Child Sexual Abuse Claims,
Survivor Rights, and Bankruptcy
March 30, 2023

BANKRUPTCY BASICS FOR COUNSEL TO SURVIVORS OF SEXUAL ABUSE

CHILDUSA
THE NATIONAL THINK TANK FOR CHILD PROTECTION

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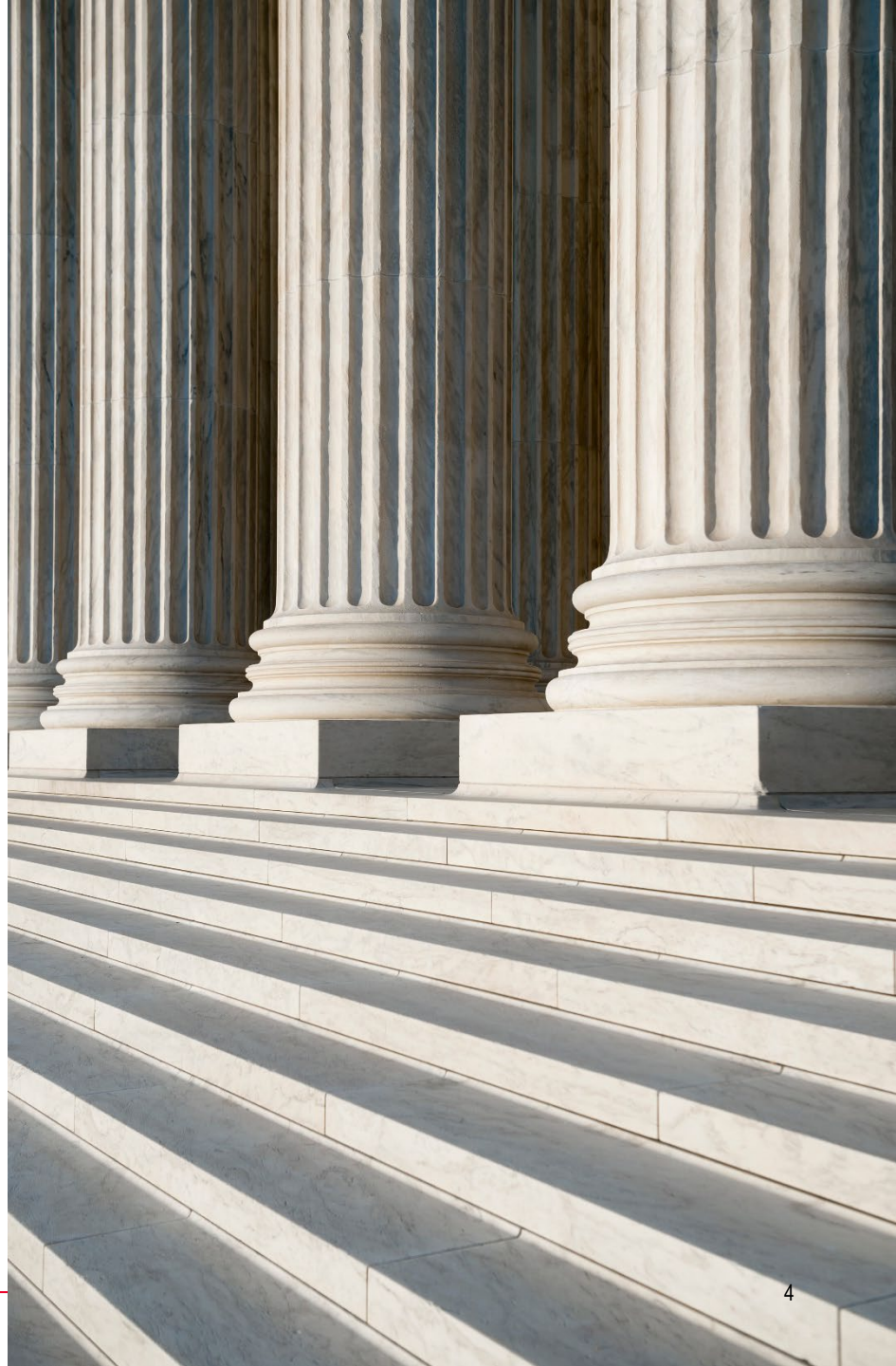
MATERIALS AND DISCUSSION DISCLAIMER

The presenters involved in this panel may be involved in ongoing cases in different roles. The topics discussed in this outline, and the issues raised in this presentation, are presented for academic purposes only and do not reflect the views of the attorneys involved, their law firms, or clients they may represent in ongoing pending matters.

