WHOSE STEEPLE IS IT? DEFINING THE LIMITS OF THE DEBTOR'S ESTATE IN THE RELIGIOUS BANKRUPTCY CONTEXT

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I. Introduction

The goals in the religious bankruptcy context should be threefold: first, to pay current creditors as fully as possible; second, to provide for adequate payment for future[1] tort claimants;[2] and

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third, to assure sufficient assets to continue the charitable work of the Church.[3] To serve these goals, the debtor's estate should be construed as broadly as possible. The Roman Catholic Archdiocese of Portland, Oregon (the "Archdiocese" or "Debtor"), facing tort claims in excess of $338,475,000 and trade creditor claims of over $22,000,000, declared bankruptcy on July 6, 2004.[4] The Archbishop claims that the Debtor's estate is worth $10,000,000 to $50,000,000,[5] while the plaintiff tort victims counter that if the assets of the Archdiocese included the parishes and schools, the estate would be worth $400,000,000.[6]

Herein lies the controversy. There will be a substantial difference in potential payment of claims depending upon how the debtor's estate is construed.[7] The Archdiocese of Portland alleges that the schools and parish buildings do not belong to the Archdiocese,[8] but are held in trust for the parishioners by the Archbishop as the nominal head of the religious corporation sole.[9]

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[1] Tort claimants include those who are aware of their claims presently as well as those who become aware of their claims at a future date. *See* Sandford L. Frey, Case Overview: Children of ISKCON, d/b/a The International Society for Krishna Consciousness, et. al., Nov. 3, 2004, presented at *Bankruptcy in the Religious Context Conference*, Seton Hall Univ. School of Law, Nov. 5, 2004.

[2] *See generally In re* Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1984) (future tort claims are not discharged by bankruptcy).

[3] *See supra* note 1. "The principle intent of the ISKCON filings is to provide as much compensation as possible to the victims of alleged child abuse." *Id.*

[4] Chapter 11 Voluntary Petition Filed, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed July 6, 2004) (on file with author).

[5] *Id.*

[6] Tort Claimants Committee Case Management Memorandum, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed July 30, 2004) (on file with author).

[7] *Id.*

[8] While the Dioceses of Tucson, AZ and Spokane, WA have also filed for bankruptcy, the facts and court documents analyzed herein apply exclusively to the Archdiocese of Portland, OR.

[9] Debtor's Memorandum Regarding Currently Identified Major Issues, *In re*

However, through actions such as using the schools and churches as collateral for loans to the Archdiocese,[10] the Archbishop in Portland acted as if his office was in actuality the true owner of the school and parish properties.

The goal of any bankruptcy proceeding is to reorganize the debtor and give it a "fresh start."[11] The goals in a religious nonprofit bankruptcy context are complicated by the fact that, unlike a publicly traded company in a Chapter 11 proceeding, there are no shareholders.[12] However, there are important stakeholders,[13] including the parishioners and arguably the needy community, who would be damaged if the Archdiocese were to actually go out of business by liquidation.

In the religious bankruptcy context, the choice of what law to apply is critical for the bankruptcy court, because conflicts between the application of canon (Roman Catholic Church) law, state or federal civil law, nonprofit and for-profit corporation law, and charitable trust principles make this a difficult and complex issue.[14] Because a bankruptcy court is a court of equity, in order to make choices that do justice and equity to the parties,[15] the court can expand the search for applicable principles beyond the usual sources of law and look for equitable principles to clear the muddy waters.[16] The search for an applicable source of law could extend so far as to include the use of substantive consolidation and the alter ego theory.[17] Assuming that the parishes are found to be separate legal entities, application of these equitable principles could bring the school and churches into the estate by piercing

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Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Aug. 3, 2004) (on file with author).

[10] Associated Press, *Archdiocese Claims Only $10 Million in Assets*, (Aug. 2, 2004), *available at* http://news.statesmanjournal.com.

[11] Hunter v. United States, 201 B.R. 959, 960 (Bankr. E.D. Ark. 1996).

[12] *In re* Lincoln Ave. & Crawford's Home of the Aged, 164 B.R. 600 (Bankr. S.D. Ohio 1994).

[13] Catharine Pierce Wells, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty: Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy*, 44 B.C. L. REV. 1201, 1209 (2003).

[14] *See id.*

[15] *In re* Church & Institutional Facilities Dev. Corp., 122 B.R. 958, 964 (Bankr. N.D. Tex. 1991).

[16] Ellis v. Sec'y of State of Ill., 883 F. Supp. 291, 293 (N.D. Ill. 1995).

[17] Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941).

the corporate veil.[18]

This paper examines the limits of the debtor's estate and the important differences that a bankruptcy court's choice of which law to apply would make in defining those limits and potential creditor recovery. Part II discusses the legal organization of the Roman Catholic Church and its parishes as an example of a hierarchical church structure, including the definition of a religious corporation sole.[19] Part III examines the statutory limits imposed by the United States Bankruptcy Code's definition of the bankruptcy estate.[20] In Part IV, the paper elucidates the application of substantive consolidation and the use of the alter ego theory to pierce the corporate veil and bring the parish assets into the debtor's estate.[21] Part V fleshes out the arguments for the use of civil law as opposed to canon law, including the constitutional limitations imposed by the Religion Clauses of the First Amendment. Part V also explains why the Bankruptcy Code, as a neutral law of general applicability,[22] should apply to the Archdiocese.[23] Part VI delves into an analysis of the Supreme Court's jurisprudence related to the alternatives of the neutral principles approach versus the deference standard in church-related matters, and why the choice between the two makes a critical difference.[24] Part VII surveys the choice between the application of trust and nonprofit law principles.[25] First, we will set the stage for our choice of law discussion by examining the legal structure of the Debtor in question.

II. The Legal Structure of the Roman Catholic Church

The Roman Catholic Church is typically described as a hierarchical church, meaning "the local church is a part of the whole body of the general church and is subject to the higher

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[18] Minton v. Cavaney, 364 P.2d 473, 475 (1961).

[19] *See* discussion *infra* Part II.

[20] 11 U.S.C. § 541 (2004). *See* discussion *infra* Part III.

[21] *See* discussion *infra* Part IV.

[22] The Bankruptcy Code is a neutral law of general applicability as it applies to all who seek its protection in federal bankruptcy court. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

[23] *See* discussion *infra* Part V.

