would in effect force the parishes involuntarily into bankruptcy, a result that the Bankruptcy Code expressly prohibits.[72] The 8th Circuit held that the committee's allegations that the archbishop dominated the parishes via his canonical supervisory authority was insufficient to invalidate the legal distinction between the archdiocese and the parishes as distinct corporate entities under Minnesota law.[73]

In the Archdiocese of Portland case, the debtor, a corporation sole under Oregon law, asserted that its formal title to certain property was subject to a trust for the benefit of unincorporated parishes who acquired it and to whom it belonged under canon law.[74] The committee sought a determination that all property titled in the Archbishop as corporation sole under was the debtor's property without regard to canon law that attributes some of that property to parishes.[75] The archdiocese argued that the bankruptcy court lacked subject matter jurisdiction over the issue under the First Amendment.[76] The court disagreed,

69 In re Roman Catholic Church of the Archdiocese of Santa Fe, at 513.
70 Ibid. at 513-14.
71 See In re Archdiocese of St. Paul and Minneapolis, 888 F.3d 944, 949-50 (8th Cir. 2018).
72 See 888 F.3d at 953. See 11 U.S.C. § 303(a).
73 See 888 F.3d at 953 ("The isolated incidents of lack of corporate formality and commingling of assets fall far short of the requirement for alter ego status under Minnesota law.").
74 See Tort Claimants Comm. v. Roman Catholic Archbishop, 334 B. R. 842, 848-49 (Bankr. D. Or. 2005).
75 See 1983 Code of Canon Law c. 1256 (". . . ownership of goods belongs to that juridic person which has acquired them legitimately").
76 See 334 B.R. at 849.

holding that the issue of title to property is a question of purely secular law.[77] It noted that the archdiocese "is free to organize its internal affairs in accordance with its internal church law" and judicial enforcement "of the consequences of those choices . . . neither rearranges the church's polity in violation of the First Amendment nor interferes with the church's right to make those choices."[78] The archdiocese was able to confirm a plan with the support of sexual abuse claimants without litigating the validity of the asserted trust in which it claimed hold property for the benefit of parishes.

E. Sexual Abuse Claims

Under bankruptcy law, a person who holds any right to payment from the debtor has a "claim," even if that right is disputed, unliquidated, unmatured, or contingent.[79] The time to test for whether a person has a "claim" and therefore is a "creditor" is on the date the debtor files for bankruptcy.[80] A person has a claim and is a creditor if the events that resulted in his injury and cause of action against the debtor occurred before the bankruptcy filing date even if he has not filed a lawsuit or made a demand for compensation from the debtor.[81]

A person who is a creditor must file in the bankruptcy court a short statement of the nature and amount of their claim known as a "proof of claim form"[82] In sex abuse bankruptcy cases, the court approves a form that elicits basic information about the person claiming to have been abused and facts regarding the alleged abuse.[83] Although proof of claim forms are ordinarily part of the public docket in

77 334 B.R at 853.

78 Ibid.

79 See 11 U.S.C. § 101(5)(A) (defining "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed").

80 See 11 U.S.C. § 101(10) (defining "creditor" as an "entity that has a claim against the debtor that arose at the time of or before [the petition date]").

81 See, O'Loughlin v. County of Orange, 229 F.3d 871, 874 (9th Cir. 2000) (noting that a "claim" arises at the time of the events giving rise to the claim, not at the time the plaintiff is first able to file suit on the claim").

82 See United States Courts, Services and Forms, "Proof of Claim" Official Form 410, downloadable at https://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0 (accessed on 30 Nov. 2023). See also Fed. Bankr. R. 3001-08 (explaining how to complete and file a proof of claim form).