DISCUSSION TOPICS

- Sexual Abuse Bankruptcy Cases
- The Chapter 11 Case Through the "Plan Stage"
- Mediation
- The Promulgation of a Plan
- Survivors' Rights to a Jury Trial
- Insurance Issues



SEXUAL ABUSE BANKRUPTCY CASES

UNIQUE ISSUES IN SEXUAL ABUSE BANKRUPTCY CASES

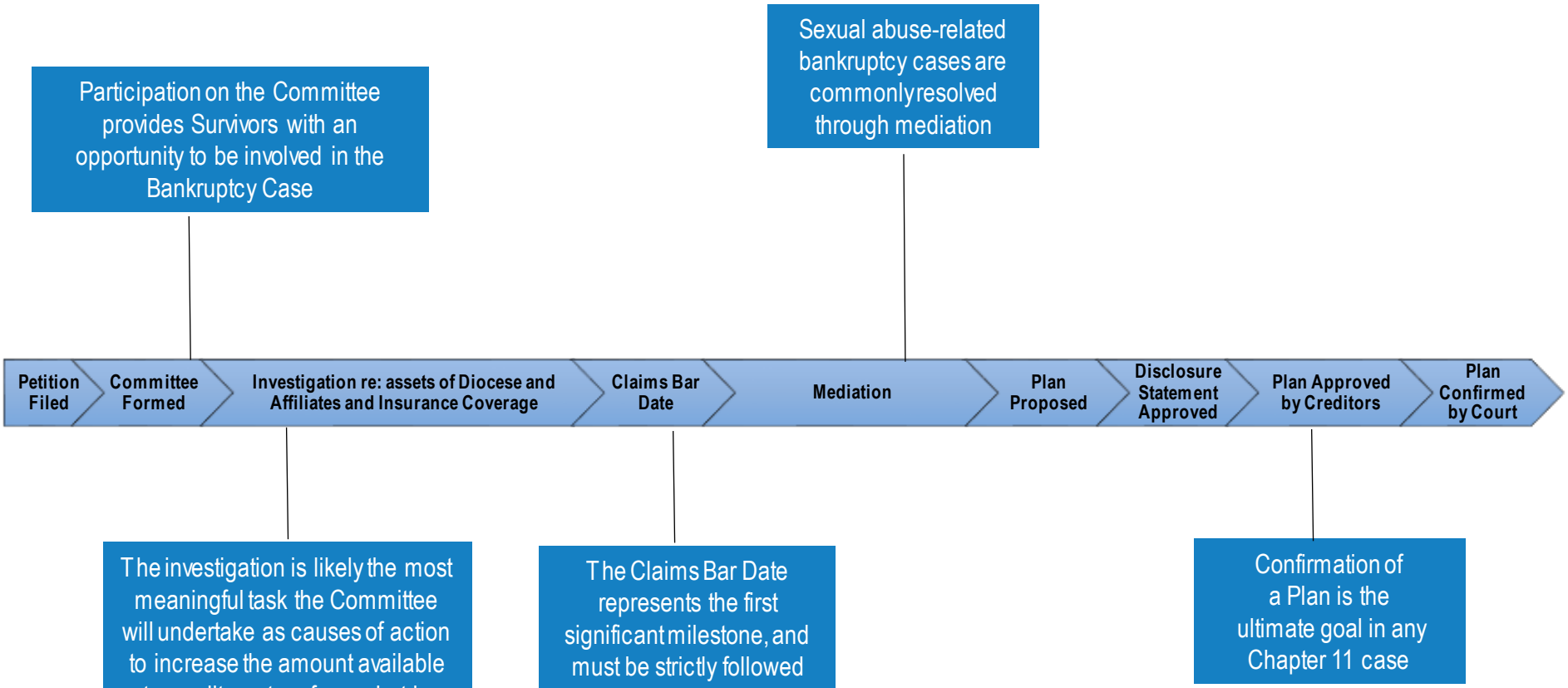
- Chapter 11 was designed as a tool to be used to reorganize financially distressed companies.
- Dioceses around the country have been using Chapter 11 as a means to address sex abuse tort claims. The debtor dioceses are usually otherwise financial healthy. See, e.g. David A. Skeel, Jr., Avoiding Moral Bankruptcy, 44 B.C. L. REV. 1181, 1181-86 (2003).
- Prior to the diocesan bankruptcy filings, the Chapter 11 process had become an increasingly popular mechanism to address mass tort liabilities, including:
  - Asbestos claims, see, e.g., *In re Johns-Manville Corporation*, Case No. 82-11656 (S.D.N.Y. August 26, 1982);
  - Dalkon shield claims, see, e.g., *In re AH Robins Co., Inc.*, Case No. 85-01307 (E.D.Va. August 21, 1985); and
  - Burn claims, see, e.g., *In re Blitz U.S.A., Inc.*, Case No. 11-13603 (De. November 9, 2011).

UNIQUE ISSUES IN SEXUAL ABUSE BANKRUPTCY CASES (CONT.)

- Diocesan bankruptcy proceedings are distinct from other mass tort bankruptcy cases, and other Chapter 11 bankruptcy cases in general, in a number of ways:
  - The majority of creditors are sexual abuse survivors, which results in highly sensitive and emotionally charged proceedings.
  - The typical Chapter 11 creditor seeks the repayment of money owed to it by the debtor, whereas sexual abuse survivors seek justice and compensation for deeply personal crimes committed against them. Bankruptcy, however, is not designed to provide justice but is instead designed to provide only a monetary recovery.
  - Due to the religious and moral issues involved in the diocesan cases, diocesan debtors face higher scrutiny from creditors and the media, who may be more likely to view the debtor as shirking its moral responsibilities through Chapter 11.