[24] *See* discussion *infra* Part VI.

[25] *See* discussion *infra* Part VII.

authority of the organization and its laws and its regulations."[26] In the Catholic Church, the successors of the original twelve Apostles are related with and united to one another.[27] The archbishops govern the particular archdiocese the Pope, as the leader of the Roman Catholic Church, assigned them to, but the archbishops' authority must be exercised "in communion with the whole church under the guidance of the Pope."[28] The parishes are the local entities of the archdiocese that are administered by a priest who answers to the archbishop.[29] In the Portland Archdiocese, the parishes are not separately incorporated under state property law, but instead are "separate juridic persons" under canon law.[30]

Churches can civilly organize in one of four forms: an unincorporated association, a trustee corporation, a membership corporation or a corporation sole.[31] The Archdiocese is organized as a nonprofit corporation sole.[32] Black's Law Dictionary defines a corporation sole as a corporation "having or acting through only one member."[33] That is, the Archbishop, through his office, is the sole corporate member of the Archdiocese. This could be interpreted to mean that the entire Archdiocese as a whole is a single legal entity, with the Archbishop at its head.[34] However, the Portland Archbishop as the Debtor states that the Archdiocese and the parishes are not one single legal entity, and therefore, the parishes and school properties should be shielded from inclusion in the Debtor's estate.[35] Whether the parishes and schools can be included in the estate depends upon the statutory limits placed on

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[26] Carnes v. Smith, 222 S.E.2d 322, 325 (Ga. 1976).

[27] MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 361-62 (2002).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Chapter 11 Voluntary Petition Filed, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed July 6, 2004) (on file with author).

[33] BLACK'S LAW DICTIONARY 344 (7th ed. 1999).

[34] The narrow focus of this paper precludes an extensive examination of canon law principles.

[35] Letter of Dave Twomey, Jr., Chief Financial Officer of the Archdiocese of Portland (2001), http://www.portlanddiocese.net/offices_finance.html.

the Debtor's estate under the Bankruptcy Code.[36]

III. The Statutory Limits of the Debtor's Estate

Section 541 under Title 11 of the United States Code broadly defines a debtor's estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case."[37] Congress intentionally defined the "property of the bankruptcy estate as broadly as possible, consistent with the desire to give a debtor a meaningful opportunity to reorganize and obtain a fresh start."[38] Whatever rights the debtor would have had outside of bankruptcy go to the debtor-in-possession and the reorganized debtor.[39]

The "what's in the estate analysis" should begin "on the specific interests claimed to constitute the debtor's property."[40] The disputed property in this case includes the local church buildings, schools, and certain bank and trust accounts that the Archbishop says are in the name of the office of the Archbishop as the sole member of the corporation sole.[41] Furthermore, the Archbishop asserts that although his name would be on the accounts or deeds to the property, he holds it only "in trust" for the local parishes and he, in fact, is not the actual owner.[42] He claims only bare legal title, not an equitable or beneficial interest.[43] Section 541(d) provides, in relevant part, that "any property in which the debtor holds only legal title and not an equitable interest, the legal title becomes part of the estate but not the equitable interest."[44] Therefore, the Church claims that because

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[36] *See* 11 U.S.C. § 541(a)(1) (2005).

[37] *See id.* §§ 301, 541(a)(1).

[38] Hunter v. United States, 201 B.R. 959, 960 (Bankr. E.D. Ark. 1996); United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).

[39] *Hunter*, 201 B.R. at 960.

[40] Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 242 (3d Cir. 2001).

[41] Complaint by Albert N. Kennedy on behalf of Tort Claimants Committee (Declaratory Judgment Re Property of the Estate), *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Aug. 11, 2004) (on file with author).

[42] *Id.*

[43] *Id.*

[44] 11 U.S.C. § 541(d) (2005).

the Archbishop holds only bare legal title, the property in question should not come into the estate.

The facts of the case contradict the Archbishop's contention in two instances, however. First, creditor Paul E. DuFrense made a motion to the bankruptcy court to stop the Archbishop from selling a particular piece of property outside of the bankruptcy estate on the grounds that it would injure his recovery as a creditor.[45] This is the heart of the controversy – the Archbishop alleges that the property is held in trust for St. Cecilia's Church; however, the Archbishop is acting as the actual owner by attempting to sell the property himself.[46] The creditors claim that the property is owned "by the party named on the deed – the ROMAN CATHOLIC ARCHBISHOP OF PORTLAND IN OREGON."[47] The language of the deed makes no reference to any trust agreement. Furthermore, according to the tax records of Multnomah County, Oregon, the property is held only in the name of the Archdiocese with no mention of any trust restrictions.[48]

Thus, according to the four corners of the deed, the documentation of the ownership of the property in question, the Archbishop is the actual owner. Most importantly, according to the Creditor's motion papers and exhibits attached for the bankruptcy court, the sales contract lists no necessity of third party approval for the sale of the property.[49] If the property really were in trust for St. Cecilia's Church, a separate juridic person, according to canon law, St. Cecilia's[50] should have to at least

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[45] Creditor's Motion for Order to Halt the Sale or Marketing of Archdiocese Real Estate Until Such Sales are Approved by the Court or a Reorganization Plan is Adopted; and Cease Employment of Real Estate Professionals Until Employment is Approved by the Court, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Sept. 23, 2004) (on file with author).

[46] *Id.*

[47] *Id.*

[48] Declaration of Michael W. Maslowsky in Support of Debtor's Motion for an Order Approving the Sale of Debtor's Interest in Real Property Free and Clear of Liens, Claims, Interests and Encumbrances, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Oct. 8, 2004) (on file with author). Fr. Maslowsky is a Catholic priest in the Portland Archdiocese.