83 See In re Roman Catholic Diocese of Rockville Ctr., 651 B. R. 146, 177 (Bankr. S. D. NY 2023) (noting that the proof of claim form required only general information about the alleged abuse and did not require claimants to state facts showing all the elements of a claim against the debtor that would be required for a complaint in state court litigation).

a bankruptcy case, sexual abuse proofs of claim are protected from public disclosure and do not become part of the public docket.[84]

The proof of claim form can be completed without the assistance of a lawyer. Lawyers represent sexual abuse claimants on a contingency fee basis under which the lawyer is entitled to a percentage of the payment the clients receive. In the Diocese of Camden case, the bankruptcy court denied confirmation of a plan proposed jointly by the debtor and the committee among other grounds because it allowed some claimants' attorneys to receive fees greater than those permitted by New Jersey lawyer ethics laws.[85] The court noted that "[t]he survivor proof of claim form contains nine pages of questions, many of which require the claimant or attorney to check a box."[86] It opined that a contingency fee of 40% of what a client recovers from the settlement trust may be unreasonably large (and therefore unethical) for work consisting solely of filing a claim form on behalf a client.[87]

To achieve a *comprehensive* resolution of claims against the debtor, bankruptcy law makes creditor participation *compulsory*. If a person is a creditor on the day the debtor files for bankruptcy, the person must timely file a proof of claim form to participate in the case and receive payment under a confirmed plan. Shortly after the bankruptcy case begins, the bankruptcy court sets a deadline for filing a proof of claim form known as the "bar date." Unfiled or late filed claims, unless the court excuses the failure, are disallowed, not entitled to payout under a confirmed plan, but are subject to the channeling injunction that blocks the claimant from suing the debtor after it emerges from a successful bankruptcy.[88] A creditor that misses the bar date can try to persuade the bankruptcy court that the bar should not apply to him because he did not have constructive notice or actual knowledge of the case in time to comply with the bar date.[89] Typically, the debtor negotiates, and the court approves, an advertising program designed to inform

84 Recent settlement approved between creditors and claims agent that accidentally published sexual abuse creditor identifying information.

85 See *Memorandum Decision Denying Confirmation of Eighth Amended Plan*, Poslusny, Jr., J. Case 20-21257, doc. 3336 at 68, Sept. 29, 2003.

86 Ibid. at 68-69.

87 Ibid.

88 See, e.g., Brogdon v. Roman Catholic Archbishop of L.A., 2021 U.S. Dist. LEXIS 237762 at *25 (D. Ariz. 2021) (holding that civil actions against the Diocese of Tucson for child sexual abuse were discharged by confirmation of its plan of reorganization).

89 See 11 U.S.C. §§ 501(b)(9), 726(a)(2)(C)(i).

claimants about the debtor's bankruptcy case and how to file a proof of claim form to maximize the number of claims resolved through the case.[90]

Some advocates for sexual abuse claimants contend that bishops use the bar date in diocesan bankruptcy cases as a ploy to undermine claims revival legislation that provides a longer window to commence a lawsuit free of a limitations defense, or otherwise to discourage claimants from coming forward with their claims.[91] To the contrary, the debtor's incentive in a chapter 11 case is to provide the widest possible notice to all creditors of their right to participate in the bankruptcy case to minimize exceptions to the bar date.

The bankruptcy process flips the burden of proof as to the validity of claims relative to the litigation system. To obtain a judgment against an organization for injuries caused by an individual perpetrator of sexual abuse outside of bankruptcy, a sexual abuse claimant must prove each element of his cause of action to a preponderance of the evidence (more likely than not). In contrast, the Bankruptcy Code provides that all claims for which a proof of claim has been timely filed are "deemed allowed," unless the debtor or another party objects. This means a timely filed claim is presumptively valid as to liability and damages unless the debtor or another party objects to the claim and prevails in bankruptcy court.[92]

Advocates for sexual abuse creditors have criticized Catholic organizations' resorting to bankruptcy as a ploy to bar access to diocesan records that might

90 See In re Roman Catholic Diocese of Rockville Ctr., 651 B. R. 146, 177 (Bankr. S. D. NY 2023) (noting that the debtor provided a list of clergy for whom the diocese may have had notice of a propensity for abuse as part of the materials made available to prospective claimants and notes that the materials clarified that the absence of a person's name on this list "does not mean that you should not file a Sexual Abuse Proof of Claim" and instructed prospective claimants to file a proof of claim even if the claimant "did not report your sexual abuse to the Diocese or to anyone else").