THE CHAPTER 11 CASE THROUGH THE "PLAN STAGE"

THE CHAPTER 11 TIMELINE



KEY PARTIES IN A MASS TORT BANKRUPTCY

DEBTOR

- Fiduciary obligation to maximize the value of its assets for all creditors.
- Required to publicly file certain financial information, such as Schedules of Assets and Liabilities, Statement of Financial Affairs and monthly operating reports.
- May not take certain actions outside of the ordinary course of business without court approval.

TORT CLAIMANTS' COMMITTEE

- Formed from claimants with asserted claims pending against the Debtor. State court counsel can be involved.
- Though individual claimants are seated on the committee, the Committee's fiduciary obligations run to all creditors represented by that group.
- Investigates assets of diocese and affiliates as well as insurance coverage to determine if there are claims that may increase assets for the benefit of its constituents.

FUTURE CLAIMANTS REPRESENTATIVE

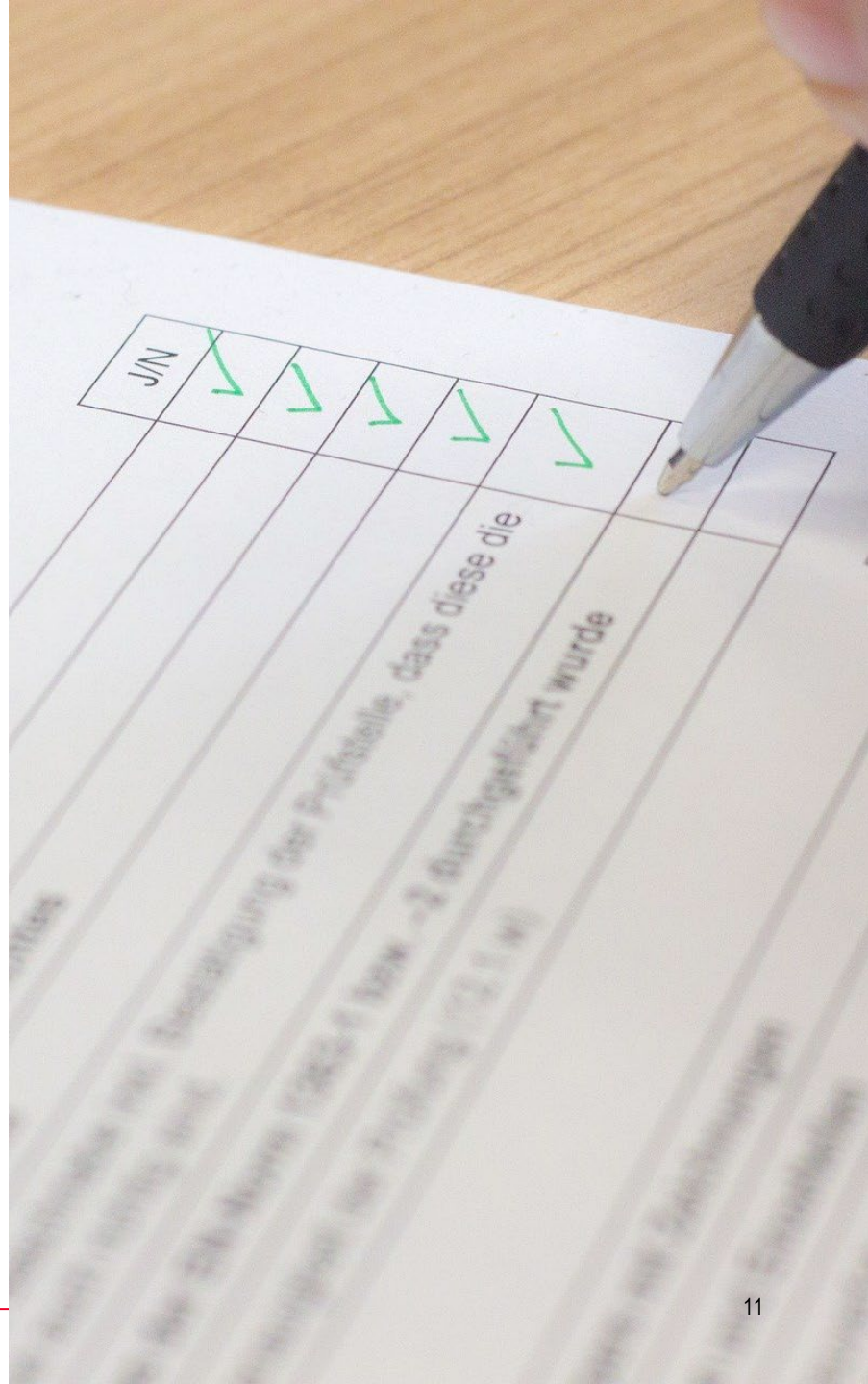
- Represents individuals who have not yet manifested an injury based on the Debtors' tortious conduct but will do so one day.
- Role patterned after section 524 of the Bankruptcy Code for asbestos-related cases.

INSURERS

- Issued liability insurance policies to the Debtor which may provide insurance coverage for sex abuse claims.
- Their coverage obligations continue to exist despite the bankruptcy filing.
- Scope of coverage will be determined by claimants' ability to prove liability and damages.

