

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



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

I PRESENTERS



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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

- The State Court discovery process typically coordinated among all plaintiffs.
- The ability of plaintiffs to take coordinated action to protect survivor rights when a diocese threatens bankruptcy.
- The state of the law on third-party releases and whether releases are a valuable tool for the benefit of survivors.
- The intricacies of insurance assignments for the benefit of survivors.
- The state of the law on injunctions in favor of non-debtor parties.
- The valuation of sexual abuse claims.



PLAINTIFF GOALS FROM THE STATE COURT DISCOVERY PROCESS

- Release of chronicle the history and pattern of abuse.
- Financials that could reveal any deliberate concealment of assets.
- Insurance archeologist can assist in obtaining records of insurance policies that cover earlier periods of child sexual abuse.



NON-DEBTOR THIRD PARTIES RELEASES FROM LIABILITY IN SEXUAL ABUSE CLAIMS

- Chapter 11 plans often include non-debtor release provisions, both consensual and non-consensual, though no section of the Bankruptcy Code specifically allows for them.
- Consensual releases require the consent of the claimants, while non-consensual releases can be approved by the court regardless of whether the claimants consent.
- Circuit courts are split regarding whether non-consensual third-party releases are permissible in a Chapter 11 bankruptcy proceeding.
- 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”).
- These third-party releases provide an incentive for dioceses to file for bankruptcy when faced with child sexual abuse claims against both itself, its parishes, and other non-debtor affiliates.

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. 20 J. Bankr. L. 7 Prac. 4 Art. 7

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)).

BENEFITS TO CREDITORS OF NON-DEBTOR THIRD-PARTIES RELEASES

- In order to obtain third-party releases, the diocese (debtor) must, among other things, establish that the non-debtor third parties have made a substantial contribution.
- Substantial contributions can be significant—providing additional funds to the trust that is established for the benefit of survivors.
- Substantial contributions enable survivors to receive distributions sooner than they would otherwise recover in most circumstances.

DETRIMENT TO CREDITORS OF NON-DEBTOR THIRD-PARTIES RELEASES

- Third-party releases have been misused, however, when:
 - Third-parties are allowed to make contributions that are not substantial.
 - Third-parties seek blanket releases from liability that does not relate to the debtor entity.
- Creditors who do not affirmatively consent to third-party releases can still be forced to release their claims against third-parties.
- Third-parties reap one of the key benefits that debtors receive in bankruptcy without having to file for bankruptcy relief or bear the burdens thereof, including:
 - Extensive financial disclosures.
 - Compliance with regular operational reporting.
 - Notice to all creditors that bankruptcy relief is sought.
 - Court scrutiny over, among other things, retentions of professionals and transactions.

INSURANCE ASSIGNMENTS FOR THE BENEFIT OF SURVIVORS

Assignability

- Insurance policies are contracts and general principles of contract law apply unless there are statutory laws to the contrary.
- Anti-assignment provisions in an insurance policy provide that a party to a contract may not assign all beneficial rights to another without the consent of the other party to the contract.
- Bankruptcy Courts look to state law as to whether anti-assignment provisions in a contract are valid and enforceable.
- There is a distinct difference between assignment of insurance policies after or before a loss has occurred.

INSURANCE ASSIGNMENTS FOR THE BENEFIT OF SURVIVORS (CONT.)

Insurers' Position on Assignment

- Debtors are often left to either litigate with insurers over their coverage obligations for the claims at issue, or assign their rights to coverage from the insurers to the settlement trust.
- Insurance assignments have drawn significant opposition from insurers in plan confirmation proceedings.
- Although many diocese plans include “insurance neutrality language” that preserves insurers’ coverage defenses in coverage litigation, insurers have objected to plan confirmation on the basis that:
 - The settlement trust construct itself violates the economic relationship that is embodied in the insurance policies; and
 - The plan “rewrites” those policies’ provisions regarding insurers’ right to control or associate in the defense of claims.

INSURANCE ASSIGNMENTS FOR THE BENEFIT OF SURVIVORS (CONT.)

Committee's Position on Assignment

- Diocese plans of reorganization are more frequently proposing an assignment of their insurance policy proceeds to a survivor trust.
- Insurance assignments provide an opportunity for the trust to maximize the insurance policy proceeds because survivors are the party with the “real” interest in those policies.
- Arguably, a diocese is not properly incentivized to maximize the amounts being paid by insurers.

INJUNCTIONS IN FAVOR OF NON-DEBTOR PARTIES

- Dioceses have been attempting to use injunctions in bankruptcy to provide absolute releases to non-debtor third-parties, and many times, these third-parties are making zero contribution towards the plan and trust.
- By its terms, section 524(g) applies only to asbestos-related claims and cannot be used to resolve any other type of liability.
- Some debtors have had success relying on other provisions of the Bankruptcy Code, most notably section 105, which grants bankruptcy courts with broad equitable authority to enter orders “necessary or appropriate to carry out the provisions.”
- Channeling injunctions may extinguish survivor claimants’ litigation against a diocese, force them to recover from a limited pot of money, and be approved on a timeline that does not allow the survivors to conduct sufficient discovery or receive a voice in the process.
- The channeling injunction usually funnels claimants into a dispute-resolution trust system created by the debtor, complete with debtor-created evidentiary standards, appeals processes, claims-payment regimes, and arbiter selections.