91 See, e.g., Jeff Anderson & Assoc. P.A., *The Impact of California Diocese Bankruptcies on Survivors*, April 4, 2023, https://tinyurl.com/rc4jb2wv (accessed on 30 Nov. 2023) ("Bishops want to stall the justice process, keep evidence and information hidden, discourage other survivors from coming forward, and continue "business as usual.")

92 11 U.S.C. § 502(a) ("a claim, proof of which is filed under section 501 . . . , is deemed allowed, unless a party in interest . . . objects."); 11 U.S.C. § 502(b)(1) (providing that a claim shall be allowed except to the extent that "such claim is unenforceable against the debtor . . . under . . . applicable law").

"reveal the scope of previous and present cover-ups."[93] In bankruptcy, creditors do not need this discovery because their claims are deemed valid.

To negotiate a plan, the debtor and the committee must estimate the value of the pool of sexual abuse claims asserted against the debtor taking possible defenses to liability into account. They must also estimate the debtor's ability to pay claims and retain resources sufficient to survive. This requires estimation of the value of the debtor's property and projected income. The committee is entitled to information relevant to these issues via bankruptcy court supervised discovery.[94] Catholic dioceses in bankruptcy have produced clergy personnel files and other information potentially relevant to the validity and value of sexual abuse claims under court orders that protect the confidentiality of the information and limits the committee's use of it to purposes relevant to the committee's responsibilities in the bankruptcy case. The confidentiality order typically does not permit disclosure to lawyers for individual sexual abuse creditors, or to the public.[95]

Until relatively recently, Catholic organizations in bankruptcy have refrained from objecting to sexual abuse creditors' claims. This strategy makes sense because objections to sexual abuse claims tend to undermine, or at least distract from, settlement negotiations. During the summer of 2023, the Diocese of Rockville Centre objected successfully to the allowance of certain sexual abuse claims. The bankruptcy court, applying federal pleading standards,[96] held that the claimants' conclusory allegations that the diocese "knew or should have known

93 SNAP Press Release, March 14, 2023, https://www.snapnetwork.org/diocese_of_santa_rosa_files_for_bankruptcy_snap_responds (accessed on 30 Nov. 2023) (noting that the Diocese of Santa Rosa's bankruptcy filing would unfairly deprive sexual abuse claimants of access to these records and that other Catholic dioceses have similarly abused the bankruptcy system to deprive claimants of information); Jeff Anderson & Assoc. P.A., *The Impact of California Diocese Bankruptcies on Survivors* (asserting that the "core reason" Catholic dioceses use bankruptcy is "to hinder the public from learning of the magnitude of clergy sex abuse and the cover-up of the crimes committed").

94 See 11 U.S.C. § 1103(c) (the committee may "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the formulation of a plan").

95 See, e.g., In re Roman Catholic Diocese of Rockville Ctr, 651 B. R. 146, 178 (Bankr. S.D. NY 2023) (noting that the debtor had produced its confidential clergy personnel files to lawyers who represent members of the Official Creditors' Committee but that the Committee had not produced those files to counsel for claimants).

96 Federal court pleading standards require allegation of specific facts in contrast to the more lenient N.Y. court pleading standards. In re Roman Catholic Diocese of Rockville Ctr, 651 B. R. at 166 (citing In re Residential Cap., LLC, 531 B.R. 1, 12 [Bankr. S. D. N.Y. 2015]).

of the abuse" were not adequate to plead the particular advance notice required to show the diocese's negligence in connection with the alleged abuse.[97] The bankruptcy court granted the creditors leave to amend their proofs of claim, but it denied their demand that the diocese produce clergy personnel files with the hope of discovering evidence of advance notice.[98]