YOUR CHAPTER 11 CASE CHECKLIST

1. Consider asking your client if s/he is interested in serving on the Tort Claimants' Committee.
2. Information Gathering for Proof of Claim
   - Gather all details possible, as you would for filing a complaint, regarding details of the abuse, such as dates (or time periods), age, frequency, and the impact of the abuse on the Survivor.
3. Regularly check the Court's Docket.
   - Use PACER Electronic Case Filing (ECF) Online Service (ww.pacer.gov), for which you must register and pay (currently $.10 per page).
   - If "Claims Agent" has been appointed, Agent's website usually contains free access to Court's Docket and claims register.
   - Creditors will receive little notice of events between the commencement of a case and the Debtor's attempt to exit bankruptcy through a Chapter 11 plan or other means.
   - Any notice received during this period is likely to have a **direct effect on your rights** and should be reviewed carefully.
   - State court counsel for survivors can file notice of appearance with the court and request receipt of all notices in the case.



"FIRST DAY" MOTIONS

- Debtor will file a series of motions requesting immediate relief.
  - These motions are to obtain permission to take certain actions necessary to maintain the Debtor's business operations that cannot be taken unless the Bankruptcy Court first issues an order authorizing the Debtor to take the actions. These motions also serve the dual purpose of dealing with the urgent concerns of major players in the Debtor's operations.
  - Common examples of first day motions include: (1) motion to approve financing; (2) motion to approve the payment of employee wages; (3) motion to approve the form and manner of the Debtor's cash management and(4) motion to maintain the confidentiality of the identity of Survivors and other "Confidential Information."
  - In addition, Diocesan debtors often commence an adversary proceeding in the early days of the case requesting that the automatic stay be extended to certain non-debtors, such as its parishes and other affiliates.

NOTICE OF COMMENCEMENT OF CASE

- Upon the filing of a Chapter 11 petition, the Clerk of the Bankruptcy Court will send a notice of commencement of case to all creditors.

- The notice will generally contain the following information:
  - Proposed counsel for the debtor.
  - The deadline for filing proofs of claim, if any.
    - **In larger Chapter 11 cases, the deadline will generally be set at a later date.**
  - An explanation of the automatic stay, which prevents creditors from taking action to collect their debts.
  - Notice of the Section 341 meeting of creditors.

- Unsecured creditors and tort claimants may also receive a solicitation from the U.S. Trustee regarding their interest in serving on the creditors' committee.

THE TORT CLAIMANTS' COMMITTEE

- **Bankruptcy Code provides for appointment of creditors' committee in Chapter 11 cases**
  - Tort Claimants' Committee can select its own counsel and financial advisors to help it perform those tasks, and these professionals are paid by Debtor, not committee members themselves.

- **Appointment**
  - United States Trustee sends questionnaire and notice of committee organizational meeting to largest unsecured creditors.
  - If your client wishes to serve, important to promptly respond to the solicitation of interest sent by the United States Trustee or otherwise contact the United States Trustee to express an interest in serving on the Committee.
  - The Committee is usually selected within the first one to two weeks after the case is filed.

- **Powers**
  - Investigate Debtor's acts and financial affairs, and litigate, if necessary.
  - Investigate insurance coverage, and litigate, if necessary.
  - Consult with the Debtor concerning administration of the case.
  - Active involvement in mediation.
  - Negotiate Chapter 11 plan.

AUTOMATIC STAY

The Automatic Stay prohibits:

- Attempts to collect prepetition debts.
- Commencement or continuation of judicial or other proceedings to collect prepetition debts (e.g., foreclosure, garnishment, levy).
- Efforts to create, perfect or enforce liens on property of the estate or of the debtor, if relating to a prepetition claim.

AUTOMATIC STAY (CONT.)

- Does Not Apply to Actions Against Non-Debtors but Under Certain Circumstances it can be Extended
  - Courts in diocesan Chapter 11 cases have extended the stay as applying to any actions against parishes, missions, and schools.
    - See *In re The Diocese of Camden, New Jersey,* Adv. Pro. No. 20-01544-JNP (Bankr. D.N.J.)
  - Generally, the Court will allow a complaint to be filed against non-debtor entities to preserve claimants' rights and avoid statute of limitations issues, but the cases are then immediately stayed.

- Consequences of Stay Violation
  - Contempt of court
  - Sanctions (including legal fees)
  - Judgments obtained in violation of the stay are generally void ab initio (as if they didn't exist at all)

NOTICE OF DEADLINE TO FILE PROOFS OF CLAIM

- At a certain point during the case, the court will fix a deadline by which creditors, including survivors, must file proofs of claim.
  - In Chapter 11 cases, the debtor often requests that the court set a deadline by which to file prepetition proofs of claim by filing a motion.
  - In some cases a court may set the bar date and notify creditors of the bar date in a notice of commencement of case.

- Any claim not **actually received** by the required date will be disallowed (subject to certain extensions), regardless of whether a complaint has already been filed in state court.

- Notice must be sent to all creditors **at least 21 days** before the deadline, but oftentimes more time is given.