[49] *Id.*

[50] Arguably, if a trustee were appointed, the trustee would have the power to dispose of estate property without approval. This assumes first, that St. Cecilia's is part of the estate and second, that the court finds that the appointment of a trustee

approve the sale of one of its interests.[51]

Second, the Archbishop authorized a demolition of Our Lady of Victory Church in Seaside, Oregon.[52] This is one of the historic churches in the Archdiocese.[53] According to John Pincetich, a parishioner of Our Lady of Victory Church, the Archbishop took this action without the consent or even tacit approval of the majority of the parishioners.[54] Mr. Pincetich, as a member of a self-proclaimed ad hoc parishioner group, entered a letter with the bankruptcy court in hopes of stopping the Archbishop's actions and complaining that the historic church could not actually be held "in trust" for them if the Archdiocese could destroy it against their wishes.[55] These two sets of facts suggest that the bankruptcy court should find that the Archbishop, in reality, has and does exercise more than bare legal title to these properties. Thus, the Archbishop should be found to be the true owner and the court should be able to bring these properties into the bankruptcy estate.

Additionally, 11 U.S.C. § 541(b)(1) states that the "[p]roperty of the estate does not include any power that the debtor may exercise solely for the benefit of an entity other than the debtor."[56] The Archbishop claims that the power to sell the local churches is one that he exercises solely for the benefit of the parishes and not himself as the sole member of the corporation sole. However, as we just saw in the two examples above, the Archbishop is clearly exercising his powers to (1) sell property of St. Cecilia's without

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does not impermissibly offend the religion clauses of the First Amendment.

[51] In New Mexico, an effort to preserve the original adobe churches has turned up a number of legal issues, including potential inclusion in the bankruptcy estate. According to Charles P. Reynolds, an attorney in private practice who represents the Archdiocese of New Mexico, these adobe churches are titled solely in the name of the corporation sole. He states that this title puts them "at risk" for reach in the case of fraudulent transfers, which would apply in the case of a bankruptcy. *See* Charles P. Reynolds, Daniel J. Wintz & Deirdre Dessingue Halloran, *Asset Management Strategies Revisited*, 37 CATH. LAW. 165, 166 (1996).

[52] Correspondence Addressed to Judge Perris of Bankruptcy Court from John Pincetich, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Aug. 17, 2004) (on file with author).

[53] The present tense is used because it is not known whether the demolition has taken place.

[54] *Id.*

[55] *Id.*

[56] 11 U.S.C. § 541(b)(1) (2005).

the parish signing off on it as a separate juridic person and (2) destroy a historic church, not for the benefit, but to the perceived detriment of the parishioners.[57] For all these reasons, the bankruptcy court should find that the Archbishop is the sole owner of the parishes and schools.

Moreover, public policy reasons suggest that the estate should be made as large as possible. The bankruptcy court and its actions are supported by federal tax dollars.[58] In fact, the Supreme Court decreed "that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own."[59] However, the government does allow religious nonprofit organizations many benefits including exemption from taxation, on the basis that they provide needed services to the community, such as food banks and hospitals, that the government would otherwise provide.[60] It would not be equitable for the Archdiocese to take advantage of civil tax exemption[61] as a benefit of nonprofit incorporation, and then attempt to evade civil bankruptcy law that applies to all corporations.[62]

On the facts of this case then, and in order to reach the three enumerated goals of a religious bankruptcy, i.e., to pay current creditors, to set aside funds for future tort creditors and to continue its charitable mission, the Archdiocese should be required to bring all of its assets into the estate for the benefit of creditors, like any other corporation is required to do under 11 U.S.C. § 541.

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[57] *Id.*

[58] *See* Lemon v. Kurtzman, 403 U.S 602, 634 n.18 (Douglas, J., concurring) (citing Madison's Remonstrance, para. 3); Stone v. Graham, 449 U.S. 39, 42 (1980).

[59] Everson v. Bd. of Educ., 330 U.S. 1, 44 (1947) (stating that a citizen successfully complained that his tax money went to reimburse parents who used bus transportation so their children could attend Catholic school).

[60] 26 U.S.C. § 501(c)(3) (2005); *see generally* Utah County v. Intermountain Health Care, Inc., 709 P.2d 265 (Utah 1985).

[61] House of the Good Shepherd v. Dep't of Revenue, 710 P.2d 778, 781 (Or. 1985) (stating that property used for the advancement of religion as its charitable purpose qualifies for a tax exemption).

[62] *See generally* Geisinger Health Plan v. Comm'r, 985 F.2d 1210, 1220 (1993) (declaring that an HMO cannot claim tax-exempt status as a charity where it does not comply with applicable nonprofit law). Likewise, if the Archdiocese expects to continue as a charitable entity, it should comply with the applicable bankruptcy law.

IV. Substantive Consolidation and Piercing the Corporate Veil

Substantive consolidation[63] and the use of the alter ego theory to pierce the corporate veil are equitable[64] remedies used by bankruptcy courts to bring assets into the estate when two entities function as a single business enterprise.[65] The court can consolidate all the assets of the entities to form one large fund from which creditors are paid. The court can use these remedies in situations where there has been an abuse of the corporate privilege and when the equitable owner acts as if the two entities are one.[66] These remedies are used by bankruptcy courts where the "interrelationships of the debtors are hopelessly obscured."[67] They allow the court to reach the assets of the larger organization when failing to do so would cause an inequitable result.[68]

A. *Substantive Consolidation*

Substantive consolidation is an equitable remedy of the bankruptcy courts. The assets of all the entities are combined and the creditors of all the entities become creditors of the combined estate.[69] In deciding whether to apply substantive consolidation, courts have either balanced the equities in favor of and against consolidation or used combinations thereof.[70] There must be an equitable need for consolidation and the benefits of the consolidation must outweigh the potential burdens.[71]

In the case at bar, equity demands substantive consolidation. Without it, present and future creditors of the Archdiocese may not receive all that they would have otherwise been entitled to

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[63] Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941).

[64] 11 U.S.C. § 105 (2005).

[65] J. Maxwell Tucker, *Development: Grupo Mexicano and the Death of Substantive Consolidation*, 8 AM. BANKR. INST. L. REV. 427 (2000).

[66] Minton v. Cavaney, 364 P.2d 473, 475 (1961).

[67] *In re* Evans Temple Church of God in Christ & Cmty. Ctr., Inc., 55 B.R. 976, 981 (Bankr. N.D. Ohio 1986) (citing Chem. Bank v. N.Y. Trust Co. v. Kheel, 369 F.2d 845, 845 (2d Cir. 1966)); *In re* Snider Bros., 18 B.R. 230 (Bankr. D. Mass. 1982).

[68] Roman Catholic Archbishop v. Superior Court, 93 Cal. Rptr. 338, 342 (Cal. Ct. App. 1971).