The Diocese of Rockville Centre objected to other claims on grounds that the claimants did not allege facts that showed the diocese had a duty of care to the claimant to prevent the abuse the plaintiff alleged. Claimants named the diocese as a co-defendant along with a school operated by a religious institute within the geographic diocese that employed the perpetrator and that the claimant attended at the time of the alleged abuse. They contended that their abuser, a member of the religious order that owned and operated the school, was an employee of both the institute and the diocese, and that the school was an agent of the diocese.[99] The claimants offered affidavit testimony of Thomas Doyle as an expert on canon law and sex abuse liability. Doyle testified that a diocesan bishop has canonical authority and control over "pastoral ministerial activities" of all religious institute schools and all clerics within the diocese.[100] The bankruptcy court held that the bishop's canonical authority over religious institute schools and clerics within the geographic diocese was not sufficient to show the requisite legal agency between the diocese and the religious institute who employed the alleged abuser.[101] In 2012, the South Dakota Supreme Court similarly held that the Diocese of Sioux Falls did not "control" the religious institutes that operated schools within the geographic diocese in which plaintiffs claimed to have been abused.[102]

F. The Plan of Reorganization

1. The Settlement Trust

In the late 1980s Johns-Manville Corporation chose bankruptcy to resolve potential liability for an overwhelming number of claims for injuries from past

97 See In re Roman Cath. Diocese of Rockville Ctr., 651 B.R. 146, 170, 171-72 (Bankr. S. D. N.Y. 2023).

98 Ibid. at 178. Instead, the court scheduled a hearing "to discuss documents in the possession of the Diocese that should be produced to counsel for the Claimants before they must file their amended claims." Id.

99 Ibid. at 413.

100 651 B.R. at 422.

101 Ibid. (holding that claimants must "prove the existence of such relationships based on underlying secular facts"). The bankruptcy court had earlier held that allegations that a diocese controlled religious orders or clerics operating *outside* the geographic diocese were not plausible. In re Roman Cath. Diocese of Rockville Ctr., 2023 Bankr. LEXIS 1055 at *9-10 (Bankr. S. D. NY April 19, 2023).

102 See, e.g., Bernie v. Catholic Diocese of Sioux Falls, 2012 S.D. 103 at *17 (Sept. 5, 2012).

exposure to its asbestos products.[103] It filed for chapter 11 and proposed a plan that created and funded an independent entity (a settlement trust) to value and pay asbestos claims. The plan channeled all claims that were or could have been filed in its bankruptcy case against the settlement trust and permanently enjoined those claimants from thereafter suing Johns-Manville. The legally independent settlement trust would validate and pay asbestos claims according to the terms agreed upon in the plan. Johns-Manville would emerge from bankruptcy free from the value-destructive shadow of long-tail liability for injury caused by pre-petition exposure to its asbestos products.[104]

Plans in the Catholic bankruptcy cases so far use the basic structure of the plan in the Johns-Manville case. They provide for the creation and funding of a settlement trust, an entity legally independent from the debtor. The debtor, diocesan parishes, schools, and other affiliated entities, and their insurers agree to contribute cash and other assets to the trust. The plan channels all claims for pre-petition sexual abuse to the trust and enjoins creditors from suing the debtor and the non-debtor entities that contribute to the trust.

The negotiation over the amount each of these parties must contribute to the trust is complicated for several reasons. The value of the pool of sexual abuse claims is unknown and not easily estimated based on similar claims settlement history outside of bankruptcy. Unlike claims for injury due to asbestos exposure, claims for injury from child sexual abuse are not readily comparable. Rather, they are highly idiosyncratic. The nature, circumstances, and impact of child sexual abuse varies from claimant to claimant.

One technique used in mass tort bankruptcy cases to estimate the value of claims is to extrapolate the value of the claims in the aggregate based on jury verdicts in "comparable" cases in the litigation system. This technique is controversial.[105] It is especially so applied to child sexual abuse claims because

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103 See In re Johns-Manville, 68 B.R. 618, 635 (Bankr. S.D. NY 1986) (confirmation of a plan that created a trust to satisfy the claims of all present and future asbestos injury claimants). See Craig Calhoun & Henry K. Hiller, "Coping with Insidious Injuries: The Case of Johns-Manville Corporation and Asbestos Exposure," Social Probs. 35 (1988) 162 (describing the Johns-Manville's chapter 11 case and arguing that it balanced the interests of known claimants and future claimants).