- **It is crucial that creditors read, understand, and follow any such notice.**

PRACTICAL TIPS FOR PROOFS OF CLAIM

- The Court will likely approve a proof of claim form specifically for survivor claims. This form **must** be used.
- Attach a narrative, complaint, or any supplemental information regarding the details of abuse to the completed proof of claim form.
- Confirm the Court has approved confidentiality procedures for survivor claims. Otherwise, claims are public, and confidential information should not be included.
- Claims must be **received** by the bar date, not postmarked by that date.
- Pay careful attention to the Court's instructions, specifically, **how** the claim must be filed (most courts permit claims by mail, including overnight mail, or electronically though the claims agent, but will not accept faxed or emailed claims), and **who must sign** (some courts permit an attorney to sign but others require the Survivor to sign).

CLAIMS BAR DATE IN SEXUAL ABUSE BANKRUPTCY CASES

- New state legislation provides "Revival Window" for child victims.
  - Ex: New York Child Victims Act, S7082/A9036; New Jersey Child Victims Act, N.J. S. 477.
- 24 states have revived previously expired statutes of limitations for a limited period.
- The Bar Date may or may not be the same as the expiration of a Revival Window.

CLAIMS BAR DATE IN SEXUAL ABUSE BANKRUPTCY CASES (CONT.)

THE ROMAN CATHOLIC DIOCESE of ROCKVILLE CENTRE	▪ General claims bar date of March 30, 2021, while the sexual abuse claimants bar date was set for August 14, 2021. ▪ Coterminous with New York's statute of limitations.
THE DIOCESE of BUFFALO	▪ Claims bar date of August 14, 2021. ▪ Coterminous with New York's statute of limitations.
DIOCESE OF CAMDEN	▪ Claims bar date of June 30, 2021. ▪ New Jersey's statute of limitations set a November 30, 2021 deadline.

LATE-FILED PROOFS OF CLAIM

- If a proof of claim is not timely filed, it may still be worthwhile to file a late proof of claim.
- If you establish that you had neither notice nor actual knowledge of the bankruptcy filing, you may be able to have your claim treated as having been timely filed if the estate's funds have not yet been distributed.
- In diocese cases, diocese seeks to bind future claims so late filed claims will likely be allowed.

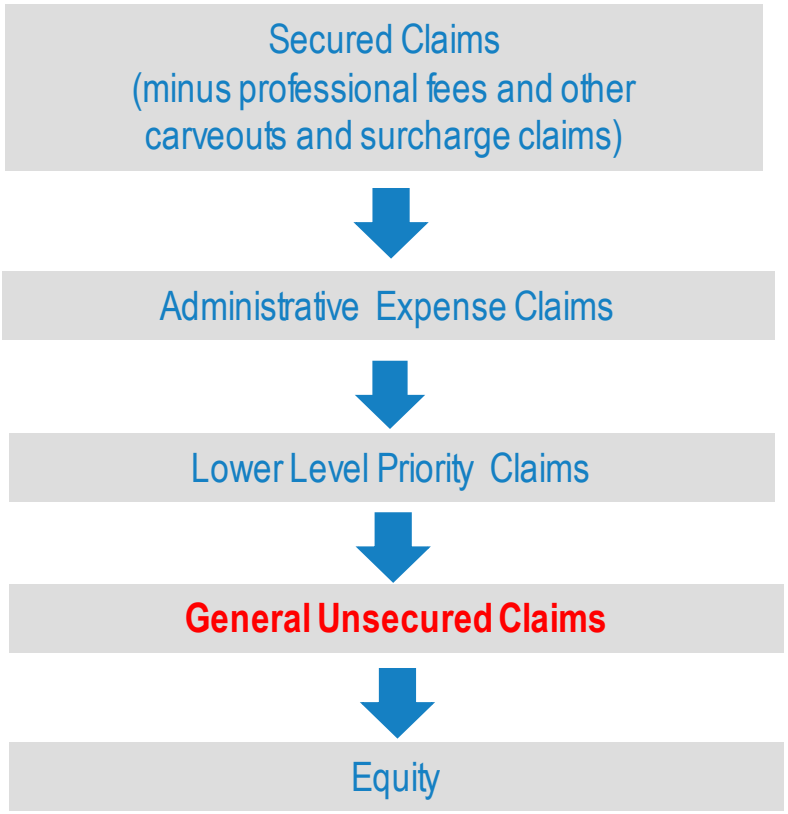
PROPERTY OF THE ESTATE

- Virtually all property debtor has interest in at time of filing goes into bankruptcy estate.
- Examples include potential causes of action.
- Due to the intersection between canon law (which typically views diocesan assets separately from parish assets) and secular law (which does not necessarily view such assets separately, depending upon organizational structures), there have been significant battles over what constitutes property of the estate, along with a number of fraudulent transfer actions involving non-debtor parishes and other charitable trusts, wherein diocesan debtors have been alleged to have transferred millions of dollars' worth of assets in order to shield themselves from liability.
  - See, e.g., *Comm. of Tort Litigants v. Cath. Diocese of Spokane*, No. CV-05-0274-JLQ, 2006 WL 211792 (E.D. Wash. Jan. 24, 2006) (finding that tort claimants' committee had standing to challenge the debtor's characterization of parish churches, schools, and cemeteries property).
  - See also *In re Roman Cath. Bishop of Great Falls, Montana*, 584 B.R. 335 (Bankr. D. Mont. 2018) (same).
  - But see, *In re The Diocese of Camden, New Jersey*, Case No. 20-21257-JNP, Dkt. 1365 (Bankr. D.N.J. Mar. 24, 2022) (finding the tort claimants' committee did not have standing to challenge certain alleged fraudulent transfers of the Diocese).

