

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



THE CATHOLIC DIOCESE, SEXUAL ABUSE CLAIMS AND BANKRUPTCY | SESSION II

I PRESENTERS



Brent Weisenberg, Esq.
Lowenstein Sandler
(Moderator)



John W. Baldante, Esq.
Levy, Baldante, Finney &
Rubenstein, P.C.



Jason P. Amala, Esq.
Pfau Cochran Vertetis Amala



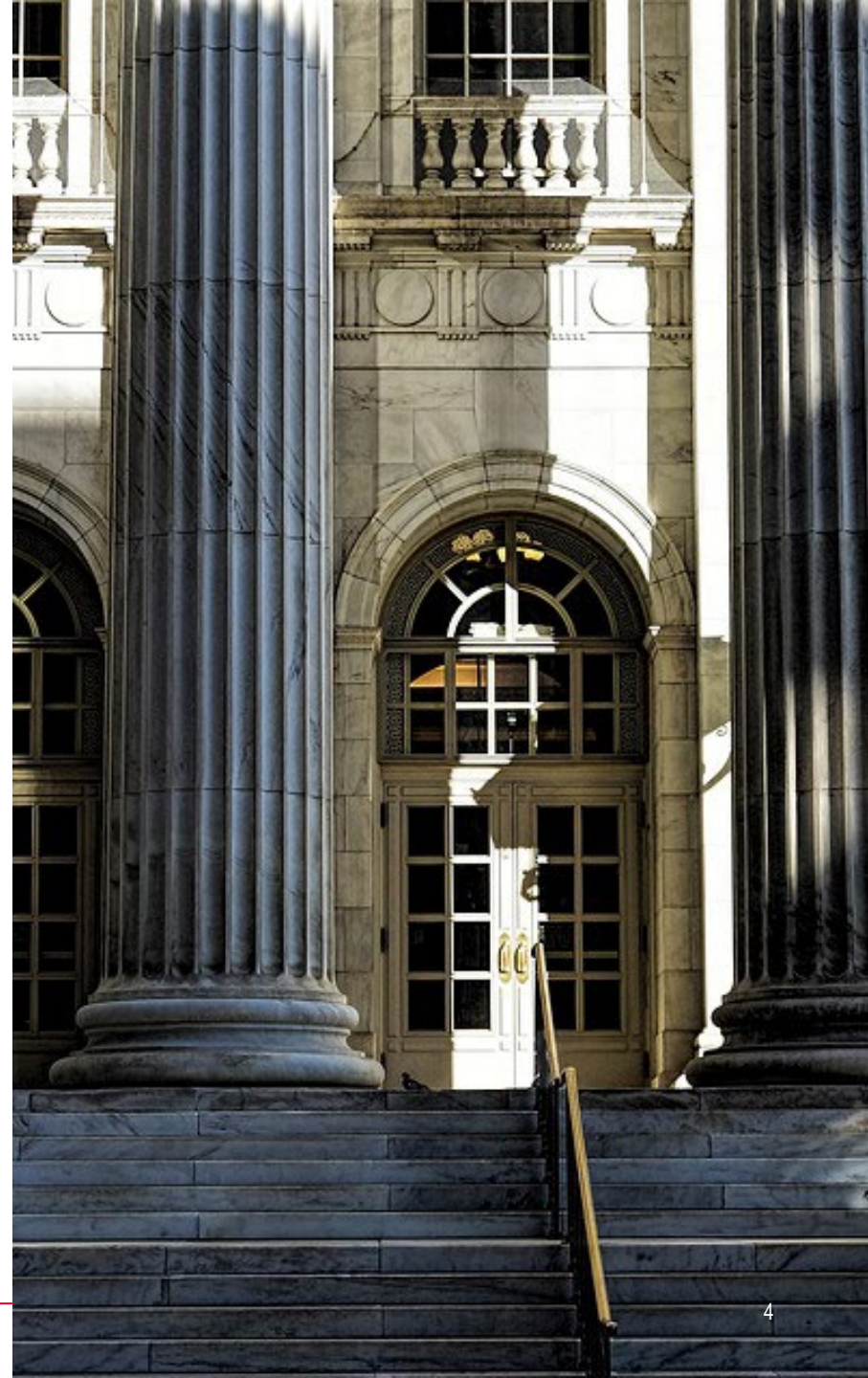
Gregory Gianforcaro, Esq.
Gianforcaro Law