104 See Samuel Issacharoff and John Fabian Witt, "The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law," *Vand. L. Rev*. 57 (2004) 1571; Michelle J. White, "Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle," *U. Cin. L. Rev*. 70 (2002) 1319.

105 See e.g., In re Eagle-Picher Indus. Inc., 189 B.R. 681, 690-91 (Bankr. S.D. Ohio 1995) (stating "qualitative considerations" for use of values of comparable claims to estimate claims filed in a bankruptcy case).

only a small number of child sexual abuse claims have ended in jury verdicts. In the litigation system, lawyers select for trial those cases with the highest potential expected verdicts. The only screen for claims in a bankruptcy case is the "deemed valid" proof of claim form. Thus, "comparable" jury verdict data is likely to overestimate the value of claims filed in bankruptcy cases.[106]

Uncertainty about what property is legally attributable to the debtor and what the value of the debtor's property is further complicates settlement in a chapter 11 case. Catholic organizations differ in many ways, including organizational form, the extent and nature of their interests in property, and the wealth of their donor constituents. The property holdings or ability of one Catholic organization to pay have no bearing on the financial circumstances of another.

Insurance issues also complicate the plan negotiation process. Insurers in several recent Catholic organization bankruptcy cases have asserted defenses to coverage. For example, the Diocese of Rochester sued its insurers as part of its bankruptcy case to resolve dispute over their coverage obligations[107] The bankruptcy court had enjoined the litigation so the parties could negotiate a settlement on the coverage issues as part of the plan negotiation process. After years of mediation in the bankruptcy case in which the parties failed to reach a settlement, the bankruptcy court lifted the injunction on the coverage litigation.[108] The diocese and its insurers agreed to a settlement of coverage liability for $148 million. The committee objected to the settlement and the debtor withdrew it before the court could approve it.[109]

Without a comprehensive settlement with all insurers, the debtor and the committee proposed a joint plan that included a cash contribution from the debtor, parishes, and certain insurers. The plan proposed that the debtor would assign to the settlement trust its rights to coverage against the non-settling insurers and provided the settlement trustee with the right to assert the debtor's rights through

106 See e.g., Paul Hinton, David McKnight & Pietro Grandi, "The Verdict Valuation Paradox: Implications for Mass Torts," *ABI Journal*, April 2023 (describing "selection bias" in using jury verdicts as comparable values of mass tort claims in bankruptcy). See generally Press Release, "Justice Department Files Statement of Interest Urging Transparency in the Compensation of Asbestos Claims," December 28, 2020 (explaining the U.S. Department of Justice's concern that claims filed in Bestwall, LLC's bankruptcy case may be duplicative, based on inaccurate information, or fraudulent and that "the lack of transparency in the compensation of asbestos claims [in bankruptcy cases] has been a significant problem"), https://www.justice.gov/opa/pr/justice-department-files-statement-interest-urging-transparency-compensation-asbestos-claims (accessed on 30 Nov. 2023).
107 See The Diocese of Rochester v. The Continental Insurance Co., 2023 Bankr. LEXIS 1114 (Bankr. W. D. NY April 25, 2023).
108 Ibid.
109 Ibid. at *6.

what promised to be years of coverage litigation.[110] Two insurers subsequently agreed to settle, bringing the total cash to be contributed to the settlement trust to $126.75 million. One of the diocese's insurers that had not settled stated its intention to file a competing plan of reorganization which will complicate the confirmation process for the diocese on the joint plan.[111]

The Diocese of Camden reached a similar impasse with insurers and the committee. To obtain the support of the committee for its plan, the debtor abandoned a settlement it had reached with certain insurers and agreed to contribute the debtor's rights against those insurers to the settlement trust The insurers objected to the plan on grounds the plan unfairly compromises the insurers' rights under the insurance policies.[112]