RELIGIOUS FREEDOM ISSUES

- Scholars have noted that there are a number of issues involving religious freedom and the Free Exercise Clause of the First Amendment that put Diocesan cases at odds with some aspects of the Chapter 11 process, including, among other things, the appointment of a Chapter 11 trustee.
  - See, Jonathan C. Lipson, When Churches Fail: The Diocesan Debtor Dilemmas. 79 S. Cal. L. Rev. 363, 365-366 (2006).

CLAIMS PRIORITY



MEDIATION

BANKRUPTCY MEDIATION, GENERALLY

- Mediation allows parties to avoid the unpredictability and expense of litigation, especially where litigation would be drawn-out, expensive and highly fact-driven.
- Mediation is not specifically addressed in the Bankruptcy Code or Bankruptcy Rules, but courts often rely on local rules providing for mediation.
- Bankruptcy Courts for the Northern, Southern and Eastern Districts of New York have included a provision authorizing mediation as part of their Local Rules.
- Local Bankruptcy Rule 9019-2(a) for the District of New Jersey provides: "Every adversary proceeding will be referred to mediation after the filing of the initial answer to the adversary complaint, except [when a specified exception applies]"; and "A contested matter . . . may also be referred to mediation . . . by the court at a status conference or hearing."
- Local Bankruptcy Rule 9019-5(a) for the District of Delaware provides: "Except as may be otherwise ordered by the Court, all adversary proceedings filed in a Chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) shall be referred to mandatory mediation."

HISTORICAL RESOLUTION OF CLAIMS IN MASS TORT CASES

- Resolution of far-ranging, numerous tort claims through the bankruptcy process began with asbestos litigation. Over 700,000 asbestos personal injury and wrongful death claims were filed against over 80 asbestos firms from the mid-1980s through the early 2000s (See RAND INSTITUTE, ASBESTOS LITIGATION, at xxiv (2005)).
- Since that time, non-asbestos mass tort cases have charted similar paths toward a global resolution for claim resolution.
- Some form of mediation or active judicial participation in the settlement of issues between the various constituents has been used to resolve a diverse collection of mass tort issues:
  - Pharmaceuticals (*Mallinckrodt PLC*, *Purdue Pharma*)
  - Silicon implant cases (*Dow Corning*)
  - Dalkon Shield (*A.H. Robins, Inc.*)

PARTIES TO MEDIATION

WHO SHOULD BE AT THE NEGOTIATING TABLE?

- The concept of mediation between all of the parties at the same time, or several subsets of the groups below (sometimes referred to as "co-mediation") should be carefully considered.

- Mediation should include:
  - Debtor/Diocese
  - The Tort Claimants' Committee
  - Official Committee of Unsecured Creditors
  - Insurers
  - Parishes or other non-debtor entities named in abuse claims

TIMING OF MEDIATION

- Prior to bankruptcy – as part of a pre-arranged or prepack plan.
- During the initial stages of the case, to facilitate a stay of actions against related parties and additional insureds.
- After the claims bar date when the universe of claims is known.
- At the plan stage, to address releases, the treatment of non-debtor entities and to determine procedures for claims administration.

ISSUES TO BE ADDRESSED THROUGH MEDIATION

- What property constitutes property of the estate
- Value of Survivor claims
- Availability of insurance proceeds
- Amount to be paid by diocese, its affiliates, and insurance carriers to obtain releases
- Abuse claim administration procedure

OPTIONS WHEN MEDIATION STALLS

- Parties may seek to have the Court estimate claims for voting purposes and confirmation.

- Some claimants may seek relief to allow them to litigate individual claims (most recently, in the Chapter 11 case *In re The Diocese of Rochester*, Bankr. W.D.N.Y. 19-20905).

- Tort Committee may seek standing to assert causes of action which belong to the Debtor's estate which it has refused to pursue. For example, fraudulent transfers, alter ego and breach of fiduciary duty claims.

THE PROMULGATION OF A PLAN OF REORGANIZATION

A PLAN OF REORGANIZATION

- **What is a Plan of Reorganization?**
  - A Chapter 11 plan of reorganization lays out how the debtor will pay its debt obligations moving forward. It gives the debtor the chance to restructure and renegotiate the terms of paying back creditors.
  - In Chapter 11, the debtor has the initial right to propose a plan for dealing with its debts for consideration by the creditors and bankruptcy court.
  - Chapter 11 plans divide creditors into groups known as classes of creditors. Classes of creditors whose rights are affected may vote on the plan. Creditors whose rights are unaffected are presumed to have accepted the plan. A plan may be confirmed by the Bankruptcy Court if it gets the required votes and satisfies certain legal requirements.
- **How many creditors in a class need to accept a plan for it to be confirmed by the court?**
  - Plan acceptance is determined by the voting of creditors with allowed claims and shareholders with allowed interests.
  - The votes are counted both by the number of creditors casting votes and the amount of dollars represented by creditors casting ballots.
  - A plan is accepted by a class if it is approved by more than 1/2 of the total claims, and at least 2/3 of the dollar value of the claims, based on the creditors actually voting, in that class.