[69] J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207, 209 (1990).

[70] *Id.* at 217.

[71] *Id.*

because the size of the estate will be dramatically decreased if the parishes and schools are not brought into the estate. The benefits of equitable consolidation will outweigh the burdens if the court keeps in mind that the goals of this religious bankruptcy should be to pay current creditors, provide for future tort claims and continue the charitable works of the Debtor. The bankruptcy court will need to walk a fine line to achieve these goals, but without the additional assets that substantive consolidation would bring in, the walk would be impossible.

B. *Alter Ego Claim*

As a comparative religious bankruptcy case to the instant case, the plaintiff tort claimants in the Hare Krishna bankruptcy proceeding put forth an alter ego[72] claim, looking to bring the assets of all the separate ISKCON entities into the estate.[73] However, the defense attorney, Sandford Frey, rebutted this claim by alleging that after an examination of relevant documents, including "property deeds" and corporate structure,[74] there was no alter ego because they followed the dictates of state property law and separately incorporated each entity. Furthermore, the stated goal of the Hare Krishna bankruptcy was to pay the tort creditors as fully as possible.[75] The proposed plan included the sale of real property in order to meet the plan obligations.[76] There would be no inequitable result in Hare Krishna bankruptcy case because the debtor intends to insure that the claims are paid.[77]

On the other hand, application of the alter ego theory could work to bring the churches and schools into the Archdiocese's estate in the Portland case, because there is a lack of separate incorporation. The deeds to property are titled in the name of only the corporation sole and the Archbishop is not acting as if the parishes and schools were separate legal entities from the

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[72] Alter ego is another term for when two organizations function as a single business enterprise. Tucker, *supra* note 65, at 428.

[73] *See supra* note 1, at 4.

[74] *Id.* In fact, even more compelling, is the fact that the entities are civilly and separately incorporated in compliance with applicable state law.

[75] *Id.* at 2.

[76] *Id.* at 5.

[77] *Id.* at 2.

Archdiocese, except to the extent defined under religious canon law.[78] Civilly, they are seen as one entity, as evidenced by the tax record, property deeds and approvals needed to sell property.[79]

For example, the Archdiocese contracted to sell real property to Faith Enhanced Development Enterprises ("FEDE") and Village Enterprises.[80] The Debtor asked the bankruptcy court to declare that the property in interest, claimed by Sacred Heart Parish to belong to the Parish and claimed by the tort creditors to belong to the Archdiocese, should be sold by the Archdiocese with the court's approval.[81] The fact that the Debtor asserts that there are no trust liens on the property, and that the foundation underwriting the sale and the title company will not approve the sale without the bankruptcy court's declaration, are relevant aspects in an alter ego claim.[82] Therefore, the property, for all intents and purposes, does belong to the Archdiocese.

Alter ego theory should also be applied if failure to apply the theory would lead to an otherwise inequitable result.[83] In a San Francisco case, the plaintiff bought a St. Bernard dog from a church entity in Switzerland.[84] The court refused to find an alter ego theory between the church entity overseas and the local Archdiocese of San Francisco, as there was no inequitable result because the plaintiff could institute an action against the church entity that breached his contract of sale in Switzerland.[85] The court declared that the purpose of the alter ego theory was not to appease every unsatisfied creditor, but to apply the theory in the case of an inequitable result.[86] In the Archdiocese of Portland bankruptcy proceeding, the present and future tort claimants will have an inequitable result if the Archdiocese is able to shield the

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[78] Debtor's Memorandum Regarding Currently Identified Major Issues, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Aug. 3, 2004) (on file with author).

[79] *See supra* note 48.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Roman Catholic Archbishop v. Superior Court, 93 Cal. Rptr. 338, 342 (Cal. Ct. App. 1971).

[84] *Id.*

[85] *Id.*

[86] *Id.*

lion's share of its assets from the bankruptcy estate. Therefore, failing any other equitable method, the bankruptcy court should employ the substantive consolidation theory to bring the churches and schools into the Debtor's estate.

However, following the Supreme Court's holding in *Grupo Mexicano,*[87] bankruptcy courts may be limited in fashioning equitable remedies to those remedies that were available prior to the Judiciary Act of 1798.[88] While *Grupo Mexicano* can easily be distinguished insofar as it did not address substantive consolidation, and at least one federal court continues to affirm it,[89] bankruptcy courts may need to look to other sources to fashion equitable remedies. Hence, we look to the bankruptcy court's most important choice in the case at bar – the choice between civil law and canon law.

V. Choice of Law – Canon Law vs. Civil Law

A. *Constitutional Limitations*

1. The Establishment Clause

The religion clauses of the First Amendment demand both freedom of religion and separation of church and state.[90] The Establishment Clause of the First Amendment mandates that the court stay out of church doctrinal matters.[91] The Supreme Court initially set down the Establishment Clause test to guide decisions touching upon relations between religion and government in *Lemon v. Kurtzman.*[92] The three elements of the *Lemon* test require that a government action: (1) must not have the primary purpose

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[87] Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999) (holding that the Judiciary Act of 1798 conferred equitable powers which do not include the creation of previously unknown remedies to equity jurisprudence).

[88] Tucker, *supra* note 65.

[89] Alexander v. Compton, 229 F.3d 750, 759 (9th Cir. 2000).

[90] U.S. CONST. amend. I; Lee v. Weisman, 505 U.S. 577 (1991).

[91] Natal v. Christian & Missionary Alliance, 1988 U.S. Dist LEXIS 16447 (D.P.R. 1988) (stating a general prohibition on court involvement in "internal church matters").

[92] 403 U.S. 602 (1971).

of advancing religion; (2) must not endorse religion; and (3) must not foster an excessive entanglement with religion.[93]

First, if the bankruptcy court applied canon law, it would primarily advance Catholic religious teaching by exempting the parishes and schools from the estate only because they are separate entities under canon law. This exemption would favor the canon law precepts of keeping the parishes separate, over the interests of the creditors whose sole interest is in creating the largest estate legally possible.