In Catholic organization bankruptcy cases filed since the wave of sexual abuse claims revival legislation in 2019, insurers have taken a more aggressive position in negotiations over coverage liability. This development appears to have made the path to confirmation of a plan longer and more expensive for debtors.[113]

2. The Confirmation Requirements: Protections for Creditors

The Bankruptcy Code requires that a plan must comply with certain statutory protections for creditors before the bankruptcy court may confirm it.[114] Creditors are entitled to vote on whether they accept the plan.[115] The plan organizes similar creditors into classes (for example, a class of "sexual abuse survivor" claims). A

110 Explaining its decision to lift the injunction, the bankruptcy court noted that the harm to the insurers from enjoining the coverage litigation "now substantially and manifestly outweighs any harm to the diocese or the abuse victims who, through their attorneys, have announced their intention to accept the considerable risks of litigation." Ibid. at *10.

111 See Dietrich Knauth, "Rochester Diocese receives insurer's competing $201 million bankruptcy plan," September 5, 2023, Reuters, https://www.reuters.com/legal/litigation/rochester-diocese-receives-insurers-competing-201-mln-bankruptcy-plan-2023-09-01/ (accessed on 30 Nov. 2023).

112 See *Memorandum Decision Denying Confirmation of Eighth Amended Plan*, Poslusny, Jr., J. Case 20-21257, doc. 3336 at 68, Sept. 29, 2003.

113 See Jay Tokasz, "Insurers in Buffalo Diocese bankruptcy put on notice by Rochester abuse settlement plan," *The Buffalo News*, November 16, 2022, updated September 13, 2023, https://tinyurl.com/ywdrknny (accessed on 30 Nov. 2023, subscription required) (explaining how the plan structure in the Rochester case may affect negotiations in the Diocese of Buffalo case); Soma Biswas, "Catholic Diocese Bankruptcy Drag On as Insurers Fight Rising Costs of Sex-Abuse Claims," *Wall Street Journal,* August 4, 2022, https://www.wsj.com/articles/catholic-diocese-bankruptcies-drag-on-as-insurers-fight-rising-costs-of-sex-abuse-claims-11659605402 (accessed on 30 Nov. 2023).

114 See 11 U.S.C. § 1129(a)(1).

115 See 11 U.S.C. § 1126(a). The plan proponent must provide a disclosure statement along with the plan which provides "adequate information" for creditors to decide whether to vote in favor of the plan. 11 U.S.C. § 1125(a).

class of creditors votes to approve the plan if at least two thirds in amount and more than half in number vote in favor of the plan.[116] The easiest pathway to plan confirmation depends on unanimous support by all classes of creditors entitled to vote on the plan.[117] If one of the classes entitled to vote does not vote to accept the plan, the plan proponent can still obtain confirmation (known as "cramdown"), but only if the court concludes that the plan "does not discriminate unfairly" and is "fair and equitable" to each dissenting class.[118]

The Bankruptcy Code provides protections for dissenting creditors even when their class votes to approve the plan. A plan may not be confirmed over the objection of a creditor unless the court determines that the payment the creditor is to receive under the plan is in the creditor's "best interest," that is, the payment the creditor will receive under the plan is at least as much as the amount that creditor would receive if the debtor (hypothetically) liquidated in a chapter 7 bankruptcy case.[119] This protection ties confirmation of a plan to the value of the debtor's property. The bigger the hypothetical liquidation value of the debtor's property, the more the plan must propose to pay a recalcitrant creditor to satisfy the best interest test.

The best interest test compares the payment the creditor will receive under the plan with liquidation in a chapter 7 bankruptcy case, which usually is the creditor's best option if the debtor cannot confirm a plan. Under the Bankruptcy Code, creditors cannot force a non-profit organization into a bankruptcy liquidation (involuntary bankruptcy).[120] Thus, for creditors of a Catholic diocese in a chapter 11 case, the only *actual* alternative to a chapter 11 plan is dismissal of the case, and individual creditor litigation and judgment enforcement outside of bankruptcy, without the cost savings of liquidation coordinated by the bankruptcy court and bankruptcy trustee for the benefit of all creditors.