A PLAN OF REORGANIZATION (CONT.)

- **Can a plan of reorganization be approved even if a class of creditors votes to reject the plan?**
  - In general, a court may "cram down" a class and order confirmation even if a class votes to reject the plan, as long as at least one class has accepted the plan, the plan does not discriminate unfairly and the plan is "fair and equitable."
  - The phrase "cramdown" is the process by which the Bankruptcy Court may confirm a plan that has not been accepted by every class of claims and interests.
  - The questions of unfair discrimination and whether the Plan is fair and equitable are legal terms, and do not take on their regular dictionary meaning.

ABSOLUTE PRIORITY RULE

- Generally, as part of the test for cramdown, the court will apply the "Absolute Priority Rule".
- The Absolute Priority Rule provides that equity owners cannot retain any property unless the plan provides for payment in full to any class of unsecured creditors that does not accept the plan.
- Courts are inconsistent in the application of the absolute priority rule to nonprofit debtors, where there are no equity interests.
- Many of the cases lack any analysis of the retention of going-concern value by directors, managers, members, or the nonprofit debtor.

THIRD-PARTY RELEASES

- Under the Bankruptcy Code, only the debtor receives a discharge.

- Courts have not adopted a single standard to approve releases for non-debtor third parties.

- The single point of agreement is that third-party releases are approved only in "extraordinary cases." *In re Continental Airlines*, 203 F.3d 203, 212 (3d Cir. 2000); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (Such injunctions are a dramatic measure to be used cautiously*); In re Metromedia Fiber Network, Inc.,* 416 F.3d 136 (2d Cir. 2005) ("a release is proper only in rare cases").

TREATMENT OF SURVIVORS

- In mass tort cases, Plan generally creates a trust which is funded by the debtor, and potentially other parties such as non-debtor affiliates and insurers.

- All Survivor claims will be channeled to the trust. Those claims will then be analyzed and ascribed a value pursuant to the trust distribution procedures.
  - The Bankruptcy Code only specifically permits channeling injunctions in connection with asbestos claims, however many courts have permitted channeling injunctions in other mass tort cases, such as sexual abuse cases.

- The Claimant will receive his/her allocated distribution based on the trust distribution procedures, ascribed value of the claim, and funding available.

THIRD-PARTY RELEASE STANDARD SAMPLES

Third Circuit

- Has not created a final standard, but *Continental* established a baseline standard that specific factual findings must be made that the releases are both fair and necessary to the proposed plan. 203 F.3d at 214. Most courts adhere to this minimum guiding principle.

Other Circuits

- Releases must be "essential to the reorganization. *In re Metromedia Fiber Network*, Inc., 416 F.3d 136, 141 (2d. Cir. 2005) (citing (*In re Drexel Burnham Lambert Group, Inc.),* 960.F.2d 285, 293 (2d Cir. 1992).
- *In re Dow Corning Corp*., 280 F. 3d 648, 658 (6th Cir. 2002) developed a 7-factor test, most of which are covered here.

Most Prevalent Standard

1) The identity of interest between the debtor and nondebtor such that a suit against the nondebtor will deplete the estate's resources.
2) A substantial contribution to the plan by the nondebtor.
3) The necessity of the release to the reorganization.
4) The overwhelming acceptance of the plan and release by creditors and interest holders.
5) The payment of all or substantially all of the claims of the creditors and interest holders under the plan.
    - See *In re: One2One Commc'ns, LLC*, 2016 WL 3398580, at *6 (D.N.J. June 14, 2016) (citing *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930,937 (Bankr. W.D. Mo. 1994))

PROPRIETY OF THIRD-PARTY RELEASES

- "Substantial contribution" is fact-specific.
- Two factors help determine the fairness of the consideration paid by the recipient of a third-party release.
  - An analysis of the reasonableness of the released parties' contribution considers their ability to pay.
    - See *In re HWA Props.*, 544 B.R. 231, 241 (Bankr. M.D. Fla. 2016); *In re Mahoney Hawkes,* LLP, 289 B.R. 285, 302 (Bankr. D. Mass. 2002).
  - The released parties' contributions must bear some relationship to the value of the potential claims against them.
    - *In re W.R. Grace & Co.*, 475 B.R. 34, 106 (D. Del. 2012), aff'd sub nom. *In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013).
- Due process requires that claimants receive compensation that stems from the actual value of the property being taken from them.
  - See *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019).