INJUNCTIONS IN FAVOR OF NON-DEBTOR PARTIES (CONT.)

- Non-debtors receive the benefits of a Chapter 11 debtor without having to file for bankruptcy themselves.
- Non-debtors receiving the injunctions are therefore not subject to the rigorous disclosures and reporting required by the Bankruptcy Code for Chapter 11 debtors.
- Parties bound by the injunction are barred from continued prosecution, and initiating lawsuits, against the non-debtors in exchange for some form of substantial contribution to the plan.
- Bankruptcy courts have viewed the contributions of diocese affiliates as a whole, allowing some diocese affiliates to propose de minimis contributions.

VARYING VALUATION METHODOLOGIES

- Review of proofs of claim filed in the bankruptcy case, either by sampling or the entirety of the survivor claims pool.
- Consideration of applicable statute of limitations and whether diocese would have a defense to the claim.
- Consideration of a revival window extending the statute of limitations for the applicable jurisdiction.
- Inclusion of prepetition settlements reached between survivors and the diocese, either on a one-off basis through the tort system or through survivor compensation programs (if one was established to adjudicate survivor claims prepetition).
 - Consideration of whether settlements referenced above took place before or after any applicable statute of limitations revival window.
- Inclusion of verdicts as opposed to settlements.
- Consideration of geographic area where abuse occurred.

DIOCESSES IN BANKRUPTCY – PENN STATE LAW (2022)

APPENDIX B: OUTCOME OF CASES									
Name of Case	Type	Date Filed	Date Confirmed	Time Filing to Confirmation	Amount in Millions			Number of Survivors	Settlement Per Victim
					Settlement Total	Insurance Portion	Total Prof Fees		
Portland	Archdiocese	7/6/2004	4/17/2007	2.78 Years	\$74.40	\$52.00	\$19.10	173	\$430,000
Tucson	Diocese	9/20/2004	8/1/2005	0.86 Years	\$22.20	\$14.80	\$5.00	45	\$493,300
Spokane	Diocese	12/6/2004	4/24/2007	2.38 Years	\$48.00	\$20.00	\$10.90	150	\$320,000
Davenport	Diocese	10/10/2006	5/1/2008	1.56 Years	\$37.00	\$19.50	\$2.60	162	\$228,390
San Diego**	Diocese	2/27/2007	11/16/2007	0.72 Years	\$198.10	\$75.65	\$5.00	144	\$1,375,690
Fairbanks***	Diocese	3/1/2008	2/17/2010	1.97 Years	\$9.80	\$1.40	\$4.80	290	\$33,790
Oregon Province Society of Jesus	Religious Order	2/17/2009	7/29/2011	2.44 Years	\$166.10	\$118.00	\$8.60	535	\$310,460
Wilmington	Diocese	10/18/2009	7/28/2011	1.78 Years	\$77.40	\$15.60	\$15.80	148	\$522,970
Milwaukee	Archdiocese	1/4/2011	11/13/2015	4.86 Years	\$21.00	\$10.70	\$23.00	350	\$60,000
Christian Bros. of Ireland	Religious Order	4/28/2011	1/13/2014	2.72 Years	\$16.50	\$3.50	\$8.10	400	\$41,000
Gallup, NM	Diocese	11/12/2013	6/23/2016	2.62 Years	\$22.00	\$18.90	\$3.50	57	\$385,960
Stockton	Diocese	1/15/2014	1/13/2017	3.00 Years	\$17.10	\$3.30	\$1.00	30	\$570,000
Helena	Diocese	1/31/2014	3/5/2015	1.09 Years	\$21.00	\$14.40	\$2.00	360	\$58,000
St. Paul and Minneapolis	Archdiocese	1/16/2015	9/25/2018	3.69 Years	\$210.30	\$166.80	\$20.55	86	\$467,300
Great Falls-Billings	Diocese	3/31/2017	8/22/2018	1.39 Years	\$20.00	\$8.00	\$1.13	43	\$232,560
Crosier Fathers and Brothers	Religious Order	6/1/2017	3/26/2018	0.82 Years	\$25.50	\$19.80	\$1.30	125	\$593,020
Duluth	Diocese	12/7/2015	3/7/2019	3.25 Years	\$31.70	\$31.70	\$5.95	101	\$253,400
New Ulm	Diocese	3/3/2017	3/10/2020	3.00 Years	\$34.00	\$26.00	\$2.57	86	\$336,633
Winona-Rochester, MN	Diocese	11/30/2018	10/4/2021	2.9 years	\$27.80	\$6.50		143	\$194,406
Agana, Guam	Archdiocese	1/16/2019	10/20/2022	3.75 years	\$36.5 plus insurance assets, and other	Settling insurers, \$18		Approx. 180	\$203,100
St. Cloud, MN	Diocese	6/15/2020	12/3/2020	.5 years	\$22.50	\$14.00		102	\$137,255



**THANK
YOU**

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