The best interest test, with its hypothetical chapter 7 liquidation analysis, seems complicated. In practice, however, the payout under Catholic organizations' plans have been typically better for all creditors than the alternative. For example, as part of a confirmation hearing in the Diocese of Camden case, the debtor's expert testified that taking all creditors' claims into account and assuming payment of those claims in a hypothetical chapter 7 case sexual abuse claimants would receive, at best, about three cents per dollar for their

116 See 11 U.S.C. § 1126(c).
117 See 11 U.S.C. § 1129(a).
118 1129(b)(1).
119 See 11 U. S.C. § 1129(a)(7).
120 The Bankruptcy Code protects religious organizations from involuntary bankruptcy initiated by its creditors. 11 U.S.C. § 303(a).

claims.[121] Under the proposed plan, accepting the highest estimated value of sexual abuse claims at $785.1 million, the $87.5 million in cash the plan proposed to transfer to the settlement trust alone would yield an average payout of over 11%, which clearly satisfied the best interest test.[122] In the Catholic diocesan bankruptcy cases so far, the plans have easily satisfied the best interest test because the settlement trust fund included contributions from parishes, affiliates and insurers, whereas the pool of assets available in a hypothetical liquidation payout includes only on the net liquidation value of the debtor's property.

3. Non-Debtor Releases

Insurers with potential coverage liability to the debtor and/or parishes and other diocesan affiliates are willing to contribute to the settlement trust in exchange for a release of liability based on claims that were or could have been asserted against them at the time the debtor filed the petition. A common plan feature in Catholic organization bankruptcy cases so far is the inclusion of so-called "non-debtor releases" by sexual abuse creditors in favor of these parties.

The Bankruptcy Code clearly provides for release of *the debtor's* pre-petition liability via a confirmed plan. It is also clear that a bankruptcy court can confirm a plan that includes non-debtor releases by unanimous consent of all creditors whose claims are released. It is not clear whether a bankruptcy court has statutory authority to confirm a plan that extinguishes the liability of a non-debtor if a creditor affected by the release objects.

The Second Circuit Court of Appeals recently held that a bankruptcy court has this authority in *In re Purdue Pharma L.P.*[123] The plan confirmed in Purdue Pharma's bankruptcy case to resolve its liability for injury caused by its opioid drugs included a contribution from and release of Purdue Pharma's shareholders, members of the Sackler family. The Supreme Court has accepted the appeal and will resolve the question.[124] The outcome will affect the utility of reorganization in bankruptcy for all debtors facing all types of mass tort liability.

4. The Claims Payment Protocol

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121 See *Memorandum Decision Denying Confirmation of Eighth Amended Plan*, Poslusny, Jr., J. Case 20-21257, doc. 3336 at 34, Sept. 29, 2003.

122 Ibid.

123 See Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.), 69 F. 4th 45 (2d Cir. 2023).

124 See Abbie VanSickle & Jan Hoffman, "What the Supreme Court's Decision to Hear the Purdue Pharma Case Means," *The New York Times*, Aug. 11, 2023, https://www.nytimes.com/2023/08/11/us/supreme-court-purdue-case.html (accessed on 30 Nov. 2023, subscription required).