Second, by choosing canon law, the court would be endorsing Catholic religious teaching over civil law precepts.[94] Canon law has been likened to an "internal corporate policy book."[95] Although the bankruptcy court may listen to arguments regarding the propriety of its applicability, the court is forbidden from using it as its sole guide, as that would amount to an impermissible endorsement of canon law over civil law. In addition to endorsement, the Supreme Court's jurisprudence teaches that governmental action must not have a coercive effect.[96] Because this is a question of first impression, beyond the Establishment Clause violation that would exist if the bankruptcy court of Oregon chooses canon law, other bankruptcy courts may be more likely to choose canon or other church law as well, thus spreading Establishment Clause violations across the land where other bankruptcy courts are faced with church bankruptcies.

Third, choosing canon law would be an impermissible entanglement in the religious affairs of the Church. The Debtor will argue that because the bankruptcy court cannot entangle itself in property disputes that involve religious questions, canon law should apply.[97] If the bankruptcy court should attempt to compel the Archbishop into bringing the churches and schools into the estate, he might respond by saying that he has no authority under

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[93] *Id.* at 612-13.

[94] Lynch v. Donnelly, 465 U.S. 668, 691 (1984).

[95] David Slader quoted by Maria Beaudette, *Churches Weigh Going Bankrupt To Escape Suits*, LEGAL TIMES, July 28, 2004, *available at* http://www.law.com.

[96] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[97] Roman Catholic Archdiocese v. Dep't of Revenue, 1995 Ore. Tax LEXIS 1 (Or. T.C. 1995) (stating that the Canon Law court does not hear civil matters, they are left to the civil courts). Therefore, the Canon Law court would not have jurisdiction over a state law property question such as the limits of the debtor's estate.

canon law to do so because an alienation of such an amount of property would require papal approval.[98] Under 11 U.S.C. § 1104, the court may then be forced to appoint a trustee to manage the financial affairs of the Archdiocese,[99] while the Archbishop continues to preside over the religious aspects.

The appointment of a trustee would cause a serious violation of the Establishment Clause, with the power to manage a debtor-in-possessions' daily affairs being turned over to the state.[100] This could be seen as excessive entanglement under *Lemon*.[101] However, for a violation to occur, the entanglement must be excessive and have the primary effect of advancing religion.[102] While the purpose of the appointment of a trustee would be to administer the post-petition plan and not to advance religion, daily management of a debtor's business would amount to excessive entanglement.[103] Therefore, the bankruptcy court would impermissibly and excessively entangle itself in church doctrine by attempting to interpret canon law instead of civil law.[104]

2. Constitutional Limitations – The Free Exercise Clause

The bankruptcy court should also not apply canon law because the issue at hand is not a religious doctrinal matter.[105] The

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[98] John J. Jarboe, *Bankruptcy – The Last Resort, Protecting the Diocesan Client From Potential Liability Judgments*, 37 CATH. LAW. 153, 164 n.39 (1996) (citing J. Michael Fitzgerald, *The Official Catholic Directory: Civil and Canon Law Requirements*, 30 CATH. LAW. 107, 129 (1986)). For example, the Pope's approval is required for a property sale totaling more than one million dollars.

[99] The bankruptcy court may appoint a trustee anytime after the commencement of the case for cause.

[100] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) (Establishment Clause violation where there was found a "fusion of governmental and religious functions" in a school district created solely to serve a religious sect).

[101] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[102] *Id.* at 612-13.

[103] 11 U.S.C. § 1106 (2005) (listing the duties of a trustee).

[104] St. Matthew's Slovak Roman Catholic Congregation v. Wuerl, 106 F. App'x 761, 768 (3d Cir. 2004) (Holding appellant's Canon Law claims nonjusticiable, the Court declared that, "[i]t is not the province of the federal courts to interpret and apply Canon Law.").

[105] These matters are defined as those concerning church doctrine, creed, or form of worship, or the adoption or enforcement, within a religious association, of laws and regulations to govern the membership, including the power to exclude from membership those deemed unworthy of membership, or church succession controversies. BLACK'S LAW DICTIONARY 530 (7th ed. 1999); Congregation Beth

Fifth Circuit *Combs* court, relying on the D.C. Circuit in *EEOC v. Catholic University*, found that there were two strands of the Free Exercise Clause.[106] Government action must not interfere with a "believer's ability to observe the commands or practice of his faith . . . [nor] encroach[] on the ability of a church to manage its internal affairs."[107] In fact, the Supreme Court in *Amos* held that "it is a permissive legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[108]

Thus, while the Bankruptcy Code is a neutral law of general applicability[109] and applies to Chapter 11 proceedings, the bankruptcy court's application (and perhaps misapplication) of canon law in the Portland case could interfere with the Debtor's right to manage its own internal affairs.[110] The Supreme Court in *Employment Division v. Smith* held that the Free Exercise Clause protected religious activities such as assembling with others for a worship service, which necessarily includes having parish buildings.[111]

The Religious Freedom Restoration Act of 1993 ("RFRA") overruled *Smith*, giving religious organizations shelter from neutrally applicable laws.[112] In *City of Boerne v. Flores*, the Court found RFRA unconstitutional with regard to separation of powers issues, but allowed the incidental burden or the exercise of religion by a law of general application.[113] Yet, the Eighth Circuit in *Young*, upon remand from the Supreme Court, found that RFRA was constitutional as applied to the Bankruptcy Code.[114] The

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Yitzok v. Briskman, 566 F.Supp. 555, 558 (E.D.N.Y. 1983).

[106] Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348 (5th Cir. 1999) (citing EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996)).

[107] *Id.*

[108] Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

[109] Employment Div. v. Smith, 494 U.S. 872 (1990).

[110] Sherbert v. Verner, 374 U.S. 398, 410 (1963); *see* Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) (A "fusion of governmental and religious functions" in a school district created solely to serve a religious sect violated the Establishment Clause.).

[111] *Smith*, 494 U.S. at 872.

[112] 42 U.S.C. § 2000bb to 2000bb-4 (1993).

[113] City of Boerne v. Flores, 521 U.S. 507, 515 (1997).