SURVIVORS' RIGHTS TO A JURY TRIAL

CONUNDRUM: FILING A PROOF OF CLAIM RESULTS IN WAIVER OF RIGHT TO JURY TRIAL

- The Seventh Amendment to the United States Constitution provides that parties litigating in federal court have the right to a trial by jury in civil cases. However, this right to a jury trial is subject to being waived and, in the context of a bankruptcy case, may be waived unintentionally as a result of filing a proof of claim.

- The Supreme Court has held, by filing a proof of claim, a creditor triggers the process of "allowance and disallowance of claims" and therefore submits itself to the equitable jurisdiction of the bankruptcy court and waives its right to a jury trial. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, (1989); *Langenkamp v. Culp,* 498 U.S. 42 (1990); see also *Travellers Int'l AG v. Robinson*, 982 F.2d 96, 100 (3d Cir. 1992).

WAIVER OF RIGHT TO JURY TRIAL (CONT.)

- "The creditor cannot preserve its right to jury trial through the inclusion of protective language in a proof of claim. See, e.g., *Schmidt v. AAF Players LLC (In re Legendary Field Exhibitions LLC)*, 19-05053 (Bankr. W.D. Tex. Jan. 10, 2020).

  - *The creditor's proof of claim included a reservation of rights, which stated that "filing of this proof of claim is not and shall not be deemed or construed as … a waiver or release of the Plaintiffs' rights to a trial by jury."*

  - Bankruptcy Court found it irrelevant that the claimants had purported, through inclusion of protective language in their proof of claim, to reserve their right to a jury trial, concluding: "Even if a creditor attempts to couch its claim in protective language reserving the right to a jury trial, such protective language is not binding on the Court; rather, the Court is bound by *Langenkamp* and *Granfinanciera*, which found that filing a proof of claim results in waiver of the right to jury trial."

28 U.S.C. § 1411(A)

- The Code "**do[es] not affect any right to trial** by jury that an individual has under applicable nonbankruptcy law with regard to a **personal injury** or wrongful death tort claim" (emphasis added).
- § 1141(a) was intended to afford tort victims the ability to sue debtors and other third parties after the bankruptcy proceedings are concluded.
  - *In re: G-I Holdings, Inc.* – "§ 1141(a) makes clear that nothing in title 11, such as filing a claim against the estate pursuant to § 501 of the Code, does not affect any right to trial by jury that an individual has under applicable nonbankruptcy law, such as the Seventh Amendment to the United States Constitution."
- Question whether § 1141(a) is rendered meaningless when the bankruptcy court confirms a plan or reorganization/liquidation that approves non-consensual third party releases without the ability to opt out such release provisions.
- Example: *The Weinstein Company Holdings, LLC, et al.,* Case No. 18-10601 (MFW), (Bankr. D. Del.) – over the objection of certain sexual misconduct claimants, the bankruptcy court approved a plan or liquidation containing certain non-consensual third party releases. The plan does not allow holders of sexual misconduct claims to opt-out of the releases against third parties (except for Harvey Weinstein).
- Personal injury claimants do reserve their rights to liquidate their claims against the personal injury trust through a jury trial.

INSURANCE ISSUES IN DIOCESAN BANKRUPTCY CASES

INSURANCE ISSUES IN DIOCESAN BANKRUPTCY CASES

- Often find tensions when liabilities transition from state/federal court system into bankruptcy system.
  - Plaintiffs tend to emphasize many bad acts and wrongful conduct by defendants to create maximum value in the traditional tort system.
  - That can backfire in bankruptcy system where insurance may be the most significant (or only) asset to satisfy claims.
- Unlocking coverage may be harder than solving Rubik's Cube.
  - Debtor may be interested in using insurance coverage to tie off liability.
  - Insurers may be willing to pay but only after coverage defenses are factored into valuation.
  - Competing creditors may be vying for the same pool of limited insurance assets.
- Creative solutions may exist, e.g., assignment of insurance claim or creation of trust but devil is in the details (and sometimes differences in state law).

INSURANCE COVERAGE: THE WORDS ALWAYS MATTER

- **Key Foundational Exclusions Found in Most Policies**
  - Intentional Acts/Fraud/Criminal Conduct
  - Expected/Intended Injury (and second cousin "no occurrence")
  - Punitive Damages
  - Fines/Penalties
  - Disgorgement/Unjust Enrichment/Matters uninsurable as a matter of law
- **Key Mass Tort Exclusions**
  - Absolute Asbestos Exclusion
  - Absolute Pollution Exclusion
  - Sexual Abuse/Molestation Exclusion
  - Opioid Exclusion
  - [Insert name of any other product where more than 10 claimants have filed] Exclusion
  - Deceptive Trade Practices/Unfair Competition

INSURANCE COVERAGE: WHAT POLICIES IN PLAY?

- **Types of Policies**
  - Commercial General Liability (CGL)
  - Directors & Officers
  - Professional Liability
- **Challenges Accessing Policies**
  - Trigger
  - Missing policies
  - Allocation
  - Failure to/Late Notice
  - Prior limit erosion/releases/policy buybacks
  - Insolvent insurers – ***emerging issue to watch***
- **Trust Challenges**
  - When insurers are not "on board" with trust creation, a new front of coverage litigation may follow
    - Reasonableness of settlement
    - Proof of claims/damages notwithstanding TDPs

THANK YOU

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