After the parties reach agreement on the amount to be contributed to the settlement trust, sexual abuse claimants negotiate the claims validation and payment protocol largely among themselves. So-called "trust distribution procedures" differ from case to case. In the St. Paul and Minneapolis case, for example, the procedures required the trustee to review the proof of claim to determine whether "the Tort Claimant proved his or her claim by a preponderance of the evidence."[125] For claims that pass this initial screen, the trustee shall assign a designated number of points for various "plus" factors, for example fifteen points if the abuser is on the Archdiocese's "credibly accused" list, ten points if the abuser is on any Catholic organization's "credibly accused" list, five points if the abuser was accused by other claimants but is not on any organization's list.[126] The trustee may assign from zero to forty points based on considerations such as the duration and frequency of the alleged abuse, the type of abuse, and circumstances of the abuse (grooming, coercion or threat, relationship of trust or respect between the claimant to the perpetrator, multiple perpetrators, and the location of the abuse (isolated location, church, rectory, etc.). The trustee also has discretion to assign between zero and forty points based on the alleged impact of the abuse on the claimant, for example, the mental health consequences, physical health effects and negative impact on "spiritual wellbeing."[127] The trustee can award from zero to five points to reward those claimants who have "previously asserted claims against the Archdiocese and have participated in the legal and factual development of claims against the Archdiocese."[128] If the claimant had filed a lawsuit against the Archdiocese before the bankruptcy case, the trustee awards thirty points.[129] The trustee has no discretion to subtract points because the allegations do not state a claim for liability of the diocese because the diocese had no duty to the claimant. Rather, the trustee "shall reduce" the claimant's payment by 33% "[if] the [claimant's] abuser belonged to a religious order."[130] To induce the support of the committee for the plan, the procedures provided that every claimant shall receive a minimum distribution of $50,000 "unless the Claim is disallowed in its entirety."[131]

Until recently trust distribution procedures were not the subject of on-the-record objections in Catholic organization bankruptcy cases. As discussed above,

125 In re Archdiocese of St. Paul and Minneapolis, Third Amended Plan, doc. 1262, Exhibit D Trust and Trust Distribution Procedures at 93 (filed September 19, 2018).
126 Ibid. at p. 94.
127 Ibid. at 96.
128 Ibid.
129 Ibid.
130 Ibid. at 97.
131 Ibid.

beginning in the New York and New Jersey Catholic organization bankruptcy cases following enactment of claims revival legislation in those states in 2019, insurers who did not settle coverage liability on terms acceptable to the committee began to object to confirmation of the plans proposed by the debtor and supported by the committee. They argued, among other things, that the trust distribution procedures failed to winnow out fraudulent or facially invalid claims, inflated the value of claims, and deprived the insurers of defenses to coverage.[132] Insurers have managed to prevent or at least delay confirmation of plans that do not include settlement and release of their liability, increasing insurers' settlement negotiating leverage, and complicating the pathway to plan confirmation for Catholic organization debtors.

## IV. Conclusion

In the last two decades, thirty-seven Catholic organizations have sought relief in bankruptcy to resolve hundreds of claims of decades-old child sexual abuse. Retroactive repeal of statutes of limitations on sexual abuse claims will no doubt yield more claims and more bankruptcy cases. Although bankruptcy cases have become common, the bankruptcy process—and Catholic organizations' resort to it—has been unfairly maligned by advocates for sexual abuse claimants in media coverage. Catholic organizations in bankruptcy have remained silent. They are, understandably, focused on the work of reaching a settlement with sexual abuse creditors in the bankruptcy case and rehabilitating their credibility and reputation. For the Catholic faithful and other observers, the use of bankruptcy proceedings by Catholic organizations thus remains mysterious or misunderstood. The legal nuances of bankruptcy as a procedural and substantive response to mass tort liability are no match for the morally and emotionally compelling narrative of sexual perversion, child suffering, and failure of trusted religious leaders to stop it. Nonetheless, bankruptcy law and process is an essential part of the sexual abuse crisis story. Canon lawyers can serve an important role in clarifying how bankruptcy offers hope for a mutually beneficial, comprehensive, and final resolution of sexual abuse claims.

132 See James Nani and Alex Wolf, "Bankrupt Catholic Dioceses' Victim Payout Deals Spurn Insurers," *Bloomberg Law*, November 17, 2022, https://news.bloomberglaw.com/bankruptcy-law/bankrupt-catholic-dioceses-victim-payout-deals-spurn-insurers (accessed on 30 Nov. 2023, subscription required).