[114] *In re* Young, 89 F.3d 494 (8th Cir. 1996), *remanded by*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

Eighth Circuit's ruling on the constitutionality of RFRA remains undisturbed. Consequently, RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability," unless "it is in furtherance of a compelling government interest, and is the least restrictive means of furthering that compelling governmental interest."[115]

Here, the Bankruptcy Code is a law of general applicability as it applies to all debtors who file for bankruptcy protection.[116] The compelling governmental interest at stake (and the reason for the entire Bankruptcy Code) is the discharge in bankruptcy and the commercial certainty that the finality of bankruptcy proceedings brings.[117] The Portland Archdiocese can make a fresh start by obtaining a discharge in bankruptcy. Therefore, RFRA requires that the court apply civil law, because that is the least restrictive civil means available (as applying canon law would violate the First Amendment) to further the governmental interest of the reorganization and continued functioning of the debtor.[118]

Furthermore, the Court emphasized that the civil courts, which include bankruptcy courts, and not ecclesiastical courts (which apply canon law), are the proper setting for the disposition of church-related property disputes as long as no doctrinal issue is involved.[119] In the Portland case, there are arguably no doctrinal issues. The issue – ownership of property – has no connection with any religious doctrine or question of faith. As the Court said, "civil courts do not inhibit the free exercise of religion merely by opening their doors to disputes involving church property."[120] It is clearly an issue of actual property ownership – and therefore civil law should apply.

The Supreme Court has also held that there cannot be exceptions to neutral laws of general applicability based on

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[115] 42 U.S.C. § 2000bb-1 (2004).

[116] *In re* Johns-Manville Corp., 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984).

[117] *In re* Kevin W. Emerick Farms, Inc., 201 B.R. 790, 805 (C.D. Ill. 1996).

[118] *See* Richard Collin Mangrum, *Tithing, Bankruptcy and the Conflict Between Religious Freedom and Creditor's Interests*, 32 CREIGHTON L. REV. 815 (1999).

[119] *Id.*

[120] Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

religion.[121] In *Smith*, the plaintiff had been fired from his job because he was smoking a known hallucinogen, peyote. This was a criminal offense under Oregon state law and thus qualified as work-related misconduct, which disqualified him for unemployment benefits.[122] The plaintiff argued that he was wrongfully terminated based on unconstitutional religious discrimination, and therefore should be eligible for unemployment compensation.[123] The Court found that unemployment compensation laws were neutral laws of general applicability that could be applied even when there was a religious practice in question.[124]

The *Smith* Court also feared that if it held the religious practice of smoking peyote to be an exception to rules requiring dismissal for employee drug use, the Court would be creating a "constitutional anomaly" and "a private right to ignore generally applicable laws."[125] The holding did not implicate the Free Exercise Clause because the Oregon law relating to unemployment compensation was not aimed at promoting or restricting religious beliefs.[126] This ruling, the Court summarized, would create untenable required religious exemptions from almost every type of civic duty.[127]

Analogous to the Bankruptcy Code, the Supreme Court found that the Internal Revenue Code's imposition of taxes on Jimmy Swaggert Ministries was a "generally applicable tax that had no constitutionally significant burden on the religious organization's religious practices or beliefs."[128] The Court found that there was no constraint on either the Free Exercise Clause or the Establishment Clause. Because the Bankruptcy Code is also a generally applicable federal code that mostly speaks to financial matters, the bankruptcy court should find that there is no First

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[121] Employment Div. v. Smith, 494 U.S. 872, 874 (1990).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] I am referring to Court-mandated exemptions, legislative exemptions are permissible. *Id.* at 886.

[126] *Id.*

[127] *Smith*, 494 U.S. at 883.

[128] Jimmy Swaggert Ministries v. Bd. of Equalization, 493 U.S. 378, 397 (1990).

Amendment implication in applying it to the Archdiocese.[129]

In the religious bankruptcy context, the federal Bankruptcy Code, specifically Chapter 11, is clearly not aimed at promoting or restricting religious beliefs. It is a neutral law of general applicability because it applies to every debtor who files for Chapter 11 protection.[130] Since a nonprofit's creditors cannot force it into bankruptcy court, the Church here has chosen to have the Bankruptcy Code apply to the reorganization.[131] The Church cannot argue for an exemption from the civic duty of following the Bankruptcy Code when it has freely invoked the Code's protections.

B. *Federalism Concerns - Choice of Law – Federal vs. State Law*

A further choice of law issue involves the choice between federal and state law. While the federal Bankruptcy Code sets forth what "types of property comprise the estate, state law generally determines what interest, if any, a debtor has in property."[132] The Supreme Court has enunciated two approaches to the application of state law in religious contexts, the neutral principles standard and the deference standard.[133] Courts have specifically held that neutral principles of property law apply to church-related property disputes.[134] The bankruptcy court here should follow the Supreme Court's lead in *Jones v. Wolf*[135] and apply a neutral principles approach, as opposed to a deference approach. Moreover, the *Jones v. Wolf* decision arguably gave the Archdiocese twenty-five years worth of notice from the Supreme Court that the neutral principles approach would apply and that they should therefore comply with applicable civil law in titling Church property.[136] The neutral principles approach allows

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[129] *In re* Young, 89 F.3d 494 (8th Cir. 1996), *remanded by*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (the RFRA of 1993 is constitutional as applied to the Bankruptcy Code).

[130] 11 U.S.C. § 101 (2005).

[131] *Id.* § 303.

[132] *In re* O'Dowd, 233 F.3d 197, 202 (3d Cir. 2000) (citations omitted).

[133] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[134] Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969).

[135] *See Jones*, 443 U.S. at 603.

[136] *Id.*

adherence to a correct separation of Church and state through the broad application of civil property and trust law. This approach brings all the property of a debtor, including trust property, either in name or in actuality, into the estate to ensure the largest possible estate from which to pay off creditors.

C. *Neutral Principles Standard*

The neutral principles standard employs only secular trust and property law to decide questions of ownership of church property.[137] The *Lemon v. Kurtzman* tests and analysis allow neutral principles application.[138] Justice Brennan's concurrence in *Maryland & Virginia Elders of the Churches of God v. Church of God at Sharpsburg*[139] notes that states can choose any method for resolving religious property disputes as long as there is no interference with "doctrinal matters" and no "extensive inquiry into 'church polity.'"[140] He would also allow other "neutral principles of law" including examination of title to the property in question, as long as there is no "determination of a religious question."[141]

Courts are allowed to adjudicate matters that do not involve strictly religious or ecclesiastical matters by applying neutral principles of law.[142] Courts have looked at four factors: the title to church property; the local church's articles of incorporation; the church constitution; and the canon and rules.[143] The title to the property allegedly held for St. Cecilia's Church only lists the Archbishop as the sole owner, it is not listed as being held in trust for anyone.[144] On the "four corners" of the document it would seem that there is no trust at all, merely sole ownership by the

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[137] *Id.*

[138] Lemon v. Kurtzman, 411 U.S. 192, 208 (1973).

