SYMPOSIUM
BANKRUPTCY IN THE RELIGIOUS NON-PROFIT CONTEXT

INTRODUCTION

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As a Catholic institution, Seton Hall University School of Law has a unique obligation and opportunity to address legal issues that are of special concern to religious entities. The continuing financial distress, including bankruptcies, of several Catholic dioceses and hospitals implicates an intersection of legal issues largely unaddressed by United States jurisprudence. In fact, the bankruptcy code neither mentions nor anticipated bankruptcies by church entities. Consequently, the bankruptcies of 2004 have highlighted the gaps in several areas of law, which present to legal academics an open field for study and normative development.

In November 2004, Seton Hall brought together leading scholars and practitioners, as well as Bankruptcy Judge Joy Flowers Conti, to address the novel questions facing attorneys advising religious nonprofits and bankruptcy judges hearing the petitions of Church entities. The intersection of bankruptcy, First Amendment, property, trust, nonprofit corporate and canon law required us to convene scholars who have never previously collaborated. Seton Hall's Professor Angela Carmella assembled the speakers and shepherded the development of their presentations with thoughtfulness, grace and creativity. Professor Stephen Lubben guided the program's planners through the vagaries of bankruptcy law, and served as a superior moderator by

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making accessible to a cadre of bankruptcy neophytes the principles of this area. Finally, Seton Hall thanks Mark Chopko, the General Counsel to the United States Catholic Conference of Bishops, for his good counsel and indispensable assistance in bringing this program to fruition.

The conference discussion revolved around three very general themes: first, the special questions posed in bankruptcies by the canon law of the Roman Catholic Church; second, the constitutional issues implicated by church bankruptcies; and third, the implications of bankruptcy for religious life.

First, the landscape – surprisingly, the Boston Archdiocese did not declare bankruptcy, as most observers had expected. Instead, in July 2004, it was the Archdiocese of Portland that filed for Chapter 11, to be followed by Tucson in September of that year and Spokane in December. On August 26, 2005, Bankruptcy Judge Patricia Williams ruled on the parties' respective motions for summary judgment in the Spokane bankruptcy, concluding that the diocesan estate included individual parish property, and that applying bankruptcy law to determine the extent of the debtor's property was not violative of the First Amendment.[1] Almost a year to the day following Portland's filing, St. Vincent's Hospital, a Sisters of Charity stalwart in Manhattan, filed for Chapter 11 as well.

This symposium opens with an analysis by Professor David Skeel of the "sovereign concerns" implicated by the tension between Free Exercise and bankruptcy. Skeel pursues this theme by analogizing the church to municipalities and sovereign nations, suggesting that Chapter 9 of the Bankruptcy Code (dealing with municipal bankruptcies) and proposals before the International Money Fund to address sovereign bankruptcies might provide useful guideposts for church bankruptcies. Specifically, Skeel addresses the questions of what diocese property becomes part of the bankruptcy estate, whether bankruptcy processes threaten Free Exercise, and how to address confirmation issues if the debtor diocese and creditors, which likely includes clergy misconduct victims, cannot reach agreement.

Dean Nicholas Cafardi picks up on the question of what

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

property is subject to the bankruptcy estate, looking at the question from a canon law perspective. Traditionally, the courts employ civil law to address secular issues, but defer to the church to address religious matters. Working from the premise that the First Amendment should allow canon law to prevail over civil law in resolving the property questions that arise in a church bankruptcy, Cafardi proceeds to argue that it is unquestionable under canon law that parish property is not diocesan property, and therefore cannot become part of the bankruptcy estate when a diocese declares bankruptcy.

Boston College Law Professor Catharine Pierce Wells comes to the issues of this symposium from the perspective of a former state regulator of charities for the Commonwealth of Massachusetts. Thus, she looks at dioceses as entities organized under state law as charitable corporations. From this perspective, Wells argues that a charity's assets do not have owners, but, depending upon state law, may be the subject of a charitable trust of which the public is the beneficiary. In such a case, she posits that the trustee of the bankruptcy may be subject to the fiduciary obligations imposed by both bankruptcy and trust law. Whether or not the criteria for a trust are satisfied, most states' law of charities designates the attorney general as protector of the public's interest in the charitable assets. Consequently, Wells argues that when a charity files for bankruptcy, the attorney general may be a necessary party – representing the public.

Sr. Melanie DiPietro brings to the discussion a career of representing religious organizations as both a canon and civil lawyer. From these perspectives, Sr. DiPietro outlines the arguments to be made on behalf of parishes that canon law is relevant to defining property in a bankruptcy, and will lead to the conclusion that parish property should be excluded from a diocese's bankruptcy estate. The state law creating the corporate sole, she argues, specifically incorporates church law, thereby authorizing bankruptcy courts, she contends, to look to canon law in differentiating between parish and diocesan property.

Dean Mark Sargent's paper is introspective, exploring how the Church might change its governance structure to avoid future scandals and to create a more effective role for the laity. In answer to his question, Sargent commends the Church to look to

U.S. corporate law principles, such as directors' fiduciary duties, transparency, and accountability, to reconceptualize the management of the American Church. Sargent urges that such a transformation is essential to survival of the Church.

First Amendment scholar Professor Angela Carmella critiques the demythologization of religion in current First Amendment analysis, and observes that this desacralized stance towards religion has informed the Supreme Court's neutrality of law in its interaction with religion. It is likely, she concludes, that if adhered to by the bankruptcy court, this "formal neutrality" will preclude a consideration of the unique nature of the Church in the pending bankruptcy proceedings. Nonetheless, Professor Carmella searches for a way by which the court can employ civil law to preserve the Church's religious legal system, and recommends trust principles to accomplish a result that most resembles that which would result from adherence to canon law. Professor Evelyn Brody takes us into the heart of the law that governs charitable trusts, cautioning against an over-reliance on trust law as an asset protection device – if trust law applies in the bankruptcy context, it might just as well otherwise apply, thereby potentially subjecting the Church to court approval for basic business decisions such as closing parish schools or reallocating assets.

A Seton Hall student comment rounds out the symposium: 2005 graduate Christina Davitt provides an excellent analysis of the "choice of law" questions between canon and civil law as well as charitable trust and non-profit corporate law.