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

- Structuring trust distribution protocols.
- The ability of a bankruptcy court to substantively consolidate a diocese debtor with its non-debtor affiliates.
- The child protection procedures accompanying a plan of reorganization typically negotiated by a diocese and a survivors' committee.



STRUCTURING TRUST DISTRIBUTION PROCEDURES

- In consensual Chapter 11 plans, where a debtor has agreed to fund a trust established for the benefit of survivors, the debtor and the Committee will negotiate certain Trust Distribution Procedures (“TDP”).
- The TDPs provide a matrix and other procedures to be utilized by a post-confirmation “Trustee” to expediate the valuation of claims and distributions from the Trust.
- TDPs typically set forth procedures for:
 - Processing and payment of expedited distributions;
 - Allowance for survivor claims;
 - Determining claim amounts;
 - Distributions to current and future claimants; and
 - Allowing Insurers to participate in the claims reconciliation process.
- Insurers also often attack the Trust’s claims resolution procedures (which form part of the plan) as being “too loose” and creating the possibility that fraudulent or unmerited claims will be paid – thereby increasing the insurers’ risk exposure when the trust pursues assigned coverage rights.

STRUCTURING TRUST DISTRIBUTION PROCEDURES (CONT.)

Guidelines for Allocation for Survivor Claims consist of evaluation factors like:

- Nature of abuse and circumstances
 - Duration/frequency
 - Type of abuse
 - Circumstances of abuse (grooming, relationship, location)

- Impact of abuse
 - Mental health issues
 - Physical health issues
 - Spiritual wellbeing
 - Interpersonal relationships
 - Vocational capacity
 - Academic capacity
 - Legal difficulties

ISSUES WITH TRUST DISTRIBUTION PROCEDURES

Insurers whose policies are subject to an assignment to the Trust typically raise the following issues with the TDP:

- Because the decision-maker appointed to the trust is selected by the Committee, he/she has an incentive to inflate claim values to obtain “exorbitant” payments from the insurers.
- The assured’s duty to defend abuse claims is illusory.
- Fiduciaries of the trust are bound to breach their fiduciary obligations to defend against the abuse claims.
- The TDP rewrite the obligations of the assureds under the insurance policies and therefore violate the underlying contracts.
- TDP cannot recreate the tort system—therefore violating the insurers’ rights and depriving them due process and right to a jury trial available to them outside of bankruptcy.
- TDP force the insurers to defend coverage actions for abuse claims they would not have otherwise needed to defend in the tort system.

SUBSTANTIVE CONSOLIDATION

Legal Elements to Satisfy

- The party requesting substantive consolidation must show:
 - A substantial identity between the entities to be consolidated.
 - That consolidation is necessary to avoid harm or to achieve some benefit.
 - In the event that the creditor shows harm, that the benefits of consolidation “heavily” outweigh the harm.
- However, some jurisdictions, including the Eighth Circuit, hold that Section 303(a) of the Bankruptcy Code prohibits involuntary bankruptcy proceedings against religious and charitable organizations.
 - This issue has not been decided in the Third Circuit, but case law from another circuit may be persuasive.



SUBSTANTIVE CONSOLIDATION (CONT.)

Strengths of Argument

- Substantial identity:
 - Similarity of the business names between the diocese debtor and its non-debtor affiliate.
 - Sufficient information to show that neither entity charged the other for services rendered to another entity.
 - A determination of whether creditors relied on the interrelatedness (and/or separateness) of the entities when deciding to do business with the debtor could be a persuasive point in favor of substantively consolidating.