[139] 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 621 (Cal. Ct. App. 1981).

[144] Motion for Order to Halt the Sale or Marketing of Archdiocese Real Estate Until Such Sales are Approved by the Court or a Reorganization Plan is Adopted; and Cease Employment of Real Estate Professionals Until Employment is Approved by the Court Filed by Paul DuFresne, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed Sept. 23, 2004) (on file with author).

Archbishop as the sole member of the corporation sole.[145]

Mazaika v. Krauczunas provides guidance for church officials who wish to ensure that the entitlement to church property is clear to the courts.[146] The property in that case was similarly situated to the property in Portland, in that it was held in the title of "Rt. Rev. Michael J. Hoban, Bishop of the Diocese of Scranton."[147] The court suggested that those words of ownership should be preceded by the "express declaration" of the actual control and trust limitations of the property.[148]

If the property in Portland were held as the *Mazaika* court suggested, it would expressly declare, "[t]his property is held in trust for the parishioners of St. Cecilia's Church and subject to the jurisdiction of the Catholic Church and the Archbishop of Portland." It would also expressly declare that the title is subject to the laws of the Catholic Church and that the Archbishop is vested with absolute control.[149] The title could also say that the property's title is vested as a matter of ecclesiastical importance to the Church government.[150]

However, in the case at bar, the title is only in the name of the Archbishop. The *Mazaika* court also noted that the only power accorded to the Archbishop is whatever there is in law as a trustee. That authority does not come from Church law, but from civil law, indicating that civil law must govern. The court concluded that "equity will only respond when the suitor comes with clean hands."[151] Here, the Archbishop, who holds the title and control and thus the actual ownership of the property, is coming with unclean hands to bankruptcy by attempting to protect his property from the reach of the Creditors.

In *Carnes v. Smith,* the court applied neutral principles of law to determinee that Church property is governed by the terms of the larger church government, which says that an implied trust

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[145] Tort Claimants Committee Case Management Memorandum, *In re* Roman Catholic Archbishop of Portland, Oregon, No. 04-37154 (Bankr. D. Or. 2004) (filed July 30, 2004) (on file with author).

[146] Mazaika v. Krauczunas, 81 A. 938, 942 (Pa. 1911).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 943.

holds the property for the interests of the local church.[152] However, because the parishioners of the local church defected from the larger organization after their request for a full time pastor was denied, the court found that they forfeited their right to use the local church property.[153] The court held that an implied trust meant that the property belonged to the larger organization and not to the local congregation.[154]

D. *Deference Standard*

Alternatively, the bankruptcy court could apply a deference standard. When a court uses a deference standard, it looks at the internal workings of the church governmental system and defers to the church hierarchy in matters of property.[155] This approach has been characterized as a way for courts to avoid forbidden entanglement with religious teachings.[156]

In the case at bar, the Archbishop will argue that the Fifth Circuit allows deference analysis by employing a "ministerial exception" as part of its First Amendment jurisprudence.[157] In *Combs v. Central Texas Annual Conference of the United Methodist Church*, the court refused to consider a female minister's wrongful discharge complaint entered when she was terminated after returning from a maternity leave.[158] The court said that the ministerial exception exists to protect the internal government workings of a church from judicial scrutiny.[159] The Debtor would say this exception should be applied to keep the property title and trust arrangements from the prying eyes of the bankruptcy court.

This argument will not hold up for two reasons. First, according to the *Combs* court, the protection of a "ministerial exception" is not to generally protect the acts of ministers of a

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[152] Carnes v. Smith, 222 S.E.2d 322, 324 (Ga. 1976).

[153] *Id.*

[154] *Id.* at 328.

[155] William G. Ross, *The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 264 (1987).

[156] Watson v. Jones, 80 U.S. 679 (1872).

[157] Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 351 (5th Cir. 1999).

[158] *Id.* at 344.

[159] *Id.* at 349.

church, but to shield from the court's interference particular personnel decisions, such as which ministers are suited to serve the church.[160] Second, because the Archdiocese has voluntarily asked for the bankruptcy court's protection, it should not be able to pick and choose which sections apply to it. A broad reading of 11 U.S.C. § 541 is appropriate here, without the application of the ministerial exception.

Furthermore, the deference standard is inapposite here because it is usually applied to resolve property disputes within the context of a schism in a church. In *Fonken v. Community Church of Kamrar,*[161] *Mazaika v. Krauzcunas,*[162] and the seminal case of *Watson v. Jones,*[163] divides in the church resulted in litigation over which group was the "true" church and which group was entitled to the property at issue. In the case of the Archdiocese of Portland, there are no allegations of a schism within the church. This case involves a single entity of the Roman Catholic Church, a subdivision, in a corporate sense, entering bankruptcy court to reorganize its debts and take care of its obligations. Because no inherently religious or schismatic issues exist in this case, the deference standard should not apply.

Another problem with the deference standard is that its application would allow the Archdiocese to shield ninety percent of its assets from the estate. This serves no useful reorganizational purpose[164] and could lead to a successful "bad faith" claim by the creditors.[165] The creditors could allege that the Archdiocese did, in fact, enter into the bankruptcy court merely to stop and limit damage from tort claimants and other creditors, without any real intention of actually reorganizing itself.[166] Under 11 U.S.C. § 1112(b), a case may be dismissed "for cause" unless filed in good faith. If a lack of good faith is successfully argued here, the case could be dismissed and the protection of the bankruptcy court would be lost.

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160 *Id.*

161 339 N.W.2d 810, 812 (Iowa 1983).

162 81 A. 938, 940 (Pa. 1911).

163 80 U.S 679, 717 (1872).

164 *In re* SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999).

165 *Id.* at 163.

166 *See id.*

VI. Choice of Law – State Nonprofit, For-Profit Corporation and Charitable Trust Law

The final choice of law issue for the bankruptcy court is one of state nonprofit, for-profit and charitable trust law. In *Watson v. Jones*,[167] the Supreme Court declared that the same doctrines that courts apply to charities should apply to churches. Since the Archdiocese of Portland is a nonprofit organization, state nonprofit law should apply.

If the Archdiocese should argue that canon law instead of nonprofit law should apply, the Revised Model Nonprofit Corporation Act ("RMNCA") declares, "If *religious doctrine* governing the affairs of a religious corporation is inconsistent with the provisions of this Act on the same subject, the religious doctrine shall control to the extent required by the Constitution of the United States or the constitution of this state or both."[168] Construing the contours of a debtor's estate in bankruptcy is not a religious question, thus canon law is inapposite and nonprofit law principles should apply. If the court applied canon law, there could be an impermissible First Amendment violation. Therefore, the court should look to nonprofit law.

One important aspect of nonprofit corporations, with respect to nonprofit corporations in general and religious nonprofit charities in particular, is its allowance of a "hands-on" role for the state attorney general in order to protect the interests of the stakeholders, the parishioners and needy communities who depend on the Church.[169] If a nonprofit wishes to sell a piece of real property, Section 12.02(g) of the RMNCA states that the religious corporation "must give written notice to the attorney general twenty days before it sells, leases, or exchanges or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities."[170]

Since this bankruptcy filing by the Portland Archdiocese is currently still a *rara avis*, it cannot be argued that the proceedings are "in the usual course of business." The Attorney General of

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[167] 80 U.S. 679 (1872).

[168] Rev. Model Nonprofit Corp. Act § 1.80 (1987) (emphasis added) [hereinafter RMNCA].

[169] Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 587 (1999).

[170] RMNCA § 12.02(g) (1987).

Oregon, not currently listed in court documents, should probably have been named or allowed to intervene in the action to represent the interests of the parishioners and the community.[171] The addition of nonprofit law and the considerations of the community for continued necessary services increase the responsibility and considerations that the bankruptcy judge has to consider in the "totality of the circumstances."[172]

One last potential choice of law is charitable trust law. Trusts have three requirements: (1) a trustee with legal title (here the Archbishop); (2) the beneficiaries with equitable title (here the parishioners and the needy community); and (3) identifiable trust property (here the real property in controversy).[173] The analysis under charitable trust law begins with an examination of the deed to the real property.[174] If the deed lists any trust or reverter clauses, an express trust is created. Property of the Archdiocese is titled solely in the name of the Office of the Archbishop.[175] The Colorado Supreme Court coined the term "implied express trust" when resolving a religious property question where a trust was alleged and there was no express language in the deed.[176] The court found that the trust was implied from the "conduct of the parties and the circumstances existing at the time of the gift."[177]

For the bankruptcy court to find an implied trust in the Archdiocese of Portland case, the court would have to investigate the history of each piece of real property in question and look to the "conduct of the parties and the surrounding circumstances."[178] Therefore, whether a parcel of real property or its equitable title could be brought into the estate would depend upon on its past history. While even that much investigation would be very burdensome for the court, it would still have to further investigate which pieces of property were in fact gifts, and which were

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[171] *Id.*

[172] Lemon v. Kurtzman, 411 U.S. 192, 208 (1973).

[173] Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organization*, [sic] 39 AM. U. L. REV. 513, 552 (1990).

[174] *Id.* at 550.

[175] Twomey, *supra* note 35.

[176] *See* Gerstenblith, *supra* note 173, at 555 (citing Bishop & Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986), *cert. denied*, 479 U.S. 826 (1986)).

[177] *Id.*

[178] RESTATEMENT (THIRD) OF TRUSTS § 13 (2003).

outright purchases, as well as the source of the funds for the purchase, to determine if an implied trust could be found. If no implied express trust is found "under neutral principles of law," and no specific reversion to the Archdiocese is apparent, then the equitable interests could potentially remain with the parishes and schools, to continue the work of the Church.[179]

The Archdiocese may argue that the parishes and schools were purchased with donated funds and that it was the implied intent of the donors to put them in trust. However, express intent must be present to create a charitable trust.[180] Since there are no express trust documents to guide the bankruptcy court, the court could decide to impose a charitable trust over all the assets of the Archdiocese including the parishes and schools.[181] However, this would not further the bankruptcy goals of paying off the creditors, as all the assets would be reserved for charitable purposes and none would theoretically be available for the creditors. There was no intent memorialized to capture the intent of the donors of funds used to purchase the church buildings, or to have them and those funds be held in trust by the Archdioceses. Therefore, there can be no trust, express or otherwise.

VII. Conclusion

Bankruptcy should not be used as both a sword and a shield. Here the Archdiocese voluntarily entered the bankruptcy court, taking advantage of 11 U.S.C. § 303, which says that a nonprofit cannot be forced into bankruptcy.[182] The use of federal law to stop the action on tort claims and stay judgments is proper if the bankruptcy rules are used for their intended purpose. Congress'

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[179] *See* Gerstenblith, *supra* note 173, at 555 (citing Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 548-49 (Cal. Ct. App. 1981), *cert. denied*, 454 U.S. 864 (1981)) ("[I]f no express trust exists under neutral principles of law then the property remains with the local churches except where there is specific reversion to the Diocese.").

[180] Kathleen M. Boozang & Thomas L. Greaney, *Mission, Margin, and Trust in the Nonprofit Healthcare Enterprise*, 5 Yale L.J. 1 (2005) (citing Persan v. Life Concepts, Inc., 738 So. 2d 1008 (Fla. Dist. Ct. App. 1999)) ("making a gift to a charity for a specific purpose does not create a charitable trust; creation of trust must be express, with intent established beyond a reasonable doubt").

[181] *Id.*

[182] *In re* Allen Univ., 497 F.2d 346, 348 (4th Cir. 1974).

intent in enacting 11 U.S.C. § 541 was to ensure that the goals of bankruptcy are met by bringing as many assets into the estate as possible. The property of the estate should include the school and the churches under a neutral principles approach, applying in equity civil property and trust law, all the while keeping in mind the role of the attorney general in speaking for the interests of the needy and the community. A broad sweep of 11 U.S.C. § 541 to bring all the property into the Debtor's estate is the only way to ensure that the three goals of bankruptcy proceedings are reached: (1) to pay current creditors as fully as possible; (2) to provide for adequate payment for future tort claimants; and (3) to assure sufficient assets to continue the charitable work of the Church.