- The harm would be a windfall to the debtor at creditors' expense. The debtor would indirectly hold onto tens of millions of dollars while paying survivors pennies for the sexual abuse they suffered.

Weaknesses of Argument

- The court may follow other jurisdictions and find that substantive consolidation of religious organizations is not permissible.

CHILD PROTECTION PROTOCOLS

The Dallas Charter

- The Dallas Charter requires all U.S. dioceses to put into place certain practices to guarantee that all parishes and Catholic schools are among the safest places possible for a minor.
- The Dallas Charter is reviewed every seven years to ensure its practices are of the highest standards.
- Specifically, the Dallas Charter requires, among other things:
 - Contact survivors and their families to demonstrate a sincere commitment to their spiritual and emotional well-being.
 - A competent assistance coordinator to aid in the immediate pastoral care of persons who claim to have been sexually abused as minors by clergy or other church personnel. Dioceses/eparchies will also have a review board, the majority of whose members will be lay persons not in the employ of the diocese/eparchy.
 - Dioceses/eparchies will not enter into confidentiality agreements except for grave and substantial reasons brought forward by the survivor.
 - Dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities. They will cooperate in their investigation in accord with the law of the jurisdiction in question.

CHILD PROTECTION PROTOCOLS (CONT.)

The Dallas Charter (cont.)

- Upon the preliminary investigation of a complaint against a priest or deacon, the diocesan/eparchial bishop will relieve the alleged offender promptly of his ministerial duties and will be referred to medical and psychological evaluation. If the investigation results in admitted or established abuse, the priest or deacon will be permanently removed from ministry.
- Well-publicized diocesan/eparchial standards for ministerial behavior and appropriate boundaries for clergy and for any other church personnel in positions of trust who have regular contact with children and young people.
- Development of a communications policy that reflects a commitment to transparency and openness.
- Establishment of an Office for Child and Youth Protection to implement “safe environment” programs, develop appropriate mechanisms to audit adherence to policies, and produce an annual public report on the progress of implementing the standards in the Charter.
- A Review Board will be appointed by the Conference President and will report directly to him. The Review Board will assist and monitor the Office for Child and Youth protection and will include parents.

CHILD PROTECTION PROTOCOLS (CONT.)

- When the diocese files a plan of reorganization, committees routinely propose Child Protection Protocols, which include forms of non-monetary relief the diocese must comply with post-confirmation.
- Examples of common non-monetary relief demanded by committees and approved by bankruptcy courts upon confirmation of plans include:
 - Posting the names of all known diocesan clergy or lay employees for whom sexual abuse allegations were substantiated or admitted on the Diocese website for not less than 10 years after the effective date of a plan of reorganization.
 - Allowing abuse claimants to publish their stories of abuse in the diocesan newspaper.
 - Issuance of letters of apology.
 - Providing annual certification and affirmation in writing that the Bishop and others have no undisclosed knowledge of admitted, corroborated, or otherwise substantiated allegations of sexual abuse after the effectiveness of a plan of reorganization or that any such knowledge has been reported to law enforcement.

CHILD PROTECTION PROTOCOLS (CONT.)

- Displaying in each diocesan or parish school of a plaque stating that abuse of children and young people in that school shall not be tolerated.
- Mandatory attendance of diocesan seminarians at annual presentations from survivor advocates and third-party child protection professionals.
- Diocese retention of a third-party child protection expert for certain specified purposes.
- Posting statements of gratitude for survivors who have spoken out.
- Continued funding of annual mandatory reporting training.
- Continued development, publication, and implementation of child abuse prevention curriculum, certain evaluation, recommendations and reporting by and to a retained third-party expert in the field of child protection that is agreed upon by the Diocese and Committee for the purpose of reviewing and making recommendations re: training and current and future child protection programs.
- Continued voluntary participation in annual audits of its compliance with the Charter.



**THANK
YOU**

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